

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

SODR-2008-3

Question:

A. What is an attorney-mediator's ethical obligation to protect the confidentiality of mediation communications if ordered by a court to testify regarding such communications?

B. What is the ethical obligation of a mediator who is not an attorney to protect the confidentiality of mediation communications if ordered by a court to testify with regard to such communications?

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

Summary:

The Model Standards of Conduct for Mediators do not require a mediator, whether a lawyer-mediator or a mediator trained in another profession, to take affirmative steps to protect the confidentiality of mediation communications if ordered by a court to testify or otherwise respond to a subpoena, discovery order, or other court order. The Model Standards do not expressly require, for instance, that the mediator file a motion for protective order, resist a subpoena, or otherwise make clear to the court the extent of the mediator's ethical obligation.

Opinion:

The ethical guidance provided in Opinions SODR 2007-1, SODR 2008-1 and SODR 2008-2¹ dealt with a situation in which a lawyer-mediator saw the risk that some time in the future he or she would be compelled to disclose confidential information that he or she learned in the mediation, under a court order to testify or otherwise in response to a subpoena, discovery order, or other court order. This opinion takes the issues raised in those earlier inquiries one step further by discussing the obligations of a mediator to seek a protective order, move to quash the subpoena, or otherwise take affirmative steps to protect the confidentiality of mediation communications.

In answering these questions, the Committee on Mediator Ethical Guidance (Committee) applies 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 does not consider or apply the local law governing confidentiality in mediation or codes of conduct for mediators that may apply.

¹ Committee on Ethical Guidance, at <http://www.abanet.org/dch/committee.cfm?com=DR018600>.

As noted in the Committee's earlier opinions, a lawyer-mediator has the ethical obligation to protect the confidentiality of mediation communications. In addition, the Model Standards specifically limit the types of information a mediator may reveal to any non-participant, including courts. The mediator "may report, if required, whether the parties appeared at a scheduled mediation and whether or not the parties reached a resolution."² This provision does not extend to any other conduct or communications of the parties to a mediation.

However, the Model Standards do not indicate whether a mediator must protect those communications by filing a motion for protective order, resisting a subpoena, or otherwise making clear to the court the extent of the mediator's ethical obligation in the event the court orders the mediator to testify about, or otherwise disclose, communications made during the mediation. Thus, the Model Standards do not provide an answer to the question posed to the Committee when a mediator faces a court order or subpoena seeking disclosure of mediation communications.

The Model Standards make no distinctions between lawyer-mediators and mediators who are not trained as lawyers in connection with the duty to keep mediation communications confidential. Accordingly, all mediators have an ethical obligation to protect the confidentiality of mediation communications. Similarly, the Model Standards impose on all mediators the same limits on communications with, or disclosures to, persons who do not participate in the mediation, including courts.

Model Standard V.A. Confidentiality provides in pertinent part:

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**.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
2. A mediator **shall not** communicate to any **non-participant** information about how the parties acted in the mediation. A mediator **may report, if required**, whether the parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

(Emphasis added.) The Notes on Construction to the Model Standards provides in pertinent part:

² MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V.A.2 (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>.

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.

The Reporter’s Notes to the Model Standards recognize that:

[A] mediator’s conduct may be affected by applicable law,³ court rules, regulations, other applicable professional rules,⁴ mediation rules to which the parties have agreed,

³ For example, VA. CODE ANN. § 8.01-576.22 provides:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation which relates to the controversy, including screening, intake and scheduling a mediation, whether made to the mediator or mediation program staff or to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

⁴ For example, the Florida standards of conduct for mediators provide:

(a) Scope. A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required by law. (b) Caucus. Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party. (c) Record Keeping. A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

and agreement of the parties, some of which may conflict with and take precedence over compliance with these Standards. This topic is noted here for both format and substantive reasons. Organizationally, it became clumsy to represent this conflict throughout the document with such phrases as “unless otherwise required by law;” while that phrase has been used once in the statement of a provision of Standard V dealing with Confidentiality (a significantly law-regulated area of mediator activity), the Joint Committee believed it best to state this basic proposition at the beginning of the document so that it would operate as a presumed understanding throughout.

Substantively, the Joint Committee, in response to comments, believed it important to clarify for a mediator what posture he or she should adopt when confronted with such a conflict. The basic principle, while straight-forward, requires elaboration. The principle that guides mediator conduct in such contexts is: in the event of a conflict between a provision of a Standard and one or more external sources identified in the *Note*, a mediator ought to conduct oneself in a manner that retains and remains faithful to as much of the spirit and intent of the affected Standard, and all other Standards, as is possible.⁵

The Reporter’s Notes do not otherwise discuss the potential conflict between the Model Standard governing confidentiality and applicable law, including court orders, subpoenas, or court rules relating to discovery of evidence, except to state:

While this Standard is consistent with the confidentiality policy goals of the Uniform Mediation Act, it is not designed to match its substantive provisions and nuances in every dimension.

Standard V . . . imposes a duty on the mediator not to share with others information obtained as a result of serving as a mediator. Even if the parties agree that the mediator shall disclose it . . . Standard V(A)(1) states that the mediator may do so but is not required to do so.⁶

FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, R. 10.360(a)-(c) (Fla. Sup. Ct. Standing Comm. on Mediation and Arbitration Rules 2000).

⁵ ABA, ACR & AAA, *Reporter’s Notes*, Notes on Construction at 8, available at <http://moritzlaw.osu.edu/programs/adr/msoc/pdf/reportersnotes-april102005final.pdf> (last visited Apr. 10, 2005).

⁶ *Id.* at 15.

The Uniform Mediation Act, in turn, notes that several states -- including Florida, Georgia, Nebraska, and California -- have passed statutes prohibiting a mediator from disclosing mediation communications to a judge.⁷ In addition, several states have passed the Uniform Mediation Act, which precludes the disclosure by the mediator of confidential mediation communications except in certain circumstances.⁸ At least one court has refused to compel the production in discovery of mediation and settlement documents in a subsequent proceeding relating to the same case.⁹ Recently, however, a New York Appellate Division court enforced a subpoena against a mediator.¹⁰ A discussion of the Uniform Mediation Act, other rules, statutes, court decisions, or court orders governing confidentiality in mediation is outside the Committee's jurisdiction.

In summary, in keeping with the expectations of confidentiality as described in Model Standard V.A, a mediator, regardless of licensure or particular background, should strive to maintain the confidentiality of mediation communications. The extent to which a mediator defends the confidentiality of mediation communications may vary depending on the resources, legal expertise, or ability of the mediator. At a minimum, good practice would suggest that the mediator inform the court, or the party seeking the confidential information, of the mediator's ethical requirements under the Model Standards, as well as any applicable statutes, rules, or contracts of the parties that protect the confidentiality of mediation communications.

Some mediators, for instance, may provide the court with a copy of the relevant standards, statutes, rules, or contract. Other mediators, with available legal resources, may move to quash a subpoena or move for a protective order. The Model Standards, however, seem to leave to the mediator's discretion and best judgment further and more formal resistance of a subpoena, discovery request, or court order. The Model Standards themselves do not impose an affirmative duty on the mediator to resist compelled disclosure of confidential communications.

⁷ UNIF. MEDIATION ACT prefatory note at 8 (amended 2003), *available at* <http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf> (last visited Aug. 25, 2008). In addition, courts in California, Texas, Oregon, and Indiana have upheld the confidentiality of mediation communications. *See generally* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43, 64-65 (2006) (discussing cases in which courts have upheld confidentiality of mediation communications).

⁸ District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington. *See A Few Facts About the . . . Uniform Mediation Act (2001)(2003)*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited Aug. 25, 2008).

⁹ *Cason v. Builders FirstSource-Southeast Group, Inc.*, 159 F. Supp. 2d 242 (W.D.N.C. 2001). *See generally* Coben & Thompson, *supra* note 7, at 57-73.

¹⁰ Richard M. Hauzinger v. Aurela G. Hauzinger, No. CA 07-00659, slip op. at 1-2 (N.Y. App. Div. 2007), *aff'd*, No. 183 SSM 16, slip op. at 1-2 (N.Y. 2008), *available at* <http://www.courts.state.ny.us/ad4/Court/Decisions/2007/09-28-07/PDF/0918.pdf> and <http://www.adrworld.com/si.asp?id=2488> (requiring mediator to testify in response to a subpoena about the circumstances surrounding the execution of the separation agreement negotiated by *pro se* parties so the court could determine whether it was "fair and reasonable at the time of the making of the agreement" and refusing to apply the UMA, which New York had not adopted at the time of the decision). *See also* Coben & Thompson, *supra* note 7, at 66-68.