

RESOLUTION 10-06-2011
(Revised to Reflect Amendments Taken
At Conference)

DIGEST

Evidence: Disclosure of Mediation Communications for Professional Negligence or Misconduct
Amends Evidence Code section 1120 to permit use of attorney-client communications made during mediation in a subsequent professional negligence or State Bar disciplinary action.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENT

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code section 1120 to permit use of attorney-client communications made during mediation in a subsequent professional negligence or State Bar disciplinary action. This resolution should be approved in principle with recommended amendment because it would allow evidence of malpractice during a mediation to be used in a subsequent action based on that malpractice.

Existing law holds that the attorney-client privilege does not extend to communications relevant to actions for breach of contract between the attorney and client. (Evid. Code, § 958.) But a recent California Supreme Court case held that such communications that occurred during a mediation in which the lawyer was representing the client were inadmissible. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113.) The court recognized that the Legislature might wish to change this outcome. This resolution would do so, by exempting from the mediation confidentiality provisions communications directly between client and attorney where the attorney's malpractice forms the basis for the client's allegations against the attorney.

However, the language of the resolution is somewhat ambiguous, in that it does not explain in which types of cases the exemption would apply. The resolution would benefit from an amendment adding the following clarifying language after the inserted words "The admissibility:" " , in a State Bar disciplinary action, an action for legal malpractice and/or an action for breach of fiduciary duty, "

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Section 1120 of the Evidence code to read as follows:

§ 1120

(a) Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in mediation or a mediation consultation.

(b) This chapter does not limit any of the following:

- (1) The admissibility of an agreement to mediate a dispute.
- (2) The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.
- (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

(4) The admissibility, in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty, of communications directly between the client and his or her attorney, only, where professional negligence or misconduct form the basis of the client's allegations against the client's attorney.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: All communications, negotiations, or settlement discussions by and between participants, including the attorney and his/her client in the course of mediation shall remain confidential and are inadmissible in any civil action.

This Resolution: Would craft an exception to the admissibility of evidence during mediation and mediation consultation. Communications directly between an attorney and client, only, may be admissible if it forms the basis of a professional misconduct or professional negligence action.

The Problem: The California Supreme Court in *Cassel v. Superior Court* (2011) 51 Cal.4th 113 holds that mediation confidentiality applies to communications between lawyer and his/her client during the mediation process. However, in the concurring opinion Justice Chin states that he questions whether the Legislature fully considered whether attorneys should be shielded from accountability this way. He invites the Legislature to consider better ways to balance the competing interests rather than simply providing that an attorney's statements made during mediation to the client may never be disclosed. As the majority notes, the Legislature remains free to reconsider this question and it may well wish to do so.

Communications directly between a client and an attorney only, should be admissible and subject to disclosure if there is a pending malpractice or disciplinary action against the attorney. Only those communications between the client and attorney, means that opposing counsel and mediator shall not be subpoenaed as provided for in Evidence Code sections 1119 and 1127. This section will not create an exception to the confidentiality provisions, but address the admissibility of such communications between attorney and client to form the basis of a malpractice action. To hold otherwise, would seriously impair and undermine not only the attorney-client relationship but would likewise create a chilling effect on the use of mediations. In fact, clients would be precluded from pursuing any remedy against their own counsel for professional deficiencies occurring during the mediation process as well as representations made to the client to induce settlement.

The court in *Porter v. Wyner* (2010) 183 Cal.App.4th 949 reasoned that, "If the mediation confidentiality sphere were to be extended to the attorney-client relationship it would render

[Evidence Code] section 958 a nullity. Evidence Code section 958 provides that there is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. The mediation process and its attendant confidentiality would trump the attorney-client privilege and preclude the waiver of it by the very holder of the privilege. This would create a rather anomalous situation wherein a well-established and recognized privilege and waiver process is thwarted by a nonprivileged statutory scheme designed to protect a wholly different set of disputants. This resolution will clarify *Cassel* regarding the admissibility of attorney-client communications during the mediation process in a subsequent legal malpractice action.

IMPACT STATEMENT

The proposed resolution does not affect other law, statute or rule.

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AMENDING GROUP: Los Angeles County Bar Association

- Inserted the phrase “. in a State Bar disciplinary action, an action for legal malpractice, and/or an action for breach of fiduciary duty,” into the original resolution
- Did not delete or alter any language