2010

Two for the Price of One Is a Costly Choice: The Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements

Elayne E. Greenberg

THE ETHICAL COMPASS

Two for the Price of One Is a Costly Choice: The Ethical Issues for Lawyer-Mediators Who Consider Drafting Agreements

By Elayne E. Greenberg

Should a lawyer who serves as a mediator for two unrepresented parties also draft the resulting agreement if both mediating parties request the lawyer to do so? On June 30, 2010, the ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance (hereinafter "The Committee") issued Ethics Opinion SODR-2010-1 "Mediator's Duty of Care When Drafting Agreements."[1] This ethics opinion calls into question the blurry ethical contours between lawyering and mediation when mediating with pro se parties. In this column, I will review the Committee's ethics opinion and then, applying the New York Rules of Professional Conduct,[2] discuss the potential ethical minefields and workable alternatives for those New York lawyers who serve as mediators[3] and also contemplate drafting the resulting agreement.

"This ethics opinion calls into question the blurry ethical contours between lawyering and mediation when mediating with pro se parties."

The context that provoked the question is as follows: A divorcing couple, seeking an uncontested no fault divorce and joint custody of their child, together retained a lawyer-mediator to mediate their property settlement, custody and support. After successfully mediating all the issues, the couple then asked the mediator to draft the agreement. The parties were not represented by counsel, did not want to seek independent counsel and did not wish to have an independent lawyer review the agreement drafted by the mediator.

Four questions were posed to the Committee:

Question 1A: If the Mediator is a lawyer, should he or she prepare the agreement under these circumstances and if so, what are the ethical responsibilities and constraints, if any, that should be considered in connection with the preparation of the agreement?

Question 1B: What are the Mediator's ethical duties and responsibilities with respect to the parties under these circumstances?

Question 1C: Would the ethical considerations be different if the mediation only involved the division of property and not custody, visitation, and support for the minor child also?

Question 1D: If the Mediator was not a lawyer, are there any different ethical considerations that would apply?[4]

The Committee opined in relevant part.

Question 1A: A lawyer-mediator may act as a "scrivener" to memorialize the parties' agreement without adding terms or operative language. A lawyer-mediator with the experience and training to competently provide additional drafting services could do so, if done consistent with the Model Standards governing party self-determination and mediator impartiality. Arguably, before taking on any new role in the process, the mediator must explain the implications of assuming that role and get the consent of the parties to provide those services. The mediator should also advise parties of their right to consult other professionals, including lawyers, to help them make informed choices.[5]

Question 1B: The Model Standards arguably also permit a lawyer-mediator to provide legal information to the parties. If, however, the mediator provides legal advice or performs other tasks typically done by legal counsel, the mediator runs a serious risk of inappropriately mixing the roles of legal counsel and mediator, thereby raising ethical issues under the Model Standards. At a minimum, the lawyer-mediator must disclose the implications of shifting roles and receive consent from the parties. The lawyer-mediator should also consider legal ethics provisions governing, among other things, joint representation of legal clients and the unauthorized practice of law (UPL) in a state in which the lawyer is not licensed.[6]

Question 1C: The ethical considerations do not differ under the Model Standards even if the mediation only involves the division of property.[7]

Question 1D: The Standards would seem to allow a mediator, no matter his or her profession-of-origin, to act as a simple "scrivener" of the parties' agreement. However, given the complexity of divorce-related settlement agreements, the Committee recognizes that a mediator may likely not act simply as a scrivener in this context, except perhaps in drafting a parenting plan or a more limited aspect of the total agreement. Any drafting

activity could raise concerns under the law governing the unauthorized practice of law (UPL) in each state.[8]

Guided by the ethical mandates of the ABA Model Standards of Conduct for Mediators[9] and the Model Standards of Practice for Family and Divorce Mediation,[10] the Committee tried to harmonize these two ethical guidelines, recognizing that the Model Standards do not provide a definitive answer.[11] The Committee cautioned that these Standards are aspirational and that lawyer-mediators should also consider the application of other relevant legal ethical guidelines and laws. However, it is only in a footnote[12] that the Committee remarked that lawyer-mediators should also be mindful of Rule 1.7 Conflict of Interest: Current Clients; Rule 2.4 Lawyer Serving As A Third Party Neutral; and Rule 1.6 Confidentiality of Information contained in the ABA Model Rules of Professional Conduct.[13]

Given weight in its analysis, the Committee also noted that a mediation party's right of self-determination includes the right to shape their mediation process. The Committee observed that it is customary in the practice of divorce mediation for divorce mediation consumers to intentionally seek out lawyer-mediators with the expectation that the lawyer-mediators will also draft their resulting legal agreements.[14] Two for the price of one. After all, isn't this just an extension of party self-determination?

To this commentator's disappointment, the resulting opinion is a reiteration of the existing poorly defined ethical contours, rather than the more direct guidance that is needed. Alive and well remain the artificial lawyer / scrivener and legal advice / legal education dichotomies that are challenging to ethically implement. Unchallenged remains the questionable practice in the divorce and family mediation that parties in mediation may get "two for the price of one," lawyer-mediators who will also draft the legal agreement. In fact, there remains enough wiggle room in these dichotomies to encourage mediator choice about this ethically defining and ethically ambiguous behavior.

This commentator believes that permitting lawyers / mediators to draft agreements not only perpetuates the confusion between the distinct roles of lawyer and mediator, but also creates a liability minefield for the lawyer-mediator.[15] Sadly, this ambiguity has impeded the development of the mediation profession. For many consumers of legal services, there remains confusion about the difference between lawyers who represent them and lawyers who mediate for them. Unable to make a truly informed decision, they may opt for what they believe is the more cost-effective choice, the lawyer-mediator.

Lawyers are ethically required to take a more proactive role in clarifying this ambiguity. Central to this discussion is the New York Rules of Professional Conduct Rule 2.4 which clarifies the distinction between the role of lawyers and lawyers serving as third-party neutrals. Specifically, Rule 2.4 provides:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.[16]

As this commentator has elucidated in an earlier column,[17] Rule 2.4 explains that lawyers who serve as third-party neutrals are helping parties resolve a dispute, but they are *not* the lawyer's clients.[18] Rule 2.4 makes a point of saying that lawyers serving as a third-party neutral have an ongoing obligation to inform unrepresented parties of this distinction.[19] The neutral is just the neutral, not their lawyer, too. Parties are not getting "two for the price of one" and lawyers may need to repeatedly dispel this commonly held, mistaken belief of pro se. Such pro se's statements to a third-party neutral as, "I'm so glad you're working with me. You'll protect me." "I don't know the law, but I'm sure you're not going to let me make a bad deal"; and "What do you think about that legal proposal?" are representative statements that trigger the Rule 2.4 requirements.

Implicit in Rule 2.4 is a third-party neutral's obligation to refrain from conduct that might be misconstrued to be lawyerly[20] such as giving legal advice, providing legal representation and legal drafting. If you say you are not acting as the parties' lawyer, then don't. This calls into question whether the hard to differentiate dichotomies such as legal education / advice and scribe / agreement drafting by third-party neutrals may in fact, when employed by a lawyer-mediator, be construed as lawyering and be in contravention of this rule.

Another ethical quagmire for the lawyer-mediator who is thinking about drafting agreements is the issue of which of the mediation parties is the client that the lawyer is representing, and is there an ethical conflict if the mediator elects to represent one party over the other. Rule 1.7[21] warns:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

"Lawyer-mediators should be ambassadors of ethical mediation process, clarifying the distinct contributions of lawyers and mediators."

Thus, those lawyer-mediators who switch hats from mediator to lawyer and opt to draft the mediation parties' agreement may be acting in direct contravention of Rule 1.7.

As with many ethical discussions, of course this ethical discussion about lawyer-mediators drafting agreements is not taking place in a vacuum, but is also taking place in an economical and political context. Economically, many pro se parties, whether through court-connected programs or private mediators, are seeking mediation as a cost-effective alternative. Many pro se parties expect that the mediator will draft the agreement, and relieve them of the cost of retaining multiple counsel. In these economically challenging times, some mediation providers are reluctant to turn away needed business. Moreover, it is more challenging to observe ethical practice when the culture of practice is otherwise. After all, if one lawyer-mediator won't draft an agreement, the mediator consumers might find other lawyer-mediators who will. Politically, some sectors of the divorce mediation community have marketed divorce mediation as a true alternative process that doesn't have to include independent legal representation for participating parties. Instead, some lawyer-mediators create a fiction in which they draft the agreement and pretend to represent one party, while the other party is pro se. Wink! Wink!

Yet, as mediation practice increases and evolves, there are increasing reports of lawyer-mediators being sued for practicing law, the deeper malpractice pocket. And, increasing numbers of pro se mediation parties who are challenging mediated agreements, claiming lack of informed consent and mediator coercion. What is the value of two for the price of one in those cases? Possibly, the existing economic and political considerations of divorce mediation need to be reconsidered. As we have been discussing, these economic and political stances are fraught with ethical challenges that need to be addressed in more ethically responsive ways.

Lawyer-mediators may suggest viable alternatives for those mediation consumers who are committed to containing their costs to an affordable level. For example, there is an increasing culture of settlement-minded lawyers available to represent clients in mediation without unnecessarily "stirring up the pot." For those court-annexed and government-annexed mediation programs, law schools are a free, skilled resource to provide mediation representation for your pro se consumers.

Ultimately, this column encourages lawyer-mediators to rise to the challenge, recalibrate their ethical compass and take proactive steps to promote ethical dispute resolution practice. Lawyer-mediators should be ambassadors of ethical mediation process, clarifying the distinct contributions of lawyers and mediators.[22] Lawyer-mediators working with pro se parties should be mindful that engaging in the practice of "two for the price of one" where lawyer mediators also engage in such lawyerly activities as drafting and giving legal advice are in contravention of their ethical mandates as lawyers. After all, the value for one service of quality should be greater than "two for the price of one."

Endnotes

1. *See* ABA Dispute Resolution Committee on Mediator Ethical Guidance, Formal Op. SODR-2010-1 (2010) [hereinafter *The Committee*].
2. *See* N.Y. Rules of Professional Conduct (2009).
3. The Ethics Committee invited lawyers to apply their own professional codes.
4. *See The Committee* at 1.
5. *See id.* at 2.

6. *See id.*
7. *See id.* at 3.
8. *See id.*
9. *See* ABA Model Standards of Conduct for Mediators (2005).
10. *See* Model Standards of Practice for Family and Divorce Mediation (2000).
11. *See The Committee*.
12. *See id.* at 3 n.2.
13. *See id.*
14. *See id.* at 2.
15. *See generally* Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003).
16. *See.* N.Y. Rules of Professional Conduct, Rule 2.4.
17. *See* Elayne Greenberg, *How Attorneys Serving as Neutrals Identify and Coordinate the Ethical Mandates of the 2009 Rules of Professional Responsibility with the Ethical Mandates of Dispute Resoltuon,* N.Y. DISP. RESOL. LAW., Vol. 2, No. 2 (2009).
18. *See.* N.Y. Rules of Professional Conduct, Rule 2.4.
19. *See id.*
20. *Id.*
21. *See* N.Y. Rules of Professional Conduct, Rule 1.7.
22. *See* Robert A. Baruch Bush, *What Do We Need a Mediator For?: Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

Elayne E. Greenberg is Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law and Co-chair of the Ethics Committee of this Section. **She thanks Joshua T. Samples, St. John's School of Law 2011, for assistance in the formatting of this article.**

The opinions expressed in this column represent only the author's viewpoint and not necessarily the views of the Association, the Section or its Officers.