

RESOLUTION 08-09-2018 – AS AMENDED

DIGEST

Evidence: Admissibility of Mediation Communications for Attorney-Client Disputes

Amends Evidence Code section 1120 to allow attorney-client communications made during mediation to be admissible in State Bar disciplinary proceedings or civil actions for malpractice.

STATEMENT OF REASONS

The Problem: In 2011, the California Supreme Court decided *Cassel v. Superior Court* (2011) 51 Cal.4th 113, in which it held that the policy underlying mediation confidentiality trumps the ability of a party to a mediation to sue his attorney for alleged professional negligence occurring at the mediation. In response to *Cassel*, the Conference of California Bar Associations adopted Resolution 10-06-2011, which became the basis of AB 2025 by Wagner/Gorrel. After widespread opposition to AB 2025 was submitted, the Legislature referred the issue to the Law Revision Commission, which conducted Study K-402 and has proposed legislation that has the potential to significantly damage mediation confidentiality. The Consumer Attorneys of California and the California Defense Council explained in a rare joint letter of opposition “Confidentiality promotes candor, which in turn leads to successful mediation...and the use of mediation is critical to successful out of court resolution of disputes.” The CCCBA’s ADR section concurs that mediation confidentiality is imperative to successful resolution of cases.

The Solution: This resolution provides a middle ground between protecting clients from malpractice and preserving mediation confidentiality, by allowing evidence of communications made in mediation if they are relevant to a State Bar disciplinary action or an action for legal malpractice, but clearly limits the use of the evidence, prohibiting its use for any other purpose.

TEXT OF RESOLUTION

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

- 1 § 1120
- 2 (a) Evidence otherwise admissible or subject to discovery outside of a mediation or a
- 3 mediation consultation shall not be or become inadmissible or protected from disclosure solely
- 4 by reason of its introduction or use in a mediation or a mediation consultation.
- 5 (b) This chapter does not limit any of the following:
- 6 (1) The admissibility of an agreement to mediate a dispute.
- 7 (2) The effect of an agreement not to take a default or an agreement to extend the time
- 8 within which to act or refrain from acting in a pending civil action.
- 9 (3) Disclosure of the mere fact that a mediator has served, is serving, will serve, or was
- 10 contacted about serving as a mediator in a dispute.
- 11 (4) The admissibility, in a State Bar disciplinary complaint or action or a civil action for
- 12 an attorney’s wrongful act or omission arising in the performance of professional services, of
- 13 communications solely between the client and his or her attorney, where breach of a professional
- 14 obligation in a mediation context forms the basis of the client’s allegations against the client’s
- 15 attorney, provided that the evidence does not constitute or disclose a communication of any

16 mediation participant other than the client and attorney. Admission or disclosure of evidence
17 under this subdivision does not render the evidence, or any other mediation communication or
18 writing, admissible or discoverable for any other purpose.

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

PROPONENT: Contra Costa County Bar Association

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Margaret J. Grover, Wendel Rosen Black & Dean, LLP, 1111 Broadway, 24th Floor, Oakland, California 94607, (510) 834-6000, mgrover@wendel.com.

RESPONSIBLE FLOOR DELEGATE: Margaret J. Grover

* * * * *

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE WITH RECOMMENDED AMENDMENTS

History:

Similar to Resolution 10-06-2011, which was approved in principle.

Reasons:

This resolution amends Evidence Code section 1120 to allow attorney-client communications made during mediation to be admissible in State Bar disciplinary proceedings or civil actions for malpractice. This resolution should be approved in principle with recommended amendments because it protects clients from unscrupulous attorneys who use the confidentiality of mediation to cloak their own wrongdoing, to the detriment of their clients, and allows clients to seek redress for attorney negligence in the context of mediations.

Mediation does not excuse attorneys from their fiduciary duties and professional obligations to their clients or from abiding by other duties set out in the California Rules of Professional Conduct. But, under current law, because nothing the attorneys say in the course of mediation is admissible for any purpose, in any venue, attorneys have absolute immunity to shirk their duties. (See *Cassel v. Superior Court (Wasserman, Comden, Casselman & Pearson, L.L.P.)* (2011), 51 Cal. 4th 113.) Such attorneys can neither be disciplined nor held financially accountable for their mediation misdeeds.

When the Conference passed Resolution 10-06-2011, the Legislature understood the importance of the issue, and referred it to the California Law Revision Commission (“CLRC”) to study. The

CLRC received and reviewed extensive public comment, held numerous public meetings to discuss the issues and receive further public comment, and recently issued a 178 page report, recommending that an exception to mediation confidentiality be enacted to allow information and communications to be admissible. This 178-page report is available at <http://www.clrc.ca.gov/K402.html>. Unfortunately, the Legislature has not yet acted on CLRC's learned and considered study and recommendation. The resolution proposes a narrowly tailored provision which limits the scope of admissibility of the mediation statements to the client's civil lawsuit against the attorney and the State Bar's disciplinary proceedings.

The resolution should be amended so that its language is in accordance with Code of Civil Procedure section 340.6, i.e. making the statements admissible in civil lawsuits for an attorney's wrongful act or omission arising in the performance of professional services. The proposed amendment would make the resolution consistent with the existing statutory scheme governing attorney duties because "legal malpractice" is not a statutorily defined term, and using it could unintentionally cause uncertainty in that statutory scheme.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

Statements made in opposition to this resolution should in no way be construed as condoning or facilitating breach by an attorney of any professional obligation when representing a client, or as support for the recommendation of the CLRC made in connection with its Study K-402.

This resolution would make current statutory mediation confidentiality protections inapplicable to attorney-client communications where certain attorney misconduct is alleged. Problems with this approach include:

Allowing a client to support a malpractice claim with excerpts from private lawyer-client mediation-related discussion, while barring that lawyer from placing such discussion, i.e., advice given, in context by citing communications made in the mediation, would violate fundamental fairness. This uneven treatment would yield unjust results and erode confidence in the justice system.

Often, private lawyer-client mediation-related discussion will disclose what others have said in the mediation. When this private discussion is introduced in a subsequent lawyer-client dispute, harm to the interests, or at least the sensibilities, of these others not involved in that dispute is likely. The possibility of such disclosure would lead to less open mediation discussions and impede the effectiveness of the process.

Current confidentiality protections for lawyer-client communications facilitate mediation use and effectiveness. It is virtually the only process which allows unreserved discussions between lawyer and client. Discussion of strengths and weaknesses, terms of possible settlement, or

maybe things the client doesn't want to hear, may be had without concern what is said by either attorney or client will come back to hurt them. To except attorney-client communications from such protection would eliminate this opportunity.

Whether attorney or client, a mediation participant subsequently could have difficulty recalling whether a comment was made in private lawyer-client discussion, or in mediation discussion involving other participants. Hard-fought disputes over admissibility are a certainty, given its importance and difficult proof.

Even if a participant correctly recalls what did or did not occur in a private lawyer-client discussion, when testifying, the participant might inadvertently refer to what happened in another phase of the mediation involving participants other than the lawyer and client. This could harm the interests of a participant not involved in the lawyer-client dispute. Retaining private attorney-client discussion and communications in the current statutory protections provide maximum assurance that disclosure of ancillary mediation communications will not, accidentally or otherwise, breach the confidentiality of a mediation, to the damage of other participants.

It is claimed this resolution "provides a middle ground." It would seem this "middle" is between current, robust (*not* absolute), statutory protections, and the approach of the CLRC's recommendation which would make admissible all types of mediation communications, not just those between the attorney and client locked in a subsequent dispute. Proponents point out this recommendation has "the potential to significantly damage mediation confidentiality." The CLRC recommendation, however, is not law. With opposition from 32 respected organizations and support from only one (the CCBA), it may never become law. This resolution has at least equal potential to do significant damage to mediation confidentiality.