ETHICAL ATTORNEYS AND MEDIATORS SUPPORT

CALIFORNIA ASSEMBLY BILL 2025

by

Elizabeth A. Moreno, Esq, the original author of the bill.

The most important persuasion tool you have in your entire arsenal is integrity."- Zig Ziglar

Attorneys who abide by the legal rules of ethics support Assembly Bill 2025, which is currently before the California Assembly. The bill states that neither the attorney nor his/her client can use mediation communications as a shield to commit bad acts.

First, the assembly bill does not create an exception to the so-called mediation confidentiality "privilege". A mediation confidentiality privilege does not exist in California. Evidence of what occurred in mediation is admissible in criminal actions and for other purposes as outlined in Evidence Code § 1120. Thus there is no "privilege" or to state it another way, there are already exceptions, which eliminate any privilege.

Second, it can be argued that mediation communications are admissible in State Bar disciplinary actions. In earlier disciplinary jurisprudential law, attorney discipline was considered quasi criminal. *The United States Supreme Court held, In re Ruffalo (1968) 390 U.S. 544, 550-551 [20 L.Ed.2d 117, 121-123, 88 S.Ct. 1222], "that where administrative proceedings contemplate the deprivation of a license to practice one's profession they are adversary proceedings of a quasi-criminal nature and procedural due process must be afforded the licensee." Emsile v. State Bar (1974) 11 Cal. 3rd 210. A*ttorney misconduct has historically been construed as "quasi-criminal," which justifies the admissibility.

Third, there is a pre-existing exception for criminal acts, this is merely an extension of those fundamental concepts, because often breach of fiduciary duty relies upon a violation of the Rules or Professional Conduct. Therefore, this is merely a reaffirmation of long ago, well-established existing law. This cannot be considered "chipping away" of anything but the articulation of existing California jurisprudence.

Fourth, the opposition's argument that the Assembly bill is chipping away at mediation confidentiality, that the interests of clients and public protection are being sacrificed on the altar of mediation confidentiality and those clients are being allowed to cherry pick is nothing but rhetoric to get the unethical practitioners to subscribe to the opposition.

Clients generally believe that there is some level of control on lawyer misconduct or abuse in a judicial or quasi-judicial setting, because lawyers are officers of the court, and the courts have inherent powers to control the conduct of attorneys. California ethics rules are “client-centered” and designed to protect the consumers of legal services.

Evidence Code § 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." Pursuant to Evidence Code § 958, attorney-client privilege does not apply in legal malpractice actions and, as a matter of fairness, lawyers are entitled to defend themselves with confidential client information. Why wouldn’t those fundamental concepts of fairness allow clients or lawyers to disclose relevant information when the misconduct occurs in mediation? Under the holding of *Cassel*, lawyers have no tort liability or accountability for misconduct in mediation.

Protection of lawyers was never the intent of mediation confidentiality. *Cassel* essentially renders the concepts supported by Evidence Code § 958 null and void. The unanimous Supreme Court essentially said their hands were tied by the plain meaning of the statute, almost creating an unbelievable result.

The Porter case explains why a broad reading of mediation confidentiality-vitiates Evidence Code § 958. As stated in Porter v. Wyner (2010) 183 Cal.App.4th 949. “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 no privileged statutory scheme designed to protect a wholly different set of disputants.”

Everyone is or should be accountable for the damage caused by their conduct, and this is all the more important for lawyers as fiduciaries. Fiduciaries agree to a different set of responsibilities than other actors in our society. They agree to put the interest of the client above their own; to be loyal; maintain confidentiality; safe keep property and files; and communicate honestly. Any act which relieves a lawyer of these iconic and emblematic obligations is a radical change in the relationship. It is well established in California that an attorney should obtain informed written consent from the client notifying them of this profound change in the relationship when fiduciary duties are impaired. If clients were informed that their advocates could routinely abandon them in settlement (one of the most important aspects of a client’s case, and one which is

solely within the discretion of the client) none would agree to mediate. No one ever intended mediation confidentiality to give lawyers a "get out of jail free" pass.

Consider Justice Ming Chin's concurring comments regarding the recent *Cassel v. Superior Court* (Wasserman, Comden) (2011) 51 Cal. 4th 113. CHIN, J., Concurring.

> "I concur in the result, but reluctantly. The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorney's actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. [1] Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. (See maj. opn., ante, at p. 135, fn. 11.) This is a high price to pay to preserve total confidentiality in the mediation process. …But I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney's statements during mediation may never be disclosed. For example, it may be appropriate to provide that communications during mediation may be used in a malpractice action between an attorney and a client to the extent they are relevant to that action, but they may not be used by anyone for any other purpose. Such a provision might sufficiently protect other participants in the mediation and also make attorneys accountable for their actions. But this court cannot so hold in the guise of interpreting statutes that contain no such provision. As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so."

The legislature is considering this question with AB2025. The legislature will not protect either attorneys or clients from introducing communications between them in a subsequent malpractice, and/or attorney disciplinary action. The legislature has taken pains to incorporate in Evidence Code section 958 into section 1120. AB 2025 in essence provides that evidence otherwise admissible or subject to discovery pursuant to Section 958 shall not be or become inadmissible or protected from disclosure in an action for legal malpractice or in a State Bar disciplinary.

Assembly Bill 2025 will not bring in third parties as witnesses, such as the mediator or opposing counsel, and will not invalidate Evidence Code sections 703.5 and 1119. The proposed assembly bill is supported by ethical attorneys who support fairness and the interest of the client and attorneys.

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