

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 3

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator (Respondent) arising from a mediation he conducted on November 2 and 6, 2006. The Committee issued a final decision, but it believes that a published formal Opinion may be informative for mediators. This Opinion is based on the following findings of fact:

Complainant and his wife were referred to Respondent in fall 2006 through a church marriage counseling program. Respondent was a licensed psychologist, as well as a mediator registered in General Civil Mediation, Domestic Relations Mediation, and Specialized Domestic Violence Mediation. Complainant and his wife discussed their marital difficulties individually and jointly with Respondent. When the couple stated that their marriage was not salvageable, Respondent gave them the choice of using him as a psychological evaluator for the counseling program or as a mediator of their divorce, but not both. The couple agreed to mediation.

In September 2006, after the initial meetings with Complainant and his wife, Respondent tested Complainant's young son for some educational problems. The testing was at the request of Complainant's wife.

On November 2, 2006, the Complainant and his wife were parties in a mediation conducted by Respondent. Both parties signed the Respondent's "Guidelines for Mediation." Mediation was continued to November 6 for a second session, which ended in impasse. Complainant was unhappy with Respondent and terminated his services November 10, 2006.

Complainant said he was unhappy because Respondent "showed a prejudice" for his wife and "demonstrated partiality" toward her from the start of the mediation. He pointed to the "numerous previous contacts" between Respondent and his wife, apparently referring to the educational testing of the son. Complainant said Respondent repeatedly fabricated settlement terms in his wife's favor. Respondent told Complainant that those points of agreement were Respondent's "mistakes" and offered to correct them. Respondent explained in his response to the ethics complaint that the settlement terms were correct, but that Respondent was using a common technique of showing deference and " 'being wrong' when the clients are angry, hostile, or claim I've made statements in error."

Complainant also said Respondent spent an extra hour counseling his wife alone after the second mediation session ended. This was evidence of bias, Complainant alleged. Respondent explained in his response that the meeting was merely a caucus with Complainant's wife after an hour-long caucus with Complainant. The wife did not receive extra time or any counseling. Respondent stated that his policy is to try to give equal time and equal treatment to parties in joint session and in caucus, without interruption.

Respondent learned after the mediation that there may at some point have been abuse between the couple. The couple scheduled through the local ADR office a second mediation on November 12, 2006, with a different mediator.

A short time later, Complainant's wife asked Respondent to provide counseling to her two children. Respondent counseled the son once in November 2006 and again in March 2007. Respondent counseled the daughter in February and March 2007.

In March 2007, the court heard a motion filed by Complainant's wife. She called Respondent, and he testified on the record that he mediated two sessions with Complainant and his wife and that the mediation ended in impasse. In denying the motion, the court wrote in its order that it "found [Respondent's] testimony and involvement with the parties in this case questionable at best."

In May 2007, Respondent submitted to the court an eight-page affidavit because his "integrity and skill as a mediator was called into question in court." The court needed to know "the true reason for the failed mediation," Respondent stated. "I sought only to clear my name by describing [Complainant's] manner and approach throughout the mediation process. Again, I was careful not to reveal content." In the affidavit he described Complainant's disruptive and uncooperative behavior during the mediation and quoted angry and insulting statements Complainant made in joint session, as well as in caucus.

Issues

1. Conflict of Interest and Impartiality

Whether the mediator failed to "avoid any dual relationship with a party which would cause any question about the mediator's impartiality," in violation of Appendix C, Chapter 1, III, C; and whether the mediator failed to show "impartiality in word and deed" in violation of Appendix C, Chapter 1, III.

2. Confidentiality

Whether the mediator failed to maintain the confidentiality of the statements made in mediation, in violation of Appendix C, Chapter 1, II.

Findings

Jurisdiction

The Commission on Dispute Resolution properly exercised jurisdiction over Respondent's conduct. Mediators registered with the Georgia Office of Dispute Resolution are subject to the Georgia Supreme Court's ADR Rules and the Commission in the context of court-connected mediations. At the time of the mediation at issue, Respondent was registered in the three mediation categories. Therefore, Respondent was subject to the Commission's jurisdiction when conducting court-connected mediations.

A mediation is court-connected when the case is referred to mediation by a court that participates in a court-connected ADR program approved by the Commission. First, it is clear that Respondent conducted a mediation for Complainant and his wife in November 2006. Second, the mediation was court-connected because the couple's divorce was filed in a court that was part of an approved court-connected ADR program. And when the case was filed, there was in effect a standing order that all contested divorces be referred to mediation. Also, Respondent became involved in the case after the case was filed and ordered to mediation. Thus Respondent mediated the case within the court-connected ADR system and the Commission's jurisdiction.

Once a case enters the court-connected ADR system, the parties can petition the court to opt out of the system (Rule 3.1 of the Uniform Rules for Dispute Resolution Programs; Appendix A to the Georgia ADR Rules). There was no evidence that Complainant or his wife petitioned the court or the local ADR program to have the case removed from the court-connected ADR system. Because the parties scheduled through the local ADR office a second mediation with a different mediator, it is clear that they acted within the court-connected ADR system when they mediated with Respondent. Therefore the mediation Respondent conducted was court-connected, and Respondent's conduct is subject to the Commission's jurisdiction.

Conflict of Interest and Impartiality

Complainant alleged that Respondent violated mediator ethics by serving as educational evaluator of his son, as counselor to his children and as mediator of his divorce. Complainant also alleged that Respondent demonstrated partiality before and during the mediation.

The Committee found that Complainant's allegations as to Respondent's multiple relationships with a party were supported by a preponderance of the evidence. The Committee found that Complainant's allegations as to Respondent's partiality were not supported by a preponderance of the evidence. However, the Committee also found that Respondent's actions before and after the mediation led to the appearance of partiality.

The Ethical Standards for Mediators comprise Appendix C to the ADR Rules. Appendix C, Chapter 1, III, C(a), states:

“A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality. Mediators should avoid any dual relationship with a party which would cause any question about the mediator's impartiality.”

Further, Appendix C, Chapter 1, III, C(f), states:

“Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the

mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.”

Contrary to these ethics rules, Respondent established a professional relationship with a subject matter of the divorce dispute, the Complainant’s children, both before and after he mediated the Complainant’s divorce. Consequently, Respondent also involved himself professionally with a party to the dispute, Complainant’s wife and the children’s mother, both before and after the mediation. By providing educational testing for the couple’s son before the divorce mediation (September 2006) and counseling for their son (November 2006 and March 2007) and daughter (February and March 2007) after the divorce mediation – both services initiated by Complainant’s wife – Respondent served the family in three professional roles within three months’ time, in violation of the Ethical Standards for Mediators.

Respondent maintained that serving as the couple’s divorce mediator in between the other two professional engagements did not constitute a professional conflict of interest because he did not serve the family in two roles simultaneously. However, Appendix C does not contemplate that only concurrent multiple relationships can create ethical issues, but that prior and future relationships can also. The Committee concluded that Respondent’s multiple professional roles in the Complainant’s family created a clear professional conflict of interest that reasonably raised questions about Respondent’s impartiality as a mediator.

Complainant also accused Respondent of bias toward his wife in the mediation, in part because the Respondent supposedly fabricated settlement terms in the wife’s favor and because Respondent apologized to Complainant for miscommunicating the settlement terms. However, the Committee found that the anger-diffusion technique that Respondent used – the mediator’s taking responsibility for a party’s own misunderstanding – is appropriate and not in itself evidence of bias.

Nor did the Committee find evidence of bias in the amount of time Respondent spent with Complainant and his wife in mediation. Respondent’s practice and policy to give equal time and equal treatment to parties in joint session and in caucus with as little interruption as possible is a reasonable explanation for any alleged differential treatment.

However, even if Respondent did not display any actual bias in the mediation, he failed to “scrupulously avoid any appearance of partiality. Impartiality means freedom of favoritism, bias or prejudice,” as stated in Appendix C, Chapter 1, III, A. The ethics rules warn that Respondent’s engaging in multiple professional relationships with the parties, though it may not create an actual conflict of interest, may create a perceived conflict of interest that erodes party trust in the mediator and jeopardizes the integrity of the mediation. It is evident from the facts that it is this perception of Respondent’s bias that predictably led Complainant to question Respondent’s impartiality and that helped to undermine the couple’s mediation.

It was predictable that Complainant, a party in emotional crisis, may be primed to suspect that Respondent’s prior professional relationship with his wife (testing of son at her request) biased Respondent toward her in mediation, even if Respondent showed no actual bias.

Respondent's later professional relationship with Complainant's wife (counseling of children at her request) only served to bolster Complainant's conclusions. It was also foreseeable that Complainant would perceive Respondent's testing of his son and Respondent's counseling of his children, not as two discrete engagements, but as a single professional relationship that Respondent maintained while also serving as the couple's divorce mediator.

Having already had a prior professional relationship with the Complainant's family, Respondent should have declined to mediate the couple's divorce. But having begun mediating, Respondent should have realized by the end of the first session that Complainant clearly questioned Respondent's credibility. When it became apparent that Complainant had lost trust in Respondent, he had a duty to discontinue mediation. Appendix C, Chapter 1, III, C(f), states:

“If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.”

The Committee found that Respondent established relationships with the subject matter of the couple's divorce, and that Respondent engaged in multiple professional relationships with Complainant's family, in violation of the Ethical Standards for Mediators. Respondent's multiple roles created a clear conflict of interest and eroded the integrity of the mediation process. And it was foreseeable that Respondent's multiple roles would prompt Complainant to question Respondent's impartiality as a mediator, even if Respondent did not display any actual partiality. When it was clear that Respondent's credibility was beyond repair, Respondent did not withdraw as mediator as the rules require.¹

Confidentiality

Complainant alleged that Respondent violated mediator ethics by testifying at the March 2007 hearing and by submitting an affidavit detailing Respondent's counseling and mediation work with Complainant's family for a May 2007 hearing in the case. The Committee found that Complainant's allegations were supported by a preponderance of the evidence. Appendix C, Chapter 1, II states:

“Statements made during the conference and documents and other material, including a mediator's notes, generated in connection with the conference are not subject to disclosure or discovery and may not be used in a subsequent administrative or judicial proceeding. ... Information given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party.”

Likewise, the confidentiality rules in the ADR Rules, VII, A, state:

¹ Advisory Opinion 3 arises out of a similar set of circumstances. A psychologist and registered mediator who served as educational and emotional evaluator of a child was appointed by the court to mediate the child's parents' divorce. In her complaint to the Commission, the mother alleged that the mediator showed bias against her and toward the father, who had paid the mediator for the child's evaluation.

“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.”

Respondent was called by Complainant’s wife and testified at the March 2007 hearing on the record. There was no evidence that he refused to testify or fought to quash a subpoena. There was no evidence that he sought a waiver of confidentiality from the family. Respondent did voluntarily what he could not be required to do under the rules.² (When Respondent testified he spoke about how he came to mediate for the couple and the result of the mediation. These matters in themselves are not confidential in a court-connected mediation.)

After the March 2007 hearing the judge issued an order that criticized Respondent’s professional credibility. Respondent executed an affidavit in May 2007 to defend his integrity as a mediator. Ironically, by submitting the affidavit Respondent undermined his credibility by once again doing voluntarily what he could not be required do under the rules – testify as to the content of the mediation.

No exceptions to confidentiality applied here. Under ADR Rules, VII, B, the confidentiality of mediation may be broken by the mediator in two situations, where:

- “a) there are threats of imminent violence to self or others; or
- b) the mediator believes that a child is abused or that the safety of any party or third person is in danger.”

While Respondent described Complainant’s behavior as manipulative and volatile, there was no evidence that Complainant threatened himself or anyone in the mediation with violence. Although Respondent learned after the mediation that there may have been abuse between the couple, there is no evidence that he believed during the mediation that a child was abused or anyone’s safety was in danger. Therefore, no exception excused Respondent’s revealing confidential mediation communications in his affidavit.

Confidentiality in a court-connected mediation can be waived to the degree necessary for a mediator to defend against an ethical complaint, under Appendix C, Chapter 2, III, G. The waiver applies to defending against formal complaints filed with the Georgia Office of Dispute Resolution. When Respondent submitted the affidavit, there was no formal ethical complaint against him, but merely criticism of his professional judgment within a court order. No waiver applied to the affidavit. Therefore, Respondent violated the confidentiality rules.

Appendix C, Chapter 1, II, prohibits “statements” made during mediation and “information” given in confidence from being disclosed, discovered or used in a subsequent

² Respondent’s appearance also was contrary to his own Guidelines for Mediation, which state in part, “The mediator shall not willingly testify for or against either party involved should either party end the mediation process and litigate the matter in court.”

judicial proceeding.³ By recounting in his affidavit Complainant's behavior during the mediation, Respondent apparently believed that Complainant's behavior was not a "statement" or "information" and therefore not subject to confidentiality requirements. That is incorrect, as emphasized by Advisory Opinion 6.⁴ Therefore Respondent's description in his affidavit of Complainant's behavior in the mediation violated the confidentiality rules.⁵

Of course, a party's oral statements during a mediation would certainly be "information" and thus confidential. Therefore Respondent's quoting and paraphrasing of Complainant's mediation and caucus statements in the affidavit violated the confidentiality rules.⁶

To sum up, Respondent's testifying voluntarily in open court about the mediation and Respondent's voluntary submission to the court of an affidavit detailing Complainant's behavior and words in the mediation constituted multiple violations of the confidentiality rules.

Sanctions

The Committee found that Respondent violated mediator ethics in several instances during the November 2 and 6, 2006, mediation and found that sanction is appropriate, as permitted by Appendix C, Chapter 2, II, K(1). Further, under Appendix C, Chapter 2, II, L, "Where there are repeated complaints, gross incompetence, or conduct which rises to the level of moral turpitude or is potentially injurious to the public, removal from registration would be appropriate."

Considering the breadth of Respondent's mediation training and his registration in three mediation categories, the Committee determined that his conduct constituted gross incompetence. After considering all other remedies, the Committee voted to remove Respondent from registration as a mediator, effective immediately. As required by the Appendix C, Chapter 2, III, D, notice of Respondent's removal from registration was disseminated to all ADR program directors throughout the state.

³ Respondent's own Guidelines for Mediation state, "Information gathered in the mediation process is confidential and privileged."

⁴ "The word 'statement' is intended in the broadest sense. Confidentiality extends to any oral communication made in mediation; tangible items generated for mediation or conduct that occurs in mediation. ... Confidentiality even extends to the mediator's impressions derived from the communications in mediation."

⁵ Oddly, Respondent wrote in his affidavit that "the contents of the mediation agreement cannot be discussed." Of course, in a court-connected mediation, a signed and executed mediation agreement becomes a public document and thus is one of the few pieces of information that can be discussed. Appendix C, Chapter 1, II: "A written and executed agreement or memorandum of agreement resulting from a court-annexed or court-referred ADR process is discoverable unless the parties agree otherwise in writing."

⁶ Respondent's serving as counselor to the couple's children after serving as mediator of their parents' divorce was ethically dangerous also in that it could have led him to disclose confidential mediation information in the counseling sessions. Respondent was not accused of such a breach.

Conclusion

This case demonstrates the fragility of a mediator's credibility and the need for the mediator to scrupulously guard against even the perception of impartiality and bias. It also shows how that credibility, once lost, is nearly impossible to restore. Therefore, the Committee strongly cautions against mediators handling cases in which the parties have engaged or intend to engage the mediator in another professional capacity. Mediators may find themselves violating not just the ethics rules for mediators, but also the ethics rules governing their other professions.

The Committee further recommends that mediators never voluntarily testify about their mediations under any circumstances other than those covered by the exceptions to confidentiality in the Supreme Court ADR Rules. If necessary, subpoenaed mediators should enlist the assistance of the local court ADR program director or the Georgia Office of Dispute Resolution in quashing the subpoena and educating court and counsel. Likewise courts should never require or allow mediators to testify about their mediations. The mediator's promise of privacy to the parties – which allows them to communicate fully and openly without fear that the information would be used against them later – is critical to the success of the mediation process.

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