

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

Inquiry:

**Is it appropriate for a mediator to accept a referral fee from an attorney to whom the mediator referred a party after the case involving that party was unsuccessfully mediated by the mediator?**

Authority Referenced:

Model Standards of Conduct for Mediators 2005, Standards II, III, V, VIII.

Summary:

No. A mediator should not accept a fee for referral of a matter from an attorney to whom the mediator referred a party after the case involving that party was unsuccessfully mediated by the mediator.

Opinion:

Unlike the 1994 Model Standards of Conduct for Mediators, the 2005 Model Standards of Conduct for Mediators do not directly prohibit referral fees.<sup>1</sup> However Standards II, III, V and VIII of the Model Standards of Conduct for Mediators weigh heavily against a mediator accepting such a fee.

Accepting a referral fee from an attorney to whom the mediator referred a party after a case involving that party concluded, raises potential issues of conflict of interest (Standard III), mediator impartiality (Standard II and VIII), and confidentiality (V).

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<sup>1</sup> The 1994 Model Standards of Conduct for Mediators provides the comment to Standard VIII. Fees, that: “[a] mediator should not accept a fee for referral of a matter to another mediator or to any other person.” The Revised Standards of Conduct for Mediators Joint Committee Draft January 2004 designated as for discussion only changed this comment to: “[e]xcept to cover administrative expenses and time spent, a mediator should not accept a fee for referral of a matter to another mediator or to any other person.” While the final version of the Model Standards of Conduct for Mediators September 2005 deleted reference under Standard VIII to “referral fees” altogether, the final version added VIII (B): “[a] mediator shall not charge fees in a manner that impairs a mediator’s impartiality.” The Reporter’s Notes September 9, 2005, at p. 21, state:

The Model Standards (September 2005) eliminates the proposed language of the Model Standards (January 2004) regarding excepting administrative fees from the concept of referral fees; public comment raised important questions about the meaning of “administrative expense” and the Joint Committee refocused its comments to address the mediator, not provider agencies or other program sponsors.

*Model Standard III. Conflicts of Interest* provides:

- 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 the mediator's impartiality.*

Accepting a referral fee after making a referral to a specific attorney could potentially raise the appearance of a conflict of interest after the mediation. By making the referral and accepting the fee the mediator is changing the nature of her relationship with the party she is referring which could also raise the question of the mediator's impartiality.

Both Model Standard II and VIII are also potentially implicated in this inquiry.

*Model Standard II. Impartiality* provides:

- B. *A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.*
2. *A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.*

*Model Standard VIII. Fees and Other Charges* provides:

- B. *A mediator shall not charge fees in a manner that impairs a mediator's impartiality.*

A mediator receiving monetary payment for referring a party from a mediation to an attorney could give the appearance of partiality. In the mind of the party being referred: did the mediator do something to affect the possibility of settlement so as to be able to make a referral and get paid for doing so? The opposing party could ask the same question as well as: does this referral indicate that the mediator was partial during the mediation process wanting to help the party for whom the mediator made the referral?

*Model Standard V. Confidentiality* provides:

- A. *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.*
2. *A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.*

Whether or not Model Standard V is implicated depends on what, if anything, the mediator communicates to the attorney to whom she is making the referral and not whether or not the

mediator receives a referral fee from the attorney. However, it is important to note that if a mediator does make a referral that she has an obligation under Model Standard V to maintain the confidentiality of all information obtained by the mediator in mediation unless all parties agree otherwise.

Mediators who chose to refer a party to counsel after mediation ends in impasse must be aware of the ethical considerations discussed above, and best practice dictates that multiple names for referral should be provided, not just one name. However, accepting a fee for that referral has an unacceptable potential to impact the mediator's perceived impartiality, and therefore the Committee strongly discourages mediators from engaging in this practice.