



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 03 (2001)

(Adopted and Issued by the Commission on May 18, 2001; Amended September 20, 2024.)

Confidentiality of Statements Made in Opening Session, Standard 3

A mediator may not agree to provide an affidavit or be deposed concerning statements made during the opening session of a mediated settlement conference, even if the parties and their attorneys agree. Absent a statutory duty, a mediator is bound by the confidentiality provisions of the Standard.

Concern Raised

Certified mediator has been asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. Certified mediator seeks clarification on the following issues:

- 1) Whether the opening session when all parties are present is confidential; and**
- 2) Whether confidentiality protections in the Standards of Professional Conduct for Mediators (Standards) are waived if both parties and their attorneys agree that the mediator give the affidavit or be deposed.**

Advisory Opinion

The Dispute Resolution Commission (Commission) advises that the mediator may not give the affidavit, nor provide information at a deposition. Providing such information is a violation of the Standards. Standard 3(a) provides that: "A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference." Standard 3(a) prohibits the communication of any information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard 3(a) does not provide for any exceptions to confidentiality beyond the statutory duty to report certain information. There is no exception for instances where the parties agree to the affidavit or deposition. Confidentiality is essential to the success of mediation. Absent a statutory duty to disclose information, the Standards obligate mediators to protect and foster confidentiality.

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department.” On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.