

PROPOSED AMENDMENTS TO SENATE BILL NO. 954

SENATE BILL

No. 954

Introduced by Senator Wieckowski

January 30, 2018

An act to amend Section 6068 of the Business and Professions Code, to amend Section 1122 of, and to add Section 1129 to, the Evidence Code, relating to mediation.

Amendments 1 & 2

LEGISLATIVE COUNSEL'S DIGEST

SB 954, as introduced, Wieckowski. Mediation: ~~confidentiality.~~  
*confidentiality: disclosure.*

Under existing law, if a person consults a mediator or consulting service for the purpose of retaining mediation services, or if persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of a consultation for mediation services or in the course of the mediation is not admissible in evidence nor subject to discovery, and all communications, negotiations, and settlement discussions by and between participants or mediators are confidential, except as specified.

This bill ~~would~~ *would, except in the case of a class action,* require an attorney representing a person participating in a mediation or a mediation consultation to ~~inform~~ *provide* his or her client ~~of~~ *with a written disclosure containing* the confidentiality restrictions related to mediation, ~~as specified,~~ and to obtain ~~informed written consent from the client that he or she understands the restrictions~~ *a written acknowledgment signed by the client stating that he or she has read and understands the confidentiality restrictions* before the client participates in the mediation or mediation consultation. *The bill would*



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*also provide that the failure of an attorney to comply with these disclosure requirements does not invalidate an agreement prepared in the course of, or pursuant to, a mediation. The bill further provides that a communication, document, or writing that is used in an attorney disciplinary proceeding to establish that an attorney did not comply with the disclosure requirements is not confidential if the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

+ SECTION 1. Section 6068 of the Business and Professions Code is amended to read:

+ 6068. It is the duty of an attorney to do all of the following:

+ (a) To support the Constitution and laws of the United States and of this state.

+ (b) To maintain the respect due to the courts of justice and to judicial officers.

+ (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

+ (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by ~~an~~ any artifice or false statement of fact or law.

+ (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

+ (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

+ (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

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+ (g) Not to encourage either the commencement or the  
+ continuance of an action or proceeding from any corrupt motive  
+ of passion or interest.

+ (h) Never to reject, for any consideration personal to himself  
+ or herself, the cause of the defenseless or the oppressed.

+ (i) To cooperate and participate in any disciplinary investigation  
+ or other regulatory or disciplinary proceeding pending against  
+ himself or herself. However, this subdivision shall not be construed  
+ to deprive an attorney of any privilege guaranteed by the Fifth  
+ Amendment to the Constitution of the United States, or any other  
+ constitutional or statutory privileges. This subdivision shall not  
+ be construed to require an attorney to cooperate with a request that  
+ requires him or her to waive any constitutional or statutory  
+ privilege or to comply with a request for information or other  
+ matters within an unreasonable period of time in light of the time  
+ constraints of the attorney's practice. Any exercise by an attorney  
+ of any constitutional or statutory privilege shall not be used against  
+ the attorney in a regulatory or disciplinary proceeding against him  
+ or her.

+ (j) To comply with the requirements of Section ~~6002.1~~ 6002.1  
+ of the Business and Professions Code and Section 1129 of the  
+ Evidence Code.

+ (k) To comply with all conditions attached to any disciplinary  
+ probation, including a probation imposed with the concurrence of  
+ the attorney.

+ (l) To keep all agreements made in lieu of disciplinary  
+ prosecution with the agency charged with attorney discipline.

+ (m) To respond promptly to reasonable status inquiries of clients  
+ and to keep clients reasonably informed of significant  
+ developments in matters with regard to which the attorney has  
+ agreed to provide legal services.

+ (n) To provide copies to the client of certain documents under  
+ time limits and as prescribed in a rule of professional conduct  
+ which that the board shall adopt.

+ (o) To report to the agency charged with attorney discipline, in  
+ writing, within 30 days of the time the attorney has knowledge of  
+ any of the following:

+ (1) The filing of three or more lawsuits in a 12-month period  
+ against the attorney for malpractice or other wrongful conduct  
+ committed in a professional capacity.

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- + (2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.
- + (3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).
- + (4) The bringing of an indictment or information charging a felony against the attorney.
- + (5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.
- + (6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.
- + (7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.
- + (8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.
- + (9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.
- + (10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.
- + *SEC. 2. Section 1122 of the Evidence Code is amended to read:*
- + 1122. (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 any of the following conditions is are 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.

+ (3) *The communication, document, or writing is to be used in  
+ an attorney disciplinary proceeding to establish that an attorney  
+ did not comply with the requirements described in Section 1129,  
+ and does not disclose anything said or done or any admission  
+ made in the course of the mediation.*

+ (b) For purposes of subdivision (a), if the neutral person who  
+ conducts a mediation expressly agrees to disclosure, that agreement  
+ also binds any other person described in subdivision (b) of Section  
+ 1115.

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1 ~~SECTION 1.~~

2 *SEC. 3. Section 1129 is added to the Evidence Code, to read:*

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1 1129. ~~Before~~ *Except in the case of a class action, before*  
2 *engaging in a mediation or a mediation consultation, an attorney*  
3 *representing a client participating in the mediation or a mediation*  
4 *consultation shall inform his or her client of provide his or her*  
+ *client with a written disclosure containing the confidentiality*  
5 *restrictions as described in Section 1119, and obtain the client's*  
6 *written consent to the restrictions, in a form acknowledging that*  
7 *the client is informed of the restrictions and understands them. a*  
+ *written acknowledgment signed by the client stating that he or she*  
+ *has read and understands the confidentiality restrictions. Failure*  
+ *to comply with this section is not a basis to set aside an agreement*  
+ *prepared in the course of, or pursuant to, a mediation.*

Amendment 4

Amendment 5

Amendment 6

Amendment 7

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