How Would You Respond to this Ethical Dilemma in Mediation?
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Read about the topic presented by our guest columnist Ruth Vance.

The Distraught Wife

The judge, in a dissolution action, issued his routine order that the parties mediate before a trial date would be set. No discovery has been done. The husband and wife choose you as their private attorney-mediator.

At the mediation session, the husband is represented by an attorney; the wife is not. The husband is a business executive who travels a lot; the wife is a stay-at-home mother to their 10 and 7 year old daughters. The wife has a B.A. and teaching certificate in art, but she hasn't taught since their 10-year-old was born, and her teaching license has lapsed.

Despite several hours in joint session, the husband and his attorney doggedly stick close to the husband's initial position on the property division. He placed a high value on the home that the wife wants so that she would wind up with few liquid assets. The wife is obviously emotionally drained.

In a private session with the wife, you notice that she appears distraught and confused. The wife cries and tells you that she doesn't know how she will make ends meet on what her husband is offering her. She also told you that one year ago they put their house on the market for $30,000 less than what her husband wants to value the house at today for purposes of the property settlement. They took the house off the market after six months when the only offer made was $20,000 less than the asking price. She also tells you that, while she has never paid the bills or taxes and hasn't paid much attention to their bank accounts or investments, she is surprised that the value of the liquid assets her husband is claiming is so low based on his salary and the fact that they haven't made any major expenditure in recent years. She changed her mind more than once on whether to accept her husband's offer, but then said tearfully that she supposed she'd better agree to be "done with this mess." Then, she turns to you and asks what she should do.

As the attorney-mediator in this case, what ethical concerns do you have? What will you do at this point?

Readers Response

Ethical concerns raised by The Revised Model Standards of Conduct for Mediators appear to be in the areas of Self-Determination (Std. I), Quality of the Process (Std. VI), and Impartiality (Std. II).

Standard I provides: "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process
and outcome." Standard I (A)(2) also provides: "A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices."

One reader thought that because the parties were ordered to mediation by a judge, the Standard regarding party self-determination was irrelevant. While this is true for process, it isn't true for outcome. In this problem, the mediator, while not a guarantor of free and informed choices, should suggest that the parties get an outside professional to help. For instance, the mediator could suggest to both parties in joint session that they agree on an appraiser to appraise the real estate and agree in advance to accept the appraiser's value. If the parties can't agree on one appraiser, they could each pick their own and the two appraisers could pick a third. The husband and wife could agree to be bound by the average of the three appraisals. Of course, the mediator will want to point out the cost of doing this. In caucus with the wife, the mediator should suggest that the wife obtain legal counsel to advise her on whether to agree to any offer made by her husband.

Can the mediator remain impartial (Std. II) when trying to balance the unequal power between husband and wife? Responses conflicted on this. Some readers thought that by trying to balance power, the mediator would lose neutrality. However, Standard I embraces the principle that a mediator help the parties reach an informed and uncoerced decision. In fact, Standard I states that a mediator should mention "the importance of consulting other professionals to help [the parties] make informed choices." So, recommending that the parties use a real estate professional to help set a value and recommending that the wife seek legal counsel before signing an agreement are warranted in this case and should not affect the mediator's neutrality.

The attorney-mediator will probably be concerned that when the wife, during caucus, asks what she should do that she is unclear as to the mediator's role and that she wants legal advice from the mediator. Even though the mediator is an attorney, the mediator's role here is as mediator, and the mediator should not give legal advice to the wife. Standard VI on Quality of the Process states in part (A)(5) that, "The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. 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."

Even though the lawyer-mediator may be qualified to give the wife legal advice, I, personally, would not because I would worry that I would no longer be neutral. Some readers thought it permissible to give the wife legal information, distinguishing that from legal advice. However, the line between information and advice is a hard one to draw. I think that it would be hard to give legal information, remain neutral, and not confuse the wife further about my role as mediator. Standard VI (A)(10) provides: "If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s
capacity to comprehend, participate and exercise self-determination." The wife's distraught state makes it even more important that the mediator recommend that the wife obtain her own attorney.

Based on what the wife told the mediator in caucus, the husband might be concealing assets. This presents a problem because the mediator has a duty to "promote honesty and candor between and among all participants. . ." (Std. VI (A)(4)). Further, "[i]f 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." (Std. VI (A)(9)). The mediator will want to be careful in handling this. In caucus with the husband, the mediator could ask where the husband's values came from. Hopefully, the mediator has already asked the parties to bring in several years' of income tax returns. Those would help to determine if all the assets are being listed. If the mediator is suspicious, he or she can tactfully remind the husband and his attorney that as part of the agreement to mediate the husband and wife agreed to honestly disclose all assets and liabilities and that failure to do so could render any agreement void. It is always possible to postpone the mediation until appropriate discovery can be conducted.

I would recommend using an agreement to mediate that describes the role of the mediator, including that the mediator represents no one and that the mediator will not give legal advice; recommends that each party retain independent legal counsel; states that honesty is required of the parties; and that parties shall decide for themselves whether to reach an agreement and what the terms will be. I would also remind the parties of these things during my orientation session before the mediation begins. That way, I can refer to the agreement later during the session if necessary.

Because of the wife's distress, I would postpone the mediation to give the wife a chance to obtain legal counsel or consult another professional, to have the parties bring in tax returns if they haven't already done so, and to choose a real estate appraiser and get an appraisal if they have agreed to that.

If the court's ADR rule provides for a report to the court, I would report that a session took place and that another session is scheduled.