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3 Reasons to Sign a Pre-Mediation Confidentiality Agreement

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At the beginning of a mediation, many mediators routinely ask all participants in the mediation to sign a form of pre-mediation confidentiality agreement (PMCA). A PMCA serves to inform the participants about the key provisions of the California Evidence Code regarding mediation confidentiality (EC). There are three good reasons to adopt this best practice, whether you are serving as neutral, attorney advocate or participant:

1. Alert participants to the statutory presumption that no evidence of anything said or any admission made, and no writing or document prepared, in the course of, or pursuant to, a mediation is admissible or subject to discovery, and disclosure of the evidence cannot be compelled, in a civil adjudicatory proceeding. EC Section 1119.
2. Clarify that the mediator is generally immune from providing testimony about statements made and conduct that occurs in a mediation in any subsequent civil proceeding. EC Section 703.5.
3. Include a provision that any settlement agreement signed by the settling parties at the end of the mediation will be admissible pursuant to EC Sections 1122(a)(1). This is the most important reason I ask participants to sign a PMCA. This creates a fall back provision to enforce a written settlement agreement, that might otherwise fail to comply with the technical requirements of EC Section 1123. A surprising number of attorneys are not consistently thinking of the technical requirements that must be met in order for a written settlement agreement prepared in the course of a mediation to be admissible. This oversight occurs due to fatigue, when attorneys and institutional clients use standard releases and settlement agreements not drafted with California mediation in mind, or when settlement documents are drafted soon after the session without the mediator there to make sure they have added the magic words required by EC 1123 to create an admissible agreement. Thus, having all participants sign a PMCA drafted to anticipate admitting a settlement agreement, is a way to create a double check system to ensure that your settlement agreement is admissible.

For more information on admitting mediation agreements and documents, and a sample clause for your PMCA, see the author's article [Enforcing Mediation Caucus Agreements after Cassel](#), Advocate Sept. 2012.

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.