Opinion #2010-02

An attorney with one of the largest firms in the county has taken the basic mediation training offered by our CDRC. She would like to apprentice with our CDRC, become certified to mediate for our center, and mediate for us. Given the large reach of her law firm, she is concerned about conflicts of interest with her firm's clients and is unsure if she can volunteer as a mediator for the CDRC.

Questions:

1. **Can the attorney-mediator disclose to the parties that she is an attorney, and the name of her law firm?**

2. **Can the attorney-mediator provide the parties' names to her law firm in order that the firm:**

   A. **Check the parties' names against the firm's conflict of interest database, for current conflicts?**

   B. **Enter the parties' names into the firm's database to avoid future conflicts of interest?**

The CDRC where the inquiring mediator intends to mediate has interpreted the confidentiality imposed by Article 21-A of NYS Judiciary Law as extending to the parties' names and, thus, bars the attorney-mediator from disclosing that information to anyone, including her law firm, regardless of the purpose. The CDRC seeks more clarity from the Committee.

CDRC also acknowledges that it is likely that questions 2.A. and 2.B. may have to be posed to the appropriate committee or body that oversees attorneys under the New York State Rules of Professional Conduct, since they might not be able to be addressed through the CDRC Standards of Conduct.

The CDRC asks the Mediator Ethics Advisory Committee for guidance on these questions.

- **Submitted by a CDRC Director.**

Summary of the Opinion

Where there is no compelling reason for a mediator to disclose his or her profession, or the name of her or his law firm, a mediator should not disclose unless asked by a party. A compelling reason to disclose would include one of the parties or the mediator reasonably believes a potential or actual conflict of interest exists. The attorney mediator provided the following information: she is an attorney in the largest firm in a small county. As an attorney she is bound by the New York State Rules of Professional Conduct ("Rules of Professional Conduct") for lawyers and has a duty to check for conflicts of interests that may affect her and her law firm. The attorney reasonably believes that a potential or actual conflict of interest for her as a mediator may exist in any given case, since she is a lawyer in a law firm with large reach in a

small county where she would also like to mediate. Therefore, this attorney-mediator has a compelling reason to reveal her profession and the name of her law firm to the parties due to her reasonable belief that a potential conflict of interest may exist. If she is certified for this CDRC and becomes a mediator there, this attorney-mediator, under her circumstances, may reveal to any mediating parties that she is an attorney and the name of her law firm, for purposes of checking for potential or actual conflicts.

Normally, a CDRC mediator who is also an attorney should not disclose the parties' names to anyone for any purpose, including inputting the parties' names into her law firm's database to check for conflicts. However, the levels of guidance under the CDRC Standards allow for a mediator to depart from this prescribed practice with "very strong reason."[1] The Committee finds that compliance with an applicable professional ethics Rule, such as the Rules of Professional Conduct, applicable to attorneys and cited by this inquirer, may amount to a strong reason for the attorney-mediator to depart from standard practice. However, it only amounts to a "strong reason" if: the attorney-mediator finds she cannot comply with the Rules of Professional Conduct without inputting the parties' names into her firm's conflict of interest database; the CDRC does not prohibit the input of the parties' names into the attorney-mediator's law firm's database; and the input of the names into her firm's database does not violate any other applicable laws.

The attorney-mediator shall do no more than the minimum necessary to satisfy the Rules of Professional Conduct. If, after careful consideration of these factors, the attorney-mediator determines she has very strong reason to depart from the prescribed practice, she shall then consult with CDRC staff to find out if she is allowed under CDRC policy to input the parties' names into her law firm's database. Before doing so, however, the attorney-mediator shall obtain the parties' consent in a manner prescribed by the CDRC. In order to obtain the parties' consent to a conflict check after meeting the requirements outlined by the Committee above, the attorney shall disclose to the parties that she is an attorney and the name of her law firm.

Authority Referenced
Standards of Conduct for NYS Community Dispute Resolution Center Mediators, Introduction; Standard III: Conflicts of Interest; Standard V. Confidentiality; and Standard VI. Quality of the Process; NYS CDRC Program Manual, Chapter V. Operational Policies (rev. 2009).

Opinion
Question 1. Can the attorney-mediator disclose to the parties that she is an attorney, and the name of her law firm?

The attorney-mediator may disclose to the parties that she is an attorney and/ or the name of her law firm, but only in a manner consistent with CDRC Standards III. Conflicts of Interest, and V. Quality of the Process. The attorney-mediator may disclose that she is an attorney and/ or the name of her firm specifically because the mediator reasonably believes that the great reach of her law firm within the county in which she would also like to mediate creates potential or actual

[1] The Introduction to the Standards states that the Standards include different levels of guidance. Specifically, "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."

conflicts of interest for her as a mediator in any given case. The Committee notes, however, that CDRC mediators who are also attorneys or practice in another professional role should not disclose their professional status to parties without applying their particular facts to the Standards.

Standard III. Conflicts of Interest states that a mediator shall avoid the appearance of a potential, actual or future conflict of interest with parties.[2] Standard III. B. then provides guidance on how to determine if a conflict of interest exists:

> Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.

Comment 1. of the Standard describes a "reasonable inquiry" :

> A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest.[3]

The Comment also states that the mediators' duty to make a "reasonable inquiry" may be shaped by the sponsoring organization for which he or she mediates. The purpose of such inquiry is stated as follows:

> Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public's or party's perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session."

Most CDRCs operate in similar ways, although the Committee recognizes that this particular CDRC may have its own policy shaping how a "reasonable inquiry" is made. Since the Committee is not aware of the specifics of this particular center, it will respond to this question by looking at commonly-accepted CDRC mediator practice. Typically, a "reasonable inquiry" by a CDRC mediator is made at two entry points: first, when a CDRC mediator comes to the CDRC to mediate a case, the CDRC staff will provide the mediator with basic information about the case just prior to the mediation, often including the parties' names and the nature of the

[2] See Standard II1. A.
[3] Id. at Comment 1.

dispute. This allows the mediator to make an initial "reasonable inquiry" into whether there exists an actual or potential conflict of interest by looking at the parties' names for prior recognition; second, the CDRC mediator will make a "reasonable inquiry" at the beginning of the mediation, when the mediator meets the parties and provides his or her "opening statement." In the opening statement, the mediator will first be able to identify the parties and see if she or he recognizes one or more of them. If so, the mediator shall acknowledge that and check in with the parties to see if they still wish to proceed (assuming the mediator is also comfortable). If not, the mediator might then ask the parties if they recognized him or her, or if they ever met or worked with her or him. If not, the mediator could then proceed. The Committee finds these commonly-accepted practices to meet the "reasonable inquiry" standard for CDRC mediators, and would be sufficient under the Standards for any CDRC mediator -- regardless of the mediator's profession outside of the mediation.

However, under these specific facts and given the attorney-mediator's concern with the reach of her law firm within the county where she practices law and would also like to mediate, the attorney-mediator may disclose to the parties that she is an attorney and the name of her law firm in order to satisfy her concern that there could be a connection between her, her law firm, and at least one of the parties.

The Committee does not come to this conclusion lightly, and requires the attorney-mediator to consider Standard VI. Quality of the Process, Comment 5., in order to do so in a way that does not bring into question the attorney-mediator's role as acting in any way other than a mediator. Standard V. makes clear that a mediator is required to act only as a mediator in her role:

> 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.

Therefore the Committee cautions the attorney-mediator that when she shares with the parties that she is an attorney and the name of her law firm in order to avoid what she perceives as a potential or actual conflict of interest, she must do so in a way that clearly informs the parties that she is only acting in her role as a mediator.

Whether the attorney-mediator should disclose her profession and law firm's name to the parties as a matter of attorney ethics is beyond the scope of the CDRC Standards and the Mediator Ethics Advisory Committee, and therefore the Committee cannot address it. The Committee can only guide the attorney-mediator in her ethical obligations as a CDRC mediator.

Question 2.A **Can the attorney-mediator provide the parties' names to her law firm in order that the firm may check the parties' names against the firm's conflict of interest database for current conflicts?**

Question 2.B. **Can the attorney-mediator provide the parties' names to her law firm in order that the firm may enter the parties' names into the firm's database to avoid future conflicts of interest?**

The CDRC attorney-mediator should not disclose the parties' names to anyone for any purpose, including for the purpose of inputting the parties' names into her law firm's database to check for conflicts. This applies whether the attorney-mediator wishes to input the parties' names into the database before the first mediation session, or subsequent to the second session, if more than one session is agreed to, or to avoid a future attorney conflict of interest for the attorney-mediator or her firm subsequent to the mediation.

However, as stated by the level of guidance in the Introduction to the Standards, the attorney-mediator may depart from this practice with very strong reason. A requirement under another professional ethics code, such as the Rules of Professional Conduct, may amount to a strong reason for the mediator to depart from the Committee's directive. However, the attorney-mediator may depart from standard practice only if: she cannot comply with the Rules without inputting the parties' names into her firm's conflict of interest database; the CDRC does not prohibit the input of the parties' names; and input of the names does not violate any other applicable laws. In any case, the attorney-mediator shall do no more than the minimum necessary to satisfy the other code. If the attorney-mediator does input the parties' names into her law firm's database, then the attorney-mediator shall disclose to the parties that she is an attorney, the name of her law firm, and obtain the parties' consent to put their names into her law firm's database.

The CDRC where the inquiring mediator intends to mediate interprets the confidentiality imposed by Article 21-A as extending to the parties' names and, thus, bars the attorney-mediator from disclosing that information to anyone, including her law firm. However, the Committee's role is not to interpret the law, i.e., whether Article 21-A would allow the attorney-mediator to input mediating parties' names into her law firm's database. Instead, the Committee's role is to determine whether this mediator's inputting parties' names into her law firm's database would constitute ethical mediator practice.

For the purpose of clarity, the Committee cites to the statute in Comment I. of Standard V.:

> All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.

Article 21-A protects "all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding."[4]

A common view of CDRCs is that any communication, beginning with screening and intake and leading up to a mediation, is considered "a mediation" under Standard V. A. As such, to input

[4] Footnote 12. to Standard V., Comment 1.

parties' names into an outside database would seem contrary to the purpose of a provision of confidentiality and the parties' expectation of confidentiality.

For further guidance, the Committee must look to Chapter V. of the CDRC Program Manual ("Program Manual"), referenced throughout the Standards of Conduct.[5] The Program Manual states that a center should not disclose to anyone any information contained in the center's case files, including the identity of a party[6], unless the party first signs "a document that permits and requests the center to disclose that information. This request may itemize the information that the party wants the center to disclose, and it may indicate the institution or person to whom the center should send the information."[7] Therefore, a CDRC mediator should not disclose the identity of the parties without, at a minimum, the parties' consent to their identity being released.

Using this directive as guidance, if the attorney-mediator must check for conflicts of interest by inputting the mediating parties' names into her law firm's database to comply with the Rules of Professional Conduct, and such use of the parties' names is lawful under applicable law, then the Committee believes that doing so may constitute "very strong reason" to depart from the prescribed practice under the Standards.[8]

However, if the attorney-mediator must input parties' names into her firm's database to comply with the Rules of Professional Conduct, then she must balance her obligations as a CDRC mediator with those of an attorney in this particular scenario. She must do the minimum necessary to satisfy the Rules of Professional Conduct, while balancing them with her obligations as a CDRC mediator. Most importantly, the attorney-mediator must do so by discussing this with center staff and then obtaining the parties' consent.

Whether the attorney-mediator can or should enter the parties' names into her law firm's database prior to the mediation session or subsequent to the mediation to satisfy a possible attorney ethics requirement is beyond the scope of the CDRC Standards and the Mediator Ethics Advisory Committee.

[5] NYS CDRC Program Manual, Chapter V. Operational Policies, IV.C.2.
[6] Id. at 2(a).
[7] Id. at 3.
[8] As stated in the Introduction to the CDRC Standards, the Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations. The Committee encourages the attorney-mediator to seek clarification of her professional responsibilities as an attorney as it interfaces with her responsibilities as a CDRC mediator.