

How Would You Respond to this Ethical Dilemma in Mediation?

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

To Disclose or Not to Disclose...

You are the mediator in the following case:

Al sued Bob for funds owed when Bob, unbeknownst to Al, dissolved the business they co-owned and sold all of the remaining assets. Al and Bob owned an antique business together for over twelve years. Initially, Al contributed about seventy percent of the capital, while Bob was more responsible for the daily operations. Over time however, Al became more involved in the day to day operations, although he stopped his involvement about two years ago, claiming an inability to "get along with Bob."

Now Al is seeking at least \$250,000 from Bob, alleging that he mismanaged much of the business, and specifically 'undersold' the antiques in most instances. The court has referred the matter to mediation. During the opening session, Bob provides Al, as well as you the mediator, a financial statement, prepared by Ace Accounting, CPA. It shows Bob's net worth to be just over \$150,000, with the primary asset the homestead, and a timeshare. Bob puts an offer of \$25,000 on the table saying that the amount is very close to the limit of what he has available, and that prospects for future income are minimal.

Several hours later in a private caucus you learn, through a variety of statements made by Bob that he has several hundred thousand dollars in the Caymen Islands. Moreover, most of the "antiques" were knock offs made in China, that the profit margins, therefore were enormous, and that he plans to retire in the next couple months in the Caymens. As Bob put it, "Al can't tell a real financial statement any better than he could recognize a real antique."

- Do you disclose this information?
- To whom?
- What are the ethical considerations at issue here?
- Does it make a difference if your Agreement to Mediate promises the participants 'strict' confidentiality?

Reader Responses

In the December 2007 issue, the Ethics Committee began a series of ethical quandaries. Ethical situations will be posed to the readership, and the responses outlined in the following issue.

This month we review reader responses to the ethical dilemma presented in the last issue involving a mediator who, during a caucus with one party, learned about hidden assets. In this scenario, one business partner concealed assets, cash, from the other, and in fact had presented a false financial statement during the joint session.

One response (from a lawyer/mediator) viewed the mediator's duty, as an officer of the court, to report this information to the referring court, believing that obligation trumped the duty to confidentiality. One can certainly not ignore the ethical obligations of any other profession to which one belongs simply because they are mediating, in this case a closer analysis suggests that the mediator's duty as an officer of the court does not trump the duty to confidentiality. This is not a court proceeding; rather, it concerns a party lying and concealing information in a mediation and the question is - 'does my obligation to conduct a fair process trump the stringent confidentiality duty or fall within an exception?'

The majority of the responses concluded that the mediator should maintain confidentiality, as well as discontinue mediating the case, as the agreement could be set aside. Also consistent in the responses was the suggestion that the mediator should merely note that he cannot continue the mediation, without disclosing any details about the reasons. While one response did initially consider whether the hidden accounts might constitute an "ongoing crime" and hence an exception under the UMA, the individual concluded that this situation did not fall within the exceptions. Thus confidentiality would be maintained.

Standard V of the Revised Standards of Conduct for Mediators directly addresses this issue, providing that a "mediator shall maintain the confidentiality of all information obtained by the mediator." Other provisions, as well, impact the analysis of this matter. Revised Model Standard VI (A)(4), Quality of Process, provides that a mediator should "promote honesty and candor between and among all participants, and ... not knowingly misrepresent any material fact..." Following this Standard, a mediator should strongly urge the business partner with hidden assets make the disclosure, and if he refused then terminate the session. Continuation of the mediation may arguably fall under a "knowingly misrepresent" provision.

Alternatively, it could, perhaps, be argued that it is up to the parties to do their own due diligence on each other, as was suggested by one response. The parties could have agreed to trust one another, and thus, to intervene would be to interfere with parties' self-determination (Revised Model Standard I(A)(2)). The writer, after raising this issue, did however opt for intervention by way of termination of the session. However, Standard I(A)(2) suggests that mediators should make parties aware of the need to consult other professionals so to make informed decisions. In this case, the mediator might suggest an investigator.

Also noteworthy was the question raised about returning the mediation fee, particularly to the party who did not cause the dilemma. As this is not addressed in the standards, it is likely an individual choice for the mediator, and may depend at least in part, on the duration of the mediation at the point that the information is disclosed.