ABA SECTION OF DISPUTE RESOLUTION
COMMITTEE ON MEDIATOR ETHICAL GUIDANCE

SODR-2009-2

INQUIRY:

I'm writing to seek ethical guidance from your committee on a circumstance that has now occurred twice in my ADR practice. I've been involved in two separate mediations where an employer has sued a former employee for the unauthorized taking and/or duplication of the employer's sensitive electronic data shortly before the employee left his job with the employer. In the course of speaking with both employers in separate caucus, I've been advised, in a rather off-hand manner, that the employers have initiated some form of referral of the case for prosecution to the police/district attorney regarding the alleged unauthorized taking/duplication by the employee of the employer's sensitive electronic data.

I'm aware that the employer's counsel is ethically barred from seeking to directly negotiate a civil settlement in exchange for not pursuing criminal charges. In those two instances there was no specific suggestion by the employer that, as the mediator, I should attempt to bargain on the employer's behalf for the employer's claimed damages in exchange for the employer dropping the criminal charges.

The dilemma for me, as a mediator, having been made privy to this very sensitive information, is what, if anything, I should say on this subject to the former employee and his counsel? I certainly don't want to indirectly engage in a form of unethical bargaining that the employer's counsel would otherwise be prohibited from pursuing. On the other hand, I feel a very strong sense of moral obligation to the employee to alert him to a very real world risk of a possible forthcoming criminal prosecution if he fails to successfully resolve his pending civil dispute with his former employer.

Authority Referenced: Model Standards of Conduct for Mediators 2005, Standards Preamble, I(A), I(A)(2),V(B), VI(A)(4), and VI(C).

SUMMARY:

The Model Standards of Conduct for Mediators preclude the disclosure of confidential caucus information, either "*directly or indirectly*," to the employee or his counsel without the consent of the employer. A mediator could, however, ask some questions that do not make direct or indirect references to the confidential caucus communications, but that still allow the employee to consider the possible consequences of failing to settle in the mediation. For instance, a mediator might more generally ask: "If you do not settle this matter in mediation, what likely options exist for both you and the employer to resolve the issues arising from your departure from your job?" Or: "What risks do you face if you do not settle this case?" Furthermore, as the employee has retained legal counsel, a mediator may reasonably assume that this counsel, if at all

experienced in the area of employment law, would anticipate, advise about, and plan for a possible criminal prosecution against his or her client. Accordingly, the mediator need not convey in the mediation the fact of a criminal prosecution referral when that prosecution is implied by the context of the dispute.

OPINION:

A. Provisions of Model Standards and Reporter's Notes.

This inquiry implicates several provisions of the Model Standards of Conduct for Mediators and highlights the potential tension that exists between the different Standards. The Standards anticipate these tensions by noting: "These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear."[1]

The Joint Committee that drafted the Standards acknowledged the possibility of two or more standards conflicting in a particular circumstance[2] and, in the Reporter's Notes, explained the possible interplay between them:

> [T]he 1994 Version [did] not address the question of the interplay among the Standards. In some instances, the interplay is consistent but the mediator must be cognizant of it. For example, while parties can exercise self-determination in the selection of their mediator, a mediator must consider *Standard III: Conflicts of Interests* and *Standard IV: Competence* when deciding whether to accept the invitation to serve. Alternatively, the interplay among Standards may result in a conflict; a mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (*Standard I*), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator's obligation to sustain a quality process (*Standard VI*). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicate to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.[3]

[1] *See* Notes on Construction to the Model Standards.
[2] Am. Bar Ass'n, Assn. of Conflict Res. & Am. Arb. Assn., *Reporter's Notes* §§ VI, V(C), http://moritzlaw.osu.edu/dr/msoc/pdf/reportersnotes-april102005final.pdf (April 10, 2005) [hereinafter *Reporter's Notes*].
[3] *Reporter's Notes*, *supra* note 2, at § V(C).

The Committee on Mediator Ethical Guidance considered the following Standards in responding to the inquiry posed by the mediator:

Model Standard V(B) Confidentiality provides in pertinent part:

> *B. A mediator who meets with any persons in private session during a mediation **shall not** convey **directly or indirectly** to any other person, **any information** that was obtained during that private session **without the consent of the disclosing person**.*

(Emphasis added.) The Reporter's Notes do not explain the use in the Standard of the language "directly or indirectly,"[4] even though the 1994 version of the Model Standards did not use the term.[5] In addition, no state mandatory code of ethics uses the language in the context of caucus communications.[6] Finally, Standard VII (D) of the 2000 version of the Model Standards of Practice for Family and Divorce Mediation does not use the language.[7] Accordingly, this advisory opinion interprets the "directly or indirectly" language for the first time in the context of caucus communications.

Standard V(B) also uses the term "shall" in limiting the disclosure of caucus communications. The Notes on Construction to the Model Standards provides in pertinent part:

> 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

[4] The Reporter's Notes, among other purposes, seek to "accurately reflect the commentary, history and deliberations of the Revision Process . . . ." *Reporter's Notes*, *supra* note 2, at 6.

[5] Instead, a comment to Standard V of the 1994 version of the Model Standards states: "If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions." Another comment stated: "Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator." The Reporter's Notes indicate that the Joint Committee adopted as a guiding principle that it would make substantive changes to the 1994 version of the standards "only if there were evidence that current practice or policies warranted such changes . . . ." *Reporter's Notes*, *supra* note 2, at 5. The committee did not, however, reveal in its notes the reason for the addition of this language to the revised Model Standards.

[6] Only seven mandatory ethics codes separately discuss the confidentiality of caucus communications. See CAL. RULES OF COURT R. 1620.4(c) (2007); FLA. RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.360(b) (2000); GA. ALTERNATIVE DISPUTE RESOLUTION R. app. C (1995) at Standard II.; MASS. UNIFORM RULES ON DISPUTE RESOLUTION R. 9(h)(iii) (2005); STANDARDS OF PROF'L CONDUCT FOR MEDIATORS pmbl. (N.C. Supreme Court 1998) at Standard III.B.; TENN. STANDARDS OF PROF'L CONDUCT FOR RULE 31 NEUTRALS App. A., § 7(b); and UTAH CT. RULES R. 104 (2007) at Canon IV(g).

[7] Standard VII(D) provides: "If the mediator holds private sessions with a participant, the obligations of confidentiality concerning those sessions should be discussed and agreed upon prior to the sessions." Model Standards of Practice for Family and Divorce Mediation, *available at* http://www.acrnet.org/acrlibrary/more.php?id+36_0_1_0_M.

> be departed from only for very strong reasons and requires careful use of judgment and discretion.

(Emphasis added.) The Reporter's Notes to this part of the Model Standards further explain that "[t]he definition of 'shall' prescribes mandatory mediator conduct . . . the Standards provide meaningful guidance for most situations and the burden transfers to an individual to justify a departure from [their] prescriptions."[8]

The revised Model Standards define mediation in the Preamble as *"a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."*

Model Standard I(A) Self-Determination provides in pertinent part:

> *A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.*
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> *2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.*

In connection with this Standard, the Reporter's Notes state:

> Several public comments raised concerns that the language of the 1994 Version stating, "Self-determination is the fundamental principle of mediation" has not been retained. The Joint Committee believes that the expanded statement of Standard I, together with the definition of mediation appearing in the Preamble, appropriately reaffirms the central responsibility that a mediator has to actively support party self-determination, prohibits conflict of interest issues from undermining a mediator's commitment to promoting party self-determination (I(B)), yet recognizes, as noted above, that Standards may conflict.
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> Other public comments suggested that the Standard should contain language that requires the mediator to make certain that the parties made informed decisions; given the

[8] *Reporter's Notes*, *supra* note 2, at 7-8.

> significant controversy about whether and how a mediator might insure that a party's decisions are suitably informed, the Joint Committee reaffirmed retaining the language of the 1994 Version as I(B).[9]

Finally, Standard VI can help to resolve the ethical dilemma raised by the tensions existing between the duties arising under Standards I and V. *Model Standards VI(A)(4) and VI(C) Quality of the Process* provide in pertinent part:

> *A.4. A mediator should promote honesty and candor between and among all participants . . . .*
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> * * *
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> *C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.*

B. Discussion.

1. Confidentiality of Caucus Communications.

In the factual situation under consideration, the mediator has obtained information in a private caucus about the actual referral of the employee's alleged theft of the employer's sensitive electronic data for possible prosecution. The referral had already occurred and so was not expressed, according to the inquiry, as a threat to prosecute if the party did not reach a favorable settlement with the employer. Instead, the employer conveyed the fact of the referral, according to the inquiring mediator, "in a rather off-hand manner."

Under Standard V(B), the mediator may not convey this information to the employee without the consent of the disclosing party, the employer.[10] However, as

[9] Standard I(B) provides: "A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others."

[10] Similarly, several ethics advisory opinions issued in Florida by its Mediator Ethics Advisory Committee (MEAC) uniformly advise mediators to protect caucus communications from disclosure to other mediation participants or to the court when the disclosing party did not consent to the disclosure. While the statements of other advisory committees or commentators are not binding on the Committee of Ethical Guidance, they indicate possible approaches to resolving the tensions created by different ethics standards. *See* MEAC Ops. 2007-001 (March 29, 2007) (protecting caucus disclosure that party had insufficient settlement authority); 2006-003 (July 24, 2006) (protecting caucus disclosure that party had insufficient settlement authority); 2003-005 (July 31, 2003) (outlining best practices for handling caucus communications and iterating need for disclosing party to consent to any disclosure to the other party of information obtained in caucus), 95-010 (Feb. 13, 1996) (protecting information learned from a party in private about legal advice given by a non-lawyer). The opinions are available at http://www.flcourts.org/gen_public/adr/MEAC%20Opionions/index%20of%20opinions.shtml.

noted above, little prior precedent exists for interpreting the scope of the "directly or indirectly" limitation found in Standard V(B) of the revised Model Standards.

The Committee on Ethical Guidance found it helpful to evaluate both a broad and narrow interpretation of this limitation when it considered how the limitation works practically in light of the mediator's duty to enhance party self-determination and informed decision-making. Under a broad interpretation, the language limiting even "indirect" disclosure of caucus communications would preclude a mediator from conveying the information through a series of "reality testing" questions, especially when the Standard uses the mandatory terminology "shall." The mediator, for instance, might be tempted to ask the employee's counsel: "Based on your experience, how often does an employer refer a case like this to the police or prosecutor for possible criminal prosecution?" Or, she might be tempted to ask the employee: "Do you know whether your former employer has referred these types of cases to the police or prosecutor for possible criminal prosecution?" A broad interpretation of the "directly or indirectly" limitation found in the Standards would preclude these types of questions.

In practice, however, a mediator might instead develop some general questions that do not make direct or indirect references to the confidential caucus communications, but that still allow the employee to consider the possible consequences of failing to settle in the mediation. For instance, a mediator might more generally ask: "If you do not settle this matter in mediation, what likely options exist for both you and the employer to resolve the issues arising from your departure from your job?" Or: "What risks do you face if you do not settle this case?" A mediator might routinely pursue this line of questioning as part of the mediation process to promote thoughtful consideration of the costs/benefits of settlement, to support party self-determination, and to enhance informed decision-making. During this analysis of the consequences of not settling, the employee or his or her counsel would likely raise the possibility of a criminal prosecution.

The Committee on Ethical Guidance also recognizes that mediators working in this practice area might regularly explore with the employee likely options and outcomes in the event the employee does not reach an agreement with the employer. That exploration might normally include some questions about the potential for a criminal prosecution. Accordingly, under a narrow interpretation of the "directly or indirectly" language of Standard V(B), a mediator would not be precluded from asking his or her regularly asked reality testing questions, even those identified above, simply because a party raised the same issue, risk, or concern in an earlier caucus.

2. Tension with Standards Governing Party Self-Determination and Informed Decision-Making.

The inquiring mediator indicates that he or she has "a very strong sense of moral obligation to the employee to alert him to a very real risk of a possible forthcoming criminal prosecution . . . ." This statement implicates Standard I governing party self-determination. This statement suggests that the mediator is concerned that the employee

cannot make a "free and informed choice[] as to . . . outcome" without knowing about the referral for criminal prosecution.

The narrow interpretation of Standard V(B) discussed above, suggests one approach to this dilemma. Standard I(A)(2) also suggests the means for reconciling the need for informed decision-making by a party and the mediator's duty to keep caucus communications confidential. In the situation described by the inquiring mediator, the employee has retained legal counsel. In this situation, the Committee on Ethical Guidance found it reasonable to assume that counsel, if at all experienced in the area of employment law, would anticipate, advise about, and plan for a possible criminal prosecution against his or her client. Accordingly, the mediator need not convey in the mediation the fact of a criminal prosecution referral when that prosecution is implied by the context of the dispute.

Moreover, Standard I(A)(2) acknowledges that the "mediator cannot personally ensure that each party has made free and informed choices . . . ." Thus, even if the employee has retained a less experienced lawyer who does not know to counsel his or her client about the chance of a criminal prosecution, the mediator need not fill that information gap under the Standards. If the employee appears pro se at the mediation, Standard I(A)(2) advises the mediator to "make the parties aware of the importance of consulting other professionals to help them make informed choices." Standard VI(C) permits the mediator to postpone the mediation to ensure that the mediator can conduct the mediation consistent with the Standards. A postponement would allow a pro se party to consult with counsel if he or she decided to do so.

In addition, Standard VI(A)(4) governing the Quality of the Process encourages the mediator to "promote honesty and candor between and among all participants." Accordingly, the mediator could encourage the employer to make the disclosure of the fact that the employer has referred the case for potential criminal prosecution. Standard V(B) permits the employer, as the disclosing person, to consent to the disclosure of the confidential communication by the mediator. In addition, the person making the disclosure in caucus could make the disclosure directly to the employee. However, it is beyond the scope of this opinion to suggest how the employer would share that fact with the employee while staying within the ethical or legal constraints imposed on negotiators in this context where the disclosure may be viewed as an inappropriate *quid pro quo* offer.

In resolving this issue, the Committee on Ethical Guidance also considered the commentary to the mandatory ethics code that applies to Georgia mediators serving court programs.[11] The examples found in the commentary to the code describe two situations that create a similar ethical dilemma for the mediator. In the first example, the husband reveals in caucus that he has cancer. His unexpected death or inability to work because of the illness or treatment could influence the wife's decision-making in the mediation about available sources of money. In the second example, the parties have successfully negotiated a resolution of a substantive dispute, but they have become stuck on a

[11] GA. ALTERNATIVE DISPUTE RESOLUTION R. app. C (1995) at Standard II.

subsidiary issue of who will pay the "warrant fee" in a minor criminal case referred by the court to mediation.[12] A party discloses in caucus that he or she would pay half or all of a warrant fee to get the case fully resolved, but tells the mediator that he or she cannot reveal that information to the other party.

The commentary to the ethics code advises that in the first example, the mediator may need to terminate the mediation if the secret "is central to the creation of a solid agreement, and if the mediator cannot persuade the party with the crucial secret to share it." [13] In the second example, the commentary recommends that the mediator "is remiss if he or she does not push the parties toward revelation" of secret information that would foster settlement.[14]

In conclusion, the Model Standards make it clear that caucus communications remain confidential, unless the Standards permit disclosure of those communications. Where a mediator is concerned about whether a party can make an informed decision without being made aware of confidential caucus information -- like a possible criminal prosecution -- the mediator can use general reality testing questions to ensure that the party has considered risks associated with not reaching a mediated settlement. In addition, the mediator can assume that counsel for the party is responsible for advising his or her client of the potential for criminal prosecution given the facts of this case.

Date: May 13, 2009

[12] A person pays the sheriff's office the fee to serve an arrest warrant arising out of the fear of violent injury to a person or property. The complaining party must normally pay the fee even if the sheriff does not serve the warrant or the party does not pursue the criminal complaint. *See* GA. CODE ANN. § 17-6-100(a) (2008).
[13] *Id*. at Standard II (bold highlighting deleted.)
[14] *Id*.