



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 16 (2010) **(Adopted and Issued by the Commission on February 26, 2010.)**

Concern Raised

During the course of a mediated settlement conference in an equitable distribution action, the certified mediator learned, in a confidential private session with the wife and her attorney, that they intentionally had not disclosed to her husband and his attorney the existence of a valuable marital asset. After exploring the consequences of continued non-disclosure with the mediator, the wife and her attorney told the mediator that they would not reveal the asset to the other side and they reminded the mediator of her duty under Standard 3 to keep the matter of the non-disclosed asset confidential. Inquiry was made to the Commission as to whether the mediator should continue to serve as mediator under these circumstances.

Advisory Opinion

Standard 8 addresses the mediator's duty to protect the integrity of the mediation process. The Standard provides that, "A mediator shall...take reasonable steps...to limit abuses of the mediation process." Section B. provides that, "If a mediator believes that the actions of a participant... jeopardize conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation."

Parties to an equitable distribution action are required by N.C. Gen. Stat. §50-21(a) to prepare an inventory affidavit setting out their assets and liabilities; and, in addition, they are required to do so by many of the district courts' local rules. This fact creates a different set of expectations for settlement negotiations with respect to truth telling and disclosure of information than those that exist in other negotiations. Parties, or their attorneys, who intentionally hide assets in the mediation of an equitable distribution claim, or who do not disclose them upon becoming aware of their existence, are violating state statutes and/or orders of the court.

It is an abuse of the mediation process for the offending party and/or attorney to negotiate a settlement of an equitable distribution claim based on such a violation; and a mediator who knows of such violations of statutes or orders would be participating with the parties in violating those disclosure requirements if s/he facilitates a settlement of the action. Thus, it would be a violation of the mediator's duty to facilitate a resolution of that action.

When a mediator learns of the intentional non-disclosure, it is best practice for the mediator to engage the offending participant in private conversation about the consequences of that party's decision. If the party persists in non-disclosure, the mediator must terminate the session and, if the party's decision remains the same, withdraw from the mediation altogether.

In withdrawing from the mediation, the mediator shall not violate the mediator's duty under Standard 3, Confidentiality. A simple statement such as, "A dilemma exists that prohibits me from continuing", with no further explanation or elaboration, should suffice to end the mediator's participation.

A mediator who accepts such an appointment at the offer or even insistence of the parties creates the same perception. In particular, that perception is created where, as reportedly here, the mediator allowed his name to be set forth in the agreement even after one of the heirs objected to the mediator's service as administrator. Such perceptions serve to discredit the mediator, the mediation process, the Clerk Mediation Program and, ultimately, the Commission and courts.

A mediator should remain focused exclusively on his or her role as mediator and should not solicit or accept an appointment as a fiduciary that flows from the mediation process. A mediator who accepts such an appointment creates the perception that he or she manipulated the mediation process and the parties to his or her own advantage in obtaining the appointment and, thus, compromised his/her neutrality in the process.

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.