

**SDNY Mediator Tip Sheet:
Conflicts - The Duty to Investigate, Disclose, Recuse
December 2021**

Introduction:

Confidence in the neutrality of the mediator is vital to the trust at the heart of the mediator-participant relationship. To have sufficient comfort to be willing to reveal information to, and accept assistance from, the mediator, the participants must believe that the mediator has no interests or relationships that could create an impression of possible bias or raise a question about the mediator's impartiality or self-interest. Implicit in the relationship is the expectation that the mediator has investigated and disclosed any association, experience, or background information that a reasonable individual would consider likely to create a potential or actual conflict of interest for, or indicate bias of, the mediator. Also important in consideration of conflicts is the context or practice in the community in which the mediation occurs. For example, in some communities, close ties with a mediator may enhance the participants' comfort in the person and process, while in other contexts, such ties might suggest recusal or withdrawal. Similarly, participants may have different perceptions of potential conflicts depending on whether or not they selected the mediator. For panel mediators in the U.S. District Court for the Southern District of New York, the best practice is to investigate, err on the side of disclosure and, if warranted, recuse or withdraw.

The Scope of Investigation:

Traditional conflict checks (present and former clients, adversaries, etc.) are necessary, but not sufficient. Mediators must disclose "any circumstance that could give rise to a reasonable apprehension of a lack of impartiality such as those circumstances enumerated under [28 U.S.C. § 455](#)." See also, [Ceats Inc. v. Continental Airlines et al.](#)

Mediators should make reasonable efforts to learn of, and disclose to the Mediation Office and the participants, any circumstance that could present a "reasonable apprehension" of a lack of impartiality. Mediators should consider all aspects of their professional and personal lives and disclose any ties among the mediator, the participants, and the matter in dispute (regardless of how remote they may seem) ***if such ties could cause a reasonable person to question whether the mediator would be impartial or demonstrate bias in handling the matter.***

Mediators should consider:

- Past or current relationships, including social or professional relationships;
- Membership on committees or in organizations, to the extent that the mediator is actively engaged in such service. This could include bar association or other professional committees, or organizations such as college, law school, fraternity, or sorority memberships or activities;
- Membership on boards of directors, whether commercial or non-profit;
- Prior service as a neutral or advocate in matters with the same participants;
- Any direct or indirect financial or personal interest in the outcome of the case;
- Relationships or circumstances involving members of the mediator's family or the mediator's current or prior employers, partners, or business associates;
- Beliefs or opinions regarding the subject matter of the dispute that have been publicly expressed or suggest, or could be perceived as suggesting, the mediator's partiality or bias.

If a mediator needs to think carefully about whether a particular relationship or circumstance should be disclosed, then it should be: *If there is any question, make the disclosure.*

When and How to Disclose:

Mediators should investigate possible conflicts and grounds for perception of bias or partiality before accepting a case for mediation and, if they are able to accept the matter, should continue to do so throughout the duration of the case. If at any point the mediator is aware of or discovers the possibility of a conflict, or grounds for perception of bias or partiality, the mediator should disclose those circumstances. In all cases, disclosure should be made first to the Mediation Office. If the Mediation Office does not consider the circumstances disqualifying, the mediator should then disclose the circumstances to the participants, in writing, with a request that the participants state their positions in writing. Absent any party objections, the mediator may proceed with the mediation.

Sample Disclosure Language:

Dear Counsel,

Although I do not believe that I have any conflicts in participating as the mediator for this matter, I am making the following disclosures:

I am a shareholder of ABC firm, a general practice law firm, with offices in New York and New Jersey. My practice is primarily in the areas of mediation, corporate reorganization, and debtor/creditor law. In addition, my spouse, (insert name), is a labor and employment arbitrator. I previously served as a mediator in an unrelated matter in which the firm representing the plaintiff in this matter also represented the plaintiff. I do not believe that these circumstances affect my ability to be impartial in this matter.

After you have had an opportunity to review this information, and the attached biography, please advise whether you have any objection to my continuing as mediator for this matter. If you have any questions, or for any reason you wish to discuss this further, please advise by an e-mail copying counsel for all parties. If necessary and appropriate, we can schedule a conference call.

Please respond by the close of business on Wednesday, both with respect to any issues arising out of these disclosures and with respect to your and your clients' availability for the mediation session. If you need more time to respond, please let me know.

Conflicts Scenarios in Southern District Mediations:

Listed below are examples of "conflicts" questions that have been raised in SDNY mediations, as well as the chosen course of action. These are all "real life" examples in which the mediator had to decide whether to: recuse outright; disclose and query whether the participants had questions/concerns or; not disclose at all.

- The mediator taught a law school seminar six years ago. One of the attorneys in the case had been a student in that seminar, along with twenty other students. There has been no contact since. The mediator disclosed and queried and mediated the case after all participants indicated that they had no concerns.
- The mediator and one of the attorneys were law school classmates over twenty-five years ago. The two see one another at reunions and are friendly in that context but have no other contacts. The mediator disclosed and queried and mediated the case after all participants indicated that they had no concerns.

- The mediator and one of the attorneys worked at the same law firm. The mediator has not worked at the firm or had contact with the former colleague in four years. The mediator disclosed and queried and did not mediate the dispute when participants expressed concern.
- The mediator's current firm is adverse to plaintiff's counsel's firm on another unrelated matter. The mediator has no role in the other matter and has no contacts of her own with counsel/parties in the mediation. The mediator recused.
- The mediator's current firm was adverse to a plaintiff's counsel's firm on another matter that concluded over two years ago. The mediator had no role in the other matter, and has no contacts of his own with counsel/parties in the mediation. The mediator disclosed and queried and mediated the case after all participants indicated that they had no concerns.
- In the past two years the mediator attended seminars and CLE programs at which counsel for a party was a speaker or panelist. The mediator disclosed and indicated that absent objection he would serve as mediator. There was no objection.
- The mediator served as co-counsel with one of the attorneys in an entirely unrelated matter that ended two years ago. The mediator disclosed, one of the parties expressed concern, and the mediator recused.
- The mediator's current firm represented one of the participants in a litigation that concluded many years ago. The mediator had no role in the matter and had no contact with the participant. The mediator disclosed and queried and mediated the case after all participants indicated that they had no concerns.
- The mediator served as an arbitrator in an unrelated case in which the defendant's attorney represented another party. The mediator disclosed and queried and mediated the case after all participants indicated that they had no concerns.

In each of these instances, the key question is the same: If disclosed, could the relationship create a "reasonable apprehension" of potential partiality or bias? If the answer is yes, or possibly, or I don't know, disclosure should be made. *When in doubt, disclose.*