Opinion 2009-02

A case was sent to mediation by the Family Court after a party petitioned the court for a change in physical custody. The mother had physical custody and the parents have had joint legal custody. They have been operating successfully with that arrangement. The child is twelve and expressed interest in living with the father. The mother wants to honor her son's expressed desire for physical custody with his father, although she does not want the situation to change.

One of the co-mediators is aware that a change in physical custody will have an impact on child support. Not only will it stop child support payment from the father to the mother, but it may also mean that the mother will have to pay the father child support. Since the Family Court separates Custody and Visitation from Support, child support is not a subject that is traditionally raised during the course of mediation. Yet both mediators feel strongly that they would be setting the parties up for further conflict if the support issue is not clarified and an agreement is signed without it being raised. At the very least, the mediators would like to provide some direction for the parties to consult attorneys for further edification.

In chatting with a colleague who is a mediator and an attorney, the colleague raised the point that telling the parties that the child's custody may trigger a change in support and that they need to consult an attorney; the mediators might be tipping the scale from legal information to legal advice. On the other hand, the colleague noted that if the professional rules of conduct for attorneys suggested that attorney-mediators say nothing at all, being an attorney she might have to bend to the high standards guiding lawyers and suggest that they consult attorneys but remain vague about why (sort of a general encouragement to consult with attorneys before signing the agreement). By doing so, this would also raise the issue of whether an attorney-mediator is held to a higher standard and whether parties who are served by non-attorney mediators are getting a lower standard of practice. One answer is for the Unified Court System to put out a pamphlet in simple and direct language lays out all these issues for parties, discussing both Custody and Visitation and Support issues for possible parties to review.

The Questions:
Should a mediator notify a party in a custody-visitation case that a change in custody may trigger a change in support? Would doing so cross a line between providing legal information and providing legal advice?

Do mediators, who are also attorneys, have an additional or different role in providing this information?

- **Submitted by a CDRC Executive Director.**

Summary of the Opinion

A mediator has no obligation to know that changes in custody may trigger changes in support. However, if the mediator is aware of this information, and deems it essential to the principles of

self-determination and a quality mediation process that the parties receive outside legal advice on this issue prior to signing an agreement, then in joint session, as part of reality testing the enforceability of the agreement, the mediator should: (1) give the parties the legal information in his/her possession – namely, that changes in custody may trigger changes in support; and (2) recommend that the parties consult outside counsel for legal advice about their specific case. In addition, the mediator should emphasize that (s)he is not acting as any party's attorney and cannot dispense legal advice specific to the case.

This Opinion applies to both attorney and non-attorney mediators; however, mediators who are also attorneys should also consult any applicable professional rules governing their responsibilities and obligations while serving as third-party neutrals.

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; Standard V1: Quality of the Process, Comment 5 and Comment 8; 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 ("Standards"), if the mediator is aware that an agreement on custody could affect support, and deems it essential to the principles of self-determination and a quality process that the parties receive outside advice on that point prior to signing an agreement, the mediator should give the parties the information in her possession and recommend that the parties consult outside counsel for advice about their specific case.

In this scenario, the mediator knows that changes in custody may trigger changes in visitation, presumably because the mediator is an attorney. The Committee observes that many community mediators would not be aware of this legal information. Community mediation centers provide uniform training for their mediators and mediators are not required to have specialized legal training beyond the scope of the training set forth in the New York State Community Dispute Resolution Program Manual.[1]

However, whether the mediator is or is not an attorney, if the mediator's training, education or experience has made her aware that the parties lack substantial information regarding the dispute, thereby impeding the parties' ability to make informed decisions and/or jeopardizing the quality of the process, the mediator should provide that information to the parties and recommend that

[1] NYS CDRC Program Manual, Chapter VII, Training, Standards and Requirements for Mediators and Mediation Trainers (rev. January 1, 2007). Parenting disputes involving child custody and visitation are classified as "special case types" for purposes of training mediators under the guidelines, and require a minimum of 12 hours of advanced training beyond the initial training requirement of 30 hours; however, the standards set forth in the Program Manual do not require mediators to be aware of legal issues affecting child custody and support.

they consult outside counsel – providing the mediator can do so in a way that does not otherwise contravene any of the Standards.

In reaching this conclusion, the Committee consulted the following authority:

Standard I: Self-Determination requires that mediation be conducted in a manner that supports the principle of party self-determination as to both process and outcome, while balancing that principle with the duty to conduct a quality mediation process under Standard VI. In certain cases, Standard I allows mediators to inform the parties that they may wish to seek outside professional advice to help them make informed decisions.

Comment 3 states:

> "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."[2]

In this case, the Committee notes that the potential legal link between custody and support appears to constitute substantial information regarding the dispute, such that if the parties lack this information and therefore are unable to consult counsel for advice, they may well be unable to make a full range of procedural and/or substantive decisions, or an informed decision to agree or not to agree. Therefore, in the Committee's estimation, Standard I allows for the mediator in this situation to make the parties aware that they may consult counsel for legal advice.

The Committee next examined Standard VI: Quality of the Process, which elaborates on the duty of the mediator to conduct a quality mediation process, defined under Standard VI.A. as "a process that is consistent with these Standards of Conduct."

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, 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."

In this situation, providing legal information within a mediator's knowledge would be consistent with the mediator's primary purpose, which is to help the parties communicate, negotiate and make decisions. It would not conflict with the mediator's obligation to refrain from acting in any

[2] Footnote 6 goes on to explain that "[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."

other professional role but that of a mediator, because the mediator would not provide legal advice specific to the case, and would not establish an attorney client relationship with any party. Therefore, where appropriate the mediator should consult with the parties about seeking outside counsel, while taking care to state explicitly that the mediator does not represent any party and cannot give legal advice.[3]

The Committee also concludes that under the scenario presented, if an agreement reached in the custody dispute does not consider the relevant law pertaining to support, the parties face a variety of possible risks affecting the quality of the process.[4] Accordingly, the mediator in this situation could reasonably conclude that the parties need more information in order to be able to negotiate and make decisions.

Comment 8 of Standard VI 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 in this situation, under Standard VI the mediator may appropriately inform the parties that they should get outside advice about relevant legal issues and settlement options. If the parties agree, the mediator might then postpone the mediation until the parties have had time to consult with counsel and acquaint themselves with all potential settlement options.

In considering how the mediator should raise this information, the Committee considered Standard II: Impartiality, which requires that 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.

[3] While Standard I says mediators "can" make parties aware that they may consult outside professionals; Standard VI provides that mediators "should" do so in certain circumstances, as outlined above. The Introduction to the Standards provides that "[u]se of the term 'should' indicates that the practice described in the Standard is strongly suggested and should only be departed from with very strong reason."

[4] Such 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.

The Committee concludes that under Standard II, the mediator may relay general legal information regarding custody and support in joint session with the parties, as part of reality testing the enforceability of the dispute. To avoid favoring one party over another, such reality testing could be done by sharing the mediator's general understanding that custody decisions may affect support, or by asking whether the parties are aware of any laws or precedents that might impact support in the event of a change in custody.[4] The mediator should then recommend that the parties seek legal advice regarding whether and how any such laws or precedents might apply to their case.

The above Standards and the Committee's analysis apply equally to mediators who are attorneys and those who are not. However, the Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations. Attorneys who are admitted to practice in New York and who serve as third party neutrals should consult the New York State Rules of Professional Conduct, as well as any other applicable laws, rules or regulations, for provisions that may apply to their work as mediators.[5]

Finally, the Committee notes that in considering whether to select this question for review, the Committee reviewed its earlier Opinion 2008-02 and felt there was a need for additional clarity on the issue of when a mediator should provide parties with legal information within her knowledge. In 2008-02, the Committee found that the mediator could, but was not required to share knowledge about a specific administrative rule. The Committee made this determination because it found that to impose an obligation on the mediator to notify parties of this specific rule could potentially (1) interfere with a party's right to self-determination, or to make his or her own choice as to the process and outcome; and/or (2) conflict with the mediator's obligation to refrain from acting in any other professional role but that of a mediator. We consider each issue in turn.

Regarding self-determination, the scenario presented in 2008-02 differs substantially from this one in that the administrative rule considered in 2008-02 related to the availability of another ADR process to resolve the parties' particular dispute. The Committee believed that by informing parties of that rule when they had already made the decision to mediate, the mediator might be interfering with the parties' self-determination and right to choose their own process. By contrast, under the situation described in this Opinion, the mediators know that the parties likely need certain information in order to be able to act upon their stated choice to mediate, and that giving the parties additional information will allow them to make informed decisions so that they can create an agreement that fully resolves their dispute.

[4] The Committee debated whether the mediator should specifically mention a potential link between changes in custody and changes in support, or simply inform the client that (s)he may want to seek outside legal advice. If the mediator is aware of the legal relationship and believes that the parties' lack of knowledge on this point will likely affect their self-determination and the quality of the process, the Committee holds that the mediator may, in the interest of transparency, inform the parties that law may exist on this point, and encourage them to seek legal advice. In doing so, however, it is imperative that the mediator draw a clear distinction between providing legal information and legal advice by not interpreting the law on behalf of the parties' particular dispute.

[5] Such rules may include, but are not limited to, Rule 1.12 (Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals) or Rule 2.4 (Lawyer Serving as Third-Party Neutral).

On the issue of process quality, the Committee seeks to augment the reasoning set forth in 2008-02. In that Opinion, the Committee declined to require that the mediator tell the parties about the specific administrative rule because such a requirement might lead to the mediator taking on another professional role by giving advice. The Committee now notes that where a mediator believes it is necessary to inform the parties of certain information relevant to the dispute, and can do so in a way that helps the parties communicate, negotiate or make decisions rather than putting the mediator in the position of rendering professional advice, the mediator should do so. One way the mediator in 2008-02 could do this, if she felt it necessary, would be to tell the parties that while she is not acting as anyone's attorney, and cannot give legal advice to either party, she is aware that there may be some law relating to the availability of other dispute resolution processes for cases like theirs. The mediator could then ask the parties whether they had consulted counsel on that point, or would like the chance to do so.