

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING THE
STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby amends Standards 2, 3, 7, and 8 of the Standards of Professional Conduct for Mediators.

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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.

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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~~ a lawyer licensed by the North Carolina State Bar and another ~~attorney~~ lawyer makes statements or engages in conduct that is reportable under subsection (d)~~(3)~~(4) 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) The duty of confidentiality as set forth in this standard encompasses information received by the mediator and then disseminated to a nonmediator employee or nonmediator associate who is acting as an agent of the mediator.

(1) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the practice, firm, or organization has provided reasonable assurance that the nonmediator's conduct is compatible with the professional obligations of the mediator.

a. A mediator having direct, or indirect, supervisory authority over the nonmediator shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the ethical obligations of the mediator.

b. A mediator may share confidential files with the nonmediator provided the mediator properly supervises

the nonmediator to ensure the preservation of party confidences.

c. A mediator shall be responsible for the nonmediator's actions, or inactions, that would be a violation of these standards if:

1. the mediator orders or, with the knowledge of the specific conduct, ratifies the conduct; or

2. the mediator has managerial or direct supervisory authority over the nonmediator and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

(2) A mediator who individually or together with other professionals employs and/or utilizes a nonmediator in the practice, firm, or organization shall make reasonable efforts to ensure that the nonmediator's conduct is compatible with the provisions set forth in subsections (c) and (d) of this standard.

~~(g)~~ 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.

Comment

Comment to Standard 3(f). Mediators may employ associates and/or assistants in their practice, including secretaries, law student interns, and paraprofessionals. The associates and assistants, whether employees or independent contractors, act for the mediator in rendition of the mediator's professional services. A mediator must give the associates and assistants appropriate instruction and

supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to a mediation case. The measures employed in supervising nonmediators should take account of the fact that nonmediators do not have mediation training and are not subject to professional discipline by the Commission.

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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~~ a lawyer, 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~~ a lawyer, 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.

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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~~ lawyer 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~~ lawyer’s statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the ~~attorney~~ lawyer 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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These amendments to the Standards of Professional Conduct for Mediators become effective on 10 June 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 3rd day of June, 2020.


For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this
the 4th day of June, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court