One Small Problem—June-July 2012

By Mel Rubin

This is a family mediation case. The husband and wife have filed for divorce. There are considerable assets and two minor children involved. The mediator has held a pre-mediation phone conversation with each party’s attorneys. On the day of the mediation the mediator convenes the parties and ushers in the wife and her attorney, as well as the husband and his attorney. As they are walking in, the husband’s attorney turns to the mediator with whom he has had prior cases, and says “Mel, this is an easy one, there is only one small problem.” (Small as in the size of Yankee Stadium!).

The parties sit down to begin their joint session, at which point the mediator inquires as to what is the small problem. The husband’s attorney turns to the mediator and announces that the husband has a pending first-degree murder trial set in approximately two months. The husband’s attorney states that the husband is completely innocent. No pre-warning has been given to the mediator, however, the wife and the wife’s counsel are well aware of the murder charges. The alleged murder was work-related.

Questions:

What should the mediator do?
How should the mediation be conducted, if it goes forward?
What potential ethical issues and concerns arise with the mediator?
What potential ethical issues and concerns arise for the mediation process?
How does a pending criminal prosecution affect a mediation?
What if the criminal prosecution is for a federal crime?

Author’s Response:

First, thanks to those who responded to the Ethical Dilemma --“One Small Problem” from the June Newsletter. The question involved a family mediation where the husband was facing murder charges while the divorce mediation was proceeding. Needless to say, many of the issues raised in this context could equally apply in non-family mediations. Moreover, many other criminal charges or concurrent consequences may be even more likely, especially if they are related to the mediated civil matter such as civil fraud matters, RICO, collection of fines, penalties etc.

Even for the most seasoned mediators, the existence of a pending murder charge has the tendency to make one stop and contemplate (euphemistically, that is). The hypothetical also lobbies for pre-mediation caucusing at the behest of either the mediator or more properly by the
attorney(s). Such would have revealed the information earlier and allowed prudent planning. As mediators seek prior notice of any ADA special needs, the time has also come to inquire of any other special factors that may affect the mediation prior to the mediation.

How far, if at all, does the mediator go in discussing the scope and limitations of confidentiality in this situation? When does too much information become legal advice? How much direct communication does the mediator want with the defendant? If the defendant, with counsel’s approval, decides to fully participate or limit same, it may be appropriate to have such waiver-none, partial or full-in writing from the defendant and his or her counsel.

Although the foundation of self-determination is no different here than in other mediations, the mediator may be tempted to provide advice, perhaps even warnings. Such action may violate the core principle of neutrality, even under the guise of providing information. Obviously, such problems are first to be addressed by the participants and their attorneys and deference given to their agreements. Moreover, the mediator does not want to be drawn into witnessing threats or disclosures of information that could have an impact on the criminal case, improper or illegal quid pro quo agreements and the like. This brief analysis has not even touched upon multi-jurisdictional issues or federal/state conflicts.

The applicable standards that may be involved in analyzing this hypothetical for the mediator include: Neutrality, balance of power, confidentiality, professional advice vs. information, responsibilities to the Court and concurrent professional standards.

For the participants, the issues would include: voluntariness, fully informed, self-determination and confidentiality.

The practicality of the hypothetical is that the criminal court is going to make a decision that will determine the major issues of that divorce-children and money issues. The proper use of the mediation will allow planning on a “what if” basis that can cover most of the anticipated consequences. While the mediation can be delayed until after that verdict (which would also avoid much of the confidentiality issue), a structured mediation may also be helpful. This scenario truly allows the mediation to give the participants an opportunity to be better educated and aware of what may be ahead of them.

In summary, this or similar situations should cause the prudent mediator to maximize their time for process appropriateness, maximizing self-determination, ensuring confidentiality appreciation and protection of the process, the participants and the mediator. Remember, just when you think you have seen it all, you haven’t!
Mel Rubin has trained for the U.S. Department of Justice, the U.S. Navy, Equal Employment Opportunity Commission, the ABA, and the Florida Bar. Mr. Rubin has personally mediated over five thousand cases. Mr. Rubin continues to serve as a member of the Supreme Court of Florida ADR Policy and Rules Committee, responsible for recommendations to the Court in the formulation of the standards and rules for mediators and arbitrators in the state of Florida.