

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 the Standards of Professional Conduct for Mediators. This order affects Standards 3, 4, and 5.

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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 or a mediation rule promulgated by a state or federal agency 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 or rule, 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 the Commission, the North Carolina State Bar, or another professional licensing board established by the North Carolina General Assembly 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 a lawyer licensed by the North Carolina State Bar and another lawyer makes statements or engages in conduct that is reportable under subsection (d)(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 4. Consent

A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the mediation process.

(a) A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

(b) A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage the parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

(c) If a party appears to have difficulty comprehending the mediation process, issue, or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate, and exercise self-determination. If the mediator determines that the party cannot meaningfully participate in the mediation, then the mediator shall recess or ~~discontinue~~terminate the mediation. Before ~~discontinuing~~terminating the mediation, the mediator shall consider the context and circumstances of the mediation, including the subject matter of the dispute, availability of support persons for the party, and whether the party is represented by counsel.

(d) In appropriate circumstances, a mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process.

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Standard 5. Self-Determination

A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive or judgmental regarding the issue in dispute and the options for settlement.

(a) A mediator is obligated to leave to the parties the full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may assist a party in making an informed and thoughtful decision, but shall not impose his or her judgment or opinion concerning any aspect of the mediation on the party.

(b) A mediator may raise questions for the participants to consider regarding their perception of the dispute, as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest options for settlement in addition to those conceived of by the parties.

(c) A mediator shall not impose his or her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should refrain from giving his or her opinion about the dispute and options for settlement, even when the mediator is requested to do so by a party or attorney. Instead, a mediator should help that party utilize the party's own resources to evaluate the dispute and the options for settlement.

This subsection prohibits a mediator from imposing his or her opinion, advice, or counsel upon a party or attorney. This subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it, as long as the mediator has already helped that party utilize the party's own resources to evaluate the dispute and the options for settlement.

(d) Subject to Standard 4(d), if a party to a mediation declines to consult with independent counsel or an expert after a mediator has raised the consultation as an option, then the mediator shall permit the mediation to go forward according to the parties' wishes.

(e) If, in a mediator's judgment, the integrity of the mediation process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, the inequality of bargaining power or ability, the unfairness resulting from nondisclosure or fraud by a participant, or other circumstances likely to lead to a grossly unjust result, then the mediator shall inform the parties of his or her concern. Consistent with the confidentiality provisions in Standard 3, the mediator may discuss with the parties the source of his or her


concern. The mediator may choose to ~~discontinue~~ terminate the mediation in such circumstances but shall not violate his or her obligation of confidentiality.

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These amendments to the Standards of Professional Conduct for Mediators become effective on 6 January 2025.

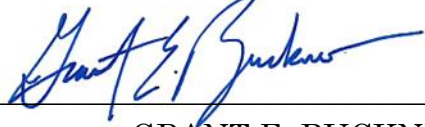
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 11th day of December 2024.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of December 2024.



GRANT E. BUCKNER
Clerk of the Supreme Court