Date of Hearing: April 30, 2024

ASSEMBLY COMMITTEE ON JUDICIARY
Ash Kalra, Chair
AB 2833 (McKinnor) – As Amended April 23, 2024

PROPOSED CONSENT (As Proposed to be Amended)

SUBJECT: EVIDENCE: RESTORATIVE JUSTICE COMMUNICATIONS

KEY ISSUE: SHOULD A RULE OF EVIDENCE BE ENACTED TO PROVIDE THAT AN INDIVIDUAL'S PARTICIPATION OR NONPARTICIPATION IN A RESTORATIVE JUSTICE PROCESS, AND ANY COMMUNICATIONS WITHIN THE PROCESS ARE NOT ADMISSIBLE OR SUBJECT TO DISCLOSURE, AND THAT DISCLOSURE CANNOT BE COMPELLED IN ANY ARBITRATION, ADMINISTRATIVE ADJUDICATION, CIVIL ACTION, CRIMINAL ACTION, JUVENILE ACTION, OR OTHER PROCEEDING REGARDLESS OF COMPLETION OR OUTCOME OF THE PROCESS, EXCEPT AS SPECIFIED?

SYNOPSIS

In recent years, there has been increased interest in models that are alternatives to traditional criminal prosecution or disciplinary systems that address the harm suffered by victims while also holding offenders accountable. One such model is the restorative justice process. The Legislature has endorsed use of the restorative justice model in several scenarios, including educational and correctional. This bill establishes a rule within Chapter 3 of the Evidence Code (that deals with "other evidence affected or excluded by extrinsic policies"), specifically an exclusionary rule for information about an individual's participation in a restorative justice process and for all communications therein, except as specified.

The bill provides that an individual's participation or nonparticipation in a restorative justice process and any communication made during the restorative justice process are not admissible or subject to discovery, and disclosure shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process. As exceptions to this rule, the bill provides that a communication made during the restorative justice process is not made inadmissible if any of the following has occurred: (1) all participants in the restorative justice process have provided written consent that all communication during the restorative justice process may be disclosed; (2) the communication discloses information that a participant, including, but not limited to, a mandated reporter, is otherwise required by law to disclose; or 3) during the restorative justice process, a participant engages in any conduct that involves the use of force or the threat of force against another participant, and the restorative justice process ends as a result of this conduct. In such a case, only communication relevant to that conduct is admissible.

The author proposes minor clarifying amendments that are incorporated into the SUMMARY, below, and explained in the analysis. The bill, co-sponsored by Initiate Justice, American Friends Service Committee, Californians for Safety and Justice, Community Works, and the RYSE Center, is supported by a large number of social and criminal justice reform organizations. It has no opposition on file and was recently unanimously approved by the Assembly Committee on Public Safety on consent.

SUMMARY: Establishes a rule of evidence that an individual's participation or nonparticipation in a restorative justice process and any communications within that process are not admissible or subject to disclosure, and disclosure cannot be compelled in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process, except as specified. Specifically, **this bill**:

1) Finds and declares all of the following on behalf of the Legislature:

    a) According to the National Association of Community and Restorative Justice, "restorative justice" refers to a broad umbrella of practices that, at their core, are centered on victims, survivors, and accountability. Restorative justice processes are community based, nonpunitive, and voluntary. Using a restorative justice approach encourages accountability, healing, and repair amongst participants. While there are a wide variety of definitions for restorative justice, these core elements are present in restorative justice processes.

    b) As practiced by organizations like the California Conference for Equality and Justice, restorative justice processes progress through a series of skillfully facilitated meetings. Each process is approached intentionally, tailored to the individuals in the process, and seeks to avoid additional harm from being caused while empowering the participants to engage in collective problem solving. Thus, facilitators take their time building trust and relationships with all participants in order to create the safest environment possible for healing and accountability to occur.

    c) The Legislature has previously acknowledged the importance of a restorative approach when harm has occurred. See, e.g., Section 17.2 of the Penal Code. These processes provide extraordinary benefits to participants. They have resulted in lowering rates of future harm, often termed "recidivism," and high rates of victim or survivor satisfaction.

    d) According to Robert Yazzie, Chief Justice Emeritus of the Navajo Nation, an integral part of restorative justice processes is for all participants to reflect, speak, and share freely. Survivors or victims can experience healing and restoration from hearing a person who caused harm share freely about what they did, the reasons for their actions, and what they are going to do to make things right. The benefits of restorative justice may be negated if participants are concerned that their statements may be used against them in a future court action.

2) Provides that, except as provided, an individual's participation or nonparticipation in a restorative justice process and any communication within the restorative justice process are not admissible or subject to disclosure, and disclosure cannot be compelled in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.

3) Provides that any communication within the restorative justice process is not made inadmissible by this section if any of the following has occurred:

    a) All participants in the restorative justice process have provided written consent that all communication within the restorative justice process may be disclosed or that a specific statement may be disclosed, provided that such consent was knowing, intelligent, free of coercion, and voluntary. Where participants consent to a limited part of the

communication, only that specific communication is subject to disclosure. Where a participant is deceased or cannot be located after reasonable efforts, their consent is deemed to have been knowing, intelligent, free or coercion, and voluntary.

b) The communication discloses information that a participant, including, but not limited to, a mandated reporter is otherwise required by law to disclose.

c) During the restorative justice process, a participant engages in any conduct that involves the use of force or the threat of force, including but not limited to, battery resulting in serious bodily injury or criminal threats, against another participant, and the restorative justice process ends as a result of this conduct. In such a case, only communication relevant to that conduct is admissible.

4) Provides that evidence obtained independently from the restorative justice process does not become inadmissible or protected from discovery solely because it was discussed or used in a restorative justice process.

5) Provides that the determination of whether a process qualifies as a restorative justice process pursuant to this section, if challenged in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding, shall be determined by the court or finder of fact. In a hearing conducted pursuant to this subdivision, the court or finder of fact may consider information that would otherwise be inadmissible to the extent that the information is probative of the issue.

6) Provides that the bill applies to all communications that take place during a restorative justice process, including those that occur prior or subsequent to enactment of the bill, where the proceeding at which the admission is sought occurs after the bill's effective date.

7) Defines the following terms for purposes of the bill:

a) "Communication" means any communication or writing, as defined in Section 250 of the Evidence Code, that is made or prepared for the purpose of, in the course of, or pursuant to, any phase of a restorative justice process.

b) "Participant" means a person who participates in a restorative justice program, and may include a facilitator, a person accused of or responsible for causing harm, a person who has been harmed, or any participating community members.

c) "Restorative justice process" means a facilitated, community-based process in which parties who have caused harm or who have been harmed and in which community members may collectively gather to identify and repair harm to the extent possible. Restorative justice processes focus on accountability, hearing, and safety and on the harms, needs, and obligations of all parties involved through a participatory process and may or may not include a dialogue between participants; and clarifies the following:

i) "Restorative justice process" includes, but is not limited to, restorative justice processes described in existing sections of the Education Code, the Penal Code, and the Welfare and Institutions Code.

ii) This definition encompasses all phases of the process, including, but not limited to, referral, preparation, preenrollment, enrollment, postenrollment, a facilitated dialogue, and post-dialogue phases of the process.

iii) This definition is not intended to include general restorative justice programming that is primarily focused on teaching and practicing restorative justice principles.

EXISTING LAW:

1) Provides that, except as provided hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial of a juvenile for a criminal offense, whether heard in juvenile or adult court. (Cal. Const., art. I, § 28, subd. (f), par. (3).)

2) Defines "relevant evidence" as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evidence Code Section 210.)

3) Establishes numerous privileges, allowing the holder of the privilege, or a person who is authorized to claim the privilege on their behalf, to prevent another from disclosing, a confidential communication, whether made orally, in writing, or otherwise conveyed between the parties in the confidential relationship, including:

   a) The lawyer-client privilege. (Evidence Code Section 954.)

   b) The privilege for confidential marital communications. (Evidence Code Section 980.)

   c) The sexual assault counselor-victim privilege. (Evidence Code Section 1035.8.)

   d) The human trafficking caseworker-victim privilege. (Evidence Code Section 1038.)

4) Provides that suspension from an elementary or secondary school may only be imposed when other means of correction, including but not limited to participation in a restorative justice program fail to bring about proper conduct. (Education Code Section 48900.5.)

5) Provides that in any civil, administrative, or arbitration proceeding, an emergency service personnel, whether or not a party to an action, has a right to refuse to disclose, and to prevent another from disclosing, a confidential communication between the emergency service personnel employed by a state, local, or regional public fire agency and a peer support team member made while the peer support team member was providing peer support services, or a confidential communication made to a crisis hotline or crisis referral service. (Government Code Section 8669.20 (a).)

6) Provides that it is the public policy of this state that the principal goals of sentencing for hate crimes includes restorative justice for immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes. (Penal Code Section 422.86 (a)(3).)

7) Provides that any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made

verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. (Penal Code Section 422 (a).)

8) Establishes the following as one of the rights established as the statutory rights of victims and witnesses of crimes: for the victim, to be notified of the availability of community-based restorative justice programs and processes available to them, including, but not limited to, programs serving their community, county, county jails, juvenile detention facilities, and the Department of Corrections and Rehabilitation. The victim has a right to be notified as early and often as possible, including during the initial contact, during follow up investigation, at the point of diversion, throughout the process of the case, and in postconviction proceedings. (Penal Code Section 679.02 (a)(15).)

9) Requires a victim of an offense that is the subject of a juvenile delinquency proceeding to be notified of the availability of community-based restorative justice programs and processes available to them, including, but not limited to, programs serving their community, county, county jails, juvenile detention facilities, and the Department of Corrections and Rehabilitation; and requires that the victim is notified as early and often as possible, including, but not limited to, during the initial contact, during follow up investigation, at the point of diversion, throughout the process of the case, and in all postconviction proceedings. (Welfare and Institutions Code Section 742 (c).)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This bill, co-sponsored by Initiate Justice, American Friends Service Committee, Californians for Safety and Justice, Community Works, and the RYSE Center, establishes a rule of evidence that an individual's participation or nonparticipation in a restorative justice process and any communications within that process are not admissible or subject to disclosure, and disclosure cannot be compelled in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process, except as specified. According to the author:

> AB 2833 would provide comprehensive admissibility and confidentiality protections for all Restorative Justice processes that occur within the state. This would make clear that any information shared in the preparation for, in the course of, or pursuant to the Restorative Justice process is confidential and inadmissible in any future court proceeding

Background regarding the restorative justice model. In recent years, there has been increased interest in models that are alternatives to traditional criminal prosecution or disciplinary systems that address the harm suffered by victims while also holding offenders accountable. One such model is the restorative justice process.

> Unlike traditional criminal justice, restorative justice focuses on the accountability of the person who caused the harm, the needs of the wronged party, and the reintegration of both into society. Restorative processes seek to account for the needs of the person who caused

> the harm, the person or persons harmed, and the community, with the ultimate goal of repairing relationships and reducing recidivism. Through dialogue, the offending party can express accountability or remorse, and the victimized party may be able to speed the process of healing through understanding and restitution.
>
> One of the most common RJ processes is victim/offender mediation or conferencing, which is a process in which the wronged party and offending party meet together to discuss the event and determine the best resolution. Early versions of these programs used the term "victim/offender" mediation, focusing on the categorization of the parties as if they were in criminal court. Today many programs today use terminology such as the "person who caused harm" or the "victimized party" to emphasize the relationship between the two, as opposed to their procedural labels. Whatever the program is called, during the in-person meeting, the parties generally have three conversations, each from their own perspective: 1) What happened? 2) What are the effects of the incident? And 3) How can the situation be made better? Successful conferences usually result in reparation agreements, which might include apologies, restitution, community service, or other terms agreed on by the parties. (Blankley, Expanding Options for Restorative Justice, ABA Dispute Resolution Magazine (Mar. 31, 2020) https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/expanding-options-for-restorative-justice/.)

The Legislature has endorsed use of the restorative justice model in several scenarios:

> AB 2167 (Kalra), Chapter 775, Statutes of 2022, requires a court presiding over a criminal matter to consider alternatives to incarceration, including restorative justice.
>
> AB 2598 (Weber), Chapter 914, Statutes of 2022, requires the Department of Education to develop evidence-based practices for restorative justice practice implementation in schools.
>
> AB 1165 (McCarty), Chapter 22, Statutes of 2023, requires a pupil in grades 4-12 who is suspended or recommended for expulsion from school for participating in hate violence, as defined, to participate in a restorative justice program provided by the school.
>
> AB 60 (Bryan), Chap. 513, Stats. 2023, establishes that victims of crimes have the statutory right to be notified of the availability of community-based restorative justice programs and processes available to them, including, but not limited to, programs serving their community, county, county jails, juvenile detention facilities, and the Department of Corrections and Rehabilitation; and that the victim of an offense that is the subject of a juvenile delinquency proceeding must be notified of the availability of community-based restorative justice programs and processes.

This bill establishes a rule within Chapter 3 of the Evidence Code (that deals with “other evidence affected or excluded by extrinsic policies”), specifically an exclusionary rule for information about an individual’s participation in a restorative justice process and for all communications therein, except as specified. The bill, as proposed to be amended, provides as follows:

> Except as provided in this section, an individual’s participation or nonparticipation in a restorative justice process and any communication made during the restorative justice

process are not admissible or subject to discovery, and disclosure shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.

As an exception to this rule, the bill provides that a communication made during the restorative justice process is not made inadmissible if any of the following has occurred:

- All participants in the restorative justice process have provided written consent that all communication during the restorative justice process may be disclosed, or that a specific statement may be disclosed, provided that such consent was knowing, intelligent, free of coercion, and voluntary. Where participants consent to a limited part of the communication, only that specific communication is subject to disclosure. Where a participant is deceased or cannot be located after reasonable efforts, their written consent is deemed to have been knowing, intelligent, free of coercion, and voluntary.

- The communication discloses information that a participant, including, but not limited to, a mandated reporter, is otherwise required by law to disclose.

- During the restorative justice process, a participant engages in any conduct that involves the use of force or the threat of force against another participant, and the restorative justice process ends as a result of this conduct. In such a case, only communication relevant to that conduct is admissible.

Confidential vs. Privileged Communications: This bill would make the fact of an individual's participation or nonparticipation in a restorative justice process and any restorative justice communication are not admissible or subject to discovery. It would also provide that disclosure of those facts and the content of such communications shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process. Maintaining confidentiality is especially important in this context, because a participant in a restorative justice process may not be honest and forthcoming if they believe that their statements could later be used against them. This provision differs from many existing provisions in the Evidence Code regarding confidentiality and privilege. Although the "duty of confidentiality" and evidentiary rules on "privileged communications" sometimes overlap and have the common aim of encouraging openness in certain settings, they are nonetheless distinct. The duty of confidentiality refers to the legal duty of some professionals (e.g., doctor, lawyer, or psychotherapist) not to disclose information obtained in confidence from their client. Subject to certain exceptions, a professional who discloses such information may be liable to the client for breach of the duty of confidentiality. A "privileged communication" also protects communications between certain professionals and their clients (as well as between spouses and between clergy and penitent); however, a privileged communication refers to a *rule of evidence*, preventing the forced disclosure of the communication as evidence in a court case, and allowing the holder of the privilege to prevent another from disclosing the communication.

However, the "privilege" created by this bill is much more limited. It does not impose a duty of confidentiality on participants in a restorative justice process so that it cannot be disclosed for any purpose. It only prevents the fact of a person's participation and the communication made within a restorative justice process from being admitted or compelled to be disclosed as evidence in a civil, administrative, or arbitration proceeding. Significantly, this bill would not affect the

duty of mandated reporters to report abuse (including abuse of children and the elderly). In that way, it is similar to provisions in existing law that make communications in a peer support program for firefighters (Government Code Section 8669.20) and peace officers (Government Code Section 8669.4) confidential. But those provisions are even more limited than this bill in that they do not make the communication inadmissible as evidence in a *criminal* trial or proceeding.

The April 23, 2024 amendments to the bill appear to have addressed the concerns that the California District Attorneys Association had with a prior version of the bill.

Author's amendments. The author proposes minor clarifying amendments to conform language of the bill in print with the language of recent amendments (on April 23, 2024):

> (b) Except as provided in this section, an individual's participation or nonparticipation in a restorative justice process and any ~~restorative justice~~ communication ***within the restorative justice process*** are not admissible or subject to discovery, and disclosure shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.
>
> (c) A communication ~~made during~~ ***within*** the restorative justice process is not made inadmissible by this section if any of the following has occurred:
>
> . . .
>
> (e) The determination of whether a process qualifies as a restorative justice process pursuant to this section, if challenged in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding, shall be determined by the court or finder of fact. In a hearing conducted pursuant to this subdivision, the ~~judge~~ ***court or finder of fact*** may consider information that would otherwise be inadmissible to the extent that the information is probative of the issue.

ARGUMENTS IN SUPPORT*:* Co-sponsor Initiate Justice writes the following to explain its support for the bill:

> Restorative Justice programs are effective tools for addressing conflict and harm within communities, an impact recognized this January 2024 in the results of a randomized control trial of San Francisco's Make It Right program featured in peer-reviewed Econometrica.4 However, as noted in a recent R Street Institute policy paper, the ability for participants to speak freely without fear of repercussion is essential for the success of these processes. Currently, the absence of clear legal protections leaves individuals hesitant to engage fully in Restorative Justice, undermining its potential for healing and restoration.
>
> AB 2833 aims to remedy this situation by establishing comprehensive protections for all Restorative Justice processes in California to ensure that information shared in Restorative Justice processes is inadmissible in future legal proceedings.

REGISTERED SUPPORT / OPPOSITION:

Support

American Friends Service Committee (co-sponsor)
Californians for Safety and Justice (CSJ) (co-sponsor)
Community Works (co-sponsor)
Initiate Justice (co-sponsor)
RYSE Center (co-sponsor)
ACLU California Action
All of Us or None Bakersfield
Alliance for Boys and Men of Color
Bend the Arc California
California Alliance for Youth and Community Justice
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Conference for Equality and Justice
California Public Defenders Association
Californians United for a Responsible Budget
Centinela Youth Services
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Courage California
Crime Survivors for Safety and Justice
Critical Resistance, Los Angeles
Ella Baker Center for Human Rights
Ensuring Opportunity Campaign
Felony Murder Elimination Project
Freedom 4 Youth
Freedom Within Project
Fresh Lifelines for Youth
Friends Committee on Legislation of California
Grip Training Institute
Healing Dialogue and Action
Indivisible CA Statestrong
Initiate Justice Action
James Morehouse Project
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoners With Children
MILPA Collective
National Youth Justice Network
Oakland Privacy
Pacific Juvenile Defender Center
Peace Anger Love
Rubicon Programs
Sacred Purpose LLC
Santa Cruz Barrios Unidos
Sister Warriors Freedom Coalition

Smart Justice California, a Project of Tides Advocacy
Strawberry Creek Monthly Meeting, Peace, Earthcare and Social Witness Committee
The Collective Healing and Transformation Project
Transformative Programming Works (TPW)
University of San Diego, Center for Restorative Justice
University of San Francisco School of Law | Racial Justice Clinic
ValorUS
White People 4 Black Lives
Young Women's Freedom Center
Youth Alive!
Youth Leadership Institute
Youth Will
Five individuals

Opposition

None on file

Analysis Prepared by: Alison Merrilees / JUD. / (916) 319-2334