The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 4

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator arising from a mediation she conducted in 2009. The Committee issued a final decision and accepted the mediator's petition for voluntary discipline.[1] The Committee believes that a published formal Opinion based on a complaint may be useful to help mediators avoid serious potential ethical issues in their practices. This Opinion is based on the following summary of its finding of facts:

On August 31, 2009, Respondent, a mediator registered with the Georgia Office of Dispute Resolution, mediated a contested probate court case where the parties were represented by counsel. Complainant, one of the attorneys in the case, attended with one client; opposing counsel attended with two clients. The parties and attorneys signed an agreement to mediate. A representative of the estate at issue was not present.

A proposed settlement went through four drafts. Respondent prepared the first draft, then Respondent left before the parties finalized the terms with the following three drafts. Respondent left the parties to finalize their proposed settlement agreement after receiving their assurances that they agreed on all issues of the case. The final settlement agreement was signed by all parties to the mediation and both attorneys, but not the mediator. The Respondent reported the outcome of the mediation to the local ADR office as a full settlement.

Several days later, on September 15, 2009, at a probate court hearing, Complainant asked the court to enter judgment for one of his clients, based on the signed settlement agreement. Opposing counsel was surprised by the motion, as she believed that all claims among all parties had been settled in the mediation, and she protested that the final settlement agreement proffered did not accurately convey that understanding. The judge granted permission for the attorneys to call Respondent from court to ask her help in resolving their disagreement.

With both attorneys listening on a speaker phone, Respondent confirmed that she understood and reported that the signed August 31 agreement was a "full and final settlement" as to all claims. Back in court, both attorneys continued to disagree over the terms of the August 31 settlement agreement, and the judge agreed to read the proffered agreement and make a decision later as to its meaning.

Two days after the phone call, in a letter dated September 17, 2009, Respondent accused one of the attorneys of using her name and position as mediator "in support of [his] posturing in front of a probate judge." The attorney's conduct was "distasteful and appalling," she wrote. Respondent went on to declare her opinion that the mediation agreement was to be a "full and

[1] Before final adjudication, the mediator filed a Petition for Voluntary Discipline accepting "responsibility for the clear violations (i.e., sending the letter and demonstrating bias)" and "acknowledge[d] fault in the more complicated, but clearly troubling issues (breach of self determination and confidentiality)." This Petition was accepted by the Ethics Committee. The mediator agreed to a 30-day suspension as a registered mediator.

final settlement" as to all claims among all parties. To opine otherwise," she wrote, "seems to be disingenuous and reflecting a mean spirited bad faith." If the mediation agreement was not clear as to the full and final settlement, then the drafter of the agreement – in this case the Complainant – was to blame, Respondent asserted. The probate court should also consider the mediation agreement to be a full and final settlement, she contended. And finally, while citing her duty to maintain confidentiality of the mediation, Respondent copied the letter to a third party – the director of the local ADR Program.

One of the attorneys filed a written complaint with the Georgia Office of Dispute Resolution alleging Respondent had violated the Ethical Standards for Mediators.

Jurisdiction of the Ethics Committee[2]

The Georgia Commission on Dispute Resolution is charged with the responsibility to ensure the quality and integrity of all court-connected mediation. To fulfill its mandate, the Commission has implemented standards of conduct to be observed by all mediators working within the context of court-annexed or court-referred programs. In order for the Commission to fulfill its mandate to ensure the integrity of the mediation process and the high ethical standards of mediators working in conjunction with court programs, the Committee took a broad view of its jurisdiction to review the actions of mediators in all but exclusively private mediations. The public has a reasonable expectation that the mediation process will be conducted in a way that protects the rights of the parties and the integrity of the mediation process when it entrusts its disputes to that process in the court system as an alternative to trial.

The Ethics Committee holds jurisdiction over registered mediators, as well as pending court cases that are mediated. Since this mediation involved a registered mediator and a pending court action in a circuit with an approved alternative dispute resolution program, the Ethics Committee found that this mediation and subsequent acts fall within the jurisdiction of the Committee. Additional facts that supported the finding of jurisdiction include the fact that the court action was scheduled for a hearing at the time of the mediation and that the mediator reported the outcome of the mediation to the local ADR office.

Complainant's Allegations

Complainant asserted that the Respondent violated the Ethical Standards for Mediators in the following areas:

Self-Determination

Allegation: The mediator failed to maintain the parties' right to self-determination by giving legal advice and coercing the parties, which is prohibited by Appendix C, Chapter 1(A)

[2] During the pendency of the Complaint, Petitioner appealed an adverse decision by the Ethics Committee to the Commission on Dispute Resolution, raising jurisdiction among other issues. Respondent had argued that even if the Commission claimed jurisdiction over the mediation session itself, her complained-of unethical conduct occurred after the actual mediation session and therefore fell outside the Commission's jurisdiction.

The Commission did not agree: "Whereas the ending of the mediation session ceases any interplay between the parties, the attorneys and the mediator, it is axiomatic that a mediator's ethical responsibilities to a mediated case, to the parties, to the attorneys, and to any settlement do not end with the mediation session itself but continue indefinitely; and, therefore, we disagree." The Commission affirmed the Committee's finding of jurisdiction over the mediation session.

(I)(E);

Discussion and Findings: Self-determination is the very bedrock of mediation. The parties are in control of settling all, some or none of the issues raised in the dispute that led to mediation. The Committee noted that Respondent did not violate the principle of self-determination during the mediation proper nor was there any evidence that she gave legal advice to the parties during the mediation proper. However, the principle of self-determination is, in its essence, the ability of individuals to bargain for themselves. It is not appropriate for a mediator, whether at the mediation itself or later in an attempt by the parties to interpret their own agreement, to enhance the scope of the agreement beyond that which was reached. It is up to the parties and not the mediator to establish the scope of the settlement.

The Committee found as a matter of fact that Respondent attempted to convince the parties of the meaning of terms in the agreement by strongly suggesting what the phrase "full and final settlement" included. Respondent facilitated the first draft of the agreement but did not remain at the mediation and did not participate in drafts two, three or four. Although she did not participate in the final draft, Respondent, in her letter of September 17, told the parties what the intent of the agreement was, what legal effect it had and how it should be interpreted by a trial judge.

The Committee found as a matter of fact that Respondent violated the principle of self-determination of the parties by publishing her letter of September 17, 2009, in which she sought to impose her interpretation of the agreement. Appendix C, Chapter 1(A)(I).

The Complainant also alleged that Respondent gave legal advice prohibited by the ADR Rules. The Committee noted that there was no evidence that Respondent gave legal advice during the mediation proper. Later, however, when the parties were attempting to establish the scope of the agreement reached, she gave legal opinions as to the meaning of "full and final" and gave her legal opinion as to the construction of contracts. Again this was outside the proper role of a neutral mediator, and the Committee found that Respondent violated Appendix C, Chapter 1 (A)(I)(E).

<u>Impartiality</u>

Allegation: The mediator failed to maintain impartiality as required in Appendix C, Chapter 1 (A)(III) (A).

Discussion and Findings: The Complainant alleged that the Respondent showed partiality toward the parties represented by opposing counsel, by misrepresenting the scope of the agreement. Again the Committee found that the gravamen of the Respondent's offense occurred after the mediation session proper and during the parties' attempt to establish the scope and meaning of the agreement in a subsequent proceeding. In her letter of September 17, 2009, to the parties, the Respondent showed that she was biased against Complainant and the clients whom he represented:

> "I do not understand why there is any further argument unless the parties acting in their individual or corporate capacities simply cannot understand the term 'full and final settlement' as you have surely explained it. I believe that to now infer that this case was not a full and final settlement and/or that there was not a complete release *seems to be disingenuous and reflecting a mean spirited bad faith.* (Emphasis supplied.) While I do

not know the probate judge in this matter, I hope that he/she shares the wisdom consistently demonstrated by several of our superior court judges in the [local jurisdiction]. If so, I am certain he/she will explain the term 'full and final settlement' in a manner your clients, individually and in their corporate capacities, can fully appreciate. As I recall any discrepancies in drafting a contract are charged against the drafter, who in this case was [Complainant]. By the full and final settlement, the intent of the agreement was clearly to release the Estate from all claims of any of these parties."

The Respondent may not have had any personal knowledge of what the intent of the parties was after the first draft because she had left and had no further participation in the mediation session. The Respondent's letter of September 17, 2009, took a clear position in opposition to Complainant and in favor of the clients of opposing counsel. By advocating for her contention that Complainant was wrong and that he had engaged in bad faith and disingenuous legal positions, Respondent was no longer impartial in word or deed.

The Committee found that the Respondent's actions constituted a violation of the rule of impartiality. Appendix C, Chapter 1 (A)(III)(A): "A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality. Impartiality means freedom from favoritism, bias or prejudice."

Confidentiality

Allegation: The mediator failed to maintain confidentiality as required in Appendix C, Chapter 1(A)(II).

Discussion and Findings: The hallmark of confidentiality is set out in Chapter C (A)(II) and "is the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed."

There is no evidence that the Respondent breached confidentiality by responding to both attorneys after the mediation. However, by mailing a copy to the local ADR program director, Respondent's actions broke through the confines of confidentiality. There was no valid reason to file this letter with a third party who was at best only administratively related to the mediation. The program director had no need or right to know the details or opinions concerning the mediation as set forth by Respondent in her letter to the parties.

The Committee did not reach the issue of how or under what circumstances a mediator might seek advice on how best to handle a dispute arising out of a mediation. In this case the Respondent included in her letter of September 17, 2009, facts and opinions which should not have been shared.

The Committee found that Respondent violated the principle of confidentiality by providing a copy of her September 17, 2009, letter to the program director.

Conclusion

This case demonstrates that mediators must be careful when communicating with mediation participants and court staff about mediations. In this case, the mediator's single ill-conceived letter to the parties – unsolicited, unnecessary, voluntary and shared with a person who had no need to know its contents – violated party self determination, impartiality and confidentiality. When given a choice, it is always prudent for the mediator to say less about a mediation, not more.

The working relationship between mediators and their court ADR program directors is unique and critical to the efficient functioning of the court-connected ADR system. While program directors do not and should not have unlimited access to confidential mediation information, some circumstances nonetheless call for mediators and program directors to discuss sensitive information about a mediation with some candor.[3] For example, a program director may advise a mediator on how to best to handle an ethical dilemma that arose during a session. Or a mediator may alert a program director to potential safety issues arising out of a session. If the mediator feels the need to talk with the program director during a session, the mediator should seek the consent of the parties first if doing so will not endanger the participants or significantly enflame the discussion. The mediator should reveal confidential information to the program director only to the extent necessary[4].

Mediators should be wary of the zealous pursuit of settlement, which might lead a mediator astray from the strict adherence to ethical process. External pressures such as a desire for a strong settlement rate should be tempered to avoid taking shortcuts or applying pressure on the parties rather than allowing the parties to arrive at agreeable solutions themselves. Honoring party self-determination requires time and patience. A mediator's credibility is built on a foundation of skill, fairness, integrity, and ethical conduct. Mediators should take utmost care to protect their professional reputations; after all, they have the most at stake in their reputations.

Lastly, this case emphasizes that a mediator's ethical obligations to a case and to its participants do not end with the conclusion of the mediation session but continue indefinitely. There is no point in time after the mediation when the parties' right of self-determination should be subjugated to the mediator's intervention. There is no point in time after the mediation when the mediator should not be conscious of the appearance of impartiality or bias. There is no point in time after the mediation when it is ethical to break the mediator's promise of confidentiality.

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[3] Of course, those circumstances involve a mediator talking with the program director *responsible for the administration of the case in question,* not any program director. The Uniform Rules for Dispute Resolution Programs, Appendix A to the ADR Rules, Section 7, clearly expect that neutrals will need to communicate with their program directors. Neutrals are reminded to review the confidentiality rules and the exceptions to confidentiality in the ADR Rules, VII.A. and B.

[4] While this case was court-connected, bringing it within the jurisdiction of the commission, the case was neither court-ordered nor court-referred; it was not administered through the local ADR Program, and the local program was not responsible for servicing it or monitoring it. It was not a local program case; therefore, the local program director had no need or right to know the details that were disclosed in the letter.