



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## **Opinion Number 41 (2021)**

*(Adopted and Issued by the Commission on March 5, 2021.)*

### **Concern Raised**

Mediator contacted the Commission to ask if a mediator has a duty to communicate with a lienholder, after the mediation has been scheduled, but prior to the mediation. The lienholder reached out to the mediator after reviewing the file and discovering the Designation of Mediator.

### **Advisory Opinion**

#### **Does a Mediator have a duty to communicate with a lienholder?**

**No.**

Rule 4 governing attendance at a mediated settlement conference does not require the attendance of a lienholder under Rule 4(a)(1). Rather, Rule 4(b) provides the attorneys or parties shall notify the lienholder of the scheduled mediation and shall request the lienholder to attend.

Mediated Settlement Conference Rule 4(b) provides:

Notifying Lienholders. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

The above rule requires the attorney or party to the action contact the lienholder to notify them of the mediated settlement conference. However, until the lienholder attends the mediation, they are considered a nonparticipant. The mediator holds no duty to the lienholder prior to the mediation and is precluded from discussing the mediation with a nonparticipant under Standard 3. Confidentiality.

Standard 3. Confidentiality provides:

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.

The mediator may confirm the fact that they have been appointed by the court to mediate the case (as this is in the public record and is not confidential) or direct the lienholder to the party or their attorney for information regarding the settlement conference without violating the Standards or Program Rules. However, the mediator is under no obligation to respond to the lienholder.

Once the lienholder is invited to participate in the mediation, and the lienholder attends the conference, they become a participant at the mediation. As a participant to the mediation, the mediator may disclose information regarding the mediation to the lienholder, so long as the information was not communicated in confidence to the mediator under Standard 3(b).

Standard 3(b) Confidentiality provides:

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 TOC Standard 3 6 permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.