

Opinion #2013-01

An interpersonal conflict among co-workers was referred to a non-Community Dispute Resolution Center (“CDRC”) provider. The dispute involved the complainant and two respondents.

On the day of the mediation, the complainant arrived separately from the other parties and before entering the mediation room told one of the mediators (who was waiting outside of the mediation room) that he was reluctant to mediate and expressed concerns that he did not have his attorney with him and that he did not realize he should have brought his attorney. He said this notwithstanding the fact that the agreement to mediate was sent to the parties well in advance of the mediation date and is clear in stating that parties are not required to but may bring an attorney. The mediator, speaking separately with the complainant outside of the mediation room, expressed that the process was voluntary in nature so that he could stop or withdraw from the session at any time. The mediator encouraged him to contact anyone he would like before proceeding and that ultimately it was up to the complainant to decide whether he wanted to mediate. The complainant stepped away and made a phone call.

After his call, the complainant came back to the mediator who was waiting outside of the mediation room and stated that he wanted to start the mediation. The co-mediators began the mediation and all parties acknowledged having read the agreement to mediate and signed it. One of the mediators then asked which of the parties would like to begin. All of the parties hesitated, but eventually one of the respondents started to talk. The two respondents took turns speaking while the complainant listened intently and took copious notes. This went on for roughly forty-five minutes. One of the mediators glanced over at the complainant and saw that his notes were very specific and seemed to track who said what. The co-mediators checked in frequently with the complainant, but the complainant refused to speak and continued to take notes.

The co-mediators felt that they had an ethical dilemma at this point. Their concerns surrounded the complainant’s lack of communication, as well as the circumstances as a whole from the beginning of the process. Particularly, they were concerned that the complainant:

1. expressed initial reluctance to participate in the mediation without having an attorney present;
2. made a phone call to someone prior to the mediation and came back with a sudden change of mind about participating;
3. did not speak at all during almost the first hour of the mediation and took copious notes.

Cumulatively, the co-mediators were concerned that the complainant was possibly using the information gleaned from the session towards discovery in a later proceeding. If the mediators continued to facilitate and the respondents continued to talk, the mediators were concerned that they would be unfairly compromising the respondents. On the other hand, the co-mediators were also worried that if they caucused with the parties and tried to

explore the complainant's reluctance to speak then it might be perceived as forcing him to participate beyond his comfort level. The co-mediators pose their questions to the committee based on these concerns.

Fortunately, just seconds before the mediators were about to caucus, one of the respondents asked the complainant a question, the complainant responded and a dialogue began. Ultimately, the mediation was a success. However, had things not turned around when they did, the co-mediators discussed what they might have done next and what would be the ethical implications of various interventions. So, assuming the complainant had remained quiet and not said anything:

Questions

- 1. Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?**
- 2. If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?**

- submitted by co-mediators of a non-CDRC mediation provider

Summary of the Opinion

Based on the facts as presented, the mediators should¹ intervene. Assuming their belief was reasonable, the co-mediators concluded that the complainant was misusing the process and that the complainant's sole objective was the unfair use of the respondents' statements in furtherance of discovery for litigation purposes. As presented in the facts, the respondents were speaking openly while the complainant silently took what appeared to be verbatim notes. The mediators believed that the complainant was not participating fairly in the process but was abusing it. Based on these facts, the co-mediators did have a duty to intervene to assure that the mediation was conducted in a manner that was consistent with the ABA Model Standards of Conduct for Mediators ("ABA Standards"); specifically ABA Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; and Standard VI. Quality of the Process. The mediator also had a duty to confirm that all of the parties shared consistent expectations of confidentiality.

The manner of mediator intervention raises concerns of mediator impartiality. The manner of intervention should not give the parties the impression that the mediators favor one side over another. The purpose of the intervention should be to focus on the parties' understanding of the process and on confidentiality rather than on presumed motivations. While this opinion speaks only to the ethical dilemmas presented by these facts and does not address issues of best practices, the manner of intervention should be such that the mediators respect the parties' right of self-determination. Parties are free to participate in the process however they choose.

¹ The Committee chose to use the level of guidance "should" for this opinion for two reasons: first, the mediators stated they reasonably believed that the mediation was progressing inconsistent with the ABA Standards (utilized because the mediation was not conducted under the auspices of a CDRC, prompting a stricter level of guidance than "may"), and secondly, even if "may" were the appropriate level of guidance, the ABA Standards do not recognize "may").

Mediators, through their intervention, should not curtail that right by imposing their personal concept of appropriate participation on anyone. If mediators reasonably believe that one side is abusing the process, such that the participant's conduct jeopardizes the mediation consistent with these Standards, then the mediators should intervene and, if the participant's conduct cannot be reconciled with these Standards, then the mediator should postpone the mediation session, withdraw from the mediation or terminate the mediation.

Authority Referenced

Since the mediation was a non-CDRC mediation, the authority referenced is the ABA Model Standard of Conduct for Mediators, developed by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution ("ABA Standards"). The Standards of Conduct for New York State Community Dispute Resolution Centers contains comparable standards to those of the ABA Standards, with the exception of one less level of guidance, and the result would be the same had the mediation taken place through the CDRC.

ABA Standards: Standard I. Self Determination; Standard II. Impartiality; Standard V. Confidentiality; Standard VI. Quality of the Process

Opinion

Question 1.

Should the co-mediators have intervened if they reasonably believed that the complainant was using the mediation for discovery purposes or should the mediators defer to the respondents' self-determination as to whether they wish to continue talking?

The mediators should intervene in situations where the quality of the process is jeopardized. ABA Standard V.I requires mediators to conduct their mediations in a manner that promotes "fairness... party participation, and mutual respect..." Central to this opinion is the reliance on the facts as presented by the co-mediators. In this query, the co-mediators reasonably believed that the complainant was abusing the process by attending for the sole purpose of obtaining discovery. This is especially egregious if the respondents were unaware of this motivation and were fully trusting in the safety and confidentiality of the mediation. Pursuant to ABA Standard VI., the co-mediators should intervene to clarify the parties' understanding of the process and intentions.

The co-mediators state that they believe that the complainant intends to violate ABA Standard V. C. and D., Confidentiality. Pursuant to ABA Standard V., the co-mediators also did have a duty to clarify that the parties' expectations of confidentiality was mutual². The co-mediators were concerned that the respondents might not have shared so completely and candidly had they been aware that the complainant intended to misuse the respondents' information to aid in litigation. In this case, ABA Standard V. would require the co-mediators to "promote understanding among the parties as to the extent to which the parties [would] maintain confidentiality." This would require intervention of some sort.

² The parties' expectation of confidentiality is based on the "Agreement to Mediate" form signed by all parties prior to the mediation, which states that the parties understand that mediation is a confidential process.

Once a determination has been made that intervention is required, the choice of how to intervene implicates ABA Standard II. Whenever mediators choose to intervene in a mediation, they should do so taking care to maintain their impartiality pursuant to ABA Standard II. Even where one party may appear to be taking advantage of another party as in the facts presented by this inquiry, mediators should not favor one party over another. The mediators also must avoid appearances of partiality. A difficulty presented by this question is determining whether or not one party is in fact abusing the process. Thus, this question also implicates ABA Standard I., the principle of self-determination. Mediators should never usurp a party's right to this fundamental freedom. A party who chooses to spend the first hour silently taking copious notes is not automatically acting inconsistently with self-determination or quality of the process. Mediators should never coerce any party into speaking, sharing information or using a particular method of taking notes. Each party is free to determine not only outcome, but also process. However, the principle of self-determination is not absolute. The process, as well as the understandings about the process, must be mutual. Therefore, in this case, checking in with the parties and clarifying matters of process and confidentiality is appropriate.

This opinion will not address best practices. It is limited to identifying the fact that there are a number of ways in which the mediators can intervene. The mediators may ask questions of the parties in joint session to check their mutual understanding of and comfort with the process and its rules. The mediators may also meet with each side individually in caucus to learn about their intentions and to clarify their satisfaction with the process. The mediators may also provide information either in joint or private session as to the availability of consultations with other professionals as appropriate.

Question 2.

If the co-mediators intervened and learned that the complainant was, in fact, using the mediation for discovery purposes, what should the co-mediators have done?

If after intervening, the co-mediators confirm that one side is in fact using the mediation for discovery purposes the co-mediators shall take appropriate action which may include termination of the mediation, withdrawal from the mediation, or postponement of the mediation session to allow both sides to consult with professionals. This opinion recognizes that these steps may impinge on the parties' rights of self-determination pursuant to ABA Standard 1. However, in this instance, considerations of confidentiality and quality of the process should trump the principle of self-determination.