



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 11 (2007)

Advisory Opinion Number 09 (2006)

(Adopted and Issued by the Commission on August 25, 2006; Amended September 20, 2024.)

Mediator's Duty in Response to Risk of Confidentiality Breach, Standard 3

Standard 3 of the Standards of Professional Conduct for Mediators places a duty of confidentiality on a mediator as to information communicated to the mediator during the mediation process. Implicit in this duty is an obligation to notify mediation participants, who may be at risk because of a breach in confidentiality, so the participants will have an opportunity to protect their interests.

Concern Raised

Certified family financial mediator's attorney contacted the Commission's office. He explained that his client kept detailed information about divorcing couples on his laptop, including information that identified the couples and revealed assets, debts, and accounts. The information pertained to couples currently involved in mediation as well as those who had completed the process. The laptop needed repairs. When he retrieved his machine following service, he discovered that the financial information was missing. The mediator returned to the store where staff sought to retrieve it. Staff was unable to locate the missing information and advised mediator that it might have been installed on someone else's computer, might be in cyberspace, or could have been erased. Attorney asks whether the mediator has any duty under the Standards of Professional Conduct for Mediators (Standards) to advise those whose information is missing of the situation so that they may act to protect themselves from financial loss or identify theft.

Advisory Opinion

Confidentiality is integral to the mediation process. Standard 3(a) of the Standards provides that, "A mediator shall not disclose, to any non-participant, 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." The only exceptions to this absolute bar on disclosure are set forth in Standard 3 and do not apply in this situation. If confidentiality is not preserved, the integrity of the mediation process is compromised. Participants will no longer feel free to speak frankly with their mediators and the public will no longer view mediated settlement as a confidential alternative to a public trial. Standard 3 places a clear duty on mediators to take every precaution to protect confidentially. **Implicit in the duty to protect confidentiality is the responsibility to notify a mediation participant who may be at**

risk because of a breach in confidentiality. Without notification, the participant will have no opportunity to take steps to protect his or her interests.

A requirement of notification protects not only the public but the credibility of mediators and mediation programs as well and, in general, is consistent with good public policy (see N.C.G.S. § 75-65).

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.