

## Opinion #2015-01

A husband and wife contacted the center to mediate their custody and support issues that have been the subject of litigation since 2009. CDRC staff conducted a standard initial intake to determine general appropriateness for mediation. As is customary with all intimate partner cases, staff provided an additional extensive screening with each party separately, to further assess appropriateness, including the potential existence of a power and control dynamic between the parties. The case was determined to be appropriate for mediation and a certified volunteer mediator was assigned to mediate the case from the CDRC's custody and visitation roster.

Both the husband and wife are represented by attorneys; however, the parties and their attorneys agreed that the parties would attend the mediation session without their attorneys present. Prior to the initial mediation session, the husband's attorney contacted the mediator to request that the mediation be video-recorded. The attorney shared with the mediator that since he would not be present at the mediation, he wanted to have a record of it in order to best advise his client going forward. He also shared that his client, the husband, was amenable to having the session video-recorded. The mediator contacted the husband, the wife and the wife's attorney, separately, to check with them about the request, and none of them expressed an objection to video-recording the session. The mediator concluded that the husband's attorney's request stemmed from a desire to have a record of what was said in mediation for the purposes of assisting his client and not for other possible purposes. The mediator then contacted the attorney for the child, who was also unable to participate, but did not express concern about the session being video-recorded.

The mediator has brought this information to the Center Director, since she is concerned about video-recording the mediation, even with the agreement of all the necessary parties. Although the Center does not have an express policy on video-recording, the mediator and the Center are unsure how recording a session might impact confidentiality. The attorneys have not indicated that they would use the video-recording in subsequent litigation or for other purposes. However, the mediator is apprehensive about the possibility and expresses concern that the parties and their attorneys may not fully understand the possible chilling effect video-recording the mediation may have on the process. The mediator is also concerned about how video-recording the mediation could impact her ability to mediate.

### Question:

Should the Center allow for the video-recording of the mediation as requested by the parties?

– Submitted by a CDRC Director

### Summary of the Opinion

The Center should not allow for the video-recording of the mediation. Although Standard I. Self-Determination extends to the parties' rights to make decisions about the process, it is the mediator's and Center's responsibility to ensure that Standard V. Confidentiality is understood

and maintained, while providing a mediation process that is consistent with Standard VI. Quality of the Process.

### **Authority Referenced**

Standards of Conduct for NYS Community Dispute Resolution Center Mediators (rev. 2009); Standard I. Self-Determination; Standard V. Confidentiality; and Standard VI. Quality of the Process.

### **Opinion**

The decision as to whether the Center should allow for the video-recording of the mediation would have been very clear had either party or the wife's attorney, in consultation with the wife, objected or expressed reluctance or concern about video-recording. Standard I. Self-Determination, states that: "...parties are free to make voluntary and uncoerced procedural and substantive decisions"<sup>1</sup> and "...can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes."<sup>2</sup> Those principles, however, must be balanced against "(i)ndicators of a 'power imbalance' that may impede a party's ability to make a decision freely and willingly."<sup>3</sup> Had either the wife or the husband expressed reluctance or concern about the video-recording, it would not have been permitted because there would not have been the consent of both parties. Yet, after discussion with all parties and their attorneys, and after an extensive screening for power imbalances including domestic violence that is typically performed in custody and visitation mediation cases by the Center, the mediator found no indicators that there was any coerciveness present that would have influenced the parties' decisions to video-record the mediation.<sup>4</sup> As such, the mediator, and thereby the Center, is solely faced with the question of whether to allow the video-recording of the session for the purposes of providing a record of the session for the husband's attorney. After considering the levels of guidance and whether the Center "may", "should" or "shall" take a particular course of action, the Committee concludes that the Center should not allow the video-recording of the mediation.<sup>5</sup>

Standard I. Self-Determination requires that "(a) mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome."<sup>6</sup> Therefore, the parties have the right to make voluntary choices about the process, including whether to video-record the mediation. However, Standard I. also states that "(t)he mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process."<sup>7</sup> Mediators protect Standard VI., Quality of the Process,

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<sup>1</sup> Standard I. Self-Determination, A.

<sup>2</sup> Id. at Comment 1.

<sup>3</sup> Id. at Comment 4., n 7. Comment 4. describes such power imbalances as including: "...where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation."

<sup>4</sup> In addition to an initial and extensive screening in custody and visitation cases, CDRCs continually assess whether power and control dynamics are present through conversations with the parties by staff or by the mediator. Throughout the session, the mediator is also observing and noting the parties' interactions and communications, so as to ensure that the parties can freely and willingly make procedural and substantive decisions.

<sup>5</sup> Under the levels of guidance listed in the Introduction to the Standards, "(u)se 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."

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

<sup>7</sup> Id. at Comment 1.

by offering a forum for resolution that is consistent with the guiding principles of mediation. Under the Standards, mediation is defined as "...a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome."<sup>8</sup> In order to best encourage a free and open dialogue and provide creative opportunities to assist the parties in addressing their issues, the mediator must provide a safe environment for parties to have candid conversations. Having every word potentially scrutinized after the mediation can undermine the safety and candor that mediation is intended to foster.

The Committee also looks to Standard V. Confidentiality for guidance. Standard V. 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."<sup>9</sup>

Article 21-A of the Judiciary Law provides the statutory foundation for protecting information obtained by a mediator during a mediation, asserting that: "all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding."<sup>10</sup> Having a video-recording of a mediation potentially impacts the confidentiality of that session.

Because confidentiality is a fundamental principle to the process of mediation, it must be protected at all reasonable costs. Allowing information about the process to be shared with the parties' attorneys, outside of the mediation, is clearly understandable. However, while these parties and their attorneys would only allow for the video-recording to be utilized for the sole purpose of aiding in their mediation efforts, there may be unforeseen consequences in which this video-recording could be used. Unforeseen consequences could include the video being viewed by other third parties, including court personnel; or utilized for other unanticipated purposes, e.g. posting to social media and/ or an Internet website. Knowing that the substance of a mediation session could possibly be shared with third parties outside the session could further deter or discourage prospective users from engaging in the process.

In addition to the above-mentioned factors, the Committee considered whether there were other options available to the parties to capture the substance of their session. Standard VI. states that "(a) mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child."<sup>11</sup> By participating in the session, the attorneys can exert the proper influence needed to guide and advise their clients. Having the attorneys present also increases the effectiveness of the process, since they can provide assistance contemporaneously, which reduces any misunderstandings or potential difficulties after the fact. Another option available to the parties, should their attorneys not be able to participate, is to take notes during the session. While taking notes necessarily must be balanced with participating fully, listening and

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<sup>8</sup> See Definitions to Standards.

<sup>9</sup> Standard V. Confidentiality, A.

<sup>10</sup> Cited in part in Standard V. Confidentiality, Comment 1, n 12; provided in full in Appendix to Standards.

<sup>11</sup> Standard VI. Quality of the Process, C.

considering options in the moment, notes of the session can be extremely helpful for the parties when debriefing with their respective attorneys after the mediation. Further, the fundamental principles of Self-Determination and Quality of the Process always allow for the parties to request that the session be paused so a party can reach out to his/ her attorney for guidance at any time during the mediation. Finally, any agreement or decisions made by the parties can be reviewed by their attorneys before finalizing.