How Would You Respond to this Ethical Dilemma in Mediation?

Our ethical dilemma for this month comes from an exciting new text on mediation written by Doug Frenkel and Jim Stark. The problem is used with the permission of Doug and Jim and is reproduced with permission of Aspen Publishers from Douglas N. Frenkel and James H. Stark's *The Practice of Mediation: A Video-Integrated Text*, Chapter 12, Problems 3, 4, copyright (c) 2008 by Aspen Publishers, www.aspenpublishers.com

The Unrepresented Tenant

The would-be tenant was a first-generation immigrant from Brazil who spoke broken and somewhat limited English, was small of stature and totally unfamiliar with American courts. He brought a small claims action against a large local realty company for failure to return $2,250 he had put down on an apartment he had rented. He appeared at the mediation by himself. The defendant was represented by the property manager, who was large and burly, an assistant property manager and by the company lawyer, who was loud and aggressive. The parties agreed that the monthly rent for the unit was $750, and that the plaintiff's payment of $2,250 covered the first and last month of the year-long lease, plus an additional $750 security deposit. They disagreed about what had transpired between them: The plaintiff claimed that the defendant had pulled a "bait and switch" on his scheduled move-in day, offering him a much less attractive apartment than the one he agreed to rent. The defendant admitted that the company had switched apartments, but blamed this on the plaintiff's announcing his intention not to move in three days before the lease term was set to begin, and then showing up on his original move-in date, having changed his mind again. They also claimed that the new apartment they later offered was "identical." Finally, they defended on the ground that the plaintiff had signed an agreement that stated in bold letters: "Failure to rent will result in forfeiture of the entire deposit," and that by refusing the substitute apartment, he was entitled to nothing. (The plaintiff claimed that he did not understand this, and in any event it was unfair.) Mediator questioning revealed that defendants had been able re-rent the original apartment within 48 hours of the plaintiff's changing his mind, and that, while they claimed spending an extra $200 in advertising fees, had no receipts in support of that claim. Defense counsel offered plaintiff $500 to settle the case, and then put enormous pressure on him, including threatening him in the hallway during a mediator caucus, calling him "dishonest," and stating that if he insisted on going to court, "we will see that you get nothing."

You take a mediator's caucus and decide to consult the court clerk about the enforceability of the deposit "forfeiture" clause that the plaintiff admits he signed. The clerk (a lawyer with ten years of experience as chief housing court clerk) informs you that most judges view such clauses as void against public policy and not enforceable. He says that state law is clear that all unused deposits are the property of and to be held in trust for tenants, and that landlord deductions from security deposit accounts -- as well as all other charges and "penalties"-- may only be made for "provable, actual damages" suffered by the landlord. Of course, the tenant in this case does not know this.

If I were the mediator in this case, I would feel comfortable taking the following

informational steps to "balance power:"

a) Tell the defendant's representatives in caucus about the likely non-enforceability of the forfeiture clause and encourage them to make an offer more reflective of the likely trial outcome. (VC) (SC) (SU) (VU)

b) Ask the plaintiff in caucus whether he has consulted a lawyer or would like to do so. (VC) (SC) (SU) (VU)

c) Suggest to the plaintiff in caucus that he might want to talk to the clerk about the forfeiture clause during the next defendant caucus, without telling him why. (VC) (SC) (SU) (VU)

d) Tell the plaintiff in caucus that you have consulted with the clerk and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)

e) Tell both parties in joint session that you have consulted with the clerk and the clause is almost certainly not enforceable. (VC) (SC) (SU) (VU)

Reader Responses

In this month's ethical dilemma the sides hardly seem balanced: an unrepresented, first generation immigrant plaintiff who speaks "broken and somewhat limited English" against a "large and burly" property manager, an assistant property manager, and the company's lawyer. Plus the lawyer is putting 'enormous pressure" on the plaintiff "including threatening him in the hallway during a mediator caucus, calling him 'dishonest' and stating that if he insisted on going to court, 'we will see that you get nothing.'" Concerns about party self-determination, mediator impartiality, and the quality of the process as set out in the Model Standards of Conduct were raised by many readers when they considered the problem. Some wanted to know why the mediator took a "mediator caucus" to consult with the clerk of court. Was the mediator concerned about her competence (Standard IV)? Did she need to know this information in order to continue mediating the matter? Probably not, but now that she has the information has she so compromised herself that she can no longer conduct the mediation "in an impartial manner" (Standard II B) and should withdraw completely.

Question (a) asks how comfortable you are - as the mediator – telling the defendant's representatives in caucus that the forfeiture clause is likely unenforceable and encouraging counsel to make an offer more reflective of the likely trial outcome. The Model Standards tell us that "A mediator shall conduct a mediation based on the principle of party self-determination" (Standard I A) but that self-determination may need to be balanced "with a mediator's duty to conduct a quality process in accordance with these Standards" [Standard I A (1)]. An initial question is why does the mediator want to tell the defendant's representatives the clerk's assessment? The defendants are not having "difficulty comprehending the process, issues or settlement options…" [Standard VI A (10)] Does the mediator believe defendants don't know about the likely non-

enforceability of the forfeiture clause? Then shouldn't she first be exploring with them what they think will happen if the case goes to trial and how a judge might decide on the validity of the forfeiture clause? And if they believe the clause is valid, and that they will prevail, under what theory does the mediator tell defendants what the clerk has told her? Is she providing "information that the mediator is qualified by training or experience to provide" that is consistent with the Model Standards [Standard VI A (5)]? Is she doing this to "promote honesty and candor between and among all participants," [Standard I A (2)]; or is she providing legal advice which puts her into a different role than that of mediator which Model Rule VI A (8) cautions against doing "without the consent of the parties." My assessment is that the mediator is providing legal advice which the parties have not asked her to provide and as the mediator I am (VU) --very uncomfortable-- telling the defendant's representatives about the likely non-enforceability of the forfeiture clause.

Question (b) asks if the mediator would ask the plaintiff in caucus whether he has consulted a lawyer or would like to do so. Standard I A (2) states that, "where appropriate a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices," It appears from the facts that the plaintiff is uncertain about his rights and is being overpowered by the defendant's representative and lawyer. This is precisely the type of situation anticipated by the Model Rules [Standard I A (2)] where in an effort to preserve self-determination the mediator is encouraged to make the party aware of the importance to consult appropriate professionals. I am (VC)--very comfortable-- asking the plaintiff if he has had the opportunity to consult a lawyer in this matter.

Question (c) wonders if the mediator is willing to go several levels further and "suggest to the plaintiff in caucus that he might want to talk to the clerk about the forfeiture clause during the next defendant caucus, without telling him why." Again the first question is why is the mediator doing this? I assume the reason is to make sure the plaintiff is best able to make an informed choice of how to resolve the matter and whether to accept defendant's offer. Does the clerk of court qualify as "other professionals" under Standard I A (2)? While I think the matter can be argued I think the answer is that the clerk of court is not the type of "professional" envisioned under the Standards. Yet the mediator can certainly explore with the plaintiff whether he feels he has adequate information with which to make a decision and, if not, where he might get that information. However, suggesting that the plaintiff talk with the clerk of the court crosses the line of impartiality for me. I would be (VU)--very uncomfortable-- suggesting to the plaintiff that he take this action.

In addition, I am even more uncomfortable telling plaintiff in caucus what the clerk of court said as suggested in question (d). To do this would clearly cross the line of impartiality. (VU)

Which leaves question (e) -- telling both parties in joint session what the clerk told the mediator. Reader Nancy Karkowsky ,Esq. Writes that "in the spirit of empowering the parties and not imposing my concept of a fair outcome and not wanting

to compromise my role as mediator/objective 3rd party i.e. not a source of legal advice, even indirectly via the clerk, I would feel most comfortable asking parties in joint session about the forfeiture clause and what do any of them know about the enforceability/non enforceability and on what do they base their statements." Given the disparity in information Ms Karkowsky would either break and schedule another session after both sides have had the opportunity to learn about the enforceability of the clause and possibly speak with the clerk or she would terminate the mediation because, "it would be unethical to continue the session with such a lack of knowledge on the plaintiff's part and lack of straight forwardness/honesty on the defendant's part … I do not believe it is my role to provide them with legal information, even indirectly, either by telling them it's enforceable via the clerk or directing them to go to speak with the clerk."

While I agree with much of Ms Karkowsky's reasoning, for me this situation only arises after the mediator has explored all other options with the parties and it is clear that both want this information. If both parties agree that the clerk's assessment would be helpful I would first see if the clerk were available to provide the parties the information directly. If the clerk is not available, upon the request of both parties, I would -- although slightly uncomfortable (SU)--convey the information to the parties jointly on the reasoning that I am providing information that might be useful to the parties in making an informed decision at their request. I am conveying the information without offering my own assessment of whether or not I agree with the clerk. If the parties did not agree that they want the information then I would feel very uncomfortable (VU) providing it.