

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

**Inquiry: Is it appropriate for a mediator to advertise that he mediated “the largest settlement in the history of [the] county”?**

Authority Referenced: Model Standards of Conduct for Mediators, Standards II, V and VII (2005).

Summary: No, such an advertisement creates an appearance of partiality in favor of a plaintiff in future mediations. In addition, the advertisement may violate the mediator’s obligation to maintain confidentiality of all information obtained by the mediator in the mediation.

Opinion:

Standard II (Impartiality) of the Model Standard of Conduct for Mediators prescribes that:

- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

Section A of Standard II defines impartiality as “freedom from favoritism, bias or prejudice.”

Standard VII of the Model Standards provides further guidance with respect to advertising and solicitation. Standard VII (A) (1) states:

A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer based communications.

The advertisement describing the “largest settlement” in the county does not contain any express promises and therefore would not violate Standard VII (A) (1).

Nonetheless, Section VII (B) provides that:

A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

An advertisement about the largest settlement in the county may be calculated to convey that the mediator is a competent practitioner, capable of handling significant litigation. An advertisement simply touting the capability of the mediator to handle large, complex or sophisticated litigation would not necessarily raise issues of partiality. Here, however, the advertisement emphasizes only one aspect of the mediator’s competence – the scale of the outcome.

By highlighting that the mediator presided over the “largest settlement,” it is apparent that the advertisement seeks to attract parties seeking to obtain a sizeable settlement, i.e., plaintiffs

and their counsel. The ad conveys the image of a mediator who is sympathetic to the plaintiff side. It would create, at the least, the appearance of partiality for one party. Indeed, the advertisement may signal that the mediator is more interested in the size of the outcome than in the integrity of an impartial process offered to both parties. The Committee concludes that the advertisement in question violates Standard VII (B).

Mentioning the size of the previous settlement also implicates questions of confidentiality. Unless there is a non-disclosure covenant in the settlement or a statutory prohibition, the parties and their counsel are free to publicize outcomes of mediations. However, a central aspect of mediation is that the mediator himself will refrain from disclosing what happened in the mediation process.

Standard V (A) of the Model Standards of Conduct for Mediators states:

A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.

If the parties have not consented to the mediator advertising that he reached the “largest settlement in the history” of the county, there is also a likely violation of the mediator’s obligation to maintain confidentiality. Even when all of the parties to the mediation have consented to the disclosure, prudence would suggest the mediator should note that consent in the advertisement in order to convey to the public that the mediator is not violating any confidences.