



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 38 (2018)

(Adopted and Issued by the Commission on September 21, 2018.)

Concern Raised

During a divorce mediation, an attorney asserted that evidence of offers made and rejected in mediation could be used later in the same action to support a motion for attorney's fees. The mediator inquired if this was correct, should he be so informing future mediation clients. The mediator's second question was whether his notes related to offers and counteroffers be used as evidence for this same purpose.

Advisory Opinion

May offers and proposals be used as evidence for attorney's fees in the same action?

No.

G.S. § 7A-38.4A, *Settlement procedures in district court actions*, provides:

(j) Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

- (1) In proceedings for sanctions under this section;
- (2) In proceedings to enforce or rescind a settlement of the action;
- (3) In disciplinary proceedings before the State Bar or the Dispute Resolution Commission; or
- (4) In proceedings to enforce laws concerning juvenile or elder abuse.

. . . No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

While what a judge may or may not admit as evidence in a specific matter is beyond the purview of this Commission, this statute declares that statements made (offers or proposals) shall be inadmissible in any proceeding in the action or other civil action on the same claim. Whether a petition for attorney's fees is a "proceeding in the [same] action" or "other civil action on the same claim", such a petition is clearly within the reach of this statute. There are four exceptions in the statute, but they are unavailing in this instance. Whether the offers were made orally, in writing, made face to face or conveyed by the mediator, they are clearly "statements made and conduct occurring in a mediated settlement conference" and are therefore "inadmissible in any proceeding in the action or other civil actions on the same claim".

May a mediator's notes related to offers and proposals be used as evidence for attorney's fees in the same action?

No.

The above quoted statute prohibits statements made in mediation from being admitted as evidence "in any proceeding in the action or other civil actions on the same claim". There is no exception for the mediator's notes. In fact, G.S. § 7A-38.4A, *Settlement procedures in district court actions*, (j) continues with:

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding 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 the Dispute Resolution Commission, and proceedings to enforce laws concerning juvenile or elder abuse.

Thus, the mediator cannot be compelled to testify or produce evidence and the mediator notes under the earlier paragraph are inadmissible. Once again there are exceptions listed in the statute which are inapposite in this situation.

The same or similar language is found in section (l) of G.S. § 7A-38.1, *Mediated settlement conferences in superior court civil actions*. Therefore, this opinion applies to that program as well.

The inadmissibility of evidence of offers made in mediation does not necessarily frustrate the desire to petition for attorney's fees based upon the history of negotiation. "No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding" (G.S. § 7A-48.4A).

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.