

OPEN FOR COMMENT UNTIL JANUARY 17, 2025

DRAFT Advisory Opinion No. 45 (2025)

(Adopted and Issued by the Commission on xxxxxx 2025)

A Lawyer Mediator is Prohibited from Assisting a Lawyer to Violate the Rules of Professional Conduct

The mediator may act as a scribe and commit to writing the agreed upon terms for the parties if all parties are represented by counsel. The mediator shall not assist an attorney in violating the NC State Bar’s Rules of Professional Conduct during a mediation by communicating to the other party, or committing to writing, a term that is in violation of the NC State Bar’s Rules of Professional Conduct.

Concern Raised

Mediator contacted the Dispute Resolution Commission (Commission) to ask if during a mediation, they could assist the parties in negotiating a term, or act as a scribe and commit to writing a term when all parties are represented by counsel, that may be in violation of the NC State Bar’s Rules of Professional Conduct (RPCs).

Advisory Opinion

May a mediator/lawyer who is acting as a scribe and committing to writing terms for all represented parties to a mediation commit to writing a term that may be in violation of the RPCs?

No.

The North Carolina State Bar’s Formal Ethics Opinion #xx, published in 2025, affirms a prohibition on parties, or their counsels, ability to include a term in a settlement agreement that would limit reporting misconduct by a party, or their counsel, to the State Bar. The Opinion further provides a mediator, who is also a lawyer, may not assist with or participate in a mediated settlement agreement that includes such a term.

State Bar RPC 84 states, “an attorney may not condition settlement of a civil dispute on an agreement not to report lawyer misconduct.” Rule 8.4(a) provides it is misconduct for a lawyer, who is serving as a mediator, to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

Regardless of who proposes the questionable language, the mediator shall not assist the lawyers involved in the mediation to violate the RPCs by furthering negotiations of the term. If the term is carried from one party to the other by the mediator/lawyer, the mediator/lawyer is deemed to be assisting the lawyers in the violation of the RPCs. The violation occurs regardless of whether the questionable term is being carried verbally or in writing by the mediator/lawyer to the other party.

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The State Bar has held that every lawyer be responsible for knowing the Rules of Professional Conduct, therefore mediator/lawyers are responsible for knowing if a term proposed by a party is in violation of the RPCs. Ignorance of the RPCs is no excuse.

The Standards of Professional Conduct for Mediators (Standards), Standard 3(a), prohibits a mediator from disclosing information learned at a mediation to a non-participant. The mediator is required to keep confidential information concerning a lawyer's statements, behavior, and professionalism during the mediation and prohibits the mediator from reporting the lawyer to the NC State Bar unless there is an appropriate exception under Standard 3(d). The NC State Bar RPCs address the reporting of professional misconduct under Rule 8.3. Subsection (e) provides a mediator/lawyer is not required to disclose information learned during a mediation if the Standards do not allow disclosure. Although the mediator is under a duty to keep the lawyer's statements, behavior, and professionalism confidential, the mediator/lawyer is not permitted to assist the lawyer in violating the RPCs.

The best practice for a mediator/lawyer to follow if a party, or their counsel, requests to propose or negotiate a term that may be in violation of the RPCs.

1. The mediator/lawyer shall not transmit the term between parties during the negotiation.
2. The mediator/lawyer is prohibited from giving legal advice, and shall not advise the party, or their counsel, the term is in violation of the RPCs.
3. The mediator/lawyer may ask the lawyer to either reconsider the proposed term or to contact the State Bar for ethics advice regarding the term. Asking this question is not providing legal advice.
4. The mediator/lawyer may also provide the lawyer proposing the term a copy of this Advisory Opinion, or a copy of the State Bar's 2025 FEO XX.
5. If the lawyer does not withdraw the term from the negotiations, mediator/lawyer shall terminate the conference and withdraw from the case.
6. The mediator/lawyer shall not disclose the reason the mediation is being terminated to the opposing party.

May a mediator/lawyer negotiate terms that may be in violation of the RPCs if the mediator/lawyer will not be acting as a scribe because one or more party is unrepresented by counsel?

No.

See above. A mediator/lawyer may not negotiate a term that would assist a lawyer to violate the RPCs. This applies even when the mediator/lawyer is prohibited from acting as a scribe and is prohibited from committing to writing terms proposed by the parties as one or more party is unrepresented.