

Opinion 2008-01

A mediation session was held between two teenagers, aged 18 and 14, regarding concerns over their interaction with each other. At ages 17 and 13, respectively, the older teen committed an assault against the younger teen. At the mediation, the 14-year old was accompanied by her mother, who had requested the session on her daughter's behalf. The parties stated at the beginning of the session that they had resolved their dispute and that they had agreed to be friends and to treat each other with respect. The mediator reality-tested the terms of their verbal agreement and explored the history of the parties' relationship with each other. They lived near each other and the 18-year old attends school with the 14-year old's older sister, with whom she is also friends.

Roughly 45 minutes into the session, the parties were nearing closure on the verbal agreement. The mother, in communicating what would happen if the parties failed to keep up their respective ends of the deal, revealed in joint session that she would seek to enforce the Order of Protection that the 14-year old had against the 18-year old. According to the mother, who presented the Order to the mediator, an Order had been issued at the time of the assault and it had been automatically renewed every three months. The mediator reviewed the Order of Protection which appeared to be a complete Stay-Away Order. It appeared as though the 18-year old was in violation of the Order just by being at the mediation.

When the mediator asked the 18-year old if she was aware of the Order, she said yes but that they continue to be friends. In fact, the parties had come to the mediation together and were planning to leave together. The 18-year old said she preferred to leave with the 14-year old and her mother because she did not otherwise know how to get home. The mediator consulted with center staff, who offered to provide carfare to the 18-year old so she wouldn't have to ride home with the 14-year old and her mother. The 18-year old refused and said she wanted to go home with them.

The Questions:

- 1.) Does a mediator have an obligation to say something to the 18-year old about violating an Order of Protection?
- 2.) Should the mediator report a violation of an Order of Protection under the circumstances? If so, to whom should the mediator report it?
- 3.) If the parties had signed a written agreement, would the 18-year old have legally incriminated herself by violating the Order of Protection? If so, what would the mediator's responsibility be?

- Submitted by a CDRC mediator

Summary of the Opinion

The mediator has no obligation to advise the 18-year old about violating an Order of Protection, but may urge the 18-year old to get outside professional advice regarding her obligations pursuant to the Order. The mediator should report any situation involving an Order of Protection to the staff of a community dispute resolution center. The Subcommittee declines to comment on whether or not certain activities involve "legal" self-incrimination.

Authority Referenced

Standards of Conduct for NYS CDRC Mediators, Standard VI: Quality of the Process, Comment 5, Comment 6, and Comment 10; Standard II: Impartiality, Comment 2; Standard V: Confidentiality, Comment 6 (rev. 2007); NYS CDRC Program Manual, Chapter 5. Operational Policies, II..A. Child Abuse Guidelines, Guideline I. (rev. January 1, 2007); Formal Opinion No. 83-F17 of the New York State Attorney General (1983).

Opinion

1.) Does a mediator have an obligation to say something to the 18-year old about violating an Order of Protection?

Under the Standards of Conduct for New York State Community Dispute Resolution Mediators, the mediator has an obligation to stop the mediation if it is furthering illegal conduct.

The mediator has no obligation to advise the 18-year old about violating an Order of Protection, but may urge the 18-year old to get outside professional advice regarding her obligations pursuant to the Order.

Discussion of Question 1. and Standards Impacted

It is against community dispute center policy to mediate where there is an Order of Protection in place that requires one party to stay away from the other.

Standard VI: Quality of the Process, Comment 10, requires that the mediator terminate the mediation, since the interaction between the two parties violates the Order of Protection:

"If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation."

As such, the mediator should terminate the session and report the situation to the center staff. Staff could then make appropriate referrals.

The mediator should not give the parties legal advice. Standard VI: Quality of the Process, Comment 5, provides:

"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. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process."

By recommending that the 18-year old seek professional advice about the Order of Protection, the mediator is removed from being the source of the advice herself. In this, as in all actions, the mediator must act in accordance with Standard II: Impartiality. As noted in Comment 2 of that Standard:

"The mediator's commitment is to remain impartial towards the parties and their choices in the process . . ."

2.) Should the mediator report a violation of an Order of Protection, under the circumstances? If so, to whom should the mediator report it?

The mediator should report a situation involving an Order of Protection to the staff of a community dispute resolution center.

Discussion of Question 2. and Standards Impacted

The only reporting obligation that the mediator has under the current facts is to the staff of the center. Standard V: Confidentiality requires:

"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."

This obligation is modified by Comment 6 of Standard V:

"Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates."

The Standards of Conduct do not provide for exceptions to confidentiality for anything other than child abuse. Thus, reporting illegal activity beyond the staff of the agency would result in the mediator violating this Standard. It would be the center staff's responsibility to determine how to handle the violation.

Once the mediator becomes aware of the Order, the mediator should withdraw from or terminate

the mediation process pursuant to Standard VI, Comment 10.

3.) If the parties had signed a written agreement, would the 18-year old have legally incriminated herself by violating the Order of Protection? If so, what would the mediator's responsibility be?

The Subcommittee declines to comment on whether or not certain activities involve "legal" self-incrimination.

Since the committee holds that the mediator should withdraw from or terminate the mediation process prior to the signing of an agreement under these circumstances, no written settlement agreement would in fact be signed.