

California Law Revision Commission  
Attn: Barbara S. Gaal, Staff Counsel  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739

September 21, 2012

Law Revision Commission  
RECEIVED

**Re: Study on Mediation Confidentiality**

SEP 25 2012

Dear Commission Members and Staff,

**Purpose.** This letter is intended to assist the Commission in its initial work of deciding the scope of its study and allocation of resources in response to the new topic of mediation confidentiality in the Legislature's regular Commission authorization resolution, ACR 98 of 2012.

**History of Referral.** This topic was added to ACR 98 by incorporating the language of AB 2025 as amended May 10, 2012. This language in turn was compromise language entirely replacing the original text of AB 2025, which would have added a new exception to mediation confidentiality by amending section 1120 of the Evidence Code. Section 1120 was part of a set of fourteen interrelated Evidence Code sections, 1115-1128, sponsored by the Commission in 1997 to define and govern mediation in California.

These fourteen statutes were adopted unanimously by the Legislature and later upheld unanimously five times in challenges heard by the California Supreme Court. They have been in force unamended since they took effect January 1, 1998. AB 2025 as introduced would have amended them to allow use of mediation communications between attorney and client in later actions against the attorney.

**Scope of Referral?** A threshold question for the Commission is the scope of its study. ACR 98 begins describing this new topic as "Analysis of the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct...". Given the background of AB 2025, it seems clear that this phrase refers to alleged attorney malpractice and other attorney misconduct, rather than a much wider scope involving possible later allegations of misconduct in mediation against any party, accompanying family member, expert witness, or other participant.

Mediation is now used very widely in California, thanks in part to the protections for candid communication which Evidence Code sections 1115-1128 together provide. If the Commission were to open up the study to cover the much larger scope of whether mediation communications should be admissible in later actions against any and all participants, it would almost certainly require the allocation of a great deal more resources and time. The Commission might be well served to decide this scope question as early as possible so as not to unnecessarily alarm and draw in all those who currently use, conduct, or benefit from mediations conducted under the current statutory protections.

**Resources - Opposition to Amendment.** The standard legislative history record for AB 2025 could be misleading. For instance, the Bill Analysis states there was no registered support or opposition to AB 2025 as amended to refer this matter to the Commission. Respectfully submitted for the Commission's study are copies of all statements of support and opposition to the original introduced version of AB 2025 in the Assembly Judiciary Committee files (as supplied by the Committee Secretary, and which includes the bound sampling submitted).

There was a single letter of support from one individual. There were more than sixty statements of opposition to the original bill submitted to the Legislature. These were from the California Employment Lawyers Association, California Lawyers for the Arts, the Southern California Mediation Association, the Association for Dispute Resolution of Northern California, and dozens of lawyers, court personnel, mediators, mediation program directors, and others.

In allocating resources for this study, the Commission could reasonably expect there to be significant opposition to amending the current statutes. Since their enactment all mediation participants, including attorneys, have been free to speak candidly in mediation without fear that their words might be used against them in any later non-criminal proceeding. In the submitted statements, those involved in mediation affirmed that this has been centrally important to the effectiveness of mediation. Echoed in many of the submitted statements, my own view was that proponents had not adequately considered the complexity of this area and the consequences of their proposed amendment.

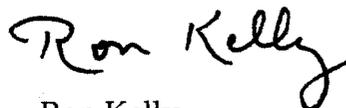
**Evidence? Initial Study.** This current system has been operating for fourteen years. Has attorney misconduct now become a significantly large problem in the real world that revision of these statutes is in the public interest?

The Commission might also be well served by an initial investigation. Is there evidence that actual attorney misconduct in California mediations happens significantly often where a remedy is unavailable because of the current statutes? If so, what is the nature of the actual problem? Does it happen often enough that this harm outweighs the public benefit of all participants knowing they're able to talk off the record in mediation? John Blackman's March 15 letter, Richard Collier's March 30 letter, and the April 11 letter from the California Employment Lawyers Association (enclosed) are representative of those with significant relevant experience who believe the problem is very small and the public benefit that will be lost is very large.

**Offer.** I've been regularly leading discussions of the public policy questions involved in mediation confidentiality for over twenty years. I served as an expert advisor to the Commission in its study and drafting of the current mediation statutes. I was actively involved in nearly all of the drafting meetings for the Uniform Mediation Act. Enclosed is a 1996 letter from the Commission's Executive Director on my work with the Commission. He states in part:  
Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort.

I hope to again be of assistance to the Commission in its study of this topic.

Respectfully submitted,



Ron Kelly  
2731 Webster St.  
Berkeley CA 94705  
510-843-6074

**CALIFORNIA LAW REVISION COMMISSION**

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December 18, 1996

Ron Kelly, Mediator  
2731 Webster Street  
Berkeley, CA 94705

**Re: Mediation law**

Dear Ron:

I want to thank you for your participation as an expert adviser in the Law Revision Commission's project to revise California mediation law.

As you know, our basic Evidence Code mediation protections were enacted a number of years ago on recommendation of this Commission. Since that time mediation has grown tremendously in importance. The Commission is now recommending to the Governor and the Legislature revisions of the law intended to preserve the effectiveness of mediation for dispute resolution.

Your assistance in this project has been critical. You have brought problems to our attention, suggested solutions, provided background on issues, and analyzed proposals. You have always been fair and even-handed in this effort. Your experience as a mediator, your background as a drafter and sponsor of several of the current code sections, and your knowledge of the legislative history of the current law in this area have been a tremendous resource to us.

Thank you again for all your help and many hours of dedicated work to improve the California law of mediation.

Sincerely,

A handwritten signature in black ink, appearing to read "Nat Sterling", written in a cursive style.

Nathaniel Sterling  
Executive Secretary

File: K-401

DONALD F. FARBSTEIN  
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March 15, 2012

Assemblyman Mike Feuer  
Chair, Assembly Judiciary Committee  
P.O. Box 942849, Room 2013  
Sacramento, CA 94249-0042

Via U.S. Mail and Fax at 916-319-2188

Re: **Opposition to AB 2025**  
(Amendment to Evid. Code § 1120, Mediation Confidentiality)

Dear Assemblyman Feuer and Other Committee Members:

I write to register my strong opposition to AB 2025.

I have specialized in handling professional liability cases throughout my 27-year career as a trial attorney, including hundreds of legal malpractice cases. I have acted as a mediator in over 400 disputes. I was a member of the Judicial Council working group that drafted the ethical standards for mediators in court-connected mediation programs (Cal. Rules of Court 3.850 *et seq.*). I was President of the California Dispute Resolution Council (CDRC) in 2006. I was President of the San Mateo County Bar Association in 2003, and from 1992 to 2002 I was Chair of that Bar Association's ADR Section. As a member of CDRC's Public Policy Committee and as a member of its Board of Directors, I have studied the issue of mediation confidentiality for many years, and I have co-authored and advised on several amicus briefs and amicus letters to the California Supreme Court on that subject.

AB 2025 must be rejected, and here is why.

AB 2025 provides an extraordinarily broad exception to mediation confidentiality, way out of proportion to the perceived injustice it is designed to overcome. It would create more opportunities for unfairness than it would alleviate, at a brutal cost to the effectiveness of mediation overall.

In all the legal malpractice cases I have handled in the last 27 years, either for a party or as a mediator, I can think of only two situations where mediation confidentiality might have

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impaired a party's ability to prosecute or defend a potential legal malpractice claim. Ironically, the only situation I have ever encountered where the situation was serious was a case where *the attorney* might have been precluded from defending himself against a bogus legal malpractice claim – not the other way around as AB 2025 has it.

So how unfair would AB 2025 be to *attorneys* who, for example, suffer harm from reasonably relying on things a client tells them during a mediation, or who suffer the fate of the attorney described above, only to find themselves unable to defend themselves or enforce a right against a client because the mediation communication is inadmissible. (Although to be honest, that probably doesn't happen much more often than the situation AB 2025 purports to address, and I don't recommend amending AB 2025 to include even more exceptions to Evidence Code § 1120.)

It is not as if malpractice occurring exclusively during a mediation session is a common occurrence that is crying out to be addressed. And it is not as if there are hordes of attorneys out there just waiting to take advantage of clients during mediations so they can get away with malpractice, armed with the knowledge that what they say to their client will never be admissible against them. Have I ever witnessed malpractice being committed in a mediation? Yes, but I can count these instances on one hand. On the other hand, have I ever witnessed malpractice being committed in a mediation that could not also easily be proven with evidence of events outside the mediation? No.

Mediation is by far and away the best and most effective process we have as a society for getting disputes resolved. A huge part of the power and efficacy of mediation revolves around the trust that is created between the mediator and the participants, and ultimately among the participants themselves. Mediation also derives much of its power from the fact that participants can be candid, and can open up to the mediator and others without fear that something they say might come back to haunt them, or get them sued, or lead to yet more litigation, or undo the settlement agreement they reach, and so on.

If I had to open my mediations not with a speech about strict confidentiality and the power of candor and trust, but instead with having to warn participants that what they say might be used against them in a court of law someday – or worse, having to warn participants that if the *other* guy gets into a spat with his attorney they too might be dragged into that battle, and they could be sued or subpoenaed to testify in court about it, and so on – that would cast a pall over the process from the very outset, and mediation would lose one of its most powerful qualities. Mediation would turn from a very valuable healing process into just one more divisive game that could be played, one more grenade to launch on the litigation

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playing field.

While the intention behind AB 2025 is well-taken (it is based on a desire to be fair, and who can argue with that?) – nonetheless exceptions like the one that would be created under AB 2025 can easily become tools for the unscrupulous. Do you have settlor's remorse? Just allege that your attorney did something wrong; all of a sudden, because testimony about what was said in mediation is admissible, the client can now say, oh boy, look what power and leverage I now have to upset this settlement, or to get what I want – this new Evidence Code section says I can sue people and issue subpoenas, and my opponents won't like that, so they'll cave in to my demands. True, AB 2025 as currently written does not open other mediation participants to having to give testimony, but you know that would be coming next.

Proponents of AB 2025 could ask me, 'How could you possibly be against the ability to bring relevant evidence into a legal proceeding, which could help the trier of fact see what really happened, and help them reach a just result?' My response is to point out a parallel situation which is familiar to us all: the attorney-client privilege. How many times would 'justice have been served,' or would 'the truth have come out' if only attorneys could be forced to testify as to exactly what their client told them had actually happened? Too many times to count. Yet we have no problem at all with the exclusion of this evidence from trial, even though everyone knows that it baldly 'prevents the truth from coming out.' Why do we put up with that? Because the public policy of allowing *complete confidentiality* between attorneys and their clients is what makes the legal system work, and it wouldn't work without it. Although mediation confidentiality is not a privilege, for purposes of our analysis the principle is not that much different: the vital public good served by it far outweighs the rare instances where it might work some degree of unfairness in a particular individual case.

Mediation confidentiality leads to far fewer 'casualties to truth and fairness' than does the attorney-client privilege or other similar evidentiary privileges which we happily tolerate day in and day out. Certainly we can allow Evidence Code section 1120 to stay as it is, without causing harm to society. Not only does the situation AB 2025 purports to address barely exist, but we already allow similar exclusions on a much grander scale, even in the context of high crimes and matters of life and death.

To follow up on a point made above, if the proposed amendment were to become law, I guarantee you there would be many more instances of people using such an exception to threaten or to file litigation, to bully other people into changing agreements, or into

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bending over and succumbing to threats, than there would be instances of 'the truth' winning out over unfairness when an attorney commits malpractice against their client during a mediation, and that malpractice could not be proven with evidence outside the mediation.

And here is an even stronger point: While abuse of this exception by unscrupulous people could present a problem, I think the greater danger could come from the possibly well-intentioned but uninformed client. Attorneys can all tell many tales about how many times they have had to try to talk a client out of an unreasonable position, or how many times they have had to 'pressure' their client not to shoot themselves in the foot, and to make or accept a particular settlement that the client doesn't really like, or isn't emotionally ready to accept. Do you really want to have AB 2025 give *carte blanche* for litigation every time a client is supposedly 'pressured' by an attorney to take less or pay more in a settlement than they want to? The transference phenomenon, where the upset client in litigation blames his or her attorney or someone else for their predicament is something we have all experienced. Do we really need to add more fuel to that flame?

Here is a perfect example of the slippery slope this amendment would put us on: Recently I presided as arbitrator in a Mandatory Fee Arbitration in which the client claimed the attorney should disgorge her contingent fee because the attorney had supposedly pressured the client into taking a settlement that was too small. I denied the client's claim for other reasons, but it was painfully apparent to me that the client – who actually was quite intelligent, well-meaning and in no way malicious or conniving – had managed to convince himself that he would have been such a powerful witness, and the facts of his case were so shockingly in his favor, that certainly the attorney should have gotten him at least \$800,000 for his (lousy) wrongful termination case instead of the 'measly' \$200,000 that she got for him. From my standpoint it was clear that the attorney had actually done a huge favor to this somewhat surly, unlikeable client by getting him a settlement that was quite grand given the circumstances. There was no way the unsophisticated and very angry client could appreciate just how lucky he was – yet there he was, trying to sue the lawyer for 'forcing' him to settle for 'only' \$200,000, when the case probably could have been defended if the defendant had held out and taken it to trial.

In considering the potential effect of AB 2025, we need to be aware of the fact that as many times as an injured client might be able to fairly introduce mediation communications against his or her attorney in a subsequent legal malpractice case, there would be even more instances where an uninformed or unscrupulous client would be able to use this new law as a wedge or cudgel to bring yet *more* litigation, or to gain more unfair leverage or

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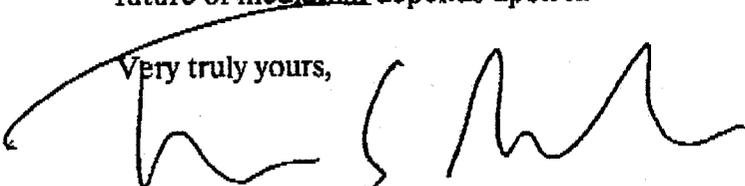
advantage.

But the purpose of mediation confidentiality in California is not to prevent unjust lawsuits, it is to give power and integrity to the mediation process. Mediation has flourished in the State of California in the last 20 years, leading to a veritable renaissance in the ability of people of all stations, all incomes, to get a decent shot at justice. Mediation has become a healthy, vital branch of our judicial system, both in the public and private sector. Mediation has been incredibly successful in clearing court dockets by preventing more cases from going to trial, and doing it sooner and without involving as many court resources as in the past.

Why would we want to jeopardize the efficacy of mediation for everyone, simply in order to provide a theoretical remedy for a potential injustice that almost never actually happens? AB 2025 is a bomb designed to swat a fly, and the collateral damage it would cause to the effectiveness of mediation could never be justified.

I emphatically ask the Assembly Judiciary Committee to say "No" to AB 2025. The very future of mediation depends upon it.

Very truly yours,



JOHN SOMERS BLACKMAN

cc: Ron Kelly  
Doug Noll, President, CDRC



Direct Line: (415) 765-6220  
E-Mail: rcollier@cwclaw.com

March 30, 2012

Assemblyman Mike Feuer  
Chair, Assembly Judiciary Committee  
Room 2013 State Capitol  
Sacramento, CA 95814

Re: AB 2025

Dear Assemblyman Feuer:

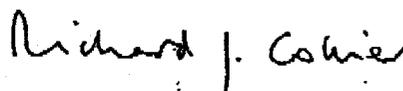
I write as someone who offers mediation services to express my opposition to Assembly Bill 2025.

The premise of my opposition is the critical importance of confidentiality to the effectiveness of the mediation process. I always have participants sign a Confidentiality Agreement to emphasize that while they are working with me we can probe, challenge, change positions without fear of having to account for our words or conduct outside the mediation. Because I can thus create a safe place for negotiation, some 90% of my mediations produce settlements. Other than the few publicized situations in the court cases, I have never encountered conduct that might lead to a malpractice case. The need for AB 2025 is not there.

Moreover, rather than curing a perceived injustice, AB 2025 causes one. By allowing testimony in a professional malpractice case regarding exchanges between an attorney and a client at a mediation, the proposed exception to confidentiality distorts what happened by presenting that testimony out of the essential context of exchanges with the mediator or with the other parties.

Mediation works. It saves participants and the court system time and money. Disincentives to mediation should be discouraged. If I have to begin every mediation by explaining the possibility raised by AB2025 that the confidentiality we all want and agree to may be breached, my commitment to the process and its effectiveness will be seriously compromised.

Yours sincerely,

  
Richard J. Collier

RJC:jd

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April 11, 2012

Honorable Mike Feuer, Chair  
Assembly Judiciary Committee  
State Capitol, Room 2013  
Sacramento, CA 95814

**RE: AB 2025 (Wagner) – OPPOSE**

Dear Chairperson Feuer:

The California Employment Lawyers Association (“CELA”) strongly opposes AB 2025 (Wagner), which will soon be heard in the Assembly Judiciary Committee. 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 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 undo the California Supreme Court decision in *Cassel v. Superior Court*, 51 Cal. 4th 113 (2011). As stated by the Court in *Cassel*, “Section 1119 governs the general admissibility of oral and written communications generated during the mediation process. Subdivision (a) provides in pertinent part that “[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action . . .” (Italics added.) Subdivision (b) similarly bars discovery or admission in evidence of any “writing . . . prepared for the purpose of, in the course of, or pursuant to, a mediation . . .” Subdivision (c) of section 1119 further provides that “[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential.” (Italics added.) Exceptions are made for oral or written settlement agreements reached in mediation if the statutory requirements for disclosure are met. (§§ 1118, 1123, 1124.)

The court went on to state, “. . . [T]he purpose of these provisions is to encourage the mediation of disputes by eliminating a concern that things said or written in connection with such a proceeding will later be used against a participant.”

Assembly Bill 2025 would change the statute so that conversations and writings between a litigant and counsel in mediation would be admissible in a malpractice lawsuit between that litigant and counsel. We believe that this would be counter-productive, hinder settlement prospect and add to the workload of a court system that is both underfunded and overburdened.

Our membership (over 1000 strong) consists of attorneys in California who represent employees’ interests. As a group we have litigated tens of thousands of cases over the years. Many of these cases were settled through mediation. For a mediation to be successful, each side participating in it must be able to freely discuss its case without fear that what is said will come back to hurt them in later proceedings. This freedom is

not only necessary when conveying proposals arguments ideas and positions across the table – it is just as important that there be a free exchange of ideas on the same side of the table.

If an attorney is to participate with one eye looking backward at a possible malpractice lawsuit from his or her own client, this will hamper the freedom to communicate to the mediator and to the other side. Rarely, if ever, are communications between attorney and client in a mediation setting reduced to a writing. If such communications are fair game for a later malpractice action, an attorney will be extremely circumspect in what is discussed with a client. It will be necessary for an attorney to bring a recording device to the mediation in order to have a record of what had been said in that party's room, because sometimes buyer's or seller's remorse can cause a client to later reject what that client originally agreed to and blame the attorney. It is not beyond contemplation that, based on memory alone, a client's version of what was said by an attorney will be different from an attorney's memory, especially when there is a conflict between them.

If this is the way mediations are to be conducted, it is easy to predict that the sleeves-rolled-up, informal nature of mediation will change, and for the worst. From experience, we believe if this bill is enacted into law, mediation proceedings will be far less successful than before because participants will be reluctant to explore various methods of settlement without making sure the record is protected. Free-ranging discussions of a case's weaknesses and strengths, and the client's prospects will come to an end. The very possibility of a party or attorney recording everything that is said in a mediation caucus room will chill the entire proceeding.

This change in the fundamental nature of mediation will, of course, lead to less success in the settlement of cases. That in turn will lead to more cases going to trial, increasing the burden on California's already burdened trial courts. In these days of decreased funding for the court system, it would be unwise to further encumber the courts in this way.

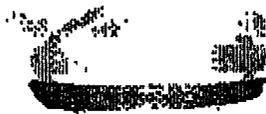
We firmly believe that the laws protecting mediation confidentiality are strongly beneficial and are important to the success of mediation in settling cases, and thus strongly oppose AB 2025.

Sincerely,



MARIKO YOSHIHARA  
CELA Political Director

CC: Members of the Assembly Labor Committee



**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:

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Assembly Member Jeff Gorrell  
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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?

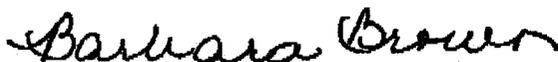
3. Does it matter whether the communications were made in front of the mediator? If they were, does the bill contemplate that the *mediator* could be called to testify? What, then, would be the relationship between this bill and Evidence Code Section 703.5, which provides that, with certain exceptions, 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,



Barbara Brown  
President  
Southern California Mediation Association  
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# Association for Dispute Resolution of Northern California

*a chapter of ACR*

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## VIA FAX

Assembly Member Mike Feuer, Chair  
Assembly Judiciary Committee  
1020 N Street, Room 104  
Sacramento, CA 95814

Assembly Member Donald P. Wagner, Vice-Chair  
Assembly Judiciary Committee  
1020 N Street, Room 104  
Sacramento, CA 95814

Re: AB 2025

Dear Chairman Feuer and Vice Chairman Wagner,

The Association for Dispute Resolution of Northern California (ADRNC) is a member-based organization which promotes alternative disputes resolution in the courts, the community and the broader society. We were initially founded in 1983. Hundreds of practitioners have been among our membership over the years.

I have been requested by the Board of Directors to express our opposition to AB 2025. We believe that the adoption of evidentiary rules making mediation confidential was an important milestone in California jurisprudence. These rules were the result of extensive discussions and involved public policy tradeoffs. Amending those rules should not be done casually.

The proposed legislation has a well-intentioned purpose: making redress possible for a person whose interests were not well served by their counsel. However, this is a case where the cure is worse than the disease. The effect of this legislation is to: (1) permit an aggrieved client to selectively disclose details of mediation without the consent of other parties, and (2) require the defendant to obtain consent from all the other parties to place in evidence facts that demonstrate that advice given was within the bounds of ethical and competent practice.

If this legislation passes clients represented by attorneys will participate in mediation far less frequently and mediated agreements will be more difficult to reach. Even a very competent attorney who has nothing but the best interests of a client in mind would now be prudent to be cautious about entering into mediation or working to persuade a client of the merits of a mediated agreement; the new legislation places the attorney at substantial risk in the event of a disagreement with the client, unsure as the attorney must be of what information would be available in a disciplinary or other hearing.

*Letter to Assembly Judiciary Committee – March 26, 2012*

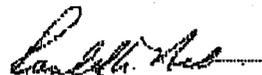
*Page 2*

As mentioned above, public policy tradeoffs are considered in the current rules. The legal system does not and cannot provide perfect redress for every wrong. Nor does the proposed legislation offer perfect redress for incompetent or unethical counsel. This legislation would compound the existing overburdening of the court. And, most importantly, as it is a well-known fact that a mediated agreement has a much higher compliance rate than do court orders, this legislation will actually make more work for the courts.

Should the proposed legislation be passed, it will make it even more difficult than at present for mediators and competent and ethical attorneys to work with clients to arrive at agreements that best serve the clients: agreements achieved in consideration of all the circumstances and which help the clients move beyond conflict. On balance, more is achieved by a larger number of individuals participating in mediation than is lost by some number of individuals agreeing to ill-advised resolutions.

We hope that the proposed legislation is not adopted and that the evidentiary rules remain as currently written.

Sincerely,



Ronald A. Nelson, President

From:

04/10/2012 14:39

#162 P.002/003



California Lawyers for the Arts  
Sacramento Mediation Center  
2015 J Street, Suite 204  
Sacramento CA 95811  
Phone: 916.442.7979  
Fax: 916.442.1370  
[www.calawyersforthearts.org](http://www.calawyersforthearts.org)  
[www.sacmediation.org](http://www.sacmediation.org)

APR 11 2012

April 10, 2012

Assembly Member Mike Feuer  
Assembly Judiciary Committee  
1020 N Street, Room 104  
Sacramento, CA 95814

Re: Opposition to AB 2025

Dear Assembly Member Feuer:

California Lawyers for the Arts (CLA) would like to express its opposition to AB 2025, which would amend the Evidence Code to allow communications between attorneys and their clients to be disclosed in malpractice litigation or State Bar disciplinary proceedings.

CLA was founded in 1974 and is a 501(c)(3) non-profit organization that provides legal services, educational programs, and dispute resolutions for artists. CLA also operates the Sacramento Mediation Center, which provides mediation services to the entire Sacramento community. We believe that AB 2025 sets a dangerous precedent that will erode the long-established firewall of mediation confidentiality, ultimately undermining the efficacy and benefits of mediation.

Mediation confidentiality is intended to serve the dispute resolution process by allowing an open discussion on disputed issues and potential solutions. Confidentiality allows parties to be open about these issues, knowing that information shared during mediation will not later become public and cannot be used against them in later proceedings. None of the current exceptions under California Evidence Code 1120 allow content regarding the items discussed during a mediation to become admissible in later proceedings – these exceptions only allow discovery of the most basic information.

AB 2025 would change this by allowing communications between a participant in this mediation and his attorney to be used in a later attorney malpractice suit or State Bar disciplinary proceeding. AB 2025 does not indicate whether this will be limited to private discussions away from other mediation participants, whether this will include discussions in front of other mediation participants, or who or what can be subpoenaed during a later proceeding to provide information regarding communications between the mediation participant and his attorney.

From:

04/10/2012 14:39

#162 P.003/003

California Lawyers for the Arts  
Page Two

This will also present a question of how a judge can determine which communications from a mediation to disclose, and which communications will remain confidential. Partial admissions of mediation discussions may be unfair to the accused attorney, while complete admissions of mediation communications would undermine all protection of mediation discussions. Currently, mediation is a cost-efficient alternative to court that encourages parties to settle their cases in ways that are acceptable to all parties to the mediation. Without confidentiality provisions, mediation will cease to be a productive way to settle disputes.

Best practices in the mediation field emphasize that, in order to be meaningful and upheld through the parties' commitments, resolutions reached in mediation must be entirely voluntary. There is no place for coercion in the mediation process. CLA follows the California Dispute Resolution Council's Standards of Practice for California Mediators on this point: "If a Mediator believes that the continuation of the process would harm any participant or a third party (such as children in a marital dissolution matter), or that the integrity of the process has been compromised, then the Mediator shall inform the parties and shall discontinue the mediation, without violating the obligation of confidentiality."

AB 2025 is a dangerous step towards eroding the long-established firewall of mediation confidentiality. Allowing exceptions to mediation confidentiality such as the exception for attorney malpractice and State Bar disciplinary proceedings in AB 2025 will make it more difficult for parties to effectively mediate their disputes. Open discussion of issues is necessary for a successful mediation. Parties to mediation will be less likely to discuss their issues freely if statements made during confidential mediation proceedings may later be heard by the public without the consent of everyone involved in the mediation.

CLA respectfully asks that this bill not be passed and not be enacted into law. If you have any questions or if we can provide any further information, please do not hesitate to contact us.

Respectfully submitted,



MJ Bogatin,  
Co-President of the Board of Directors

cc: Assembly Member Don Wagner  
Assembly Judiciary Committee

Law Offices of

David J. Meadows

Mediation & ADR Services

679 Arimo Avenue Oakland, CA 94610

510-451-2660 Fax 510-451-2651

djm@davidmeadows.com

March 15, 2012

VIA FACSIMILE ONLY

Mike Feuer

Chair, Judiciary Committee

Capitol Office, P.O. Box 942849, Room 2013

Sacramento, CA 94249-0042

Fax: 916-319-2188

Re: AB 2025

Dear Chairman Feuer:

I oppose AB 2025. I am a mediator and have seen the importance of confidentiality in encouraging frank and sometimes difficult discussions between parties and between lawyers and their clients over settlement decisions. Sometimes these discussions happen in front of me, and sometimes they don't. There is no rational way to allow information about some of the conversations into evidence in a later case, such as a malpractice case by the client against the attorney because of a settlement reached at mediation, without opening the door for many if not all the conversations.

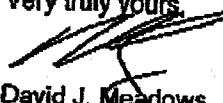
Much of what an attorney and client talk about at a mediation derives from information the mediator provides. Some of this information is provided by the other side, either information about the potential evidence, or their financial and other circumstances that are significant for evaluating settlements. Some of this information is from the mediator about the mediator's insights about the case, or reasonable settlement ranges or negotiating approaches, or about risks for the party in going forward.

One cannot separate the discussions between an attorney and client from the context in which they arise, so either none of this information is admissible (the current law), or most or all of it comes in. The latter course ends confidentiality as we know it.

Without confidentiality, the dynamics of mediation change radically, and many cases that now settle would not. This is not because attorneys regularly bully clients, but because open discussions depend on a certain level of comfort and protection that the confidentiality rules provide.

There may be cases in which attorneys do wrong at a mediation. There are many more cases, I believe, in which clients are disappointed about a settlement and want a second bite at the apple when it is unjust. The cost of losing confidentiality is far greater than the benefit of preventing isolated instances of attorney misconduct. Thank you.

Very truly yours,

  
David J. Meadows



5588 N. Palm Ave. Suite 105  
Fresno, CA 93704

March 15, 2012

Mr. Mike Feuer- Chair  
CA State Assembly  
Committee on Judiciary  
P.O. Box 942849, Room 2013  
Sacramento, CA 94249-0042

RE: AB 2025- OPPOSE

Dear Mr. Feuer:

As per Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file, I am very much opposed to any effort to compromise the statutory protections of mediation. I am an Ombudsman and we also use informal mediation as part of our practice. Please do not lessen the benefits of the only real non-adversarial and confidential means by which people can resolve their conflicts. Please oppose AB 2025.

Thanks,

A handwritten signature in cursive script that reads "Kathy Biale".

Kathy Biale

**R. Elaine Leitner, Esq.**  
Mediation Services

6114 La Salle Avenue, PMB 474  
Oakland, California 94611-2821

Phone: (510) 339-7375  
Fax: (510) 339-9402  
Email: ELeit@aol.com

March 15, 2012

To the Assembly Judiciary Committee

AB2025 – OPPOSE

Dear Committee Members:

As a mediator for over 20 years, I want to express my opposition to AB2025 which will no doubt have a severe chilling effect on mediation as a process to resolve disputes. To work, mediation must be a confidential process, with only exceptions where danger to others exists. I adopt the comments from the letter of Ron Kelly to the Assembly Judiciary Committee, of March 13, 2012 on file.

Thank you,

Sincerely,



R. Elaine Leitner

**LAW & MEDIATION OFFICES OF MARGARET S. TILLINGHAST**  
**CERTIFIED FAMILY LAW SPECIALIST\***  
2171 Junipero Serra Blvd., Suite 700  
Daly City, CA 94014  
(650) 991-4700  
fax: (650) 991-1650  
[mstillinghast@att.net](mailto:mstillinghast@att.net)  
Visit our website:  
[maggietillinghastslawandmediation.com](http://maggietillinghastslawandmediation.com)

**CONFIDENTIALITY NOTICE**  
**THE CONTENTS OF THIS FAX ARE INTENDED FOR THE ADDRESSEE ONLY**

**FAX TRANSMITTAL MEMO**

**DATE:** 3/15/12  
**TO:** Mike Feuer, Majority Policy Leader  
**FAX:** (916)319-2188  
**RE:** AB 2025: Oppose!!!  
**FROM:** MARGARET S. TILLINGHAST, ESQ., CFLS\*  
LAW & MEDIATION OFFICES OF MARGARET S. TILLINGHAST  
2171 Junipero Serra Boulevard, Suite 700  
DALY CITY, CA 94014  
(650) 991-4700 RETURN FAX: (650) 991-1650  
(\*Board of Legal Specialization, State Bar of CA)

NUMBER OF PAGES (INCLUDING COVER PAGE) 1

**MESSAGE:**  
Rep. Feuer:

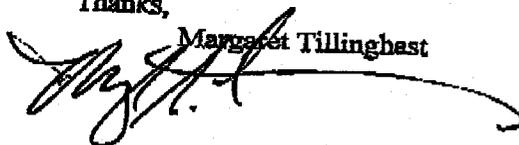
I am writing to let you know that I oppose AB2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file as well as for the following reasons.

In this time of severe budget cuts, our state courts are overrun and Mediation provides a very viable option. In my area of Family Law, Mediation provides an incredibly positive means in which to destructure a family that is breaking up. Through mediation we can arrive at agreements tailored to that particular family's need, agreements which would not be possible in an overburdened courtroom that allows a maximum of twenty (20) minutes on most issues brought by the motion process.

As practitioners, we must be protected so that we can continue to provide this invaluable alternative to litigation. I am vehemently opposed to AB 2025.

Thanks,

Margaret Tillinghast



March 15, 2012 at 12 pm PST

**By Fax: 916-319-2188**

Mike Feuer, Chair of the Judiciary Committee  
Donald P. Wagner, Vice Chair of the Judiciary Committee  
Assembly Judiciary Committee  
1020 N. Street, Room 104  
Sacramento, CA 95814

**RE: I Oppose AB 2025**

Dear Mr. Feuer and Mr. Wagner:

I have been in HR Management in the private sector for over 20 years, and have also recently volunteer mediated in the Pittsburgh small claims court for a short time. So although I am not a professional mediator for the legal system on a regular basis, I am often times a mediator within the companies for which I work and consult. I understand how and why mediation works, but am not as constrained as lawyers and professional mediators are in the legal system. I actually mediate and manage risk in my job as an HR professional so that I can try to keep needless claims out of the court system, and so I can keep companies out of trouble!

I very much oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Mediation works because all parties can talk frankly, honestly and off the record, without fear that any of the parties are creating evidence that could be used against them at a later date. The confidentiality protections are a very important part of the process that enables mediation to be successful. AB 2025 would be 10 steps backwards.

Sincerely,



Jan Hayashi  
HR Consultant, VirtuOz  
HR Manager, McMorgan & Company

**MADELYN SHIPMAN**  
**5650 Mt. Rose Highway**  
**Reno, Nevada 89511**

**Tel: 775-849-1763**

**Fax: 775-849-1794**

**E-Mail: [shipmanheikka@gmail.com](mailto:shipmanheikka@gmail.com)**

**TO: Judiciary Committee**

**FAX: 916-319-2188**

**FROM: Madelyn Shipman**

**DATE: March 15, 2012**

**RE: AB 2025**

This fax contains 1 pages, including this cover sheet. The information contained herein is considered either *PRIVATE* or *CONFIDENTIAL* and, therefore, intended only for the named recipient.

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#### Comments on AB 2025

Please accept this as opposition to the proposed amendment contained in AB 2025. I am a mediator/lawyer, a Settlement Judge for the Nevada Supreme Court and member/legislative committee of the Nevada Dispute Resolution Coalition. For reasons stated by both Mr. Kelly and the Cassel court, one-sided admissibility will negatively affect lawyer-client interaction in a mediation -- and, therefore, the outcome of a mediation. Confidentiality is the key to success in a mediation. AB 2025's amendment goes either too far or not far enough -- I believe too far. Either all communications should be admissible in the described situations -- including those of the mediator -- or none should be admissible. The former would place mediators in an untenable situation -- as all mediated results are contextual. Statements and actions can easily take on different meaning outside of the mediation.

FROM :

FAX NO. :

Mar. 14 2012 06:00PM P1

Laura Effel  
P. O. Box 867  
Larkspur, CA 94977  
(415) 924-7229  
(206) 666-4597 fax  
[laura.effel@gmail.com](mailto:laura.effel@gmail.com)

March 14, 2012

By fax  
Assembly Judiciary Committee  
(916) 319-2188

Re: AB 2025 oppose

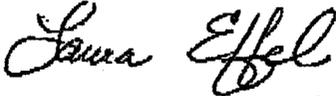
To the Committee:

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

As the California Supreme Court found in its recent unanimous *Cassel* decision upholding our current laws:

...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

Very truly yours,



**TERI SKLAR**

ATTORNEY AT LAW AND MEDIATOR  
2404 CALIFORNIA ST., #34  
SAN FRANCISCO, CA 94115

TELEPHONE: (415) 929-7355

E-MAIL: [terisklar@sbcglobal.net](mailto:terisklar@sbcglobal.net)

WEBSITE: [www.mediate.com/tsklar](http://www.mediate.com/tsklar)

March 14, 2012

To: Assembly Judiciary Committee  
Fax: (916) 319-2188

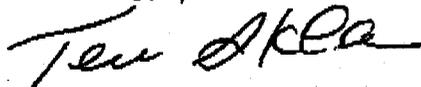
From: Teri Sklar, Mediator and Attorney At Law  
Phone: (415) 929-7355  
Email: [terisklar@sbcglobal.net](mailto:terisklar@sbcglobal.net)

Re: Opposition to AB 2025

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. I am an attorney who is currently a full time mediator and believe this bill will be extremely detrimental to the currently viable & valuable mediation process. I understand the concern for clients relating to potential malpractice by their attorneys during the mediation process but I believe this "remedy" does far more damage than good. I also believe the opportunity for real communication and understanding which can be offered through the mediation process can do far more to protect the rights of everyone involved, including clients who are under-represented or ineffectively represented by their counsel, than any remedy potentially offered through this legislation. Undermining the current mediation confidentiality protections would rip the foundation out from under a critical bridge for communication.

Thank you for your attention to and thoughtful consideration of my opposition to AB 2025.

Sincerely,



Teri Sklar  
Mediator and Attorney At Law



March 14, 2012

Re: Opposition to AB 2025

To: Assemblymember Mike Feuer, Chair Judiciary Committee  
Assemblymember Donald P. Wagner, Vice Chair Judiciary Committee

As an attorney who used mediation services for 30+ years and also has been a commercial mediator for 15 of those years, I vigorously oppose AB 2025 for the reasons so well stated by Ron Kelly in his March 13, 2012 letter to the Assembly Judiciary Committee, on file. If passed, the clearly foreseeable consequence of this legislation would be that attorneys will be faced with the grossly unfair need to defend themselves against a malpractice or breach of fiduciary duty claim without being allowed to provide supporting evidence. On the other hand, to permit mediators and other mediation participants to testify in such actions would be to gut the confidentiality guarantee that makes mediation such a powerful alternative to expensive and protracted litigation.

Litigants opt for mediation with the full understanding that they are making a good tradeoff. Litigants are able to speak candidly about their cases knowing their words won't be used against them in exchange for giving up the practical right to bring suit against lawyers or mediators for (non-criminal) words spoken, or actions taken, in the safe mediation zone. The desire of some to bring an undetermined number (probably small) of additional malpractice claims should not cause the Legislature to throw out a mediation system that has worked so beautifully for so many, including for Judges who are seeking to control their dockets in these tough economic times.

I respectfully urge you and the Judiciary Committee to help defeat AB 2025.

Thanks very much,

A handwritten signature in black ink, appearing to read "Cynthia L. Remmers".

Cynthia L. Remmers  
Mediator, Arbitrator, Fact-finder

**Attn: Assembly Judiciary Committee**

**Fax: 916-319-2188**

**Chair: Majority Policy Leader Mike Feuer**

**Vice Chair: Assemblymen Donald P. Wagner**

**Regarding: AB2025**

**I strongly oppose this legislation for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.**

**For the process of mediation to be effective, mediators must have the same client-provider confidentiality protections as other professions such as therapist-client, lawyer-client etc.**

**Mediation is a vital means of helping resolve conflicts and its effectiveness must not be compromised.**

**Nancy McKay Peterson  
Licensed Clinical Social Worker  
CA License No. LCS011661**

**8 Kinkaid Square  
Alameda, CA 94502  
510-381-0798**

Mar 14 2012 5:38PM

Jason C. Meek

7075394150

p. 1

Assembly Judiciary Committee  
Fax 916-319-2188

AB 2025 Oppose

Dear Sir -

I am a California lawyer, mediator and adjunct law professor teaching negotiation and conflict resolution at UC Berkeley and UC Hastings. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Very truly yours,



Jason Meek  
c/o iDeal Counsel APLC  
182 Howard St. #428  
San Francisco CA 94105  
415.371.9139

**DENA REINER**  
Mediator

18 Oceanview Ave  
Half Moon Bay CA 94019  
tel 650-712-9821 fax 650-712-9921  
e-mail dreiner7@att.net

April 9, 2012

**VIA FAX: 916-319-2188**

Assembly Member Mike Feuer, Chair  
Assembly Member Donald P. Wagner, Vice-Chair  
Assembly Judiciary Committee  
1020 N Street, Room 104  
Sacramento, Ca 95814

Dear Chairman Feuer and Vice Chairman Wagner:

As a mediator, I am writing to express my opposition to AB 2025.

I do not understand how the brains work of the people who thought this would be a good idea.

In short, without confidentiality re mediation, mediation will cease to have the high success rate it enjoys. Without confidentiality, especially in juvenile victim offender and parent/teen mediations, the parties will be unwilling to say what they really want to say, which is what mediation is all about. I believe that confidentiality is an important foundation for a successful mediation. Having no confidentiality will totally undermine the entire mediation process.

Please rethink this bill, which is detrimental to the mediation process.

Thank you.

Very truly yours,



Dena Reiner, Mediator

**MICHAEL G. MALONE  
MEDIATION & ARBITRATION SERVICES**

52 Canyon Oak Drive  
San Rafael, CA 94903-1732  
Telephone: (415) 472-2091  
Fax: (415) 472-2091  
mgmalone@comcast.net

March 25, 2012

Mike Feuer  
Chair  
Assembly Committee on Judiciary  
P.O. Box 942849  
Room 2013  
Sacramento, CA 94249-0042

Donald P. Wagner  
Vice Chair  
Assembly Committee on Judiciary  
State Capitol  
Room 2153  
Sacramento, CA 94248-0001

Re: Opposition to AB 2025

Gentlemen:

I write you in opposition to the passage of AB 2025, as a person with 24 years experience mediating cases; 15 years as a litigator who learned the merit of settling cases through mediation and the last nine years as the person in the middle, the mediator of hundreds of cases in the service of our courts here in the Bay Area. I am disturbed with the facility that AB 2025 has been brought to your committee with little, if any, vetting by its proponents. I urge you give it that vetting, seeking the advice and counsel of those individuals best in a position to provide that advice and counsel on the harmful effects AB 2025 will have on our already burdened courts and one of the best tools our courts currently have of keeping their backlog of cases growing even worse during this time of financial stress.

As you are well aware, our courts already are suffering a crushing scarcity of resources. During my 24 years experience, mediation has helped lighten that burden. Mediation produces voluntary resolutions, in line with our democratic ideals of self-determination. With tens of thousands of mediations taking place in California every year, our courts rely heavily on the mediation process to keep from returning to the days when parties were not

Mike Feuer  
Donald P. Wagner  
March 25, 2012  
Page 2 of 3

likely to see their case come to trial for several years after the filing.

The passage of AB 2025, however, threatens the success of mediation by cutting a hole in our legal protections for mediation communications, specifically, the confidentiality of those communications.

It has been my experience, both as a litigator and later as a mediator, that the ability of any party to the mediation to communicate openly in mediation without fear of their communication being used against them in later court proceedings promotes the success of the mediation process. Everyone can talk frankly because they can be sure they are not creating more evidence to be used against them later, unless, of course, it's a later criminal proceeding, as the law now provides.

It also is my experience that parties often enter negotiations with what they soon realize are unrealistic expectations. Only when faced with the understanding not only of their own strengths and weaknesses, but of the strengths and weaknesses of their opposing parties, learned through the open negotiations guaranteed by the confidentiality of communications, do individuals often realize the folly of their continuing to hold on to positions that are tenuous at best should they continue to trial where 12 strangers then will decide the fate of their dispute. Consequently, lawyers in mediation, through their own experience, often urge their own clients to end their fight. Lawyers often urge their clients to settle for less than the clients believed they could and would get before entering mediation. Currently, lawyers are free to be honest in mediation, even if their clients don't like what they hear; and they very often don't.

If AB 2025 passes, however, a client who does not like hearing his or her attorney tell them their case is worth less than they believed when they entered a mediation will then be able to sue their lawyer for urging them to settle instead of continuing the fight. The client will be free to use these communications between client and attorney as the basis for claims of perceived attorney malpractice merely because the client no longer appreciates the attorney's apparent lack of zeal for the client's cause. The accused lawyer, however, will not be able adequately to defend his or her actions, either by explaining what the mediator or the client's opponents may have said to bring the attorney to conclude settlement at the new terms were in the client's best interests or even by

Mike Feuer  
Donald P. Wagner  
March 25, 2012  
Page 3 of 3

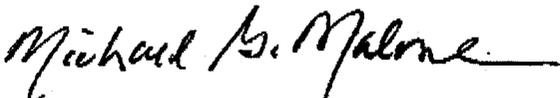
calling as witnesses in his or her defense the mediator or the client's opponents.

AB 2025 will set up a miserable situation in any later malpractice or State Bar disciplinary claims by a client against his attorney. A trial judge or State Bar tribunal either will have to conduct a completely unfair process or find a way to ignore our current confidentiality protections. Either way is wrong.

In the first instance, a judge might decide that in order to run a fair hearing he or she has to admit into evidence all communications between lawyer and client discussing what they heard from the mediator or other participants, many of which are not permitted even by AB 2025. Thus, confidentiality is destroyed. In the second instance, when the judge lets in only selective mediation communications, i.e., the communications only between attorney and client, the attorney is deprived of those communications that may be necessary to a successful defense.

This is why our current laws were written the way they were and is why they have worked well. Don't change them. Everyone in our state has benefited from the current confidentiality protections for mediation.

Respectfully,



Michael G. Malone  
MGM:mgm

**LPS**  
LELAND  
PARACHINI  
STEINBERG  
MATZGER  
MELNICK LLP

NEIL E. TAXY  
ntaxy@lpslaw.com

March 28, 2012

VIA FACSIMILE:  
916-319-2142 and  
916-319-2188

Chair Mike Feuer  
Assembly Judiciary Committee  
State Capitol  
P.O. Box 942849  
Sacramento, CA 94249-0042

Re: AB 2025 - Oppose

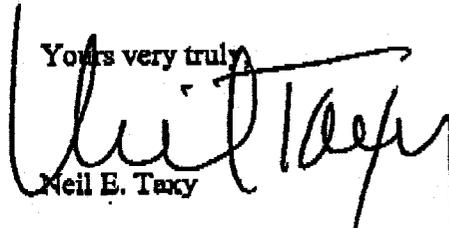
Dear Assemblymember Feuer,

As an attorney and mediator, I understand and respect the need for confidentiality in mediation.

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Thank you for your consideration.

Yours very truly



Neil E. Taxy

NET/mnj

[S:/ADMIN/0038/LTR/776086.DOCX]

## NANCY NEAL YEEND



March 21, 2012

Assemblyman Mike Feuer, Chair  
Assembly Judiciary Committee  
PO Box 942849, Room 2012  
Sacramento, CA 94249-0042

Re: Support of AB2025

Dear Assemblyman Feuer and Other Committee Members:

As an introduction, I serve as faculty at the National Judicial College and have for the last 18 years. In addition, I have been mediating civil, non-family, cases for 30 years, and serve on the Court of Appeal, First District's Mediation Program. During my tenure at the National Judicial College, I have worked with judges from every state, and I believe that I have a significant grasp of what is happening nationally with respect to mediation confidentiality, specific exceptions to confidentiality, and what has happened in the many states, which have integrated exceptions into their statutes and rules.

I support the concept of an exception to mediation confidentiality for attorney malpractice. Actually, I could more enthusiastically support AB2025, if it included an additional exception for *mediator* malpractice!

Those opposing AB2025 have presented a "parade of horrors," but there is no evidence from any state that has created exceptions for attorney malpractice and/or mediator malpractice to support their speculative claims. I have direct experience mediating in Florida, which has malpractice exceptions—the bill's opponents' claims are not supported by reality. The specious argument that there is no need for AB2025 is also unproven.

Last year's Supreme Court decision: *Cassel v. Superior Court*, S178914, essentially says that attorney malpractice is protected under portions of California Evidence Code 1120 et seq. With malpractice being shielded, one must ask these naysayers, "Does an attorney have an obligation (morally, ethically or legally) to disclose to his/her client that malpractice is protected by the mediation confidentiality statute?" They cannot have it both ways: either create the exception as stated in AB2025, or disclose the fact that malpractice is protected.

If you need a resource on the topic of mediation confidentiality and its exceptions, please know and I will make myself available to the Committee.

Very truly yours,

Nancy Neal Yeend

nny:dlg

# **AB 2025 - Oppose**

**Sample of Statements of Opposition  
Submitted to  
Assembly Judiciary Committee  
and/or Senders' Own Representatives  
March 13-17, 2012**

**Compiled by Ron Kelly, Mediator  
510-843-6074  
ronkelly@ronkelly.com**

**From:** James McBride <jmcbride@sftc.org>  
**Date:** Wed, 14 Mar 2012 16:07:34 -0700  
**Subject:** AB 2025- OPPOSE

**AB 2025 OPPOSE**

Dear Chairman Feuer,

I am the Supervising Judge of the Civil Division of the San Francisco Superior Court and a former Presiding Judge. AB 2025 would jeopardize the very sound system of protections that enhance the success of mediation in California. AB2025 poses a serious threat that mediation would become a less successful method of reducing the number of cases brought to resolution by our Courts. As you well know, we are hard pressed to deal with current case loads (San Francisco for one can no longer provide a settlement conference with a judge) and any increase in the cases sent to trial could be the proverbial last straw. I oppose AB 2025 for all the same reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Respectfully,

James J. McBride  
Superior Court Judge  
County of San Francisco

[Referenced March 13, 2012 letter to the Assembly Judiciary Committee from Ron Kelly is on following page]

## **AB 2025 - Want to Make Our Mediations Fail?**

**Most mediations are already hard for everyone involved. Want to make them fail? They will, if lawyers can't safely urge their clients to settle.**

**Our courts are already suffering a crushing scarcity of resources. For decades, mediation has helped lighten that burden. Mediation produces voluntary resolutions, in line with our democratic ideals of self-determination. Hundreds of thousands of mediations take place in California every year.**

**Now AB 2025 threatens that by cutting a hole in our legal protections for mediation communications (proposed change below).**

**For fourteen years, everyone in a mediation has been able to take a time out from the battle - to talk frankly and off the record - to try to reach a voluntary settlement. Parties, lawyers, witnesses, mediators, experts - everyone can talk off the record. They can talk frankly because they can be sure they are not creating more evidence to be used against them later (unless it's a later criminal proceeding).**

**Based on what they hear, lawyers in mediation often urge their own clients to end the fight. They often urge their clients to settle for less than the clients believed they could get going in. Lawyers are now free to be honest in mediation, even if their clients don't like what they hear - and they very often don't. This is really important.**

**If AB 2025 passes, a client who didn't like hearing this could sue their lawyer for urging them to settle instead of continuing the fight. The client would be free to use these communications. But the accused lawyer could not explain what the mediator or the other side said that caused the lawyer to push their client to settle.**

**AB 2025 would set up a miserable situation in any later malpractice claim. A trial judge or State Bar tribunal would have to either conduct a completely unfair process, or find a way to ignore our current confidentiality protections. Either way is wrong. A judge might decide that to run a fair hearing he or she had to admit into evidence all communications between lawyer and client discussing what they heard from the mediator or other participants.**

**\*\* If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality.\*\* That's why our current laws were written the way they were. That's why they've worked well for fourteen years. Don't change them. Everyone in our state has benefited from the current confidentiality protections for mediation.**

**As the California Supreme Court found in its recent unanimous Cassel decision upholding our current laws:**

**...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.**

**Yes this is formal judicial language, but it hits the nail right on the head.**

**Thank you,  
Ron Kelly, Mediator  
2731 Webster St.  
Berkeley CA 94705  
510-843-6074  
ronkelly@ronkelly.com  
March 13, 2012**

**AB 2025 would cut a hole in current mediation confidentiality protections by adding 1120 (b)(4):**

**Section 1120 of the Evidence Code is amended to read:... (b) This chapter does not limit any of the following: ... (4) The admissibility in an action for legal malpractice, an action for breach of fiduciary duty, or both, or in a State Bar disciplinary action, of communications directly between the client and his or her attorney during mediation if professional negligence or misconduct forms the basis of the client's allegations against the attorney.**

DONALD F. FARBSTEIN  
MICHAEL A. FARBSTEIN  
JOHN SOMERS BLACKMAN  
MARGARET A. BURTON\*  
DEIRDRE O'REILLY MARBLESTONE  
\*ALSO ADMITTED IN NEVADA

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March 15, 2012

Assemblyman Mike Feuer  
Chair, Assembly Judiciary Committee  
P.O. Box 942849, Room 2013  
Sacramento, CA 94249-0042

Via U.S. Mail and Fax at 916-319-2188

Re: **Opposition to AB 2025**  
(Amendment to Evid. Code § 1120, Mediation Confidentiality)

Dear Assemblyman Feuer and Other Committee Members:

I write to register my strong opposition to AB 2025.

I have specialized in handling professional liability cases throughout my 27-year career as a trial attorney, including hundreds of legal malpractice cases. I have acted as a mediator in over 400 disputes. I was a member of the Judicial Council working group that drafted the ethical standards for mediators in court-connected mediation programs (Cal. Rules of Court 3.850 *et seq.*). I was President of the California Dispute Resolution Council (CDRC) in 2006. I was President of the San Mateo County Bar Association in 2003, and from 1992 to 2002 I was Chair of that Bar Association's ADR Section. As a member of CDRC's Public Policy Committee and as a member of its Board of Directors, I have studied the issue of mediation confidentiality for many years, and I have co-authored and advised on several amicus briefs and amicus letters to the California Supreme Court on that subject.

AB 2025 must be rejected, and here is why.

AB 2025 provides an extraordinarily broad exception to mediation confidentiality, way out of proportion to the perceived injustice it is designed to overcome. It would create more opportunities for unfairness than it would alleviate, at a brutal cost to the effectiveness of mediation overall.

In all the legal malpractice cases I have handled in the last 27 years, either for a party or as a mediator, I can think of only two situations where mediation confidentiality might have

Assemblyman Mike Feuer  
Re: Opposition to AB 2025  
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impaired a party's ability to prosecute or defend a potential legal malpractice claim. Ironically, the only situation I have ever encountered where the situation was serious was a case where *the attorney* might have been precluded from defending himself against a bogus legal malpractice claim – not the other way around as AB 2025 has it.

So how unfair would AB 2025 be *to attorneys* who, for example, suffer harm from reasonably relying on things a client tells them during a mediation, or who suffer the fate of the attorney described above, only to find themselves unable to defend themselves or enforce a right against a client because the mediation communication is inadmissible. (Although to be honest, that probably doesn't happen much more often than the situation AB 2025 purports to address, and I don't recommend amending AB 2025 to include even more exceptions to Evidence Code § 1120.)

It is not as if malpractice occurring exclusively during a mediation session is a common occurrence that is crying out to be addressed. And it is not as if there are hordes of attorneys out there just waiting to take advantage of clients during mediations so they can get away with malpractice, armed with the knowledge that what they say to their client will never be admissible against them. Have I ever witnessed malpractice being committed in a mediation? Yes, but I can count these instances on one hand. On the other hand, have I ever witnessed malpractice being committed in a mediation that could not also easily be proven with evidence of events outside the mediation? No.

Mediation is by far and away the best and most effective process we have as a society for getting disputes resolved. A huge part of the power and efficacy of mediation revolves around the trust that is created between the mediator and the participants, and ultimately among the participants themselves. Mediation also derives much of its power from the fact that participants can be candid, and can open up to the mediator and others without fear that something they say might come back to haunt them, or get them sued, or lead to yet more litigation, or undo the settlement agreement they reach, and so on.

If I had to open my mediations not with a speech about strict confidentiality and the power of candor and trust, but instead with having to warn participants that what they say might be used against them in a court of law someday – or worse, having to warn participants that if the *other* guy gets into a spat with his attorney they too might be dragged into that battle, and they could be sued or subpoenaed to testify in court about it, and so on – that would cast a pall over the process from the very outset, and mediation would lose one of its most powerful qualities. Mediation would turn from a very valuable healing process into just one more divisive game that could be played, one more grenade to launch on the litigation

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playing field.

While the intention behind AB 2025 is well-taken (it is based on a desire to be fair, and who can argue with that?) – nonetheless exceptions like the one that would be created under AB 2025 can easily become tools for the unscrupulous. Do you have settlor's remorse? Just allege that your attorney did something wrong; all of a sudden, because testimony about what was said in mediation is admissible, the client can now say, oh boy, look what power and leverage I now have to upset this settlement, or to get what I want – this new Evidence Code section says I can sue people and issue subpoenas, and my opponents won't like that, so they'll cave in to my demands. True, AB 2025 as currently written does not open other mediation participants to having to give testimony, but you know that would be coming next.

Proponents of AB 2025 could ask me, 'How could you possibly be against the ability to bring relevant evidence into a legal proceeding, which could help the trier of fact see what really happened; and help them reach a just result?' My response is to point out a parallel situation which is familiar to us all: the attorney-client privilege. How many times would 'justice have been served,' or would 'the truth have come out' if only attorneys could be forced to testify as to exactly what their client told them had actually happened? Too many times to count. Yet we have no problem at all with the exclusion of this evidence from trial, even though everyone knows that it baldly 'prevents the truth from coming out.' Why do we put up with that? Because the public policy of allowing *complete confidentiality* between attorneys and their clients is what makes the legal system work, and it wouldn't work without it. Although mediation confidentiality is not a privilege, for purposes of our analysis the principle is not that much different: the vital public good served by it far outweighs the rare instances where it might work some degree of unfairness in a particular individual case.

Mediation confidentiality leads to far fewer 'casualties to truth and fairness' than does the attorney-client privilege or other similar evidentiary privileges which we happily tolerate day in and day out. Certainly we can allow Evidence Code section 1120 to stay as it is, without causing harm to society. Not only does the situation AB 2025 purports to address barely exist, but we already allow similar exclusions on a much grander scale, even in the context of high crimes and matters of life and death.

To follow up on a point made above, if the proposed amendment were to become law, I guarantee you there would be many more instances of people using such an exception to threaten or to file litigation, to bully other people into changing agreements, or into

Assemblyman Mike Feuer  
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bending over and succumbing to threats, than there would be instances of 'the truth' winning out over unfairness when an attorney commits malpractice against their client during a mediation, and that malpractice could not be proven with evidence outside the mediation.

And here is an even stronger point: While abuse of this exception by unscrupulous people could present a problem, I think the greater danger could come from the possibly well-intentioned but uninformed client. Attorneys can all tell many tales about how many times they have had to try to talk a client out of an unreasonable position, or how many times they have had to 'pressure' their client not to shoot themselves in the foot, and to make or accept a particular settlement that the client doesn't really like, or isn't emotionally ready to accept. Do you really want to have AB 2025 give *carte blanche* for litigation every time a client is supposedly 'pressured' by an attorney to take less or pay more in a settlement than they want to? The transference phenomenon, where the upset client in litigation blames his or her attorney or someone else for their predicament is something we have all experienced. Do we really need to add more fuel to that flame?

Here is a perfect example of the slippery slope this amendment would put us on: Recently I presided as arbitrator in a Mandatory Fee Arbitration in which the client claimed the attorney should disgorge her contingent fee because the attorney had supposedly pressured the client into taking a settlement that was too small. I denied the client's claim for other reasons, but it was painfully apparent to me that the client – who actually was quite intelligent, well-meaning and in no way malicious or conniving – had managed to convince himself that he would have been such a powerful witness, and the facts of his case were so shockingly in his favor, that certainly the attorney should have gotten him at least \$800,000 for his (lousy) wrongful termination case instead of the 'measly' \$200,000 that she got for him. From my standpoint it was clear that the attorney had actually done a huge favor to this somewhat surly, unlikeable client by getting him a settlement that was quite grand given the circumstances. There was no way the unsophisticated and very angry client could appreciate just how lucky he was – yet there he was, trying to sue the lawyer for 'forcing' him to settle for 'only' \$200,000, when the case probably could have been defended if the defendant had held out and taken it to trial.

In considering the potential effect of AB 2025, we need to be aware of the fact that as many times as an injured client might be able to fairly introduce mediation communications against his or her attorney in a subsequent legal malpractice case, there would be even more instances where an uninformed or unscrupulous client would be able to use this new law as a wedge or cudgel to bring yet *more* litigation, or to gain more unfair leverage or

Assemblyman Mike Feuer  
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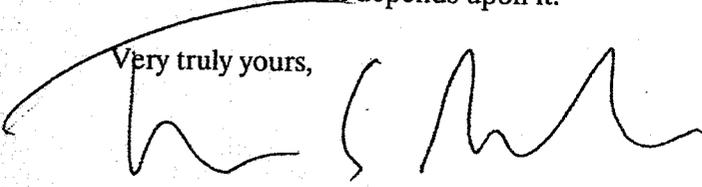
advantage.

But the purpose of mediation confidentiality in California is not to prevent unjust lawsuits, it is to give power and integrity to the mediation process. Mediation has flourished in the State of California in the last 20 years, leading to a veritable renaissance in the ability of people of all stations, all incomes, to get a decent shot at justice. Mediation has become a healthy, vital branch of our judicial system, both in the public and private sector. Mediation has been incredibly successful in clearing court dockets by preventing more cases from going to trial, and doing it sooner and without involving as many court resources as in the past.

Why would we want to jeopardize the efficacy of mediation for everyone, simply in order to provide a theoretical remedy for a potential injustice that almost never actually happens? AB 2025 is a bomb designed to swat a fly, and the collateral damage it would cause to the effectiveness of mediation could never be justified.

I emphatically ask the Assembly Judiciary Committee to say "No" to AB 2025. The very future of mediation depends upon it.

Very truly yours,



JOHN SOMERS BLACKMAN

cc: Ron Kelly  
Doug Noll, President, CDRC

Law Offices of Robert E. Leslie  
Arbitrator and Mediator  
425 Market Street, Suite 2200  
San Francisco, CA 94105

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March 18, 2012

FAX ONLY (916) 319-2188

Assembly Judiciary Committee  
State of California

Re: AB 2025

As a mediator for many years, I am registering my opposition to AB 2025. I direct you to Ron Kelly's March 13, 2012 letter to you which compliments my feeling on the issue.

The passage of AB 2025 would cause attorneys representing parties in mediation to refrain from entering into frank discussions with opposing parties, opposing counsel, and the mediator in their effort to resolve the dispute for fear of retaliatory action by a client after the fact.

The proposed change in Evidence Code 1120 would be devastating in its effect on mediations in the future. The American Arbitration Association has advised me that cases that start off in arbitration through that tribunal, that go through the mediations process, result in an 85% settlement percentage. Evidence Code 1120 works in its present state.

Based on my observations over the past 25 years representing parties in mediations and being a mediator myself I assure you that mediation only works when there can be frank negotiations among the parties, counsel and the mediator. That will not occur if AB 2025 is enacted.

Very truly yours,

ROBERT E. LESLIE

CC: Ron Kelly

**Yaroslav Sochynsky**  
**Wulff, Quinby & Sochynsky**  
**Dispute Resolution**  
**1901 Harrison St., Suite 1420**  
**Oakland, CA 94612**  
**Tel: (510) 663-5222**  
**Fax: (510) 663-5226**  
[yarko@aol.com](mailto:yarko@aol.com)  
[www.wqsadr.com](http://www.wqsadr.com)

**FAX TRANSMITTAL**

**TO:** JUDICIARY COMMITTEE FAX No. 916-319-2188  
MAJORITY POLICY COMMITTEE LEADER FEUER  
ASSEMBLYMAN WAGNER  
**FROM:** YAROSLAV SOCHYNSKY  
**RE:** AB 2025  
**DATE:** MARCH 15, 2012

I have been a mediator since 1985 and have mediated well over 1,000 cases. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Please don't undermine the efficacy of the mediation process with this ill-conceived legislation.

Sincerely,

Yaroslav Sochynsky

TELEPHONE:  
(415) 986-1441

DOUGLAS A. VOORSANGER  
ATTORNEY AT LAW  
250 MONTGOMERY STREET, SUITE 1400  
SAN FRANCISCO, CALIFORNIA 94104  
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(415) 398-1608

March 14, 2012

VIA FAX (916-319-2188)

Majority Policy Leader Mike Feuer  
Assemblyman Donald P. Wagner

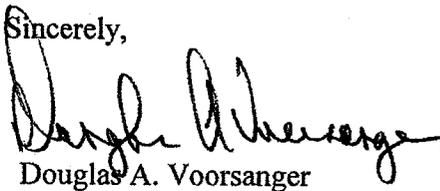
Re: AB 2025

Gentlemen:

I oppose AB 2025 for the reasons stated in Ron Kelley's March 13, 2012 letter to the Assembly Judiciary Committee on file.

I am an attorney and a mediator on the San Francisco Superior Court probate litigation panel and Bar Association of San Francisco attorney-client fee dispute panel. Confidentiality is critical to making mediations effective and I oppose AB2025 which would erode this important aspect of the mediation process.

Sincerely,



Douglas A. Voorsanger

DAV:ad

Attn: Assembly Judiciary Committee

Fax: 916-319-2188

Chair: Majority Policy Leader Mike Feuer

Vice Chair: Assemblymen Donald P. Wagner

Regarding: AB2025

I strongly oppose this legislation for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

For the process of mediation to be effective, mediators must have the same client-provider confidentiality protections as other professions such as therapist-client, lawyer-client etc.

Mediation is a vital means of helping resolve conflicts and its effectiveness must not be compromised.

Nancy McKay Peterson  
Licensed Clinical Social Worker  
CA License No. LCS011661

8 Kinkaid Square  
Alameda, CA 94502  
510-381-0798

## Assemblymember Mike Feuer - District AD42

\* Indicates required fields

\* First Name:

\* Last Name:

\* Address:

\* City:

\* Zip Code:

Phone: (  )  -  ext:  type:

\* E-mail:

Select an Issue:

Support  Oppose

Comments:  Characters Left

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Fred Tileston

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[Privacy and Conditions of Use](#)

**From: "Ken Malouos" <kmm@malouoslaw.com>**  
**Date: Wed, 14 Mar 2012 16:52:05 -0700**

**Sent to my Assembly Member, Allyson Huber.**  
**AB 2025 - OPPOSE**

**I OPPOSE AB 2025 for the reasons stated in the letter from Ron Kelly to the Assembly Judiciary Committee, dated March 13, 2012. Also, as a mediator, I am well aware of the need for total confidentiality in mediation in order to bring about settlement of disputes. This bill would make mediation meaningless.**

**Ken Malouos**  
**Attorney at Law**  
**Mediator and Arbitrator**  
**3620 American River Drive, Suite 260**  
**Sacramento, CA 95864**  
**(916) 974-8600**  
**(916) 974-8608 (fax)**  
**www.malouoslaw.com**

\*\*\*\*\*

**From: Robert Sammis <rsammis@msn.com>**  
**Date: Wed, 14 Mar 2012 16:28:51 -0700**

**I am a retired attorney who is an adjunct professor at Hastings and a volunteer mediator for Marin County. I oppose AB2025 for the reason's stated in the letter Ron Kelly sent to the Assembly Judiciary Committee on March 12, 2012 which is on file. I tried to e-mail Mike Feuer and Donald Loagner but their e-mails will not accept out of district comments. Please pass on to them my opposition of AB2025. Thank you.**

**Robert Sammis**

\*\*\*\*\*

**From: "Dixon Q. Dern" <ddern@dixlaw.com>**  
**To: "Ron Kelly" <ronkelly@ronkelly.com>**  
**Subject: RE: A Quick Favor? Please?**  
**Date: Wed, 14 Mar 2012 16:33:14 -0700**  
**thread-index: AQKm5jht4LjhuSp8Q/mHqIKHsY0x+pS2qPCQ**  
**X-ELNK-Received-Info: spv=0;**  
**X-ELNK-AU: 0**

X-ELNK-Info: sbv=0; sbrc=.0; sbf=00; sbw=000;

Thanks for your email. I sent my opposition to Mike Feuer—the form would not let me contact Wagner, the proponent. My message was: I am writing to oppose 2025, both in my role as an attorney and mediator. Although the decision in Cassell at first reading seemed wrong, the more I thought about it the more I came to be convinced that The Court got it right—there is a lack of due process where, charged with malpractice (usually for recommending settlement) an attorney has no way to get evidence from the hearing to the contrary. This bill opens the door to real manipulation of mediations. Please rethink it. Many thanks.

DIXON Q. DERN, P.C.

Attorney, Mediator, Arbitrator  
1262 Devon Ave.  
Los Angeles, CA 90024  
Telephone 310-275-2003  
Facsimile 310-275-7655

\*\*\*\*\*

From: "Michelle L. Thimesch" <michelle@thimeschlaw.com>  
Date: Wed, 14 Mar 2012 16:51:29 -0700

Sent to Assembly member Joan Buchanan (15th District):

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file as it is in line with the California Supreme Court decision (unanimous) in Cassel: ...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

My experience as a litigator and as a mediator has proved to me that it is in fact the case that even in a situation where the mediation does not immediately settle the dispute among the parties the fact of participation in the process acts as a catalyst to bring parties around to reflect on their own behaviors and demands. It's amazing when it works and even when it doesn't settle cases it plays a very important role and this is because it is so different than any other method of conflict resolution. Mediation is not easy and is often emotional but it is rewarding and effective alternative dispute resolution method. This proposed bill will absolutely negatively affect this process. Attorneys will NOT encourage their clients to take advantage of this process at their expense. That would be sad but it would be a fair result given this short sited bill.

Thank you,

Michelle L. Thimesch

\*\*\*\*\*

Date: Wed, 14 Mar 2012 15:42:59 -0700  
From: "Olen Jones" <ojones@nationalcore.org>

I oppose AB 2025, because the legislation would effectively gut mediation practice in CA.

As the California Supreme Court found in its recent unanimous Cassel decision upholding our current laws:

...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

I urge you to vote no on this proposed legislation.

Olen Jones, Community Relations

National Community Renaissance ®  
National CORE  
9065 Haven Avenue, Suite 100  
Rancho Cucamonga, CA 91730  
(909) 483-2444 Ext. 117  
(909) 483-2448 Fax  
ojones@nationalcore.org

\*\*\*\*\*

Date: Wed, 14 Mar 2012 19:32:11 -0700

I sent the following to each of the members of the Committee:

"I am a practicing mediator. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Please vote against AB 2025. Thank you."

And thank you for your continuing vigilance and positive action.

Best regards,  
Bruce  
Bruce Johnsen  
824 Munras Ave. Ste. G  
Monterey, CA 93940

TEL: 831-373-5969  
FAX: 831-373-4604

<mailto:bruce@brucejohnsen.com>bruce@brucejohnsen.com  
(Or e-mail alternate:  
<mailto:brucerjohnsen@gmail.com>brucerjohnsen@gmail.com)  
<http://www.brucejohnsen.com>www.brucejohnsen.com

\*\*\*\*\*

From: Unmani Saraswati <ums@mediationoffices.net>  
To: "assemblymember.wagner@assembly.ca.gov"  
<assemblymember.wagner@assembly.ca.gov>  
CC: "ronkelly@ronkelly.com" <ronkelly@ronkelly.com>  
Subject: AB 2025 - Oppose  
Thread-Topic: AB 2025 - Oppose  
Thread-Index: Ac0C0c6/ZXEFeitaRqWHKtNf7aby5A==  
Date: Wed, 14 Mar 2012 23:26:32 +0000

Dear Assembly Member Wagner,

**I am a mediator-attorney, and oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.**

**Thank you.**

**Regards, Unmani Sarasvati**

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**Unmani Sarasvati, JD  
Mediation Offices of California, PC  
San Francisco/Oakland  
1-800-486-0220, ex. 2  
<<http://www.mediationoffices.net/>>[www.mediationoffices.net](http://www.mediationoffices.net)**

**\*\*\*\*\***

**Date: Wed, 14 Mar 2012 15:18:12 -0700  
Subject: Re: A Quick Favor? Please?  
From: Carol Bloom <[carolvbloom@gmail.com](mailto:carolvbloom@gmail.com)>**

**I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.**

**Carol**

**\*\*\*\*\***

**From: Mary Madison Campbell <[memadison@ucdavis.edu](mailto:memadison@ucdavis.edu)>**

**AB 2025 - Oppose**

**I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file**

**Please do not erode the importance of confidentiality in mediations throughout CA. It is the cornerstone of what makes it effective. Creating safe venues of protected communication is of the utmost importance in resolving conflict. As a mediator and human being, I urge you not to pass this bill.**

Mary Madison Campbell

\*\*\*\*\*

From: "Marlene (Mo) Morris" <momorris@me.com>

Subject: Re: A Quick Favor? Please?

Date: Wed, 14 Mar 2012 15:38:37 -0700

"AB 2025-Oppose"

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. I am an attorney and former mediator and agree with Ron that the proposed legal change to the attorney-client privilege would make it all but impossible for attorneys to provide effective representation to their clients in a mediation context. As a result, courts will become even more backlogged and litigants will not achieve timely and satisfactory settlement of their disputes.

Thank you for your consideration.

Sincerely,

Marlene Morris

\*\*\*\*\*

Date: Wed, 14 Mar 2012 15:41:04 -0700 (PDT)

From: David Meadows <djm@davidmeadows.com>

Reply-To: David Meadows <djm@davidmeadows.com>

I oppose AB 2025.

I am a mediator and have seen the importance of confidentiality in encouraging frank and sometimes difficult discussions between parties and between lawyers and their clients over settlement decisions. Sometimes these discussions happen in front of me, and sometimes they don't. There is no rational way to allow information about some of the conversations into evidence in a later case, such as a malpractice case by the client against the attorney because of a settlement reached at mediation, without opening the door for many if not all the conversations.

Much of what an attorney and client talk about at a mediation derives from information the mediator provides. Some of this information is provided by the other side, either information about the potential evidence, or their financial and other circumstances that are significant for evaluating settlements. Some of this information is

from the mediator about the mediator's insights about the case, or reasonable settlement ranges or negotiating approaches, or about risks for the party in going forward.

One cannot separate the discussions between and attorney and client from the context in which they arise, so either none of this information is admissible (the current law), or most or all of it comes in. The latter course ends confidentiality as we know it.

Without confidentiality, the dynamics of mediation change radically, and many cases that now settle would not. This is not because attorneys regularly bully clients, but because open discussions depend on a certain level of comfort and protection that the confidentiality rules provide.

There may be cases in which attorneys do wrong at a mediation. There are many more cases, I believe, in which clients are disappointed about a settlement and want a second bite at the apple when it is unjust. The cost of losing confidentiality is far greater than the benefit of preventing isolated instances of attorney misconduct. Thank you.

David Meadows  
Mediation & ADR Services  
679 Arimo Avenue  
Oakland, CA 94610  
510-451-2660  
510-451-2651 (fax)  
<mailto:djm@dauidmeadows.com>djm@dauidmeadows.com

\*\*\*\*\*

Date: Wed, 14 Mar 2012 15:49:23 -0700  
From: Kevin C. Coleman <Kevin@Kcolemanmediation.com>

I think AB 2025 is knee-jerk reaction to the Cassell case and would make bad law. This is one case out of thousands of mediations and to make a law as result of it's outcome is a short-term view. I oppose AB 2025 also for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Kevin

Kevin C. Coleman  
Mediator/Attorney-At-Law  
Mediation Office of Kevin C. Coleman  
<mailto:Kevin@KColemanMediation.com>Kevin@KColemanMediation.co

m  
369-B Third Street #127

San Rafael, CA 94901

415-488-7609

<<http://www.kcolemanmediation.com/>>[www.KColemanMediation.com](http://www.KColemanMediation.com)

\*\*\*\*\*

From: John Levy <[info@johnlevyconsulting.com](mailto:info@johnlevyconsulting.com)>

Date: Wed, 14 Mar 2012 15:50:29 -0700

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

I am a mediator generally performing mediation as a volunteer in community-based situations.

John Levy, PhD

415 663-1818

Painless IT

<http://johnlevyconsulting.com>

\*\*\*\*\*

Date: Wed, 14 Mar 2012 15:54:26 -0700

From: Claudia Long <[claudia@longlawoffices.com](mailto:claudia@longlawoffices.com)>

**AB 2025 - Want to Make Our Mediations Fail?**

I oppose AB 2025. As a mediator, I am called upon to analyze complex cases quickly and discuss them frankly with parties and their counsel.

The proposed law would make my comments evidence in the event of a malpractice action by the client against the attorney. It would also prevent the attorney from speaking frankly with his client in mediation.

While I would urge lawyers and clients to communicate frankly before the mediation, it is often up to me to point out downsides of the case to the parties. Those conversations are often unpleasant for the party. If the attorney fears a malpractice case if he agrees with my analysis, he will be loath to participate.

The current laws work well to protect clients and their counsel. AB2025 would expose clients to bad advice, as the attorneys and mediators would be walking on eggshells to prevent disclosure of the

discussions. And once those conversations were no longer protected, it would constrain the other side from conceding a point, because then those conversations would be the next round of evidence, as rebuttal or corroboration of the malpractice claim. It's a slippery slope, and the current law needs no fixing. Claudia Hagadus Long, Attorney/Mediator

\*\*\*\*\*

From: "David M. Miller" <[dmiller@millermediation.com](mailto:dmiller@millermediation.com)>  
Date: Wed, 14 Mar 2012 16:11:44 -0700

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. I'd like to emphasize the biggest problem with this proposal: You either end up with a one-sided situation, where a client can submit information or evidence of malpractice but the lawyer is hindered in his defense; or, you open the door on everyone involved in the mediation becoming a potential witness. In the latter situation, I assure you that I, as an ADR practitioner would have a very difficult time getting anyone to be completely open with me during mediations. The result of that would be a lot less of my cases getting settled, and the Court system becoming more backlogged with unsettled cases.

Dave Miller

David M. Miller, Esq.  
Miller|Mediation  
P.O. Box 6721  
Moraga, CA 94570-6721  
T: (925) 300-9510  
F: (925) 396-6196  
<<mailto:dmiller@millermediation.com>>[dmiller@millermediation.com](mailto:dmiller@millermediation.com)  
<<http://www.millermediation.com>>[www.millermediation.com](http://www.millermediation.com)

\*\*\*\*\*

From: "Robert N. Dobbins, LL.M." <[dobbinsadr@gmail.com](mailto:dobbinsadr@gmail.com)>  
Date: Wed, 14 Mar 2012 16:21:52 -0700

AB 2025 0 Oppose

Good day,

After 20+ years as a litigator I went back to school to get first a Masters and then an LL.M. in dispute resolution. I am a full time mediator and have the good fortune to teach mediation and other ADR topics at UC Hastings and at Pepperdine Law Schools.

I believe in mediation as an effective process for resolving disputes as it affords the parties the chance to reacquire control of their situation and find an outcome that works for them. A fundamental pillar of the mediation process is confidentiality - the ability for all involved to talk openly, freely, candidly about all aspects as they search for resolution. Take away this pillar and the process crumbles.

Our Supreme Court has repeatedly spoken to this issue. Consistently, often unanimously, the Justices wax eloquent first on the importance of the mediation process to our system and secondly to the fact that confidentiality is fundamentally important to the process.

Please, do not take away from the people this valuable dispute resolution tool. Our system desperately needs the relief mediation brings; the people deserve access to a process that is founded upon party self-determination. Without the confidentiality protections, the process is undermined at best and destroyed at worst.

Thank you,

Robert N. Dobbins, LL.M.  
Mediator - Judicate West  
Robert N. Dobbins, LL.M.  
Appropriate Dispute Resolution  
Mediation

\*\*\*\*\*

Date: Wed, 14 Mar 2012 16:34:11 -0700 (PDT)  
From: TERI H SKLAR <terisklar@sbcglobal.net>  
Subject: Re: A Quick Favor? Please?  
To: Ron Kelly <ronkelly@ronkelly.com>  
X-ELNK-Received-Info: spv=0;  
X-ELNK-AU: 0  
X-ELNK-Info: sbv=0; sbrc=.0; sbf=00; sbw=000;

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. I am an attorney who is currently a full time mediator and believe this bill will be extremely detrimental to the currently viable & valuable mediation process. I understand the concern for clients relating to potential malpractice by their attorneys during the mediation process but I believe this "remedy" does far more damage than good. I also believe the opportunity for real communication and understanding which can be offered through the mediation process can do far more

to protect the rights of everyone involved, including clients who are under-represented or ineffectively represented by their counsel, than any remedy potentially offered through this legislation. Undermining the current mediation confidentiality protections would rip the foundation out from under a critical bridge for communication.

Teri Sklar  
Attorney At Law/Mediator  
terisklar@sbcglobal.net  
<<http://www.mediate.com/tsklar>>[www.mediate.com/tsklar](http://www.mediate.com/tsklar)  
(415) 929-7355

\*\*\*\*\*

From: Michaela Cassidy <[michaelacassidy@aol.com](mailto:michaelacassidy@aol.com)>  
Date: Wed, 14 Mar 2012 19:38:27 -0400 (EDT)

I strongly oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. In my professional experience, the inability to speak, and problem solve, with complete confidentiality would profoundly violate and undermine the likely success of all mediations. Please do NOT pass this legislation.

\*\*\*\*\*

Date: Wed, 14 Mar 2012 16:45:13 -0700

Dear Assemblymember Feuer:

As an attorney who used mediation services for 30+ years and also has been a commercial mediator for 15 of those years, I vigorously oppose AB 2025 for the reasons so well stated by Ron Kelly in his March 13, 2012 letter to the Assembly Judiciary Committee, on file. If passed, the clearly foreseeable consequence of this legislation would be that attorneys will be faced with the grossly unfair need to defend themselves against a malpractice or breach of fiduciary duty claim without being allowed to provide supporting evidence. On the other hand, to permit mediators and other mediation participants to testify in such actions would be to gut the confidentiality guarantee that makes mediation such a powerful alternative to expensive and protracted litigation.

Litigants opt for mediation with the full understanding that they are making a good tradeoff. Litigants are able to speak candidly about their cases knowing their words won't be used against them in exchange for giving up the practical right to bring suit against

lawyers or mediators for (non-criminal) words spoken, or actions taken, in the safe mediation zone. The desire of some to bring an undetermined number (probably small) of additional malpractice claims should not cause the Legislature to throw out a mediation system that has worked so beautifully for so many, including for Judges who are seeking to control their dockets in these tough economic times.

I respectfully urge you to help defeat AB 2025 by letting members of the Judiciary Committee know that this proposed legislation is a very bad idea.

Thanks very much,

Cynthia L. Remmers  
Mediator, Arbitrator, Fact-finder

\*\*\*\*\*

Date: Wed, 14 Mar 2012 16:52:47 -0700 (GMT-07:00)  
From: "ndewar@ppcollab.com" <ndewar@igc.org>  
Reply-To: "ndewar@ppcollab.com" <ndewar@ppcollab.com>

I oppose AB 2025. I have practiced as a mediator since the mid-1980s and participated in the drafting of Sect. 1120. AB 2025 seems to be trying to solve an almost non-existent problem: how much malpractice really occurs in mediation? This proposal would attempt to provide protection in very rare circumstances while making it difficult or impossible for the attorneys of a mediation participant to conduct the sort of frank exchanges with their clients that are vital if their clients are to take full advantage of the opportunities offered by mediation.

I agree with the arguments laid out in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Please do your best to put an end to this perverse proposal.

\*\*\*\*\*

Date: Wed, 14 Mar 2012 16:56:59 -0700 (PDT)  
From: Pat Patterson <n8zd@yahoo.com>

I sent this message to Allyson Huber:

AB 2025 - Oppose. I am a mediator in Alameda and Contra Costa Counties. Allowing clients to sue their lawyers for advising them to settle a legal dispute in mediation undermines the purpose of

mediation...to have frank open discussions of the issues without creating additional "evidence" for either side to use against the other...

This is poorly conceived and should not pass,

Respectively,  
Ron Patterson

\*\*\*\*\*

From: Dudley Braun <dudley\_braun@hotmail.com>

Date: Wed, 14 Mar 2012 17:03:44 -0700

Here's my text submitted to Mike Feuer and Don Wagner:

**AB 2025 Oppose**

I'm a active mediator who values the undiluted confidentiality already in the law. Confidentiality in ALL respects is essential for successful mediation environments.

Don't add any amendment to Section 1120 of the evidence code as proposed in (b)(4) about admissibility of communication -- don't add it for any reason. Mediation is confidential, period. Clients don't need "protection" from their attorneys. Especially at the cost of sabotaging important mediation conditions.

Dudley

\*\*\*\*\*

Date: Wed, 14 Mar 2012 17:10:26 -0700 (PDT)

From: Heather Volante <heathervolante@yahoo.com>

**AB 2025 - Oppose**

I am an attorney and trained mediator and I oppose AB 2025. It's distressing to learn that in settlement-worthy cases, with AB 2025 in place, I could jeopardize my practice by giving my client my best analysis and recommendations; legislation that encourages me to withhold information & refrain from authentic participation would undoubtedly cause both my client and the process to suffer as well. I also oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Please represent my voice and oppose AB 2025.

Sincerely,

Heather Volante

Heather D. Volante, Esq.

The Law & Mediation Office of Heather D. Volante  
685 McAllister Street, Suite 111  
San Francisco, California 94102

Tel: 415-563-7226

Fax: 415-563-7226 (By Appointment Only)

Email: heathervolante@yahoo.com

\*\*\*\*\*

From: Spearjack@aol.com

Date: Wed, 14 Mar 2012 20:47:07 -0400 (EDT)

I oppose AB 2025 and urge you to prevent its passage. I am a California attorney (U.C. Hastings '89) and routinely engage in mediation as counsel and periodically as a mediator. AB 2025 destroys the candor and confidentiality that makes mediation productive. If counsel cannot freely explain the process and positions to their client, then the client is deprived of competent advice and the mediator cannot freely discuss all issues that impact a party's decision. Virtually all mediators rely upon each party's counsel to advise the client of the options and consequences. Inherently valuable in any settlement is the advantage of closure. The risk of trial is eliminated and the certainty of cost or recovery is obtained. If each lawyer must look to their own future protection during that process - and each client to his own attorney as a secondary source of funds, then the process is tainted and every piece of counsel's advice is suspect. The non mediation records of the lawyer's conduct are sufficient to protect a client and to enforce the ethical obligations of counsel.

I and many others begin a mediation session assuring everyone that everything said is completely confidential. If AB2025 becomes law, then I will need to warn everyone that what they say to their lawyer and what their lawyer says to them may not be confidential even if it inferentially reveals what another participant said or offered. If, for example, defendant offers \$1,000 and the plaintiff later sues their lawyer for malpractice for recommending either acceptance or rejection, it is inconceivable that in the malpractice action the defendant's offer is not published in open court and/or to the Bar at a hearing. Once defendant's learn that any offer can be made public,

mediation will cease to be the effective tool it is today.

Respectfully,  
Jack Eskridge, Esq.

\*\*\*\*\*

Date: Wed, 14 Mar 2012 20:48:34 -0400  
From: "Jason C. Meek" <jason@idealcounsel.com>

AB 2025 Oppose

Dear Sir -

I am a California lawyer, mediator and adjunct law professor teaching negotiation and conflict resolution at UC Berkeley and UC Hastings. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Very truly yours,  
Jason Meek

\*\*\*\*\*

From: Elaine Leitner <eleit@aol.com>  
Date: Wed, 14 Mar 2012 17:55:09 -0700

AB 2025 -oppose

As a mediator of 20 years I oppose this bill which will chill effective mediation for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file

\*\*\*\*\*

From: Malcolm Sher <malcolmsher@me.com>  
Date: Wed, 14 Mar 2012 18:02:03 -0700

*I strongly oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Lawyers will shy away from recommending mediation and court calendars will remain clogged. Confidentiality of the mediative process is critical to its continued success as a form of dispute resolution. AB 2025 will be a disservice to clients, the legal profession and the courts.*

\*\*\*\*\*

From: TERRY NORBURY <terrynorbury@mac.com>  
Date: Wed, 14 Mar 2012 18:03:00 -0700

I sent the following to each member of the committee today between 5:30 and 6:05.

**AB 2025 - Oppose**

I am a mediator and a Lawyer. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

Terry Norbury  
415 661 3228

\*\*\*\*\*

From: "Chuk Campos" <chuk@clearinterests.com>

Subject: AB2025

Date: Wed, 14 Mar 2012 18:21:13 -0700

re: AB 2025 - oppose

Dear Sir:

As a practicing mediator I am opposed to the changes AB2025 specifies.

Mediation is an opportunity for opposing parties to work out their differences in an environment where they still have a choice. While certainly not as drastic (I say this only to underscore the point), the passage of this bill would be similar to doing away with attorney/client privilege - it would be the same as allowing a party to file a malpractice suit against their attorney as a result of private discussion they don't like hearing.

Mediation is designed to peacefully address the huge number of lawsuits facing the court system. This bill has the potential to needlessly eliminate mediation as an option for many cases that would best be served by mediation. Moreover, it could have the effect of potentially adding more lawsuits as a result of parties filing suit when they have second thoughts over the outcome of a mediation.

What goes on in mediation should not only be viewed as "off the record" but also a privileged exchange among the parties on neutral ground.

Respectfully,

**Chuk Campos  
Mediator**

\*\*\*\*\*

**From: "Ginny Morrison" <gmorrison@collaboration-specialists.com>  
Date: Wed, 14 Mar 2012 19:49:09 -0700**

**"As a mediator and lawyer interested in the effective resolution of conflicts and the even-handed treatment of all mediation participants, I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file."**

***Ginny Morrison***

**Collaboration Specialists**

**39 Allyn Ave.**

**San Anselmo, CA 94960**

**+1 415-524-8203 / +1 415-449-6377 (FAX)**

**skype: newginny**

**www.Collaboration-Specialists.com**

***We must come to see that the end we seek is a society at peace with itself,***

***a society that can live with its conscience.***

**- Martin Luther King, Jr.**

\*\*\*\*

**From: "Joanne Sferrati" <jsf@vom.com>  
Subject: AB 2025 - Oppose"  
Date: Wed, 14 Mar 2012 21:02:29 -0700**

**"I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file."**

**\*\* If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality.\*\***

\*\*\*\*\*

**From: Harriet Whitman Lee <hwlee@igc.org>  
Date: Wed, 14 Mar 2012 21:11:17 -0700**

**To the Honorable Chairman Feuer**

**Assembly Judiciary Committee**

**I urge a no vote on AB 2025. It threatens existing legal protections for mediation communications.**

**As an attorney mediator I know how essential it is for the parties and their attorneys to be able to talk frankly and off the record. Frequently a voluntary settlement is not possible when they do not have that kind of discussion and advice.**

**\*\*\*\*\***

**Date: Wed, 14 Mar 2012 23:15:43 -0700 (PDT)  
From: Sher King <shersking@yahoo.com>**

**Oppose AB 2025 - Oppose**

**Please consider the definition of confidential- allowing clients to selectively remove pieces of the confidential mediation process to file claims against attorneys, attempting to negotiate settlements in good faith, will erode the civil justice system.**

**Allowing citizens avenues of settlement beyond litigation is paramount to relieving the over crowded courts. Self determination is critical to consummate resolution.**

**Why take away a viable, working and cost-effective option for the people?**

**Please consider the atmosphere you will be helping create : not a collaborative one, but a treacherous bastion of gaming deceit.**

**Your legacy~**

**\*\*\*\*\***

**From: "Jan Hayashi" <jan.hayashi@comcast.net>**

**Date: Wed, 14 Mar 2012 23:35:01 -0700**

**Sent my comment below to Senator Mark DeSaulnier.**

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**AB 2025 - Oppose (comment sent 3/14/2012 at 11:32pm)**

**Please forward these comments to both Mike Feuer, Chair and Vice Chair, Donald Wagner. Unfortunately, I am not allowed to submit comments directly to these committee members and must go to my Senator, based on my home address.**

I am in HR Management in the private sector. I very much oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Mediation works because all parties can talk frankly and honestly and off the record. AB 2025 would be 10 steps backwards.

Sincerely,  
Jan Hayashi  
HR Consultant, VirtuOz  
HR Manager, McMorgan & Company

\*\*\*\*\*

Date: Thu, 15 Mar 2012 09:50:50 -0400  
From: Sigal Shoham <sigalshoham@gmail.com>

I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file.

As the California Supreme Court found in its recent unanimous Cassel decision upholding our current laws:

...the Legislature might reasonably believe that protecting attorney-client conversations in this context facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant's counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either. The Legislature also could rationally decide that it would not be fair to allow a client to support a malpractice claim with excerpts from private discussions with counsel concerning the mediation, while barring the attorneys from placing such discussions in context by citing communications within the mediation proceedings themselves.

I am a mediator and would like to see the laws upholding total confidentiality continued because it is essential to the work of alternative dispute resolution.

Thank you, Sigal Shoham

\*\*\*\*\*

From: <kbiala@milestonemma.net>

**AB 2025- OPPOSE**

**As per Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file, I am very much opposed to any effort to lessen the statutory protections of mediation. I am an Ombudsman and we also use informal mediation as part of our practice. Please do not lessen the benefits of the only real non-adversarial and confidential means by which people can resolve their conflicts. Please oppose AB 2025.**

**Hope my email helps.**

**Thanks,  
Kathy Biala  
\*\*\*\*\***

**From: "Madelyn Heikka" <shipmanheikka@gmail.com>  
Subject: Comments Faxed to the Committee  
Date: Thu, 15 Mar 2012 09:03:02 -0700**

**Comments on AB 2025**

**Please accept this as opposition to the proposed amendment contained in AB 2025. I am a mediator/lawyer, a Settlement Judge for the Nevada Supreme Court and member/legislative committee of the Nevada Dispute Resolution Coalition. For reasons stated by both Mr. Kelly and the Cassel court, one-sided admissibility will negatively affect lawyer-client interaction in a mediation - - and, therefore, the outcome of a mediation. Confidentiality is the key to success in a mediation. AB 2025's amendment goes either too far or not far enough - I believe too far. Either all communications should be admissible in the described situations - including those of the mediator - or none should be admissible. The former would place mediators in an untenable situation - as all mediated results are contextual. Statements and actions can easily take on different meaning outside of the mediation.**

**Madelyn Shipman**

**\*\*\*\*\***

**From: ELeit@aol.com  
Date: Thu, 15 Mar 2012 12:22:53 -0400 (EDT)**

Just sent on my letterhead by fax:

March 15, 2012

To the Assembly Judiciary Committee

AB2025 - OPPOSE

Dear Committee Members:

As a mediator for over 20 years, I want to express my opposition to AB2025 which will no doubt have a severe chilling effect on mediation as a process to resolve disputes. To work, mediation must be a confidential process, with only exceptions where danger to others exists. I adopt the comments from the letter of Ron Kelly to the Assembly Judiciary Committee, of March 13, 2012 on file.

Thank you,

Sincerely,  
R. Elaine Leitner

\*\*\*\*\*

Date: Thu, 15 Mar 2012 10:44:31 -0700  
Subject: Re: AB 2025 - Oppose  
From: Catherine Cary <cathcary@gmail.com>

Dear Assemblymember Feuer - I am a non-attorney mediator based in San Francisco writing to express my opposition to AB 2025.

I agree with the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file, and as expressed to the Judiciary Committee by the California Dispute Resolution Council.

Confidentiality in mediation is a cornerstone of the process and it is imperative that it not be threatened or eroded by exceptions that are broadly defined and subject to varying interpretation. I do not believe the proposed revisions to the Evidence Code are the correct solution for the perceived problem.

Respectfully yours - Catherine McCracken

\*\*\*\*\*

**From:** <kay.henden@henden.com>

**Date:** Fri, 16 Mar 2012 09:51:01 -0700

**Sent an email to Mike Eng, who is Assemblyman for my district, as follows:**

**AB 2025 - Oppose**

**I am opposed to AB2025, now in the Judiciary Committee, on the grounds that it would severely impair the mediation process, one of the most valuable tools in the efficient and fair resolution of legal disputes.**

**I have tried to email my opposition to Mike Feuer - Chair, and Donald P. Wagner - Vice Chair; however, your email system will not permit correspondence with them unless the author of the email is in their district.**

**As I am in your district, I ask that you forward my opposition to the bill on to the individuals named, and add your own opposition as well. The proposed legislation is detrimental to dispute resolution and should not be passed.**

**Thank you.**

**Kay Henden**

**\*\*\*\*\***

**From:** "Claudine Feibusch" <cdine@pacbell.net>

**To:** <ronkelly@ronkelly.com>

**Subject:** Tried to send, says I'm not in the right district

**AB 2025 - Oppose**

**As a trainer mediator myself, I am opposed to this bill. I oppose AB 2025 for the reasons stated in Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file. Ron has worked tirelessly to support quality mediation in CA.**

**Claudine & David Feibusch**

**241 Colusa Ave.**

**El Cerrito, CA 94530**

**<mailto:cdine@pacbell.net>cdine@pacbell.net**

\*\*\*\*\*

5588 N. Palm Ave. Suite 105  
Fresno, CA 93704  
March 15, 2012

Mr. Mike Feuer- Chair  
CA State Assembly  
Committee on Judiciary  
P.O. Box 942849, Room 2013  
Sacramento, CA 94249-0042

RE: AB 2025- OPPOSE

Dear Mr. Feuer:

As per Ron Kelly's March 13, 2012 letter to the Assembly Judiciary Committee on file, I am very much opposed to any effort to compromise the statutory protections of mediation. I am an Ombudsman and we also use informal mediation as part of our practice. Please do not lessen the benefits of the only real non-adversarial and confidential means by which people can resolve their conflicts. Please oppose AB 2025.

Thanks,  
Kathy Biala

\*\*\*\*\*

From: "Paul S. Silver" <paulsilverlaw@sonic.net>  
Subject: Opposition to mediation confidentiality  
Date: Sat, 17 Mar 2012 10:01:23 -0700

This is in opposition to AB 2025. As an attorney who has represented numerous parties in mediation, as well as a acting as mediator for other parties, I oppose any modification of the existing mediation confidentiality provision as proposed by AB 2025. Mediator Ron Kelly, who helped establish mediation confidentiality, said it best: "AB 2025 would set up a miserable situation in any later malpractice claim. A trial judge or State Bar tribunal would have to either conduct a completely unfair process, or find a way to ignore our current confidentiality protections. Either way is wrong. A judge might decide that to run a fair hearing he or she had to admit into evidence all communications between lawyer and client discussing what they

heard from the mediator or other participants. If you let in only selective mediation communications, it's completely unfair to the accused. If you let them all in, there's no more confidentiality." The current mediation confidentiality provision has been vetted repeatedly by the Supreme Court which has staunchly opposed modifications because, on balance, they will cause more mischief than facilitate the process. It may seem a simple thing to allow lawyers to be sued for legal malpractice or breach of fiduciary duty but it's not because it eliminates the one thing which distinguishes mediation from every other judicial proceedings: mediation allows for complete candor. In mediation an attorney can tell a difficult client what they need to hear and may not want to hear, and can do it in a way the facilitates resolution. If attorneys have to be on their guard and can't be candid with their clients for fear of repercussions then the entire process becomes unbalanced.

**Paul S. Silver**

**PAUL S. SILVER, A Professional Corporation**

**815 Fifth Street, Suite 200**

**Santa Rosa, California 95404**

**Writer's Direct Phone: (707) 823-1944**

**Writer's Direct Fax: 1-877-829-4305**