

## **Advisory Opinion of the NC Dispute Resolution Commission**

### **Advisory Opinion No. 30 (2014)**

(Adopted and Issued by the Commission on August 8, 2014)

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 practices. In adopting the Policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

### **Concern Raised**

Mediator conducted a court-ordered mediated settlement conference in a complicated case involving a large real estate development, which was in financial trouble. Mediator reported that an agreement was reached at mediation as to all issues with a voluntary dismissal with prejudice to be filed within approximately six weeks. Thereafter, plaintiff filed a motion seeking to enforce the mediated settlement agreement and served a subpoena on the Mediator. The Mediator brought his notes from the mediation and testified about what had occurred at the mediation, including testifying as to the parties’ discussion during the conference, their settlement proposals, the conduct of the parties, and the terms of their agreement. No objection to the Mediator’s testimony was made. The Mediator did not alert the Court to Standard III and his duty to preserve confidentiality. The Court did not compel his testimony.

May a Mediator testify when he is subpoenaed to testify in a proceeding to enforce a mediated settlement agreement when none of the parties objects to his testimony?

### **Advisory Opinion**

The enabling legislation for the Mediated Settlement Conference Program in Superior Court Civil Matters and Other Settlement Procedures, N.C. Gen. Stat. §7A-38.1(l), provides that:

“No mediator ... shall be compelled to testify or produce evidence concerning statements made and conduct occurring in the anticipation of, during, or as a follow-up to a mediated settlement conference...pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.”

A mediator of a court-ordered mediated settlement conference may not be compelled under N.C. Gen. Stat. §7A-38.1(l) to testify in a proceeding to enforce or rescind an agreement reached in that mediated settlement conference. That prohibition applies to testimony about statements made and conduct occurring in a mediated settlement conference, which is defined in 7A-38.1(b)(1) as “a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.” It does not apply to testimony about statements made and conduct occurring in a voluntary mediation, meaning one that is conducted by agreement of the parties and is not court-ordered.

If the parties to a voluntary mediation want to have this provision apply to their mediation, they should either ask the court to order mediation under the authority of 7A-38.1 or enter into an agreement that the mediation will be governed by that statute and the Supreme Court Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. In the latter event, the protection probably would be provided, but under a theory of waiver and estoppel rather than direct application of the statute. To summarize, a mediator may not be compelled to testify in any civil proceeding about statements and conduct occurring in a court-ordered mediated settlement conference, meaning mediations that are ordered by the court under statutory authority.

The facts in this advisory opinion involve a scenario in which the mediator was subpoenaed to court, but was not ordered by the court to testify. The mediator was served with a subpoena, a device described in the Rules of Civil Procedure as a means to effectuate attendance, testimony and the production of documents.” However, the Rules of Civil Procedure also contain mechanisms to call to the attention of the court reasons why compliance should not be required. The mediator’s failure to call the court’s attention to the mediator’s obligations of confidentiality renders his testimony voluntary. The Commission’s decision published as Advisory Opinion 03 (2001) applies. The mediator should not voluntarily testify and should alert the court to the mediator’s duty of confidentiality, a duty that cannot be waived by the parties or the mediator.

In A.O. #03 (2001), the certified mediator was 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. The Commission advised that the Mediator should not give the affidavit nor provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." The opinion notes as follows:

Standard III.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 III.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.

The Commission herein reaffirms its opinion in A.O. #03 (2001) and extends it to conclude that mediators in court-ordered mediations and certified mediators in all mediations (unless exempted by Standard III) should call to the court's attention (either by motion to quash, a request to be excused made in open court on the basis of the mediator's duties or by such other procedure available under the circumstances presented) the mediator's duty of confidentiality in any civil proceeding where the mediator is called upon to testify. Those mediators should not voluntarily testify in any such cases and should alert the court by motion or otherwise to the mediator's duty of confidentiality.

Standard III does not provide an exception to the duty of confidentiality when the parties are in agreement that the mediator may testify. An agreement of the parties to allow disclosure of information is not contemplated in any of the exceptions set out in Standard III. It is irrelevant that the parties do not object to the testimony. The Mediator breached his duty to maintain the confidentiality of the mediation process when he testified as to statements made and conduct occurring at the conference.