OPINION

Should mediators draft settlement agreements in wake of 'Reid'?

By David A. Hoffman

For more than 40 years, lawyers serving as mediators have been drafting settlement agreements for divorcing parties in Massachusetts. Many thousands of divorcing couples have obtained divorces in this way, with mediated agreements approved by the Probate & Family Court as part of their divorce judgment.

Massachusetts was one of the earliest adopters of this practice, but we are not alone in this regard. Many other states permit the drafting of marital settlement agreements — known in Massachusetts as "separation agreements" — by mediators who are lawyers.

Ethics opinions

One of the earliest ethics opinions on this point in the U.S. was issued in 1978 by the Boston Bar Association Ethics Committee (Opinion 78-1), stating that "an attorney may act as mediator in connection with the divorce and preparation of a separation agreement between [the spouses] and in that connection may prepare either a separation agreement or the draft of a separation agreement."

The committee based its decision on the view that, in drafting a separation agreement, a mediator is not "acting as an attorney" for either of the parties.

In 1985, the Massachusetts Bar Association Ethics Committee reached a similar conclusion (Opinion 85-3), based on a different premise — namely, that drafting a separation agreement amounts to "dual representation" but an acceptable dual representation.

The MBA committee concluded that, in addition to serving as a mediator, "an attorney may also represent both parties in drafting a separation agreement, the terms of which are arrived at through mediation, but must advise the parties of the advantages of having independent legal counsel review any such agreement, and must obtain the informed consent of the parties to such joint representation."

While these two opinions focus on the question of whether principles of legal ethics permit the drafting of separation agreements by mediators, the ABA Section of Dispute Resolution concluded that principles of mediation ethics support a similar conclusion.

In Opinion 2010-1 (2010), the section's Committee on Mediator Ethical Guidance stated: "The Committee sees no ethical impediment ... to the mediator performing a drafting function that he or she is competent to perform by experience or training."

Established practice

Based on this guidance, the drafting of separation agreements by divorce mediators who are lawyers has become routine in Massachusetts. Even mediators who are not lawyers can assist divorcing parties in writing up the terms of their divorce, but they typically do so in a simpler fashion, with a bullet-point list of settlement terms, and encourage the parties to find a lawyer to draft the formal separation agreement.

> While the outcome of the *Reid* case turns on whether the mediator was negligent, the rationale for that decision could have a significant impact on how the rules of legal and mediation ethics are applied to mediators.

I have heard Probate & Family Court judges comment occasionally about the separation agreements drafted by mediators, noting that some are more skillfully drafted than others. But I have never heard a Probate & Family Court judge — each of whom reviews many hundreds of separation agreements a year — comment that lawyers serving as mediators should refrain from drafting separation agreements.

The 'Reid' case

Against the backdrop of this well-established practice, a decision last November in *Reid v. Kroll* (Middlesex Superior Court, No. 2181CV00769) has caused some divorce mediators in Massachusetts to wonder whether they should stop drafting separation agreements.

The plaintiff in *Reid* sued the divorce mediator who mediated his divorce, alleging negligence and legal malpractice. The separation agreement drafted by the mediator (who is also a Massachusetts lawyer) included arguably inconsistent provisions about whether the parties' mutual waivers of alimony would be modifiable or non-modifiable.

The plaintiff ex-husband alleged that the parties agreed in their mediation sessions that the alimony waivers would be "forever binding." Several years after the Reids' divorce judgment became final, the ex-wife filed a complaint for modification, which resulted in the ex-husband paying her approximately $211,186 in alimony.

The only decision thus far in the *Reid* case is the court's denial of the mediator's motion to dismiss. In that decision, the court stated that (a) in drafting the parties' separation agreement, the mediator provided legal services; and (b) the ex-husband alleged sufficient facts to support a claim that the separation agreement was negligently drafted.

In arriving at these conclusions, however, the *Reid* court also suggested that the mediator may have violated ethical rules applicable to lawyers regarding conflicts of interest: "There are also questions about whether the mediator compromises his appearance of independence upon switching to the lawyer role as Defendant Kroll purportedly did here."

The court also suggested that the drafting of divorce agreements by mediators who are lawyers is inherently "problematic ... given the adversarial nature of a divorce" and because such drafting amounts to a "dual or joint representation in a divorce action."

Lessons for mediators

Some of the concerns expressed by the *Reid* court may be further clarified if the case proceeds to trial, and even more clarity may emerge from *Reid* if it reaches an appellate court. In the meantime, however, the following are some tentative conclusions suggested by the case.

1. *Mediator liability.* Mediators, whether they are lawyers or not, can be sued for negligence. *Reid* is not the first case in which a mediator was sued, although such suits are rare and rarely succeed. See Moffitt, "Suing Mediators," 85 B.U. L. Rev. 147 (2003) ("[O]nly one reported case describes a verdict against a mediator for improper mediation conduct, and that verdict was overturned on appeal.").

Some courts have found that court-appointed mediators are entitled to quasi-judicial immunity, but the Reids' mediation, like most divorce mediations in Massachusetts, was not a court-referred case. In any event, liability insurance for mediators is readily available. For mediators who are also lawyers, it's usually included in their legal malpractice policies.

But the bottom line is that negligence actions will continue to be available to mediation parties, regardless of whether ethics rules permit, or do not permit, mediators to draft agreements.

2. *Liability waivers.* The mediator in *Reid* sought to insulate himself from any claim of wrongdoing by including in his consent to mediate form a waiver of liability for any "errors, omissions, or future negative consequences stemming from the mediation process or the preparation of any document."

However, as the *Reid* court noted, Rule 1.8(h)(1) of the Massachusetts Rules of Professional Conduct permits attorneys to obtain a waiver of liability from a client only if the client is advised by separate counsel regarding the waiver. The record in *Reid* shows that the parties did not receive such advice.

3. *Mediation vs. legal services.* *Reid* distinguishes two of the divorce mediator's main functions: (a) facilitating negotiation, and (b) drafting an agreement. There is a widespread consensus that a mediator's core function — i.e., facilitating negotiation — does not amount to the practice of law. See *In re Bott*, 462 Mass. 430, 434 (2012).

On the other hand, drafting a detailed separation agreement that will be incorporated into the judgment of divorce is generally considered to be the practice of law. The mediator in *Reid* tried to foreclose any such claim by including in the parties' separation agreement a statement that "at no time has the attorney/mediator acted as an attorney" for either of the parties; however, the *Reid* court brushed away that disclaimer by pointing out that it was inconsistent with the mediator's actions, which included legal drafting.

4. *Unauthorized practice of law.* It is common practice in the U.S. that mediators who are not lawyers do not draft separation agreements, because doing so could constitute the unauthorized practice of law.

Instead, such mediators typically document any agreement reached by the parties, as noted above, by creating a bullet-point memorandum of understanding in the parties' own words, and urge the parties to seek counsel to document their deal more formally. The *Reid* case underscores the wisdom of that practice.

5. *Legal ethics.* For mediators who are lawyers, there are two provisions in the Massachusetts Rules of Professional Conduct that could be viewed as especially relevant to whether agreement-drafting is permitted.

Rule 1.7 permits lawyers to provide legal services for parties with conflicting interests if, inter alia, the parties give informed consent in writing. (See also comment 28: "common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them").

And Rule 1.12 permits lawyers to provide legal services for parties in cases where the lawyer served as mediator (or arbitrator, judge, etc.), if the parties provide informed consent in writing.

The plaintiff in *Reid* argued that the mediator did not obtain informed consent to a joint representation — indeed, the mediator included language in both his consent to mediate form and the parties' separation agreement stating that he was not providing legal services.

6. *Mediation ethics.* Although, as noted above, the ABA has concluded that mediators may draft agreements if qualified to do so, Massachusetts has adopted separate rules for court-connected cases, the Uniform Rules on Dispute Resolution. In such cases — i.e., those that are referred to the mediator by a Massachusetts court — the URDR could be read as prohibiting mediators from drafting agreements. See Rule 9(e)(iv) (prohibiting neutrals from "act[ing] on behalf of any party to the dispute resolution process ... in any matter" related to the dispute) and Rule 9(c)(iv) (prohibiting a neutral from giving legal advice).

It appears that the divorce mediation in *Reid* was not court-referred and so those rules would not apply.

7. *Practical implications.* Since the *Reid* case has reached only the motion-to-dismiss stage, it remains to be seen how the court will ultimately rule (if at all) on the ethical propriety of the mediator drafting the parties' separation agreement.

Hopefully, the persuasive analyses in the BBA, MBA and ABA ethics opinions cited above will hold sway. In the meantime, however, mediators who are lawyers may decide to use joint-engagement agreements prior to drafting a separation agreement, though the legal effectiveness of such agreements may turn on whether each of the parties has a lawyer to advise them about signing it.

Or, some mediators may decide that they will draft separation agreements only if the parties hire counsel to review it, despite the significant cost this may impose on low-income parties.

8. *Practical problems.* If lawyers serving as mediators are not permitted to draft separation agreements, but instead permitted to prepare only a bullet-point list of settlement terms, there will likely be significant inefficiencies. As noted by Robert Collins in "The Scrivener's Dilemma in Divorce Mediation," 17 Cardozo J. of Conflict Resolution 691, 710 (2016): "[T]he mediator has been personally involved in the negotiation of all the details of the settlement, and remains in the best position to record on paper precisely what the couple had decided to do."

The cost of educating additional professionals about the settlement terms may dissuade some people

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from using a divorce mediator.

Conclusion

While the outcome of the *Reid* case turns on whether the mediator was negligent, the rationale for that decision could have a significant impact on how the rules of legal and mediation ethics are applied to mediators.

Ultimately, it may be up to the Supreme Judicial Court to articulate the appropriate ethical standards regarding agreement-drafting by lawyers who serve as mediators, and also for mediators who are not lawyers and wish to avoid prosecution for the unauthorized practice of law.

Cutting across all of these types of cases, however, is the need for people in conflict to have access to affordable mediation.

In *Reid*, the parties were not represented by counsel in their mediation, nor did they have separate counsel review their separation agreement before they submitted it to the Probate & Family Court. This is not unusual; one or both parties are self-represented in approximately two-thirds of the divorce cases in Massachusetts.

The lack of counsel available to the majority of divorcing parties and other civil litigants has perhaps been a factor in decisions in Massachusetts and other states permitting lawyers serving as mediators to assist their clients by drafting separation agreements.

But even if our society eventually steps up to the responsibility of making legal services available for all who need them, there will continue to be substantial advantages for divorcing couples in having their mediators document their deals. MLW