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TO: MEMBERS, ASSEMBLY JUDICIARY COMMITTEE  
FROM: DOUG NOLL, 2012 CDRC PRESIDENT  
RE: AB 2025 (WAGONER) – OPPOSE, SET FOR HEARING: 4.17.12  
DATE: APRIL 9, 2012

On behalf of the CDRC, I write to you regarding its OPPOSE position on AB 2025 (Wagner) relating to an exception to the mediation confidentiality provision set forth in Evidence Code Section 1120. CDRC was organized in 1994 to advocate for fair, accessible, and effective alternative dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of the CDRC consists of several hundred individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

The purpose of AB 2025 is to negate the decision of the California Supreme Court in *Cassel v Superior Court*, 51 Cal 4th 113 (2011), a matter in which the plaintiff sued his former attorneys, alleging that they committed malpractice during the course of a mediation by purportedly forcing him to settle a dispute for an amount less than he and the attorneys previously agreed upon. The Court held that all communications between the plaintiff and the defendant attorneys that occurred for the purpose of the mediation were inadmissible because of the confidentiality provisions of Section 1120. California has a very strong mediation confidentiality provision in order to promote parties participation in mediations. This enhances settlements due to an ironclad protection of all information shared in mediation as remaining confidential.

Regardless of whether one believes that it is right or wrong to create an exception to the doctrine of confidentiality in mediation in order to restore the right of a client to sue an attorney for mediation malpractice, this is a flawed bill. In essence, this bill creates an inequity while trying to correct an inequity. The bill's sponsor argues that it is unfair that legal clients have no redress

for claims of malpractice during mediation. However, the solution would allow only the lawyer to testify as to what happened in the mediation. All materials and other witnesses would be ineligible to be admitted or to testify. In other words, it would be the plaintiff against the defendant lawyer and their words on what happened in the mediation. Except that the attorney cannot testify about any mediation related communications that he or she received from the other participants. In other words, testimony would be very limited and would in most if not all cases, be an incomplete picture of what occurred. All other mediation communications emanating to and from other participants in the mediation will still be inadmissible under Section 1120, and the mediator will remain incompetent to testify under Evidence Code Section 703.

Typically, plaintiffs and defendants usually enter into mediation, after consultation with their attorneys, with a minimum that they will accept (plaintiff) or a maximum that they will pay (defendant), yet often the case settles between the minimum and maximum. Parties change their views because they come to the realization, based on mediation communications that they receive from their adversary or the mediator during the mediation, that the other party is willing to settle and that a settlement, even one less favorable than what the attorney and client agreed upon prior to the mediation session, is better than the risk, cost, and aggravation of further litigation.

Given that cases often settle at a number different from what was anticipated, this bill will permit a party who is suffering from settler's remorse to later sue the attorney for malpractice and the attorney could not call upon witnesses who might explain how the settlement was reached or that the malpractice plaintiff expressed satisfaction or agreement with the final result. This not only will lead to an increase in unfounded malpractice claims but once attorneys realize that they could be exposed to these kinds of suits when they recommend mediation to a client, they may be less inclined to make that recommendation. A decline in mediation, particularly court connected mediations, will lead to more trials in our over burdened courts.

The bill will also allow for the admission in State Bar proceedings of communications between attorney and client that occur during mediation. A State Bar disciplinary proceeding can lead to the loss of an attorney's license and, ergo, the loss of the attorney's livelihood. It may be a violation of due process if the attorney is unable to call upon percipient witnesses (i.e a person who participated in the mediation) who may support the attorney's defense.

In short, this bill creates more questions than answers. Is it in the public interest to allow for mediation malpractice suits at a cost of prohibiting citizens who are attorneys from adequately defending themselves? Will this bill lead to spurious malpractice suits? Will it reduce mediation

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and therefore increase court caseloads? Is mediation malpractice such a serious problem that a remedy of this nature needs to be enacted?

These questions need to be answered and therefore this bill should be held until these important policies issues have been examined and reported to the Legislature. The CDRC recommends that either the State Bar or the Judicial Council, look into this matter and report back to the Legislature. Today the State of California is a leader in the numbers and cases that are resolved due to mediation. From community mediation centers who work on neighbor to neighbor issues, school and parent issues to medical and personal injury cases to complex commercial cases and labor negotiations - mediations are a significant part of our justice system in the state. This bill will chill those settlements and will certainly increase the caseloads of the courts.

For the reasons stated above, the CDRC respectfully requests your NO vote on AB 2025 (Wagner). If you have any questions or concerns, please do not hesitate to contact me at my office at 916.448.1222. Thank you