Mediating, Judging With Pro Se Parties: A Balancing Act

By Hon. Stephanie H. Klein (Ret.)
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Mediators, like judges, encounter ethical issues when dealing with a pro se party facing a represented party. If they try to compensate for parties without counsel, they run the risk of compromising their impartiality. If the judge or mediator treats the pro se party like any party with counsel, she may deny the pro se litigant a fair trial or a fair opportunity to negotiate their case.

Consider, for example, an employment dispute in mediation. In joint caucus, the pro se complainant, a member of a protected class, explains that he worked for a trucking company for five years and was abruptly fired with no explanation while other employees kept their jobs. Employer's counsel then launches into a ten-minute recitation of the facts and pertinent case law. She rebuts the plaintiff's case point by point to demonstrate how she will prevail in court. The mediator recesses for the first separate caucus with the complainant. Totally deflated, the complainant says that he failed to understand much of what the employer's counsel said and has no idea what he is seeking in damages.

What is a mediator able to do? Do the ethical rules permit her to explain what counsel said and offer guidance on developing an opening offer?

Let's begin by looking at what a judge is permitted to do in such a situation. The Code of Judicial Conduct and the Rules Governing Standards of Conduct for Magisterial District Judges require impartiality, which might suggest that judges may not offer any assistance to pro se parties. Code of Judicial Conduct, 207 Pa. Code Part II, Ch 33, Sub A, Rule 1.2 (2015) and Rules Governing Standards of Conduct for Magisterial District Judges, Pa.R.C.P.D.J., Rule 1.2 (2015) (hereinafter "Codes").

However, the Codes further provide that a (judge or magisterial district judge) "shall accord to every person or entity who has a legal interest in a proceeding … the right to be heard according to law. " Rule 2.6.(A). One might fairly interpret this Rule to mean that when faced with a pro se party, the judge may explain the legalese presented by counsel in laymen's terms and may also explain evidentiary rulings.

This interpretation is supported by the Comment 4 to Rule 2.2 in the Codes which states that "[i]t is not a violation of this Rule for a (judge or magisterial district judge) to make **reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters heard fairly and impartially.**" (Emphasis added).

Thus the Codes support the proposition that judges should "reasonably accommodate" pro se litigants to afford them a fair hearing. Certainly explaining rulings and objections in plain language would be appropriate. A judge might consider offering a continuance to a pro se litigant in a compelling case where the litigant brought only an inadmissible statement instead of a live witness.

In magisterial district court, where I sat for 18 years, these problems did not appear acute. Attorneys were accustomed to pro se litigants and to judges explaining legal concepts, rulings and decisions in a manner understandable to laypeople. These explanations eased fears of litigants overwhelmed by their case, and assuaged concerns that they may be denied a fair opportunity to tell their story in court. Clerks frequently gave out telephone numbers for Legal Aid and the Bar Association's Lawyer Referral Service. Civil demeanor and explanations that did not unduly delay the trial went a long way towards assuring pro se litigants that they are getting their day in court.

Unlike the Codes, the Model Standards of Conduct for Mediators (2005), adopted by the three main trade associations for mediators, the American Bar Association, the Association for Conflict Resolutions and the American Arbitration Association, do not mention any specific accommodation for pro se litigants. (Hereinafter "Model Standards"). http://www.mediate.com/articles/model_standards_of_conflict.cfm#LinkTarget_391 . The Model Standards "are to be read and construed in their entirety." Model Standards, Notes on Construction.

Like the Codes, Model Standard II.B. requires that mediators conduct mediations "in an impartial manner and avoid conduct that gives the appearance of partiality." Reading this Standard alone, answering the pro se party's questions about what he should do might prejudice the mediator's impartiality.

Moreover, Standard VI.A.5. cautions the mediator that "[m]ixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. " Mediators trained in other professions like law, psychology or social work must not offer counsel which confuses their role as mediator with their former professions.

But the Standards do not solely concern themselves with impartiality and mixing roles. Similar to the Codes, Standard VI.A. provides that "a mediator shall conduct a mediation… in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, **procedural fairness, party competency** and mutual respect among participants. " (Emphasis added).

Model Standard VI.A.10 further provides that "[i]f a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the **party's capacity to comprehend, participate and exercise self-determination**. " (Emphasis added).

Finally, Standard I. A. provides that mediators shall conduct mediations "based on the principle of party self-determination… the act of coming to a voluntary uncoerced decision in which each party makes free and informed choices as to process and outcome. " Implicit in this Standard is the notion that without

comprehension, a party may not be able to exercise his self-determination to make the “free and informed choice” that must occur in every mediation.

What principles can we glean from reading these Model Standards together? First, while impartiality is important, equally important is procedural fairness and party competency. Second, while mediators must refrain from practicing their former disciplines while mediating, mediators are duty bound to make accommodations or adjustments that will “make possible the party’s capacity to comprehend, participate and exercise self-determination.” Model Standard VI.A.10.

What might these adjustments include? First, while mediators may not offer legal advice, they may offer a detailed explanation of the mediation process. The mediator may explain mediation by contrasting it with the adversarial process and further explain that successful legal argument and successful negotiation represent two entirely different processes.

A second adjustment might be for the mediator to pose open-ended questions in separate caucus to ensure that that the pro se party is able to fully illuminate the facts and interests in his case.

A third adjustment, in response to the pro se party’s inability to formulate a first offer, might be for the mediator to suggest how most parties evaluate damages and to hand him a calculator to add up his back pay.

A fourth adjustment might be to slow down the offer/counter-offer process to allow the pro se party more time to evaluate an offer. A mediator may also suggest to a party unsure about an offer or what to counter-offer that he call a trusted family member or friend or legal counsel to dissect and discuss offers. It might take more time, but will result in a better-informed pro se party, and will promote party competency. See Standard I.A.2.

Finally, effective listening, that is careful and sympathetic listening to all parties, goes a long way towards assuring parties of a fair mediation. This might involve paraphrasing a party’s statements, responding audibly at strategic moments during a narrative so that the party knows the mediator is listening, and asking appropriate questions so as to ensure that all understand the party’s position and interests.

In conclusion, parties often lack the means or inclination to engage counsel to litigate or mediate matters that implicate important rights. Yet the Codes and Model Standards fix responsibility for a fair trial or mediation squarely on the shoulders of mediators and judges while they must also maintain their impartiality. It is a tap dance that requires intelligence, creativity and sensitivity to parties and will yield enormous rewards when parties emerge from the process feeling that they have had a fair opportunity to mediate or litigate their dispute. •

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