

How Would You Respond to this Ethical Dilemma in Mediation?

July 2008

Read about the topic presented by our guest columnist Susan Nauss Exon*, Professor of Law, University of La Verne College of Law, Ontario, California. E-mail your responses to this quandary to Roger Wolf at rwolf@law.umaryland.edu.

The Sleazy Attorney

Attorney represented an elderly client in a divorce action, wherein client lost his home and his life savings of approximately \$300,000. Client's assets were wiped out partly for spousal support to a wife who had worked during most of their forty-year marriage and partly due to attorney's failure to process required paperwork to avoid foreclosure on some real property. Client paid attorney \$38,000 in fees to represent client in the divorce. Despite client's periodic requests for invoices during the divorce proceeding, attorney waited until several months after the conclusion of the matter to bill client for an additional \$30,000.

A fee dispute ensued and the parties submitted the fee dispute to the local bar association's binding arbitration program; client was awarded a judgment of \$10,000 based on a finding that reasonable attorney's fees were \$28,000. Attorney appealed the arbitration award by filing a court action for breach of contract. Client counterclaimed for legal malpractice, fraud, and breach of the covenant of good faith and fair dealing. Minimal discovery has been conducted in the action and it has been referred to you to mediate.

Based on the parties' pre-mediation briefs, you become concerned that attorney violated lawyer rules of professional conduct during the course of the divorce representation. Client's attorney has not raised this issue in his brief. You also question the propriety of suing a former client for such a small sum of money.

The day of the mediation arrives and you begin with individual caucuses rather than a joint session. When you meet privately with attorney, you are met by a man with messy hair and wrinkled clothes. He talks in a quiet, gentle voice but has difficulty laying out facts in a coherent fashion. You learn that the attorney has been practicing for over twenty years. Ten minutes into attorney's opening remarks, you are already losing respect for attorney and are having difficulty listening to his aimless drivel. You believe that if attorney's behavior at the mediation is typical for him, attorney probably committed malpractice in the underlying divorce case as well as violations of lawyer rules of professional conduct. Hence, the arbitration award was probably correct.

As the mediation session continues, attorney refuses to back off of his position, claiming that his former client owes him money. By late afternoon, you believe the parties are close to impasse. You believe that if you mention your beliefs about the malpractice and ethical violations, you can encourage settlement. Then while in caucus with client, client asks whether you believe attorney committed malpractice in the divorce case? As an

attorney-mediator, how do you respond? Do you mention to either or both parties your concern about the ethical violations? Discuss any other ethical dilemmas that you see.

Reader Responses

The Client is asking the mediator for legal advice regarding malpractice. The mediator believes that discussing such information might help the parties overcome impasse. Responses recognized that the quality of the process comes into play as well as party self-determination and mediator impartiality.

Standard VI(A)(5) of the Model Standards of Conduct for Mediators (Model Standards) states that "mixing the role of a mediator and the role of another profession is problematic . . ." and a "mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards." One response suggested that as an attorney, arguably the mediator is qualified to answer if she is aware of the standard of care for malpractice in her jurisdiction. The Model Standards make clear, however, that the mediator should not mix other professional roles with that of a mediator. In other words, the mediator as a neutral should not give legal advice, as would retained counsel.

In the scenario, if the client was represented by counsel, an easy response would be to refer the question to the client's counsel. As a mediator, I would limit my discussion with the client's counsel to the legal standard for malpractice and let the attorney give legal advice to the client by applying the legal standard to the specific facts of the case. If the client was not represented by counsel, the mediator would be well-advised not to provide an opinion for fear the client believed that the mediator was representing him. Again, the mediator might provide legal information, but as long as the mediator does not apply the legal information to specific facts, an argument can be made that the mediator is not providing legal advice, and hence, is not mixing the roles of attorney and mediator.

Furthermore, the mediator should encourage party self-determination by urging the parties to seek the assistance of counsel, consistent with Model Standard I(A)(2). That Standard cautions that the mediator cannot ensure that each party has made an informed choice, although the mediator can inform the parties of "the importance of consulting other professionals to help them make informed choices." This can be done in private caucus with the client. In a separate caucus with the attorney when the mediator raises the question of possible malpractice, the mediator should ask whether attorney has thought about retaining malpractice counsel, especially since the crossclaim alleges malpractice.

A third related issue pertains to mediator impartiality. Model Standard II requires a mediator to conduct a mediation in an "impartial manner" and describes impartiality as "freedom from favoritism, bias or prejudice." By providing legal information to the client in a private session without offering an opinion, the mediator can maintain impartiality. Similarly, the mediator can discuss the malpractice concern in a private caucus with the attorney. As previously noted, the mediator can ask the attorney a series of questions regarding the issue of attorney malpractice, including whether the attorney has retained

separate malpractice counsel and query about any concerns attorney may have regarding the malpractice claim. The mediator should be able to remain impartial and maintain her own credibility by simply raising questions and offering the topic for consideration without providing any opinion.

A separate issue relates to the mediator's concern about potential ethical violations. Since neither party has raised the issue, I would not add fuel to the fire by mentioning a new issue. But, should the attorney-mediator report suspected professional misconduct? ABA Model Rule 8.3 addresses a lawyer's responsibility to report another's conduct when the lawyer "knows" another lawyer has violated the Rules of Professional Conduct that raises a substantial question regarding the "lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Although this is a tough call for any attorney, the facts indicate that the mediator *suspects* a violation, and therefore, does not *know* for certain, mediation confidentiality should govern to preclude reporting under these facts, and ABA Model Rule 3.3, Candor to the Court, does not pertain to mediation.

Several comments focused on the first part of the mediation when the mediator had a difficult time listening to the attorney's drivel while in caucus. By not paying attention, one response noted that the mediator could not be impartial and would "sabotage her credibility." Thus, the mediator should not continue to mediate. Several other responses indicated that by recognizing that she (the mediator) had "checked out," she became aware of her biases, was able to adjust her behavior, and became a better mediator. Finally, one response stated that the mediator needs to realize it is not about her agenda - what she thinks or feels - and as long as the mediator gets back on track quickly, she should be able to maintain her competence. I agree with these latter responses that by recognizing her personal biases and modifying her behavior, the mediator can maintain her level of competence and should be able to continue mediating the matter.