May-June 2010:  How Well Can You Write?
By Roger Wolf

Dilemma: You have spent the past three days mediating a complex business dispute. The parties have finally reached agreement, albeit reluctantly. When you ask how they want to take care of writing up the agreement, the parties say, “Why don’t you, the mediator, write it up and send it to us.” Do you draft the agreement? Does it make a difference if:

1. Both sides are unrepresented?
2. Only one party is represented by counsel?
3. Both sides are represented?
4. This is not an area of law in which you have much background?

Response: This dilemma is a common problem for many mediators. It is confronted frequently by mediators doing day of trial mediations in local courts, community disputes, office issues, and divorce and access issues1 to name but a few, and the Standards of Conduct for Mediators 2005 (The Standards) do not give clear guidance on the extent to which a mediator may draft the agreement reached by parties to the mediation. In the May hypothetical the parties had already reached agreement on the issues and it was not until the question of drafting the agreement was posed that the mediator became aware that they wanted the mediator to perform the task and, as most of us know, it is often during the drafting of the agreement that some of the hardest negotiations occur and “agreements” have been known to unravel.

For purposes of the hypothetical we are going to assume that the mediator made full disclosure to the parties of her background in the subject matter and of her mediation skill at the time they engaged her. As Standard IV (A) states, “A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties;” and, “A mediator should have available for the parties’ information relevant to the mediator’s training education, experience and approach to conducting a mediation.” [Standard IV (A) (3)]. We are also not going to delve into the requirements of other laws, standards, or ethical codes that may have bearing on a mediator’s decision except to note that every mediator should be aware of the requirements of any other ethical code or agreement that they are responsible to. As the Note on Construction to the Standards cautions, “Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties and mediator have agreed, and other agreements of the parties.”

Addressing the problem in the hypothetical we are given four different scenarios – both parties are unrepresented, one party is represented and the other not, both parties are represented by counsel, and finally the mediator is not knowledgeable in the subject matter. When the parties request the mediator to “write up the agreement and send it to them” the mediator has a number of options. Some of those responding to the hypothetical stated that they never write agreements. This approach avoids any concern about Conflict of Interest [Standard III (A) and (D)]; conflicts of roles [Standard VI (A)(5) (6) and (8)]; and concerns about unauthorized

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1 The ABA Section of Dispute Resolution’s Committee on Mediator Ethical Guidance will soon issue an Opinion addressing this issue in the context of unrepresented divorcing parents.
practice of law and/or malpractice, but it may be least satisfying for the parties and is particularly troublesome if the parties are unrepresented.

Several people responded that they would tell the parties that before anyone departed they all needed to record the terms of the agreement they had reached and, if they wanted, the mediator would write down what they said and help them negotiate any new issues that arise. The Standards make no mention of the mediator acting as scrivener but arguably it is implied in the definition of mediation set forth in the Preamble, “Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.” If the mediator has expertise in the subject matter that would be useful to the parties it is unclear whether she provides it. Standard VI (A) (5) states, “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.” The phrase, “consistent with these Standards” suggests that the mediator preserves “self determination (Standard I), does not demonstrate bias or prejudice [Standard II (A)], remains free of conflicts of interest [Standard III (A)], and does nothing to undermine the integrity of the process [Standard III (D)]. The line between information and advice can be murky. For example, in a day of trial mediation the mediator may feel comfortable explaining (providing information) to unrepresented parties about the choices they have in disposing of the court case once they have reached an agreement and the difference between a judgment and a continuance. Information on the tax consequences of a business transaction would appear, however, to cross the line not only because it seems to be more advice than information but also because the mediator seems to have undertaken an additional dispute resolution role inconsistent with the role of mediator [Standard VI (a) (8)].

A third choice the mediator can make is to agree to draft a “Memorandum of Points of Agreement” acting basically as a scrivener and not adding technical language or additional terms and sending it to the parties with the clear admonition to have it reviewed by an attorney and put in the form of a final agreement. Where the parties are already represented by counsel this can easily be handled and, if need be, the parties can return to mediation to resolve additional issues. Where the parties are not represented by counsel or only one party is represented it becomes more problematic. The mediator has the responsibility to foster party self determination [Standard I (A)] and particularly where a party or parties are unrepresented to “… make the parties aware of the importance of consulting other professionals to help them make informed choices.” [Standard I (A) (2)]. Not only should the mediator do this at the outset of the mediation, the suggestion to consult a lawyer should be repeated at the time the agreement is being written. If the parties ask the mediator to write the agreement and the mediator is more than a scrivener, the mediator has taken on a new role, inconsistent with that of mediator. The mediator must be competent to assume the new role and most obtain the informed consent of the parties before doing so. Once she takes on this new role, I would argue, she can no longer serve as mediator in this matter.

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2 In Maryland, for example, the definition of mediation contained in the court rule [Rule 17-102 (d)] provides that “A mediator may…upon request, record points of agreement reached by the parties.” And an ethical opinion from the bar supports that as long as that is the extent of the mediator’s writing it is not the practice of law.
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