

AMENDED IN ASSEMBLY MAY 10, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2025

Introduced by Assembly Member ~~Wagner Gorell~~

February 23, 2012

An act to ~~amend Section 1120 of the Evidence Code, relating to evidence mediation.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 2025, as amended, ~~Wagner Gorell. Evidence: admissibility. Mediation: confidentiality.~~

Under existing law, when a person consults a mediator or mediation service for the purpose of retaining mediation services, or when parties agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute, anything said in the course of the consultation for mediation services or in the course of the mediation is not admissible in evidence nor subject to discovery in any other action or proceeding. Existing law provides that evidence that is otherwise admissible is not inadmissible solely because it was introduced or used in a mediation or mediation consultation. Additionally, existing law provides that an agreement to mediate a dispute or to extend the time within which to act or refrain from acting in a civil action is admissible, as is the mere fact that a mediator served, is serving, will serve, or was contacted about serving as a mediator in the dispute.

This bill would provide that communications between a client and his or her attorney during mediation are admissible in an action for legal malpractice or breach of fiduciary duty, or both, and in a State Bar disciplinary action, if the attorney's professional negligence or

~~misconduct forms the basis of the client’s allegations against the attorney.~~

This bill would require the California Law Revision Commission to study and report to the Legislature, as specified, concerning the relationship under current law between mediation confidentiality and attorney malpractice and misconduct, as well as the availability and propriety of contractual waivers.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. (a) *The California Law Revision Commission*
2 *shall study and report to the Legislature regarding the relationship*
3 *under current law between mediation confidentiality and attorney*
4 *malpractice and other misconduct, and the purposes for, and*
5 *impact of, those laws on public protection, professional ethics,*
6 *attorney discipline, client rights, the willingness of parties to*
7 *participate in voluntary and mandatory mediation and the*
8 *effectiveness of mediation, as well as any other issues that the*
9 *commission deems relevant. Among other matters, the commission*
10 *shall consider Sections 703.5, 958, and 1119 of the Evidence Code*
11 *and predecessor provisions, as well as California court rulings,*
12 *including, but not limited to, Cassel v. Superior Court (2011) 51*
13 *Cal.4th 113; Porter v. Wyner (2010) 183 Cal.App.4th 949, and*
14 *Wimsatt v. Superior Court (2007) 152 Cal.App.4th 137.*

15 (b) *The commission shall also consider and report on the*
16 *availability and propriety of contractual waivers. In conducting*
17 *its analysis, the commission shall consider the law in other*
18 *jurisdictions, including the Uniform Mediation Act as it has been*
19 *adopted in other states, other statutory acts, scholarly commentary,*
20 *judicial decisions, and any data regarding the impact of differing*
21 *confidentiality rules on the use of mediation.*

22 (c) *The commission shall request input from experts and*
23 *interested parties including, but not limited to, representatives*
24 *from the California Supreme Court, the State Bar of California,*
25 *legal malpractice defense counsel, other attorney groups and*
26 *individuals, mediators, and mediation trade associations. The*
27 *commission shall make any recommendations that it deems*
28 *appropriate for the revision of California law to balance the*

1 *competing public interests between confidentiality and*
2 *accountability.*

3 SECTION 1. ~~Section 1120 of the Evidence Code is amended~~
4 ~~to read:~~

5 ~~1120. (a) Evidence otherwise admissible or subject to~~
6 ~~discovery outside of a mediation or a mediation consultation shall~~
7 ~~not be or become inadmissible or protected from disclosure solely~~
8 ~~by reason of its introduction or use in a mediation or a mediation~~
9 ~~consultation.~~

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

11 ~~(1) The admissibility of an agreement to mediate a dispute.~~

12 ~~(2) The effect of an agreement not to take a default or an~~
13 ~~agreement to extend the time within which to act or refrain from~~
14 ~~acting in a pending civil action.~~

15 ~~(3) Disclosure of the mere fact that a mediator has served, is~~
16 ~~-serving, will serve, or was contacted about serving as a mediator~~
17 ~~in a dispute.~~

18 ~~(4) The admissibility in an action for legal malpractice, an action~~
19 ~~for breach of fiduciary duty, or both, or in a State Bar disciplinary~~
20 ~~action, of communications directly between the client and his or~~
21 ~~her attorney during mediation if professional negligence or~~
22 ~~misconduct forms the basis of the client's allegations against the~~
23 ~~attorney.~~