

## **Opinion 2006-03**

The inquirer mediated a dispute during which he concluded that one party had received insurance payouts totaling \$19,000 for damage to a piano that he had purchased for \$1,000. The mediator believes that this party has engaged in insurance fraud and asks whether he may report the insurance fraud to authorities or whether he is obligated not to report it. The inquirer continues, "This is a moral dilemma in which I have a personal desire to see justice done, but feel a greater responsibility to my word."

### **Summary of the Opinion**

Notwithstanding his concerns that justice will be subverted unless he contacts the authorities, the mediator should refrain from contacting the police and from otherwise disclosing information conveyed during mediation to anyone other than staff of the center where he mediates.

Mediators often come across evidence of criminal conduct while mediating at a community dispute resolution center, and they are expected to refrain from disclosing that information so that parties can candidly discuss and resolve their disputes without worrying that their statements will be introduced in evidence against them. Unless someone's physical safety is imminently at stake, a mediator should not disclose to the authorities information gathered during mediation without first discussing with staff from the center the mediator's inclination to do so.

Moreover, if the mediator cannot remain impartial because of a party's past criminal conduct, then the mediator should withdraw.

### **Authority Referenced**

Standards of Conduct for New York State Community Dispute Resolution Centers Mediators: Standard II (Paragraphs A & C); Standard V (including Comment # 6); Standard VI (including Comment # 10). Laws of 1981, Chapter 847, section 1. MEAC Opinion 2006-01.

### **Opinion**

Standard V of the Standards of Conduct for New York State Community Dispute Resolution Centers Mediators ("Official Standards") provides:

"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."

Opinion 2006-01 elaborated on the importance of mediators preserving the confidences of parties' communications:

"Confidentiality is integral to the mediation process. It fosters trust among the parties and between each party and the mediator, and it also promotes trust among parties in the mediation process itself. Confidentiality also permits parties to discuss topics and emotions that they might not otherwise be willing to discuss if the confidentiality of their statements were not protected. It also permits parties to think about options for resolution that they might not otherwise consider if they felt that a mediator would disclose the contents of the parties' deliberations. The peaceful resolution of conflict depends on the parties' belief that a mediator will

vouchsafe the parties' confidences, but the obligation to refrain from disclosing information gathered during mediation is not absolute."

To date, the Mediation Ethics Advisory Committee ("Committee") has not considered whether statements describing crimes already committed merit a greater, lesser or equal degree of confidentiality than statements indicating a plan to commit a crime in the future. Moreover, the Committee has not yet considered whether the type of criminal conduct (*e.g.*, crimes of violence to persons versus crimes of damage to property) is a factor that enhances or lessens a party's reasonable expectation of confidentiality.

The Committee acknowledges that there are instances when the interests furthered by disclosure of information gathered during mediation outweigh the interests furthered by not disclosing such information. The rules explicitly permit such disclosure, for instance, when there are allegations of child abuse. It is possible that there are scenarios in addition to allegations of child abuse that warrant disclosure, even though Standard V does not explicitly permit disclosure in those scenarios.

The Committee also recognizes that there are instances when a mediator learns information that makes it difficult or impossible for the mediator to conduct a mediation that is consistent with Standard VI (Quality of the Process). In the instant case, Comment # 10 to Standard VI seems applicable: "If a mediator 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."

The list of options (postponement, withdrawal or termination) in Comment # 10 is not necessarily exhaustive; in fact, it would be consistent with Comment # 10 for a mediator to continue mediating if the parties choose to forgo discussion during the mediation of any illegal activity. However, the listed options suggest that if a mediator encounters information that compromises the integrity of the mediation, then he or she should exercise control over the process in a way that not only preserves the integrity of the mediation process but also minimizes the likelihood that someone will be harmed as a result of the mediation.

The best option for a mediator who believes that he or she faces such a scenario is to consult with staff of the community dispute resolution center for guidance as per Comment # 6 to 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 he or she mediates." Ideally, a mediator will not feel compelled to decide how to proceed without first consulting with staff.

The Committee believes that unless someone's physical safety is imminently at stake, a mediator should not disclose to the authorities information gathered during mediation without first discussing this option with staff from the center. Staff from the center can help the mediator determine whether disclosure is required and whether disclosure in a particular instance is consistent with the fundamental values of the mediation process.

The Committee also believes that in the circumstances described by the inquirer, the mediator should refrain from disclosing to non-participants (particularly, the police) the contents of statements made during the mediation process.

Members of the Committee sympathize with the inquirer's concern that justice will be subverted if the mediator fails to report evidence that one party has engaged in insurance fraud. However, mediators often come across evidence of criminal conduct while mediating at a community dispute resolution center, and they are expected to refrain from disclosing that information so that parties can candidly discuss and resolve their disputes without worrying that their statements will be introduced in evidence against them.

In its act to amend the Judiciary Law to create the Community Dispute Resolution Centers Program, the Legislature wrote:

“To assist in the resolution of disputes in a complex society, there is a compelling need for the creation of dispute resolution centers as alternatives to structured judicial settings. Community dispute resolution centers can meet the needs of their community by providing forums in which persons can participate in the resolution of disputes in an informal atmosphere *without restraint and intimidation.*”

Laws of 1981, Chapter 847, Section 1 (emphasis added).

Members of the Committee are mindful that in some instances, a mediator's commitment that justice be done might impair the mediator's ability to remain impartial. Standard II (A) of the Official Standards defines impartial as “freedom from favoritism or prejudice in word, action or appearance, and Standard II(C) cautions, “If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.”

In the instant case, it seems that the inquirer views the ethical dilemma as a “moral” one that pits a “personal desire to see justice done” against a “responsibility” to keep information confidential. Mediators in this circumstance are advised to assess whether they can remain impartial in the face of evidence that one or more of the parties is subverting justice (as the mediator defines “justice”). If the mediator cannot remain impartial because of a party's criminal conduct—even where that conduct is incidental to the dispute that the parties discuss during mediation—then the mediator should withdraw pursuant to Standard II(C).

In conclusion, the inquirer should not voluntarily disclose evidence that a party has engaged in insurance fraud, and the inquirer should withdraw from mediation in the future if he concludes that he cannot remain impartial in the face of evidence that a party has subverted justice.