

Ethical Dilemmas

1. Mediator's Sexual Orientation

You have been selected by George and Sarah to mediate their divorce. The reason for the divorce is that George has come to realize that he is gay. You too are gay, and you have come out to your family and friends, but you have not talked to your professional colleagues or clients about being gay. So far as you know, the parties do not know that you are gay, and you are wondering whether you should make that disclosure. Is disclosure ethically required? If the situation was reversed – a same-sex couple getting a divorce because one partner realized that they are straight – should a heterosexual mediator disclose their sexual orientation?

2. Construction Mediation

You are mediating a construction dispute involving a claim by a concrete subcontractor for payment by the general contractor, who discovered that the concrete for the building's foundation was a lower grade than was specified in the architect's plans. The parties have just agreed to a settlement of the case, involving (a) a partial refund from the subcontractor to the general contractor; (b) an indemnification from general contractor to the subcontractor if it is ever sued for this defect; and (c) an agreement not to disclose the settlement terms to anyone. The building owner is not a party to the mediation and evidently knows nothing about the defect, and evidently the city Building Department was not aware of the problem because it signed off on the inspections of the building at each stage of construction. During the mediation, you asked the parties whether the owner needs to know about the foundation, and both parties, and their lawyers, said, in effect, "all foundations give way eventually – it's just a matter of time for any building." What, if anything, should you do? Would it make a difference if the building was a grain silo vs. a day care center?

3. Legal Malpractice Case

You are mediating a legal malpractice case, in which liability has been conceded, and the only question is the amount of damages. The parties are on the verge of a settlement, and they have asked you to record their settlement terms. Just before finalizing the document, the defendant's counsel asks the plaintiff to include a clause stating that the plaintiff will refrain from filing an ethics complaint against the defendant with the state's Board of Bar Overseers. Plaintiff's counsel says that for an extra \$50,000 of settlement money, the plaintiff will agree to that, and the defendant agrees to pay the extra \$50,000. You know – but you are not sure whether the lawyers and parties know – that such a clause is legally unenforceable because of public policy considerations. What should you do, if anything? What if you talk separately with the plaintiff and plaintiff's counsel and ask what they know about the enforceability of such clauses, and they say: "We know it's not enforceable, but defense counsel seems to not know that – and that's their problem not ours. Besides it's not your job to educate defense counsel – you're supposed to be impartial." What, if anything should you do? Despite the admonition from plaintiff's counsel, can you raise the enforceability question, in caucus, with the defendant and defendant's counsel?

4. Taking Care of Dad

You are mediating a dispute between adult siblings Matt and Lilly (both of them single), over who will take care of their ailing, aging father. There are no lawyers in the mediation. Both siblings want to take on this role and have their father reside in their respective homes. They have a financial incentive for doing this – their father says he will leave more of the family estate to whoever cares for him. Matt, who is loud and assertive, is the older sibling. He works as a banker and is rarely home. Lilly is timid and has always admired Matt. Lilly has fewer financial resources than Matt, but has a better relationship with their father and more time to care for him. The mediation has gone on for only an hour, with Matt dominating the conversation. Lilly appears uncomfortable and agrees with everything Matt says. No attorneys are present, and the father’s interests have not been discussed yet. When you ask, “what do you think your father would prefer?” both parties brush the question aside and say, “he’ll be fine with whatever solution we come up with.” At the beginning of the second session of the mediation, Matt announces that the two siblings have come to an agreement – their father will live with Matt, and Lilly can visit on the weekends, if she’d like. You ask Lilly if that is correct, and she says quietly, “yes.” You’ve noticed that you are feeling protective of Lilly, and that you dislike Matt’s domineering manner. What, if anything, should you do? Would it matter if Matt has excellent home-care arrangements in place to care for the father when he is at work?

5. Marital Infidelity

You are mediating the divorce of a heterosexual couple who have no kids, and therefore the only issues are financial. You have explained to both parties and their lawyers that information shared with you during caucuses will remain confidential unless the disclosing party agrees to have the information shared with the other party. During your caucus with the husband and his lawyer, he confides in you that he had an affair for several years before their divorce, but they ask you to keep that information confidential. Later, in a separate caucus with the wife and her lawyer, while discussing various proposed settlement terms, the wife remarks: “At least he was a faithful husband, and we only split due to personality issues. I wouldn’t be willing to settle on these terms if he had been a scumbag who cheated on me!” What, if anything, should you do? Would it matter, for purposes of this question, if you are in a no-fault-divorce jurisdiction in which marital infidelity, by itself, is viewed by the courts as having no bearing on property division, alimony, and other financial issues in a divorce?

6. Intimate Partner Violence

You are mediating the break-up of a business partnership. There are no lawyers in the mediation. Harvey and Juliana co-owned a small cinematography firm in Los Angeles, and they were also romantically involved but not married. When their romantic relationship ended, the parties decided to go to mediation to decide which party would be buying out the other. Harvey was being very stubborn about settlement terms. You decide to meet separately with each party. In a caucus with Juliana, she tells you the following: “Tell him I am willing to accept his proposed settlement terms. Speaking confidentially, I am scared of him. A few years ago, when we were still a couple, he once got so angry with me that he tried to choke me, and I blacked out. When I woke up a few minutes later, he told me never to tell anyone, and that if I did, he would kill me. And so, until this moment, I have never

told anyone. The only reason I am telling you is that you're legally required to keep this secret." What, if anything, should you do? Is withdrawal from the mediation an option?