

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 5

Introduction

The Committee on Ethics was asked to consider a complaint against a registered mediator arising from a divorce mediation conducted in 2010. 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 the 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:

Findings of Facts

The mediator mediated a divorce case that began mid-afternoon. The mediation was contentious, had no breaks for dinner, and lasted until 3 a.m. the next day. During the lengthy mediation session, the Complainant alleged that she could hear frequent laughter while the mediator caucused with the opposing party, and the Complainant believed the mediator spent more time with the opposing party and counsel. The mediator stated that equal time was spent with both parties, except during the drafting of the mediation agreement, which was done in the room where the opposing party and attorney sat.

Late in the mediation process, the Complainant and the Complainant's attorney also viewed the mediator speaking in close proximity to the opposing party. It was the Complainant's perception that the conversation was more flirtatious than professional. The mediator admitted that the mediation agreement was drafted in a relatively small area and if someone saw them together in the room without hearing their discussion, one could assume that the mediator's conversation with the opposing party was social rather than professional.

During the mediation, the parties reached a final settlement. They filed it with the court almost three months after the mediation, and the divorce was finalized a week after that.

Three months after the mediation session, the opposing party contacted the mediator for a dinner date. The mediator inquired of the party about the status of the divorce, and was told that the divorce was final. The mediator then agreed to go out and had two dinners with the party. The mediator did not seek independent verification from the court or the parties' attorneys that the divorce was final. The first dinner was prior to the court's final divorce decree in the case. The mediator and the party did not socialize thereafter.

¹ Before final adjudication, the mediator filed a Petition for Voluntary Discipline accepting responsibility for actions that led the Complainant to believe that the mediator was biased. This Petition was accepted by the Ethics Committee. The mediator agreed to a private Formal Letter of Admonition, pursuant to the Georgia Supreme Court Alternative Dispute Resolution Rules, Appendix C, Chapter 2, II(L)(1). The Committee issued a private sanction, rather than a public one, because of the mediator's lack of prior discipline, reputation in the legal and mediation community, and sincere remorse for an isolated lapse of judgment. The Committee concluded that the imposition of a private Formal Letter of Admonition sufficiently protected the public and instructed the mediator on the impropriety of the conduct.

The Complainant found out about the dinners and was concerned by the mediator's conduct, especially since the divorce was not final until after the first dinner. The Complainant filed an ethics complaint against the mediator with the Georgia Office of Dispute Resolution.

Jurisdiction of the Ethics Committee

The Commission claimed jurisdiction over the complaint because the mediator was registered with GODR, there was a standing order from the court referring contested divorce cases to mediation, and the parties did not opt out of the court-connected ADR system.

Complainant's Allegations

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

Impartiality and Conflict of Interest: The mediator failed to maintain impartiality as required in Appendix C, Chapter 1(A)(III)(A) and created a conflict of interest or the appearance thereof during and after the mediation as prohibited by Appendix C, Chapter 1(A)(III)(C)(a),(b), and (f).

Discussion and Findings: The Committee found that during and after the mediation, the mediator's conduct caused the Complainant to question the integrity of the mediation. Furthermore, the Committee found that the mediator violated Appendix C, Chapter 1(A)(III)(A), which states: "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."

A reasonable person could easily conclude that having two dinners with a party three months after a contentious 12-hour divorce mediation, and prior to the final divorce decree, would create a perceived or actual conflict of interest for the mediator. Perceived or actual conflicts of interest that raise questions about a mediator's impartiality, especially in the case of a dual relationship with a participant, should be avoided during and after the mediation. The Committee found that the mediator violated this ethical standard. Appendix C, Chapter 1(A)(III)(C)(a), and (f).

Moreover, the mediator did not make an independent inquiry to determine if a potential or actual conflict of interest existed before having dinner with a participant. Accordingly, the Committee found the mediator violated Appendix C, Chapter 1(A)(III)(C)(b).

Conclusion

When a court refers a case to mediation, it is because the parties are in crisis and need a skilled mediator and the mediation process to develop a mutually satisfactory solution. Mediators in those situations need to be ever vigilant and mindful of their actions before, during and after mediation because of the vulnerable state of the participants. Mediators are also expected to be the guardians of the overall fairness of the mediation process. Social contact, or conduct that could be misinterpreted as social contact, should always be assiduously avoided

with parties to a mediation as it can lead to allegations of mediator misconduct even months after a mediation session.

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