

Executive Director, Conference of California Bar Associations  
c/o Kronick, Moskovitz, Tiedemann & Girard  
400 Capitol Mall, 27th Floor  
Sacramento, California 95814

Attention: Resolutions Committee

Re: Resolution 05-01-2012

I write to express the opposition of the Southern California Mediation Association (SCMA) to Resolution 05-01-2012.

The issue of mediator regulation has been of intense interest to mediators across the country for years, and much has been written on the topic. While mediators certainly do not all agree on how - or even whether - mediators should be certified and/or regulated, they virtually all understand the complexity of the issue. Resolution 05-01-2012 ("the Resolution"), which will be before the Conference of California Bar Associations in October, does not even begin to appreciate that complexity and instead proposes the most simplistic, uninformed possible structure. Here are just a few of the things that are wrong with it:

The Resolution (by adding Business and Professions Code Section 6241) defines a mediator as "a neutral third-party who *for compensation* conducts a mediation." (Emphasis added.) This is of course nonsense. The Resolution itself defines "mediation" as "a process in which a neutral third party or parties facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." What then would we call a person who conducts this process without compensation? Besides being internally inconsistent, the Resolution appears to ignore or dismiss the thousands of lawsuits that are settled and neighborhood disputes that are resolved without compensation of the mediator. Mediators should of course be paid for their work; but if regulation is important, why exclude from it mediators who are not paid, or - even worse - classify them out of the field entirely?

The Resolution proposes that the standards of conduct, minimum qualifications for mediators, and procedures for enforcing the standards of conduct would be up to the Judicial Council. The State Bar would be responsible for certification, registration, and discipline of mediators and be directed to "use the same procedures in adjudicating the fitness of a mediator to mediate as it does in adjudicating the fitness of an attorney to practice law." What is proposed by the Resolution is regulation of mediators not by the private sector but by the *state*, specifically by the *State Bar*. Nothing qualifies either the Judicial Council or the State Bar - any more than, say, the California Medical Association - to regulate mediators. While many litigated cases go to mediation, many non-litigated disputes do, too. And while many mediators are lawyers, many are not. There are many arguments to be made against state regulation of mediators in general, but regulation by the *State Bar* is possibly the worst conceivable idea; it would most likely target non-lawyers and be biased in favor of lawyers, and would do nothing to ensure mediator competence.

The Resolution (by adding Business and Professions Code Section 6240) declares that the practice of mediation must be regulated because "mediation has become an increasingly cost-effective and popular means of resolving disputes." We do not see the connection here. It may

well be that regulation is a good idea, but it certainly is not required because of mediation's popularity and cost-effectiveness. And who, for that matter, is complaining about, or claiming to be harmed by, the lack of regulation such that the proponent of the Resolution felt compelled to act?

Some form of certification and/or regulation of mediators may ultimately be a good thing. But such a system would have to take into account, at a minimum:

1. The fact that people come to the field of mediation from many diverse backgrounds, including psychology, social work, and law;
2. The fact that mediators by training, temperament, and circumstance use many styles - or combinations of styles - of mediation, and any fitness criteria would thus have to allow for those different styles.

Mediation is far too nuanced a profession to be regulated in the model of state regulation of attorneys. To gain an illustration of the complexity of mediator regulation, see the Model Standards for Mediator Certification Programs adopted by the Association for Conflict Resolution in 2011 at <http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsCertification.pdf>. (We do not argue that California adopt these Model Standards but simply refer to them as illustrative of the complexity of the issue.) Regulation, if it is to be done, must be done by those steeped in the theory and practice of this field - by the mediators themselves.

We respectfully urge the Resolutions Committee to disapprove this Resolution.

Sincerely,

Barbara Brown  
President  
Southern California Mediation Association

