

Opinion 2007-01

The Question

A mediation was held this week. During the mediation, one of the parties was requesting that the other party sign a document which required notarization. One of the mediators is a notary. Can a mediator also act as a notary?

- Submitted by the director of a community dispute resolution center.¹

Summary of the Opinion

A mediator-notary is not precluded from acting as a notary under the facts presented. Looking under Standard VI, Quality of the Process, Comment 5, as well as the NYS Notary Public License Law, a notary is not considered a “professional” in the way Standard VI. intended. A notary’s role is ministerial in nature. Therefore, the mediator may notarize the document in this situation.

Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Standard II (A) and (B), Standard III, and Standard VI (A) and (B) and Comment 1, Standard VI, Comment 5 (rev. 2007); Notary Public License Law, NYS Department of State Division of Licensing Services, *NY CLS Exec § 135* (2007).

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Other facts provided subsequent to the submission of this inquiry indicate that the mediator-notary did not charge the parties for the service. Nor did the mediator-notary notarize a mediation agreement or another document related to the mediation. The mediator-notary explained to the parties that a notary cannot notarize a document that she/he is a witness to or has a substantial interest in, since that would be considered a conflict of interest under the notary’s code of conduct. Further, the mediator-notary explained to the other party in the mediation -- who did not ask for a notary, although did not object -- that a notary is required to notarize a document (when there is no conflict of interest or legal reason not to) as acknowledgment of signature. Notaries are required to carry their stamp at all times.

Based on the entire facts as presented, nothing indicates that the mediator in this instance could not also act as a notary. The notary’s role is ministerial in nature, so would not preclude the mediator from acting as such.

Reviewing the Standards, the Standard implicated in this question that must be considered is Quality of the Process. Standard VI, Comment 5, states:

“(t)he primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.”

¹ The center practices a co-mediation model. Two mediators co-mediated this session.

Based on Comment 5, therefore, it is clear that a mediator must not act in another professional role when mediating. The question, then, becomes whether the notary is considered a “professional” within the meaning of Standard VI. Reviewing the NYS Department of State Division of Licensing Services’ Notary Public License Law for New York notaries, it is clear that a notary ‘s function is ministerial.

Public Service Law states that a notary public is authorized and qualified to, among other things:

“...administer oaths and affirmations, to take affidavits and depositions, (and) to receive and certify acknowledgements or proof of deeds...”

As such, the role of the notary is limited to acting as a witness. The notary is not performing a professional service that would normally create a conflict of interest with his/her role as a mediator. The mediator acting as a notary under the facts presented is in accord with the Standards of Conduct, since a notary is not considered a “professional” within the spirit of the Standards nor within the notary law. Therefore, there is nothing that precludes the mediator-notary from disclosing her/his status as a notary during the mediation or performing notary services for the parties to the mediation.

Mediators who are notaries, though, should consider that while performing notary services alone does not create a conflict of interest, the mediator-notary should take care to perform the notary services in a way that will not create a conflict of interest or influence the quality of the process. For example, where one party has requested that a document be notarized, the notary should be certain that both parties freely desire to execute the document. The notary should ensure that neither party would believe the notary-mediator, by performing notary services, is advocating that the parties execute the document or that the notary-mediator is showing partiality to the party who requested that the document be notarized.