

IN THE SUPREME COURT OF NORTH CAROLINA

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ORDER ADOPTING THE  
STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby adopts the Standards of Professional Conduct for Mediators, which appear on the following pages. These standards supersede the Revised Standards of Professional Conduct for Mediators, published at [367 N.C. 1053–62](#).

The Standards of Professional Conduct for Mediators become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK  
Clerk of the Supreme Court

# Standards of Professional Conduct for Mediators

## Preamble

The Standards of Professional Conduct for Mediators apply to (i) all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission); and (ii) all mediators who are not certified by the Commission, but are conducting court-ordered mediations in the context of a program or process governed by statutes that provide for the Commission to regulate the conduct of mediators participating in the program or process.

These standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for the conduct of mediators. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner that will merit that confidence. (*See Rule 7 of the Rules of the Dispute Resolution Commission.*)

It is the mediator's role to facilitate communication and understanding among the parties and to assist the parties in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issue in dispute. In mediation, the ultimate decision whether, and on what terms, to resolve the dispute belongs to the parties alone.

## Standard 1. Competency

**A mediator shall maintain professional competency in mediation skills and, where a mediator lacks the skills necessary for a particular case, the mediator shall decline to serve or withdraw from serving.**

(a) A mediator's most important qualification is the mediator's competence in the procedural aspects of facilitating the resolution of a dispute, rather than the mediator's technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and advance those skills on an ongoing basis.

(b) If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, then the mediator shall notify the parties and shall withdraw from mediating the dispute if requested by any party.

(c) Beyond disclosure under subsection (b) of this standard, a mediator is obligated to exercise judgment as to whether the mediator's skills or expertise are sufficient given the demands of the case and, if they are not, to decline from serving or withdraw.

## **Standard 2. Impartiality**

**A mediator shall, in word and action, maintain impartiality toward the parties and on the issue in dispute.**

(a) Impartiality means an absence of prejudice or bias, in word and action, and a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

(b) As early as practical, and no later than the beginning of the first mediation session, the mediator shall fully disclose of any known relationship with a party or a party's counsel that may affect, or give the appearance of affecting, the mediator's impartiality.

- (c) The mediator shall decline to serve, or shall withdraw from serving, if:
- (1) a party objects to the mediator serving on grounds of lack of impartiality and, after discussion, the party continues to object;  
or
  - (2) the mediator determines that he or she cannot serve impartially.

## **Standard 3. Confidentiality**

**A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.**

(a) A mediator shall not disclose to any nonparticipant, 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. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) 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, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of

mediator forms are available on the North Carolina Administrative Office of the Court's website at <https://www.nccourts.gov>.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

- (1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.
- (2) If a statute requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

- (3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A-38.3B(g), then the mediator may do so.
- (4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, nonparticipants, law enforcement personnel, or other persons potentially affected by the harm, if:
  - a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;
  - b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant

damage to real or personal property, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

- c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.
- (5) If a party to, or a participant in, a mediation has filed a complaint with either the Commission or the North Carolina State Bar regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.
- (6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.
- (7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information is presented in an unbiased manner, and that no confidential information is revealed.
- (8) If a mediator is an attorney licensed by the North Carolina State Bar and another attorney makes statements or engages in conduct that is reportable under subsection (d)(3) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.
- (9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

- (10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

#### **Standard 4. Consent**

**A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the mediation process.**

(a) A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

(b) A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage the parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

(c) If a party appears to have difficulty comprehending the mediation process, issue, or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate, and exercise self-determination. If the mediator determines that the party cannot meaningfully participate in the mediation, then the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstances of the mediation, including the subject matter of the dispute, availability of support persons for the party, and whether the party is represented by counsel.

(d) In appropriate circumstances, a mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process.

### **Standard 5. Self-Determination**

**A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive or judgmental regarding the issue in dispute and the options for settlement.**

(a) A mediator is obligated to leave to the parties the full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may assist a party in making an informed and thoughtful decision, but shall not impose his or her judgment or opinion concerning any aspect of the mediation on the party.

(b) A mediator may raise questions for the participants to consider regarding their perception of the dispute, as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest options for settlement in addition to those conceived of by the parties.

(c) A mediator shall not impose his or her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should refrain from giving his or her opinion about the dispute and options for settlement, even when the mediator is requested to do so by a party or attorney. Instead, a mediator should help that party utilize the party's own resources to evaluate the dispute and the options for settlement.

This subsection prohibits a mediator from imposing his or her opinion, advice, or counsel upon a party or attorney. This subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it, as long as the mediator has already helped that party utilize the party's own resources to evaluate the dispute and the options for settlement.

(d) Subject to Standard 4(d), if a party to a mediation declines to consult with independent counsel or an expert after a mediator has raised the consultation as an option, then the mediator shall permit the mediation to go forward according to the parties' wishes.

(e) If, in a mediator's judgment, the integrity of the mediation process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, the inequality of bargaining power or ability, the unfairness resulting from nondisclosure or fraud by a participant, or other circumstances likely to lead to a grossly unjust result, then the mediator shall inform the parties of his or her concern. Consistent with the confidentiality provisions in Standard 3, the mediator may discuss with the parties the source of his or her

concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate his or her obligation of confidentiality.

### **Standard 6. Legal and Other Professional Advice Prohibited**

**A mediator shall limit himself or herself solely to the role of mediator and shall not give legal or other professional advice during the mediation.**

A mediator may provide information that the mediator is qualified by training or experience to provide, but only if the mediator can do so consistent with these standards. A mediator may respond to a party's request for the mediator's opinion on the merits of the case, or on the suitability of settlement proposals, in accordance with Standard 5(c).

### **Standard 7. Conflicts of Interest**

**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.**

(a) A mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

(b) If a party is represented or advised by a professional advocate or counselor, then a mediator shall place the interest of the party over the mediator's own interest in maintaining cordial relations with the professional advocate or counselor, if such interests are in conflict.

(c) A mediator who is an attorney, therapist, or other professional, and the mediator's professional partners or co-shareholders, shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his or her staff has engaged in a substantive conversation with a party to the dispute. A substantive conversation is one that goes beyond a discussion of the general issue in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential under Standard 3 is a substantive conversation.

A mediator who is an attorney, therapist, or other professional may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any preceding issue in the dispute, or in any outgrowth of the dispute.

(d) A mediator shall not charge a contingent fee, or a fee based on the outcome of the mediation.

(e) A mediator shall not use information obtained, or relationships formed, during a mediation for personal gain or advantage.

(f) A mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.

(g) A mediator shall not prolong a mediation for the purpose of charging a higher fee.

(h) A mediator shall not give any commission, rebate, or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of a referral of clients for mediation services.

A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality. However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

#### **Standard 8. Protecting the Integrity of the Mediation Process**

**A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.**

(a) A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party—even if they cannot agree.

(b) If a mediator believes that the statements or actions of a participant—including those of an attorney who the mediator believes is engaging in, or has engaged in, professional misconduct—jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from, or terminating the mediation. If an attorney's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the attorney to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

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