

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Advisory Opinion 3

Findings of Fact

Complainant and her former husband were divorced in Florida in 1990. Under the terms of the divorce decree, they shared custody of their son. After moving to Georgia in 1991, they continued under the terms of the decree, which provided that if they ceased to live in the same school district, the child would spend one year with one parent and the next with the other. Since moving to Georgia the parents lived in the same school district, and the child had attended the same school. Complainant's former husband remarried and moved to another county in 1995. Under the terms of the divorce decree, the child would be with Complainant's former husband during the 1995-96 school year. Complainant filed an action to modify custody.

Respondent, a psychologist and registered mediator, was hired by Complainant's former husband to evaluate his son's emotional and educational status to determine whether it would be detrimental for him to change schools. According to Respondent, she made it a condition of her employment that she would be a neutral evaluator and would report only to the court. Respondent was hired on August 16, 1995, and conducted tests on the child. She interviewed Complainant's former husband. She had only one brief telephone conversation with Complainant. After testing the child she told Complainant's former husband that the transfer to another school would have no detrimental effect upon him. The evaluation was paid for by Complainant's former husband.

An emergency hearing was held on August 22, 1995, in superior court. At that hearing, which took place primarily in chambers with only the lawyers, and later Respondent, present the court decided to send the case to mediation. He appointed Respondent to mediate the case. Both Complainant and Complainant's former husband agreed to Respondent's appointment. Complainant's attorney prepared the order which said that Respondent was the mutually agreed upon mediator and that she would make a report in the best interest of the child to the court if the parties did not resolve the matter by mediation.

The mediation was held August 25, 1995. Both Respondent and Complainant's former husband felt that an agreement had been reached. Complainant says that she never felt that an agreement was reached. A few days before the hearing that had been scheduled for September 28, 1995, after it was clear that there was no agreement, Respondent began to prepare a report for the court. Respondent met once with the child before the September hearing and once before the November hearing to ascertain how he was adjusting to the new school. She testified at the

hearing September 28, 1995, and also at the continuation of the hearing November 6, 1995. The judge who conducted the hearing and its continuation asked the attorney of Complainant's former husband to strike out all references to the mediation in the report. Respondent was instructed not to testify to anything that she learned in the course of the mediation. At the hearing September 28, 1995, Respondent told the court that she was concerned about the confidentiality that she might owe the child. The court said that the privilege rested with the child and the custodial parent and that Complainant's former husband waived the privilege. He acknowledged that Complainant objected to Respondent's testimony about the evaluation of the child but ruled that Complainant's former husband as the primary custodial parent had the final decision as to a waiver. Respondent made no further objection to testifying.

On November 15, 1995, the court entered an order modifying the Florida judgment. The court awarded joint custody to both parents but awarded primary physical custody to Complainant's former husband, giving Complainant what amounted to standard visitation. Complainant brought a complaint to the Ethics Committee of the Georgia Commission on Dispute Resolution concerning Respondent's conduct as a mediator.

At the hearing before the Committee Complainant said that she felt during the mediation that because the Respondent had tested the child and had spent a greater amount of time with Complainant's former husband than with Complainant, Respondent had already reached a conclusion favorable to Complainant's former husband about the appropriate custody arrangement. Complainant said that when she agreed to the mediation she did not realize the implications of accepting a mediator who had already done an evaluation of the child. Complainant said that as a mediator, Respondent's style was more directive than that which she experienced during the two previous mediations. Complainant contends that several parts of Respondent's report came from the mediation. She also contends that part of Respondent's testimony at trial came from knowledge that she could have only gained in the mediation.

Respondent responded that she was concerned about the confidentiality to which the child was entitled and that she did not want to testify. When asked if she felt any discomfort about her dual role at the mediation, she answered, "I'm a psychologist." She also said that she had never served in this dual capacity before and that she made the judges aware of her concerns. Complainant's former husband stated at the hearing before the Committee that nothing at the hearings was gleaned from the mediation. He noted that the judge was "very particular" about this.

Discussion

This case presents a troubling combination of ethical issues which touch on each of the major ethical areas discussed in Appendix C to the Georgia Supreme Court ADR Rules, the Ethical Guidelines for Mediators. The appointment of a person who has been involved in a custody evaluation as a mediator between the parties raises issues of neutrality and the appropriateness of dual roles. The mediator's reversion to the role of evaluator after the

mediation reached impasse raises issues of neutrality and a serious issue of confidentiality. Complainant's complaint of coercion in the mediation session raises the issue of self determination. Finally, there is an issue of overall fairness of the mediation process in this case.

The guidelines of the Academy of Family Mediators and the Georgia Psychological Association, and the Association of Family and Conciliation Courts to which Respondent referred the Committee, all discuss the issues involved in this complaint.

The Standards of Practice for Family and Divorce Mediators of the Academy of Family Mediators provide under the discussion of impartiality and neutrality (IV (C):

A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship, and the participants given the opportunity to freely choose to proceed.

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association, adopted by the Georgia Psychological Association, provides in regard to couple and family relationships (§4.03[b]):

As soon as it becomes apparent that the psychologist may be called on to perform potentially conflicting roles (such as marital counselor to husband and wife, and then witness for one party in a divorce proceeding), the psychologist attempts to clarify and adjust, or withdraw from, roles appropriately.

The Model Standards of Practice for Family and Divorce Mediation of the Association of Family and Conciliation Courts provides in regard to prior relationships (II (B)(1):

A mediator's actual or perceived impartiality may be compromised by social or professional relationships with one of the participants at any point in time. The mediator shall not proceed if the previous legal or counseling services have been provided to one of the participants. If such services have been provided to both participants, mediation shall not proceed unless the prior relationship has been discussed, the role of the mediator made distinct from the earlier relationship and the participants have been given the opportunity to freely choose to proceed.

Respondent has provided the Committee with articles collected by Gail L. Perlman and Arnold T. Shienvold under the title "The Integrated Child Custody Evaluation: Using Mediation in Evaluations." These articles demonstrate the controversy in the fields of mediation and psychology around the subject of the use of one neutral to perform the functions of mediator and custody evaluator. This brief introduction to the problem makes it clear that the area is fraught

with danger. The authors of these several articles, who are in disagreement about the wisdom of a psychologist accepting dual roles, agree that if dual roles are accepted, it is essential that the roles be defined very carefully and their differences discussed thoroughly with the parties. There is great danger that even if the roles are carefully delineated and discussed with the parties, misunderstanding can result.

Conclusions

The effective date of the Ethical Guidelines for Mediators [whether that date is the September, 1995, date of the Commission's passing the guidelines or the December 13, 1995, date of the Supreme Court order creating Appendix C] occurred after the custody evaluation of the child, after the mediation, and after at least the September hearing. Therefore, there is a threshold jurisdictional issue in this case. This is true even though a draft of the guidelines had been mailed to every registered neutral, including Respondent, during the winter of 1995 and prior to any of the events in this case. Because of this jurisdictional issue, the decision which follows is advisory only.

1. Neutrality. Respondent was placed in an awkward situation by the court's appointing her as mediator. She and her attorney emphasize that Complainant made no objection and that Complainant's attorney prepared the order appointing Respondent. However, the ethical guidelines for mediators set out above require that when a mediator has served one party in a professional capacity in the past it is not appropriate for that person to act as a mediator. If the mediator has served both parties the mediation may proceed following a thorough discussion of the relationship if the parties freely choose to proceed. There is no indication that Complainant ever considered herself the client of Respondent. Before the emergency hearing, she had only one brief phone conversation with Respondent. Even though Respondent identified her role as that of neutral evaluator and made it a condition of her employment that she report only to the court, there is every indication that Complainant considered Respondent to be Complainant's former husband's expert. Under these circumstances, her neutrality was bound to be suspect. In addition, Complainant's former husband had reason to believe that he was in a strong position going into mediation because Respondent had informed him prior to either the emergency hearing or the mediation of her opinion that the transfer of the child to a different school would have no detrimental effect upon him. Although Respondent expressed concern about the relationship to the court there is no evidence that she asked to be relieved from the appointment as mediator.

2. Confidentiality. The portion of transcript furnished to the Committee shows that when asked to testify at the September 28, 1995, hearing Respondent told the court that she was concerned about the confidentiality that she owed the child. There is no indication that she voiced a similar concern to the court about the confidentiality that she owed the parties to the mediation. Even though the court ruled that information gained from the mediation was not admissible, it is impossible to believe that the testimony was not influenced by information and

impressions gained during the mediation.

3. Self-Determination. There are two issues regarding self-determination in this matter. First, there is an issue of whether the parties agreed to the mediation by Respondent voluntarily or whether they were ordered into the mediation process with a neutral who had been hired by one of the parties in another professional capacity. Although both parties ostensibly agreed to Respondent as the mediator, there was no attempt to thoroughly explore the question of dual roles. This level of voluntariness is required under the standards of the Academy of Family Mediators, the Georgia Psychological Association, and the Association of Family and Conciliation Courts. Respondent considered herself bound by the standards of these bodies. Unlike the Ethical Guidelines found in Appendix C, these standards were all in existence at the time of the events in this case.

Secondly, the issue of coercion has been raised. Another aspect of the damage that an appearance of bias can cause is the impression that the mediator is driving the parties towards a particular result. Whether this was the mediator's actual intention would be impossible to determine unless one participated in the mediation. However, the potential for a party to come away from the mediation feeling coerced is great if there is an impression that the mediator is biased.

In conclusion, the Committee recommends in the strongest terms that courts never appoint a mediator who has served the parties in any other professional capacity. The Committee further recommends that the court never allow a mediator to testify in a hearing involving parties to the mediation under any circumstances other than those that might arise in the context of one of the exceptions to confidentiality spelled out in the Supreme Court Alternative Dispute Resolution Rules. Finally, the Committee recommends that a mediator appointed by the court to mediate between parties with whom he or she has another professional relationship or asked to testify in a hearing involving parties to the mediation should decline to serve or to testify unless disobedience of a clear order of the court would put the mediator in danger of being found in contempt of court.