

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

Inquiry: Must a mediator disclose to prospective parties that she has conducted a number of previous mediations for one of the parties (or its attorney)? What needs to be disclosed?

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

Summary: Generally, yes. Under Standard III of the Model Standards of Conduct, conducting a prior mediation could be regarded as a relationship that constitutes a conflict of interest or raises the appearance of such a conflict. The mediator is thus obliged to make reasonable inquiry to determine whether there has been a prior mediation involving one of the present participants. Upon such a determination, the mediator should disclose the prior mediation to the present parties but should limit his/her disclosure to the name of the person(s) with whom the mediator worked in the previous mediation. After disclosure of the previous mediation and with the consent of the parties in the present mediation, the mediator may serve in the present mediation.

Opinion: Standard III (A) of the Model Standards of Conduct for Mediators (2005) provides guidance for this inquiry:

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.

While this Standard would certainly apply to an attorney-client relationship between the attorney, serving as a mediator, and one of the participants, it is broad enough to encompass other business relationships as well, including that of the mediator and former participants.

This relationship was specifically considered by the Standard's Drafting Committee. The Reporter's Notes, at p. 13,¹ state:

Some Committee members were disturbed to hear reported that a common practice among some mediators is for the mediator not to disclose with all mediation parties and their representatives that the mediator has served previously as a mediator in situations involving some of the mediation parties or their representatives; the language of III (A) seriously questions the integrity of such a practice.

Mediators, of course, are happy to have return business. Most people who hire a mediator on repeated occasions do so because of the mediator's reputation and effectiveness rather than the mediator's inclination to favor that person.

¹A joint committee consisting of representatives from the ABA, AAA and ACR organizations drafted the revised Model Standards in 2005. There are Reporter's Notes, which provide commentary regarding the revisions. However, the Reporter's Notes "are not part of these Standards and therefore have not been specifically approved by any of the organizations." See Standards p. 1, n. 2 (2005).

On the one hand, where a substantial part of a mediator's compensated work comes from a single source, that relationship would reasonably raise a question of the mediator's impartiality. *Id.*² On the other hand, an isolated mediation in the distant past would not necessarily pose such a concern.

Nonetheless, it is the appearance (reasonably viewed) of possible partiality due to the prior relationship that triggers the application of Standard III. The Committee on Ethical Guidance concludes that the prudent course for a mediator is to recognize and disclose the relationship implicated by the prior mediation.

The Committee on Ethical Guidance also considered whether the mediator should disclose that he/she has mediated a case involving the same insurance carrier that is involved in the present case. Standard III (B) provides that:

A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

Accordingly, if the mediator knows, or after due inquiry learns, of insurance carrier(s) in the previous cases, it generally would follow that disclosure of this relationship would be appropriate.

Even if such a relationship exists, one may still serve as mediator after disclosure to, and consent by, the parties. Standard III (C) states:

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.

Given the requirements of confidentiality, the mediator should limit disclosure to the names of the person with whom the mediator had a "relationship" in the previous matter. Standard V (A) requires that "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." In addition, a "mediator should not communicate to any non-participant information about how the parties acted in the mediation." Standard V(A)(1).

If the mediator is asked by a prospective party, for example, what happened in the previous mediation or whether that case settled, the mediator should demur and refer the inquiry to the counsel (or party) in the previous mediation. The Standards of Conduct apply to the mediator but do not prevent the parties or counsel from revealing information about the previous mediations, including the performance of the mediator.

²The Reporter's Notes indicate that the Committee regarded this as "a serious potential conflict and that there would be a duty minimally to disclose that situation." Reporter's Notes at 13.

If, after disclosure, the parties to the present mediation agree, the mediator may proceed in the present case, notwithstanding the earlier relationship(s).³

³ Of course, the mediator should be sensitive to whether the undertaking the new mediation might have any implications with respect to the integrity of the *earlier* mediation with one of the same parties. Standard III (F) states:

Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.