

Ethics in Mediation: Caesar's Wife must be above Suspicion

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In one of my recent cases, the question of impartiality appeared in quite an irregular way. It happened when I entered the mediation room where both parties were seated together with their lawyers. They were drinking coffee and making small talk. To my surprise, one of the lawyers looked quite familiar. Just for a moment, I had a hard time to sort out the situation. And then, I realised she was my classmate I had not seen for ages.

Surprise in mediation room

Her name would not help me a lot as she was married and, as is the Czech custom, she adopted the bridegroom's surname. Yet anyway, did I underestimate the preparation and of the conflict check? This was just one of the questions the silence was suddenly fraught with. Is this circumstance influencing my impartiality and independence? Should I show my surprise or pretend nothing extra happened? What should be my next step? To reveal? Not to share this? What would the other party think of me? Would they suspect me of behaving unethically? Would they think this was intentional?

Unfortunately, there are no universal guidelines leading a mediator through this area full of pitfalls. One has to rely on himself and I believe that sincerity is always the best cure for likewise situations. Thus, after a moment of hesitation, we exchanged greetings, I sat down and revealed the circumstances: "As you might have seen, I am really surprised to see Ms. XY here. She used to be my classmate at the law school. Since then, we have seen each other occasionally, and I did not know she was going to represent this party today. Of course, I am impartial and independent, however, you might consider choosing a different mediator if you have any doubts or if you do not feel comfortable in this situation..."

The other party, to my ease, took it well: "Oh, thank you...Ms. XY told us already when we were considering you as our mediator...It is definitely alright. However, we appreciate your frankness..."

The case was settled in two hours.

Partial neutral?

As illustrated by this case, impartiality and independence are really crucial for mediation and other ADR. Stick to those principles and you will be valued as a good mediator. Break them and you will be held in low esteem not speaking about legal consequences.

Yet, this approach is not uncontested. For some of the scholars and practitioners, transparency and party control are by far more important issues due to the nonbinding nature of consensual alternative dispute resolution. According to those opinions, the term of neutrality is imminent to the power. Since there is no power of mediators towards the parties, there is no need for impartiality and independence. According to this opinion, the control of the procedure is much more important, as it is a parties' consent that produces the outcome of the said procedure.

Quite surprisingly, the following discussion appeared between me and my classmate from the opening example after the conclusion of the mediated settlement agreement: "How can a mediator, no matter how partial, influence the outcome of mediation?"

"I believe that every experienced mediator would be able to provide you with a set of examples of tiny tricks and techniques that would be able to achieve that aim..."

She did not hesitate and started a rebuttal: "OK, however, as soon as the parties discover this, they might interrupt mediation and change the mediator or just stop taking part in it..."

"Indeed, supposing they realised..."

"Wait a minute, with due diligence, you can discover it..."

"Well, in the case of dependence, you might get a chance, while impartiality is invisible...!"

Virtues lost in self-interest

I was not talking about some magic. The terms independent, impartial and neutral are sometimes used as synonyms though they do have a different meaning that needs to be distinguished. As such, the impartiality is the neutral's real absence of preference in favour of one of the parties that is a condition sine qua non of real neutrality. It is a state of mind of not being interested regarding the outcome of the procedure. In other words, the presence of bias causes absence of impartiality and vice versa, the absence of bias means impartiality. By contrast, the term independent means absence of objective links between persons: Absence of control or influence of another, the absence of association with another entity and absence of dependence on something or someone else. The relation between impartiality and independence can be expressed as follows: There cannot be a partial neutral, but there can be a dependent one. However, the later would neither be acceptable for the parties nor would be in accordance with the law.

As in the majority of ethical topics, the crucial term to be observed is a conflict of interest which might be described as a real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

The problem of ethically difficult questions is not hidden in search for definitions and rules but rather in their practical application. The main obstacle was aptly described by the French author François de La Rochefoucauld: "Virtues are lost in self-interest as rivers are lost in the sea".

Indeed, it is quite easy to denounce certain behaviour once it is discussed as a theoretical example in the class or with the colleagues. However, the true trial occurs only when there is a real conflict of interest - when there is something at stake.

Let's take an example: Imagine a certain person is considered to be appointed a mediator in small claim case with a fixed fee. Now, another person is about to be appointed an arbitrator in multimillion USD case. Both are considering revealing the same information that might cause doubts of the parties as to their impartiality, such as that one of the lawyers is a classmate. Obviously, both candidates are putting at risk their appointments and consequently certain financial incomes. While for the first person, the decision is quite easy, the decision of the later one is much more difficult as she is risking to lose much more. Her financial interest is in seeming conflict with her public duty to disclose and inform the parties. There is a real conflict of interest. Only in cases like this, one can really prove her moral standards.

To divorce or not to divorce...

In 63 BC, Gaius Julius Caesar was elected to the office of the Pontifex Maximus, the supreme priest of the Roman state religion. One of the benefits of this post was the entitlement to the official residence on the Via Sacra. Today, its ruins can be still spotted in Forum Romanum in downtown Rome and one has to admire its really convenient central location. According to some critics, this (and not the religious zeal) was the only reason why the young politician went after the office of supreme priest.

At this time, Caesar was married to his second wife, Pompeia. As Pontifex Maximus's spouse, she was obliged to host the festival of the Bona Dea ("good goddess"), which no male was permitted to attend. However, an *enfant terrible* of then Rome, Publius Clodius Pulcher, managed to sneak into the house dressed as a woman, apparently for the purpose of seducing Pompeia. This adventure turned into a disaster. He was caught, got some beatings and was later prosecuted for sacrilege. In fact, with the highest probability, there was no affair between Pompeia and Clodius. Anyway, the other day, Caesar divorced the poor woman. During the trial, he supposedly stated the reason in the following way: "Caesar's wife ought not even to be under suspicion."

What does have this classical story of the ancient divorce and impartiality and independence of ADR neutrals in common? In public (and not in private) life, mediators should take some inspiration in the approach of the famous Roman and take the issue of conflict of interest really seriously. A general saying "Better safe than sorry" is to be followed. Or, in other words, "A mediator ought not even to be under suspicion."

TO BE CONTINUED...