



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 05 (2003)

(Adopted and Issued by the Commission on November 7, 2003; Amended September 20, 2024.)

Discussions after Impasse has been Declared, Rule 6 and Standard 3

Under certain circumstances after impasse has been declared, a mediator may have a discussion with an attorney for a party about what was said at the mediated settlement conference.

Concern Raised

The mediator conducted a mediated settlement conference in a worker's compensation case. The mediation resulted in an impasse. The parties were some distance apart at the time the conference concluded. Later, the attorney for the injured worker wrote to the mediator. In his letter, the attorney identifies certain information that the mediator relayed to him during the conference. He asks the mediator to reveal the name of the conference participant who gave that information to him during a caucus session, *i.e.*, to tell him whether the words were said by the representative or attorney of the employer or by the attorney for the insurance company. The mediator realizes that the attorney has not only misquoted them but is seeking to characterize the words as a threat, or as tantamount to a threat. The mediator does not believe that any such threat was intended. The mediator suspects that the attorney wants the information not for the purpose of clarifying matters and re-opening settlement negotiations, but rather to find a basis for a bad faith action, *i.e.*, the mediator believes that the attorney will try to argue that his client was being threatened with loss of her company provided health insurance if she does not settle in a way that satisfies the employer. The letter raises two issues for the mediator:

- 1) The attorney has not accurately reported what the mediator told him at the conference and attributed an intent that, the mediator believes, was not present. Can the mediator clarify both what was said and the spirit in which the words were offered?**
- 2) Can the mediator identify the participant who originally gave the information to him provided that he first receives permission from the participant to make the disclosure?**

Advisory Opinion

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC), allow for *ex parte* communications between the mediator and a party and their counsel. However, the Rules for Settlement Procedures in District Court Family Financial Cases prohibit *ex parte* communication before, during, or after the conference without permission from all parties. It is not unusual for parties in a MSC mediation to contact a mediator following an impasse and seek some clarification or other assistance and a mediator may respond. Through such *ex parte* conversations, the Dispute Resolution Commission (Commission) believes that MSC mediators can sometimes play an important role in reviving or furthering settlement discussions. While mediators are not required or obligated to provide additional assistance or information once a case has impassed, they may do so if they believe it will assist the parties and lead to further settlement discussions and there is no violation of confidentiality under the Standards for Professional Conduct of Mediators (Standards), Standard 3. If, as in this case, the mediator believes that the information is being sought for some purpose other than furthering negotiations, the mediator may simply determine that nothing can be gained by further discussions with the party and simply not respond to the inquiry.

Confidentiality can sometimes be an issue when *ex parte* communications occur post-mediation. It may be that the best course of action for the MSC mediator is to offer to re-convene the mediation and bring the parties back together. When the parties are face-to-face again, the mediator avoids breaching confidentiality protections. Further, the mediator ensures that they will not, through some lapse in memory, make a misstatement and further confuse and complicate matters.

Unless the mediator previously had permission to identify the particular speaker to the opposing side, they should not do so now, unless the mediator first contacts the individual and determines whether they have permission to reveal his or her identity.

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.