

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

Inquiry: A mediator posted the following on his Facebook page:

“Whew! Just settled my first Superior Court civil mediation. A case involving a non-English speaking elderly client, who really really didn’t want to have to go through trial. Possible jury verdict could have been zilch to around \$80k. I got her \$50k.”

Was this posting proper under the Model Standards of Conduct?

Authority Referenced: Model Standards of Conduct for Mediators Standard II and V (2005).

Summary: This posting on social media raises important concerns about the mediator’s impartiality and the confidentiality of the process. When disclosing any information about a mediation, the mediator must be sensitive to the way the mediator’s conduct is described. Standard II (B) requires the mediator to conduct the mediation in an impartial manner and avoid conduct that gives the appearance of partiality. The posting -- especially the remark “I got her \$50k” -- displays a degree of favoritism toward the “elderly client” and therefore creates an appearance of partiality.

In addition, this posting on Facebook or other social media would not be proper unless the mediator had the consent of all parties. Standard V (A) requires that the “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.” This is particularly true here, where it appears that some of the posted information may have been obtained by the mediator in private session. See Standard V (B).

Opinion:

1. IMPARTIALITY

Standard II (B) of the Model Standards of Conduct for Mediators (2005) states:

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

In Standard II (A) “impartiality” is defined as “freedom from favoritism, bias or prejudice.”

The mediator must be sensitive to the manner in which the posting describes the mediator’s conduct. Here, the posting only describes the dispute from the standpoint of the elderly “client” and does not even mention the other party (or client). Most problematic is the mediator’s remark that “I got her \$50k,” which could reasonably be interpreted as describing only the benefits to the plaintiff. Not only does the comment exhibit favoritism to the plaintiff by only describing the

benefits to the plaintiff and not mentioning any impact on the defendant, it suggests that the mediator considered his role to be that of an advocate rather than a neutral.

When a mediator publicly describes what transpired in the mediation, the mediator should take care to avoid descriptions that appear partial to one side or the other.¹

2. CONFIDENTIALITY

Standard V of the Model Standards of Conduct for Mediators (2005) states:

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.

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. ***

The Facebook posting would violate two subsections of Standard V. First, although the description of what happened in the mediation is fairly general,² it nonetheless contains information obtained by the mediator in mediation and is therefore presumptively confidential. If the mediator does not have the agreement³ of both parties, he/she should not disclose what happened during the mediation in social media, such as Facebook, or any other setting.

Second, the posting mentions that the client “really really didn’t want to have to go through trial.” Since it seems unlikely that the disputant would have shared this sentiment openly with the other disputant, this seems to be information that was gleaned by the mediator in private session, where parties often have heightened expectations of confidentiality. Disclosing such information publicly, without the agreement of the disputant, would violate section B of Standard V, which dictates that the mediator must 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.”

Furthermore, as the Committee noted with respect to advertising in SODR 2015-1, even when all of the parties to the mediation have consented to the disclosure, prudence would suggest the

¹ To the extent that the Facebook posting would be regarded as advertising or solicitation, the mediator should further be guided by Standard VII (B) which provides that the “mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.”

² While the posting is indeed general and does not identify the participants, it is conceivable that someone could connect the mediator’s name and Superior Court files and thereby trace the identity of the participants.

³ Although not expressly addressed in the Standards, prudence would suggest that the mediator obtain written consent from each party as to what would be disclosed.

mediator should note that consent in the social media posting in order to convey to the public that the mediator is not violating any confidences.