

## Opinion 2010-01

A volunteer mediator from our center was mediating a case at Civil Court. During an individual session with one of the parties, the mediator noticed that the party had a tape recorder on her lap. When the mediator asked the party if she had been taping the mediation session all along, the party said that yes “because she wasn't a good note taker” and she didn't "want to miss anything important."

The mediator asked the party whether she was planning to share with the other party that the session had been recorded and to ask if the other party would agree to have the rest of the mediation taped. The party said she did not plan to do either, since she was recording the session for her own purposes and did not plan to use the taped session against the other party if they went before a judge.

The mediator attempted to explore with the party her underlying interests for wanting a recording of the session. However, the party did not want to discuss it beyond sharing that she just felt more comfortable having a record of the session. The mediator was unsure how to proceed.

### Questions:

1. Should the mediator continue with the mediation?
2. If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing:
  - A. To the other party?
  - B. To center staff?

- Submitted by the director of a CDRC

### Summary of the Opinion

The mediator shall not continue with the mediation. The mediator shall disclose to the parties in joint session that he is terminating the mediation.

The mediator may disclose the fact of the taping and/ or that the taping is the reason for withdrawal. After the mediation session has been ended, the mediator should disclose the taping to center staff.

### Authority Referenced

Standards of Conduct for New York State Community Dispute Resolution Center Mediators, Introduction; Standard I. Self-Determination; Standard II. Impartiality, A., Comment 2 and Comment 3; Standard V. Confidentiality, A., Comment 3 and Comment 6; and Standard VI. Quality of the Process, A. and B., Comment 8. (rev. 2009).

## Opinion

### Question 1.) Should the mediator continue with the mediation?

The mediator shall not continue with the mediation.<sup>1</sup>

According to the facts, the mediator has attempted to explore the underlying interests of the party taping the session (“taping party”). In addition, the mediator has asked the taping party if she would share that she is taping the mediation with the other party. The taping party has not only declined to share the fact of the taping with the other side but has also declined to discuss her reasons for the taping any further. Because this discussion took place during a private session and since the taping party refuses to disclose it to the other party, the private taping directly conflicts with the taped party’s ability to exercise self-determination by making voluntary procedural and substantive decisions from the outset. To allow the mediation to continue without revealing the private taping to the other party would also conflict directly with the quality of the process and the mediator’s impartiality.

The Committee finds that the Standards impacted by this decision to terminate the mediation include Standard I. Self Determination, Standard VI. Quality of the Process, and Standard II. Impartiality.

Standard I. Self-Determination, Comment 1., states:

Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.

While quite unusual, tape recording of mediation can be an appropriate issue of process design for the parties to discuss at the outset of mediation. If given the opportunity to discuss the issue up front, the parties can make informed decisions related to the impact of taping. Parties can determine the acceptable uses of any tape recording given the confidential nature of mediation. They can also assess for themselves the degree to which they participate in the process including their willingness to candidly discuss sensitive concerns when the discussion is being recorded. If

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<sup>1</sup> The Introduction to the Standards of Conduct for New York State Community Dispute Resolution Center Mediators (“CDRC Standards”) states the different levels of guidance. Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment. Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason. Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described. The levels of guidance are extremely significant to understanding the Committee’s analysis, because the Committee’s reasoning can vary greatly whether or not a mediator “may”, “should”, or “shall” pursue a certain course of action. Referring to the levels of guidance when reading the Committee’s Opinion is crucial to understanding the nuances revealed by the ethical dilemma and how the Committee reaches its conclusion. (Standards of Conduct for New York State Community Dispute Resolution Mediators, p. 1).

the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that the taped party can exercise self-determination as to his participation in the process. The impact on the taped party's self-determination alone might be sufficient reason for the mediator to stop the mediation. However, the Committee's analysis includes the impact on quality of the process and impartiality.

Standard VI. Quality of the Process, A., states that “(a) mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.” VI. B. further notes that a mediator “shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct...jeopardizes sustaining a quality mediation process.”<sup>2</sup>

Here, the taping party's refusal to disclose the taping to the other party conflicts with the mediator's obligation to conduct a quality mediation process. If the taped party is unaware of the taping, he would clearly have difficulty participating in the process in a manner consistent with these Standards. Again, therefore, the mediator shall terminate the mediation, withdraw from service, or take other appropriate steps, since participant conduct, including that of the mediator, would jeopardize sustaining a quality mediation process.<sup>3</sup>

In addition, the Committee finds further support to terminate the session or withdraw from the mediation in Comment 8. to Standard VI., where -- as in this scenario -- the party appeared to have difficulty participating in the mediation process. The Comment directs the mediator to “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.” Here, the mediator did attempt to explore with the taping party her underlying interests for wanting a recording of the session and the party did not want to discuss it. That provides additional justification for not continuing with the session.

The other Standard directly impacted by this scenario is Standard II. Impartiality. In addition to the above Standards that would lead the mediator to not continue with the mediation session, Standard II. would also create a reason for the session to be discontinued. The mediator could not continue with the session without informing the other party of the taping that has occurred, because to do so would be to create the appearance (and in fact the possible existence) of mediator partiality. Standard II. A. states:

A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.

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<sup>2</sup> Standard VI. B., Quality of the Process.

<sup>3</sup> The Committee does not address which of these actions to take, because the inquirer only asks whether the mediator should continue with the mediation, and because the Committee's role is not to suggest “best practices.”

The taped party could very well find out about the taping at a later time and it would impact the taped party's experience of the mediation, as well as the possible outcome.

In weighing all of the above factors, the Committee concludes that the mediator shall not continue with the mediation. Taping a mediation without the other party's knowledge interferes with the other party's exercise of self-determination, the mediator's obligation to remain impartial and jeopardizes sustaining a quality mediation process. As always, if the mediator is unsure how to proceed in this instance, the mediator should stop the mediation and consult with Center staff.

**Question 2.A.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to the other party?**

The Committee, after careful consideration, finds that the mediator may disclose the taping to the taped party. The Committee notes that the mediator's discretion to disclose the taping to the taped party indicates a practice that the mediator should consider adopting although it can be deviated from in the exercise of good professional judgment.<sup>4</sup> In reaching its conclusion, The Committee looks to Standard V. Confidentiality, Standard I. Self Determination, Standard II. Impartiality, and Standard VI. Quality of the Process.

Standard V. Confidentiality, states:

A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.

The taped party would reasonably expect that communications made during the course of mediation would remain confidential. The secret tape recording of the mediation by the taping party could reasonably be seen as frustrating the taped party's expectation of mediation confidentiality.

However, the facts indicate that the mediator became aware of the tape recorder during private session and the taping party informed the mediator that she did not intend to tell the other party. Standard V. Confidentiality, Comment 3., states:

A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.

The Committee therefore must attempt to balance the taping party's confidentiality with the taped party's confidentiality while at the same time examining the impact of the taping and its

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<sup>4</sup> See explanation of levels of guidance for use of the term "may" in the Introduction to the CDRC Standards.

non-disclosure on self-determination, quality of the process, and the mediator's impartiality.

The Committee admits that on the analysis of the Standard of Confidentiality alone, the mediator might be told that he may disclose the taping to the other party. However, with the additional examination of the impact of the taping and its non-disclosure on self-determination, quality of the process, and the mediator's impartiality, the Committee solidifies the finding that the mediator may disclose the taping to the other party.

Looking to the analysis of Standard I., Comment 1., above, if the taping party is not willing to share that taping has already occurred, then the mediator is unable to ensure that both parties can exercise self-determination as to their participation in the process. The taped party cannot assess how taping could impact his participation in the process.

As stated previously in Question 1. above, the mediator shall avoid conduct that gives the appearance of partiality toward or prejudice against a party.<sup>5</sup> By not disclosing to the other party that the mediation had been taped, the mediator could be perceived as acting with prejudice against the taped party. Furthermore, by not disclosing the taping to the other party, the mediator would at a minimum be giving the appearance of acting with partiality towards the taping party.

Finally, Standard VI. Quality of the Process requires that the mediator "shall conduct a quality mediation process that is consistent with these Standards of Conduct."<sup>6</sup> By not disclosing the reason for terminating the session, withdrawing from service, or taking other appropriate steps to temper the taping party's conduct, the mediator would not be fulfilling his required duty to sustain a quality mediation process.<sup>7</sup> For all of the above reasons, the Committee holds that the mediator may disclose the reason for ending the session.

**2.B.) If the mediator does not continue the mediation, can the mediator disclose the reason why he is withdrawing to center staff?**

Standard V. Confidentiality, Comment 6., states that "(n)othing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates."

The mediator should disclose the taping to center staff so that staff will be aware of the circumstances of why the mediator withdrew from the mediation, especially if the same parties requested or are referred to mediation by the court again.

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<sup>5</sup> Standard II. Impartiality, A.

<sup>6</sup> Standard VI. A.

<sup>7</sup> Id. at B.