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SCMA

Southern California Mediation Association

May 3, 2012

Assembly Member Mike Feuer, Chair
Assembly Judiciary Committee
State Capitol
Sacramento, CA 95814
Fax No. (916) 319-2188

Assembly Member Jeff Gorell
State Capitol
Sacramento, CA 95814
Fax No. (916) 319-2137

Re: Southern California Mediation Association - Oppose AB 2025

Dear Chairman Feuer and Assembly Member Jeff Gorell:

The Southern California Mediation Association (SCMA) is California's largest professional association of mediators, founded over 20 years ago as a non-profit organization to promote and support mediation. Its members have a unique breadth and depth of experience with mediation, which renders especially thoughtful and compelling their views on pending legislation which affects their field. As SCMA's president I write to express its strong opposition to AB 2025.

One of the hallmarks of mediation is that resolution of the dispute is voluntary: the mediator does not decide the matter, issue any orders, declare who is right or wrong, or tell the parties what to do, let alone give legal advice. Another hallmark of mediation is that the process is confidential: the parties - and their counsel - can be as candid as they want to be with each other and with the mediator in an effort to hammer out a resolution, without fear that their settlement efforts can be used against them later. The goal here must be to encourage people and institutions to use this process to address their disputes, not only to resolve their own conflicts but also to relieve the already overburdened court system.

The concept of AB 2025 is superficially appealing, and we applaud the legislature's desire to protect the public: no one wants unscrupulous attorneys to get away with malpractice just because it occurs in the context of a mediation. This has hardly been a pressing problem in our state, however; and the bill as drafted potentially does way more harm than good by eroding mediation confidentiality. This impact should not be taken lightly, and the bill certainly should not be rushed. The ramifications of this proposed legislative change were not thought through by the drafter. Unless the Judiciary Committee gives this bill more time for research and analysis, the bill may become law without having been thought through by the legislature either. The bill raises many questions and answers none. Consider:

1. The bill as drafted makes an exception to mediation confidentiality for "communications directly between the client and his or her attorney" in a subsequent malpractice or disciplinary action. It does not specify whether it is only the client who can testify to these communications or whether the attorney can also testify. If this bill, alone or in combination with other statutes, is interpreted to allow only the client to testify to these communications and the attorney cannot defend himself or herself, doesn't it violate due process?

2. The bill also does not state who else might be called to testify about the communications. If the communications at issue were made in front of other parties to the mediation or opposing counsel, does the bill contemplate that they can be brought in to testify in support of either the client or the attorney?

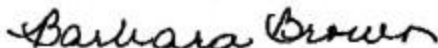
3. Does it matter whether the communications were made in front of the mediator? If they were, does the bill contemplate that the mediator could be called to testify? What, then, would be the relationship between this bill and Evidence Code Section 703.5, which provides that, with certain exceptions, mediators may not testify in subsequent civil proceedings?

4. If all percipient witnesses can be summoned to testify about what happened at the mediation, is there any mediation confidentiality left? If parties and counsel can no longer count on mediation confidentiality, will they not be less willing to participate in mediation? If mediators have to face the specter of being called as witnesses, will they not be less willing to serve on court mediation panels?

5. If parties are less willing to participate in mediation and mediators are less willing to serve, what is the impact on the court system? The Los Angeles County court system is the largest in the country. Last year tens of thousands of mediations were handled by members of the County's court mediator panels.

In a recent survey of SCMA members, 83% of the respondents said that SCMA should oppose this bill. Listen to the mediators, who up and down the state are telling you that this bill as drafted is a bad idea, which most certainly should not leave your committee until the above issues have been thoroughly analyzed and the language revised accordingly.

Respectfully submitted,



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