

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

**SODR-2010-2**

*Question:*

Is it appropriate for a mediator who is not a licensed attorney in the state in which he or she is conducting the mediation to prepare a child support worksheet based upon the information supplied by the parties?

*Summary:*

A mediator with the experience and training required to competently complete child support worksheets based on the information supplied by the parties could ethically do so, if done consistently with the Standards governing party self-determination and mediator impartiality. The mediator should be sensitive to the role he or she is playing when calculating child support and preparing worksheets, either manually or with the help of a computer program. The mediator should also consider the parties' capacity to meaningfully participate during the entire mediation. Similarly, if the mediator acts essentially as a data-entry person, the Committee sees no ethical impediment under the Model Standards to the mediator performing those services. If, however, the mediator begins to give professional advice – such as accounting, financial, tax, or legal advice – or performing tasks typically done by, for example, an accountant, financial planner, tax expert, or lawyer, the mediator then runs the risk of inappropriately mixing professional roles. The mediator should disclose the implications of that shift in roles and get party consent to the shift in roles or the use of other dispute resolution processes. Finally, before performing child support worksheet services, the mediator should advise the parties to consult other professionals, including lawyers, to help them make informed choices.

*Authority Referenced:* Model Standards of Conduct for Mediators 2005, Standards I(A), I(A)(2); II(B); II(C); III(A); III(D); IV(A); IV(B); VI(A)(5); VI(A)(8); VI(C).

*Opinion:*

*A. Introduction.*

In answering this question, the Committee on Mediator Ethical Guidance (Committee) is applying the Model Standards of Conduct for Mediators, (Model Standards or Standards) as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in 2005.<sup>1</sup> The Committee is not applying any mandatory or other aspirational codes of ethics adopted by states or by other mediation organizations or any laws governing the conduct of mediators or lawyers. At the end of this opinion, the Committee provides some *Additional Commentary* that may assist mediators in researching these other

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<sup>1</sup> Am. Bar Ass'n, Assn. of Conflict Res. & Am. Arb. Assn., *Reporter's Notes* §V(B) (April 10, 2005)[hereinafter *Reporter's Notes*], available at <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-april102005final.pdf>.

sources of law. Application of these sources of law to the questions posed is beyond the jurisdiction of this Committee. The Reporter’s Notes to the Model Standards recognize “that a mediator’s conduct may be affected by applicable law, court rules, regulations, [and] other applicable professional rules . . . some of which may conflict with and take precedence over compliance with these Standards.”

The Committee notes that the mediator posing the question is not a licensed attorney in the state in which he or she is conducting the mediation, and that the parties have provided all the factual information the mediator uses to complete the child support worksheets. The question does not indicate the level of training or expertise the mediator may specifically have in connection with the completion of worksheets, the calculation of child support, or, more generally, about child custody and visitation. The Committee limits its opinion to these specific facts.

The Committee notes that the aspirational Model Standards of Practice for Family and Divorce Mediation (Family Standards) would apply to family law practitioners. It advises those practitioners to be guided first by the Family Standards, relevant provisions of which specifically permit certain drafting activities by family mediators. While it is not within the purview of this Committee to interpret the Family Standards, the Committee has provided citations in the footnotes to provisions found in those standards that are parallel to the applicable provisions of the Model Standards.<sup>2</sup> These standards, which specifically instruct family mediators to “assist participants in determining how to promote the best interests of children,” do not specifically resolve whether mediators may ethically prepare child support worksheets or make related calculations.<sup>3</sup>

As in SODR-2010-1, our earlier opinion relating to agreement drafting services, the Committee concludes that the Model Standards of Conduct for Mediators 2005 do not provide a clear answer to the question presented here. The calculation of child support for the parties in a family mediation can involve the adoption of professional roles other than that of a mediator – specifically, for example, that of accountant, financial advisor, tax expert, or legal counsel -- depending on the scope of the service rendered. Completing a child support worksheet based solely on information supplied by the parties falls on the end of the spectrum of services that requires more limited training, skill, or expertise by the mediator when compared, for instance, to a mediator who helps the parties consider and discuss the tax consequences of any child support payment.

*B. Provisions of Model Standards and Reporter’s Notes.*

The question posed to the Committee raises ethical issues similar to those considered in its opinion SODR-2010-1 governing the agreement drafting services provided by mediators. It

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<sup>2</sup> MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000). The ABA House of Delegates, the Association of Family Courts and Community Professionals, and the Association for Conflict Resolution approved the Family Standards. *Id.*

<sup>3</sup> MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VIII. The ABA House of Delegates, the Association of Family Courts and Community Professionals, and the Association for Conflict Resolution approved the Family Standards.

triggers many, if not all, of the same provisions of the Model Standards discussed in that opinion, including those standards governing the definition of mediation, party self-determination, mediator impartiality, quality of the mediation process used, use of outside professionals to assist the parties, the implications of mixing roles, the provision of information the mediator is competent to give by training or expertise, informed consent of the parties to the shift in the mediator's role or in the dispute resolution process, and postponement of the mediation to allow time for the parties to obtain needed information or advice. The question also implicates laws and rules governing joint legal representation and the unauthorized practice of law (UPL).<sup>4</sup>

Rather than repeat the language of those standards and the commentary from the Reporter's Notes found in Opinion SODR-2010-1, the Committee refers interested persons to that opinion for the relevant language.

### C. *Discussion – Calculating Child Support.*

The mediator's question invokes an analysis of the Model Standards similar to the analysis found in opinion SODR-2010-1 because the question suggests a distinction between providing the services of a data-entry person, providing professional information, or providing legal advice. It also suggests an analogy to serving as a scrivener of a mediated settlement agreement or offering more extensive drafting services. In the situation presented, the mediator takes the information provided by the parties, much like a data-entry person, and prepares a child support worksheet. In doing so, the mediator either applies the relevant statutory provisions manually to calculate child support or uses a software program to do so.

The Model Standards do not provide a clear answer to the question presented to the Committee.<sup>5</sup> At the heart of the question is the issue of whether preparing child support worksheets falls within the definition of mediation and comports with the core values of mediation as expressed in the Model Standards. However, even if it does, provisions of the Model Standards may constrain who may perform this service and how they may do it.

A mediator with the experience and training competent to prepare child support worksheets could do so, if done consistently with the Standards governing party self-determination and mediator impartiality. The mediator should also advise parties to consult

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<sup>4</sup> A lawyer-mediator conducting a mediation in a state in which he or she is not licensed to practice law could be deemed a "nonlawyer-mediator" for purposes of UPL law in that state.

<sup>5</sup> The Family Standards instruct mediators to "assist parties in determining how to promote the best interests of children" MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VIII. More specifically, Standard VIII.A. provides: "The mediator should encourage the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits." Standard VIII.A.3. identifies as a possible topic of discussion "development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants." The Family Standards do not specifically authorize a mediator to prepare child support worksheets, but do allow the mediator, with the consent of the participants, to "document the participants' resolution of their dispute." *Id.* at Standard VI.E. The Family Standards also encourage mediators to "facilitate full and accurate disclosure and the acquisition and development of information during the mediation so the participants can make informed choices." *Id.* at Standard VI.A.

other professionals, including lawyers, to help them make informed choices about child support. Arguably, before taking on any new role in the process, the mediator should explain the implications of assuming that role and get the consent of the parties to provide those additional services.

The Standards would seem to allow a mediator, no matter his or her profession-of-origin, to act as a data-entry person, especially if he or she uses an approved computer program to generate the worksheets.

Even if the Model Standards clearly allowed the mediator to prepare child support worksheets, they serve only as aspirational guidelines of practice for mediators. Statutes, professional rules, regulations, court opinions, and other sources of law beyond the scope of this opinion could constrain any mediator from preparing the worksheets. In ultimately answering the submitted question, the mediator must consider, at a minimum, the law governing the unauthorized practice of law (UPL) as delineated in each state where the mediator may want to offer the worksheet service to parties.<sup>6</sup> The Model Standards do not supersede or take precedence over these sources of law.

### 1. *Definition of Mediation.*

In analyzing the question presented, the Committee first considers the definition of mediation found in the Model Standards. It does not expressly include the completion of child support worksheets. Instead, it defines the role of the mediator as facilitating communication, negotiation, and the voluntary decision-making of the parties. One could argue that a mediator's completion of the worksheets facilitates communication and negotiation.

### 2. *Party Self-Determination.*

Standard I(A) indicates that the parties may exercise self-determination over the process as well as over the outcome. Accordingly, the parties could decide, as a process choice, to have the mediator complete the child support worksheets. However, even in this context, a mediator "should make the parties aware of the importance of consulting other professionals to help them make informed choices." Thus, a mediator who accepts responsibility for completing the worksheets, should advise the parties to have them reviewed by a lawyer or other professional to ensure that they reflect informed choice. The Reporter's Notes recognize that parties receiving

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<sup>6</sup> While beyond the scope of this opinion, the Committee points out that many states broadly define the practice of law in three typical ways:

(1) by proscribing it without defining the "practice of law"; (2) by using a circular definition in which the practice of law is what lawyers do or have done or have the skills and training to do; or (3) by listing activities that constitute the practice of law. The listed activities typically include (1) the drafting of legal instruments, forms, and pleadings; (2) giving legal advice; and (3) appearing in court on behalf of a person. One court called the varying tests "consistent only in their inconsistency." Professor Rhode calls the UPL prohibitions "broad and largely undefined [in] scope" and covering a "breathtaking amount of common commercial activity." She also asserts that states make "[n]o attempt . . . to justify prevailing definitions."

Paula M. Young, *A Connecticut Mediator in a Kangaroo Court?: Successfully Communicating the "Authorized Practice of Mediation" Paradigm to "Unauthorized Practice of Law" Disciplinary Bodies*, 49 S. TEX. L. REV. 1047, 1134-39 (2008).

this advice may ignore it. Accordingly, the mediator's obligation under the Standards seems to end when he or she makes this recommendation to the parties.

3. *Mixing Professional Roles, Mediator Competence, and Referral of Parties to Other Professionals.*

Standards VI(A)(5) and (8) deal more directly with the mixing of professional roles. Some persons could argue that a mediator who completes child support worksheets, even when limited to using the information provided by the parties, has engaged in the practice of law. Many state statutes explicitly define the practice of law as drafting "legal instruments," which are then defined broadly.<sup>7</sup> We discuss this aspect of the question in the *Additional Commentary* below.

The analysis under the Model Standards consists of two parts: (1) is the mediator qualified to provide the "information" by virtue of his or her training or experience; and, (2) can the mediator provide the information in a way consistent with the other provisions of the Model Standards – especially, as the Reporter's Notes indicate -- the standards governing self-determination and impartiality. The Reporter's Notes indicate a particular concern about mixing the role of mediator and lawyer.

The discussion under Model Standard VI(A)(5) occurs in the context of giving "information." Arguably, one could distinguish between the role of a data-entry person and the role of a legal advisor, for example, in the worksheet context. As a scrivener, the mediator would simply enter the parties' information verbatim on to the worksheets or into the computer program. However, once the mediator suggests additional terms or indicates the consequences of any particular data input, for example, he or she may be mixing roles. The Model Standards would then ask the mediator to consider the two-part test set out in Model Standard VI(A)(5). The mediator would need to consider whether providing that information or advice affects the self-determination of any party -- positively or negatively -- and whether it may affect the parties' perceptions of the mediator's impartiality.

The Reporter's Notes to Standard VI also suggest that a mediator must consider "additional elements for service" imposed on certain programs or practice areas, presumably by state statute, court rule, program rule, or applicable codes of professional ethics. Thus, some mediators may be precluded from completing child support worksheets under these additional "elements for service." These "elements of service" may also require the mediator to obtain specific training in calculating child support or in completing worksheets. They may also require a mediator to use a designated computer program for the task.

Several Standards suggest some alternatives for the mediator. Standard VI(C) again gives the mediator an option to postpone the mediation to allow the parties sufficient time to consult with an attorney, to ensure that an attorney could attend the next session of the

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<sup>7</sup> See, e.g., Proposed Decision, *In re Resa Fremed*, No. UPL 05-002 (Conn. Statewide Grievance Comm. March 9, 2006), discussed at length in Young, *supra* note 6, at 1055-1118.

mediation, or to retain an attorney to complete the child support worksheets.<sup>8</sup> Similarly, Standard IV(B) contemplates a co-mediation model, in which one of the mediators has the training, experience, and skills required to competently complete the worksheets. The Reporter’s Note to this Standard recognizes the need to protect members of the public in the mediation process.

#### 4. *Mediation Impartiality.*

Finally, in determining whether the mediator may arguably “mix” roles, he or she must consider the affect of the worksheet-related services on the parties’ perceptions of the mediator’s impartiality. For instance, if the mediator suggests additional terms or gives advice about allocation of income in the worksheet categories, it may seem to one of the parties to show favoritism to the other party.

#### *Conclusion – Calculating Child Support and Preparing Worksheets:*

The mediator should be sensitive to the role he or she is playing when calculating child support and preparing worksheets, either manually or with the help of a computer program. The mediator should also consider the parties’ capacity to meaningful participate during the entire mediation. Similarly, if the mediator acts essentially as a data-entry person, the Committee sees no ethical impediment under the Model Standards to the mediator performing those services. If, however, the mediator begins to give professional advice – such as accounting, financial, tax, or legal advice – or performing tasks typically done by, for example, an accountant, financial planner, tax expert, or lawyer, the mediator then runs the risk of inappropriately mixing professional roles without disclosing the implications of that shift in roles, or without getting party consent to the shift in roles or the use of other dispute resolution processes.

#### *Additional Commentary:*

Worksheet-related activity could draw the attention of bodies enforcing restrictions on UPL. As noted in the Introduction, an analysis of the UPL issues raised by this inquiry falls beyond the jurisdiction of the Committee.

The Committee is nonetheless aware of several state court-connected mediation programs that have offered some information about the application of the code of ethics for mediators and the UPL constraints in their particular states. For example, Virginia’s Dispute Resolution Services office has interpreted the applicable law to allow mediators to engage actively in the preparation of child support calculations and the completion of court forms.<sup>9</sup> The Virginia statutes create other safe-harbors for mediators. They permit a family law mediator to complete child support guideline worksheets and any written reasons for deviating from the child support

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<sup>8</sup> The Family Standards provide: “The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.” MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.C. They also provide: “The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.” *Id.* at Standard VI.E.

<sup>9</sup> DEP’T OF DISPUTE RESOLUTION SERVS., SUPREME COURT OF VA., GUIDELINES ON MEDIATION & THE UNAUTHORIZED PRACTICE OF LAW (1999), ch. 2, §4 (citing VA. CODE ANN. § 8.01-576.11 (West 2007)) [hereinafter VIRGINIA UPL GUIDELINES], *available at* [http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf).

guidelines.<sup>10</sup> Mediators may also use commercially available computer programs to make the calculations.<sup>11</sup>

Virginia mediators may also complete court-sponsored or court-approved forms—as opposed to court orders—when preparing a written agreement for the parties.<sup>12</sup> These forms typically have appropriate language and signature lines to “either order the dismissal of the court case pursuant to the agreement or, in some cases, to convert the agreement itself into a court order.”<sup>13</sup> The Virginia UPL Guidelines suggest the preparation of the forms is not likely to be deemed the practice of law, but even if it is, the service “is authorized and supervised by the courts” to protect the parties.<sup>14</sup>

The Georgia UPL Guidelines also take a substantially more liberal approach to the line between legal advice and legal information. The Georgia Office of Dispute Resolution expresses concern that to do otherwise could “paralyze domestic relations mediation.”<sup>15</sup> Thus, like Virginia,<sup>16</sup> family mediators in Georgia can guide or help parties to use the child support tables and calculators because those activities are not the same as “making judgments for the parties as to how their particular circumstances dictate the inputs to the calculations and deviations.”<sup>17</sup> Georgia family mediators can help the parties make these calculations by using “electronic spreadsheets and Web-based calculators designed by Georgia’s child support authorities.”<sup>18</sup> Georgia authorities have designed the tools to guide separating parties to reach state-sanctioned outcomes for child support. Mediators using them do not prepare the actual separation agreement, and even if they did, that “activity is clearly accepted mediator practice in Georgia and does not run afoul of the UPL standards.”<sup>19</sup> The Georgia UPL Guidelines note that mediators who were not licensed attorneys had engaged in family law mediation since at least 1992, and that they had helped parties with the child support calculations under the older, less complicated statute. The revised law, despite its greater complexity, does not require substantially different behavior from mediators. They could work with it consistent with UPL proscriptions.<sup>20</sup>

Colorado provides another example of the specific guidelines that may exist for mediators. Under guidelines approved by the Executive Council of the Colorado Bar Association, Colorado mediators may “assist the parties in the selection, use, and preparation of certain forms to assure coverage of issues and topics in the development of a mediated separation

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<sup>10</sup> *Id.* at ch. 3, § 3 & n.76 (citing Va. Code Ann. § 8.01-576.11 (West 2007)).

<sup>11</sup> *Id.*

<sup>12</sup> *See id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Comm. on Ethics, Ga. Comm’n on Dispute Resolution, Advisory Op. 7, at 2 (Jan. 3, 2007) [hereinafter Georgia Advisory Op. 7], available at <http://www.godr.org/files/Advisory%20Opinion%207.pdf>.

<sup>16</sup> *See* VIRGINIA UPL GUIDELINES, *supra* note 9, ch. 2, § 4.

<sup>17</sup> Georgia Advisory Op. 7, *supra* note 15, at 3.

<sup>18</sup> *Id.* at 1, 3.

<sup>19</sup> *Id.* at 3 (citing 2004 ACR Proposed Policy Statement). *See* Assoc. for Conflict Resolution Bd. of Dir., *The Authorized Practice of Mediation: Proposed Policy Statement of the Association for Conflict Resolution 4–7* (draft Aug. 28, 2004), available at <http://www.acrnet.org/pdfs/upl-draft-rpt-aug04.pdf>.

<sup>20</sup> *Id.*

agreement, parenting plan and/or child support plan.”<sup>21</sup> They should stay away, however, from working with forms “not central to the core objective of mediating . . . [that is,] an agreement for separation or parenting.”<sup>22</sup> The guidelines then provide a list of specific forms central to the process of divorce mediation and “appropriate for use and drafting by the mediator.”<sup>23</sup> These forms can be used “as the drafted agreement or Memorandum of Understanding . . . whether intended for temporary orders, final orders, or post dissolution matters.”<sup>24</sup> In certain circumstances, the mediator may also complete supporting documents like the Financial Affidavit and Worksheet A or B of the Child Support Obligation form. The Colorado UPL Guidelines do not explain the applicable circumstances, except to say that they “[d]epend[ ] on the situation of the parties.”<sup>25</sup> The Colorado UPL Guidelines provide a liberal interpretation of the drafting role of the mediator based on statutory language, which at best, is ambiguous about that role.

As a general matter, regulatory bodies enforcing UPL restrictions have disputed whether the use of do-it-yourself legal kits, books, and software constitutes UPL.<sup>26</sup> The cases involving the use of legal software may apply to mediators who are not also licensed lawyers who use child support software when facilitating party decision-making. So, again, the mediator should check the rules governing that practice in particular states.

The Committee also suggests that mediators consider the “Other Resources” listed at the end of opinion SODR-2010-1.

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<sup>21</sup> Alternative Dispute Resolution Section, Colo. Bar Ass’n, *Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation* (approved Jan. 12, 2007), at 6, available at <http://www.coloradomediation.org/ccmo/docs/UnauthPractLawFinal020707.pdf>. Another part of the Colorado guidelines states, however, that mediators may not recommend to either party “which form to use or how to fill it out except as authorized by statute, trial court order or administrative rule.” *Id.* at 10.

<sup>22</sup> *Id.* at 6 (concluding, without support, that any other forms would be outside the “ambit of the CDRA’s authorization to draft mediated agreements”).

<sup>23</sup> *Id.* (“[I]nclude[ing] Parenting Plan, Separation Agreement (With Children) or Partial Separation Agreement or Information for the Court, Separation Agreement (Without Children) or Partial Separation Agreement or Information for the Court”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> For a discussion of the use of do-it-yourself legal kits, books, and software, see Young, *supra* note 6, at n.448.