

How Would You Respond to this Ethical Dilemma in Mediation?

Presented by our guest columnist Roger Wolf, Ethics Committee Co-chair.

The Unprepared Lawyer. What Is A Mediator To Do?

In a court referred employment discrimination matter in which both parties are represented by counsel, the mediator, who is also a member of the state bar, becomes concerned during the joint meeting that plaintiff's attorney knows little about the area of employment discrimination law and has failed to do his homework for the mediation. During the initial caucus with plaintiff and her counsel the mediator, who knows employment law, realizes that plaintiff has the basis for substantial recovery (\$200,000 or more). When the mediator tries to explore what they are looking for by way of relief plaintiff's lawyer tells the mediator, "Just money. Let's see what they offer."

In the caucus with defendant's corporation and its counsel the mediator explores the case and when asked what they want replies, "They are looking for monetary relief at this point but didn't give me a number." Defendant's lawyer replies, "Well, since they want us to make the first offer, you tell them we don't think this case is worth much but to dispose of it we'll give them \$20,000."

When the offer is shared with plaintiff and her lawyer her lawyer responds that if they will pay \$25,000 it's a deal. Defendant agrees to pay \$25,000 in return for a full release and confidentiality clause, which is accepted.

If you were the mediator in this case what, if any, ethical concerns would you have? Would you have said or done anything to indicate to plaintiff and her lawyer your concern about their undervaluation of the case? Should the mediator do anything about plaintiff's lawyer's performance? If so, what?

Readers Response

The ethical dilemma from last month placed the mediator in the middle of an employment discrimination case with both sides represented by counsel but the attorney for the complainant (at least in the mediator's opinion) is ill prepared, has grossly undervalued the client's case, and agrees, with minimal negotiation, to a mediated settlement that is significantly below the value of the case.

If the mediator does nothing and allows the parties to reach this agreement she has another "success" on her record but has she provided a quality process (Standard VI from the Model Standards of Conduct) that promoted "party participation, procedural fairness, . . . and party competency"? If the mediator intervenes and suggests the complainant and her attorney might want to test and see if this first monetary demand of the company is its best offer is the mediator showing partiality as prohibited by Standard II (B)(1). Or is she risking crossing the line between mediator and taking on another role in violation of Standard VI (A)(5) or (8)? Should the mediator exercise the escape clause in Standard

VI (C) and postpone, withdraw or terminate the mediation? Does the mediator, if she is an attorney herself and a member of a Bar Association have an ethical duty to report the complainant's lawyer to the grievance committee?

What about the parties' right to Self Determination as set out in Standard I. The complainant voluntarily selected her attorney. Nobody has pressured her or her attorney to agree to this settlement. But is the decision an informed one? As Standard I (A)(2) reminds us, "a mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions ...". The mediator cannot guarantee that her assessment of the case value is accurate. Nor can the mediator be certain that the complainant and her attorney don't have reasons that they are not disclosing to her for accepting the offer.

Almost everyone who responded with an analysis of how the mediator should deal with this situation felt that she should not interject herself into the process to alter the agreement. You reasoned that both parties to the mediation seem content with the agreement and if the complainant subsequently feels that her attorney did not adequately represent her then she can file her own grievance against the attorney. One person responded that they needed to know more before they would refer the attorney to the bar grievance committee.

Attorneys who are mediators need to remember that they are still bound by the ethical requirements of the legal profession when they are mediating. Where there is a conflict between codes or where one code requires action and the other is permissive the mediator must default to the strictest ethical standard. An attorney who is a mediator may have an ethical responsibility to report an attorney engaged in malpractice, although it is rarely done.

Personally I believe the mediator in this ethical dilemma should have probed a little more with the complainant and her attorney when she brought back the \$25,000 offer. Ask about how the \$25,000 would meet the needs and interests of the complainant. Ask how they arrived at their valuation of the case. Have a conversation about negotiation strategy and query about their assessment of the risk of making a counter offer, etc. etc.. I believe the mediator needs to use care in embarking on this path but that such a course is permitted by Standard VI (A) (10) which provides:

"If a party appears to have difficulty comprehending the process, issues, or settlement options . . . the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination."