

Second Supplement to Memorandum 2017-9

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct (Public Comment)**

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Attached are the following new materials for members of the Commission<sup>1</sup> to consider:

- |   |                   |
|---|-------------------|
|   | <i>Exhibit p.</i> |
| • Robert Flack, Los Angeles (1/31/17) ..... | 1                 |
| • Robert Flack, Los Angeles (2/1/17) .....  | 2                 |

Respectfully submitted,  
  
Barbara Gaal  
Chief Deputy Counsel

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.



## **This is California where facts still matter:**

The following are clarifications made to add the record and expand on the extensive research done by CLRC Staff.

- ✓ JAMS, as a policy, does not Publicly Endorse or Oppose any current law or any proposed legislation.
  - ✓ In testimony before the California Senate Judiciary Committee in February, 2016, Jay Walsh, Esq. (General Counsel of JAMS)
  - ✓ Mr. Walsh retired in December, 2016, and his successor has not been available for comment.
- ✓ The American Arbitration Association (AAA) has no formal record of supporting the UMA.
- ✓ The AAA Current Position is that, absent other guidance, the UMA provides a reasonable basic framework for effective mediation.
- ✓ However, the AAA is not opposed to each jurisdiction establishing their own guidance which enhances the effectiveness of mediation and is not disruptive.
  - ✓ Personal Communication, January 30, 2017
- ✓ Eight States have considered the UMA and have decided against its adoption. (Ref: MM16-58).

# **Mediation Confidentiality Statutory Alternatives**

B&PC § 6148 As a Model

Mediation Agreement Samples

**Business and Professions Code - BPC**  
**DIVISION 3. PROFESSIONS AND VOCATIONS GENERALLY**  
**CHAPTER 4. Attorneys [6000 - 6243]**  
**ARTICLE 8.5. Fee Agreements [6148]**

**Section 6148.**

(a) In any case not coming within Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars (\$1,000), the contract for services in the case shall be in writing. At the time the contract is entered into, the attorney shall provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative. The written contract shall contain all of the following:

- (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- (2) The general nature of the legal services to be provided to the client.
- (3) The respective responsibilities of the attorney and the client as to the performance of the contract.

(b) All bills rendered by an attorney to a client shall clearly state the basis thereof. Bills for the fee portion of the bill shall include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill shall clearly identify the costs and expenses incurred and the amount of the costs and expenses. Upon request by the client, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. The client is entitled to make similar requests at intervals of no less than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they shall be described and estimated.

(c) Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.

(d) This section shall not apply to any of the following:

- (1) Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical.
- (2) An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.
- (3) If the client knowingly states in writing, after full disclosure of this section, that a writing concerning fees is not required.
- (4) If the client is a corporation.

(e) This section applies prospectively only to fee agreements following its operative date.

(f) This section shall become operative on January 1, 2000.



## **PreMediation Agreements as an Alternative were presented at the September CLRC Hearing**

### **Advantages:**

- **Applies to All Consumer Mediations, not just Court Supervised**
  - “Public Right to Know” **ONLY** attaches when Court Supervised
  - Most mediation is conducted without Court Supervision
  - California Constitutional Right to Privacy Applies
- **Provides Education and Informed Consent**
  - Arms Parties with Specific and Immediate Advice
  - Restricts Possibly Unscrupulous and UnProfessional Behavior
- **ProActive in Anticipating Problems and Preventing Them**
  - Education, Notice and Informed Consent
  - Front End Solution - Not a “Gotcha” System
- **Not Subject to Abuse of Process**
  - Back Door to Disrupt Legitimate Process Not Created
  - Encourages Parties to be “Present” and Respectful
- **Reinforces the Central Values of True Mediation**
  - Self-Determination
  - Voluntary Participation
  - Mutual Selection of Neutral Mediator
  - Voluntary Withdrawal Option
  - No Compulsory Process

**PROPOSED  
STANDARD PRE-MEDIATION AGREEMENT  
OUTLINE OF ISSUES**

**Consumer Notice and Protection in Mediation.**

The confidentiality of the private settlement of disputes is supported by long standing tradition and the California Constitutional Right to Privacy. In California, people have the “inalienable right” to privacy in the management of their personal relationships including their disputes.

The purpose of this Agreement is to provide consumer education and notice concerning the character of the Mediation Process. Parties engaging in Mediation, while benefitting from a confidential process, lose the opportunity to use any information gained in Mediation for any other purpose than the Mediation itself.

Where any individuals or natural persons are Parties in Mediation, this Agreement provides PreMediation notice which informs those Parties of their expectations, rights and limitations as before they engage in confidential Mediation to resolve their issues.

Specifically:

1. The Mediator in the Mediation is a Neutral who has been selected and retained jointly by all Parties to the dispute. The Parties have been provided sufficient opportunity to inquire about the Neutral’s professional experience and background and do not object.
2. The Parties may retain counsel to prepare for or to participate in Mediation (with the advanced consent of the Mediator).
3. The Parties have been advised that:
  - a. Their participation in Mediation is voluntary and they may withdraw from Mediation at any time for any reason.
  - b. Any settlement agreement resulting from Mediation:
    - i. shall be consensual and not compulsory,
    - ii. shall be in a writing that verifies that it is intended to be enforced, unless it

is an oral agreement which strictly complies with the provisions of Evid. Code Sec. 1118,

- iii. should an attorney fee agreement be modified as part of any settlement, it shall also be in a writing that verifies that it is intended to be enforced, and
- iv. to be disclosed (and enforced), any agreement shall comply with the provisions of Evid. Code Sec. 1123.

The Mediator's role is limited to facilitating the Parties' resolution of their issues.

- v. The Mediator has no authority to determine the resolution of any case.
  - vi. The Mediator shall not act as a representative, advocate or legal advisor for any Party.
  - vii. The Mediator may express opinions on the applicability of the law to the facts to the extent that such opinions, in the judgment of the Mediator and consent of the Parties, may be helpful in facilitating a settlement.
  - viii. The Mediator shall not provide legal advice.
  - ix. The Parties agree they will rely solely on their own judgment with the advice of their own attorneys in arriving at a resolution of their dispute.
  - x. Unless specifically requested by all Parties (in writing), the Mediator shall not offer any case evaluation (or preliminary adjudication) which could be interpreted as conclusive or coercive rather than as merely advisory.
- c. Mediations are confidential.
- i. The Parties may choose to rely only on admissible evidence (information that would otherwise be admissible and not subject to the Mediation Confidentiality of Evid. Code 1115 et. seq).
  - ii. Absent a specific agreement, any information may be considered in Mediation.
  - iii. The privileged character of any information is not altered by its disclosure in Mediation.
  - iv. The Mediator cannot be compelled to disclose any information received in any form related to the Mediation.

- d. All statements made during the course of Mediation are confidential and privileged settlement discussions, are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding.
  - i. These offers, promises, conduct and statements:
    - (1) will not be disclosed to third Parties except persons associated with the participants in the process,
    - (2) are privileged and inadmissible for any purposes, and
    - (3) evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in the mediation process.
  - ii. **This protection from disclosure may prevent the use of any evidence of Mediation in any future claims against the Parties or any retained attorney (*Cassel* warning).**
- e. All confidentiality provisions shall extend beyond the duration of the Mediation.
- f. Family Law Provisions (If a Family Law Matter).
  - i. Mutual Fiduciary Responsibilities. Family Code Sec. 721 specifies that a husband and wife are in a fiduciary relationship that imposes a duty of the highest good faith and fair dealing on each of them and that prohibits either of them from taking any unfair advantage of the other. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets and debts.
  - ii. Disclosures. Family Code Sec. 2014-5 requires specific disclosures in the connection with the filing of a petition for dissolution. These disclosures while not produced for mediation, may be used during mediation. The requirement for such disclosures may only be waived as permitted by these statutes.
  - iii. Valuation.
    - (1) The Mediator will not be requested or required to investigate or confirm the identity or value of the Parties' assets or the identity and amount of their liabilities, or the amount of the Parties' income or expenses.



(2) The Parties reserve their rights to have any of these matters investigated or confirmed by an independent third party (for example: an attorney, accountant, appraiser, actuary, etc.)

4. This section shall not apply to any of the following:
- a. Services rendered by a DRPA Agency.
  - b. Services rendered as part of an on-going relationship between the Parties and the Mediator (as may be typical of Family Law Matters) where the Mediator's services are of the same general kind as previously rendered to the Parties.
  - c. If the Parties are corporations, LLC's or other business entities.

**Acknowledged:**

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Party

\_\_\_\_\_

Date

\_\_\_\_\_

Attorney

\_\_\_\_\_

Date

\_\_\_\_\_

Party

\_\_\_\_\_

Date

\_\_\_\_\_

Attorney

\_\_\_\_\_

Date

\_\_\_\_\_

Mediator

\_\_\_\_\_

Date

**Proposed Cal.Evid.Code Sec. 9XX. Consumer Notice and Protection in Mediation.**

The confidentiality of the private settlement of disputes is supported by long standing tradition and the California Constitutional Right to Privacy. In California, people have the “inalienable right” to privacy in the management of their personal relationships.

In Mediation, under Evid. Code Sec. 1115-1128, where individuals or natural persons are Parties, the Parties shall be provided the following notice in the form of a Pre Mediation Agreement:

1. The Mediator in the Mediation shall be a Neutral who has been selected and retained jointly by all Parties to the dispute. The Parties have been provided sufficient opportunity to inquire about the Neutral’s professional experience and background and do not object.
2. The Parties may retain counsel to prepare for or to participate in Mediation (with the advanced consent of the Mediator).
3. The Parties have been advised that:
  - a. Their participation in Mediation is voluntary and they may withdraw from Mediation at any time for any reason.
  - b. Any settlement agreement resulting from Mediation:
    - i. shall be consensual and not compulsory,
    - ii. shall be in a writing that verifies that it is intended to be enforced, unless it is an oral agreement which strictly complies with the provisions of Evid. Code Sec. 1118,
    - iii. should an attorney fee agreement be modified as part of any settlement, it shall also be in a writing that verifies that it is intended to be enforced, and
    - iv. to be disclosed (and enforced), any agreement shall comply with the provisions of Evid. Code Sec. 1123.
  - c. The Mediator’s role is limited to facilitating the Parties’ resolution of their issues.
    - i. The Mediator has no authority to determine the resolution of any case.
    - ii. The Mediator shall not act as a representative, advocate or legal advisor for any Party.
    - iii. The Mediator may express opinions on the applicability of the law to the

- facts to the extent that such opinions, in the judgment of the Mediator and consent of the Parties, may be helpful in facilitating a settlement.
- iv. The Mediator shall not provide legal advice.
  - v. The Parties agree they will rely solely on their own judgment with the advice of their own attorneys in arriving at a resolution of their dispute.
  - vi. Unless specifically requested by all Parties (in writing), the Mediator shall not offer any case evaluation (or preliminary adjudication) which could be interpreted as conclusive or coercive rather than as merely advisory.
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- e. All statements made during the course of Mediation are confidential and privileged settlement discussions, are made without prejudice to any party's legal position, and are inadmissible for any purpose in any legal proceeding.
- i. These offers, promises, conduct and statements:
    - (1) will not be disclosed to third Parties except persons associated with the participants in the process,
    - (2) are privileged and inadmissible for any purposes, and
    - (3) evidence that is otherwise admissible or discoverable is not rendered inadmissible or non-discoverable as a result of its use in the mediation process.
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    - (2) The Parties reserve their rights to have any of these matters investigated or confirmed by an independent third party (for example: an attorney, accountant, appraiser, actuary, etc.)
- 4. This section shall not apply to any of the following:
  - a. Services rendered by a DRPA Agency.
  - b. Services rendered as part of an on-going relationship between the Parties and the Mediator (as may be typical of Family Law Matters) where the Mediator's services are of the same general kind as previously rendered to the Parties.
  - c. If the Parties are corporations, LLC's or other business entities.
- 5. Operative Date
  - a. This section applies prospectively only to Mediations following its operative date.
  - b. This section shall become operative on January 1, 20XX.