

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

SODR-2013-1

Question:

In a lender liability case between a small business and a local bank, the business owners claim that the bank pulled their loan, thereby ruining their business. There are a number of contract and tort claims, including a claim for severe emotional distress associated with the business difficulties. As the mediation progresses the focus has been on the substantive claims, and during caucus with the bank's representatives and its attorney, it is clear that they believe the business has failed. During caucus with business owners and their attorney, they seem upbeat and deny suffering any severe emotional distress. At the end of this caucus as the mediator, attorney, and clients finalize the settlement offer that the mediator will deliver to the bank, the mediator relays the fact that the bank and its lawyers believe the plaintiffs are now out of business. Plaintiffs' counsel denies ever saying that the business failed, which is consistent with the mediator's memory of the pre-mediation submissions and the mediation session so far. When the mediator inquires further, the attorney states that not only is the business still operational, it has several contracts in the offing. However, since nothing has been finalized he argues that it is premature to share that information and asks the mediator to keep it confidential. Furthermore, the offer the attorney wants the mediator to deliver includes emotional distress damages as part of the offer. What is the mediator to do?¹

Authority Referenced: Model Standards of Conduct for Mediators 2005, Standards Preamble, I(A), I(A)(1), 1(A)(2), II(B), III(A), V(A), V(B), VI(A)(4), VI(C)

Summary:

The Model Standards of Conduct for Mediators precludes the disclosure of confidential caucus information without the consent of the disclosing party. If the mediator improperly discloses confidential information then corrective steps must be taken including, if necessary, terminating the mediation. The Model Standards of Conduct for Mediators does not require the mediator to correct a mistaken impression of one party to the mediation where the mistaken impression is not the result of fraud or misleading representations and where the party with the mistaken impression is represented by counsel. However, in such circumstances mediators are required to protect integrity of the mediation process and to promote open and honest communications between the parties and if one party refuses to correct, or allow the mediator to correct, a false impression of the other party that is the basis for that party's settlement offer then the mediator should resign or terminate the mediation. While a mediator can convey demands between the parties to a mediation that may be excessive, a mediator may not convey a demand for damages that has no basis in fact.

¹ Based on a survey instrument in Larry Lempert, In Settlement Talks, Does Telling the Truth Have Its Limits?, 2 INSIDE LITIG. (1988).

Opinion:

This scenario presents a problem with an information asymmetry that has led to an erroneous assumption that may be underlying one party's negotiation posture. This scenario puts the tension between confidentiality in caucus sessions in conflict with a mediator's duty to promote open and honest communication.

Confidentiality of Caucus Communications (Generally)

Standard V(A) provides that:

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.

Standard V(B) provides:

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.

While Standard V(A) addresses the mediator's obligation to confidentiality in general, Standard V(B) specifically addresses the obligation of the mediator to maintain the confidentiality of information acquired during private sessions. Standard V(B) makes clear that without the consent of the disclosing person, a mediator must keep confidential all private session communications.

The threshold question when the mediator meets in private session with the business owners and their attorneys is whether the information that the bank and its attorneys conveyed in private session - that they believe the business has failed - is a confidential communication that cannot be shared "without the consent of the disclosing person." The mediator clearly obtained this information as a result of what was said in the private session with the bank and unless consent was given it should remain confidential. It is unclear from the facts whether consent to share the information was given. There are multiple ways in which a mediator can insure that a party's consent to share information is obtained. The Committee notes to Standard V(B) suggest several:

Some public comments suggested that a mediator, when conducting a caucus, can appropriately place the responsibility on the party with whom she or he is caucusing to flag each element of information that the party wishes the mediator to keep confidential. In Standard V (B), the Joint Committee rejects that approach to the degree that it is not consistent with securing meaningful and timely party consent. At a practice level, the Joint Committee notes that some mediators advise the participants that the mediator will keep confidential those matters disclosed by a participant if the participant so requests; otherwise, the mediator shall treat comments made in the caucus as being ones that he or she could use in subsequent caucuses if doing so, in the mediator's judgment, would help advance discussion. By contrast, the practice of other mediators when conducting a caucus is to advise the participants that a mediator will treat all matters

shared with him or her as confidential but shall ask at the end of a particular caucus whether the mediator has the participant's consent to use any or all of that developed information in subsequent caucuses. Whichever practice is adopted by a mediator, Standard V (B) affirms that it is a mediator's duty to insure that party consent to the approach is known, meaningful and timely.[PAGE 16].

Whatever course the mediator chooses to pursue it is the mediator's responsibility to insure that party consent to what information can be shared and what kept confidential "is known, meaningful and timely."

If the mediator had permission to share the information about the bank's perception then there is no breach of confidentiality. If, on the other hand, the mediator did not have party consent to reveal the bank's belief that the business was no longer operating, the mediator breached the duty to maintain the confidentiality of information shared in caucus.² **Standard II(B)** provides that "A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality." **Standard VI(A)** provides that "A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes . . . procedural fairness . . . and mutual respect among all participants." **Standard VI(C)** provides that "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." **Standard I(A)** provides that "A mediator shall conduct a mediation based on the principle of party self-determination. . . . Parties may exercise self-determination at any stage of a mediation, including . . . participation in or withdrawal from the process, and outcomes."³ Having conveyed the information without authority, **Standards I(A), II(A), VI(A) and VI(C)** all suggest that the mediator must reflect at this point on whether his/her actions have undermined the integrity of the process and what steps must be taken to correct the situation. The mediator should meet again privately with the bank, confess the breach, and explore possible options for dealing with the disclosure (it very well may be that the bank has no objection to the disclosure) including offering the bank the option of exercising its self-determination to withdraw from the process. Or the mediator may choose to explore the situation with the bank and its attorney during the next private session.

Mediator's Responsibility when told not to convey information to the Bank

At the end of the private session with the business owners and their attorney the mediator is told not to reveal to the bank the current status of the business and is instructed to convey to the bank the businesses' latest demand which includes damages for emotional distress as part of the offer.

²It should be noted that this dilemma could have been avoided if the mediator merely inquired about the status of the business without revealing information about the bank's belief that the business had failed.

³ The Committee refers the reader to the Opinion SODR-2009-2 for an in depth analysis of the interplay between these sections.

It is not clear from the facts exactly what the mediator is being forbidden to disclose to the bank and its attorney. Is the mediator only being told not to reveal that the business has several contracts in the offing, “since nothing has been finalized” or is the mediator being told not to disclose that the business is still in operation as well? This distinction is important as there are different conclusions on a mediator’s ethical responsibilities in each situation. With regard to the status of the contracts in the offing, there the business owners have no legal duty to disclose that fact. A mediator cannot misrepresent this fact, but is not required to withdraw from the mediation when asked not to disclose this fact, although he or she may do so pursuant to Sections VI(A)(4) and VI(C). If the mediator is being told not to share the current status of the business with the bank then the bank will be unable to make an informed decision as required by **Standard I**. On the other hand the mediator is precluded from sharing the confidential information without the consent of the disclosing party **Standard V(B)** and consent has been denied.

Standard VI(A)(4) provides that “a mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation,” which should prompt the mediator to encourage the business owners and their attorney to permit the mediator to disclose that the business is still operating or to reveal that information themselves directly to the bank.⁴ The mediator may also want to explore with the business owners and their attorney at this juncture how they expect the mediator to respond if the bank and its attorney ask the mediator what the current status of the business is.⁵ Additionally, the mediator may want to explore what would happen if a deal is struck and the bank subsequently discovers this information. The mediator certainly cannot misrepresent the operational status of the business to the bank nor can the mediator break confidentiality and answer a question about the business’ operational status directly or indirectly. **Standard V(B)**. At this point in the mediation, if the business owners and their attorney refuse to reveal the current status of the business and its possible contracts, the Committee on Ethical Guidance believes that the mediator is bound to maintain the confidentiality of the information and, as long as the mediator is not being asked to affirmatively misrepresent or lie about the status of the business, may continue to participate in the mediation.

When the mediator again caucuses with the bank and its attorney can he/she ask questions that might prompt the bank to ask about the current status of the business?⁶

⁴Generally speaking a lawyer is not responsible for opposing counsel’s misunderstanding of the facts surrounding a negotiation and thus has, no duty to correct any misunderstandings. Model Rules of Professional Conduct 4.1, cmt. 1. However, if the business and its attorney know the Bank’s mistake is the primary reason for its offer, both the business and its lawyer have a duty to reveal the correct information to the Bank. Restatement (Second) Torts, §551(2)(c) and cmt. 1 (1977) and Restatement (Second) Contracts §161(b) (1981). Failure to do so would be engaging in misrepresentation by omission and they attorney would be violating MRPC 4.1(b). Art Hinshaw, Peter Reilly, and Andrea Schneider, *Attorneys and Negotiation Ethics: A Material Misunderstanding*, 29 Negotiation Journal 265, 272-74 (2013).

⁵ Many mediators would respond to such a question by the bank by asking, “Is that a question you would like me to ask them?” or “Is that a question you would like to ask them yourself?”

⁶The scenario as presented is unclear whether the mediator chose to explore the bank’s misconception about the status of the business during the mediator’s initial caucus with the bank. We presume that the

For example can the mediator inquire about whether it would be helpful to the bank to know the business' current operational status in assessing the latest offer? No, that would be an indirect disclosure prohibited by **Standard V(B)**. May the mediator ask the bank if it has adequate information to evaluate the current offer and if not what if any additional information would be helpful? While this question is more neutral the Committee still believes it would be impermissible if the question is generated by the mediator's effort to prompt the bank and its attorney to inquire about the current operational status of the business.⁷

In the case under consideration all parties are represented by attorneys. It is reasonable to assume that the attorney for the bank, if at all experienced, will not enter into a final settlement agreement without first knowing the current status of the business. But what if the bank and its attorney never do inquire about the operational status of the business; and the business and its attorneys refuse to disclose its operational status to the bank despite the mediator's continued efforts to convince them to disclose the information; and it is clear to the mediator that the bank is preparing to resolve the case based upon the mistaken belief that the business is no longer operational? May the mediator continue to participate in the mediation? **Standard I(A)(1)** provides that while "self-determination is a fundamental principle of mediation practice" this needs to be balanced with a mediator's "duty to conduct a quality process in accordance with these Standards." **Standard I(A)(2)** provides that "a mediator cannot personally ensure that each party has made free and informed choices..." **Standard VI(A)(4)** provides that "A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of the mediation." The Committee on Ethical Guidance believes that the mediator while barred from disclosing confidential information, has a continuing obligation to try and persuade the business to reveal to the bank its current operational status.⁸ If the business continues to refuse disclosure, even though the bank's incorrect perception is due to no misrepresentation by the business, then the mediator should terminate or withdraw from the mediation⁹ based on **Standard VI(C) which states, "If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these**

mediator did not. However, some mediators might have been prompted by **Standard I** and the desire to foster party self determination to explore this issue with the bank and its attorney through questions like, "Do you know the current status of the plaintiff's business? Is that something you would like me to ask them?" If the mediator had chosen to raise these questions with the bank and its attorney before meeting with the business owners and their attorneys the Committee finds such questions consistent with Model Standards.

⁷ See the discussion of acceptable questions in *Opinion SODR-2009-2*.

⁸ There are many methods for doing so including discussing any of the following: general principles of fair dealing, how difficult it will be for the bank to find out the business is an ongoing concern, what the bank may do should it find out the business is ongoing, whether the contract will be void or voidable upon discovery that the business is ongoing, the requirements of the law of fraud, and the attorney's duties under MRPC 4.1. See, Restatement (Second) Torts, §551(2)(c) and cmt. 1 (1977) and Restatement (Second) Contracts §161(b) (1981); MRPC 4.1(b); Art Hinshaw, Peter Reilly, and Andrea Schneider, *Attorneys and Negotiation Ethics: A Material Misunderstanding*, 29 Negotiation Journal 265, 272-74 (2013).

⁹ Before actually terminating or withdrawing from the mediation the mediator should advise the business and its attorneys that if they persist in refusing to disclose or permit the mediator to disclose the current operational status of the business to the bank the mediator will have to withdraw or terminate the mediation and explain to them the ethical standard, giving them an opportunity to reverse their decision.

Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”

The mediator's Responsibility when asked to convey a false demand that would create a false impression.

The business owners' and their attorney's request that the mediator convey to the bank their latest demand which includes a request for damages for emotional distress is also troubling. Presumably the complaint includes a claim for emotional distress, but whether it does or not the mediator needs to explore the basis for these damages with the business owners and their attorney. Mediators often do this by asking the party making the demand a question like, “When the bank asks me what the damages for emotional distress are based on what do I tell them?” It may be that the business owners indeed suffered emotional distress when their loan was pulled even though the business was not totally destroyed. If that is the case the Committee on Ethical Guidance has no concern with the mediator conveying the demand to the bank even though the demand may be excessive.

If, however, the business owners are asking for damages for emotional distress when there is no basis for such a claim, the mediator is being asked to convey false and misleading information in violation of **Standard VI(A)(4)** and would not be conducting the mediation in an “impartial manner” as required by **Standard II(B)**. As the Reporter's notes to **Standard VI(A)(4)** state:

“Standard VI(A)(4) reflects the nuanced environment in which mediation occurs. The language of Standard VI(A)(4) prohibits a mediator from knowingly misrepresenting a material fact or circumstance to a mediation participant while it acknowledges that resolving matters in mediation is not always predicated on there having been complete honesty and candor among those present. To state the matter differently, while mediation participants might engage in negotiating tactics such as bluffing or exaggerating that are designed to deceive other parties as to their acceptable positions, a mediator must not knowingly misrepresent a material fact or circumstance in order to advance settlement discussions.”

If the mediator is not able to persuade the business owners and their attorney to drop the unsupported demand -- a false demand that would create the false impression that there was actual emotional distress -- then the mediator must “take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.” **Standard VI(C)**.