

## **Committee Issues Ethics Opinions on Mediator Conduct**

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The goal of the Committee on Mediator Ethical Guidance of the American Bar Association (“ABA”) Dispute Resolution Section (the “Committee”) is to provide guidance on mediation ethics to mediators, counsel, parties and the public. The Committee’s hope is for its views to be considered persuasive, though not binding, on ethical issues. The Committee’s primary focus is on the interpretation and application of the American Bar Association/American Arbitration Association/Association for Conflict Resolution Model Standards of Conduct for Mediators (2005), although it may look to other sources of authority for guidance as well. The Committee is comprised of 12 members, currently co-chairs Geetha Ravindra and Nancy Lesser, and members James Alfini, Robert Bordone, Roger Deitz, Jay Folberg, Ellen Sickles James, Maureen Laflin, Leila Taaffe, Larry Watson, Paula Young and Michael Young.

Since its inception in 2007, the Committee has issued six opinions. A detailed review of each is set forth below.

### **Committee Addresses Confidentiality Duties of Attorney-Mediators**

Three of the opinions that the Committee has issued deal with the ethical duties of a mediator who also represents clients in the practice of law and the need to protect the confidentiality of information learned in the mediation context.

In **SODR-2007-1**, an attorney received a set of interrogatories directed to his client calling for all information about a certain subject known to the client and its employees and agents, including its attorneys. A partner at the attorney’s law firm was a mediator who recently mediated a case involving unrelated parties. During the course of that mediation, however, the attorney-mediator received

information which would be responsive to the interrogatories. The question posed was: What should the attorney-mediator do?

The Committee responded that a mediator must maintain the confidentiality of information obtained in mediation unless otherwise agreed to by the parties or required by applicable law. Accordingly, absent agreement by the parties to the mediation that disclosure was permissible, the attorney-mediator in that case, who had received information during the course of a mediation that would be responsive to interrogatories directed to another partner at his law firm should not disclose this information absent applicable law requiring the attorney-mediator to answer the interrogatories.

In **SODR-2008-1**, a continuation of SODR-2007-1, the question before the Committee was whether the Committee's conclusions would change if the attorney-mediator was the same attorney representing one of the parties in the case in which information was sought in discovery. Specifically, the issue for resolution was whether an attorney-mediator has an ethical obligation to disclose to parties who are about to participate in a mediation that there is a risk that the attorney-mediator may need to disclose statements made in mediation in the future in some other case.

The Committee opined that an attorney-mediator does not have an ethical obligation to make such a disclosure to the mediating parties, subject to certain important qualifications. The governing precept is that a mediator shall maintain the confidentiality of information obtained in mediation unless otherwise agreed to by the parties or required by applicable law. However, the ethics question posed implied that a court in unrelated litigation might interpret "applicable law," *i.e.*, state or federal law regarding litigation discovery obligations, as requiring disclosure of the information gained in the unrelated mediation. Nevertheless, the Committee did not believe that the risk of this occurring was significant enough to require a warning at or prior to the mediation *unless* the attorney-mediator

reasonably should have anticipated that he may be handling a case in which his knowledge of information gained in the mediation might be sought.

If, for example, the attorney-mediator knew there was a related case in the firm that could potentially lead to his need to respond to interrogatories seeking pertinent information gained in the mediation, such a risk must be disclosed at the beginning of or prior to the mediation. In addition, a mediator also must disclose any actual or potential conflicts of interest arising from the subject matter of the mediation. In the case at issue, the Committee believed that the scenario posed may be viewed as creating an actual or potential conflict that should be disclosed in advance.

In **SODR-2008-2**, the Committee considered whether, assuming the attorney-mediator does not make the warning disclosure described in SODR-2008-1 above and is later required by a court to disclose confidential mediation information, the attorney-mediator would have liability to the participant in the mediation who shared the confidences to the attorney-mediator. The Committee advised that the question of mediator liability is distinct from the mediator's ethical responsibility pursuant to the Model Standards of Conduct for Mediators. Liability would be determined under the jurisdiction's tort or statutory law. The answer to the first question might serve as the basis of a finding that there was or was not a duty of the mediator to disclose a risk. The issues of breach of duty, causation and damages would turn on additional facts, that are not provided, and on state tort law, which is beyond the scope of the Committee.

### **How Far Must a Mediator Go To Protect Confidential Information?**

Must a mediator seek a protective order or risk contempt in the face of an effort to obtain mediation confidences? That question was answered in **SODR-2008-3**.

In **SODR-2008-3**, the question at issue concerned an attorney-mediator's ethical obligation to protect the confidentiality of mediation communications if ordered by a court to testify regarding such

communications. It also inquired as to whether those ethical obligations varied if the mediator was not an attorney.

The Committee concluded that The Model Standards of Conduct for Mediators do not expressly require a mediator, whether a lawyer-mediator or otherwise, to take affirmative steps to protect the confidentiality of mediation communications if ordered by a court to testify or otherwise respond to a subpoena or other court order. The Model Standards do not require a mediator, for instance, to file a motion for protective order, resist a subpoena, or otherwise make the extent of the mediator's ethical obligation clear to the court either.

However, there is no question that, under the Model Standards, a mediator should strive to maintain the confidentiality of mediation communications. The Committee noted that the extent to which a mediator protects the confidentiality of mediation communications may vary depending on the resources, legal expertise, or ability of the mediator. At a minimum, while not required, good practice suggests that the mediator inform the court, or the party seeking the confidential information, of the mediator's ethical obligations under the Model Standards, as well as any applicable statutes, rules, or contracts that protect the confidentiality of mediation communications.

### **Can One Party Pay All Mediation Fees?**

One opinion issued by the Committee addressed the ethical issues posed by the payment of the mediator's fees exclusively by one party to the mediation.

In **SODR-2008-4**, the Committee was asked whether either of two scenarios implicated any ethical issues: 1) two parties seeking to resolve a conflict hire a mediator to assist them. The mediator makes a disclosure that his fee is to be split equally between the parties unless they agree otherwise. The mediation concludes successfully. Part of the resolution is that one party will bear the full cost of the mediation; 2) a mediator offers his services to a company that has regular need for mediation services in

connection with customer disputes. The company retains the mediator with the understanding that the company will pay the mediator's fees in full. The mediator and the company agree that: a) The mediator will be completely neutral in the process; b) the standing fee arrangement between the company and the mediator will be fully disclosed to the customers prior to the mediation; and c) prior to each mediation, the mediator will advise the customer that, if the arrangement is not acceptable to the customer, an arrangement with another mediator, agreeable to both parties, would need to be made.

As an initial matter, the Committee opined that the shifting of the mediation fee from one party to the other as part of a mediated resolution does not pose ethical problems for the mediator under the Model Standards. The Committee also concluded that it is ethical for a mediator to conduct a mediation in which one party has arranged at the outset — either as a way of inducing participation by the other party or for other reasons — to be responsible for 100% of the fees.

To the extent that the mediator is aware of the arrangement, however, he or she should disclose the arrangement as early as possible. The mediator also should ensure that all parties have agreed to the arrangement and are comfortable with the mediator going forward with the mediation.

The mediator also must do some soul searching to ensure that he is comfortable with such a situation as well. The mediator must be confident that he or she can proceed in an impartial manner even though he or she is aware of the fee arrangement. Additionally, the mediator should further consider the potential conflict of interest and lack of impartiality concerns that may arise if the mediator solicits an ongoing relationship between the mediator and the party paying all the mediator's fees, particularly if the arrangement involves a substantial source of the mediator's income.

### **Can a Mediator Ask Counsel to Reduce Her Fees to Get a Deal Done?**

In **SODR-2009-1**, the mediation had reached an impasse over the settlement amount. The mediator asked counsel (outside the presence of his client) if counsel could modify or reduce the fees

owed to him by the client in order to bridge the small gap between the parties' settlement amounts. Counsel refuses and said that the mediator was being unethical in making such a request. The question presented was whether the mediator's question was unethical.

The Committee concluded that 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 to the fact that the suggestion to reduce counsel fees is a delicate subject which, if mishandled, may create tension between client and counsel and potentially jeopardize the mediation.

The Committee recognized that counsel, while not a “party” as that term is used in the Model Standards, is a “participant.” Furthermore, regardless of terminology, there is no question that counsel fees are a factor that may affect the outcome of the mediation. In a real and practical sense, then, the interests of counsel are often an issue for the mediator to consider in helping to fashion a successful settlement. Just as the Standards forbid a mediator's use of coercive tactics against a party to attempt to secure a settlement, the spirit, if not the letter of the Standards would prohibit the same type of conduct if employed against a party's counsel in a particular case.

The full text of the Committee's opinions, as well as the Committee's Operational Procedures and the Intake Form for ethical inquiries, may be found on the Section of Dispute Resolution's webpage at <http://www.abanet.org/dch/committee.cfm?com=DR018600>.

The Committee welcomes inquiries not only from ABA members, but members of the general public and institutions as well. The Committee also may, on its own initiative, take an ethical issue under advisement. Final opinions issued by the Committee do not include the name and contact information of the requestor, or any other individual or entity identified in the request.

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