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Are These Magic Words in your Mediated Settlement Agreements?



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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](#).

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** 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.*