The Los Angeles County Bar Association
Small Firm & Sole Practitioner Section and
ADR Services, Inc.

Presents Webinar

Mediation Advocacy: Everything You Wanted to Know

Wednesday, April 21, 2021

Program - 5:30 p.m. - 6:30 p.m.

Los Angeles County Bar Association

1.0 Hour of General CLE Credit

Provider #36
The Los Angeles County Bar Association is a State Bar of California approved MCLE provider. The Los Angeles County Bar Association certifies that this activity has been approved for MCLE credit by the State Bar of California.
Mediation Advocacy
April 21, 2021
LACBA Small Firms Section/ADR Services

OUTLINE OF TOPICS

ZOOM ADVOCACY

PREPARING FOR MEDIATION
  Preparing your Case
  Selecting the Mediator
  Preparing your Client
  Pre-Mediation Calls with the Mediator

AT THE MEDIATION
  Opening Demands
  Demonstratives
  Strengths and Weaknesses

POST MEDIATION
  Follow Up
  Mediator Proposal
  Keeping the settlement going during COVID

COMMON MISTAKES LAWYERS MAKE

EC 1129 DISCLOSURE: ALTERNATIVE LANGUAGE
Mediation Advocacy
April 21, 2021
LACBA Small Firms Section/ADR Services

LIST OF MATERIALS

Speaker Bios

Articles

5 Tips for Successful Settlements, Caroline Vincent
The Pros and Cons of Virtual Mediation, Wendy Kramer
ZOOM - The Future of Virtual Dispute Resolution, ADR Services
Are These Magic Words in Your Mediated Settlement Agreements, Caroline Vincent
Enforcing Mediation Caucus Agreements after Cassel – Caroline Vincent

Sample Agreements/Documents

ADR Services Stipulation for Settlement
Stipulation re CCP 664.6
EC Sec 1129 Disclosure Alternative – Vincent Draft
WENDY W. KRAMER, ESQ.

Wendy W. Kramer is a highly effective full-time mediator. Formerly a partner with Kramer & Kramer handling a wide variety of insurance-related matters, she has developed particular expertise in matters involving personal injury, business disputes, professional malpractice, landlord tenant disputes (habitability) and complex commercial litigation.

In addition to serving as the 2013 President of the Southern California Mediation Association, Ms. Kramer previously served as the ADR Chair for the Santa Monica Bar Association, the Los Angeles and Ventura Superior Courts ADR Programs, and a Fee Dispute Mediator for both the Beverly Hills and Santa Monica Bar Associations, as well as on the Board of Governors for the International Academy of Mediation (IAM). She currently serves as the Chair of the IAM’s Mentorship Program. She has mediated over 3,000 matters and arbitrated over 300 matters. She is known for her ability to deal with difficult personalities, multi-party matters and complicated legal issues.

AREAS OF EXPERTISE:

**Vehicular Accidents:** Catastrophic and soft tissue injuries involving automobiles, bicycles, scooters, motorcycles, trucks, buses, metrorail, taxis, vanpools, pedestrians, DUI, wrongful death, roadway design defect, municipalities, uninsured motorist and underinsured motorist claims, police, fire, paramedics, off road vehicles and dirt bikes.

**Premises Liability:** Slip/trip and falls, sidewalks, roadways, commerical and residential property, exposure to hazardous materials, toxic torts, dogbites, public entities, security guards, safety issues, false arrest/imprisonment, trivial defects, dangerous conditions, electrical, gas, schools, municipalities, elevators, escalators, workplace accidents, construction, workers’ compensation.

**Insurance:** Bad faith, subrogation, property damage, water damage, fire damage, coverage, uninsured and underinsured motorist claims, workers’ compensation liens.

**Employment:** Wrongful termination, sexual harassment, wage & hour, retaliation, whistleblower.

**Real Estate:** Commercial and residential landlord/tenant disputes, habitability claims, homeowners associations, condominium conversions, eviction, unlawful detainer, buy-sell agreements, franchise disputes.

**Professional Malpractice:** Legal, medical, dental, pharmacuetical, spas.

**Business:** Complex business and commercial contracts; attorney/client fee disputes, fraudulent transfers, lemon law, consignment.

**Products Liability:** Design defects, manufacturing defects.

**Assault and Battery:** Nightclubs, bars, concerts, casinos, road rage, security gaurds, bouncers.

Ms. Kramer earned her J.D. from Loyola University School of Law. In 2004, she completed the Straus Institute for Dispute Resolution Training from Pepperdine University, School of Law. She is available to hear matters throughout California.
Over the course of her 13 years of judicial service, Judge Feffer served in an unlimited jurisdiction civil independent calendar court for 6 years, a civil trial court for 3 years, and a family law court for 4 years. During that time, Judge Feffer presided over more than 75 civil jury trials, more than 500 civil bench trials, hundreds of evidentiary hearings, and numerous settlement conferences, with a diverse range of complex factual and legal issues. Judge Feffer has handled a wide array of cases, including employment litigation, professional liability, personal injury, elder abuse, products liability, business litigation and partnership disputes, real estate litigation, land use litigation, eminent domain, insurance coverage, insurance bad faith, and entertainment cases.

In addition to her civil court assignments, Judge Feffer served four years in the Family Law Division, where she presided over, and issued rulings on, thousands of cases involving all types of contested and complex family law subject matters, including business valuation, property valuation and characterization, validity of pre-marital agreements, child custody and support, and spousal support.

Judge Feffer is highly regarded for her thorough preparation and ability to connect with litigants, understanding and appreciating the conflicting perspectives involved in disputes. She is committed to working on matters until they are resolved to the satisfaction of the parties. Her patience, compassion, and dedication have helped establish her reputation as an even-handed and esteemed jurist.

Prior to her appointment to the bench, Judge Feffer served as a partner and trial lawyer litigating civil actions in state and federal court, on behalf of both plaintiffs and defendants.

**JUDICIAL EXPERIENCE**

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<tr>
<th>2007 – 2020</th>
<th>Judge of the Superior Court, Los Angeles</th>
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<td>Unlimited Jurisdiction Independent Calendar Civil Court, 2015-2020</td>
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<td>Civil Trial Court, 2012-2014</td>
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<td>Family Law Calendar Court, 2008-2012</td>
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<td>Criminal Calendar Court, 2007</td>
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**EDUCATION**

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<th>1993</th>
<th>University of Southern California, Gould School of Law, Juris Doctor</th>
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<td>University of Southern California, Annenberg School for Communication, Master of Arts, Communication Management</td>
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<td>1990</td>
<td>University of California, Los Angeles, Bachelor of Arts, Communication Studies</td>
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**AREAS OF EXPERTISE**

- Business
- Elder Abuse
- Employment
- Family Law
- Insurance Coverage
- Legal Malpractice
- Medical Malpractice
- Partnership Disputes
- Personal Injury
- Real Estate and Land Use
CIVIL LITIGATION CAREER

2005 – 2007  Jones & Mayer, San Marino, California
1993 – 2004  Burke, Williams & Sorensen, LLP, Los Angeles, California

MEMBERSHIPS

- State Bar of California
- State Bar of Arizona
- State Bar of Idaho
- Federal Court Admissions: Supreme Court of the United States; Ninth Circuit Court of Appeals; United States District Court, Central District of California, Southern District of California, District of Arizona, and District of Idaho
- Los Angeles Superior Court: Bench-Bar Committee, Community Outreach Committee, Rules Committee, Security Committee, Lemon Law Task Force
- Civil Jury Project at New York University School of Law: Judicial Advisor
- State Bar of California Litigation Section: Executive Committee, Judicial Advisor
- California Judges Association: Civil Law & Policy Committee

SPEAKING ENGAGEMENTS AND PUBLICATIONS

Regularly engaged as a speaker and panelist on litigation-oriented topics for various associations including ABOTA, LACBA, CAALA, ASCDC, the State Bar of California, and the Civil Jury Project at NYU School of Law, Judge Feffer is well known for her eloquence, respectful and decisive judicial temperament, and exceptional legal knowledge.

For a complete list of Judge Feffer’s speaking engagements and publications, please visit her website at www.JudgeFeffer.com.
AREAS OF EXPERTISE (EXPANDED)

BUSINESS
• Commercial lease
• Breach of contract
• Contract interpretation
• Non-compete contracts
• Public works and public entity contracts (design defects and cost overruns)
• Construction defect
• Unfair and unlawful business practices (Business & Professions Code § 17200)
• Uniform Trade Secrets Act

ELDER ABUSE
• Physical abuse
• Neglect
• Financial abuse

EMPLOYMENT
• ADA compliance
• FEHA (Fair Employment and Housing Act)
• Workplace discrimination, harassment and retaliation based on age, gender, sex, sexual orientation, race, national origin, and religion
• Wrongful termination and constructive discharge

FAMILY LAW
• Child custody and visitation (including school selection issues and accommodating medical and educational needs of children who have special needs)
• Child support calculation
• Spousal support calculation and modification including for high income earners
• Premarital agreements
• Property characterization
• Property division
• Property valuation
• Business valuation (including goodwill)

INSURANCE COVERAGE

LEGAL MALPRACTICE

MEDICAL MALPRACTICE
• Medical malpractice
• Dental malpractice
• Bedsores in care facilities
• Abandonment of patient

PARTNERSHIP DISPUTES
• Partnership dissolution
• Breach of fiduciary duty
• Accounting
PERSONAL INJURY AND TORTS
- Automobile
- Bicycle
- Pedestrian
- Negligence
- Defamation (including online internet postings)
- Sexual assault and abuse
- School expulsion
- Dog bite
- Dangerous condition of public property
- Public transportation (bus, light rail, train)
- Asbestos
- Civil rights/police misconduct/police excessive force
- Product liability
- Assumption of risk

REAL PROPERTY AND LAND USE
- Homeowner Association disputes
- CC&Rs disputes
- Eminent domain
- Inverse condemnation
- Construction defect
- Commercial lease disputes
- Residential lease disputes
- Landlord-tenant disputes
- Partition and accounting of real property
- Real estate sales commission
- Quiet title
- Mold infestation
- Public and private nuisance
- Property boundary disputes
- CEQA compliance
- Zoning

ENTERTAINMENT AND SPORTS
- Contract disputes (including credits)
- Royalties
- Breach of fiduciary duty
- Wrongful termination/FEHA

GOVERNMENTAL/PUBLIC AGENCY
- Eminent domain and inverse condemnation
- CEQA (California Environmental Quality Act)
- Zoning and land use
- Dangerous condition of public property
- Public works contracts
- Police liability/civil rights
- College tenure disputes
- Personal injury actions involving public transportation
PROFESSIONAL LIABILITY
- Legal malpractice
- Dental malpractice
- Architectural malpractice
- Construction defect

PROPERTY DAMAGE

DISCOVERY REFEE
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www.adrservices.com

Caroline Vincent is a highly successful mediator, arbitrator and neutral evaluator who has served as neutral in over 2,700 disputes, including with the Los Angeles/Orange County offices of ADR Services since 2004, and ten years prior to that with JAMS. She specializes in employment, complex commercial, real estate, construction defect, probate, personal injury, professional liability, family business and insurance coverage matters. Her perseverance, keen intellect, ability to cut to the heart of the matter and skill at keeping the parties moving toward settlement, allows her to deliver a high rate of closure in all types of cases. She excels in dealing with difficult lawyers and clients, as well as complex matters.

Prior to her 27 year professional neutral career, Ms. Vincent enjoyed a diverse and successful law practice in the Los Angeles area for 15 years, specializing in corporate, real estate and commercial transactions and also practiced estate planning, probate litigation, employment and personal injury law. A graduate of the USC Gould School of Law (Law Review Staff), Ms. Vincent worked on high end transactional matters with several multi-national law firms, including Morrison & Foerster, Rogers & Wells (now Clifford Chance) and Carlsmith Ball.

Caroline has been active in the development of the ADR field since 1983, serving for 10 years as a volunteer mediator and a member of the operating committee of the Neighborhood Justice Center (later LACBA’s Center for Civic Mediation) where standards and ethics for neutrals were developed. She served on various other ADR committees of bar associations and on the ADR Courts Committee of the Los Angeles Superior Court. A past member of the boards of WLALA and the CLARE Foundation (President), she frequently serves on committees producing MCLE courses in ethics, employment and real estate for LACBA, SMBA and other groups, and serves as adjunct
professor with the USC Gould Advanced Mediation Clinic (Employment and Housing Claims).

Helping lawyers and their clients resolve disputes is Caroline’s passion. She also enjoys collaborate leadership and bringing people together to resolve institutional and community matters. She recently served as Chair of the LACBA Small Firm & Sole Practitioner Section, and for this work was selected for the LACBA President’s Outstanding Section Leader Award in both 2019 and 2020. She also serves as the founding chair of the LACBA Lawyer Well-being Project. She is a trustee elect for the LACBA 2021-23 term, and founding chair of the LACBA Lawyer Well-Being Project.

One of her proudest achievements is her 1994 role in designing and facilitating a dialogue on sexual harassment prevention training with 50 employees of the LAPD.

Caroline has written extensively on matters concerning mediation confidentiality, settlement agreement best practices and effective mediation advocacy. Her articles can be found at www.carolinevincent.com.
Focus on these 5 tips to make your negotiations and mediations successful:

1. **Keep your Eye on the Prize**

Whether you are negotiating a lease, drafting a demand letter, engaging in discovery or preparing for mediation or trial, stay focused on the desired and achievable end result for your clients. Lawyers and their clients are sometimes overly focused on the strategy to get someone else to do something, which often results in losing sight of the end goal. Write down the end goals and include such things as money in your client’s pocket, injunctive relief, return of property and the soft outcomes (e.g., closure, emotional healing, reduction of stress, time freed up to make widgets instead of preparing testimony). Then itemize the transactional costs on the road to get there (including your fee), as well as who is advancing fees and costs for depositions, experts and the like. Adjust the end goals appropriately, and keep your client’s eye on the prize.

2. **Focus on Problem Solving**

Rather than spend the majority of your focus and efforts on discovery and other litigation procedures, always keep problem solving within your line of sight. Consider the following:

- What will it take to obtain the desired result for your client?
- What information is essential for the client to make an informed decision between risky and costly litigation and a possible settlement?
- What information is needed to persuade the other side that a settlement discussion is a good idea for their client?
- What alternative strategies are available?
- Might a carefully constructed friendly demand letter with an invitation to a mediation or a neutral evaluation be in order?
- How can the facts of the case be packaged and presented in an easy to understand format to help your client and the other side get an overall idea of the merits, risks and possible resolutions of the matter?
Can you identify the few key depositions, documents and other information that will reveal 95% of the facts and law in dispute?

Continue to balance the time and efforts needed to keep a good position on the litigation track, and also put attention on problem solving.

3. Talk Settlement with the Other Side Early and Often

There are many ways to resolve a dispute, trial being only one of them. Trial is a costly and risky method of dispute resolution, requiring an extraordinary expenditure of attorney fees, costs, time and emotional energy. Since more than 95% of cases settle before trial, the earlier the focus on settlement discussions, the better the opportunity to obtain a net positive result for the client (or reduce the maximum exposure and expense, if your client is going to be paying). Maximize the desired result by going to mediation or a neutral evaluation early and often. A third party neutral can help both sides focus upon the information required to address the merits, risks and damages of the case, as well as develop other information which may be useful to resolving more complex cases, such as a joint accounting or discussing the division of major assets and liabilities in a business dissolution. Don’t fall prey to the myth that you will look weak by trying to find a settlement that works; tell your clients and the other side that settlement exploration is a routine part of your litigation strategy.

4. Create and Implement a Negotiation Plan

Know what you want and have a plan to get there. Review the risks and costs of proceeding with discovery and trial, the range of likely outcomes at trial and the client’s out of pocket and likely recoverable damages. What are the needs and interests of your client, and of the other side? In light of this information, what is the reasonable range of the settlement value of the case? Negotiation plans that involve asking for something in the neighborhood of the higher end of the range, and suggesting that your client might accept something within the range, get excellent results more quickly than plans that are based upon reactions to the opponent’s moves. Resist the urge to simply mirror a small move. Instead, make one of these moves:

- A move coupled with a bracketed move (my client moves to X, and will move to Y if you move to Z);
- A suggested range of settlement numbers (we are willing to discuss settlement numbers between X and Z); or
- A move that suggests the amount of further movement that is possible (we have room to move if you make a significant move; we have a little more room to move, but not a lot of room; we are here to negotiate, but we are not paying more than 6 figures).
Telling the other side what you are thinking and where you are headed (while leaving a little fudge room) is forward-going, informative and productive. Even when the case does not yet settle, you, your client and the other side are able to make a more informed decision about next steps, because you each have a better idea of where you are headed for settlement and what is possible. Of course, remain flexible and adjust your plan as time goes on.

5. Document your Mediated Settlement Agreements Carefully

If in a mediation, or if settling as a result of a mediation, be mindful of the requirements of Evidence Code Section 1123 in order for your agreement to be admissible, and therefore enforceable:

- Remember to provide that the settlement agreement is “admissible or subject to disclosure,” or that it is “binding or enforceable,” or words to that effect.

- Make sure the settling parties sign the agreement.

- Remember that standard releases are often one way agreements, and are probably not admissible if not signed by all the settling parties.

- Consider putting language into all of your standard releases and settlement agreements compliant with Evidence Code Section 1123 so that in the event your settlement occurs in the course of a mediation (which could be 10 days after the last mediated communication), your agreement will be enforceable.

To see Caroline’s newsletter and article link on creating admissible settlement agreements, [click here](#).

Caroline C. Vincent is an attorney mediator, neutral evaluator and arbitrator with ADR Services, Inc. in Los Angeles and Orange County, who has heard over 2000 disputes in her 25 year ADR career. She specializes in employment, complex torts, probate/elder abuse, insurance, professional liability and business and real estate disputes, including class and mass actions. Caroline is a 1978 graduate of the USC Gould School of Law where she served on Law Review, and teaches ADR Ethics. She is recognized in Super Lawyers for her expertise in ADR.
The Pros and Cons of Virtual Mediation

by Wendy Kramer

Who could have imagined that 2020 would wind down with Californians still in basic lockdown, conducting business mostly via virtual platforms such as Zoom, Webex, and FaceTime? Who would have imagined how swiftly lawyers and mediators would take a deep dive into new technology and rapidly gain proficiency? Lawyers are indeed a hardy bunch!

Virtual appearances in courthouses for depositions and mediations are no longer a temporary fix but are likely to stay well beyond the COVID-19 pandemic. Thousands of virtual mediations have been conducted. Issues surrounding privacy and confidentiality have been successfully addressed with waiting rooms, break-out rooms, and passwords. It turns out that virtual mediations are highly effective in resolving disputes.

One of the biggest benefits is the ability to attend without wearing a mask. Masks will continue to be legally required for the foreseeable future. Numerous studies have shown that our ability to effectively communicate is hampered by face coverings. Paul Ekman, a world-renowned communications expert, has identified seven universal emotions: anger, contempt, disgust, enjoyment, fear, sadness, and surprise. Although eyes are involved in expressing these emotions, noses and mouths play significant roles. Fear and anger are big upper face emotions observed in widened eyes or furrowed brows. However, disgust is primarily observed in the curling of the upper and lower lip and the nose. Consider the numerous types of smiles: polite, dominating, warm and friendly, all obscured by masks.

The ability of lawyers to communicate effectively with clients and of mediators to read and manage emotions is hampered by masks. This means that if clients are attending a virtual mediation by logging in from the lawyer’s office conference room, it is more effective to provide clients with separate rooms or screens in order to go maskless. If a participant is unfamiliar with technology, a premediation lesson is helpful.

Mediation participants no longer need experience the stress of negotiating freeways and unfamiliar office buildings, finding parking and elevators, and landing in a strange conference room. Also gone are the amenities: bagels, catered lunches, freshly baked cookies, and the collegiality of friends and colleagues. Although these are sorely missed, they are replaced by the heightened comfort that accompanies being in one’s own environment (dogs, cats, kids, spouses, significant others). These interruptions and the conversations that blossom around them increase a mediator’s ability to create intimacy and trust.

Virtual mediations have resulted in increased participation by real decision makers (insurance professionals, business owners, or family members crucial to decision making). Expert and lay witnesses can attend. Those who did not have the opportunity to assess a witness can now do so. With a mouse click, mediators can create additional break-out rooms for people to meet privately.

Proximity is a bonus leading to enhanced communication and trust. In face-to-face communication, one simply does not get “up close and personal” with a stranger, invading personal space. On screens, however, people are just inches away from one another. Mediators need not stay masked, 6 to 15 feet away, depending upon various governmental orders.

Being on camera positively affects the behavior of mediation participants. People seemingly put their best foot/face forward (as if posing for a photo) which generates more civility, less interrupted conversation, fewer unreasonable positions and more sharing of information. According to Debra Dupree, PsyD/LMF, a San Diego-based mediator, in high conflict situations, people can be physiologically triggered while in the same room. This is decreased and/or mitigated in a virtual setting, leading to less emotional intensity and a decrease in disruptive conversations.

There will still be disputes best served by in-person mediations; however, virtual platforms do not pose insurmountable impediments to successful conflict resolution. Post-pandemic mediation consumers will have the choice of attending mediations virtually or in person and will tailor their choice to achieve optimum results.

Wendy Kramer is a full-time neutral on the panel of ADR Services, Inc., where she mediates a broad range of civil matters. She is a past president of the Southern California Mediation Association, a Distinguished Fellow of the International Academy of Mediation (IAM), and the chair of the IAM’s mentorship program.

1 Paul Ekman, Emotions Revealed (Henry Holt & Co. 2003).
ZOOM:
THE FUTURE OF VIRTUAL DISPUTE RESOLUTION

Friday, September 11, 2020, 12:00 pm to 1:00 pm

Speakers:

Glenn Barger, Esq.
Wendy Kramer, Esq.
Mitch Tarighati, Esq.
Hon. Jacqueline Connor
Hon. Gerald Rosenberg
Hon. Joe Hilberman

ABOUT THE PROGRAM:
How to be effective in Zoom Hearings, including the nuts and bolts of using the technology from a logistical standpoint, how to prepare clients for virtual dispute resolution and how to achieve the best resolution for your client via a virtual platform.
PART I – ONLINE/VIRTUAL MEDIATIONS | BEYOND THE BASICS | THREE PERSPECTIVES

Presented by: Glenn Barger, Esq., Wendy Kramer, Esq., and Mitch Tarighati, Esq.

• **Preparation for A Successful Online Mediation**
  - Importance of technical preparation, including your client’s ability to participate on-line and/or over the phone, including when they are together or in separate locations
  - Ensuring you are ready and capable of providing any exhibits, documents, video, photos, reports, testimony and evidence to help argue your case
  - Advise the mediator in advance, if possible, of any intricacies or issues that you may not be able to discuss easily with your client in the virtual room
  - Exchange cell phone numbers so you can also communicate and talk privately with the mediator during the session

• **Factors to Consider in Execution of A Successful Mediation**
  - No masks required – Tips; individual screens/rooms to allow for unmasked participation; pre-mediation training if needed, lighting
  - Increase in civility
  - Folks are more comfortable in own environment/no travel required – get to meet dogs, cats, kids
  - On-camera effect – folks put best face/foot forward
  - Screen proximity
  - More insurance professional/decision maker attendance
  - Sophisticated use of breakout rooms for focused conversations
  - Ability for an insurance professional or an attorney who hadn’t had the opportunity to assess witness(es)

• **Overcoming Challenges in Establishing “Online” Trust & Rapport**
  - “Getting Zoom out of the way” – Not being in-person will NOT be the THE reason why the case does not settle!
  - Minimizing “Zoom Anxiety”
    - Participants should be alerted of the actual, mediation-based, experiences so that they know that they are in safe “online hands”
    - Participants should have multiple ways of accessing the mediator during the session
  - Remaining mindful of the “extra” importance eye contact, upper body gestures, facial expression and non-verbal cues
  - Being on camera and having a microphone is not an opportunity to monopolize the communication
    - Both mediator and participants should be mindful of their speaking/listening time
o Going as fast or as slow as the parties like or are comfortable with
  ▪ While an online mediation does present opportunities to not spend time on
    some activities (walking between rooms, etc.), that does not mean that
    parties aim to have a “faster” mediation online or short-circuit some
    essential processes.

o Being on the lookout for “Zoom fatigue” or “Zoom Stress”
PART II – ANATOMY OF A HYBRID MEDIATION AND FACTORS TO CONSIDER

Presented by: Hon. Jacqueline Connor and Hon. Gerald Rosenberg

- **In-Person Advantages**
  - Traditional and more organic connection with counsel and clients
  - Ability to assess personality and dynamics of communication is intuitive
  - Eye to eye communication and the ability to read responses/body language
  - Quicker ability to develop trust and confidence
  - Relationships developed are more personal

- **Zoom Advantages**
  - Multiple simultaneous platforms to communicate (screen, text, call, ipad, phone, desktop, laptop)
  - Participation options: telephone only, video appearance or audio only
  - Availability of onscreen exhibits and presentations, videos, powerpoint slides
  - Breakout rooms can configure instantly then be reconfigured instantly
  - Privacy can be controlled; intruders are immediately identified; sessions can be locked
  - Health concerns can be alleviated: control back to lawyers as well as clients
  - Parties can customize the experience depending on needs and circumstances
  - Immediate availability of dedicated ADR IT expert to assist lawyers and clients
  - Greater level of participation from true decision makers
  - Less likelihood of someone walking out (they are already home)
  - Work is more efficient; less time on war stories and chatting
  - Easier ability to orchestrate private conversations/exchange of information

- **HYBRID Options and Advantages**
  - Accommodating of distance and health concerns unique to each and every participant
  - Comfortable familiar setting for nervous clients/family
  - Control of distance from opposition if and as needed
  - Enormous savings in travel and housing costs for distant witnesses, clients, adjusters, experts
  - In person available when important to see/meet a plaintiff or witness
  - Preferences of attorneys or their clients can be accommodated
  - Ability to go to one of the attorneys’ offices to maintain safety precautions
  - Unlimited number of breakout rooms digitally available as well as onsite separate rooms
  - Attorney in own office with client in another adjacent room
  - Option of client at home in personally controlled setting
Part III – INCREASING THE LIKELIHOOD OF A SUCCESSFUL ARBITRATION

Presented by: Hon. Joe Hilberman

- Cooperation between all counsel
- Open communication (not *ex parte*) with the arbitrator including a discussion of any particular needs or issues to be addressed
- Ensure attorney and witness familiarity with Zoom
  - Go to the Zoom website for online tutorials
  - Contact ADR Services for support and tutorials
- Ensure familiarity with how to set up video and audio, including best camera placement and adequate audio quality
- Ensure adequate wi-fi connectivity
- Learn to screen share documents and exhibits
- Attorneys need to prepare the witnesses for the uniqueness of the Zoom presentation.
- Communicate and coordinate with the arbitrator
- Stipulate to the foundation of exhibits where possible
- Provide the arbitrator, and exchange with counsel, a joint witness list, joint exhibit list, and arbitration brief of each party, no fewer than 3 court days before the arbitration. Include when the witness will testify and expected length of direct and cross-examination
- Be sure to meet and confer with all counsel regarding realistic scheduling of witnesses
- Consider limiting to the extent possible the number of exhibits, as that is a bit of a logistical problem of presentation
- Ensure the arbitrator creates a sufficient number of “break-out” rooms
- Exchange cell phone numbers with counsel and the arbitrator and ADR Services coordinator.
- Discuss any issue you can think of before the arbitration, including such mundane issues as appropriate dress…Suit? Tie? Casual dress? The most important consideration is that the parties importance of the proceedings to the parties and witnesses.
Stay Connected!

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Did you know that agreements and other documents created in the course of a mediation in California are presumed to be inadmissible? In order to admit a mediated settlement agreement into evidence, so that the agreement can be enforced, remember to include the specific language required by California's mediation confidentiality statute.

California Evidence Code (EC) Section 1123 provides for admissibility of settlement agreements if signed by the settling parties and if one of these three conditions is met:

- The agreement provides that it is admissible or subject to disclosure, or words to that effect;
- The agreement provides that it is binding or enforceable, or words to that effect; or
- The parties to the agreement expressly agree in writing to its disclosure.

Put these magic words into all of your standard settlement agreements and release forms, so that they are already prepared if you choose to use your own form to document an agreement made at a mediation session. Otherwise, the failure to put the magic words into your mediated settlement agreement means that the presumption under EC Section 1119 that all mediated documents are inadmissible applies.

An example clause that could be inserted into all of your settlement agreements and releases might look like this:

*In the event this agreement is signed in the course of a mediation, the undersigned agree that it is binding, enforceable, admissible and subject to disclosure in any subsequent proceeding to enforce this agreement pursuant to California Evidence Code Sections 1122 and/or 1123.*

The parties are technically under the presumed confidentiality of a mediation from the moment a mediation starts (which could be a convening call with a mediator), until ten days after the last mediation session or communications with the mediator (unless a writing reduces the ten day period). Thus, if your settlement agreement is negotiated with opposing counsel two days after a mediation session and signed four days later, you may be settling in the course of a mediation, and the presumption under EC Section 1119 that all documents are inadmissible would apply. A paragraph such as the above already in your standard forms should resolve any issue of admissibility, in case you forgot that you might be under the mediation confidentiality umbrella.
Make sure the agreement is signed by the settling parties. Releases are often one way agreements, but to be admissible during the course of a mediation under EC Section 1123, releases must be signed by both the releasor and the releasee, along with the magic words.

When your efforts have been properly documented under EC Section 1123, your settlement agreements will be admissible, and therefore enforceable.

To see Caroline's article on enforcing mediated documents, [click here](#).

Caroline C. Vincent is an attorney mediator, neutral evaluator and arbitrator with ADR Services, Inc. in Los Angeles and Orange County, who has heard over 2000 disputes in her 25 year ADR career. She specializes in employment, complex torts, probate/elder abuse, insurance, professional liability and business and real estate disputes, including class and mass actions. Caroline is a 1978 graduate of the USC Gould School of Law where she served on Law Review, and teaches ADR Ethics. She is recognized in Super Lawyers for her expertise in ADR.

* Nothing herein shall be construed as legal advice. The suggestions made are for discussion purposes only, and may not be suitable for any particular legal or mediation situation, or legally enforceable under current or future statutory or case law. Anyone using a suggested clause or other suggestion contained herein is advised to review the California Evidence Code and applicable case law and or obtain the advice of legal counsel as to its legal effect for any particular situation.
Enforcing mediation caucus agreements after *Cassel*

A primer on the admissibility and enforceability of agreements made in caucus-only sessions, especially agreements you make with your own clients

In *Cassel v. Superior Court* (2011) 51 Cal.4th 113, the California Supreme Court ruled that, absent meeting specified exceptions set forth in the Evidence Code, statements made in and during the course of a mediation that occur solely between an attorney and client are not admissible in a civil action. After several appellate cases that had differently construed the Evidence Code’s mediation provisions regarding the admissibility of statements, agreements and conduct between only lawyer and client, *Cassel* is now the definitive ruling on the admissibility of statements made, documents created and conduct occurring between parties on the same side of a dispute, as well as between disputants themselves.

This article addresses the need to consider whether certain agreements made throughout a mediation that are solely between an attorney and a client, or between multiple plaintiffs, lienholders or other stakeholders on one side of a dispute, ought to be made admissible, and if so, how.

(Editor’s note: All unlabeled statutory references are to the Evidence Code.)

In *Cassel*, a client brought a legal malpractice action against his attorney, alleging that the attorney pressured the client into accepting a settlement for an amount far less than what was agreed or anticipated prior to the mediation. The court ruled that all of the statements and conduct preceding and during the mediation were inadmissible, even though all of the alleged conduct and statements occurred in private communications solely between the client and his attorney. The court held that “[a]bsent an express statutory exception, all discussions conducted in preparation for a mediation, as well as all mediation-related communications that take place during the mediation itself, are protected from disclosure.” (*Cassel, supra*, at 128.) This holding was based upon an analysis of the language of Evidence Code section 1119, which broadly provides that (except as otherwise provided in the chapter), no evidence of anything said, nor any writing made for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible in any arbitration, civil action or administrative adjudication.

Common agreements

Consider the following situations where agreements are frequently made in plaintiff-side caucuses:

- Agreements to amend the written retainer agreement, including reducing the percentage of attorney fees, guaranteeing the client a base amount of recovery, guaranteeing or reducing the costs or liens;
- Agreements made on the telephone with a medical lienholder to reduce the amount of a lien;
- Agreements between multiple plaintiffs represented by the same lawyer (or by co-counsel) to take less than an equal percentage of the proceeds, for a variety of reasons (one plaintiff has greater medical specials or loss of earnings component; one plaintiff owes another money and agrees to offset it through an amended settlement proceeds distribution, one plaintiff has advanced costs and will receive a reimbursement of costs);
- Pro forma distribution statements made at the mediation.

In other words, if you make a side deal, or prepare a diagram or a set of figures that is useful for your clients, is that admissible? *Cassel* suggests that lawyers put on their confidentiality “antennae” upon contemplating, preparing for and engaging in mediations. Over a decade has passed since the legislation which clearly specifies the general presumption that communications in California mediations are inadmissible, with several specific exemptions provided for in the legislation allowing admissibility of evidence. Meeting the technical hurdles requires forethought and precision.

It has become commonplace for lawyers and mediators to either sign standard confidentiality agreements acknowledging the inadmissibility of statements made in mediation, or if they do not sign such agreements, to understand that everything discussed in mediation is inadmissible. It is also widely understood that written settlement agreements are admissible, provided they meet one of the requirements set forth in Evidence Code section 1123 (i.e., that the agreement states that it is enforceable or binding or words to that effect; that it is admissible or subject to disclosure or words to that effect; or that all parties to the agreement expressly agree in writing to its disclosure). What is not widely held in the consciousness of mediators and lawyers alike is that these and other special technical requirements in the Evidence Code, are necessary to admit into evidence agreements made with less than all of the usual settling parties.

This article suggests that lawyers and mediators ought to turn on their...
admissibility antennae and notice situations where side agreements or caucus agreements are made, and consider whether any special steps should be taken to ensure that they are admissible and consequently enforceable in the event of a subsequent dispute.

**Agreements made with plaintiff**

A common conversation between mediator, plaintiff and plaintiff’s counsel occurs toward the end of the negotiations, when the client is being asked to consider accepting a particular offer. The conversation focuses on the net proceeds the client can expect to receive based upon accepting that offer. This net number is not always easy to determine because liens have not been negotiated and the exact costs advanced on the matter may not be readily available.

Counsel sometimes will advise the client that he can expect to receive a minimum of a certain dollar figure or “something in that range.” Some attorneys offer to reduce their fees and/or costs so that the client can expect to receive a certain sum. When the liens cannot be negotiated as expected and misunderstandings between lawyer and client ensue, *Cassel* dictates that to the extent that such agreements are made during or in the course of the mediation, they must meet technical statutory exceptions in order to be admissible (only the written exceptions under Evidence Code sections 1122 and 1123 are covered in this article; see also exceptions in sections 1118 and 1124 for admissibility of oral agreements made in mediation, which are generally impracticable and rarely used).

In the examples given, this would mean that the client would be unable to enforce an agreement more favorable to the client than the retainer agreement unless it met the technical admissibility provisions of the Evidence Code, but it would not prevent a client from initiating a complaint with the State Bar (the admissibility of such evidence in a disciplinary setting is unclear). If an oral agreement made at the mediation was more favorable to the attorney than what the client understood was agreed, the lawyer will be unable to enforce the more favorable agreement. It is always good business practice to make certain that any agreements made between lawyer and client are clear and in writing. But is a scribbled note with you and your client’s signature enough? The answers are probably not, and maybe.

**Agreements with lienholders**

During mediation, you, the plaintiff counsel, phone the primary doctor and negotiate the doctor’s lien. Later, the doctor reneges on the agreement. Unless the attorney takes the time to create a writing that meets the technical statutory requirements of the mediation provisions of the Evidence Code, the agreement is not enforceable because it is not admissible. The same would hold true for a lien negotiation made on the way to mediation. How can you make sure this is binding on the medical provider?

**Agreements with multiple plaintiffs**

When you, or you and your co-counsel, represent more than one plaintiff, there are sometimes different amounts of money that each plaintiff will be offered and/or will accept. Usually these separate amounts will be set forth next to each plaintiff’s name in a global settlement agreement presented at the end of the mediation. But consider these not uncommon occurrences:

- A mediator’s proposal is needed to settle the case, and the plaintiffs will agree among themselves to their proportionate shares if the proposal is accepted.
- Your clients, on their own, determine to shift the allocations.
- The clients wish to adjust the allocations through a reallocation of the respective charge of attorney fees or costs set forth in the retainer agreement (thereby amending the retainer agreement).
- One of the clients, Client A, does not want to settle the case unless he receives $20,000, but only $17,000 is offered to him. The other three of your four clients is each willing to give $1,000 of their monies to Client A, but the defendant is unwilling to change its allocation as offered in the negotiations or in any final settlement agreement.

In these situations, the attorney should be focusing on making sure that the agreements between the clients are enforceable, as buyer’s remorse and next day jitters are common occurrences for plaintiffs. Does an agreement they sign at the mediation among themselves work? Yes, but only if the technical requirements allowing its admissibility pursuant to sections 1122 and/or 1123 are met.

Agreements in the above circumstances that are made in advance of the mediation session will likewise necessitate satisfaction of the statutory requirements to be admissible if they are made or prepared “for the purpose of, in the course of, or pursuant to” a mediation. (Evid. Code, §§ 1119(a) & (b); *Cassel*, supra, at 128.)

**Admissible settlement agreements**

Pursuant to section 1123 a written settlement agreement meeting certain technical requirements is one of the statutory exceptions to the rule prohibiting admissions of statements and conduct in mediations. Attorneys participating in mediations should be well versed in these requirements, as these clearly apply to the primary disputants in any mediation, plaintiff(s) and defendant(s).

A written settlement agreement is admissible pursuant to section 1123 if signed by the settling parties and if one of these three conditions is met:

- The agreement provides that it is admissible or subject to disclosure, or words to that effect (Evid. Code, §1123(a));
- The agreement provides that it is binding or enforceable, or words to that effect (Evid. Code, § 1125(b)); or
- The parties to the agreement expressly agree in writing, or orally in accordance with section 1118, to its disclosure (Evid. Code, § 1123(c)).

A typical Stipulation for Settlement form that is customarily provided by the mediator or an ADR provider, for signature by plaintiff(s), defendant(s) and their respective counsel, is likely to contain something like the following:

The parties agree that they have reached a full and final settlement of all claims arising from the events described in the complaint. This
agreement is binding and it contains the material terms of the agreement between the parties. Pursuant to Section 1123 the parties agree that this agreement is exempt from the confidentiality provisions of Evidence Code Sections 1119, et seq., and is admissible in evidence to enforce the settlement.

This settlement language meets all three of the enumerated requirements of section 1123, only one of which must be met, in order for a written settlement agreement to be admissible (Evid. Code, § 1123(a), (b) and (c). Note, however, that the settling parties must sign the agreement, (Evid. Code, § 1123)).

The author is a proponent of including admissibility language in a standard confidentiality agreement, signed by all participants and the mediator at the commencement of a mediation. The provision in the author’s confidentiality agreement is as follows:

The undersigned agree that this confidentiality agreement and any written settlement agreement resulting from this mediation are binding, enforceable and admissible in any subsequent proceeding to enforce those agreements.

The purpose of this “umbrella” provision is to safeguard against the failure to specifically state in the settlement agreement itself (usually drafted after everyone is exhausted) that it is either “admissible or subject to disclosure” or that it is “binding or enforceable” or words to that effect. Thus, by agreeing that a settlement agreement to be created in the future is admissible, the parties are protected in the event a deal memo is written and signed without the magic words contained in section 1123 (a) or (b). This would permit a barebones initialed deal point memo between the primary disputants in a mediation to be admitted. Note that this provision meets the exceptions of either section 1123(c) or 1122(a)(1), depending upon who signs it.

Admissible agreements signed only by participants in the plaintiff caucus

There are four suggestions for the admission of agreements signed only by participants in the plaintiff caucus:

• Written settlement agreements signed by the caucus participants

As discussed above, Evidence Code section 1123 provides an exception to the inadmissibility of agreements that are signed by the settling parties and that meet one of three technical requirements. It is probable that a side agreement between attorney and client, or attorney and lienholder would be considered a settlement agreement and therefore admissible if one of the requirements in section 1123 (a), (b) or (c) is met. After all, the participants in a caucus are resolving (settling) an issue between them by coming to an agreement about the issue (part of the Casel holding is that attorney and client are distinct participants for purposes of the mediation confidentiality statute). It is suggested that somewhere the document they sign refer to as a “settlement agreement.”

There are a couple of caveats to the success of using a settlement agreement under section 1123 for caucus-only settlements. Section 1122(a)(2) provides that an admissible writing prepared by or on behalf of less than all the mediation participants may not disclose anything said or done or any admission made in the course of the mediation (Evid. Code, § 1122(a)(2); emphasis added). The California Law Revision Comments to section 1122(a)(2) state that the subsection facilitates the admission of unilaterally prepared materials if they reveal nothing about the mediation discussion. (Cal. Law Revision Com. com., 29B pt. 3B West’s Ann. Evid. Code, § 1122(a)(2).) The comments to section 1122 further note that section 1123 (written settlement agreements) is an exception to section 1122. And the Law Revision comments to section 1123 refer to section 1122. What this means exactly is unclear, although taken together, the likely conclusion is that a settlement agreement signed by any of the participants in a mediation is admissible, including plaintiff caucus participants, if it meets one of the enumerated exceptions of section 1123.

A strong suggestion is to make sure that the settlement agreement between attorney and client, or attorney and lienholder, or between multiple clients keeps the recitals and agreements to a minimum and avoids discussing issues that pertain to communications, documents and writings with other participants at the mediation. About one thing we can be certain – this issue will be litigated, eventually.

An attorney might get into the practice of having a confidentiality agreement signed at the beginning of the mediation (by all participants per Evidence Code section 1122(a)(1)), that provides that any settlement or other agreements, including those between other than the primary disputants, are admissible settlement agreements pursuant to section 1123(c). That way, the legal pad scrabbles evidencing the allocations of settlement dollars would be admitted.

• Written agreements to disclose communications that are not settlement agreements

Evidence Code section 1122 (a) provides for two other ways for written agreements in mediations to be admissible, if either of the following conditions is satisfied:

1122(a)(1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclose the communication, document, or writing; or

1122(a)(2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done on any admission made in the course of the mediation. (Evid. Code, § 1122(a)(1) and (a)(2)).

• Written agreements to disclose communications signed by the mediator and all participants

Section 1122(a)(1) allows the mediator and all participants to expressly agree in writing to a disclosure of the communication or document. Providing a
provision in the primary settlement agreement that any writings by and between an attorney and a client are admissible between them is one possible approach, provided the mediator and all participants are signatories. Another option is to sign a pre-mediation confidentiality agreement providing for admissibility of caucus-only agreements, where the mediator and all participants are normally present and signing.

- **Written agreements to disclose communications signed by fewer than all participants.**

  Section 1122(a)(2) is the more likely provision to be used. A writing prepared on the attorney’s legal pad that is signed by the client and the attorney and says that it is subject to disclosure, and has nothing more than the percentage or monetary allocations agreed to be distributed from settlement monies ought to be admissible under this section. While you are at it, however, make it a settlement agreement by calling it a settlement agreement, and state that it is binding or enforceable, as well as admissible and subject to disclosure. And make sure that all parties to the settlement agreement sign it. As discussed above, it is highly suggested that you include the magic language “provided that this agreement does not disclose anything said or done or any admission made in the course of the mediation.” This avoids the potential conflict between sections 1123 and 1122(a)(2) discussed above.

  For lienholders, ask them to sign such an agreement that can be faxed, or ask if you may obtain their email signature in order to bind them to their commitments. This provision is also clearly intended to allow the admission of documents you and your client create in preparation for litigation, that just happen to be created while you are sitting around for hours at the mediation. Care should be taken that no mediation discussions regarding the larger mediation dispute are included in the writing.

- **Retainer agreements**

  The lawyer’s initial retainer agreement with a client is the best place to fashion agreements with clients about disclosure of any communications or agreements made in preparation of and during the course of the mediation. By agreeing to disclose documents you and your client create, reciting the statutory exception language of Evidence Code section 1122(a)(2), your legal pad scratch notes of the final allocations are admissible into evidence and expectations that clients and attorneys can air their disputes without the shield of mediation confidentiality will be honored.

- **Final thoughts**

  As a mediation proceeds, lawyers ought to have heightened antennae regarding whether or not it is wise to take certain affirmative steps to make sure agreements between their clients and themselves and/or lienholders, spouses, and others are admissible and enforceable. Remember Evidence Code sections 1122 and 1123, and carry their provisions with you. Be mindful that there are technical requirements and take the time to study and implement them.

  Also consider whether there are there other things besides an agreement you wish to have admissible and subject to disclosure. Is your client relying on a representation by the other side that ought to be a recital in a settlement agreement? Or might a particular document or set of communications be useful for enforcement or interpretation of an agreement? Sections 1122 and 1123 cover these situations.

  Plaintiffs’ lawyers will clearly sail through settlement to closed files with happy, referring clients, when they learn and implement the exceptions to the mediation confidentiality rules so that the agreements they make with mediation participants are kept – by being admissible and enforceable.

- **Suggested clauses**

  All suggested clauses are for discussion purposes only, are not to be considered legal advice and may not be usable or legally enforceable for any particular mediation situation. Anyone using a suggested clause is advised to review the Evidence Code and applicable case law and/or obtain the advice of legal counsel.

- **Pre-mediation or confidentiality agreement clauses (signed by the mediator and all participants)**

  The undersigned agree that this confidentiality agreement and any written settlement agreement resulting from this mediation are binding, enforceable and admissible in any subsequent proceeding to enforce those agreements (Evid. Code, § 1122(a)(1)).

  [Optional addition to the above]: A written settlement agreement for purposes of this paragraph includes any written agreement signed by less than all of the mediation participants to resolve, clarify or establish the outcome of any issue that arises solely between them during the course of the mediation (Evid. Code, § 1122(a)(1)).

  [Optional addition to the above]: In addition, other writings, statements or admissions made during the course of the mediation are admissible solely for the purpose of interpreting and enforcing the terms and provisions of any resultant written settlement agreement. (Evid. Code, § 1122(a)(1)).

  [Optional addition to the above]: In addition, any communications, documents or writings transmitted or prepared solely between a party and its respective counsel, is admissible and may be disclosed in any proceeding between the party and its respective counsel. (Evid. Code, § 1122(a)(1)).

- **Agreement that side agreement or other statements in the mediation may be admissible (signed by the mediator and all participants)**

  The parties agree, pursuant to Evidence Code section 1122(a)(1), that all statements, writings, communications, documents and conversations created and exchanged among and between them during, and as a result of the facilitated meetings with the mediator may be disclosed in any subsequent legal proceeding and are admissible as evidence. All participants to the mediation agree that any side agreement, writings, or communications by and between one set of parties and/or their respective counsel is admissible in any subsequent proceeding, provided that the only
The parties agree, pursuant to Evidence Code Section 1122(a)(2), that this settlement agreement, prepared solely between the signing parties, is binding and enforceable between them, and is admissible and may be disclosed in any subsequent proceeding between them, provided that, the communications, documents or writings do not disclose anything said or done or any admission made in the course of the mediation between the main mediation disputants (Evid. Code, § 1122(a)(2); probably admissible under Evid. Code, § 1123, if signed by all of the settling parties).

Caroline C. Vincent is an attorney mediator, neutral evaluator and arbitrator with ADR Services, Inc., in Los Angeles and Orange County. She specializes in employment, personal injury, probate/elder abuse, insurance, professional liability and complex business and real estate disputes, including class and mass actions. She is a 1978 graduate of the USC Gould School of Law where she served on Law Review.
This case having come on this date for voluntary mediation, it is hereby stipulated by the parties that the matter is deemed settled pursuant to the following terms and conditions:

1. The parties stipulate that this settlement does not constitute and shall not be deemed as an admission of liability, including any act, omission, or damages of any party.

2. Defendant(s) ________________________________________________________________ shall pay to Plaintiff(s) ________________________________________________________________ the sum of $____________ within ___ days as a full and complete settlement and compromise of the disputes arising between the parties in this matter. Plaintiff(s) agree(s) to accept said sum with the knowledge that he/she/they will be barred from proceeding against any and all defendant(s) in the future concerning all of the allegations raised in this matter.

Other terms (i.e., provision for medical comp liens, stipulation for entry of judgment, extension of the five-year statute) are as follows:

a. ________________________________________________________________

b. ________________________________________________________________

c. ________________________________________________________________

d. ________________________________________________________________

3. Further conditions of the settlement are as follows:

a. If a court action is pending, Plaintiff(s) will execute a request for dismissal of the action with prejudice to be filed after all settlement documents have been signed, after a proper request has been submitted asking the Court to retain jurisdiction to enforce the settlement pursuant to Code of Civil Procedure section 664.6, and after all funds have been paid or other settlement terms satisfied as set forth above;

b. The undersigned expressly acknowledges and agrees that this settlement and mutual release is intended to extinguish all claims of every type, including those known and unknown and those suspected and unsuspected, without regard to whether they are now known or suspected, even if those claims may materially affect the undersigned’s
decision to enter into this release. This is a full and final mutual release, and the undersigned expressly waives any right under Civil Code section 1542, which provides:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.”

Although it is possible that the undersigned may discover new or additional damages or injuries, this release is intended to include all claims against all settling parties and to extinguish all obligations in favor of the undersigned arising from the dispute(s) at issue.

c. Each party shall be responsible for their own attorneys’ fees and costs in this matter.

4. This settlement agreement may be enforced pursuant to Code of Civil Procedure section 664.6. It is admissible and subject to disclosure, despite the otherwise enforceable requirements of confidentiality, solely for the purpose of establishing in court that an agreement has been reached by the parties for purpose of enforcing and interpreting that agreement. (Evidence Code section 1123(a).) The prevailing party in any proceeding to enforce this settlement agreement shall be entitled to recover reasonable attorneys’ fees and costs.

5. The parties do ____ / do not_____ intend to prepare a more formal agreement of settlement and mutual release which shall include the material terms of this stipulation.

6. This settlement agreement is intended to be fully and formally binding and enforceable and is effective this ____ day of ____________, 20____, and reflects the final agreement between the parties to this dispute, and each of them, pursuant to Evidence Code section 1123(b). This document contains the entire understanding and agreement between the parties concerning the resolution of the disputes between them and at issue in this matter. No other promises or agreements shall be binding or shall modify this Agreement unless signed by the parties. This agreement has been executed without reliance on any promise, representation or warranty not contained herein. A copy of this agreement may be used in lieu of the original for all purposes.

________________________________________________________
Attorney for: Plaintiff

________________________________________________________
Attorney for: Plaintiff

________________________________________________________
Attorney for: Defendant

________________________________________________________
Attorney for: Defendant

________________________________________________________
Attorney for: Defendant
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ___________________

_____, Plaintiff(s),

vs.

_____, and

DOES 1 TO 10,

Defendant(s).

CASE NO: ______

STIPULATION AND [PROPOSED]
ORDER RE: SETTLEMENT AND
RETENTION OF JURISDICTION

[C.C.P. § 664.6]

JOINT STIPULATION

The parties in the above entitled matter, having reached a settlement, request that the Court retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement, pursuant to C.C.P. section 664.6, even after dismissal of this matter. (Sayta v. Chu (2017) 17 Cal.App.5th 960; Mesa RHF Partners, L.P. v. City of Los Angeles (2019) 33 Cal.App.5th 913.) The parties acknowledge that for the Court to retain jurisdiction to enforce the settlement under C.C.P. § 664.6, this Stipulation and Order must be filed before dismissal is entered.

IT IS SO STIPULATED.

Dated: ____________________________  Dated: ____________________________

Plaintiff ____________________ Defendant __________________
STIPULATION AND [PROPOSED] ORDER RE: SETTLEMENT AND RETENTION OF JURISDICTION

Dated:____________________________  Dated:________________________

Plaintiff ____________________  Defendant ____________________________

Dated:____________________________  Dated:________________________

Attorney for Plaintiff _________  Attorney for Defendant _____________

Dated:____________________________  Dated:________________________

Attorney for Plaintiff _________  Attorney for Defendant _____________
[PROPOSED] ORDER

The Court, having reviewed the above stipulation of the parties, and good cause appearing, orders that the parties’ joint request is GRANTED and the Court shall retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement, pursuant to C.C.P. section 664.6, even after dismissal of this matter.

IT IS SO ORDERED.

Date: ______________________  Judge of the Superior Court
Evidence Code Section 1129

- New California mediation law that took effect January 1, 2019
- Imposes written disclosure duties on attorneys \textbf{prior to the client agreeing} to mediation

Requires attorney to provide the client with a printed disclosure containing the confidentiality restrictions described in Section 1119 and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

- 1129(c) governs format of printed disclosure
- 1129(d) has \textit{sample language} that \textit{may} be included in the disclosure
  
  - Using the sample language satisfies the disclosure requirement of 1129 (a)[New EC 1122(a)(3)]
  
  - NOTE: the sample language is much broader than the required disclosure required by 1129 (a) ... which required disclosure is to advise re EC 1119. The sample language contains multiple erroneous and misleading statements, not consistent with and superfluous to the EC mediation confidentiality provisions and case law. Nothing in the disclosure required by EC 1129 (a) suggests a lawyer advise their client that the client cannot use evidence of mediation communications in a legal malpractice claim.

  - The \textit{sample language} in 1129(d) follows, \textbf{some of the inaccurate and erroneous items are highlighted in yellow}. Superfluous malpractice language is highlighted in gray.
**Mediation Disclosure Notification and Acknowledgment**

To promote communication in mediation, California law generally makes mediation a confidential process. California’s mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court’s consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation **must** remain confidential.

- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.

- A mediator’s report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.

- A mediator cannot testify in any subsequent civil proceeding about any communication or conduct occurring at, or in connection with, a mediation.

This means that all communications between you and your attorney **made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.**

I, _____________ [Name of Client], understand that, unless all participants agree otherwise, no oral or written communication made during a mediation, or in preparation for a mediation, **including communications between me and my attorney**, can be used as evidence in any subsequent noncriminal legal action including an action against my attorney for malpractice or an ethical violation.

**NOTE:** This disclosure and signed acknowledgment does not limit your attorney’s potential liability to you for professional malpractice, or prevent you from (1) reporting any professional misconduct by your attorney to the State Bar of California or (2) cooperating with any disciplinary investigation or criminal prosecution of your attorney.

[Name of Client]  [Date signed]

[Name of Attorney]  [Date signed]
An Alternate Disclosure #1?

MEDIATION DISCLOSURE NOTIFICATION AND ACKNOWLEDGMENT

To promote communication in mediation, California law generally makes mediation a confidential process. California’s mediation confidentiality laws are laid out in sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. EC Section 1119 establishes a presumption that, during mediation, all communications and writings are inadmissible as evidence in subsequent proceedings, such as litigation or arbitration. EC Section 1119 does however note that there are exceptions, which if met, permit communications and writings to be admissible between some of the parties and for settlement agreements. These exceptions are contained in EC Sections 1122 and 1123.

The text of EC Section 1119 follows:

“Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.”

*****

I, _____________________ [Name of Client], have read and understand the confidentiality provisions of Evidence Code Section 1119.

[Name of Client] [Date Signed]

[Name of Attorney] [Date Signed]
Alternate Disclosure #2:

When parties are in mediation, there is a presumption under the California Evidence Code that all writings and communications between the participants in mediation [including the lawyer and their client] are presumptively inadmissible in any trial or arbitration. That means that, unless we agree otherwise, neither you nor I can testify, nor could other participants testify, about what happens in mediation. This is in EC Section 1119.

However, the Evidence Code contains two specific provisions that provide methods to admit, and use in court or arbitration, communications between some or all of the participants, and also to admit written settlement agreements signed by the mediation participants. These are in EC Sections 1122 and 1123.
1119. Written or oral communications during mediation process; admissibility

Except as otherwise provided in this chapter:

(a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

EC 1122 Communications or writings; conditions to admissibility

(a) A communication or a writing, as defined in Section 250, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if either of the following conditions is satisfied:

1. All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with Section 1118, to disclosure of the communication, document, or writing.

2. The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with Section 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

EC 1123 Written settlement agreements; conditions to admissibility

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if the agreement is signed by the settling parties and any of the following conditions are satisfied:

(a) The agreement provides that it is admissible or subject to disclosure, or words to that effect.

(b) The agreement provides that it is enforceable or binding or words to that effect.

(c) All parties to the agreement expressly agree in writing, or orally in accordance with Section 1118, to its disclosure.

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.
Flying small or solo?

**BENEFITS OF THE SMALL FIRM AND SOLE PRACTITIONER SECTION:**

**LISTSERVE:** A resource unlike any other... access to hundreds of L.A. lawyers online every day asking and answering questions, giving advice, making and asking for referrals and discussing relevant topics and issues. It's worth the price of membership!

**PROGRAMS:** Attend essential programs live or through webinars across broad practice areas, including practice management tools for small firm/solo lawyers.

**NETWORKING:** Whether Section-organized events or a local LACBA social networking group, there are great opportunities to expand business relationships, participate in mentoring and develop new friendships.

**CLE:** Fulfill all your CLE requirements right here at LACBA, including through Section-organized and hosted events. Plan and hold on yourself!

**REFERRALS:** We have lawyers in almost every practice area asking for and making referrals. Get help finding an expert witness, neutral or other service provider across most disciplines.

**SOCIAL MEDIA:** We keep our Section up-to-date through a variety of social media platforms: FB, Twitter, Instagram and LinkedIn.

**LEADERSHIP AND COLLEGIALITY:** Become part of a strong community of lawyers with opportunities to take on leadership roles and otherwise participate in Section-building through our friendly and egalitarian Executive Committee, serving on a sub-committee or running programs and events.

**MAKE A PROFESSIONAL IMPACT:** Opportunities to speak on topics of interest, dialogue on important issues, write articles for the newsletter and shape the discourse for small firms and sole practitioners in Los Angeles County and beyond.

**OTHER LACBA BENEFITS:**

**LACBA NETWORKING MEETINGS:** Network and meet contacts all over Los Angeles in a wide range of practice areas.

**LACBA eBRIEFS:** Notifications with summaries of published court decisions.

**MEMBER PRICING:** Membership pricing for all CLE programs and events and special Section pricing for Section programs.

**LACBA THIS WEEK:** Notice of events and programs of all LACBA Sections.

**VENDOR DISCOUNTS:** Discounts/benefits from vendors for services.

**LA LAWYER MAGAZINE:** Subscription for members to Los Angeles Lawyer Magazine (and access to back issues and CLE Self Tests).