

ABA Section of Dispute Resolution
Committee on Mediator Ethical Guidance

SODR-2008-1

QUESTION ONE:

Does an attorney-mediator have an ethical obligation to disclose to parties who are about to participate in a mediation which he or she is about to conduct that there is a risk that some time in the future the attorney-mediator may not be entitled to maintain the confidentiality of the statements made in mediation by the participants if the following hypothetical situation occurs:

- 1) the mediation is terminated and the matter is over;
- 2) thereafter, the attorney-mediator represents a different party in a new matter (unrelated to the mediation or its participants) strictly in his or her capacity as an attorney;
- 3) in connection with this new matter, his or her client is the subject of interrogatories propounded by an adverse party which call for the disclosure of facts from the client (and its agents, including its attorneys) concerning certain events or transactions;
- 4) the attorney-mediator has knowledge of facts which would be responsive to those interrogatories; and
- 5) his or her knowledge of those facts was acquired wholly from the unrelated mediation described in the first paragraph of this question.

Authority Referenced: Model Standards of Conduct for Mediators 2005, Standards I.A., III.A., III.C., III.D., III.E., and V.A.

SUMMARY:

An attorney-mediator does not have an ethical obligation to disclose to parties who are about to participate in a mediation that there is a risk that some time in the future the attorney-mediator may not be entitled to maintain the confidentiality of the statements made in mediation by the participants under the circumstances stated in the hypothetical, subject to certain qualifications described below.

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 mediation that would be responsive to interrogatories directed to his client (a non-participant in the mediation) and its agents, including its attorneys, should not disclose this information to anyone absent an applicable exception to confidentiality stated in the Model Standards, local mediator ethics codes, or other applicable law, unless the parties to the mediation have already

agreed that the mediator may make the disclosure. The hypothetical implies the possibility that a court might interpret “applicable law” – i.e., state or federal law regarding litigation discovery obligations – to require disclosure of the information gained in the mediation. We do not comment in this opinion as to the mediator’s obligations to maintain the mediation confidentiality under such circumstances, but believe that the risk of this occurring is not significant enough to require a warning by the attorney-mediator at or prior to the beginning of the mediation session.

Our qualifications are as follows: First, if the attorney-mediator can, at the beginning of the mediation, reasonably anticipate the scenario set forth in the hypothetical, she or he should disclose the risk to the parties to the mediation prior to the mediation. Second, a mediator must also disclose to the mediation parties any actual or potential conflicts of interest arising from the subject matter of the mediation. The scenario suggests a situation that may be viewed as creating an actual or potential conflict that should be disclosed in advance.

OPINION:

In answering this question, the Committee on Mediator Ethical Guidance (“CMEG”) 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 other codes of conduct for mediators that may be relevant. The Committee is also not applying any professional codes of conduct for lawyers that may be relevant, nor is the Committee rendering any interpretation of possibly applicable state or federal civil procedure rules. The Committee advises the mediator to consider the possible application of all of the above.

As noted in CMEG Opinion No. 1, the mediator should not disclose information acquired in the mediation that would be responsive to the interrogatories, unless the parties to the mediation agree to the disclosure or the mediator has an independent obligation under applicable law to make the disclosure.

Model Standard V.A. Confidentiality provides:

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.

Again as previously noted, based on the information provided to the Committee, neither of the two exceptions to the broad scope of confidentiality appears to apply in this circumstance, although we acknowledge, for purposes of this opinion, that the “applicable law” exception may apply if a court were to interpret a state or federal rule regarding discovery in civil litigation to require disclosure of the information learned at the mediation.

With respect to the issue of a warning, the Model Standards, unlike some state codes of ethics, do not create an affirmative duty to describe for parties in the agreement to

mediate or in the mediator's opening orientation statement any specific exceptions to confidentiality.¹ The Model Standards do, however, state in Standard V.C. that, "A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation." This suggests that the mediator has an obligation to consider with the parties their expectations with regard to the scope of confidentiality and any exceptions to confidentiality they may agree are appropriate in that particular case. Standard V.D. confirms this mediator responsibility in noting that, "Depending on the circumstances of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations." Thus, while the attorney-mediator in this case has no explicit ethical obligation under the Model Standards to disclose the particular risk described in the hypothetical above, the mediator and the parties should consider developing at the outset of a mediation their own confidentiality agreement based on the needs and expectations of the parties and/or on the individual mediator's standards of practice. As indicated below, however, such expectations and discussion need not encompass every conceivable scenario in which the expectation of confidentiality is challenged.

In answering the question posed, the Committee assumes no applicable law would explicitly require the mediator described in this situation to divulge information gleaned from an unrelated mediation when that information is requested of the client or its attorneys in a written interrogatory. Moreover, the situation posed is unusual enough that the Committee does not believe that the Model Standards would require disclosure generally. If, however, applicable law explicitly requires the mediator to provide that information in order to answer the interrogatory sent to the client, the mediator should disclose this risk in advance.

The Committee again notes the possible applicability of other standards of conduct and suggests that the mediator determine whether any local law or code of ethics requires a pre-mediation discussion with the parties about confidentiality, and if so, whether the risk posed by the hypothetical is sufficiently significant to warrant disclosure. If the hypothetical contemplated disclosure of confidential information specifically falls within an allowed exception arising under local law, the risk should be disclosed. The Committee declines to take a position with respect to obligations under a local law or code of ethics that does not contain a specifically applicable exception to confidentiality.

¹ See, e.g., STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS (Jud. Council of Va. 2002) at § I (currently under revision by the Virginia Ethics Committee), *available at* <http://www.courts.state.va.us/soe/soe.htm>. Cf. Florida Mediator Ethics Advisory Committee Op. 2000-010 (Jan. 12, 2001) (advising that mediators are not required under the Florida ethics rules to go into detail about any specific statutory provisions or exceptions governing confidentiality, except to say that mediation communications are confidential, unless disclosure is required by law), *available at* http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/2000%20Opinion%20010.pdf; and Florida Mediator Ethics Advisory Committee Op. 2003-003 (May 22, 2003) (same and expressing concern that even an attorney-mediator could misinterpret the statutory exceptions to confidentiality), *available at* http://www.flcourts.org/gen_public/adr/bin/MEAC%20opinions/MEAC%20Opinion%202003-003.pdf.

The question posed also raises several other issues. The Model Standards support party self-determination throughout the mediation process, including mediator selection and also explicitly require the mediator to promote the integrity of the process by avoiding conflicts of interest.

Model Standard I.A. Self-Determination

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. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process, design, participation in or withdrawal from the process, and outcomes.*

Model Standard III. Conflicts of Interest

A. *A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict can arise from involvement by a mediator with the subject matter of the dispute . . . that reasonably raises a question of the mediator's impartiality.*

* * *

C. *A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.*

D. *If a mediator learns of any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.*

E. *If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.*

The mediator in this case had a duty to disclose any potential or actual conflicts of interest relating to the subject matter of the mediation that he or she reasonably knew before or became aware of during the mediation. If for example, the attorney-mediator knew there was possibly a related case in the firm that could potentially lead to the need to respond to interrogatories, as in the aforementioned inquiry, this should have been disclosed to the parties. Such disclosure would have allowed the parties to choose another mediator who could avoid the potential future conflict of interest. In a circumstance in which there either was no such case in the office, or the attorney-mediator did not know about it, there would be no duty to disclose. The potential conflict posed by the hypothetical appears to be so attenuated that it need not be disclosed.

Finally, as indicated above, the question also poses the issue of the application of concurrent standards of professional conduct. Unlike some state codes of mediator

conduct, the Model Standards do not expressly recognize that a mediator may have duties that arise under two or more sets of ethics codes.² The facts of a situation may make an attorney-mediator subject to both a mediator ethics code and to a lawyers' professional code.

In this case, the attorney mediator should keep in mind relevant legal ethics provisions that may come into play if the attorney-mediator is ultimately confronted with the ethical dilemma posed by the hypothetical. Relevant ethics provisions include analogs of the following ABA Model Rules of Professional Conduct: (1) Rule 1.7 Conflict of Interest: Current Clients; (2) Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third Party Neutral; (3) Rule 1.16 Declining or Terminating Representation; and (4) Rule 2.4 Lawyer Serving as a Third-Party Neutral. An assessment of these and other legal ethics provisions is outside the scope of this Committee's jurisdiction.

² See, e.g., STANDARDS OF ETHICS AND PROF'L RESPONSIBILITY FOR CERTIFIED MEDIATORS (Jud. Council of Va. 2002) at § P (currently under revision by the Virginia Ethics Committee), *available at* <http://www.courts.state.va.us/soe/soe.htm> .