

Opinion 2008-02

The Question:

A mediation session was held between an attorney and a client concerning attorney's fees. During the course of the mediation the mediator, who is also an attorney, realized that the parties' fee dispute was covered by Part 137 of The Rules of the Chief Administrator. Neither the attorney nor the client seemed to be aware of the rule or the attorney's obligation to provide the client with notice of the right to arbitrate. Does a mediator have an obligation to say something to either party regarding the rule?

- Submitted by a CDRC mediator.

Summary of the Opinion

The mediator has no obligation to say something to either party regarding Part 137. If, however, the mediator deems it essential to the principles of self-determination and a quality mediation process, the mediator may raise the matter in joint session with each party as part of reality testing the enforceability of the agreement and making the parties aware that they may consult outside counsel.

Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Introduction; Standard I: Self-Determination, Comment 1, Comment 2, and Comment 3; Standard II: Impartiality, Comment 2 and Comment 3; Standard VI: Quality of the Process, Comment 5 and Comment 8; Part 137 of the Rules of the Chief Administrator (22 NYCRR 137); NYS CDRC Program Manual, Chapter VII. Training, Standards and Requirements for Mediators and Mediation Trainers (rev. January 1, 2007).

Opinion

Under the Standards of Conduct for New York State Community Dispute Resolution Center Mediators, the mediator does not have an obligation to advise either party regarding Part 137 of the Rules of the Chief Administrator.¹

In this scenario, the mediator is aware of Part 137 presumably because the mediator is an attorney. The Committee notes that most community mediators would not have knowledge of Part 137. Community mediation centers provide uniform training for their mediators and do not

¹Part 137.2 (a). states: "In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8."

expect them to have specialized legal training beyond the scope of the mandated mediation training.²

However, regardless of whether the mediator is an attorney or is otherwise aware of Part 137, it is not the mediator's role to notify either party of the rule. To impose such an obligation on the mediator could interfere with a party's right to self-determination, or right to make his or her choice as to the process and outcome. Such a requirement could also conflict with the mediator's obligation to refrain from acting in any other professional role but that of a mediator.

Under Standard I: Self-Determination, a mediator is required to conduct mediation in a manner that supports the principle of party self-determination as to both process and outcome. This requires that a mediator should not intervene in the decisions of parties who have both voluntarily agreed to mediate a dispute. Comment 2 of the Standard, however, states that the mediator may need to balance party self-determination with a duty to conduct a quality mediation process. In order to do so, the mediator in this case may wish to inform the parties that they may want to seek outside professional advice to help them make informed decisions. Comment 3 states further:

“a mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process.”³

Standard VI: Quality of the Process elaborates on the duty of the mediator to conduct a quality mediation process. A quality mediation process is defined under Standard VI.A. as “a process that is consistent with these Standards of Conduct.”

Requiring the mediator to inform the parties about Part 137 would potentially violate the mediator's obligation to not act in any other professional role but that of a mediator. Comment 5 of Standard VI states:

“The 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,

² NYS CDRC Program Manual, Chapter VII. Training, Standards and Requirements for Mediators and Mediation Trainers (rev. January 1, 2007). Attorney-client fee disputes are not classified as “special case types” for purposes of training mediators under the guidelines.

³ A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions, or an informed decision to agree or not to agree.

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.”

Therefore, the mediator may consult with the parties about seeking outside legal advice.

The Committee acknowledges that if this dispute is mediated contrary to the requirements of Part 137, the parties face a variety of possible risks.⁴ Accordingly, the mediator could conclude that the parties do need more information about fee disputes to make a fully informed choice about mediating the dispute. Comment 8 states:

“If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, 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. If no such option can be reasonably provided, the mediator should take other appropriate steps, including postponing the session, withdrawing from the mediation or terminating the mediation.”

The Committee believes that, given this situation, the mediator has the choice, if he or she determines it is appropriate, to balance the parties’ right to self-determination with a quality process and inform the parties that they may want to get outside advice about any special requirements with respect to attorney-client fee disputes.

Although the inquirer’s questions have been addressed, the Committee has decided to further consider how the mediator should inform the parties concerning seeking outside advice, if he or she decides to do so. The Committee considered whether it would be preferable for the mediator to raise this issue in caucus or in joint session and how the issue should be framed. Standard II: Impartiality requires that a mediation be conducted in an impartial manner. Comment 2 of the Standard says a mediator must maintain impartiality even while raising questions regarding reality, fairness, equity, durability and feasibility of proposed options for resolution. The Committee concludes that it would be consistent with the Standards for reality testing to be done in joint session with the parties. To avoid favoring one party over another, such reality testing should be done by asking questions as to whether the parties know if there are any laws or

⁴ Risks could include: having the mediated agreement deemed unenforceable; impacting the client’s perception of the process if not made aware of the Rule; and/or professional risks to the mediator as an attorney being aware of the Rule. The Introduction to the Standards states that the Standards are to be used as a guide for ethical mediation practice and are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations. As such the mediator, as attorney, may also wish to consult outside professional standards before determining how to proceed if the mediator is concerned about the impact of going forward without the client seeking outside advice.

precedents that might impact the disposition of a fee dispute, without specifically referring to Part 137. ⁵

⁵ The Committee debated whether the mediator should specifically mention Part 137 of the Rules of the Chief Administrator or whether he should simply inform the client that she may want to seek outside legal advice. If the mediator is aware of the rule and faces the dilemma of trying to balance the parties' self-determination with the quality of the process, the Committee holds that the mediator may let the parties know about the Rule. However, such a mediator, as well as any mediator unaware of the Rule, is not obligated to let the parties know. Regardless of how the mediator proceeds, it is imperative that he draw a clear distinction between providing legal information and legal advice, by not leaving the parties with the impression that the Rule applies or interpreting the Rule on behalf of the parties' particular dispute.