

## Opinion 2006-02

### The Questions

- 1) **Is a mediator obligated to keep confidential or obligated to disclose a 12-year-old party's statements that the 12-year-old has engaged in sexual relations with individuals over 18 years old? If the mediator is obligated to disclose the statements, to whom must the mediator make the disclosure?**
- 2) **In a mediation between the 12-year-old party and that child's parent, may the mediator disclose the child's allegations that the child has had sexual relations with individuals who are over 18 years old where the child has specifically asked the mediator to refrain from doing so?**
- 3) **Is it appropriate for a mediator to suggest that the child discuss with her parent the child's sexual conduct after the child specifically declines to do so?**

**We had a case involving a mother and her 12-year-old daughter, who came to the center to discuss issues such as the daughter's staying out late and her behavior. During caucus, the daughter discussed how she had been having sex with 18- and 19-year-old boys because she wanted them to be her friend. She stressed that she did not want this information to get back to her mom. However, in the same session, she stated that her mother already knew (about the sexual conduct). The mediator was not sure how much the mother already knew. The mediator was horrified that this young girl was sexually active and wanted to know if she should have talked the girl into discussing this with her mom.**

**- Submitted by a staff member of a community dispute resolution center.**

### Summary of the Opinion

When allegations arise concerning a child's participation in sexual conduct with an adult during caucus, the mediator should not disclose the contents of those statements to the other party without first obtaining the permission of the party who made the statement. When allegations arise concerning a child's sexual conduct with an adult, the mediator should obtain as much information as possible from the party in caucus, and then the mediator should consult with staff to determine whether the center should report those allegations to the statewide central register of child abuse and maltreatment or to a local child protective service. Staff should then move forward by considering the program's guidelines and the CDRC Program Manual.

### Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Standard I, Standard II(A) and (C), Standard V(A), Comments 1, 2, 3, and 6, and Standard VI (2005). Program Manual for the Community Dispute Resolution Centers Program, Chapter 5, Guidelines II, III, and IV of the Child Abuse Guidelines.

## Opinion

The questions in this inquiry, although raised by a center staff member, concern the mediator's obligations when a child tells a mediator during caucus that the child has engaged in sexual conduct with individuals who are over 18 years old.

A mediator certified by a community dispute resolution center ("CDRC") is bound by the Standards of Conduct for New York State Community Dispute Resolution Center Mediators ("Official Standards") to maintain the confidentiality of all information obtained during a private session (Standard V, Comment # 3). The only exception to confidentiality under the Standards exists where there are allegations or evidence of child abuse (Standard V(A)).

Questions # 1 and #2 ask whether the mediator is obligated to keep confidential or to disclose statements made in caucus by a 12-year-old party who claims to have engaged in sexual relations with individuals over the age of 18 years old. If the mediator is obligated to disclose this information, to whom should the mediator disclose it?

Standard V, Comment # 3, states that a mediator who meets privately with a party during a mediation "should not convey directly or indirectly to any party, group or institution any information that was obtained during that private session without the consent of the disclosing party." In the absence of a contradictory comment in the Official Standards, the mediator should not disclose information gathered during caucus to another party. A review of the other comments to Standard V indicates that a mediator is not permitted to disclose the contents of any statement revealed during caucus to another party unless the mediator first obtains the permission of the party who made the statement during caucus. Accordingly, notwithstanding the nature of the parties' relationship (in this case, parent and child), the mediator should not disclose the contents of the child's statements without first obtaining the child's permission to do so.

The fact that the mediator cannot disclose the contents of the child's statements, which were made during caucus, to the child's mother does not end the inquiry. If a party has alleged conduct that might constitute "child abuse," then the mediator has an affirmative obligation to comply with Guideline IV of the Guidelines for Cases Involving Child Abuse as set forth in the Program Manual for Community Dispute Resolution Centers ("Child Abuse Guidelines"). Incidentally, these steps are also set forth in Standard V, Comment # 2 and are discussed in greater depth below.

Guideline II of the Child Abuse Guidelines defines "child abuse" in part as an act or failure to act by a parent which, as to such child, "commits, or allows to be committed, a sex offense against him or her, or allows him or her to engage in a sexual performance." (CDRC Program Manual, Ch. 5, Section II (A), Guideline II (iii)).

If the mediator believes that the child has described conduct that constitutes child abuse, then Standard V, Comment # 2 requires the mediator to stop the mediation, 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. Accordingly, this comment expressly permits the mediator to disclose to center staff information pertaining to allegations of child abuse.

In this case, the allegation is made during caucus by the child whose safety is at issue, and the child has expressly asked the mediator not to discuss the matter with the child's mother. Although the inquirer states that the child indicated that the mother already knew about the child's sexual conduct, the mediator apparently was not sure how much the mother actually did know. In light of the fact that the allegations were made during caucus and Comment # 3 to Standard V expressly discourages a mediator from sharing information disclosed by a party during caucus with other participants, the Committee believes that the mediator in this case should use the caucus to obtain as much information from the child, adjourn the mediation pending discussion with staff, and then consult with staff to determine: (1) whether to report the allegations of child abuse to the statewide central register for child abuse or a local child protective agency as per Guideline III of the Child Abuse Guidelines (see below) - a staff responsibility; and (2) whether to resume the mediation.

Guideline III of the Child Abuse Guidelines states:

Each community dispute resolution center (hereinafter "center") shall, during its intake process, exercise maximum care and effort to determine whether a matter for which mediation is sought involves alleged or actual child abuse. Upon any such determination, a center shall advise the parties that the matter may not be mediated. At the same time, the parties shall be informed of any resources made available by the community to victims and perpetrators of child abuse. If, based on the information learned at intake, a center reasonably believes that a child's health or physical well-being is in jeopardy, it shall also refer the matter to the statewide central register (footnote omitted) of child abuse and maltreatment or to a local child protective service."

Although Guideline III speaks of child abuse adduced during intake, the Committee believes that the same steps should be followed if evidence of child abuse is adduced during mediation. The Committee wishes to stress that mediators and center staff should not disclose allegations of child abuse to anyone other than the statewide central register or a local child protective service. If, for some reason, circumstances require immediate disclosure of this information but the center staff and mediator are unable to contact either of those entities, then it would be appropriate for the mediator and center staff to contact local police, particularly where the child's safety or well-being is in imminent danger.

Question # 3 asks whether it appropriate for a mediator to suggest that the child discuss with her parent the child's sexual conduct after the child specifically declines to do so. The Committee concludes that it would not be appropriate for a mediator to do so. Standard I of the Official Standards instructs:

"A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree."

While the mediator may, for example, help a party gather more information or brainstorm options, the mediator may not suggest how the party should proceed or conduct herself. Assuming that a party is competent to make decisions as to outcome and process, those are decisions that a mediator should refrain from influencing through direct or indirect pressure.

The Committee is limited to the facts and questions posed in the inquiry and can only address in full the mediator's responsibilities. However, the Committee would like to note that staff must consider taking certain steps in such a situation. Staff should consider, among other things, the program's guidelines and the CDRC program manual for specific steps to take, but should balance these with consideration of the quality of the mediation process.