

The Committee on Ethics of the Georgia Commission on Dispute Resolution

Ethics Opinion 2002-1

Introduction

The Committee on Ethics was asked to consider a complaint against a mediator (Respondent) arising from a mediation conducted by Respondent on January 18, 2002. The Committee conducted an evidentiary hearing in this matter, taking testimony from all parties who were present at the mediation and other witnesses. The Committee issued a letter opinion to Respondent shortly after the hearing, but believes that a published formal Opinion may serve as a useful guide for mediators. The Committee's Opinion is based upon the following findings of fact.

The parties, former spouses, were referred to court-connected mediation to attempt to resolve issues concerning child support arrearage and unpaid medical expenses for their children. The mediator was selected by counsel for Complainant. Both parties were represented by counsel at the mediation session.

Because of facility limitations that day, some caucuses were conducted in a hallway (with no one nearby who could overhear). The conduct which is the subject of this complaint occurred during such a caucus with the ex-wife (Complainant) and her attorney. The mediator remarked to Complainant (and her counsel) that he didn't understand what she ever saw in her former husband, and that "...he must've had a really big ****." He further told Complainant that she needed to "start thinking with what's between your shoulders". Complainant and her attorney were shocked by these statements, but did not confront the mediator as they were focused on trying to resolve the issues in the case. Complainant felt extremely offended and humiliated by the mediator's remarks. Complainant was so distressed that her father was called immediately after the mediation session to comfort her. Complainant shared the mediator's remarks with her ex-husband, the other party at the mediation. Both parties expressed dismay that they were subjected to insulting behavior in a process that the court had ordered them to attend and for which they had to pay. However, there was no indication that the mediator's behavior affected the outcome of the mediation which resulted in an agreement.

Issues

1. Neutrality

Whether the mediator's conduct compromised his neutrality as to either or both parties.

2. Fairness of the process

Whether the mediator's conduct jeopardized the fairness of the process.

Findings

1. Neutrality

The *Ethical Standards for Neutrals, Appendix C* to the *Georgia Supreme Court Alternative Dispute Resolution Rules* provide that: “A mediator must demonstrate impartiality in word and deed. A mediator must scrupulously avoid any appearance of partiality.” Standard III.

In this matter, the mediator’s remarks, while only made to one party, were derogatory toward both parties. The inappropriate remarks made in caucus gave a strong appearance that impartiality had been compromised as to both parties. Thus, although there may not have been an appearance of impartiality in the joint sessions, there was certainly an appearance of lack of impartiality to the complainant and her attorney in caucus. After the session, complainant told the opposing party of the remarks, as should have been foreseeable, and thus left him with the impression that the mediation had not been conducted with impartiality.

2. Fairness of the Process / Self Determination

Standard IV of the *Ethical Standards for Neutrals* provides that: “The mediator is the guardian of fairness of the process. In that context, the mediator must assure that the conference is characterized by overall fairness and must protect the integrity of the process.”

The mediator’s conduct in this matter violated the dignity of the parties and the integrity of the process. A mediation in which any party feels humiliated or insulted by the mediator, where there is an objective reason for such feeling, is a process that has lost its integrity and is in danger of losing its fairness. In this case, there was no evidence that the remarks did, in fact, affect the parties’ decision-making. However, it is important to be aware that any conduct by a mediator that is insulting to a party risks also being intimidating, and any conduct that is intimidating may be coercive and thus undermine the parties’ self-determination.

Sanctions

Because this is the first complaint against the mediator, the conduct did not appear to affect the outcome of the mediation, and the mediator acknowledged that the remarks, if made, were entirely inappropriate, the Committee has issued a private reprimand to the mediator and advised that any subsequent misconduct will result in suspension and possible revocation of registration.

Conclusion

While the conduct at issue in this case is never acceptable in any mediation process, it is particularly harmful in a court-mandated mediation. The parties are required to participate by the court, and the mediator serves as a representative of the court system. Vulgar, offensive and demeaning remarks are a reflection on the referring

court, the local ADR program and the process of mediation in general. As was clear from the evidence in this case, parties will likely share their experience in mediation with relatives, friends and the community at large. Thus, the damaging repercussions of such behavior can extend far beyond the immediate parties involved.

The scrupulous demeanor of respect for all participants in mediation is essential. The Committee trusts that the conduct complained of in this matter is extremely rare, but issues this formal Opinion with the expectation that practitioners will take care to ensure that it does not occur again in any mediation.