

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

Question SODR-2007-1

In the course of litigation, an attorney receives a set of interrogatories directed to his client, a party, calling for all information about a certain subject known to the client and its employees and agents, including its attorneys. A law firm partner of the attorney is a mediator who has recently mediated a case involving persons not involved in the described litigation. During the course of that mediation, the attorney-mediator received information which would be responsive to the interrogatories referred to. What should happen?

Authority Referenced: Model Standards of Conduct for Mediators 2005, Section V.

Summary:

A mediator shall maintain the confidentiality of information obtained in mediation, unless otherwise agreed to by the parties or required by applicable law. An attorney-mediator who has received information during the course of a mediation that would be responsive to interrogatories directed to his law firm partner should not disclose this information to the partner absent applicable law requiring that the attorney-mediator answer the interrogatories, unless the parties to the mediation already agreed that disclosure is permissible.

Opinion:

In answering this question, the Committee is applying the Model Standards of Conduct for Mediators, as adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution in 2005. The Committee is not applying local law or codes of conduct for mediators that may be relevant. The attorney-mediator in the case above should not disclose information acquired in the mediation that would be responsive to the interrogatories absent a requirement of law, such as a court order.

Model Standard V. Confidentiality provides:

(A) A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

The mediator's duty is straightforward. Since neither of the exceptions apply (party consent or a requirement of law), the mediator must maintain confidentiality.

In answering this question we assume no applicable law would require the attorney mediator described in this situation to divulge information gleaned from an unrelated mediation when that information is requested of his partner's client in a written interrogatory. If, however, there is applicable law requiring the attorney-mediator to provide such information in order to answer the interrogatory sent to his partner's client, consent of the parties to the mediation might be sought, or, barring that, a motion for a protective order might be filed by the attorney-mediator seeking exemption from the rule.

As posed, this problem also suggests that the attorney-mediator may have already disclosed certain information to his law firm partner that the mediator learned in the course of the mediation. The possibility that such a disclosure occurred may raise an issue under the Model Standards. Additionally, the CPR-Georgetown Commission on Ethics and Standards in ADR (2004) proposed Model Rule of Professional Conduct for the Lawyer as Third-Party Neutral may prohibit such disclosure (*see* Rule 4.5.2. Confidentiality, Comment 4).

Finally, the Committee is not addressing the question as to how the attorney to whom the interrogatories are directed should respond, as that matter is outside the Committee's jurisdiction.