

## **Mediation Ethics: What Should I Do?**

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Program Description: Mediators often find themselves facing ethical conundrums that can undermine confidence in the process. This innovative program profiles panel members acting out ethical dilemmas as a catalyst to discuss and interpret the Model Standards of Conduct for Mediators and recent opinions issued by the Committee on Mediator Ethical Guidance, which construe those Standards. By the end of the program, attendees should be better equipped to understand and resolve intricate ethical challenges. Topics to be covered include: concealment of information in caucus, mediation and social media, conflicts of interest, and overreaching behavior by a participant.

This session focused on various ethical dilemmas that a mediator may face in his or her profession and alluded primarily to the Model Standards of Conduct for Mediators (“Model Standards”) to address them.

First, the presenters began by giving a brief overview of the Model Standards. The Model Standards was prepared in 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution. In 2005, the Model Standards was revised and approved by each organization. The Model Standards serve as a fundamental ethical guideline for mediators and has three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The Model Standards consist of the following nine standards:

Standard I:	Self Determination
Standard II:	Impartiality
Standard III:	Conflicts of Interest
Standard IV:	Competence
Standard V:	Confidentiality
Standard VI:	Quality of the Process
Standard VII:	Advertising and Solicitation
Standard VIII:	Fees and Other Charges
Standard IX:	Advancement of Mediation of Practice

The Model Standards do not have the force of law, unless adopted by a court or other regulatory authority. Nonetheless, given that the Model Standards have been adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution, they might be viewed as establishing a standard of care for mediators.

The presenters acted out various scenarios that were mentioned in several recent opinions issued by the Section on Dispute Resolution's Committee on Mediator Ethical Guidance. The presenters allowed an open candid discussion about whether the mediator in the scenarios abided by his or her ethical obligations. In discussing the various scenarios, the presenters interpreted the Model Standards, the Model Rules of Professional Conduct, and the Unauthorized Practice of Law rules, which were also mentioned in the opinions. The opinions (e.g., "SODR 2015-1") that were brought up during this session are discussed below:

**SODR 2015-1: Is it appropriate for a mediator to advertise that he mediated "the largest settlement in the history of [the] country?"**

No. The mediator must appear impartial. An advertisement such as the one above creates an appearance of partiality in favor of plaintiffs in future mediations. Further, the advertisement may be in violation of the mediator's duty to keep information obtained during the mediation confidential. See Model Standards II, V, and VII (2005).

**SODR 2015-2: Must a mediator disclose to prospective parties that she has conducted a number of previous mediations for one of the parties (or its attorney)? What needs to be disclosed?**

Generally, yes. According to the Model Standards, a prior mediation may be viewed as a relationship that constitutes a conflict of interest. Thus, a mediator should make a reasonable inquiry to determine whether they have conducted a prior mediation involving one of the current parties. If so, the mediator should disclose this information to the current parties and obtain consent to serve as the mediator in the present mediation. See Model Standards III and V (2005).

**SODR 2016-1: Is it appropriate for a mediator to post on his Facebook page that he just settled a case involving a non-English speaking elderly client and that he got her \$50k?**

The mediator has a duty to conduct the mediation in an impartial manner and avoid any conduct that appears otherwise. The mediator posting on Facebook that he settled a case for a client for \$50k shows a degree of favoritism towards the client and therefore, creates an appearance of partiality. It might also be a violation of the mediator's confidentiality obligations. When posting on social media, the mediator must be careful about the way the mediator's conduct is framed. See Model Standards II and V (2005).

**SODR 2016-3: Two pro se parties asked the mediator to leave the room while they discuss the matter. When the mediator comes back into the room, the parties have reached an agreement and ask the mediator to put the terms into writing. What should the mediator do?**

The mediator should determine whether the parties' decision to ask him to leave the room was voluntary and informed. The mediator should then continue his role as mediator and ask the parties how they reached the agreement. However, the mediator should decline to draft the agreement because in doing so, the mediator assumes the role of an attorney. The mediator should recommend that the parties consult independent counsel to draft and/or look over the agreement. See Model Standards I and VI (2005).

**SODR 2017-1: If an attorney a mediator knows, either a personal friend or professional colleague, contacts the mediator about mediating a matter, or refers a matter for mediation, what if anything must the mediator disclose to the other party or parties?**

A relationship, whether personal or professional, could raise questions about the mediator's impartiality. The mediator should disclose these relationships to the participants of a mediation and allow them to inquire further about the relationship. After disclosing the relationship, the mediator should obtain consent from the participants to continue serving as the mediator. See Model Standards II and III (2005).

**SODR 2018-1: What are a mediator's ethical responsibilities and options when one party tells the mediator something in confidence, that if disclosed to the other party, the mediator believes would substantially alter the other party's settlement position, or even their willingness to settle?**

This answer depends on various factors such as: whether the information regards facts or law; whether the parties are represented by counsel; the nature of the information and how significant it really is; when the information was disclosed to the mediator; the mediator's belief and judgment; or any other number of other variables. Nevertheless, the Model Standards provide that a mediator should promote honesty and candor between the parties and shall not knowingly misrepresent any material facts or circumstances during course of the mediation. At the same time, the mediator must adhere to the ethical obligations of confidentiality. A mediator who meets with a party in private shall not convey any information obtained during this meeting without obtaining consent from the disclosing party. The mediator must also make a self-determination and decide how to proceed. For instance, if the mediator believes that any conduct has jeopardized the mediation, the mediator shall take appropriate steps, including but not limited to, postponing, withdrawing, or terminating the mediation. See Model Standards I, III, V and VI (2005); Model Rules of Professional Conduct 4.1.