

How Would You Respond to this Ethical Dilemma in Mediation? June 2009

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The Judge Beckons

You recently mediated a family business dissolution case that concludes in a signed agreement. A week after the mediation, the plaintiff's attorney contacts the court's ADR coordinator to ask that the settlement be set aside. The attorney explains that his client has complained that she was not feeling well for the last couple hours of the six-hour mediation; she would have signed anything to conclude the session, she has told him.

The judge calls both attorneys to a meeting at her office to learn more. The defendant's attorney attests he saw no outward distress by the plaintiff, while the plaintiff's attorney explains that on the day of mediation he thought her discomfort was "a typical case of nerves," yet he now understands that she was without her anti-anxiety medication that afternoon - and therefore should be considered to have been "incompetent to contract."

Clearly frustrated, the judge asks both counsel whether the mediator should be contacted, to seek her recollection of the day's events. Both answer affirmatively, and the judge calls you on the phone. She asks for your assessment of the plaintiff's condition during the mediation, and notes that both parties' attorneys have waived confidentiality restrictions by asking for your views.

Responses to *The Judge Beckons*

Astute readers will note the remarkable parallels between this scenario and the *Wilson v. Wilson* case presented in a recent *Dispute Resolution Magazine* (that the scenario and article share the same author would constitute a hint). Other readers may note echoes of *Olam v. Congress Mortgage* or *Randle v. Mid Gulf* in this case. And still other readers may not have encountered or considered this problematic issue before.

Responses to this dilemma have been both thoughtful and divergent. Most emphasize that mediation is confidential (in most jurisdictions) and that the mediator is prohibited to share any information about the content of a mediation session with any outside actor or agency. But from this starting point, a range of approaches emerge.

Some mediators rhetorically asked, "Whose self-determination is served by confidentiality in this case? If the parties', then what are we to make of their attorneys' support of the judge's contacting the mediator? Attorneys function to represent the parties' interests." Others highlighted the distinction between substance of mediation communications and a mediator's judgment of a party's demeanor and ability to

participate, noting that requested feedback was not about the specific content of any proposal or offer.

Before engaging these arguments, let's step back to admire the work of Professors Coben and Thompson, whose analysis of litigation arising from mediation found that confidentiality was the key concern in 130 recent cases; in 60 of these, courts did not uphold confidentiality protections. Among the justifications for compelling mediator testimony, they found courts "concluding the evidence was offered for a permissible purpose," as was reasoned in *Wilson*—especially given that the majority of the mediation took place in caucus sessions, only the mediator interacted with Mr. Wilson extensively that day.

Olam presents a similar rationale and represents the most detailed explanation of the court's perceived need of the mediator's account: Judge Wayne Brazil argued that "testimony from the mediator would be the most reliable and probative on the central issues." But would it?

First, is a mediator sufficiently trained in assessing a disputant's fitness for mediation? Professor Patrick Coy and I have observed, addressing differential cognitive or emotional abilities of disputants puts mediators in a dangerous and delicate situation. "It is dangerous because few, if any mediators are trained in mental health diagnosis and psychological assessment. These analytical processes are difficult enough for highly trained and skilled professionals who have ample assessment time with their clients."

And second, Richard Smullyan's knights-and-knaves puzzles hint at the predictability—and thus limited utility—of the mediator's likely response. Recall that some of Smullyan's logic games take place in a land where knights speak only truths, while knaves always lie. A close colleague has pointed out, "[What mediator] is going to say, 'The parties didn't seem competent to mediate, but I went ahead anyway'"?

While a few responses to the dilemma pointed up these concerns, others stood fast on the issue of party self-determination while setting aside the mediator's interest in protecting confidentiality. If both parties seek the mediator's revelation of communications or her judgment of parties' capacities, then the mediator should accommodate these requests. We should note that other mediators have argued compellingly against this very practice, as they note the erosion of confidentiality protections could be broadly detrimental. How the standards of self-determination and confidentiality function in relation to one another is not prescribed in the Model Standards of Conduct for Mediators.

And to the distinction between mediation communications and a mediator's judgment of a party's competence, we have another divided jury: Some readers held the mediator's assessment to be sufficiently unrelated to mediation content, and thus outside the veil of confidentiality and therefore appropriately shared with the judge. Others anticipated this line of reasoning, and rebutted that any assessment is grounded wholly in the mediator's communication with the parties (and thus should remain confidential, as any explanation or justification for the assessment would necessarily break confidences).

And so what is a mediator to do when the judge calls? The preponderant response is that the mediator should decline to offer any information regarding the mediation, aside from whether a mediation between those parties was held or not. A majority of respondents suggest it's permissible to inform the judge whether a written agreement was reached or not. Many readers pointed to local mediation rules and provisions regarding confidentiality and mediator communication guidelines. These should be any mediator's first reference, should a judge or other party call. The ABA Committee on Mediator Ethical Guidance stands ready to offer their guidance, as well.

Returning to two other concerns embedded within this case, allow me some likely-unsatisfying responses. To the issue of parties' perceptions of mediator pressure, guidance from the literature and professional codes is that the mediator apply no more pressure than the parties expect. And regarding a mediator's judgment of party competence, the essence of most recommendations is to discontinue the mediation process if a party's behaviors hint that she or he cannot participate effectively—whether to terminate or just suspend would depend on what (if any) accommodations might support the party's capability. Both of the preceding issues are delicate and complex, and to this author's thinking, unresolved at present. Further consideration and guidance on these important issues will improve future mediation practice.