



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## **Advisory Opinion Number 23 (2012)**

*(Issued by the Commission on May 11, 2012; Amended September 20, 2024.)*

### **Mediator Testimony in State Bar Disciplinary Proceeding, N.C.G.S. § 7A-38.1(l)**

**Absent a subpoena, a mediator may not speak to a State Bar investigator concerning conduct occurring during a mediated settlement conference by an attorney whose client has filed a grievance against the attorney. However, pursuant to an exception set out in N.C.G.S. § 7A-38.1(l), the mediator may be compelled to testify in a disciplinary proceeding before the State Bar.**

**If a State Bar investigator contacts a mediator about the attorney-mediator's own behavior, the mediator must respond, with certain exceptions relating to lawyer-client confidentiality, to the investigator's questions, even when there is not a subpoena.**

### **Concern Raised**

A mediator was contacted by a State Bar investigator who told the mediator that he was investigating a grievance filed against an attorney by the attorney's client. The grievance involved conduct that the client alleged occurred during a superior court mediated settlement conference, and the investigator explained that he wished to talk to the mediator about what occurred at the mediation. Mediator asks whether he may speak with the investigator about the attorney's conduct.

### **Advisory Opinion**

N.C.G.S. § 7A-38.1(l) provides that evidence of statements made and conduct occurring in a mediated settlement conference are not subject to discovery and are inadmissible in any proceeding in the action or other civil actions on the same claim and then lists a few situations where this prohibition does not apply. One of the exceptions is a disciplinary proceeding before the State Bar.

N.C.G.S. § 7A-38.1(l) provides:

“No mediator, other neutral, or neutral observer present at a settlement proceeding 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 ... in any civil proceeding for any purpose, including

proceedings to enforce or rescind a settlement of the action, except ... disciplinary hearings before the State Bar....”

Clearly, the intent of the statute is to allow mediators to cooperate with the State Bar when subpoenaed to testify related to a disciplinary hearing regarding an attorney’s conduct in mediation. However, when no subpoena is involved, the Commission does not read this subsection broadly to permit mediators to answer an investigator’s questions in the preliminary stages of an investigation into a grievance, even in instances where other participants in the mediation raise no objections to or even encourage the mediator’s cooperation. Moreover, the State Bar has advised the Commission that, absent a subpoena, State Bar Rules of Professional Conduct would not require an attorney-mediator to speak with an investigator about another attorney’s conduct.

The Commission has long regarded confidentiality as a foundation of the mediation process. Standard 3 obligates mediators to maintain the confidentiality of all information obtained within the mediation process. The only exceptions include instances where mediators are under a statutory obligation to report the information or public safety is at risk. In Advisory Opinion 03 (2001), the Commission cautioned mediators not to provide affidavits or to allow themselves to be deposed regarding what occurred at a mediation, even at the request or with the permission of all parties involved in the conference. A mediator may testify in relation to a State Bar hearing only when subpoenaed to do so and before testifying should advise the State Bar Disciplinary Hearing Commission or its investigator of the prohibitions set forth in the statutes and Standards of Professional Conduct for Mediators (Standards) regarding a mediator’s obligations to observe confidentiality.

Note: If a State Bar investigator contacts an attorney-mediator regarding the attorney-mediator’s own conduct, pursuant to N.C.G.S. §§ 7A-38.1(l), 7A-38.3B(h), 7A-38.3D(k), 7A-38.3F(h), 7A-38.4A(j), and Standard 3(d)(5), the attorney-mediator is permitted to respond to an investigator’s questions whether or not a subpoena is involved.

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.