

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
No. 13-02**

A Nebraska Lawyer who is not licensed as a mediator under the Nebraska Parenting Act (Nebraska Revised Statutes §43-2921), should not mediate in cases involving proceedings or modifications where parenting functions are at issue (Nebraska Revised Statutes Chapter 42 - Husband and Wife, and §§ 43-1401-1418 - Infants and Juveniles).

QUESTION PRESENTED

Whether a Nebraska Lawyer who is otherwise highly trained and experienced in mediating in Nebraska and elsewhere is subject to the requirements of the Nebraska Parenting Act which would require that attorney to comply with the Parenting Act and receive additional training and certification.

FACTS

A Nebraska Lawyer serves as a professional mediator in various civil and commercial matters. He has mediated hundreds of cases and is considered one of the most popular and experienced mediators in the state, if not the Midwestern Region. He has also mediated several Domestic matters in which child custody and visitation are at issue although he is not certified as a mediator under the Nebraska Parenting Act (Nebraska Revised Statutes §43-2921). While no one has challenged his experience or abilities as a mediator, an issue has arisen as to whether he may ethically mediate Parenting Act cases. Therefore, an Advisory Opinion has been requested.

RELEVANT AUTHORITIES

The following authorities are relevant to the issue presented.

Nebraska Rules of Professional Conduct.

First, the Nebraska Rules of Professional Conduct provides in relevant part as follows:

Preamble, §5:

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Preamble, § 6:

In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Rule 1.1. COMPETENCE:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonable necessary for the representation.

The Comment to the aforementioned Rule includes the following: "A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.... A lawyer can provide adequate representation in a wholly novel field through necessary study."

Rule 2.3. LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them.

Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Uniform Mediation Act, Neb. Rev. Stat. 25-2930, et seq.

The following provisions of the Uniform Mediation Act are relevant to the issue presented.

25-2931. Terms, defined. For purposes of the Uniform Mediation Act:

(1) Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) Mediation communication means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(3) Mediator means an individual who conducts a mediation.

* * *

25-2932. Scope. (a) Except as otherwise provided in subsection (b) or (c) of this section, the Uniform Mediation Act applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

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25-2938. Mediator's disclosure of conflicts of interest; background.

(a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subdivision (a)(1) of this section after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) An individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection (a), (b), or (g) of this section is precluded by the violation from asserting a privilege under section 25-2933.

(e) subsections (a), (b), (c), and (g) do not apply to an individual acting as a judge.

(f) The Uniform Mediation Act does not require that a mediator have a special qualification by background or profession. (Emphasis added)

(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) of this section to be disclosed, the parties agree otherwise.

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25-2941. Uniformity of application and construction. In applying and construing the Uniform Mediation Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Nebraska Dispute Resolution Act, Neb. Rev. Stat. 25-2901.

The following provisions of the Nebraska Dispute Resolution Act are relevant to the issue presented:

25-2903. Terms, defined. For purposes of the Dispute Resolution Act:

(1) Approved center shall mean a center that has applied for and received approval from the director under section 25-2909;

(2) Center shall mean a nonprofit organization or a court-established program which makes dispute resolution procedures available;

(3) Council shall mean the Advisory Council on Dispute Resolution;

(4) Director shall mean the Director of the Office of Dispute Resolution;

(5) Dispute resolution process shall mean a process by which the parties involved in a dispute voluntarily agree to enter into informal discussion and negotiation with the assistance of a mediator;

(6) Mediation shall mean the intervention into a dispute by a third party who has no decision making authority and is impartial to the issues being discussed;

(7) Mediator shall mean a person trained in the process of mediation who assists parties in dispute to reach a mutually acceptable resolution of their conflict; and

(8) Office shall mean the Office of Dispute Resolution.

25-2908. Director; duties. Consistent with the purposes and objectives of the Dispute

Resolution Act and in consultation with the council, the director shall:

(1) Make information on the formation of center available statewide and encourage the formation of centers;

(2) Approve centers which meet requirements for approval;

(3) Develop a uniform system of reporting and collecting statistical data from approved centers;

(4) Develop a uniform system of evaluating approved centers;

(5) Prepare a yearly budget for the implementation of the act and distribute funds to approved centers;

(6) Develop guidelines for a sliding scale of fees to be charged by approved centers;

(7) Develop curricula and initiate training sessions

(8) Establish volunteer training programs;

(9) Promote public awareness of the dispute resolution process;

(10) Apply for and receive funds from public and private sources for carrying out the purposes and obligations of the act; and

(11) Develop a uniform system to create and maintain a roster of mediators for juvenile offender and victim mediation, as provided in section 43-245, and centers approved under section 25-2909. The roster shall be made available to courts and county attorneys.

25-2913. Mediators; qualifications; compensation; powers and duties. (1) Mediators of approved centers shall have completed at least thirty hours of training in conflict resolution techniques, neutrality, agreement writing, and ethics. For disputes involving marital dissolution, mediators of approved centers shall have an additional thirty hours in family mediation. An initial apprenticeship with an experienced mediator shall be required for at least three sessions for all mediators without prior mediation experience.

25-2919. Application of act. The Dispute Resolution Act shall apply only to approved centers and mediators of such centers.

Nebraska Parenting Act, Neb. Rev. Stat. 43-2920, et seq.

The following provisions of the Nebraska Parenting Act may be relevant to the issue presented:

43-2921. Legislative findings.

The Legislature finds that it is in the best interests of a child that a parenting plan be developed in any proceeding under Chapter 42 involving custody, parenting time, visitation, or other access with a child and that the parenting plan establish specific individual responsibility for performing such parenting functions as are necessary and appropriate for the care and healthy development of each child affected by the parenting plan.

The Legislature further finds that it is in the best interests of a child to have a safe, stable, and nurturing environment. The best interests of each child shall be paramount and consideration shall be given to the desires and wishes of the child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning.

In any proceeding involving a child, the best interests of the child shall be the standard by which the court adjudicates and establishes the individual responsibilities, including consideration in any custody, parenting time, visitation, or other access determinations as well as resolution of conflicts affecting each child. The state presumes the critical importance of the parent-child relationship in the welfare and development of the child and that the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child.

Given the potential profound effects on children from witnessing child abuse or neglect or domestic intimate partner abuse, as well as being directly abused, the courts shall recognize the duty and responsibility to keep the child or children safe when presented with a preponderance of the evidence of child abuse or neglect or domestic intimate partner abuse, including evidence of a child being used by the abuser to establish or maintain power and control over the victim. In domestic intimate partner abuse cases, the best interests of each child are often served by keeping the child and the victimized partner safe and not allowing the abuser to continue the abuse. When child abuse or neglect, domestic intimate partner abuse, or unresolved parental conflict prevents the best interests of the child from being served in the parenting arrangement, then the safety and welfare of the child is paramount in the resolution of those conflicts.

43-2922. Terms, defined.

For purposes of the Parenting Act:

* * *

(14) Mediation means a method of nonjudicial intervention in which a trained, neutral third-party mediator, who has no decision making authority, provides a structured process in which individuals and families in conflict work through parenting and other related family issues with the goal of achieving a voluntary, mutually agreeable parenting plan or related resolution;

(15) Mediator means a mediator meeting the qualifications of section 43-2938 and acting in accordance with the Parenting Act;

* * *

43-2927. Training; screening guidelines and safety procedures; State Court Administrator's office; duties.

(1) Mediators involved in proceedings under the Parenting Act shall participate in training approved by the State Court Administrator to recognize child abuse or neglect, domestic intimate partner abuse, and unresolved parental conflict and its potential impact upon children and families.

(2) Screening guidelines and safety procedures for cases involving conditions identified in subsection (1) of section 43-2939 shall be devised by

the State Court Administrator. Such screening shall be conducted by mediators using State Court Administrator-approved screening tools.

(3) Such screening shall be conducted as a part of the individual initial screening session for each case referred to mediation under the Parenting Act prior to setting the case for mediation to determine whether or not it is appropriate to proceed in mediation or to proceed in a form of specialized alternative dispute resolution.

(4) The State Court Administrator's office, in collaboration with professionals in the fields of domestic abuse services, child and family services, mediation, and law, shall develop and approve curricula for the training required under subsection (1) of this section, as well as develop and approve rules, procedures, and forms for training and screening for child abuse or neglect, domestic intimate partner abuse, and unresolved parental conflict.

43-2937. Court referral to mediation or specialized alternative dispute resolution; temporary relief; specialized alternative dispute resolution rule; approval; mandatory court order; when.

(1) In addition to those cases that are mandatorily referred to mediation or specialized alternative dispute resolution under subsection (3) of this section, a court may, at any time in the proceedings upon its own motion or upon the motion of either party, refer a case to mediation or specialized alternative dispute resolution in order to attempt resolution of any relevant matter. The court may state a date for the case to return to court, and the court shall not grant an extension of such date except for cause. If the court refers a case to mediation or specialized alternative dispute resolution, the court may, if appropriate, order temporary relief, including necessary support and provision for payment of mediation costs. **Court referral shall be to a mediator agreed to by the parties and approved by the court, an approved mediation center, or a court conciliation program. The State Court Administrator's office shall develop a process to approve mediators under the Parenting Act.** (Emphasis added)

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43-2938. Mediator; qualifications; training; approved; specialized mediator; requirements.

(1) A mediator under the Parenting Act may be a court conciliation program counselor, a court conciliation program mediator, an approved mediation center affiliated mediator, or a mediator in private practice.

(2) **To qualify as a Parenting Act mediator** (emphasis added), a person shall have basic mediation training and family mediation training, approved by the Office of Dispute Resolution, and shall have served as an

apprentice to a mediator as defined in section 25-2903. The training shall include, but not be limited to:

- (a) Knowledge of the court system and procedures used in contested family matters;
- (b) General knowledge of family law, especially regarding custody, parenting time, visitation, and other access, and support, including calculation of child support using the child support guidelines pursuant to section 42-364.16;
- (c) Knowledge of other resources in the state to which parties and children can be referred for assistance;
- (d) General knowledge of child development, the potential effects of dissolution or parental separation upon children, parents, and extended families, and the psychology of families;
- (e) Knowledge of child abuse or neglect and domestic intimate partner abuse and their potential impact upon the safety of family members, including knowledge of provisions for safety, transition plans, domestic intimate partner abuse screening protocols, and mediation safety measures; and
- (f) Knowledge in regard to the potential effects of domestic violence on a child; the nature and extent of domestic intimate partner abuse; the social and family dynamics of domestic intimate partner abuse; techniques for identifying and assisting families affected by domestic intimate partner abuse; interviewing, documentation of, and appropriate recommendations for families affected by domestic intimate partner abuse; and availability of community and legal domestic violence resources.

(3) To qualify as an approved specialized mediator for parents involved in high conflict and situations in which abuse is present, the mediator shall apply to an approved mediation center or court conciliation program for consideration to be listed as an approved specialized mediator. The approved mediation center or court conciliation program shall submit its list of approved specialized mediators to the Office of Dispute Resolution on an annual basis. Minimum requirements to be listed as an approved specialized mediator include:

- (a) Affiliation with a court conciliation program or an approved mediation center;
- (b) Meeting the minimum standards for a Parenting Act mediator under this section;
- (c) Meeting additional relevant standards and qualifications as determined by the State Court Administrator; and

(d) Satisfactorily completing an additional minimum twenty-four-hour specialized alternative dispute resolution domestic mediation training course developed by entities providing domestic abuse services and mediation services for children and families and approved by the State Court Administrator. This course shall include advanced education in regard to the potential effects of domestic violence on the child; the nature and extent of domestic intimate partner abuse; the social and family dynamics of domestic intimate partner abuse; techniques for identifying and assisting families affected by domestic intimate partner abuse; and appropriate and safe mediation strategies to assist parties in developing a parenting plan, provisions for safety, and a transition plan, as necessary and relevant.

43-2940. Mediation; uniform standards of practice; State Court Administrator; duties; mediation conducted in private.

(1) Mediation of cases under the Parenting Act shall be governed by uniform standards of practice adopted by the State Court Administrator. In adopting the standards of practice, the State Court Administrator shall consider standards developed by recognized associations of mediators and attorneys and other relevant standards governing mediation and other dispute resolution processes of proceedings for the determination of parenting plans or dissolution of marriage. The standards of practice shall include, but not be limited to, all of the following:

- (a) Provision for the best interests of the child and the safeguarding of the rights of the child in regard to each parent, consistent with the act;
- (b) Facilitation of the transition of the family by detailing factors to be considered in decisions concerning the child's future;
- (c) The conducting of negotiations in such a way as to address the relationships between the parties, considering safety and the ability to freely negotiate and make decisions; and
- (d) Provision for a specialized alternative dispute resolution process in cases where any of the conditions specified in subsection (1) of section 43-2939 exist.

(2) Mediation under the Parenting Act shall be conducted in private.

Nebraska Standards of Practice and Ethics for Family Mediators.

The Nebraska Standards of Practice and Ethics for Family Mediators was prepared by the Director/State Court Administrator pursuant to Neb.

Rev. Stat. 43-2940(1) above. The following provisions of the Nebraska Standards of Practice and Ethics for Family Mediators may be relevant to the issue presented:

I. INTRODUCTION

These standards serve as the foundation for these standards and conduct of mediators practicing Parenting Act and family mediation in the state of Nebraska. They set out standards of behavior and ethical considerations for mediators in relationship to the parties in dispute, fellow mediators, and the citizens of Nebraska.

Nothing in these standards should be interpreted to establish or augment any substantive legal duty on the part of mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. However, violation of the Standards of Practice and Ethics for Family Mediators may result in disqualification from rosters of approved Parenting Act Mediators. (Emphasis added).

II. SCOPE, DEFINITION, MEDIATOR'S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE.

A. Scope. The Standards set out in this document shall apply to all family mediators practicing under the Nebraska Parenting Act. The Nebraska Office of Dispute Resolution (ODR) **recommends** that all family mediators practicing in the State of Nebraska adhere to these standards. (Emphasis added)

STANDARD II. EDUCATION AND TRAINING

A family mediator shall be qualified by education and training to undertake the mediation.

STANDARD XIII. MEDIATOR COMPETENCY

A family mediator shall acquire and maintain professional competence in mediation.

ANALYSIS

The Requesting Attorney is subject to the provisions of the Nebraska Parenting Act if he wants to mediate disputes which touch, in any manner, subjects addressed by Nebraska Revised Statutes Chapter 42 (Husband and Wife), and §§

43-1401-1418. Additionally, the Parenting Act MAY apply to proceedings or modifications in which parenting functions for a child are at issue under Chapters 30 and 42. This is the “where and when” the Act is applicable per § 43-2924. The Requesting Attorney has already admitted that he has not completed the training required for by the Act and, because of this he fails Standard II of the Nebraska Standards of Practice and Ethics for Family Mediators. This failure may result in disqualification from rosters of approved Parenting Act Mediators. Here is where The Requesting Attorney runs into the ethical dilemma of knowingly continuing to operate as a family mediator even though he does not have the statutorily required training to do so.

The key to the Act is not the legal or mediation abilities of the mediators – rather, it is the mediator’s newly created duty to be cognizant of, and responsible for, the reporting of child abuse, child neglect, domestic intimate partner abuse, and/or unresolved parental conflict. The definition for “mediator” listed under § 43-2922 “means a mediator meeting the qualifications of section 43-2938 and acting in accordance with the Parenting Act.” The imperative requirements (“shall”) listed under § 43-2938 are in place to make sure mediators addressing Act subjects have the proper training to address the aforementioned duties. Further, Standard II of the Nebraska Standards of Practice and Ethics for Family Mediators clearly lays out the training required to handle mediation under the Act. The Requesting Attorney does not have this training and is not interested in doing this training.

The Requesting Attorney is a very accomplished mediator, but the Act’s applicability under § 43-2924 requires the training listed under § 43-2938 and The Requesting Attorney does not have this. Therefore, per the Act, he is not able to serve as a mediator on matters under the Act.

The Nebraska Standards of Practice and Ethics for Family Mediators have three primary goals: (1) to serve as a guide for the conduct and practice of Parenting Act and family mediators; (2) to inform the mediating parties about mediation practice; and (3) to instill public confidence in the mediation process. Neb. Rev. Stat. § 43-2940 (1) (Supp. 2007) states: “Mediation of cases under the Parenting Act shall

be governed by uniform standards of practice adopted by the State Court Administrator.” These standards are adapted from existing codes of conduct and standards for mediators, including the Model Standards of Practice for Family and Divorce Mediation, adopted and approved by the Association of Family and Conciliation Courts (AFCC) in 2000 and the American Bar Association House of Delegates in 2001; the AAA/ABA/ACR Model Standards of Conduct for Mediators (2005); the Nebraska Office of Dispute Resolution (ODR) Manual of Standards and Ethics for Center Mediators (2001); the Nebraska Parenting Act (2008); the Nebraska Dispute Resolution Act (1991); and the Nebraska Uniform Mediation Act (2003). Based on this background and the Act’s clear language, the training is required to serve as a mediator under the Act.

The Requesting Attorney fails to accept these goals and standards of practice, insisting that his experience in complex commercial mediation qualifies him to address Act subjects. The Requesting Attorney appears to make a sustainable argument with his Proposed Conclusion of Law where he argues that Neb. Rev. Stat. § 43-2940(1) of the Act allows for uniform standards of practice developed by the State Court Administrator as developed by recognized associations of mediators and attorneys (listed above). The Requesting Attorney points out that the Introduction to the Nebraska Standards of Practice and Ethics for Family Mediators specifically states:

Nothing in these standards should be interpreted to establish or augment any substantive legal duty on the part of mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. However, violation of the Standards of Practice and Ethics for Family Mediators may result in disqualification from rosters of approved Parenting Act Mediators.

The Requesting Attorney readily accepts that he would not be included on a list of approved mediators as he is not looking for court-appointed work. And, based on the aforementioned language, if he ignores the training requirements of the Act and serves a mediator anyway, there is no cause of action that can be brought

against him, either by the State or a disgruntled party following a mediation outcome grabbing at straws. Where The Requesting Attorney suffers in his argument is his repeated oversight that a “mediator” under the Act is qualified by the training required by the Act. A mediator agreed to by the courts or the parties or whomever under the Act, is still a mediator who has fulfilled the training requirements of the Act. The Requesting Attorney does not have this training. Therefore, per the Act, he is not able to serve as a mediator on matters under the Act.

In reality, the arguments of both the attorney opposing the Requesting Attorney’s position and The Requesting Attorney are both correct – the Act’s training requirements are not optional, but the punishment under the Act is a non-deterrent. If The Requesting Attorney is interested in exposing himself to liabilities for missing an opportunity to detect and report on child abuse, child neglect, domestic intimate partner abuse, and/or unresolved parental conflict because he does not have the proper training, as defined by the State of Nebraska, then the Act has no deterring effect.

But, the Nebraska Rules of Professional Conduct do, starting with § 5 of the Preamble:

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

Further, § 6 states: “In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” To knowingly ignore the training requirements of the Act and to continue serving as a mediator under the Act does

not conform to the requirements of the law or further confidence in the justice system that created those laws. It is for this reason that The Requesting Attorney might open himself up to violations of the Rules and should consider precluding himself from serving as a mediator for matters addressed by the Act. The risk seems to outweigh the reward, especially considering he does mediations under the Act so infrequently.

CONCLUSION

In order to maintain standards and ensure confidence in the Nebraska Legal System and otherwise maintain respect for the Nebraska Rules of Professional Conduct, A Nebraska Lawyer who is not licensed as a mediator under the Nebraska Parenting Act (Nebraska Revised Statutes Chapter 42 (Husband and Wife), and §§ 43-1401-1418) *should* not mediate in cases involving proceedings or modifications where parenting functions are at issue.