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Legal Ethics Corner

New Attorney Duties When Going To Mediation

By Rachel Ehrlich

On top of the new and revised Rules of Professional Conduct that went into effect on November 1, 2018, if you go to mediation on or after January 1, 2019, you must comply with Evidence Code section 1129.

I mediate civil disputes that range in subject matter from insurance coverage and bad faith to personal injury to landlord-tenant. Since Governor Brown signed SB 954, creating Evidence Code sections 1122(a)(3) and 1129, I have been discussing these changes with lawyers in mediation.

Among lawyers who have thought about the import of Evidence Code section 1129, the four most common misapprehensions are:

1. **"The mediation provider obtains the client's consent."**

No, you must obtain your client's informed written consent to mediation after explaining the effect of confidentiality under the California Evidence Code (Sections 703.5 and 1115 to 1129).

2. **"It is the responsibility of the mediation provider to explain confidentiality."**

Yes, under California Rule of Court 3.854, in a court-connected mediation program for a general civil case, the mediator is required to explain mediation confidentiality. However, section 1129 puts responsibility for explaining mediation confidentiality and its consequences on attorneys and attorneys only. The statute provides that failure to obtain the mandatory written consent is not a reason to unwind a settlement reached in mediation, but it is a basis for discipline of the attorney – not the mediator.

3. **"The mediation provider has the needed form."**

Maybe, as a courtesy, mediation providers will have the statutory form available, but it is unlikely they will have forms available in all languages. Section 1129 provides a sample acceptable form to use to document client consent to participate in mediation in view of how mediation confidentiality operates. However, the consent document must be in the client's preferred language (the statutory example is in English), a single page in no less than 12-point font, and signed by both the client and the attorney. You may wish to check with bar associations and attorney organizations for translated forms.

4. **"Mediation was already scheduled when I started representing the client so I don't need to do anything."**

No, section 1129 requires that even when a client has already agreed to mediate a matter before the attorney begins representing the client, the attorney "shall" make the required disclosure and obtain the required acknowledgment from the client.

To learn more about why and how section 1129 came to be, read Ron Kelly's article, "New California Law Requires Informed Consent to Mediation," published by BASF in September 2018 at blog.sfbar.org.

Rachel Ehrlich is a mediator of civil disputes in California and across the country, she is based in the Bay Area and affiliated with Judicate West. Her neutral practice includes a variety of issues that range from insurance coverage and bad faith to real estate (including financing, purchases/disclosures, construction and landlord-tenant) to personal injury.