

Suggestions* for Post Cassel Clauses:

1) Pre-Mediation or Confidentiality Agreement (signed by the mediator and all participants).

- a) 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 [EC 1122(a)(1)]. *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.* [EC 1122(a)(1)].
- b) 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. 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. [EC 1122(a)(1)].
- c) 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. 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. [EC 1122(a)(1)].

2) Caucus/Side Agreement language to make admissible/enforceable (signed by less than all mediation participants).

- a) The undersigned agree that this agreement shall constitute a settlement agreement between them regarding the issues therein, and that this agreement is binding, enforceable and admissible in any subsequent proceeding to enforce this agreement. [Might work under EC 1122 and 1123, if signed by all of the settling parties]. [EC 1122(a)(2); EC 1123].
- b) The parties agree, pursuant to Evidence Code § 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 and may not disclose anything said or done or any admission made in the course of the mediation between the main mediation disputants.¹ [EC 1122(a)(2); EC 1123].
- c) The parties agree, pursuant to Evidence Code § 1122(a)(2) that any side agreement communications, documents or writings prepared solely between one set of parties and/or their respective counsel are admissible and may be disclosed in any subsequent proceeding between them, provided that, the communications, documents or writings do not and may not disclose anything said or done or any admission made in the course of the mediation (*e.g., between the main mediation disputants*). [EC 1122(a)(2)].
- d) *Note: to ensure enforceability of a side agreement, request that all the other participants, and the mediator, sign a writing agreeing to the side agreement's admissibility (it will probably be a rare occasion that this is done at the commencement of the mediation). If the side agreement is not a part of the main settlement agreement, and/or if you do not want the side agreement to be disclosed to the other side, consider asking the participants to sign something along the lines of the following:*

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 parties competent to testify regarding the side agreement, writings or communications, are the parties who signed the side agreement or created the writings or made the communications, and that the other participants to the mediation, including the mediator, cannot be compelled to testify [EC 1122(a)(1); EC 1122(a)(2)].

¹ In *Cassel v. The Superior Court of Los Angeles County*, 51 Cal. 4th 113 (2011), the court discusses at length that a mediation, as defined by the Evidence Code, is a process between disputants, so that the words "made in the course of the mediation" would necessarily refer to communications between the primary disputants who came to the mediation. A side agreement could thus be between one party or group of parties and its counsel, or between two or more but less than all of the primary disputants.

3) Agreement that Process is NOT a mediation

The parties agree that this process is NOT a mediation and is therefore not subject to Sections 1119 - 1128 of the Evidence Code. Rather, this process is a (facilitation) (negotiation) (settlement conference) and is subject to Section 1152 of the Evidence Code. The neutral party facilitating the negotiations is not serving as a mediator. Thus, communications between the parties are admissible in a subsequent proceeding, except to the extent of offers to compromise, which are inadmissible to prove liability.

4) Agreement that all statements in the mediation may be admissible.

[For a simple family estate planning mediation (no lawyers)]:

Admissibility/Evidence Code. 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 mediator Caroline Vincent may be disclosed in any subsequent legal proceeding and are admissible as evidence. They otherwise agree and understand that the provisions of the Evidence Code pertaining to the immunity of the mediator and her inability to be compelled to testify still apply.

5) Retainer Agreement Language [*Wimsatt* waiver]

Attorney and client agree that, pursuant to Evidence Code § 1122(a)(2), any communications, documents or writings that are prepared, transmitted and communicated between them are not deemed inadmissible just because they occurred for the purpose of, or in the course of, or pursuant to, a mediation, and, [subject to the waiver of the attorney-client privilege], neither party will object to their disclosure in any subsequent proceeding between them, provided that the communications, documents or writing do not disclose anything said or done or any admission made in the course of the mediation.

* Nothing herein shall be construed as legal advice. All suggested clauses are for discussion purposes only, and may not be suitable for any particular mediation situation, or legally enforceable under current or future statutory or case law. Anyone using a suggested clause is advised to review the Evidence Code and applicable case law and or obtain the advice of legal counsel as to the clause's legal effect for any particular situation.