

Should A Mediator Draft Settlement Agreements?

Point/Counter-Point: Pro

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 Committee

This is a response to the question posed to the Ethics Committee "Should A Mediator Draft Settlement Agreements [aka Separation Agreements]?" I write with another point of view, different from the one expressed by my committee colleague Ed Blumstein (see reprint of article on page 11). His answer to the question was "No." My answer is a qualified "Yes." The question is complex and multi-faceted, and has created a wonderful opportunity to examine our process, our role of serving the parties, and how we view our work and ourselves in the larger community.

A large part of Ed's reason for answering "No" rests on the possible illegality (unauthorized practice of law, or "UPL") of a non-lawyer drafting the settlement agreement and that it is unwise to compete with lawyers. I believe that mediators should draft agreements, for reasons stated later, but qualify this because of some UPL prohibitions, which may or may not be enforced. What constitutes the practice of law in the mediation context can vary from state to state. In many states, for instance, the mere drafting of an agreement is not necessarily the practice of law. Regardless of UPL, for me, the question posed raises far deeper considerations to which a UPL solution is not responsive.

The conclusion that mediators should not draft separation agreements because that is what lawyers do also does not get at the heart of the question posed. There are other aspects of the mediation process that are relevant. What about

Agreements to Mediate? They have legal implications, especially in the area of confidentiality. Are we saying that mediators cannot draft these for parties in mediation? It seems an arbitrary distinction to say that mediators may draft some agreements that have legal implications but not others, such as separation agreements.

So, let's say mediators draft memoranda of understanding which in turn get turned over to lawyers to write into agreements. What if the parties do not want attorneys involved? What if attorneys are not willing to turn the terms into a separation agreement for a variety of reasons, then protracted and acrimonious expensive negotiations ensue where the parties are not included? Is this what our process was designed for? Is this supporting self-determination?

Or, let's say the negotiations between attorneys are not acrimonious. Does having a lawyer draft or review an agreement guarantee quality? These kinds of one-dimensional approaches avoid the larger issues of ensuring the quality of the mediation process that honors self-determination, issues of quality of training and skill of a mediator, as well as issues of meaningful education of the legal community so that attorneys are better equipped to be supportive of clients in the mediation process.

Our ethical standards require that we not give legal or other (financial, psychological, etc.) advice that is inconsistent with our role as mediator, a role that supports self-determination. Thus we refrain from engaging in counseling or advocacy during mediation. While a mediated separation agreement can have therapeutic value and legal implications, it is not,

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In the last issue, we printed the "Con" side about this important issue without the "Pro" opinion to balance the discussion (see page 11 for a reprint of the "Con" position). The Ethics Committee worked together to present the many perspectives about this question to bring forth further discussion. Due to a missed deadline, we unfortunately only published one opinion rather than both side by side as originally intended, and we regret the error and any confusion that may have occurred. Following these two pieces are letters to the editor regarding this issue, and we encourage you to comment further about drafting settlement agreements in the winter newsletter (deadline Dec. 1).

per se, counseling or advocacy. Memorializing in a written contract those terms created and desired by parties is honoring their ability to make their own informed long-lasting decisions.

Parties come to mediation as an alternative—often an alternative to avoidance, to violence, to trial, to bitter (and often expensive) negotiations conducted through attorneys, and as an alternative to stalemate that happens when they continue their conflict on their own. For separating and/or divorcing parties, creating workable, livable, fair terms for their circumstances with such terms captured in a separation agreement is often one of their primary outcome goals for mediation. Why shouldn't the mediator be the scrivener? Aren't these decisions and potential outcomes what self-determination is all about? Isn't this the potential that the mediation process holds?

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Part of our ethical obligations and part of good process is to discuss our role and to inform the parties that we do not purport to represent them. While mediators ask the parties if they desire to consult with others, including counsel, before signing any agreement, the parties may or may not choose to do so. It would fly in the face of self-determination for a mediator to require it. Part of the mediator's job is to highlight what professional help they may wish to consider to make informed decisions, to identify issues important to each of the parties and to explore potential consequences, pro and con, of the options chosen.

Parties may make decisions on their own, may obtain information on their own from other resources, and may sign legally binding contracts, both with and without "boilerplate." People do it everyday, often without the advice of counsel, and often with satisfaction and success. For example, contractual terms are agreed to for real estate contracts, warranties on appliances, 401(k)'s, life insurance contracts, investment accounts, child's school policies, consent to medical treatment, consent to terms in an employee handbook, and the list goes on. All of these are significant contracts, not necessarily written, explained or reviewed by attorneys. And for many people, these are the most important contracts they will ever sign.

As for skill in drafting a separation agreement, it does require it. Again, our mediator ethical precepts speak to this

and admonish us not to hold ourselves out for being able to do what we do not have the training or the ability to do. With good training and mentoring, a mediator can learn the skill and art of

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drafting a separation agreement. The terms, of course, can always be reviewed by counsel and others chosen by the parties and suggestions for change or modification can always be referred back to the mediation process.

Furthermore, in mediation in general, settlement agreements with legal consequences are drafted routinely by experienced mediators inside and outside the family context, for example, by AFM private mediators, by family mediators in court annexed and court supported programs, by mediators in agency and corporate EEO and labor and management settings.

Additionally, separation agreements drafted by the mediator in collaboration with both parties can have benefits for the parties that are not found in the typical separation agreements drafted by attorneys who are still in the role of advocates. The latter usually focus exclusively on legal rights and obligations. Important things such as common purposes and interests of the parties, mutual recognition of each party's needs and desires, and other statements created by the parties which might foster better relations between the parties in the future are seldom in agreements drafted by attorneys but often included in agreements drafted by mediators.

In mediation, the guiding ethical principles are self-determination of the parties and offering a quality process. Parties come to mediation wanting a

more humane, self-directed approach to resolution of a conflict. Part of that process for a family mediator may be to assist in memorializing the agreed upon terms in a separation agreement. Drafting a settlement or separation agreement that captures not only the legal responsibilities but also other equally important values and outcomes not only creates value for the parties but creates value for the mediation process and reaches the full potential that mediation holds. The question is not may we do it, but rather how well can we do it. What are your thoughts? **MN**

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