

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

**Inquiry: During a court supervised mediation, the plaintiff in the dispute is absent but her attorney is present. The respondent is present and represented by counsel. The court does not allow attorneys to appear in lieu of their clients without prior authorization by the court, but when asked directly whether the attorney had authority to act without their client present he answered in the affirmative. During the course of the mediation that same attorney pointed out that opposing counsel had not filed an entry of appearance and therefore did not have authorization by the court to be present, while also reiterating that he had authorization by the court to be there without his client.**

**Upon further investigation it became evident that neither attorney had the proper authorization filed with the court, despite the plaintiff’s attorney stating that he did have such authority. After asking plaintiff’s counsel in private about no paperwork ever having been filed requesting permission to appear at the mediation without his client, this attorney acknowledged that he knew he did not have the proper authorization and he never filed the paperwork required for such authorization. Without the court's permission to appear in lieu of the client, the court's rules state that the mediation cannot go forward. Under court rules, the mediator is required to report to the court whether the parties appeared at mediation. Ultimately the court would treat the situation as if the plaintiff failed to appear at the mediation resulting in the suit's dismissal. What should the mediator do according to the Model Standards?**

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

Summary: The answer depends on applicable laws in the jurisdiction in which the mediation occurred. Under Standard V (A), the mediator must “maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.” The mediator should consult the applicable law regarding mediator confidentiality, the rules of the referring court, and the laws of the jurisdiction mandating the reporting of misconduct, such the jurisdiction’s analog to Rule 8.3 of the American Bar Associations Rules of Professional Conduct. A review of those sources will reveal whether the mediator is “required” to disclose the attorney’s misrepresentation here and to whom.

In addition, under Standard VI (A), the mediator is required to conduct the mediation “in a manner that promotes . . . presence of the appropriate participants [and] party participation. . .” If the mediator believes that the attorney’s conduct here jeopardized conducting the mediation consistent with the Standards, the mediator should take “appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.” Standard VI (C).

Opinion:

**1. 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. \*\*\*

The mediator's inquiry boils down to a question of whether the mediator may disclose the false representation of counsel that he had proper authorization to excuse plaintiff's presence from the mediation. Under the Standard, the mediator is bound to maintain the confidentiality of that misrepresentation and to refrain from disclosing it, "unless agreed to by the parties or required by applicable law." There is no indication that counsel agreed to the disclosure,<sup>1</sup> so the inquiry must focus on whether disclosure is "required by applicable law."

The law applicable to this question may be (1) the mediation confidentiality statute, (2) the rules of the referring court or other laws requiring disclosure, and (3) the laws of the jurisdiction mandating the reporting of misconduct, such the jurisdiction's analog to Rule 8.3 of the American Bar Association Rules of Professional Conduct.

(1) The mediator should first consult applicable local statutes or rules relating to mediation confidentiality, since these laws vary from jurisdiction to jurisdiction.<sup>2</sup> Confidentiality laws typically relate what statements made during mediation may or may not be disclosed as evidence *in a subsequent court or administrative proceedings*. Such laws may guide, but would often not

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<sup>1</sup> The mediator here learned of the lack of proper authorization during a "private" conversation with plaintiff's counsel. Standard V (B) states: "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." Thus, the mediator should not disclose this information to defendant or his counsel without the consent of plaintiff's counsel. The mediator could, of course, simply explain the termination of the mediation as due to a commonly-known fact -- the lack of the proper "paperwork" evidencing authorization of counsel to appear without his client.

<sup>2</sup>For example, California's confidentiality statute broadly excludes the admissibility of statements that were made "for the purpose of, in the course of, or pursuant to, a mediation" (Evid. Code, § 1119, subs. (a), (b).) even if the statements might involve the attorney's professional misconduct. See *Cassel v. Superior Court*, 244 P.3d 1080, 1094-95 (Cal. 2011). See also, Ariz. Rev. Stat. § 12-2238(B): "The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met: 1. All of the parties to the mediation agree to the disclosure. 2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party. 3. The disclosure is required by statute. 4. The disclosure is necessary to enforce an agreement to mediate." and, *Grubaugh v. Blomo*, No. 1 CA-SA 15-0012, 2015 WL 5562347 (Ariz. Ct. App. Sept. 22, 2015) (Arizona confidentiality not waived in legal malpractice action because none of the four specific statutory exceptions applied).

On the other hand, other statutes may create exceptions to mediation confidentiality, allowing testimony in subsequent proceedings involving alleged professional misconduct. E.g., Va. Code §8.01-576.10(v). The Uniform Mediation Act includes an exception to the mediation privilege for a statement that is "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a party, nonparty participant, or representative of a party based on conduct occurring during a mediation. . ." U.M.A. §7(a)(7) ("Exceptions to Privilege"). However, mediators may not be compelled to testify about such professional misconduct. U.M.A. §7 (c). In these examples though, the statutes do not *require* the mediator to disclose professional misconduct outside of the subsequent court proceedings context.

prescribe what the mediator is “required” to disclose. On the other hand, there are some confidentiality rules that do not limit their application to disclosure at subsequent proceedings, and instead prohibit any disclosure by the mediator and others.<sup>3</sup>

(2) The mediator should also determine whether there are other applicable laws that require the mediator to disclose this statement.<sup>4</sup> Some court rules, such as those of the court here, may prescribe what must be reported back to the referring authority regarding the attendance of the parties. Such disclosure is consistent with the Standard V (A) (2), which states: “A mediator may report, *if required*, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.” (*Emphasis added*). In addition, some jurisdictions require mediators to report suspicions of child abuse.

(3) Most applicable here would be the state analog to ABA Model Rule of Professional Conduct 8.3 (a), relating to the reporting of professional misconduct, which provides:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

The attorney’s initial false representation that the court had authorized him to appear at the mediation without his client would seem to raise “substantial question as to that lawyer's honesty.” However, this Committee has not been charged with interpreting Rule 8.3 of the Rules of Professional Conduct. Instead, the Committee encourages the mediator to consult interpretations of that Rule by the ABA and of its state analog by the state bar licensing the attorney in the present case.

If the mediator is a member of the bar,<sup>5</sup> there may be a tension between his/her obligations of confidentiality as described in Standard V, and the obligations of reporting misconduct, as delineated in, for example, 8.3 (a). However, by prescribing that the mediator maintain confidentiality unless “required by applicable law,” the Model Standards appear to give precedence to the law over the ethical duty.<sup>6</sup>

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<sup>3</sup> *E.g.*, “The Court hereby prohibits the mediator, all counsel and parties and any other persons attending the mediation from disclosing any written or oral communications made in connection with or during any mediation session.” (U.S. District Court for District of Columbia Local Rule LCvR 84.9).

<sup>4</sup>The Reporters Notes to the Uniform Mediation Act make clear the distinction between, on the one hand, the privilege and its exceptions, and, on the other hand, laws that may require the mediator to report misconduct: “Reporting requirements operate independently of the privilege and this exception. Mediators and other are not precluded by the Act from reporting misconduct to an agency or tribunal other than one that might make a ruling on the dispute being mediated, which is precluded by Section 8(a) and (b).” Reporters Notes on U.M.A. § 7(A) (7), p. 40.

<sup>5</sup> If the mediator is not a member of the bar, then Rule 8.3 would not “require” his/her disclosure of the attorney’s conduct to the professional authority.

<sup>6</sup>This result, of course, may differ depending on the ethics rules and laws in the local jurisdiction. For example, the Virginia Rules of Professional Conduct, Rule 8.3 (c) states that: “If a lawyer serving as a third party neutral receives

## 2. QUALITY OF PROCESS

Standard VI Quality of Process states:

- 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.  
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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.

Here, without the court's permission for the attorney to appear in lieu of the client, the court's rules state that the mediation cannot go forward. The mediator is ethically bound to conduct the process with the "presence of appropriate participants" and "party participation." Absent that, the mediator could well decide that the attorney's efforts to circumvent the court's policy would "jeopardize the conducting of the mediation." Under these circumstances, the mediator has several options. The mediator might postpone the mediation so that counsel can secure either a court waiver or the presence of the client(s). Another option would be to withdraw from serving as mediator, particularly if he/she is concerned that the attorney's misrepresentation to the mediator has undermined the mediator's impartiality. Alternatively, the mediator could simply terminate the mediation.

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reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority."