

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

SODR-2009-1

INQUIRY:

“The mediation has reached an impasse over the settlement amount. The mediator asks counsel (outside the presence of his client) if counsel can modify/reduce the fees owed to him by the client in order to bridge a small gap between the parties' settlement amounts. Counsel refuses and said the mediator is being unethical in making such a request. Is the mediator's question unethical?”

Authority Referenced: Model Standards of Conduct for Mediators 2005, Standards I, II, VI.

SUMMARY:

The mediator did not act unethically in suggesting to counsel – outside the presence of his client – that he could consider offering his client a fee reduction in order to reach a settlement at the mediation. However, the mediator must be sensitive when handling this delicate subject, which, if mishandled, may create tension between client and counsel and potentially jeopardize the mediation.

OPINION:

In answering this question, the Committee has applied 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.

In the circumstances posed in the question, the mediator did not acted unethically in suggesting that counsel for a party could consider offering his client a fee reduction in order to reach a settlement at the mediation. The mediator acted appropriately in raising this issue with

counsel without the client present. However, the mediator must be sensitive to the fact that the subject of counsel potentially reducing fees is a delicate one which, if mishandled, may well create tension between client and counsel and potentially jeopardize the mediation. If the subject had been handled inappropriately by the mediator, both good mediator practice and the Model Standards might potentially have been implicated.

Model Standard I. Self-Determination provides:

- 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 II. Impartiality provides:

- B. *A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.*

- 1. *A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.*

Counsel, while not a “party” as that term is used in the Model Standards, is a “participant.”

Regardless of terminology, there is no question that in a particular case the lawyer’s interests may play a role in the mediation process and are a factor which may affect the outcome. In some cases, such as employment discrimination claims, plaintiff’s counsel may have statutory rights to seek counsel fees from the defendant should his client prevail. Mediations of such cases often involve consideration of counsel fees as part of the settlement, whether those fees are separately compensated by the defendant or are part of a lump sum settlement. In other cases, such as class action litigation, class counsel typically has the right to seek an award of fees from the court if there is a benefit conferred on the class. In such mediations, class counsel may negotiate an

agreement from the defendant as to the amount of the fee award for which class counsel may petition the court without objection, or the defendant may agree to simply pay class counsel a fixed amount as fees. Contingency fee cases implicate counsel's interests as well, as counsel's agreement in mediation to reduce the percentage of the contingency may make the offered settlement more attractive to the client.

In a real and practical sense, then, the interests of plaintiff's counsel are often an issue for the mediator to consider in helping to fashion a successful settlement. Just as Standard I forbids a mediator from using coercive tactics against a party to attempt to secure a settlement, the spirit, if not the letter of the Standard, would prohibit the same type of conduct if employed against a party's counsel in a particular case.

If, for example, the mediator had raised the issue of the reduction in fees with the client present, that might have created a conflict between client and counsel. It might also have placed undue pressure on counsel to agree to such a request. Even in the absence of the client, if the mediator did not ask the question with some sensitivity, the resultant tensions which might have occurred between the mediator and counsel could jeopardize the entire mediation. That also might have led counsel for the plaintiff to conclude that only she was the target of such pressure by the mediator, not her counterpart counsel on the other side, and to therefore view the mediator as partial to the other side. Such conduct would implicate Standard II as well.

Certainly good practice would call for the mediator to be sensitive to those risks, to be alert to any evidence that the issue may create problems, and to exercise caution in the manner in which those issues are handled. Based on the question posed it appears it was handled appropriately here.

Model Standard VI. Quality of the Process provides:

- A. *A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.*

As addressed above, had the mediator addressed this issue in a coercive fashion with counsel, or raised it with counsel in the presence of the client, such conduct could potentially violate Standard VI, which addresses the quality of the mediation process. Had the mediator engaged in behavior which created a rift between client and counsel, this would not have promoted “mutual respect” between counsel and client. As discussed above, it appears to have been handled appropriately here.

It should be noted that the Committee’s opinion does not expressly address the issue of whether the mediator’s question requested counsel to engage in unethical conduct, since the Committee’s jurisdiction does not extend to an interpretation of the Model Rules of Professional Conduct applicable to counsel. However, the Committee noted in reaching its conclusions that the mediator’s inquiry did not request that the lawyer subordinate the client’s interest to his own, which potentially could violate the lawyer’s own ethical standards.