You are mediating a case between a divorcing husband and wife. The wife, Nancy, resides in Springfield, and the husband, Carl, now resides in York, a city within the same state, but over 400 miles away. Nancy filed the no-fault divorce action against Carl approximately nine months ago. The case was referred to mediation by the court when the parties could not agree to issues relating either to the division of marital assets or to the division of parenting time. You have conducted all requisite screening for this case, and you have found no reason not to mediate this case.

In your pre-mediation discussions with the parties, you have learned quite a bit about Nancy and Carl and their current situation. Nancy and Carl have two children, ages 12 (PJ) and 9 (RC). Currently, both of the children live in Springfield with Nancy. Nancy works full-time, day shift, as a nurse practitioner in the local Springfield hospital. She can see the kids off to school and then PJ watches RC until Nancy gets home from work. Carl is a moderately successful novelist who has the freedom to work wherever he likes and lived in Springfield with Nancy and the kids until about three months ago, when he moved to York to be closer to his mother and his new girlfriend, Lisa.

Nancy’s and Carl’s relationship greatly deteriorated after Carl moved. Nancy is very suspicious of Lisa and believes that Carl began seeing her before Nancy filed for divorce. Carl claims that they only started dating recently and that his mother’s failing health is the primary reason for the move. Nancy is adamant that Lisa not be able to spend any time near “her” children. Nancy now “requires” that for Carl to see the children, he must travel to Springfield and stay in Springfield for his visits. Carl does not have housing in Springfield and claims he cannot afford to stay in hotel rooms for his visitations. Accordingly, Carl stopped visiting his children and he refuses to pay child support on the basis that Nancy is “keeping his kids away from him.”

Given the great distance between the two parties, you have agreed to conduct this mediation partly online. You reside in Springfield, and you invited Nancy to the mediation in your office. Carl will participate via videoconference (such as Skype). Carl is concerned that you will show favoritism towards Nancy, who is physically in your office. Nancy is concerned that Carl will invite his mother (or worse, Lisa) to observe the mediation “off camera” in violation of their agreement to mediate privately. As you consider how to respond to Nancy and Carl, what ethical concerns do you have as a mediator?

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Congratulations to the 2012 Cyberweek Ethical Dilemma Contest Winners, Stephanie Kozikowski and Jung Eun Choi in the international category!

Winning Response by Stephanie Kozikowski
The first job of the mediator is to make sure that both sides understand the process. The mediator should begin by describing what mediation is and how this particular mediation will be conducted. This will promote Model Standards of Conduct for Mediators (MSC) I: Self-Determination, as the parties can better make “voluntary, uncoerced” decisions if they know what is supposed to happen. The mediator should also provide both parties with “complete information about mediation fees” in writing according to MSC VIII(A). Carl cares deeply about seeing his children, yet has expressed difficulty paying hotel expenses, so he might not have the financial resources to pursue mediation. Moreover, since the court referred the case to mediation he might not realize he has to pay more fees, especially since his lawyer is not involved.

Once mediation begins, the biggest issue for Carl is MSC II: Impartiality, particularly part B stating that a mediator must “avoid conduct that gives the appearance of partiality.” Carl has already expressed concern that the mediator will show favoritism towards Nancy because she will be physically present. The mediator should consider if other mediation options exist to maintain impartiality and the appearance of impartiality, including: having the mediation take place at a time when Carl can be in Springfield and present; having the mediation take place at a town halfway between York and Springfield where both can be present; or even having Nancy and the mediator and Carl all Skype into the mediation. If the mediator cannot find a way to address Carl’s feelings, she should seriously consider withdrawing per MSC II(C). If the mediation does continue as planned, the mediator should be aware that she will have a harder time figuring out Carl’s body language, and that nuance in tone and expression might be lost on a small screen or with a bad internet connection. Online mediation will also produce some problems with MSC IV: Competence, since it will be harder for the mediator to express “serious demeanor, professional presentation, occasional humor, and just plain charisma.” (quoting Joseph W. Goodman, The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites, 2 Duke L. & Tech. Rev. 1, 11 (2003)).

Nancy’s biggest concern is confidentiality(MSC V), since she does not want Carl’s mother or girlfriend listening in off camera. The mediator should promote “understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation” according to MSC V(C). The mediator should also check throughout mediation that the Quality of Process, MSC VI, has not been compromised. MSC VI(A)(4) states the mediator should promote candor, which would help fulfill MSC VI(A)(3): having both parties agree on who should be present at the mediation. The mediator should also discuss a system for caucuses, since Carl may have similar confidentiality concerns that Nancy is off-camera when he is speaking privately to the mediator. To further promote confidentiality, the mediator needs to have Process Competence in accordance with MSC IV, which in this case may mean understanding the Skype program well enough so that she does not have issues with muting or video connection that allow Carl to unwittingly hear into her caucuses with Nancy.

By conducting mediation using Online Dispute Resolution practices, the mediator is fulfilling the standard of Advancement of Mediation Practice by “striving to make mediation accessible” as per MSC IX(A)(2). Without ODR, Carl might have been unable to participate in any mediation at all since he lives hundreds of miles away.
The mediator should also consider that this dispute resolution may have long-term effects as Carl and Nancy have children together and will thus have to continue their relationship once mediation ends. Although the mediator is working with the parents, she should frame issues concerning the children in terms of the children’s best interests. This focus will help the mediator maintain neutrality.

Winning response by Jung Eun Choi

Carl’s concern about favoritism and Nancy’s concern for confidentiality apparently originate from a procedural circumstance where one party will be physically present with the mediator at her office during the mediation while the other party will be participating via Skype. The mediator, however, should be aware and keep in mind throughout the mediation that the root of the parties’ concerns is their lost trust in each other. Without trust, an efficient mediation cannot be achieved. Thus, one of the most crucial tasks for the mediator is to facilitate an environment where the parties can restore their lost personal trust. Keeping this in mind, the mediator shall promote 1) the competence of the mediator, 2) self-determination of the parties, 3) the impartiality of the mediator, 4) protection of confidentiality, and 5) the quality of the process.

Pursuant to the Model Standard of Conduct (“Standard”) IV.A, the mediator must ensure her competence and qualification in conducting this Online Dispute Resolution (“ODR”) via videoconference. Since the subject matter deals with a sensitive family issue and the process involves technology, she should prepare or request appropriate assistance from other professionals to aid her preparation to competently mediate the matter. The mediator’s technological savvy—or her savvy to request appropriate assistance in this regard—is especially important because in this ODR, even a trivial technological mistake (e.g., failure to mute) could taint the whole mediation process.

The mediator, under Standard I.A, shall discuss the process of mediation with the parties and ensure that the parties make free and informed choices about the process and outcome. Because Carl and Nancy have concerns about the venue of the mediation, the mediator must confirm that their choices for the process are based on their voluntary and informed decision. To ensure this, she should educate the parties about the alternative or accommodated processes other than videoconference and the importance of consulting other professionals such as family law attorneys.

The mediator shall conduct a mediation in an impartial manner as Standard II requires. This issue of impartiality goes back to the question of the mediator’s competence. She should question herself to confirm that she could maintain her neutrality to the parties in a case where her physical proximity to each differs. Once she is certain of her ability to be impartial, she should also help the parties to be confident in her and the mediation process and that they will be able to resolve their disputes in a neutral and trustworthy manner.

To relieve Carl’s concern about the mediator’s favoritism towards Nancy, the mediator should assure him of her neutrality. For instance, she could educate the parties that the standards of conduct to follow as a professional mediator require her neutrality. She could also devise
procedural ways, such as keeping minutes of proceedings of each caucus meeting, which would only include non-confidential information with parties’ consent pursuant to the Standard V.B, so that each party can keep track of the other party’s interaction with the mediator. Additionally, as the Standard IV provides, the mediator must avoid any conflict of interest or relationship with either party, Nancy in particular in this case. These potential scenarios could harm her role as a mediator and the integrity of the mediation. Due to the different location of the parties, it is crucial that the mediator must earn Carl’s trust and assure him of the fairness of the process.

Nancy’s lack of trust in Carl and the personal nature of the mediation contribute to her concern for his potential violation of confidentiality. Thus, it is the mediator’s role and responsibility to promote the quality of the mediation process by encouraging honesty and candor between the parties according to the Standard VI.A(4). The mediator should make sure that each party, especially Carl, understands the confidentiality agreement they have agreed upon and what would constitute a violation of their agreement. She should also emphasize the importance of observing the terms of their agreement in order to reach a satisfying mediation result for the parties and their children.

Without confusing her role as a mediator—not as a family attorney, psychotherapist, or judge—as Standard VI.A(5) provides, the mediator should help Carl and Nancy better understand what is at the core of their issues, what the other side’s understanding is, and what they really want to gain from this mediation. These ethical concerns would be better solved when the mediator takes every approach bearing in mind that the parties’ issues are intertwined with emotions and lost trust.