The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 1

Introduction

The Committee on Ethics is asked to consider a complaint against a mediator (Respondent) arising out of a mediation which the Respondent conducted September 24, 1997. The parties were sent to mediation after they appeared for trial on the issue of custody and visitation of the ten-year-old daughter of the Complainant and the father of the child. The parties and their counsel went directly to the Respondent's office from the courthouse. Both parties were represented by counsel at the mediation.

The mediator and the parties worked to establish a visitation schedule with a calendar on a board. No written agreement or memorandum of understanding was finalized at the mediation. On September 25, 1997, the Respondent sent a memorandum to both attorneys containing the points of what she described as an "agreement settling all issues." She reduced the visitation schedule from the board to narrative form and also attached a copy of the schedule, as it appeared on the board, in calendar form.

On October 6, 1997, the Complainant sent a letter to her attorney ". . . rescinding any and all agreements which you may believe to have been made at the mediation session on September 24, 1997." The Complainant asked the Respondent for any documents pertaining to the mediation which contained her signature or that of her attorney. The Respondent responded that the file was privileged and that she could not send the contents of the file or any part of the file to her. After the ADR Program authorized her to release to the Complainant documents which were already furnished to the judge, the Respondent did so. She also executed and sent to both parties an affidavit to the effect that the mediation was held and that the parties had reached agreement.

On October 7, 1997, the Complainant's attorney filed with the clerk of Superior Court a Notice of Withdrawal and Request to Withdraw from representation of the Complainant. Following a hearing, the Superior Court granted the father of the child's Motion to Enforce Settlement on December 19, 1997.

Issues

1. Voluntariness

A. Process issues

1. Whether the Respondent fully explained the mediation process so that the Complainant had the opportunity to bargain from a position of informed consent.

2. Whether the Respondent had a duty to discuss with the Complainant the pros and cons of proceeding with or without an attorney present at the mediation.

3. Whether the Respondent should have informed the Complainant that a guardian ad litem could be present to represent the minor child.

4. Whether the Respondent's asking the parties to sign a blank agreement "checkoff"and billing statement form at the beginning of the mediation violated ethical principles regarding voluntariness.

B. Coercion

Whether the Respondent coerced the Complainant during the mediation process.

2. Neutrality

A. Whether the fact that two members of the Respondent's law firm were on a witness list for the father of the child created a conflict of interest that should have been revealed.

B. Whether the Respondent displayed personal bias against the Complainant during the mediation.

3. Confidentiality

Whether the Respondent breached confidentiality in executing an affidavit about the fact that a mediation was held and that an agreement had been reached.

Findings

1. Voluntariness

A. Process issues

Many of the points of the complaint go to the question of how thoroughly the Respondent explained the mediation process. The Ethical Standards for Mediators, which appears as Appendix C to the Georgia Supreme Court Alternative Dispute Resolution Rules, provide at I.A. as follows:

> *A. In order for parties to exercise self-determination they must understand the mediation process and be willing to participate in the process. A principal duty of the mediator is to fully explain the mediation process. This explanation should include:*
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> *1. An explanation of the role of the mediator as a neutral person who will facilitate the discussion between the parties but who will not coerce or control the outcome;*
> *2. An explanation of the procedure which will be followed during the mediation session;*
> *3. An explanation of the pledge of confidentiality which binds the mediator and any limitations upon the extent of confidentiality;*
> *4. An explanation of the fact that the mediator will not give legal or financial advice and that if expert advice is needed, parties will be expected to refer to outside experts;*
> *5. An explanation that where participation is mandated by the court, the participation of the parties is all that is required and settlement cannot be mandated;*
> *6. An explanation that the mediation can be terminated at any time by the mediator or the parties;*
> *7. An explanation that parties who participate in mediation are expected to negotiate in an atmosphere of good faith and full disclosure of matters material to any agreement reached;*
> *8. An explanation that the parties are free to consult legal counsel at any time and are encouraged to have any agreement reviewed by independent counsel prior to signing;*
> *9. An explanation that a mediated agreement, once signed, can have a significant effect upon the rights of the parties and upon the status of the case.*

The Complainant contends that a sense of urgency pervaded the mediation. The parties and counsel went to the courthouse prepared for trial. When the judge ordered the case to mediation, the attorneys for the parties agreed upon the Respondent as the mediator. She was called at home by the judge. The parties and the attorneys walked directly to the Respondent's office from the courthouse and immediately began the mediation. The Complainant contends that because of this, and because of the Respondent's failure to adequately explain the mediation process, she was not prepared for what transpired. Specifically, she contends that the Respondent failed (1) to explain that the mediation could be terminated at any time, (2) to clarify her right to consult her lawyer, and (3) to make her aware that a guardian ad litem could be present to protect her daughter's interests.

The Committee finds that the mediation was conducted under circumstances which did

lead to a sense of urgency. Both the Respondent, who was called from her home to come immediately to the office to conduct the mediation, and the parties and counsel, who came directly from the courthouse, must have felt rushed.

The Committee believes that when a mediation takes place in an atmosphere of urgency, there is a danger that problems will arise because parties do not fully understand the process. It is hard to imagine a situation where there is a genuine need to rush into a mediation. The Committee feels that it is important that every mediator strive to begin every mediation in an atmosphere of calm. It is particularly important that parties unfamiliar with mediation are allowed ample time to feel centered and ready to begin. However, the Committee finds that the Respondent's opening statement was detailed and calculated to give parties an opportunity to collect themselves, to become familiar with the process, and to ask questions. The Committee finds that the mediation itself, which took five hours, was not rushed in any respect. While it is true that the mediator herself worked through lunch, there is no indication that anyone else did so. Therefore, the Committee concludes that the Respondent was not responsible for any feeling of urgency experienced by the parties to the mediation and that she tried to create an atmosphere of calm.

The Committee finds that the Respondent did not tell the parties of their right to terminate the mediation. Although the Respondent's opening statement as described at the Ethics Committee hearing emphasized party choice over and over again, she did not make clear to the parties their right to terminate the mediation. This is an important right, and parties should specifically understand that while they may have been ordered by the court to attend a mediation session, they have the right to terminate the session. Therefore, the Committee concludes that the Respondent technically violated the Ethical Standards for Mediators, I.A.6.

The Complainant contends that at various times during the mediation she was confused about the details of the plan under discussion. She says that she was confused by the chart developed on the board but that it was her understanding that at the end of the day she would still have an opportunity to review any agreement with her lawyer. The Complainant's attorney was present and available for consultation throughout the mediation. The Complainant complains that the Respondent did not discuss the pros and cons of proceeding with or without an attorney present at the mediation. The Committee finds that the Respondent had no such duty. The Mediation Guidelines prepared by the ADR Program provide in part that "If an agreement is reached, all parties will have ten (10) days to have it reviewed by their respective attorneys." Although the Committee finds that the language from the Mediation Guidelines regarding attorney review of any agreement is indeed ambiguous, the Committee finds that the intent of the language from the Mediation Guidelines is that a party who is <u>not represented</u> at the mediation will have an opportunity to have any agreement reviewed by a lawyer. Although the Committee finds that this provision should be clarified in the guidelines, the Committee concludes that responsibility for ambiguity cannot be attributed to the Respondent.

The Committee finds that the Respondent did not inform the parties that a guardian ad litem could be present at the mediation. A guardian ad litem is appointed by the court and owes

a duty to report to the court. Because he or she may not be able to keep confidentiality, the guardian's presence at a mediation conference may be problematic. Since custody agreements are always subject to review by the court, the opportunity for a guardian's input at that juncture can provide protection for the best interest of the child. The Committee concludes that a mediator has no responsibility to inform parties that a guardian ad litem can be appointed or that a guardian could be present at the mediation.

The Committee finds that the Respondent asked the parties to sign in blank a "Mediation Report" form prepared by the ADR Program. The report was filled out at the end of the mediation, indicating that the mediation lasted from 10:15 a.m. until 3:00 p.m., that a full agreement was reached, and that the amount owed by each party was $296.88. The Committee concludes that while asking parties to sign such a form in blank at the beginning of the mediation is not good practice, it is not an ethical violation.

B. Coercion

The Complainant contends that she was coerced by the Respondent at many points during the mediation. The Committee finds that there is no persuasive evidence that the Respondent coerced the Complainant. The Complainant is a very articulate and forceful person who was represented by counsel throughout the mediation. Although there is evidence that the Complainant cried during the mediation and that she may have felt some confusion at different points, it is not at all unusual for parties to experience a wide range of emotion during a mediation. There is no indication that there was anything unusual about the atmosphere of this mediation. Several people present described an atmosphere of relief and lightheartedness at the conclusion of the session. The Complainant's admission at the Committee hearing that she was in general agreement with the content of the visitation schedule would be an odd coincidence had she been coerced. The Committee concludes that the Respondent did not coerce the Complainant at any point.

2. Neutrality

A. The Committee finds that two members of the Respondent's law firm were on a witness list for the father of the child. Further, one of the two lawyers had represented the Complainant in another matter. However, the Committee also finds that the Respondent was unaware of these connections to the parties. The Ethical Standards for Mediators create no duty to conduct a search for conflicts that would have revealed the connections. Therefore, the Committee concludes that the Respondent committed no ethical violation involving a conflict of interest.

B. The Complainant contends that the Respondent exhibited personal bias toward her. The Committee finds that there is no persuasive evidence of personal bias on the part of the Respondent and concludes that there was no ethical violation in this regard.

3. Confidentiality

The Respondent executed an affidavit that was used in the Motion to Enforce Agreement brought by the father of the child. The affiant stated that the mediation occurred. The affiant stated at Paragraph 5 that "At the conclusion of the mediation, when the parties announced an agreement, the attorney for the Complainant turned to the Complainant and specifically asked her if what was contained on the board was her agreement. The Complainant answered in the affirmative." The affiant stated at Paragraph 6 that "At the conclusion of the mediation, when the parties announced an agreement, the attorney for the father of the child turned to the father of the child and specifically asked him if what was contained on the board was his agreement. The father of the child answered in the affirmative." The affiant concluded that "When the parties and their attorneys left my office, it was with the understanding that they had reached a full and binding agreement."

The Georgia Supreme Court Alternative Dispute Resolution Rules provide at VII that "Neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation . . . in any subsequent administrative or judicial proceeding." By executing an affidavit, the Respondent was doing voluntarily that which she could not be required to do - testifying. The Committee finds that the execution of the affidavit was not good practice and was very unwise. Further, the Committee concludes that when she revealed in Paragraphs 5 and 6 what was said at the mediation, she used language that might have been broader than necessary to determine whether an agreement was reached.

Sanctions

The Committee has found one ethical violation which is technical in nature. Although the Respondent carefully explained the concepts of self-determination and choice to the parties, she did not specifically explain the right of the parties to terminate the mediation. This was a technical violation of Ethical Standard I.A.6. The Committee believes that technical ethical violations could be found in every mediation. There is no need to sanction technical violations of the Ethical Standards for Mediators. The purpose of sanctions in the context of ethics is to improve mediator performance through education, not to punish. The purpose of stringent sanctions such as removal from registration is to protect the public. The awareness of a technical violation is sufficient to educate the mediator to guard against such a violation in the future.

The Committee finds that the wording of Ethical Standard II and Georgia Supreme Court Alternative Dispute Resolution Rule VII, Section A, could lead to confusion regarding the mediator's testimony as to the <u>fact of the existence of an agreement</u>**.** This confusion could result from the provision of Rule VII that "An agreement resulting from a court-annexed or court-referred mediation . . . is not immune from discovery unless the parties agree in writing." That

language could be read to provide that the existence of oral agreements as well as written agreements is subject to discovery. Even under this reading of the rule, the Respondent may have gone further than necessary to determine whether an agreement was reached when she testified to what was said during the mediation. The rules need to be clarified, and the concept of confidentiality needs to be discussed more thoroughly in mediation training.

Summary

There are several lessons to be learned from this case concerning "best practice." First, mediators should never allow a sense of urgency to pervade the mediation session. The elements of the opening statement should always include the explanation of mediation found at Ethical Standard I.A. Secondly, mediators should never ask parties to sign a form in blank to be filled out later. Although this did not lead to an ethical problem in this case, it could have done so. Thirdly, program rules and guidelines should be clear about the right to have an attorney present. When program rules provide that parties may have an attorney review an agreement after mediation and that the attorney may object to any terms of the agreement within a specified period, the rules should clearly state whether a party who is represented by an attorney at mediation has the right to have an agreement reviewed by an attorney after the mediation.

Finally, this case points up the dangers inherent in failing to reduce an agreement to writing at the mediation session. Where there is agreement, a written memorandum of agreement or points of agreement should be made by the mediator or counsel for the parties and signed by the parties at the mediation. To recommend that all agreements be reduced to writing in at least outline form and signed by parties before leaving the mediation does not mean that mediators should coerce unwilling parties into finalizing an agreement before leaving. If the points of agreement are not clear, the mediator should call a break, schedule another session, or do whatever is necessary to allow parties to satisfy themselves that there is agreement. What is recommended is that if it is clear that parties are in agreement, this agreement should be memorialized while the parties are present. There are several reasons for this recommendation. A written agreement guards against the danger of misunderstanding. Reducing agreements to writing while all parties are present provides the best opportunity to correct misunderstanding. Since the writing would be the highest and best evidence of the agreement, a signed written agreement guards against the danger that the parties will try to call the mediator to testify. Finally, a written agreement protects against serious problems of proof when there is a motion to enforce an oral agreement allegedly made in a highly confidential meeting.