

# Tennessee Association Of Professional Mediators Quarterly Meeting

Dec. 11, 2008

**ETHICAL CONSIDERATIONS  
AT THE MEDIATION TABLE**

## Scenario 1 – Death, Dogs & Dollars

Walter Harris died at the age of 67 after a long bout with cancer. Five years before his death, he was married for a second time to a beautiful younger woman named Misty, age 36, who had attended to him during his long illness. He had been divorced from his first wife 10 years earlier. Walter had two children from his first marriage: son Jerome, age 35, and daughter Sandy, age 40.

Walter's will left \$1 million to a charitable trust, "All About Chihuahuas," which is administered by his second wife, Misty, who will run the charitable operation. His remaining estate was divided between Misty and his daughter Sandy. Because his son Jerome had been extremely upset about Walter's remarriage, Walter had become estranged from Jerome and had completely cut Jerome out of the will. Walter had purchased a life insurance policy in the amount of \$750,000 which named Misty as the beneficiary. The divorce decree from Walter's first wife had stated that the children were beneficiaries of the \$750,000 insurance policy so long as they visited their father at least three times per year.

Putting aside the \$1 million in the charitable trust and the effect of the insurance policy, the estate consists of a house in Walter's name, a lake house, stocks valued at \$500,000 in both Walter's and Misty's names, a piece of land valued at \$350,000 in Walter's name and cash in the bank of \$100,000 in both Walter's and Misty's names.

Misty is named as Executrix of Walter's will. Her attorney, Larry Cheatem, is present for the mediation. Jerome is contesting the will because he believes Misty had undue influence on Walter in his decision to cut Jerome out of the will.

All About Chihuahuas has indicated it will take whatever the court deems it should have and is not participating in the mediation. Daughter Sandy is independently wealthy and doesn't care about Walter's money. She is not at the mediation.

### **The mediator learns the following confidential information relating to Misty's position:**

Cheatem, the attorney for executrix Misty was also the attorney for decedent Walter Harris. Before his death, Walter had told the attorney that he had reconciled with his son Jerome and that the attorney should amend the will by codicil. Even though the attorney was asked to prepare the codicil 18 months before Walter died, the attorney never got it done. Misty had also told Cheatem that she knew her husband's intent was to divide the estate among her, daughter Sandy and son Jerome.

The attorney is concerned that his failure to draft the codicil may have been malpractice and that the will does not reflect Walter's true intent.

At the time of the mediation, Misty is in Florida visiting her mother and is available to participate only by telephone, not in person.

During the mediation, Misty reveals to the attorney by telephone that the appraiser came by and looked at the house last week and told her it was worth \$2.5 million rather than \$500,000 as everyone had thought, because it had recently been zoned commercial. Jerome does not know about the independent appraisal or the rezoning. Misty's answers to interrogatories, prepared two weeks ago in preparation for the mediation, stated the \$500,000 figure that was reflected in the tax appraisal. Her attorney thinks he has 30 days to update the answers to interrogatories and has not yet made any effort to disclose the new information.

**The mediator learns the following confidential information relating to Jerome's position:**

The first offer by Jerome's attorney is to take one-half of the entire estate plus one-half of the insurance policy and that he will give Misty 30 days to get out of the house, as Jerome plans to move in.

Until 18 months ago, Jerome had not visited his father since father's remarriage to Misty. However, Jerome's attorney is informed at the mediation that Jerome talked to his father 18 months before father's death and was told that the will was being changed by father's attorney. Upon hearing this, Jerome's attorney threatens to report Cheatem to the Board of Professional Responsibility for failing to timely amend the will.

Near the end of the mediation, Jerome's attorney tells Jerome that he should accept an offer made by the other side that Jerome's attorney considers to be reasonable. ("If you don't agree on the spot, then I'm out of here and you can hire a new attorney. Then you'll have to pay me the \$25,000 you owe now and hire a new lawyer to take you to court.") The discussion takes place in front of the mediator.

**What ethical issues are raised by this scenario?**

**What actions should the mediator take?**

## **Scenario 2 – Kids in the Middle**

Mom and Dad are in the middle of a divorce mediation. Parenting time with their two children is the major sticking point; however, a few other issues remain to be resolved.

Dad has been the primary caregiver. He works part-time at home for a meager salary, but his time is flexible so that he is able to take the kids to and from school and after-school activities. He takes the kids to doctor and dentist visits, goes to teacher-parent conferences, and does most of the cooking and cleaning for the family. He cannot imagine not having the children living with him most of the time.

Mom has a high-paying job for a national pharmaceutical company. She travels several days a week and spends many extra hours a day working on her Blackberry. She loves the children but has never felt very maternal. She does not want to be the primary residential parent, but she does not want to have to pay exorbitant child support either.

Mom says to her attorney, in front of the mediator in private caucus, that she knows that if she threatens to “take the kids,” Dad will capitulate on the issue of the marital residence and agree to sell it. She doesn’t want to have to give up her job or hire a nanny, so she really doesn’t want to be the primary residential parent, but she wants you, the mediator, to press Dad to give her sole responsibility for the kids, even though she knows that losing the kids would devastate his life and the kids. She is convinced the threat will force a quick settlement even though she would not really want to follow through on the threat.

Later, during the mediation, Mom lets you and her attorney know for the first time that she is being promoted and that she will be moving to San Francisco in a few months. She can’t do the job and take the kids. She knows that San Francisco is one of the most expensive cities to live in, so she can’t be saddled with high child support payments. No one else knows about the promotion. She wants you to help her negotiate the lowest child support possible without disclosing her plans to move.

**What ethical issues are raised by this scenario?**

**What actions should the mediator take?**

### **Scenario 3 – Settling for All the Wrong Reasons**

Attorney Bailey Wilson represents Big Ben Clock Company in a contract dispute between Big Ben and a former supplier, Chimes R Us. It is a fairly simple dispute over the interpretation of a provision relating to a pricing formula, but the amount claimed against Big Ben is almost \$1 million. Wilson has analyzed the case thoroughly and feels that, while Chimes R Us has a claim that will withstand summary judgment, the merits are clearly on the side of Big Ben. Wilson thinks that a reasonable settlement would be in the range of \$100,000 and certainly no more than \$200,000.

Big Ben's President, Ben Thomas, has indicated a strong desire to settle and agreed to mediation. Despite its somewhat weak position, Chimes R Us started the mediation at \$1 million and has been slow to move, now telling the mediator that it does not intend to go below \$800,000. Ben Thomas has been willing to move much faster and in larger increments. He has now made an offer of \$500,000 and seems willing to go as far as necessary to get it settled – much to the surprise and chagrin of Wilson.

The mediator then informs the Big Ben side that the president of Chimes R Us has made reference to rumors that Ben Thomas recently ended an affair he was having with the CFO of Chimes R Us. While this technically has nothing to do with the lawsuit and might never even come up in discovery or trial, the mediator raises the question of whether that relationship is having an impact on the negotiations. The light bulb suddenly goes on for Wilson: he now thinks that Ben Thomas is prepared to pay whatever it takes to be sure there is no chance that something could come out during discovery about the affair for fear that it will impact his pending divorce proceedings. Wilson is concerned that Ben Thomas is not acting in the best interest of Big Ben's shareholders but rather in his own personal interest. Chimes R Us has made what it says is its absolute final offer of \$750,000 and Ben Thomas wants to agree to pay this amount despite the fact that Wilson thinks such a settlement is about 5 times what the case is worth.

**What ethical issues are raised by this scenario?**

**What actions should the mediator take?**