



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## **Opinion Number 34 (2018)**

*(Adopted and Issued by the Commission on February 2, 2018.)*

### **Concern Raised**

An attorney for a party at a mediated settlement conference reported to the Commission that the mediator simultaneously conducted a second mediation involving a separate dispute and separate parties at the same time and place as the mediated settlement conference in which the attorney participated. The mediator charged the parties in each mediation the mediator's full hourly rate and assessed an administrative fee for each conference.

### **Advisory Opinion**

#### **Question 1**

**May a mediator simultaneously conduct two mediated settlement conferences in unrelated cases involving different parties?**

**No.**

Standard 7, Conflicts of Interest, begins with "A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute." There is an inherent conflict of interest when a mediator conducts two mediations at the same time in that the mediator is or appears to be serving his own interests and not those of the parties.

Subsection (g) of Standard 7 states that, "A mediator shall not prolong a mediation for the purpose of charging a higher fee." Pursuant to MSC Rule 6(a)(1), the mediator is in control of the conference, and as such determines the length of the opening statement, the needs of the parties during caucus sessions, and the amount of time the mediator spends in each caucus session. It would be very difficult for a mediator to be able to "time" the caucus sessions for the separate conferences so that no party is waiting an undue amount of time while the mediator is in caucus with a party in the other conference. As such, it is apparent that conducting simultaneous mediations is likely to result in one or both of the conferences being prolonged prior to settlement or impasse. By choosing to hold simultaneous conferences, the mediator is, in effect, prolonging the conference(s) which results in a higher fee, a violation of Standard 7(g).

The Commission is also concerned about the mediator's ability to maintain the confidentiality of all information obtained within the mediation process as required by Standard 3, Confidentiality. In particular, 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..." The parties to each mediation are non-participants in the other, simultaneous mediation. Standard 3(b) provides that, "A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process..."

The mediator must keep track of a significant amount of information, and it may be very difficult to keep track of confidential information disclosed in each caucus during each mediation. The parties and/or their attorneys may express concerns about the protection of their confidential information which could result in a lack of trust or guarded participation in, or dissatisfaction with the process. In fact, this query came from an attorney to a Commission member, and the attorney raised this very concern. Standard 3 reflects the bedrock importance of the mediator's duty to preserve the confidentiality of all information disclosed within the mediation process, and the Commission, therefore, discourages a mediator from conducting simultaneous mediations under any circumstances, even if all parties agree to do so.

## Question 2

**May the mediator assess the mediator's full hourly rate and administrative fee for each mediated settlement conference?**

**No.**

The Commission suggests that convening two mediations at the same time and place and charging all parties at a mediator's full hourly rate violates Standard 7 in that it places the mediator's financial benefit ahead of the mediator's primary obligation to impartially serve the parties.

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.