



Duncan Crabtree-Ireland  
Jennifer Kim  
Conference of California Bar Associations  
340 S. Lemon St., #1282  
Walnut, CA 91789

re: Resolution 09-03-2015 to the Conference of California Bar Associations

Dear Conference Chairs:

The Southern California Mediation Association, the leading organization in Southern California supporting the practice of mediation, opposes amending California Evidence Code 1120 to allow discovery and the admissibility of evidence, in family law actions, of breaches of fiduciary duty amounting to oppression, fraud or malice.

While family law mediators share the goal of preventing abuse in the resolution of family law actions, existing remedies provide adequate protection. Creating a new exception to mediation confidentiality would not only threaten the continued viability of mediation proceedings that have proven so useful to resolving many thousands of family law disputes, but would also create new opportunities for costly and destructive litigation.

The courts in California have repeatedly upheld the strong protections for mediation confidentiality contained in Evidence Code §1119. *See, e.g., Rojas v. Superior Court for the State of California*, 33 Cal. 4th 407 (2004); *Simmons v. Ghaderi*, 44 Cal.4th 570 (Cal. 2008); *Cassel vs. Superior Court*, 51 Cal.4th 113 (2011). The courts recognize that confidentiality is fundamental to mediation, and that carving out exceptions to confidentiality would undermine the practice and provide opportunities for parties to create new controversies, precisely the result that parties seek to avoid when they choose mediation.

No compelling need has been shown to carve out the proposed exception for family law mediation. The disclosure obligations of the Family Law Code § 2104, et seq. already provide strong protections from the conduct described in the proposed resolution. If a party has been guilty of this kind of abusive conduct in a divorce mediation, their fraud will generally be evident in their financial disclosures (or lack thereof). Existing remedies for such fraudulent conduct include setting aside the judgment, and monetary sanctions against attorneys and parties.

Moreover, these financial disclosures are already discoverable and admissible under existing law even if they were prepared in the course of mediation proceedings. The recent case *Lappe vs. Superior Court*, 232 Cal.App.4th 774, 784 (2d Dist. 2014) expressly held that “Evidence Code section 1119 does not apply to disclosures made pursuant to and for the purpose of complying with the Family Code’s statutory mandate.”

In addition to these protections, family law mediators and/or attorneys representing clients in mediation are on the frontlines to defend against this sort of conduct. Mediators and legal professionals are trained to be able to see the “red flags” of fraud and take steps to end the mediation or otherwise expose fraudulent conduct before an unfair and fraudulent agreement is completed.

SCMA therefore supports the current statutory scheme and strongly opposes the limitations on family mediators and attorneys representing clients in mediation contained in Resolution 09-03-2015.

We respectfully request the Committee on Resolutions recommend disapproval.

Very truly yours,

Joseph C. Markowitz, immediate past president  
Terri Breer  
Wendy Forrester