

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

**SODR-2008-4**

INQUIRY:

After 27 years of law practice, I have decided to "redirect" my efforts toward an ADR practice. I have been struggling to market my new practice. As I have tried to contemplate different scenarios where ADR might be beneficial, I realized that the second of the following situations might give rise to an ethical conflict for a neutral. Consider the following:

In a typical situation, two parties seeking to resolve a conflict hire a mediator to assist them. The mediator makes a disclosure that his fee of \$200 per hour is to be split equally between the two companies unless they agree otherwise. They enter into mediation which is successful in resolving the dispute. Part of the resolution is that one party will bear the full cost of the mediation. I see nothing wrong with one party paying the mediator's fee under these facts, and I see this frequently in personal injury mediations.

Now consider this scenario: ABC, Inc. is a company that not infrequently has disputes with customers. ABC wants to use mediation as much as possible in resolving these disputes when they arise. Mediator X, knowing of ABC's desire to use mediation regularly, offers to do mediations involving this company. ABC's customers typically cannot afford to pay ½ of the mediator's hourly rate or just don't want to engage in mediation if they are going to have to pay for it, so ABC wants Mediator X to serve as a neutral and agrees to pay X's fees in full. Mediator X explains to company that although it will be paying the full fee, X must be completely neutral in the process and that his sole role will be to facilitate discussions between ABC and its customer. X also advises ABC that he must make a full disclosure to any of ABC's customers who wish to engage in mediation that he (a) has an agreement with ABC that ABC pay the fees associated with the mediation, (b) that he acts as a neutral in the mediation process even though ABC is paying his fee, and (c) he has maintained in the past and will in the future continue to maintain an ongoing relationship with ABC in providing mediation services. This is agreeable to ABC. Thereafter, prior to each mediation, Mediator X advises customer of the foregoing items and that, if this is not acceptable to customer, an arrangement with some other mediator, agreeable to both ABC and customer, would have to be reached. If customer agrees, the mediation goes forward.

Is this ethically appropriate? As a lawyer, I am all caught up in the notion of "avoiding even the appearance of impropriety" yet, at the same time, fully realize that full disclosure and waiver vitiates any conflict or appearance of impropriety. I guess the

same would be true in mediation. It might even be analogous to a judge, at the beginning of a hearing or trial, disclosing a prior relationship of some type with one of the parties and offering to recuse himself if either party is uncomfortable with that fact.

Authority Referenced: Model Standards of Conduct for Mediators (2005). Model Standards I.A.B, II.C, III.A.C, VII.B, VIII.B.2

#### SUMMARY:

The shifting of the mediation fee from one party to the other as part of a mediated resolution of the dispute does not pose ethical problems for the mediator under the Model Standards. It is also ethical for a mediator to conduct a mediation in which one party has arranged at the outset of the mediation — either as a way of inducing participation by the other party or for other reasons — to be responsible for 100% of the fees. To the extent that the mediator is aware of the arrangement, he or she should disclose the fact of his or her knowledge as early as possible in the process. The mediator should also ensure that all parties have agreed to the arrangement and are comfortable with the mediator going forward with the mediation given the mediator’s knowledge of the differential responsibility for the fee. In addition, the mediator must be confident that he or she can proceed in an impartial manner even though he or she is aware of the fee arrangement. The Committee also notes that a mediator's duty to self-evaluate his or her impartiality is an ongoing one. Finally, the mediator should further consider that the potential conflict of interest and lack of impartiality concerns that may arise if the mediator solicits an ongoing relationship between the mediator and the entity that has agreed to pay 100% of the fees, particularly if the arrangement involves substantial sources of the mediator's revenues.

#### OPINION:

In addressing this inquiry, the Committee on Mediator Ethical Guidance is applying the Model Standards of Conduct for Mediators, as adopted in 2005 by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution (“Model Standards”). The Committee has not considered other codes of conduct for mediators or any other statute or rule regulating mediators. The Committee is also not applying any professional codes of conduct for lawyers that may be relevant, or any other statute or rule regulating the legal profession. The Committee advises the mediator to consider the possible application of all of the above.

The relevant provisions of the Model Standards for consideration of the question posed are:

### *Model Standard I. Self-Determination*

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, unforced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.*
- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressure from court personnel, program administrators, provider organizations, the media or others.*

### *Model Standard II. Impartiality*

- C. A mediator shall decline a mediation if the mediator can not conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.*

### *Model Standard III. Conflict of Interest*

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict 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.*
- C. 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.*

### *Model Standard VII. Advertising and Solicitation*

- B. 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.*

### *Model Standard VIII. Fees and Charges*

- B.2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.*

With respect to the question stated in the second paragraph of the inquiry, as set forth above, the Committee considered the implications on a mediator's ability to maintain

impartiality if at the conclusion of the mediation one party agreed to pay the full mediation fee. The Committee concluded that the shifting of the mediation fee from one party to the other as part of a mediated resolution of the dispute does not, in and of itself, pose ethical problems under any of the above relevant Model Standards.

The most specifically applicable Model Standard to this portion of the inquiry is Model Standard VIII. The Committee believes that, consistent with Model Standard VIII B.2, if both parties agree to the new fee arrangement, the mediator may accept an unequal fee payment, assuming, first, that the mediator did not exert any undue pressure on either or any party to cause or agree to such arrangement and, second, that the shifting of fees at the conclusion of the mediation process did not otherwise affect the mediator's ability to conduct the mediation in an impartial manner.

With respect to the question posed in the third paragraph of the inquiry, as set forth above, the Committee considered the implications to a mediator's ability to maintain impartiality if one party to the mediation agreed from the outset of the mediation — as a way of inducing participation by the other party — to be responsible for 100% of the fees and the mediator was aware of such an arrangement. Model Standard VIII would allow for such arrangement provided that it does not adversely affect the mediator's ability to conduct the mediation in an impartial manner. In addition, to the extent that the mediator's knowledge of such an arrangement can create a potential or perceived conflict of interest, Model Standard III would require the mediator to disclose his or her knowledge of the arrangement. Model Standards VIII and III, as well as Model Standard II, would require the mediator to decline the arrangement or to withdraw from it, if his or her knowledge of the arrangement precludes him or her from conducting the mediation in an impartial manner.

More specifically, an arrangement at the outset of the mediation that one party will pay 100% of the mediation fee could give the appearance of the mediator's partiality towards the paying party. For this reason, the fact of the mediator's knowledge must be properly disclosed in a timely fashion. Model Standard III C notes that a mediator shall disclose to the parties any potential or actual bias or favoritism that may arise from such a relationship or that could reasonably be viewed as affecting the mediator's impartiality. The Committee concluded that the fee arrangement is ethical, provided that before the mediation begins the mediator discloses to the parties his or her knowledge of the arrangement and the parties agree to go forward. To avoid any perception of partiality, the mediator should disclose the arrangement as early as possible in the process, and ideally prior to getting together for the in-person session. Only if all parties agree to the arrangement, and to going forward with the mediator even though she or he is aware of the arrangement, may the mediator proceed with the mediation. However, the mediator must continue to remain sensitive to any concerns that may arise before, during or after the mediation with respect to his or her neutrality in light of the payment arrangement. The mediator must end the process if the mediator concludes it is, in some manner, affecting his or her impartiality.

The question posed raises other potential ethical concerns that the mediator should consider before accepting the engagement with such a fee arrangement. First, Model Standard I requires that a mediation be conducted on the basis of self-determination such that all parties are able voluntarily, without coercion, to select a mediator. Under the facts provided, the Committee believes that, with the proper disclosures and party agreement, the payment arrangement does not undermine a party's ability to exercise self-determination in selecting a mediator. However, the mediator should consider, among possibly other concerns, a) whether the party not paying for the mediation is represented by counsel and b) whether the party not paying for the mediation is required to participate in the mediation by contract or whether s/he may decline participating in the mediation. These factors may undermine a party's exercise of self-determination in selecting a mediator and in agreeing to an unequal fee arrangement. If the party not paying for the mediation is required by contract to participate, and particularly if that person is not represented by counsel, she or he should be given the option of declining the proposed mediator and selecting a different mediator under the same fee arrangement.

The Committee believes that there is less concern if the party not paying for the mediation is represented by counsel and similarly there is less concern if the party is not bound by contract or other legal requirement to participate in the mediation. There may be occasions where a mediator concludes, after consideration of these issues and conferring with a party, that a particular party is not in a position due to the above concerns (or others that are present) to exercise self-determination by making a voluntary and informed choice as to whether to proceed with the mediation with a mediator proposed by the party who will pay 100% or a larger portion of the fees. If the mediator draws this conclusion, he or she should not proceed with the mediation. But, assuming the mediator does not reach this conclusion, the Committee does not believe that there is otherwise an ethical issue under the Model Standards that would preclude proceeding.

Second, the Committee further noted that a mediator's duty to self-evaluate his or her impartiality is an on-going one. Model Standard II places an affirmative duty on the mediator to conduct the mediation without bias or favoritism. If, as the mediation proceeds, the mediator becomes aware that she or he may not be conducting the mediation impartially, for any reason, including that she or he feels some level of favoritism to the party responsible for paying the fee or the largest portion of the fee, the mediator should withdraw.

Third, the Committee cautioned that should the relationship between the mediator and the party – frequently an institution – paying the fees or the larger portion of the fees, reach a point where the mediator conducts multiple mediations involving that party, such that a substantial amount of the mediator's professional time or a substantial portion of his or her income, involves or comes from this party, significant questions concerning the mediator's impartiality will arise. In such cases, the character and frequency of the arrangement between mediator and institution must be disclosed to all parties and consent

to proceed obtained. Apart from disclosure obligations, the mediator must, on a continuous basis, evaluate whether his impartiality is compromised under the circumstances outlined. If the mediator's impartiality is compromised, no degree of disclosure can cure that and mediator withdrawal from the arrangement would be appropriate.

Finally, the Committee noted that the scenario laid out in the inquiry suggests at least the possibility that the mediator solicited the engagement. Model Standard VII B, a mediator shall not solicit in a manner that undermines the integrity of the process or gives the appearance of partiality for or against a party. The Committee believes that such solicitation in the circumstances described in the inquiry could create the appearance of partiality and additional conflict of interest potential, but is not necessarily unethical, again assuming that the mediator discloses the precise contours of the relationship with the institutional party and conducts the mediation in neutral, impartial manner. In addition, the other party must have a meaningful ability to decline to participate in the mediation with the particular mediator.