

How Would You Respond to this Ethical Dilemma in Mediation?

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

The Mikado Club VIP

The phone inquiry asking if you would mediate a business dispute between a business owner and a non-paying client gave no hint of what was to follow. Your receptionist scheduled a date and you entered the mediation room prepared for a run-of-the-mill discussion of contracts signed, services promised, customer expectations disappointed, and hurt and angry feelings on all sides. You heard all that and more.

It turns out that the business owner, Madame X, is the head proprietor of MIKADO CLUB VIP - a high-class and very expensive escort service. The client, Mr. George Fox, is a long-standing client who has been patronizing MIKADO for many years. The current dispute arose over Mr. Fox's last assignation with Ashley - one of MIKADO's most sought after "Models." Typically, Mr. Fox pays \$5,000 for each 24 hour period spent with a woman hired from MIKADO. Often Mr. Fox takes the Models out on the town to a play, opera or lavish dinner before retiring to the Hayflower Hotel. On this particular occasion, Mr. Fox wanted to take Ashley to The Association of Carnivore's National Convention. Ashley, a passionate vegetarian, refused to go. Mr. Fox felt humiliated and the evening went badly. Mr. Fox refused to pay the \$5,000 fee.

The parties' previously happy relationship is in tatters. They are both really angry. Furthermore, each is beginning to make ominous noises about "ruining" the other. You think violence might possibly erupt. Certainly reputations could be lost. You know from what each has said privately that this could be easily settled with an apology and a perfunctory (and reduced) payout on Mr. Fox's part. You also know that the case could be settled without any discussion of future escort activity- activity that is surely illegal, though, you yourself don't find it unsavory. After all, Ashley is a consenting adult- and you are quite certain she takes home more after-tax income than you do.

As a mediator and also a licensed lawyer what ethical standards will you need to consider? Have you already gone too far? What do you do?
If you are not a licensed lawyer would your obligations be any different?

Responses and Guidelines for Attorney-Mediators

Attorney-mediators are guided not simply by the rules and standards applicable to third-party neutrals, but also to the guidelines set forth in the Model Rules of Professional Conduct binding on attorneys. Rule 1.16(a)(1) states that a lawyer shall withdraw from representing a client where such representation will result in a violation of law. Although the mediator here does not represent George Fox, it could be argued that his continued participation in the mediation will likely result in the commission of a criminal act. If the mediator helps generate an agreement that involves any payment from Fox to the Club,

then he has helped facilitate an exchange of sex for money, an exchange that remains verboten in most states. Such participation arguably violates the spirit- if not the exact letter- of the Model Rules.

Indeed, Robert Fries of San Francisco, CA. makes exactly this point when he writes: “Because I’m a lawyer and the state’s criminal law and by inference State Bar rules of professional responsibility.....forbid anyone, including a lawyer, from assisting the commission of a crime, and (even in California) prostitution is a crime,.....I believe that my obligation to follow such rules would create a bar to, at least, my being effective in discussing and facilitating option for settlement of this dispute. ...” Fries points out that any resolution in which money changes hands would effectively conclude the act of prostitution. Further he notes that a resolution that included a “confidentiality provision (or even without one)” would possibility create mediator liability as “an accessory before and/or after the fact.”

Virtually everyone who wrote in stated that attorneys would need to be very careful in this case. They did note, however, that it might be possible to work on the case with the condition that all options discussed in mediation be legal and above-board. The possibility of working with the parties under clearly stated pre-conditions was also mentioned by responders commenting on the obligations of non-attorney mediators.

Guidance from the Model Standards of Conduct

Non- attorney mediators need not concern themselves with the Model Rules, but they are subject to the strictures of the Model Standards (binding upon mediators of all professional background). Standard VI (9) states that “if a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.” Again, it might be argued that facilitating a payment between George and VIP would entail “furthering criminal conduct” because it would constitute the payment portion of a prohibited money for sex swap. What, though, if the mediation discussions took another turn. What if they didn’t focus around a money payment, but rather revolved around questions of apology or future (nonsexual) interactions. Would Standard VI continue to remain a bar to mediator involvement?

Focusing on outcomes that entail no future crime raises the interesting question of what it means to “further” criminal activity. If George and VIP’s prior transactions were illegal, but their mediation discussions focus on entirely legitimate ways of concluding their dispute, is the mediation still being used to “further” criminal activity? (i.e. imagine that George is amenable to hiring VIP staff at a discounted price in the future to function as bartenders and waitresses at future company functions. In this way- George is adding to the VIP coffers without providing compensation for past illicit services rendered).

Some readers argued that – regardless of whether it was theoretically possible for George and VIP to conclude their dispute in an entirely legal fashion, their earlier unsavory connections should be enough to warn mediators away from taking the on as

clients. Working with George and VIP, would, they asserted, render the mediator complicit in a cover-up of their earlier wrongdoing and bring the profession as a whole into disrepute. Other readers took a more open stance. Noting that the hypothetical posits that relations between George and VIP are taking an ominous turn, which each threatening to “ruin” the other, these readers focuses on the parties’ WATNA, in the event that the mediator turns them away. While agreeing that they would not want to be seen as encouraging future illicit conduct, they were comfortable with the idea of helping George and VIP patch things up so as to avoid any further fall-out from their dispute. After all, they reasoned, which is more ethically supportable- remaining aloof while a bad situation gets worse- - or eschewing an overly rigid, moralism and working to bring about a lawful and harmonious resolution?

Even those mediators inclined to take on this case noted that existing confidentiality laws , including the UMA, would likely not protect the parties’ disclosures regarding prior criminal conduct- and that publicity leaks surrounding the case would not enhance the mediator’s personal reputation.

As Bob Fries concluded in his posting, “assuming an inclination to go ahead with this matter AND having in mind the confidentiality covering mediation (quite strict...in California) [a mediator] would be wise to consider carefully the possibility of potential harm to reputation caused by publicity following inadvertent...or intentional...disclosure.....Besides, under what category would the mediator list this matter on her/his resume?.”