



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 38 (2018)

(Adopted and Issued by the Commission on September 21, 2018; Amended September 20, 2024.)

Exclusion of Evidence of Negotiations in Separate Proceeding, N.C.G.S. § 7A-38.4A

Evidence of offers made and rejected during a mediated settlement conference may not be introduced in support of a motion for attorney’s fees in the same action. Such a motion is a “proceeding in the action” and therefore, evidence of statements made in the conference is barred by N.C.G.S. §7A-38.4A. The use of the mediator’s notes is also barred by the statute.

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 and whether he should inform future mediation clients of this. The mediator's second question was whether his notes relating to offers and counteroffers could be used as evidence for this same purpose.

Advisory Opinion

Question 1

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

No.

N.C.G.S. § 7A-38.4A(j) provides:

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.

A petition for attorney's fees is clearly a "proceeding in the action" as presented in this inquiry. None of the four exceptions set out in the statute apply to the petition, and therefore evidence of offers made and rejected during mediation is barred by the statute. Regardless of whether such evidence is based on verbal or written statements of a mediation participant, or on such statements relayed by the mediator, they fall within the language of the statute and are therefore "inadmissible in any proceeding in the action or other civil actions on the same claim."

Question 2

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. N.C.G.S. § 7A-38.4A(j) continues as follows:

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.

Accordingly, the mediator cannot be compelled to testify or produce evidence, and the mediator's notes are inadmissible, with certain exceptions not applicable in this inquiry.

The same or similar language is found in N.C.G.S. § 7A-38.1. Therefore, this advisory opinion applies to mediated settlement conferences in superior court civil actions as well.

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.