

ABA Section of Dispute Resolution
Committee on Mediator Ethical Guidance
October 25, 2016

Inquiry:

The mediation, in which both parties are *pro se*, proceeds up to a point, when both parties ask the mediator to leave the room. The mediator exits the room and checks back repeatedly to see if he's needed (which he is not). The parties settle the case and invite the mediator back into the mix, asking him to put into writing the terms of agreement they have reached. The mediator is concerned about whether he had sufficiently overseen the parties' interaction to be comfortable that there was not coercion, bad faith, etc. involved in reaching a final settlement. Under the Model Standards, what should the mediator do?

Authority Referenced: Model Standards of Conduct for Mediators Standard I and VI (2005).

Summary: A mediation is a process in which an impartial third party facilitates communication and negotiation and promotes decision making by the parties to the dispute. Assuming the described process could be a mediation, the parties' exclusion of the mediator from some of their negotiations, highlights the tension between the parties' right to self-determination as to process and outcome (Standard I) and the mediator's obligation to conduct a quality process (Standard VI). The mediator should assess whether the parties' decision to exclude him was voluntary and informed, should continue to offer services as mediator and should discuss with the parties how the agreement, reached out of his/her presence, was reached. However, while the mediator could discuss the parties' agreement with them after their separate negotiation, she/he should decline their requests to act as anything more than a scrivener because, in doing so, the mediator risks assuming a different role, that of an attorney (Standard VI). Instead, the mediator should recommend that the parties consult independent counsel to draft the agreement.

Opinion:

This Opinion first examines whether the described process is a mediation. Then, it considers how the mediator must balance, on the one hand, respect for the parties' self-determination as to process and, on the other hand, the obligation to maintain a quality process. Finally, the Opinion addresses whether the parties' request that the mediator put the settlement in writing is consistent with the Standards.

Mediation.

The threshold question is whether the described process was a mediation. A process does not become a "mediation" simply because it is labeled as such.¹ The Preamble to the Model Standards defines mediation as follows:

¹ See Standard VI(A)(6), which states: "A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation."

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Here, the mediator met with the parties, neither of whom was represented by counsel, and presumably facilitated communication and negotiation until the parties chose to continue negotiation on their own for a while. Whether this meets the definition of a mediation should depend on the quantity and quality of the mediator's interactions with the participants.

From a quantitative standpoint, there must be substantial interaction between the mediator and the parties. For example, the Preamble's definition would not be satisfied if the mediator had convened the process and conducted a cursory discussion of the dispute for 20 minutes, after which the parties asked the mediator to leave and then engaged in unassisted negotiations for the next two hours.

For a mediation to occur, the mediator need not be present with all of the parties during every moment of the process. It is hardly unusual for mediation participants, from time to time, to consult and negotiate with each other out of the presence of the mediator.² This is certainly true in mediations where the parties are represented by counsel and there seems no *definitional* reason to treat a process involving *pro se* disputants differently.

From a qualitative standpoint, the definition addresses the mediator's active facilitation of both communication and negotiation between the parties, and the mediator's active promotion of voluntary decision making by the parties. In the present inquiry, it is not clear how actively the mediator had fostered an exchange of information and settlement options. Nor is it evident to what extent the mediator had actively promoted the parties' voluntary decision making. The mediator did "check back repeatedly to see if he's needed" and the parties, although negotiating on their own, did not express their intention to end the mediation.³ For purposes of this opinion, the Committee will assume that the described process could have satisfied the Preamble's definition.

Self-determination and quality of process.

A central tenet of mediation is self-determination, which relates both to outcome and to process. Model Standard I prescribes that:

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation,

² Sometimes, counsel will need to consult with each other outside the mediator's presence; sometimes the principal clients will confer with each other. In multiparty mediations, some subset of participants may need to negotiate with another subset, while the mediator is meeting with other parties.

³ Standard VI.A.3 states: "The presence or absence of persons at a mediation depends on the agreement of the parties *and the mediator*." [emphasis added] Therefore, notwithstanding the parties' intent to continue the mediation, the mediator could well conclude that the exclusion of the mediator undermined his/her ability to facilitate the negotiation or to promote voluntary decisions. If that was his/her conclusion, the mediator could terminate the process.

including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Here, allowing the parties to negotiate out of the presence of the mediator would have been consistent with self-determination “as to process,” if the choice to exclude the mediator was voluntary and informed. It was appropriate for the mediator to continue to offer mediation services. The mediator should remind the parties of his/her role in promoting voluntary and informed decision-making and to clarify what his/her continuing role would be. Nonetheless, the Committee believes that it is not inherently problematic for the mediator to be excluded from some of the party negotiations during part of the mediation.

There is, however, a tension between self-determination and the mediator’s obligation to maintain a quality process. Standard I.A.1 states that:

Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

Standard VI (Quality of Process) requires that:

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

This tension between the Standards is discussed in the Reporter’s Notes:

[A] mediator, for example, may feel pulled in conflicting directions when the mediator, duty-bound to support party self-determination (Standard I), recognizes that parties are trying to design a process that is not mediation but want to call it mediation to gain confidentiality protections, thereby undermining the mediator’s obligation to sustain a quality process (Standard VI). Standard I(A)(1) and I(B) explicitly recognize this potential for conflict and indicates to the mediator that sustaining a quality process places limits on the extent to which party autonomy, external influences, and mediator self-interest should shape participant conduct.

Reporter’s Notes, September 9, 2005, page 9.

In the present inquiry, the mediator was concerned that when she/he was not present, one of the parties might have engaged in coercion, bad faith or other misconduct in bringing about the settlement. The mediator here may have acted to minimize the potential for misconduct by continuously offering to assist in the parties’ negotiations. Yet, not being present during the negotiations, the mediator’s ability to detect misconduct by a party is obviously reduced.

Of course, even if the mediator had attended all of the parties' negotiations, she/he cannot necessarily be able to vouch for the quality of the outcome. Standard I.A.2 recognizes this:

A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

Upon resuming his/her participation after the parties had negotiated on their own, the mediator should discuss with them how the settlement was reached, its completeness and implementation, and whether they each believed that the outcome was a "free and informed" choice. Such a discussion might alleviate the mediator's concern about the quality of the process.

The mediator should also consider Standard VI. C:

If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

In the present case, if the mediator discerned other red flags that suggest that there has been overreaching, coercion or misconduct by one of the parties here, she/he could postpone, withdraw from or terminate the process.

In any event, where parties are *pro se* – and particularly if the mediator is concerned about the outcome -- the mediator should follow the guidance of Standard I.A.2 and recommend that the parties consult independent counsel before they finalize any settlement.

Putting the agreement in writing.

More problematic is the request that the mediator put the agreement "into writing." When the parties have reached an agreement in the mediator's presence, the mediator is often asked to memorialize that agreement. The mediator's serving as a "scrivener" to capture the *pro se* parties' agreement reached in mediator's presence is not inconsistent with the Model Standards, although it may run contrary to court or bar rules or ethics opinions in some jurisdictions.

Here, the mediator was asked to write up the terms of an agreement reached outside the mediator's presence. When the mediator is being asked to do something beyond serving as a scrivener – such as drafting a contract -- the mediator risks assuming a different role, that of an attorney.

Standard VI.5 states:

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the

mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

Acting as an attorney, while or after serving as a mediator, is particularly problematic since it implicates issues of unauthorized practice of law, dual representation, impartiality (Standard II) and Conflicts of Interests, under both the Model Rules (Standard III)⁴ and state bar rules. Best practice suggests that here, while the mediator could discuss the parties' agreement with them after their separate negotiation, she/he should decline their requests to prepare a written agreement and should instead refer them to an attorney to draft the agreement.

⁴ Even if it was not discussed or contemplated by the parties, the mediator's assuming the role of the drafter might be deemed by the applicable bar as creating an attorney-client relationship with one or both of the parties. Standard III. F. of the Model Rules flags the problem: "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."