

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

SODR-2011-1

Question:

I am writing to seek guidance on whether a family law mediator, who is a full-time court employee, may engage in advocacy regarding family law policy issues, such as custody and parenting time. This advocacy may include, among other things, testifying before legislative bodies, lobbying individual legislators, speaking at conferences that advocate particular policy positions on family law issues, and being a member of groups that advocate positions on particular family law policy issues.

[The Committee on Mediator Ethical Guidance (Committee) has included at Appendix A to this opinion the inquiring mediator’s analysis of the Canons of Judicial Ethics and several ethics opinions relating to the ability of judges to engage in advocacy, lobbying, and public speaking; to join groups that advocate particular positions or public policy; and to accept funding to attend a training conference offered by an advocacy group.]

Authority Referenced: Model Standards of Conduct for Mediators 2005, Preamble, Standards I(A), II(A), II(B)(1), II(B)(2), II(B)(3), II(C), III(A), III(B), III(C), III(D), III(E), III(F), VII(B), and IX(A)(4).

Summary:

The Model Standards of Conduct for Mediators (Model Standards) do not expressly preclude advocacy-related activities by mediators. In fact, the Model Standards support outreach and educational activities if the mediator conducts them consistent with the provisions of the Model Standards. However, the Model Standards do require the mediator to repeatedly assess -- before, during, and after a mediation -- whether the advocacy-related activities might create an actual, potential, or perceived conflict of interest or a source of favoritism, bias, or prejudice that could undermine the quality, effectiveness, and “integrity” of the specific mediation the mediator is handling, or has handled.

In the context of the question posed to the Committee, the Committee concludes that the mediator can engage in the activities listed but should disclose to the parties in a family law mediation his or her current and past participation in the identified activities. Parties can then make an informed choice about whether to retain the mediator to handle the particular dispute.

Unlike the highly cautious and preclusive approach taken under the Canons of Judicial Conduct, the Model Standards leave to the mediator and the parties the duty to monitor, assess, and disclose before, during, and after the mediation whether advocacy-related activities raise questions of favoritism, bias, prejudice, or conflicts of interest that would undermine the process or the specific parties' confidence in their mediation. If that assessment reveals a lapse in the ability of the mediator to conduct a mediation in an impartial manner, the mediator must withdraw. Secondly, and arguably of lesser importance under the Model Standards, the advocacy-related relationship or activity should not undermine public confidence in the mediation process as a means for resolving disputes.

In addition, the Model Standards prohibit soliciting new business in a way that creates an appearance of partiality or undermines the integrity of the mediation process. And, a mediator should reject compensation, gifts, or other items of value from an advocacy organization for training, speaking, or playing advocacy roles, if that item of value "raises a question as to the mediator's actual or perceived impartiality." In addition, a mediator using his or her relationship with an advocacy group to generate new business, through public speaking opportunities or by playing other roles in the organization, would need to ensure that the activities do not make mediating in future cases problematic because the mediator has created "an appearance of partiality for or against a party," or because the mediator's association with those activities "otherwise undermines the integrity of the process."

Opinion:

A. Introduction.

In answering this question, the Committee applies the Model Standards, as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in 2005. The text of the Model Standards on which the Committee relies appears at Section D of this opinion. The relevant commentary found in the Reporter's Notes appears in the Discussion section.

The Committee does not apply any other mandatory or aspirational codes of ethics or canons of conduct adopted by states or by other mediation, legal, or judicial organizations. It also does not apply any court operating rules or ethical constraints that would apply to a full-time court employee.

The Committee does not apply local law or codes of conduct for mediators, or any professional codes of conduct for lawyers or judges that may be relevant, but it advises the inquiring mediator to consider their possible application if he or she is

also a lawyer or a judge.¹ The Reporter’s Notes to the Model Standards recognize “that a mediator’s conduct may be affected by applicable law, court rules, regulations, other applicable professional rules . . . some of which may conflict with and take precedence over compliance with these Standards.”²

The Committee also notes that the aspirational Model Standards of Practice for Family and Divorce Mediation (Family Standards) would apply to family law practitioners. The inquiring mediator should consider the Family Standards first in resolving the question posed to the Committee.³

B. Discussion

In the judicial context, advocacy through a group or organization creates the risk that the public will perceive the judge as fostering, supporting, or subscribing to the public policy, legal philosophy, or legal position advocated by the group or organization. In turn, the public may conclude that the judge will not remain impartial in administering the law and in issuing decisions on the outcomes of cases coming before him or her. Whether the judge can set aside both real and apparent beliefs about those advocated policies, philosophies, or positions does not defeat the need for the public to perceive judges as fair, unbiased, and impartial when they make substantive, outcome-determinative, decisions from the bench.⁴

In contrast, mediators operating within the confines of the Model Standards have no control over the substantive outcomes negotiated by the parties. Instead, the mediator facilitates communication and negotiation, while supporting and protecting the substantive decision-making authority of the parties.⁵ This clear

¹ The Committee assumes that the inquiring mediator is not a judge currently serving on the bench. If the inquiry comes from a judge, then the mandatory Code of Judicial Ethics would supersede the aspirational provisions of the Model Standards.

² Am. Bar Ass’n, Assn. of Conflict Res. & Am. Arb. Assn., *Reporter’s Notes* §V(B) (Sept. 9, 2005)[hereinafter *Reporter’s Notes*], available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporter_notes.authcheckdam.pdf

³ 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.*

⁴ As the inquiring mediator’s discussion set forth in Appendix A indicates, the ethics opinions involving judges express ongoing concern about the public’s perception of the neutrality of judges and the honesty of the judicial process. These opinions leave little opportunity, if any, for judges to engage in advocacy, lobbying, and public speaking; to join groups that advocate particular positions or public policy; and to accept funding or a gift from an advocacy group. They apparently sacrifice the opportunity to provide understanding and education about the courts, the judicial system, and issues arising before judges, for a nearly absolute rule that judges avoid any relationship or activity that undermines public confidence in specific judges or the judicial system.

⁵ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Preamble (defining the role of the mediator as facilitating communication and negotiation; highlighting the voluntary decision-making of the parties; and identifying one of the purposes of mediation as providing parties the opportunity

distinction in the roles played by judges and mediators in resolving disputes provides the critical difference when analyzing the mediator's ability to, for example, engage in family law advocacy, lobbying, and public speaking; to join groups that advocate particular positions or public policy in the family law context; and to accept funding, a gift, or other item of value from a family law advocacy group.

The Model Standards serve several goals, including but not limited to: promoting the parties' confidence in the impartiality of the mediator they have chosen to handle the process;⁶ requiring a mediator to analyze before and during the mediation whether he or she can conduct the process free of favoritism, bias, or prejudice;⁷ promoting the parties' confidence in the integrity of the particular mediation in which they participate;⁸ and promoting public confidence in mediation as a process for resolving disputes.⁹

1. Conflicts of Interest

The Model Standards do not expressly preclude advocacy-related activities by mediators. However, the Model Standards do require the mediator to repeatedly assess -- before, during, and after a mediation -- whether the advocacy-related activities might create an actual, potential, or perceived conflict of interest or a source of favoritism, bias, or prejudice that could undermine the quality, effectiveness, and "integrity" of the specific mediation the mediator is handling, or has handled. The Model Standards also expressly prohibit a mediator from creating a conflict of interest -- actual or perceived -- during and after a mediation. And, they preclude the mediator from entering future personal and professional relationships with individuals or organizations that might raise questions about the mediator's impartiality in a prior mediation.¹⁰

Standard III(A) requires the mediator to "avoid a conflict of interest or the appearance of a conflict of interest **during and after** a mediation." (Emphasis

to reach mutually satisfactory agreements, if they desire); Model Standard I(A) (putting self-determination over the outcome and the process design in the hands of the parties and defining self-determination in terms of a voluntary, uncoerced decision that reflects the free and informed choices of the parties); Model Standard I(B) (instructing mediators to avoid undermining party self-determination and suggesting specific pressures mediators may face that might cause them to influence the outcome).

⁶ See discussion *infra* at Section D.2.

⁷ See discussion *infra* at Section D.1.

⁸ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Standards III(E), III(F), and VII(B) (seeking to protect the "integrity" of the "mediation process," "the mediation," or the "process," respectively).

⁹ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Preamble (seeking to protect the public confidence in "mediation as a process for resolving disputes").

¹⁰ See discussion *infra* at Section D.2.

added.) While the standards do not define the term,¹¹ Standard III(A) states that a conflict of interest “can arise from involvement . . . with the subject matter of the dispute . . . that reasonably raises a question of a mediator’s impartiality.” This section would prevent a mediator from participating in activities, including advocacy-related activities, that would give rise to an actual or perceived conflict of interest during or after the mediation based on the subject-matter of the dispute.

Standard III also spells out protocols for informing the parties of any actual or potential conflicts of interest that might arise from any mediator’s experience in the world, including advocacy-related activities. Standard III(B) requires the mediator to make a reasonable inquiry into facts that might create a potential or actual conflict of interest. Standard III(C) requires the mediator to disclose to the parties, 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.” This same standard, nonetheless gives the parties, by agreement, the right to use a mediator despite disclosures that raise a question about his or her impartiality.

Standard III(D) requires on-going disclosure of facts that might raise, mid-mediation, “a question with respect to that mediator’s service [by] creating a potential or actual conflict of interests.” Standard III(E) requires the mediator to withdraw from the mediation, regardless of the preference of the parties, if “a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation.”

Taken together, these provisions of Standard III emphasize disclosure of actual and potential conflicts of interest prior to and during the mediation. It prohibits mediators from creating a conflict of interest during or after the mediation. And it requires a mediator to withdraw from the mediation if the conflict of interest undermines the integrity of the mediation, even if the parties waived the conflict of interest during the disclosure phase of the process.

The drafters of the Model Standards were concerned that participants in a completed mediation may reflect back on the experience, and conclude that the process was not as fair or impartial, as they believed at the time. Subsequent activity by the mediator -- for example, in connection with a family law advocacy group -- could create this later perception of bias on the part of the participants in a divorce mediation. Similarly, the mediator could disclose advocacy-related bias or conflicts of interest at the start of the mediation, or as knowledge of those possible sources of bias arise mid-mediation, and the participants might waive the conflict at that time. But, they might later, as a form of negotiator’s remorse, be suspicious that the mediator acted with partiality toward a party or the outcome in that

¹¹ Unfortunately, the Reporter’s Notes also fail to define a “conflict of interest” in the mediation context.

mediation because of the advocacy-related beliefs or opinions the mediator held (and disclosed) at the time of the mediation.

Standard III uses terms requiring the mediator to exercise judgment about which conflicts of interest require avoidance, disclosure, or the mediator's withdrawal. Are they actual, potential, or perceived? Does a fact raise an "appearance of a conflict of interest"? Does a fact "reasonably raise" a question about a mediator's impartiality? Would a "reasonable individual" consider the fact as "likely" to create a conflict of interest? Was the conflict of interest "reasonably known" to the mediator? Could a participant "reasonably" see the conflict of interest as raising a question about the mediator's impartiality? Could a participant "reasonably" view the conflict of interest as "undermining the integrity" of the mediation?

With this delegation of judgment to the mediator and to the parties about the analysis of conflicts of interest, the assessment of mediator impartiality, and the effects of conflicts of interest on the integrity of the process, the Committee recommends that the inquiring mediator exercise caution and good judgment in pursuing any advocacy-related activities in the family law context.

The mediator must take care in analyzing whether he or she must disclose to the parties the advocacy-related activities prior to accepting the case; whether the mediator must disclose, mid-mediation, facts about the activities that give rise to new or additional questions about the mediator's impartiality, and whether the mediator must ultimately withdraw from the process whose integrity is threatened by the conflict of interest arising from the advocacy-related activities. The analysis could yield very different outcomes if the inquiring mediator is conducting a patent infringement mediation rather than a family law mediation.

In the context of the question posed to the Committee, the Committee concludes that the mediator should disclose to the parties in a family law mediation his or her current and past participation in all the identified activities: testifying before legislative bodies and lobbying individual legislators about family law policy, speaking at conferences that advocate particular policy positions on family law issues, and being a member of groups that advocate positions on particular family law policy issues.

2. *Mediator Impartiality.*

To serve the goals of the Model Standards, the mediator must decline any case in which he or she cannot serve with impartiality. As noted above, the mediator must also analyze and then disclose to the parties any possible sources of bias or conflict of interest. While parties can still decide to use the mediator after

these disclosures,¹² the Model Standards impose a continuing duty on the mediator to monitor whether he or she can conduct the mediation in an impartial manner. The mediator retains the right to withdraw and, in some circumstances, must withdraw if the mediator detects a lapse in his or her impartiality towards the parties or the substantive outcome of the parties' negotiation.

The question posed by the inquiring mediator implicates every section of Standard II governing impartiality. Standard II(A) requires the mediator to decline the mediation if the mediator cannot conduct the mediation free of "favoritism, bias, or prejudice." Standard II(B) requires the mediator to "conduct a mediation in an impartial manner" and free of the "appearance of partiality." One subsection bans partiality "based on a participant's personal characteristics, background, values and beliefs, or performance in the mediation, or [for] any other reason."¹³ Two more subsections ban the giving or receiving of gifts or other items of value if the practice could raise a question about the mediator's actual or perceived impartiality.¹⁴ Standard II(C) requires the mediator to withdraw if "at any time" the mediator cannot "conduct a mediation in an impartial manner." Thus, Standard II defines impartiality, focuses on the ability to conduct a mediation in an impartial manner, and requires the mediator to assess and monitor his or her ability to act with impartiality.

Activities or membership in an organization advocating a particular public policy, philosophy, or opinion, as noted briefly above, could affect a mediator's orientation to the substantive outcome in the mediation. These activities could also give rise to favoritism, bias, or prejudice against one of the parties for his or her "values or beliefs" that are not consistent with the values, beliefs, opinions, or views expressed by the mediator as a member of, or participant in, an advocacy organization. Standard II creates a mandatory duty to decline mediations or to withdraw from them when the mediator does not have the ability to conduct the mediation in an impartial manner.¹⁵ Accordingly, an active mediator-advocate may find that he or she must repeatedly decline cases or must often withdraw mid-mediation. As a result, the mediator may lose income and may inconvenience parties. The standards do not clearly preclude the advocacy-related activities, but

¹² Model Standard I(A), in combination with Standard III(C), highlights the now recognized role of party self-determination over the process of mediation, including mediator selection. Accordingly, the parties could decide, as a process choice, to retain a mediator who has disclosed an actual or potential conflict of interest, favoritism, bias, or prejudice that arises from the mediator's association with, and activities in, an advocacy organization.

¹³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Standard II(B)(1).

¹⁴ MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Standards II(B)(2) and(3).

¹⁵ The Note of Construction advises:

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the [S]tandard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Model Standards, at 2.

they delineate the consequences that flow from any biases that arise from those activities.

The provisions that govern the giving or receiving of gifts or items of value suggest that a mediator should be cautious in receiving compensation from the advocacy organization for any role the mediator may play as an advocate, testifying witness, lobbyist, speaker on behalf of the organization, educational speaker to its membership, or in any other capacity.

3. *Integrity of the Mediation Process.*

Several standards address an overall concern about protecting the integrity of the mediation process. Thus, under Standard III(E), a mediator shall withdraw from a mediation or decline to proceed with the mediation if “the mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the process.” Similarly, under Standard III(F), the mediator may not establish future relationships with “any of the participants in any matter that would raise questions about the integrity of the mediation.”¹⁶ This standard goes on to say that the mediator should consider several factors before developing **future** relationships with “parties, other individuals **or organizations**” in order to avoid creating a perceived or actual conflict of interest.¹⁷

Under Standard VII(B) the mediator may not solicit business “in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.” The Reporter’s Notes further state: “[This standard] addresses the increasing challenge of blending appropriate communication and marketing of a mediator’s services without soliciting business in a manner that results in compromising that individual[] [mediator’s] actual or perceived impartiality.”¹⁸

The Reporter’s Notes shed additional light on the concern for protecting the integrity of the mediation process.¹⁹ Specifically, the Reporter’s Notes indicate that

¹⁶ The text of this standard apparently refers to a mediation conducted by the mediator prior to the creation of the new professional or personal relationship. The text, however, does not make that interpretation clear.

¹⁷ The factors include the “time elapsed following the mediation, the nature of the relationship established, and services offered when determining [whether] the relationship might create a perceived or actual conflict of interest.” MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard III(F).

¹⁸ Reporter’s Notes, *supra* note 2, at 20.

¹⁹ *See id.* at 2 (indicating that mediation in other [practice] contexts may require additional standards “to insure process integrity”); *id.* at 14 (promoting public confidence in the integrity of the mediation process by requiring mediators to be competent); *id.* at 15 (insisting that the parties’ understanding of the nature and extent of confidentiality is crucial to the integrity of the process).

conflicts of interest “undermine public or party confidence in the central integrity of the process.”²⁰

Accordingly, the mediator should consider how his or her advocacy-related activities in the family law context may affect or undermine the integrity of the mediation process. Specifically, a mediator using his or her relationship with an advocacy group to generate new business, through public speaking opportunities or by playing other roles in the organization, would need to ensure that the activities do not make mediating in future cases problematic because the mediator has created “an appearance of partiality for or against a party,” or because the mediator’s association with those activities “otherwise undermines the integrity of the process.”

4. *Protecting the Public Confidence in Mediation as a Process for Resolving Disputes*

At the same time, Standard IX(A)(4) encourage mediators to participate in outreach and educational activities that advance the practice of mediation and help the public understand and appreciate the mediation process. The Reporter’s Notes show that the listed activities designed to advance the field of mediation is not exhaustive.²¹ Thus, some of the activities identified by the inquiring mediator could fall within the scope of this Standard and would be encouraged, rather than discouraged, as long as the mediator conducts them consistently with the other Model Standards.²² In analyzing the question posed by the inquiring mediator, the Committee is concerned about unnecessarily restricting the activities of mediators in outreach and educational activities. They are important to the future growth and development of the field.

C. *Conclusion:*

The Model Standards do not expressly prohibit advocacy-related activities of mediators. They do impose assessment, declination, disclosure, and withdrawal requirements that flow as a consequence of actual, potential, and perceived conflicts of interest, or certain risks to the ability of the mediator to conduct a mediation in an impartial manner and without any conflict of interest.

²⁰ *Id.* at 12. The Reporter’s Notes for Standard III(F) offer that any future relationship should “not cast doubt about the integrity of the mediation process.” *Id.* at 14. *See also id.* at 13 (requiring the mediator to withdraw, despite party preferences, “if the conflict of interest casts serious doubts on the process integrity”); *id.* (questioning the integrity of a practice by some mediators in failing to disclose service as a mediator in previous mediations involving the current parties or their representatives); and *id.* at 21 (cautioning that payment by the parties of unequal amounts of the mediator’s fee can undermine process integrity).

²¹ *Id.* at 21

²² MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at 1 (“These Standards are to be read and construed in their entirety.”)

Accordingly, the inquiring mediator should disclose to the parties his or her current and past participation in all the identified activities: testifying before legislative bodies, lobbying individual legislators, speaking at conferences that advocate particular policy positions on family law issues, and being a member of groups that advocate positions on particular family law policy issues. The parties can then make an informed choice about retaining the mediator to handle the particular dispute.

The Model Standards also prohibit soliciting new business in a way that creates an appearance of partiality or undermines the integrity of the mediation process. And, a mediator should reject compensation, gift, or other items of value from an advocacy organization for training, speaking, or playing advocacy roles, if that item of value “raises a question as to the mediator’s actual or perceived impartiality.” Finally, a mediator using his or her relationship with an advocacy group to generate new business would need to ensure that the activities do not make mediating in future cases problematic because the mediator has created actual or perceived conflicts of interest with the parties in those future cases, or “otherwise undermines the integrity of the process.”

D. Provisions of Model Standards:

The Committee on Mediator Ethical Guidance considered the following Standards in responding to the question posed by the mediator.

1. Preamble to Standards.

The Preamble to the Model Standards recognizes that the Standards serve three primary goals. “[T]o promote public confidence in mediation as a process for resolving disputes” constitutes one of those goals.²³

2. Definition of Mediation.

The Preamble also defines mediation as “a process in which an impartial third party . . . promotes voluntary decision making by the parties to the dispute.” It also recognizes that “[m]ediation serves various purposes, including providing the opportunity for parties to . . . reach mutually satisfactory agreements, when desired.”²⁴

²³ MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Preamble.

²⁴ *Id.*

3. *Party Self-Determination.*

Standard I(A) reinforces the role of parties as the final decision-makers in the mediation process. It provides:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary uncoerced 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 . . . and outcomes.

4. *Mediator Impartiality.*

Model Standards II(A), II(B)(1), II(B)(2), II(B)(3), and II(C) Impartiality provide:

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

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

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should [not] . . . accept a gift . . . or other item of value that raises a question as to the mediator's actual or perceived impartiality.

3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

5. *Conflicts of Interest.*

Standards III(A), III(B), III(C), III(D), III(E), and III(F) deal with relationships to parties or particular outcomes that may indicate that the mediator cannot handle the matter with impartiality. These Standards express concern about the “appearance of a conflict” as well as actual conflicts of interest. They provide:

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 . . . whether past or present, personal or professional, that reasonably raises a question of the mediator’s impartiality.

B. A mediator shall make 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 the mediator

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.

D. If a mediator learns of any fact after accepting a mediation that raises a question with respect to that mediator’s service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator’s conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. . . . When a mediator develops personal or professional relationships with organizations following a mediation in which [the mediator was] involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationship established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

6. *Advertising and Solicitation*

Standard VII(B) requires mediators to avoid soliciting business “in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.”

7. *Advancement of Mediation Practice.*

Finally, Standard IX(A)(4) expressly approves of a mediator’s participation in “outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.”

APPENDIX A

Extended Discussion by Inquiring Mediator of Canons of Judicial Ethics and Ethics Opinions Relating to the Ability of Judges to Engage in Advocacy, Lobbying, and Public Speaking; to Join Groups that Advocate Particular Positions or Public Policy; and to Accept Funding to Attend a Training Conference Offered by an Advocacy Group

Under the standards of mediator ethics, family law mediators are required to be impartial in both fact and appearance. In Nebraska, this standard is codified in Standard IV of the Nebraska Standards of Practice and Ethics for Family Mediators, which states family law mediators must “conduct the mediation process in an impartial manner” and “be impartial in word, action, and appearance”

This question appears to be a matter of first impression for mediators. However, the analogous impartiality provision of the Canons of Judicial Ethics has been extensively interpreted in this context. Canon 4 of the Canons of Judicial Ethics states:

A Judge Shall So Conduct All Extra-Judicial Activities as to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;*
- (2) demean the judicial office; or*
- (3) interfere with the proper performance of judicial duties.*

(emphasis added).

In Judicial Ethics Opinion 46 (July 1997), the California Judicial Ethics Committee stated:

Whenever a group engages in advocacy with respect to substantive legal issues, participation by judges should be scrutinized with great care. If the group engages in such advocacy as to make judicial participation improper, it is not permissible to separate the judge from the advocacy functions of the organization and limit his or her involvement to the nonadvocacy functions of the organization since the public will nevertheless perceive the judge as fostering the advocacy functions of the organization.

Factors to be considered in determining whether judicial participation is appropriate include: (1) the extent to which the group engages in political or advocacy activities; (2) the extent to which group is perceived by the public as engaging in political or advocacy activities; (3) the size and public prominence of the organization; (4) whether the issues which concern the group are likely to come before the court; (5) whether the group is concerned with procedural or substantive changes in the law or in the application of the law; (6) whether the judge is participating in a policy making position; (7) the fundraising activities of the group.

No single one or combination of these factors is necessarily determinative. The ultimate test for judicial participation in such bodies is whether the judge's association with the group, and the necessarily resulting public perception that the judge supports the goals of the group, is likely to lead to a public perception that the judge's impartiality in administering the law may be questioned. * * *

In determining whether to join a private organization and/or government board, a judge also has an affirmative duty to learn sufficient information about the organization or governmental board so that the judge can determine whether participation would violate the Code of Judicial Ethics.

The Delaware Judicial Proprieties Committee has also interpreted Canon 4 in this context. In one opinion, the Delaware Committee allowed a judge to join an organization in part because the organization “was not assembled to advocate positions or recommend policies to the executive or legislative branches of government” and “was not intended to take public positions on issues or endorse particular policy initiatives.”²⁵ In three other decisions, the Delaware Committee advised judges against joining organizations because “all three extra-judicial groups either had previously generated controversy and media attention, or were likely to become controversial. Additionally, it was anticipated that the organizations would be making recommendations to executive or legislative bodies for changes in the law or procedures.”²⁶

In Judicial Ethics Opinion 97-6, the Nebraska Judicial Ethics Committee unequivocally indicated that a member of the judiciary should not accept an appointment to be a member of a domestic violence organization, in that case a Community Response Team which mobilized community resources to reduce and prevent domestic violence by developing a coordinated approach to respond to crimes of domestic violence. In Opinion 97-6, the Committee

²⁵ Delaware Judicial Ethics Opinion 1992-1 (January 9, 1992).

²⁶ See Delaware Judicial Ethics Opinions 1985-1 (April 17, 1985) (Dover Charter Review Committee); 1991-1 (October 7, 1991) (Mental Health Code Revision Committee); and 1999-1 (April 22, 1999) (Brandywine School District)

concluded that a judge must avoid membership in even the most praiseworthy of nonjudicial organizations if they espouse or are dedicated to a particular legal philosophy or position, as such membership would call into question the judge's impartiality. Opinion 97-6 quoted a previous Nebraska ethics opinion, as follows:

The critical perception is the public's perception. Judges have no practical means by which they may disavow for public consumption selected policy positions of the organizations the judges choose to join. The public, or at least those segments of the public who tract specific special interest issues, may be justified in believing the judges who join advocacy groups support the policy positions of the organization the judges join. Judges' perceptions of their own extrajudicial activities and judges' ability to set aside their personal beliefs, both real and apparent, are irrelevant. * * *

The key the inquiring judge should remember in answering those questions is that maintaining the appearance of judicial impartiality is more important to society than any benefits any extrajudicial organization of which the judge is a member can provide to society. Lubet, S., *When Good People Do Good Things: The Ethical Dimension of Judicial Involvement in Victim Assistance Programs*, 69 *Judicature* 199 (1986).²⁷

In Judicial Ethics Opinion 00-2, the Nebraska Judicial Ethics Committee reaffirmed the notion that a member of the judiciary should not accept membership in an organization that espouses a particular legal philosophy or position, in that case ATLA. The Committee indicated, however, that a member of the judiciary might be able to accept a position as a "Judicial Fellow" which entailed gifts "incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use."

In Nebraska Judicial Ethics Opinion 01-1, the Judicial Ethics Committee equivocally indicated that a member of the judiciary, with certain cautionary considerations in mind, could accept an invitation to provide a welcoming statement at an event being sponsored by Mothers Against Drunk Driving (MADD). In that opinion, the Committee held that the judge might be able to avoid the appearance of partiality in future cases if the judge's welcoming speech was limited to welcoming the attendees and he took pains to ensure that his or her participation did not suggest endorsement of MADD's policy objectives or training goals.

In Nebraska Judicial Ethics Opinion 02-6 (Informal Opinion - Not Issued), the Judicial Ethics Committee unequivocally indicated that a member of the judiciary should not accept funding from a county Coordinated Response Team to attend a prosecutor's seminar dedicated to education on Domestic Violence. In that

²⁷ Nebraska Judicial Ethics Advisory Opinion 91-2.

case, the local domestic violence project, the county Coordinated Response Team, was using Department of Justice monies through the Violence Against Women Act to offer to pay the tuition and expenses of the judge. In Informal Opinion 02-6, the Committee expressed concern about both the judge's acceptance of funding to attend the conference as well as the Coordinated Response Team's request for the judge to attend a later meeting of the Coordinated Response Team and make a statement.