

**ABA SECTION OF DISPUTE RESOLUTION  
COMMITTEE ON MEDIATOR ETHICAL GUIDANCE**

**SODR-2010-1**

*Questions:*

A married couple with one minor child has decided that they would like to get an uncontested no fault divorce and want joint custody over their minor child. The parties have decided to jointly retain you as a Mediator to mediate the terms of a property settlement, custody, and support agreement. The mediation is successful, and the parties reach an agreement concerning the division of all of their property and the custody, visitation arrangements, and child support for their minor child. The parties then want the Mediator to prepare the agreement for them. Neither party wants to retain his or her own attorney to prepare the agreement or to have their attorneys review the agreement if prepared by the Mediator.

Question 1A: If the Mediator is a lawyer, should he or she prepare the agreement under these circumstances and if so, what are the ethical responsibilities and constraints, if any, that should be considered in connection with the preparation of the agreement?

Question 1B: What are the Mediator's ethical duties and responsibilities with respect to the parties under these circumstances?

Question 1C: Would the ethical considerations be different if the mediation only involved the division of property and not custody, visitation, and support for the minor child also?

Question 1D: If the Mediator was not a lawyer, are there any different ethical considerations that would apply?

*Authority Referenced:* Model Standards of Conduct for Mediators 2005, Preamble, Standards I(A), I(A)(2); II(B); II(C); III(A); III(D); IV(A)(1); IV(B); VI(A)(5); VI(A)(8); VI(C).

*Summary:*

The Committee answers the posed questions mindful of the specific context of the inquiry. It posits that the unrepresented parties in a divorce mediation specifically seek out a lawyer-mediator with the expectation that he or she will provide substantive drafting services and that the parties will not retain an attorney to review the mediator's work product or otherwise advise the parties about their legal rights. In answering the questions, the Committee does not endorse any particular style or orientation of the mediator, and it does not analyze the questions by defining the proposed services as facilitative or evaluative in nature.

The Committee also 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>1</sup>

Question 1A: A lawyer-mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. Arguably, before taking on any new role in the process, the mediator must explain the implications of assuming that role and get the consent of the parties to provide those services. The mediator should also advise parties of their right to consult other professionals, including lawyers, to help them make informed choices.

Question 1B: The Model Standards arguably also permit a lawyer-mediator to provide legal information to the parties. If, however, the mediator provides legal *advice* or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing the roles of legal counsel and mediator, thereby raising ethical issues under the Model Standards. At a minimum, the lawyer-mediator must disclose the implications of shifting roles and receive consent from the parties. The lawyer-mediator should also consider legal ethics provisions governing, among other things, joint representation of legal clients and the unauthorized practice of law (UPL) in a state in which the lawyer is not licensed.

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<sup>1</sup> MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000). The ABA House of Delegates, the Association of Family and Conciliation Courts, and the Association for Conflict Resolution approved the Family Standards. *Id.*

Question 1C: The ethical considerations do not differ under the Model Standards even if the mediation only involves the division of property.

Question 1D: The Standards would seem to allow a mediator, no matter his or her profession-of-origin, to act as a simple “scrivener” of the parties’ agreement. However, given the complexity of divorce-related settlement agreements, the Committee recognizes that a mediator may likely not act simply as a scrivener in this context, except perhaps in drafting a parenting plan or a more limited aspect of the total agreement. Any drafting activity could raise concerns under the law governing the unauthorized practice of law (UPL) in each state.

*Opinion:*

A. *Introduction.*

In answering these questions, the Committee on Mediator Ethical Guidance (Committee) is applying the Model Standards, as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in 2005. The Committee is not applying any other mandatory or aspirational codes of ethics adopted by states or by other mediation organizations.

The Committee is not applying local law or codes of conduct for mediators, or any professional codes of conduct for lawyers that may be relevant,<sup>2</sup> but it advises the lawyer-mediator to consider their possible application. At the end of this opinion, the Committee provides some resources that may assist mediators in researching these other 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, other applicable professional rules . . . some of which may conflict with and take precedence over compliance with these Standards.”<sup>3</sup>

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<sup>2</sup> In this case, the lawyer-mediator should keep in mind relevant legal ethics provisions that may come into play if the lawyer-mediator is ultimately confronted with the ethical dilemma posed by the hypothetical, particularly issues related to the joint representation of legal clients and the practice of law in a state in which the lawyer is not licensed. Relevant ethics provisions include analogs of the following ABA Model Rules of Professional Conduct: (1) Rule 1.7 Conflict of Interest: Current Clients; (2) Rule 2.4 Lawyer Serving as a Third-Party Neutral; and (3) Rule 1.6 Confidentiality of Information. An assessment of these and other legal ethics provisions is outside the scope of this Committee’s jurisdiction. A lawyer-mediator may wish to seek a legal ethics advisory opinion from the relevant entity in his or her jurisdiction, or the advice of an ethics expert pursuant to Rule 1.6(b)(4) or an analogous state provision.

<sup>3</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>.

The text of the Model Standards on which the Committee relies appears at Section D of this opinion, along with the Reporter's Notes further discussing those Standards. The Committee also provides a list of "Other Resources" at Section E of this opinion.

*B. Discussion – Drafting Mediated Settlement Agreements.*

Mediators working with unrepresented parties face unique challenges. Because the parties do not have the advice of counsel in the mediation session, the mediator may find that the parties turn to him or her for assistance in understanding legal concepts and consequences, or in documenting their agreement. Those challenges are heightened in a family law situation, when parties often participate in the mediation without representation and discuss sensitive issues concerning both finances and the care of children.

The Model Standards do not provide a clear answer to Questions 1A to 1D presented to the Committee.<sup>4</sup> At the heart of these questions is the issue of whether drafting the mediated settlement agreement or a Memorandum of Understanding (MOU) 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, how they may do it, and whether activities beyond that of scrivener are permissible.

Even if the Model Standards clearly allowed the mediator to assume a drafting role, 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 -- whether a lawyer or a person trained in any other profession-of-origin -- from performing a drafting service on behalf of the parties. In ultimately answering the submitted questions, the mediator must consider, at a minimum, the law governing joint representation of clients by a lawyer and the law governing UPL as delineated in each state where the mediator may want to offer the drafting service to parties.<sup>5</sup> The Model Standards do not supersede or take precedence over these sources of law.

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<sup>4</sup> As noted above, the Family Standards expressly contemplate the drafting role of the mediator, whether a lawyer-mediator or a mediator with another profession-of-origin. They provide: "With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed." *Id.* at Family Standards VI.E.

<sup>5</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

1. *Definition of Mediation.*

In analyzing the question presented, the Committee first considers the definition of mediation found in the Model Standards.<sup>6</sup> It does not expressly include the drafting or preparation of mediated settlement agreements or MOUs.<sup>7</sup> Instead, it defines the role of the mediator as facilitating communication, negotiation, and the voluntary decision-making of the parties. One could argue that reducing the parties' negotiation to a written agreement or MOU provides such facilitation.

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 draft the negotiated settlement agreement or MOU. 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."<sup>8</sup> Thus, a mediator who accepts responsibility for drafting an agreement or MOU, should advise the parties to have it read by a lawyer or other professional to ensure that it reflects informed choice.<sup>9</sup> The Reporter's Notes seem to recognize that parties receiving this advice may ignore it. Accordingly, the mediator's obligation under the Model 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.*

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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).

<sup>6</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), at Preamble.

<sup>7</sup> In contrast, the Virginia statute defines "dispute resolution services" as including the "screening and intake of disputants, conducting dispute resolution proceedings, *drafting agreements* and providing information or referral services." VA. CODE ANN. § 8.01-576.4 (2007) (emphasis added). See also FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.420(c) (2000) (requiring certified mediators appropriately to memorialize "the terms of any agreement reached" and to "discuss with the parties and counsel the process for formalization and implementation of the agreement"). See also MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.E., which specifically contemplates a drafting role for the mediator.

<sup>8</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard I(A)(2).

<sup>9</sup> *Id.*

Standards VI(A)(5) and (8) deal more directly with the mixing of professional roles. Some persons would argue (and several bar committees enforcing UPL law have determined) that a mediator who serves in a drafting role has begun to engage in the practice of law. Many state statutes explicitly define the practice of law as drafting “legal instruments” which are then defined broadly to include even mediated settlement agreements and MOUs.<sup>10</sup> This aspect of Questions 1A to 1D is discussed generally below.

The analysis under the Model Standards consists of two parts: (1) is the mediator competent 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 provisions of the Model Standards governing self-determination and impartiality.

The discussion occurs in the context of giving “information.”<sup>11</sup> The Standard does not discuss the drafting role of the mediator. Arguably, one could distinguish between the role of the “scrivener” and the role of a legal advisor in the drafting context. As a scrivener, the mediator would simply transcribe the parties’ agreement verbatim, without suggesting or adding language, including legal boilerplate clauses, that may have legal affect on the parties’ agreement. However, once the mediator suggests additional language for the agreement, 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, by suggesting additional contractual provisions, affects the self-determination of any party -- positively or negatively -- and whether it may affect the parties’ perceptions of the mediator’s impartiality.

Standard VI(A)(8) raises a related issue depending on whether the mediator’s drafting role could be considered “an additional dispute resolution role in the same matter.” Even if the parties request that the mediator draft the agreement or MOU, the mediator may need to explain the implications of that “change in process” and obtain consent to perform it. The Reporter’s Notes suggest that the focus of this Standard is on “a different intervenor role,” such as arbitrator, counselor, or neutral evaluator. The notes do not specify what counseling role they contemplate, whether legal, financial, or mental health. If this Standard applies, it triggers a duty on the part of the mediator to advise the parties of the implications of serving

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<sup>10</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 5, at 1055-1118.

<sup>11</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard VI(A)(5).

as the agreement drafter and, specifically, to get the parties' consent to the service.<sup>12</sup>

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 drafting agreements or MOUs under these additional "elements for service."

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 mediation, or to retain an attorney to draft the agreement or MOU.<sup>13</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 draft an agreement or MOU. 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 effect of the drafting service on the parties' perceptions of the mediator's impartiality. For instance, if the mediator suggests the addition of a provision to the mediated settlement agreement, it may seem to one of the parties as showing favoritism to the other party.<sup>14</sup>

In addition, depending on how one defines when the mediation "terminates," taking on the drafting role could be deemed as the creation of a new relationship with the parties either during or after the mediation. This new role potentially triggers Standard III(A) governing conflicts of interest. Standard III(D) would again require the mediator to disclose the potential conflict of interest and to seek the consent of the parties before serving in that new role. The Reporter's Notes specifically contemplate the new role of "personal lawyer."

#### C. *Conclusion: Drafting the Mediated Settlement Agreement.*

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<sup>12</sup> For instance, attorneys serving as mediators providing this service may need to explain the legal professional rules governing joint representation and get a written waiver of any potential conflict arising from that joint representation.

<sup>13</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>14</sup> MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), Standard II(B).

The mediator posing the questions focuses most particularly on the issue of whether a lawyer-mediator can draft the mediated settlement agreement in the context of a mediation requested by unrepresented parties to a divorce. As the discussion above suggests, the mediator should be sensitive to the role he or she is playing, whether he or she is competent to provide the requested drafting service, and the parties' capacity to meaningfully participate during the entire mediation, regardless of whether the mediation concerns purely financial issues or includes custody and child support issues. The fact that the mediation may involve custody and child support issues highlights the mediator's responsibility to help the parties get information about their legal rights and obligations, even at the risk of interrupting or even ending the mediation process.

The Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training. A mediator may, in drafting a mediated settlement agreement or MOU, act as a "scrivener" -- simply memorializing the parties' agreement without adding terms or operative language. The Model Standards arguably also permit a mediator to, if she has the necessary background and experience, provide legal information to the parties. If, however, the mediator puts on his or her legal counsel's hat, by giving legal advice or performing tasks typically done by legal counsel, then the mediator runs the serious risk of inappropriately mixing the role of legal counsel and mediator without disclosing the implications of that shift in roles or without getting party consent.

In addition, any drafting activity by a mediator could draw the attention of bodies regulating lawyers or those enforcing restrictions on UPL.<sup>15</sup>

*D. Provisions of Model Standards and Reporter's Notes.*

These questions implicate several provisions of the Model Standards and highlight the potential tension that exists between the different Standards.

The Committee on Mediator Ethical Guidance considered the following Standards in responding to Questions 1A to 1D posed by the mediator.

First, the revised Model Standards define mediation in the *Preamble* as "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." The Reporter's Notes to the *Preamble* state: "The revised definition of mediation is not designed to exclude any mediation style or approach consistent with Standard I's

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<sup>15</sup> For a discussion of cases analyzing scrivener's activities as an issue of UPL, see Young, *supra* note 5, at n.448.

commitment to support and respect the parties' decision-making roles in the process."<sup>16</sup>

*Model Standard I(A) Self-Determination* provides in pertinent part:

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, uncoerced decision in which each party makes free and **informed choices as to process** and outcome.

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2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator **should make the parties aware of the importance of consulting other professionals to help them make informed choices.**<sup>17</sup>

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<sup>16</sup> *Reporter's Notes, supra* note 3, at §V(A).

<sup>17</sup> Similarly, the Family Standards note that "a family mediator shall recognize that mediation is based on the principle of self-determination by the participants." MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard I. The Family Standards further explain that phrase as follows:

A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.

B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.

C. A family mediator should inform the participants that they may seek information and advice from a variety of sources during the mediation process.

D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

*Id.* The Family Standards recommend that the mediator inform the parties that "they may obtain independent advice from attorneys, counsel, advocates, accountants, therapists or other professionals during the mediation process." *Id.* at Standard III. The Family Standards also address the mediator's responsibility to structure the mediation process so that the participants can make informed decisions. Those responsibilities include the following:

A. The mediator should facilitate full and accurate disclosure and the acquisition and development of information during mediation

(Emphasis added.)

*Model Standard VI (A)(5) The Quality of the Process* cautions that:

The role of a mediator differs substantially from other professional roles. **Mixing the role of a mediator and the role of another profession is problematic** and thus, a mediator should distinguish between the roles. A mediator may provide **information** that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.<sup>18</sup>

(Emphasis added.)

*Model Standard VI (A)(8) The Quality of the Process* further provides:

A mediator **shall** not undertake **an additional dispute resolution role** in the same matter without the consent of the parties. Before providing such service, a mediator **shall** inform the parties of the implications of **the change in process** and obtain their consent to the change. A mediator who undertakes such role assumes different

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so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts.

B. Consistent with standards of impartiality and preserving participant self-determination, a mediator may provide the participants with information that the mediator is qualified by training or experience to provide. The mediator shall not provide therapy or legal advice.

C. The mediator should recommend that the participants obtain independent legal representation before concluding an agreement.

D. If the participants so desire, the mediator should allow attorneys, counsel or advocates for the participants to be present at the mediation sessions.

**E. With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.**

*Id.* at Standard VI (emphasis added). Another provision of the Family Standards encourages mediators to refer parties to other professionals, including attorneys. *Id.* at Family Standards III.4.

<sup>18</sup> More explicitly, the Family Standards preclude a mediator from giving legal advice. MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard VI.B. Like the Model Standards, they permit a mediator to offer the parties “information that the mediator is qualified by training or experience to provide.” *Id.*

duties and responsibilities that may be governed by other standards.

(Emphasis added.)

*Model Standard VI(C) The Quality of the Process* provides:

If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator **shall** take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

(Emphasis added.)

*Model Standard IV(A)(1) Competence* also may apply. It provides in pertinent part:

A. A mediator **shall** mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. . . . Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence . . .

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator **shall** discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to . . . requesting appropriate assistance.

(Emphasis added.) The Reporter's Notes to this Standard provide in pertinent part: "[T]o promote public confidence in the integrity and usefulness of the [mediation] process and to protect the members of the public, an individual representing himself or herself as a mediator must be committed to serving only in those situations for which he or she possess the basic competency to assist."<sup>19</sup> They further state:

Standard IV(B) recognizes the situation in which a mediator . . . learns during the course of the discussions that the matters are more complex than originally anticipated and beyond his or her competency. In such

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<sup>19</sup> *Reporter's Notes, supra* note 3, at §IV(F).

situation, Standard IV(B) imposes a duty on that mediator to take affirmative steps with the parties to address the situation and make appropriate arrangements for serving them (perhaps through hiring co-mediators with relevant competencies . . . .)<sup>20</sup>

Perhaps most importantly, in the context of the questions asked by the mediator, the Reporter's Notes state:

Additional public comments suggested that the language of the Standards include reference to an individual's meeting the qualification requirements set forth by relevant state statutes; the Joint Committee believed . . . that the Standards are considered as fundamental ethical guidelines; **particular programs or practice areas might require additional elements for service.**<sup>21</sup>

(Emphasis added.)

*Model Standards II(B) and II(C) Impartiality* provide in pertinent part:

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

C. If at any time a mediator is unable to **conduct** a mediation in an **impartial manner**, the mediator shall withdraw.<sup>22</sup>

(Emphasis added.)

*Model Standard III. Conflicts of Interest* provides in pertinent part:

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 . . . that reasonably raises a question of the mediator's impartiality.

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

<sup>21</sup> *Id.*

<sup>22</sup> The Family Standards have similar provisions governing mediator impartiality. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), Standard IV.E.

D. If a mediator learns 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.

(Emphasis added.) The Reporter's Notes express concern about acting on behalf of a mediation party, party representative, witness, or some other participant in "another role (such as a personal lawyer, therapist, or consultant to their business)." The Notes caution the mediator "to make certain that entering into such new relationship does not cast doubt about the integrity of the mediation process."<sup>23</sup>

*E. Other Resources.*

The Committee suggests that mediators also consider the following resources in determining whether they may provide in the state in which they are conducting the mediation the services identified in the mediator's questions:

- The list of statutes, court rules, and case law defining the practice of law found at *Am. Bar Ass'n Task Force on the Model Definition of the Practice of Law, State Definitions of the Practice of Law* app. A (2003), available at [http://www.abanet.org/cpr/model-def/model\\_def\\_statutes.pdf](http://www.abanet.org/cpr/model-def/model_def_statutes.pdf) (last visited March 3, 2008).
- Am. Bar Ass'n Section of Dispute Resolution Council, *Resolution on Mediation and the Unauthorized Practice of Law* (adopted Feb. 2, 2002), available at <http://www.abanet.org/dispute/resolution2002.pdf>.
- 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) (identifying mediation as a practice distinct from law; listing those mediation activities a mediator should be able to conduct without engaging

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<sup>23</sup> *Reporter's Notes, supra* note 3, at §V(E). Several of these Standards use the term "shall" in defining the responsibilities of mediators. The Notes on Construction to the Model Standards provides in pertinent part:

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 standard 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), Notes of Construction.

in UPL so long as they are conducted consistently with mediation's core values), *available at* <http://www.acrnet.org/pdfs/upl-drafrpt-aug04.pdf>.

- Assoc. for Conflict Resolution, *Report of the Task Force on the Unauthorized Practice of Law* (draft August 2002), *available at* <http://www.acrnet.org/pdfs/upl-drafrpt-aug02.pdf>.
- The discussion found in Young, *supra* note 5 *passim*.
- Ethics opinions issued by state regulatory bodies of the bar or of mediators relating to UPL in the context of drafting mediated settlement agreements, MOUs, or court documents, or calculating child support, including:
  - Proposed Decision, *In re Resa Fremed*, No. UPL 05-002 (Conn. Statewide Grievance Comm. March 9, 2006) (finding that a therapist-mediator had engaged in the unauthorized practice of law by preparing a MOU for a divorcing couple that covered issues of marital assets, inheritance, alimony, and a parenting plan);
  - Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 6 (June 14, 2005) (advising that a mediator cannot prepare a court order for the parties, even at the request of a judge or judicial officer, because under Georgia law preparation of a court order would constitute the practice of law; further advising that if a lawyer-mediator prepared a court order it would constitute impermissible legal advice under the mandatory ethics codes for mediators);
  - Comm. on Ethics, Ga. Comm'n on Dispute Resolution, Advisory Op. 7 *passim* (Jan. 3, 2007) (advising that mediation is not the practice of law; advising that court-connected mediators are expected to help parties prepare settlement agreements or MOUs; advising that "Georgia's state-created child support worksheets, schedules, Excel spreadsheet, and on-line calculator" are tools that mediators, whether lawyer or non-lawyer, may use to help parties calculate child support; advising that mediator may not make judgments for the parties about "the inputs to the calculations and deviations," but may help the parties negotiate these issues);
  - Me. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar, Op. 137 (Dec. 1, 1993) (stating that a lawyer-mediator may draft the divorce judgment and other ancillary documents, such as promissory notes and deeds, so long as the mediator remains neutral, reflects the parties' resolution of the matter in the documents, and encourages parties to consult with independent legal counsel to review draft documents; construing language of bar rule broadly to find that "settlement agreement" can include ancillary documents that may be necessary to reflect fully the parties' resolution of the matter);
  - State Bar of Mich. Standing Comm. on Prof'l and Jud'l Ethics, Op. RI-278 (Aug. 12, 1996) (stating that a lawyer-mediator may draft MOU, must advise pro se parties to obtain independent legal advice about draft agreement, and

“should . . .discourage [party] from signing any agreement which has not been so reviewed”; further stating that a lawyer-mediator is not per se prohibited from preparing pleadings required to implement parties’ MOU, but activities would be the practice of law and not mediation; accordingly, lawyer would have to comply with Michigan Rules of Professional Conduct 1.7 and 2.2 and other ethics duties);

- N.Y. State Bar Ass’n Comm. on Prof Ethics, Op. 736 (Jan. 3, 2001) (stating that a lawyer-mediator may not draft and file separation agreement and divorce papers on behalf of spouses as joint clients unless the lawyer can satisfy the “disinterested lawyer” test of DR 5-105(c));
- Or. State Bar Ass’n Op. 1991–101 (July 1991) (stating that a lawyer-mediator may draft settlement agreement under DR5-105 if he or she advises and encourages parties to seek independent legal advice, but mediator cannot represent one or both parties in placing the agreement in the records of the court);
- Utah State Bar Ethics Advisory Opinion Comm., Op. 02–10 (Dec. 18, 2002) (advising that “a lawyer may advise a mediator on issues likely to arise in the course of the mediation but may not advise the mediator how to prepare the divorce agreement and court pleadings” even in simple, uncontested divorces because it would constitute assisting UPL; further advising that in the context of unbundled legal services, the committee would allow a lawyer to represent a divorce mediation party in the limited capacity of preparing pleadings so long as the client gave informed consent to the limited role);
- Utah State Bar Ethics Advisory Opinion Comm., Op. 05–03 (Sept. 30, 2005) (advising that a lawyer-mediator who “drafts the settlement agreement, complaint, and other pleadings to implement the settlement and obtain a divorce for the parties . . . is engaged in the practice of law and attempting to represent opposing parties in litigation.” A lawyer may only do this if he satisfies a four part inquiry: “(1) The lawyer reasonably believe[s] that the representation of both parties will not adversely affect the relationship with either in this directly adverse representation. (2) The parties are firmly committed to the terms arrived at in mediation, the terms are faithful to both spouses’ objectives and consistent with their legal rights, there are no remaining points of contention, and the lawyer can competently fashion the settlement agreement and divorce documents. (3) Both parties give fully informed consent. (4) The lawyer mediator makes known to the court the nature of his dual role.”
- Va. State Bar Standing Comm. on Legal Ethics, Op. 1368 (Dec. 12, 1990),
  - “The committee believes that providing legal information, albeit not legal advice, and assisting individuals to reach agreement on such issues as division of property, contractual obligations, liability and damages, by definition entails the application of legal knowledge and training to the facts of the situation . . . . Therefore, under the rationale of [two earlier ethics opinions], the committee believes that such activities subject the

attorney/mediator to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation.”

- “To the extent that the mediator is engaged by the parties as a scrivener of the agreement reached during the mediation process, such tasks do not constitute the practice of law . . . . Should, however, the mediator/lawyer provide any services beyond those of scrivener, the mediator/lawyer must meet the requirements of [the disciplinary rule], which prohibit the sharing of legal fees with a nonlawyer . . . .”
- The Florida Mediator Ethics Advisory Committee has issued sixteen advisory opinions discussing whether a mediator may mix professional roles, give legal advice, provide information, provide evaluations, or draft certain types of documents. The Florida Mediator Ethics Advisory Committee Opinions are available at [http://www.flcourts.org/gen\\_public/adr/MEAC%20Opinions/index%20of%20opinions.shtml](http://www.flcourts.org/gen_public/adr/MEAC%20Opinions/index%20of%20opinions.shtml). See
  - Op. 95–002 (1995) (describing the mediator’s role and the inappropriateness of a mediator giving legal advice);
  - Op. 96–002 (1996) (describing the need for a mediator to decline a court appointment when it would compromise the mediator’s integrity);
  - Op. 96–003 (1997) (advising that a mediator may not advise or ask about missing claims, but may ask if a party has sought legal advice);
  - Op. 98–003 (1998) (advising that mediation is not the practice of law);
  - Op. 99–004 (1999) (discussing non-lawyer party assistance in mediation);
  - Op. 2000–009 (2001) (advising that a mediator may aid in the preparation of court forms after a mediated settlement agreement);
  - Op. 2001-003 (2001) (discussing whether a mediator may draft financial affidavits and certain pleadings);
  - Op. 2001–011 (2002) (advising that even if a mediator is trained to give information, it may be a violation of impartiality to give it);
  - Op. 2003–002 (2003) (stating a mediator does not have an ethical obligation to advise a party without an attorney);
  - Op. 2003–003 (2003), (advising that if a mediator is trained to give information, it can only be done consistent with the standards governing impartiality and party self-determination);
  - Op. 2003–007 (2003) (stating that a mediator may distribute a form describing the “basis for contesting the claim or counterclaim”);
  - Op. 2003–010 (2004) (advising that a mediator must make sure an agreement is in writing and formalized appropriately);
  - Op. 2003–011 (2004) (stating that there is no exception allowing county mediators to predict how a particular court will decide a case);
  - Op. 2004–004 (2005) (advising that a mediator may assist in completing forms, but may not draft forms);

- Op. 2005–004 (2005) (stating that a mediator should not “represent either one party or both parties in any dissolution proceeding or in any matter arising out of the subject mediation.”);
  - Op. 2000-009 (2001) (discussing whether a mediator may prepare settlement agreements and court forms).
- Dep’t of Dispute Resolution Servs., Supreme Court of Va., *Guidelines on Mediation & the Unauthorized Practice of Law* (1999), 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) (discussing legal advice and drafting activities) . The Virginia UPL Guidelines consist of several chapters posted on the Virginia Supreme Court’s website.
  - Alternative Dispute Resolution Section, Colo. Bar Ass’n, *Recommended Guidelines Regarding Unauthorized Practice of Law Issues in Mediation* (approved Jan. 12, 2007) (discussing legal advice and drafting activities), available at <http://www.coloradomediation.org/ccmo/docs/UnauthPractLawFinal020707.pdf>.
  - Task Force on Mediation and the Practice of Law, N.C. Bar Ass’n Dispute Resolution Section, *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law* (1999), available at <http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/UnauthorizedPracticeofLaw.pdf> (discussing legal advice and drafting activities).