

**ABA Section of Dispute Resolution
Committee on Mediator Ethical Guidance
3.20.17**

Inquiry:

As mediators, we promote our services to attorneys we know and who we have worked with before. If an attorney a mediator knows, either a personal friend or professional colleague, contacts the mediator about mediating a matter, or refers a matter for mediation, what if anything must the mediator disclose to the other party or parties? If disclosure is required, what is an appropriate disclosure that meets all ethical requirements? Is there anything that will definitely result in a mediator being disqualified? In order to assist the committee here are two scenarios:

a. Mediator worked with Attorney at a firm but left that firm ten years ago to work for another firm. Mediator and Attorney are personal friends and they socialize at each other's homes with their spouses at least once per quarter. Attorney is still with the firm. Mediator has been practicing at another firm for the past ten years and has just started mediating. Mediator gets a telephone call from Counsel who tells Mediator that Attorney has proposed using Mediator to mediate a particular case the Attorney and/or her firm are involved in, and Counsel wants to interview Mediator. Mediator answers Counsel's questions about her experience and training as a mediator and her subject matter expertise. What, if anything, should Mediator disclose to Counsel regarding Mediator's personal friendship and/or prior working relationship with Attorney?

b. Mediator has been hired by Attorney as co-counsel on cases. The last such case concluded three years ago. Mediator and Attorney keep in touch and get together for lunch or dinner at a restaurant once per quarter. Mediator gets a telephone call from Counsel who tells Mediator that Attorney has proposed using Mediator to mediate a particular case the Attorney and/or her firm are involved in and Counsel wants to interview Mediator. Mediator answers Counsel's questions about her experience and training as a mediator and her subject matter expertise. What, if anything, should Mediator disclose to Counsel regarding Mediator's professional relationship with Attorney?

Authority Referenced: Model Standards of Conduct for Mediators Standard II and III (2005).

Summary: The mediator should disclose to prospective participants of a mediation any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. Standard III. A. A past professional relationship and a present friendship both could raise such a question. The mediator should disclose these relationships and invite the participants to inquire further. After this disclosure and if the participants consent, she/he may serve as the mediator.

OPINION

Standard III. Conflicts of Interest states:

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. * * *

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

This Standard recognizes that "a conflict of interest can arise from multiple sources in multiple time dimensions. A mediator must canvass this extensive range of possible disqualifying activities, attuned to the notion that his or her immediate duty is to disclose information that might create a possible conflict of interest." Reporter's Notes, September 9, 2005, p. 13.

The present inquiry raises the issue of "the relationship between a mediator and any mediation participant, whether past or present, personal or professional." Both illustrations involve a past professional relationship and a present personal relationship. In the first scenario, the referring attorney and prospective mediator previously worked at the same law firm and have remained social friends. In the second scenario, the referring attorney and prospective mediator served as co-counsel in a past case and continued to socialize from time to time. These apparently positive relationships could reasonably raise a question of the mediator's impartiality. "Impartiality," is defined as "freedom from favoritism, bias or prejudice." Standard II. A.

Therefore, the mediator should disclose these relationships to all participants in the mediation. After this disclosure and if all participants consent, the mediator may proceed with the mediation.

The Standards do not expressly prescribe what degree of disclosure is necessary. The extent of disclosure must be sufficient to help the participants reasonably understand the nature of the relationship. Thus, the better approach is to describe in detail the relationship (*e.g.*, they socialize at each other's homes with their spouses at least once per quarter), which should foster greater transparency about the relationship and confidence in the disclosure.¹ The mediator should be willing to respond to inquiries about these relationships from the prospective participants.

The mediator should then affirm that the relationship would not affect his/her neutrality and impartiality as a mediator and would not adversely affect his/her ability to serve as an impartial

¹ The Committee believes that the detailed disclosures set forth in the Inquiry's two scenarios (A & B) are sufficient.

mediator. The mediator should memorialize the disclosures and the consent of the participants, either in the agreement to mediate or in a letter or email to the participants

The present inquiry also asks whether there are any conflicts that would definitely require disqualification. Standard III. E. states:

If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

The Model Standards do not provide specific illustrations of non-waivable conflicts. Where the mediator is *both* involved “with the subject matter of the dispute” *and* has a relationship with one of the mediation participants, he/she should be acutely sensitive to the potential for undermining the integrity of the process. The most obvious examples are where the mediator is currently representing one of the participants *in the dispute*, or where mediator has, in the past, advised or counseled one of the participants *regarding the dispute being mediated*. Some state and local standards have prohibited the mediator from serving due to such a conflict.²

Of course, the mediator may also conclude that the relationship is such that he/she cannot handle the matter impartially or that, notwithstanding his/her subjective beliefs, service as a mediator would give “the appearance of partiality.”³ In these instances, the mediator should not serve.

² See, e.g., North Carolina Revised Standards of Conduct for Mediators VII.C (2014), which states:

“A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an outgrowth of the dispute.”

³ Standard II. B. states “A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”