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February 15, 2023

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Hon. Thomas J. Umberg
California State Senate
1021 O Street
Suite 6530
Sacramento, CA 95814-4900

Re: SB 42

Dear Senator Umberg:

On behalf of the California Dispute Resolution Council (CDRC), I request that you consider an amendment of SB 42 so that it contains an exception for mediation confidentiality.

The CDRC was organized in 1994 to advocate for fair, accessible, and effective alternate dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

SB 42 currently contains two exceptions, to wit, information otherwise protected by the attorney client privilege and information gained by a licensee while participating in the Attorney Diversion and Assistance Program. By specifically including two exceptions, it would appear that no other exception was considered by the Legislature. Hence, the bill would supersede the doctrine of mediation confidentiality set forth in Evidence Code Sections 1115 et. seq.

CDRC believes that mediation confidentiality should be an exception to the reporting requirement set forth in SB 42. The ability of parties in a mediation to speak to each other and to the mediator candidly is the key to a successful mediation. The

CDRC Administration

775 East Blithedale Ave., Box 120, Mill Valley, CA 94941
T: 415-322-8960, E: caldrc1992@gmail.com www.cdrc.net



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absence of mediation confidentiality will substantially reduce California mediations and many of the lawsuits which otherwise would have been resolved in a mediation could very well be added to the court docket. Please bear in mind that the doctrine of confidentiality does not apply to any information that was known before the mediation commenced. A party thus cannot convert non-confidential information to confidential information through the device of discussing it during the mediation.

SB 42 affects mediation confidentiality because the doctrine of confidentiality applies to the mediator, as well as the parties.

We therefore suggest that the proposed second paragraph of the bill read as follows:

“(b) This section does not require disclosure of information otherwise protected by the attorney-client privilege, *information subject to mediation confidentiality*, or information gained by a licensee while participating in the Attorney Diversion and Assistance Program”. (Italics for illustration only).

Thank you for your consideration.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Richard Flier", is positioned above the printed name.

Hon. Richard Flier

President