

Opinion 2009-01

You are the mediator in a custody and visitation matter. The parties have four children. The two older children are in school. The two younger children are not yet in school. Dad has recently moved in with a woman who has four children of her own who reside with her. Dad and his girlfriend live about a half hour away from Mom.

During the mediation the parties discuss having the two older children reside with Mom and the two younger children reside with Dad. Mom seems hesitant. She seems to be okay with the idea of separating the children, but wants all of the children to attend the same school. That is very important to her. As a mediator who has often mediated parenting cases, you are pretty sure that the mother's school district will not allow the younger children to attend the school if they reside with Dad who lives in a different district. You believe that another factor behind Mom's hesitance is her twice expressed concern that the children of the father's live in girlfriend have caused physical harm to the parties' two young children, although Mom's description of "physical harm" was couched in terms of typical sibling rivalry. The harm did not result in the need for medical treatment. Mom does not appear to be convinced by Dad's statements that he has spoken with the girlfriend's children and that it will not happen again. She is worried that the tension might escalate.

Despite the above, Mom and Dad have tentatively agreed that the two older children will reside with Mom and the two younger children will reside Dad. Mom is getting ready to sign the agreement, but does not look at all comfortable.

The Question:

As a mediator, what if anything should you do at this point?

Submitted by a CDRC mediator.

Summary

If the mediator is unsure about what action to take prior to the mother's signing the agreement, the mediator shall meet with each party in individual sessions to find out more information and check in with the parties regarding the agreement. If the mediator is still unsure of what to do after speaking with the parties and obtaining clarification, then the mediator shall consult with center staff for guidance and should inform the parties of other options that may help them make informed decisions. The mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if at any time the mediator believes that she/ he cannot ensure a quality mediation process.

Authority Referenced

Standards of Conduct for NYS Community Dispute Resolution Center ("CDRC") Mediators, Standard I. Self Determination, Comments 1., 2., and 3.; Standard II. Impartiality, A. and C., Comment 2.; Standard IV. Competence, Comments 1. and 2; Standard V. Confidentiality, A. and Comment 2.; Standard VI. Quality of the Process (rev. 2007); Community Dispute Resolution

Center Program Manual, Ch. 7, Section I. A.(5) (June 11, 2003); Model Standards of Practice for Family and Divorce Mediation, The Symposium on Standards of Practice convened by the Association of Family and Conciliation Courts (August 2000).

Opinion

The mediator asks what he/ she should do when the mother looks uncomfortable when she is about to sign an agreement with the father regarding the custody of their children. In answering this question, the Committee must first address the possible ethical dilemmas that the mediator may be encountering.

In addition to looking to the Standards of Conduct for NYS CDRC Mediators ("CDRC Standards"), the Committee finds the Model Standards of Practice for Family and Divorce Mediation ("AFCC Standards") help to provide further guidance to the mediator.¹ The AFCC Standards specifically address mediation cases involving children and parents, and take into consideration issues such as "best interests of the children" and the importance of having the parties consult an outside professional or have an attorney review the agreement before it is signed.² Furthermore, the AFCC Standards require similar knowledge and competency for a mediator who is mediating family cases under the AFCC Standards as are required by the CDRC Standards.³

The Committee finds the authority to look to outside standards within the "Introduction" to the CDRC Standards, which holds that "(t)he Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations."⁴ As the Committee has stated in a previous opinion, the Committee considers, interprets or refers to Standards adopted by other entities in formulating a response to a particular inquiry only to the extent that the CDRC Standards fail to offer sufficient guidance or because the inquirer has specifically asked for an interpretation of other entities' Standards.⁵ In this opinion, the Committee finds that the CDRC Standards address

¹Model Standards of Practice for Family and Divorce Mediation, The Symposium on Standards of Practice convened by the Association of Family and Conciliation Courts (2000).

²The AFCC Standards include three different levels of guidance to the mediator: 1.) Use of the term "may" in a Standard is the lowest strength of guidance and indicates a practice that the family mediator should consider adopting but which can be deviated from in the exercise of good professional judgment. 2.) Most of the Standards employ the term "should" which indicates that the practice described in the Standard is highly desirable and should be departed from only with very strong reason. 3.) The rarer use of the word "shall" in a Standard is a higher level of guidance to the family mediator, indicating that the mediator should not have the discretion to depart from the practice described. These levels of guidance were the models from which the CDRC Standards adopted its levels of guidance (FN. 3, CDRC Standards).

³AFCC Standard II. A. states: "A family mediator should: 1.) have knowledge of family law; 2.) have knowledge of and training in the impact of family conflict on parents, children and other participants, including knowledge of child development, domestic abuse and child abuse and neglect; 3.) have education and training specific to the process of mediation; 4.) be able to recognize the impact of culture and diversity." See also CDRC Standard IV. Competence, Comments 1. and 2.; CDRC Program Manual, Ch. 7, Section I. A.(5).

⁴Standards of Conduct for NYS Community Dispute Resolution Center Mediators (rev. 2007).

⁵Mediator Ethics Advisory Opinion 2006-01.

many of the questions that arose in considering the sources of the mediator's dilemma, yet the AFCC Standards offer unique guidance as it relates to the specifics of a family mediation involving children.

As the mediator did not specify the source of her/ his concerns, the Committee has looked to the following facts as possible sources of ethical dilemmas:

I. The case being mediated is a custody/ visitation matter between parents with four children. Under the proposed agreement, the children will split up into two separate households: the two older children will remain with the mother and the two younger children will move in with the father, his live in girlfriend, and the girlfriend's four older children. The Committee sees these facts as a possible concern to any mediator. A mediator may find it difficult to be confronted with parents splitting up their children into two households, especially considering the surrounding facts: that the mother's children possibly will not be able to all attend the same school and there is concern about potential physical harm to her two younger children.

Looking first to the CDRC Standards, the Committee considers the Standards of Self Determination, Impartiality, and Quality of the Process. Under CDRC Standard II. Impartiality, a mediator is required to conduct a mediation impartially and with regard to the principal of party self determination. CDRC Standard II. A. continues by stating that "(a) mediator shall accept for mediation only those matters in which the mediator can remain impartial."

The mediator's discomfort with the parties' proposed agreement to split up the children and with the mother's apparent concern with signing the agreement may indicate that the mediator is having difficulty remaining impartial under the circumstances.

Under CDRC Standard I. Self Determination, a mediator is required to conduct a 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 CDRC Standard I., however, states that the mediator may need to balance party self determination with a duty to conduct a quality mediation process.⁶ Standard I., Comment 3. adds that "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." As such, the Committee holds that the mediator should inform the parties that they may consult other professionals to help them make informed decisions.

The Committee believes the mediator can promote a voluntary agreement without being partial or interfering with the parties' self determination, by making the parties aware that they may consult other professionals to help them make informed choices. This can be done "even while raising

⁶Standard VI. A. states that "(a) mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct."

questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw."⁷

Looking to the AFCC Standards, the mediator faces a possible dilemma between the parties' self-determination and the best interests of the children.⁸ Self-determination is the fundamental principle of mediation.⁹ However, AFCC Standard VIII. requires that a family mediator "shall assist participants in determining how to promote the best interests of the children." As such, the mediator may find that the children splitting up into two different families may need to be explored further by the parties before a final decision is made. AFCC Standard VIII. A. continues: "The mediator should encourage the participants to explore the range of options available for separation or post divorce parenting arrangements and their respective costs and benefits. Referral to a specialist in child development may be appropriate for these purposes." Possible topics for discussion may include, among others:

- "1. information about community resources and programs that can help the participants and their children cope with the consequences of family reorganization and family violence;
2. problems that continuing conflict creates for children's development and what steps might be taken to ameliorate the effects of conflict on the children;
3. development of a parenting plan that covers the children's physical residence and decision-making responsibilities for the children, with appropriate levels of detail as agreed to by the participants;
4. the possible need to revise parenting plans as the developmental needs of the children evolve over time; and
5. encouragement to the participants to develop appropriate dispute resolution mechanisms to facilitate future revisions of the parenting plan."¹⁰

While the Committee does not assume that the mediator has not already explored these options with the parties, based on training as a CDRC mediator in family matters and without necessarily looking to the AFCC Standards for guidance, the Committee concludes that the mediator should also take this step to assist the parties in determining how to promote the best interests of the children. If the parties do not wish to explore this or other options, the mediator can choose several actions under the AFCC Standards.

AFCC Standard VI. C. provides that "(t)he mediator should recommend that the participants obtain independent legal representation before concluding an agreement," in order "that the participants

⁷CDRC Standard II., Comment 2.

⁸AFCC Standards I. and VIII.

⁹Id. at I. A.

¹⁰Id. at VIII. A. 1.-5.

make decisions based on sufficient information and knowledge."¹¹ Further, the mediator "should inform the participants that any agreement should be reviewed by an independent attorney before it is signed."¹² Another option under AFCC Standard I. C. is that the mediator "should inform the participants that they may seek information and advice from a variety of sources during the mediation process," including prior to signing the agreement. One final option for the mediator exists under AFCC Standard XI. A., which provides the possible circumstances under which a mediator "should consider suspending, or terminating the mediation," including "if the mediator believes the mediator's impartiality has been compromised in accordance with Standard IV" (addressing Impartiality) in AFCC Standard XI., A., 7. If the mediator chooses this option, the AFCC Standards state that the mediator "should take all reasonable steps to minimize prejudice or inconvenience to the participants which may result."¹³

II. The second potential source of concern for the mediator may arise from the mediator's knowledge that splitting up the children as the parents have preliminarily decided will result in the children being required to attend different schools. The mediator states in her communication with the Committee that although the mother "seems to be okay with the idea of separating the children," she "seems hesitant" about the arrangement if the children cannot all attend the same school. In addition, the mediator states that he/ she "has often mediated parenting cases..." and is almost certain that the mother's school district "will not allow the younger children to attend the school if they reside with Dad who lives in a different district." Notwithstanding the fact that the two younger children are not yet in school, the Committee finds that the mediator faces a potential dilemma by virtue of knowing an applicable regulation, but not being in a position to give advice about this regulation to the mother.

The CDRC Standards impacted by such a dilemma include CDRC Standard I. Self Determination and CDRC Standard VI. Quality of the Process. The mediator must determine if the mother is able to make an informed decision without this information, which the mediator believes may be pertinent to the mother's decision. In order to ensure a quality process, then, the mediator should inform the parties in joint session that they may consult other professionals to help them make informed decisions. The mediator may also choose to check this option with the parties by asking if they are aware of any governing regulations pertaining to the children living at different residences but attending the same school.

The Committee did not need to address the AFCC Standards in resolving this dilemma, as the Committee found the CDRC Standards to provide sufficient guidance to the mediator.¹⁴

¹¹See Id. at VI.

¹²Id. at E.

¹³AFCC Standard XI. B.

¹⁴The Committee reviewed AFCC Standards I. and VI. before making this determination. If the mediator consulted the AFCC Standards, the mediator would also consider AFCC Standard I., which focuses on self-determination, and AFCC Standard VI., which focuses on the mediator structuring the process so that the parties

III. The third potential source of concern for the mediator may be seen in the mediator's statement that he/ she believes that "another factor behind Mom's hesitance is her twice expressed concern that the children of the father's live in girlfriend have caused physical harm to the parties' two young children," although Mom's description of 'physical harm' was couched in terms of typical sibling rivalry. While "the harm did not result in the need for medical treatment...Mom does not appear to be convinced by Dad's statements that he has spoken with the girlfriend's children and that it will not happen again. She is worried that the tension might escalate."

In these statements, the Committee finds two potential ethical dilemmas: one, that there is physical harm that may or may not rise to the level of abuse; and two, that the mother is not convinced by the father's statements that the physical harm will stop.

If the mediator is unsure whether the physical harm constitutes child abuse, CDRC Standard V. Confidentiality, Comment 2. requires the mediator "to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process."¹⁵ The mediator shall meet with each party in an individual session. After speaking with the parties, the mediator shall consult with a staff person at the center and share the information obtained at the individual session. Center staff shall then determine the next step to take.

If center staff determines that the mediation can continue, the mediator shall then explore the mother's "twice expressed concern" that the harm caused to the two younger children by the father's girlfriend's four children will not happen again and that "the tension may escalate." Again, the mediator must balance the parties' self-determination with ensuring a quality mediation process. The mediator should check in with the parties regarding the durability of the agreement. If the mother still seems uncomfortable with the agreement after reflecting on it further, the mediator should meet with the parties in individual session to assess whether the agreement is viable. CDRC Standard I., 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 "(a) mediator cannot personally ensure that each party has made a fully informed choice to

make decisions based on sufficient information and knowledge. Under the AFCC Standards, the mediator should endeavor to ensure that the parties' make an informed decision and should do so by suggesting they seek outside appropriate guidance as to what, if any, regulations would apply to an agreement to move two of the children to another location yet put all four of the children in the same school. Therefore, the mediator would come to the same conclusion as the mediator would reach under the CDRC Standards.

¹⁵CDRC Standard V.A. states: "An allegation of child abuse is the only exception to the Confidentiality Standard and any allegation may be reported to center staff."

reach a particular agreement...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.”¹⁶ The mediator "shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process."¹⁷

The Committee did not need to address the AFCC Standards in resolving this dilemma, as the Committee found the CDRC Standards to provide sufficient guidance to the mediator.¹⁸

IV. The fourth potential source of concern for the mediator may be seen in the mediator's statement that the mother "is getting ready to sign the agreement, but does not look at all comfortable." Here, as in the Committee's previous analysis in fact scenario II., the mediator must balance the party's self determination with the mediator ensuring a quality process under the CDRC Standards I. and VI. The Committee did not need to address the AFCC Standards in resolving this dilemma, as the Committee found the CDRC Standards to provide sufficient guidance to the mediator.¹⁹

¹⁶CDRC Standard I., Comment 3. The footnote to this Comment further adds: "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."

¹⁷CDRC Standard VI., B.

¹⁸The Committee reviewed AFCC Standards IX. and VI. A. and E., and VII. A. before making this determination. If the mediator consulted the AFCC Standards, the mediator would also consider AFCC Standard IX, which states that "(a)family mediator shall recognize a family situation involving child abuse or neglect and take appropriate steps to shape the mediation process accordingly." Therefore, "(i)f the mediator has reasonable grounds to believe that a child (or children) of the participants is abused or neglected within the meaning of the jurisdiction's child and neglect laws, the mediator shall comply with applicable child protection laws." This would not require the CDRC mediator to go beyond the steps outlined under the CDRC Standards to find out further information in individual sessions with the parties and notify the CDRC staff for further guidance as to whether to continue the mediation. AFCC Standard VI. E. also would advise the mediator to consider the appropriateness of suspending and terminating the mediation process in light of the allegations," or should encourage the "participants to consult appropriate experts," which the mediator would do as well under the CDRC Standards. Further, if the mediator does not believe the mother is comfortable with the father's statement that the physical harm to the two younger children will stop, AFCC Standard VI. A. guides the mediator to facilitate "full and accurate disclosure and the acquisition and development of information during mediation so that the participants can make informed decisions. This may be accomplished by encouraging participants to consult appropriate experts." AFCC Standard VII. A. also guides the mediator to "encourage the participants to explore the range of options available for separation or post divorce parenting arrangements..." including "referral to a specialist in child development," before signing the agreement. Again, the mediator would come to the same conclusion as the mediator would reach under the CDRC Standards.

¹⁹The Committee reviewed AFCC Standards I., VI., VIII. and XI. before making this determination. If the mediator consulted the AFCC Standards, the mediator would come to the same conclusion as the mediator would reach under the CDRC Standards.