

# The Intermediary

A Bridge between the Dispute Resolution Commission  
and North Carolina's Certified Mediators



*From the Chair*  
*By J. Anderson Little*

## BEING MINDFUL ABOUT CASE MANAGEMENT

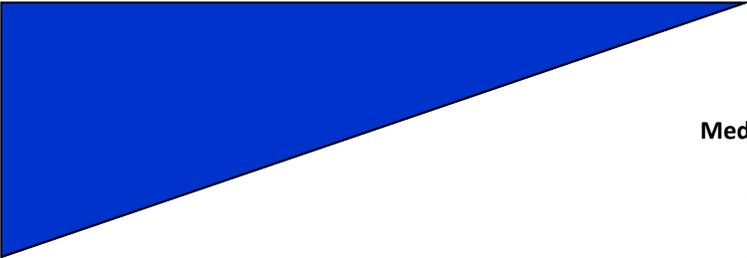
In this edition of the newsletter I focus on court staff – the Trial Court Coordinators and Judicial Assistants who are critical to the successful implementation of North Carolina's mediated settlement conference programs. Particularly, I am mindful of how much they contribute to the success of those programs and to our work as mediators.

Court staff are very much aware of our work as mediators. When asked, most are quick to say how grateful they are for their district's mediated settlement conference program. They describe mediation as a powerful tool for case management and say that mediated settlement conference programs have made their calendars and judges more efficient. Most are also quick to add that they are grateful for their mediators and realize that without them their jobs would be more difficult.

While court staff express appreciation for the work we do as mediators, they have some concerns as well. **Those concerns almost always relate to a mediator's failure to perform his or her case management duties.** When mediators fail to follow through with their responsibilities to the court, mediation does not lead to the kinds of efficiencies contemplated by our legislature. Such failures make the hard work court staff do even harder and reflect negatively on our mediation programs and our fellow mediators. Some of the concerns that court staff continue to express to the Commission are: *(continued on next page)*

### Commission Members

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**Mediators often fail to take charge of the scheduling process.**

We should begin our scheduling efforts shortly after being notified of our selection or appointment in a case. Our goal should be to find a date that all parties agree to and that is appropriate in light of the parties' need for discovery. However, if an attorney or party won't respond to our scheduling communications or is uncooperative, it is our responsibility to take charge and set a date, time, and location for the conference. We need not contact court staff for permission to schedule the mediation under those circumstances.

**Mediators often fail to conduct their conferences by the deadline set by the court.**

It is our duty to schedule mediation by the deadline set by the court (MSC/FFS Rule 6). If the parties are unable to meet before the deadline (e.g., more discovery has to be done for the parties to have a meaningful discussion, or a party is out of the country for an extended period), then we should file new AOC-DRC-19 form and suggest an extension of the mediation deadline.

**Remember, if a request for an extension is not filed and the deadline passes, it is the mediator who is accountable.**

If the parties tell us that they will file a motion for an extension, we should follow-up with them to ensure that the date has been changed. When deadlines come and go with no word from the mediator, court staff must take time away from other pressing matters to track down mediators and attorneys to inquire about the status of the case. Excessive requests in individual cases have become burdensome for court staff. That's not good for us or the mediation programs throughout the State.

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So to make sure the goal of expediting settlement and disposition of cases is achieved, make sure that continuances are justified and occur infrequently in the life of the case. We now have a new section of the "Mediator's Toolbox" on the DRC's website called "Extending Deadlines" that will be helpful in getting deadlines extended.

**Mediators often fail to file their Reports of Mediator within the time limits set out in program rules.** Mediators must file a Report of Mediator in every case they are appointed or selected to mediate. This is true whether a conference is held or not, such as when a case is dismissed by the parties or the court. Do not assume that court staff is aware that the case has been dismissed. They learn of that fact when we file our Reports.

**Not only must a Report be timely filed, but it must be fully completed.** Too often, we submit incorrect or incomplete Reports, such as when we fail to complete the section that asks for the type of closing document that will be filed, the person who will file it, and the date it will be filed. Court staff need this information to follow-up when closing documents haven't been filed and to prepare their trial dockets.

**Why is this important?** Much of the information staff forwards to the AOC for statistical reporting is gleaned from Reports of Mediator. The statistics compiled by AOC are distributed in the DRC's annual report to the Governor, members of the General Assembly, judges, the State Bar and North Carolina Bar Association officials, and many others. These statistics are the most powerful tool the Commission has to demonstrate that mediation works and that our programs are meeting the goals set out in their enabling legislation.

**Mediators who fail to report (or report late) are statistically sabotaging our mediated settlement conference programs.** Court staff must classify cases that are resolved in mediation as "Disposed Without Attending ADR" if the mediator's report is not received. In FY 2012/13, 1,724 cases were reported as "Disposed Without Attending ADR". In addition, court staff do not have the time to chase after us to file our reports. The net result? The court ordered mediation programs will receive no credit for settlements reached prior to, during, or after mediation if we do not do our duty to file our reports completely and on time.

**In conclusion, let me suggest the following:**

Let's be mindful of the contributions court staff make to our success and the success of the mediation programs.

Let's be mindful of how our actions or failures to act can negatively impact court staff and the work they do on the programs' behalf.

Let's be mindful that cooperation between court staff and mediators is essential for the success of our mediation programs.

Let's be mindful that our case management duties are not difficult to understand or accomplish. Let's learn them and do them. *END*



## **Caseload Statistics Published**

*The AOC has now published caseload statistics for the Mediated Settlement Conference and Family Financial Settlement Programs for FY 2013/14. To view both statewide totals and numbers for individual judicial districts go to the DRC website at [www.ncdrc.org](http://www.ncdrc.org). Then, click on "Program Information", select a program, and then click on "Program Statistics". The Commission would like to thank AOC staff member Stephanie Nesbitt for her work in compiling the data and to especially thank all the Judicial Assistants and Trial Court Coordinators working in North Carolina's courts who collected and submitted data for their district. The Commission will be distributing the information to members of the General Assembly, judges, NCBA and State Bar offices, and others interested in the work of our courts.*



## DISTRICT CRIMINAL COURT VIDEO AVAILABLE!!!

### *“BUILDING A WIN-WIN”*

The DRC and Dispute Resolution Section of the NCBA recently released an informational video about NC’s District Criminal Court mediation program. The video showcases the use of mediation in the resolution of misdemeanor cases that are citizen initiated and describes the benefits of the DCC program to participants, the courts, and the public at large. The DRC, the Dispute Resolution Section of the NCBA, and representatives from several community mediation centers combined forces to create this introductory video to help educate participants referred to mediation in district criminal court. The video educates its viewers through interviews with several district court judges, a prosecutor, and mediators. It also features footage of “mock” mediations. The DRC approved the release of the video for distribution at its Annual Retreat on August 8-9, 2014.

M. Ann Anderson, a former Commission member, former Chair of the Dispute Resolution Section, and mediator, chaired the Committee that developed the video. Bryan Miller and others on the production team at the NC Bar Association graciously offered their time to film, edit, and produce the video, designed to be short and to the point. Court officials and volunteer community mediators appeared in the film.

N.C. Gen. Stat. §7A-38.3D, the enabling legislation for the DCC program, provides that in any district the court may encourage the parties to agree to participate in the voluntary mediation of any pending criminal district court action. The program is implemented in cases involving person-to-person complaints or warrants. The chief district court judge, the district attorney, and the local community mediation center determine whether to establish a DCC program in their district. Thousands of cases are mediated through the DCC program each year thanks to the efforts of a wide array of volunteers and staff at NC’s community based mediation centers.

**The DRC commends and thanks all of the staff and volunteers at these centers for their dedication to and hard work for this program.** Thanks to them, thousands of litigants resolve their conflicts through voluntary mediation, and the number of cases sent to trial is significantly reduced. As Chief District Court Judge Robert Rader of Judicial District 10 states in the video, “I honestly believe that mediation is one of the best forms of resolving disputes that we have.” *FIND THE VIDEO ON THE COMMISSION’S WEBSITE, [www.ncdrc.org](http://www.ncdrc.org). CLICK ON “Program Information,” then, “District Criminal Court,” then “Video/Brochure”, then “video.”*

# Commission Adopts New Advisory Opinions



## Advisory Opinions

**N.C. Gen. Stat. §7A-38.2 provides that the administration of mediator certification and regulation of mediator conduct shall be conducted through the Dispute Resolution Commission. On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on ethical dilemmas that arise in the context of their mediation practices or assistance in interpreting Standards of Professional Conduct or program rules. In adopting the Policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public. Two new advisory opinions follow.**

### **Advisory Opinion No. 29 (2014)** **(Adopted by the Commission on August 8, 2014)** **(Subject to comment period ending October 10, 2014)**

#### **Concern Raised**

Mediator mediated a civil superior court case in which the plaintiff alleged sexual harassment against the defendant. The mediation did not result in a settlement. The plaintiff was also the complaining witness in a criminal action against the defendant for assault on a female and sexual battery. Those criminal charges arose out of the same facts alleged in the civil case.

At the trial of the criminal case, defense counsel called defense counsel in the civil case to testify about statements made in the mediation of the civil case, including the offers to settle made by the plaintiff. Defense counsel argued that they should be admitted in the criminal matter to show the motive of the plaintiff in initiating criminal charges against the defendant. Despite objections by the prosecutor, the trial judge in the criminal case allowed the testimony of the defense attorney in the civil case about statements and offers made during the mediation of the civil case.

The mediator in the civil case had made opening remarks at the mediation and explained the notion of mediator confidentiality. The mediator also explained that statements made and conduct occurring in that mediation would not be admissible in any proceeding in the civil case pursuant to N.C. Gen. Stat. §7A-38.1. However, the mediator did not explain that such evidence could be admitted in a criminal case according to that section.

Should the mediator explain to the parties at the beginning of a mediated settlement conference that inadmissibility of statements made and conduct occurring in a mediated settlement conference is limited to proceedings in the action that is being mediated and may be admissible in criminal actions

*(Continued on next page)*

and the other actions enumerated in N.C. Gen. Stat. §7A-38.1?

### Advisory Opinion

The Commission reminds mediators that “inadmissibility” and “confidentiality” are separate and distinct concepts, and mediators should be careful in explaining the differences to the parties at a mediated settlement conference. The mediator can look to the enabling legislation for the superior court mediated settlement conference program (N.C. Gen. Stat. §7A-38.1) and Standard III of the Standards of Professional Conduct for Mediators for guidance in explaining and understanding these principles.

“Confidentiality” relates only to the mediator as outlined in Standard III of the Standards of Professional Conduct for Mediators. Subject to the exceptions stated therein and in N.C. Gen. Stat. §7A-38.1, a mediator shall not disclose, directly or indirectly, to any non-participant, including the court that ordered the mediation, any information communicated to the mediator by a participant within the mediation process.

Standard III applies only to the mediator and not to the attorneys or parties. A previous Advisory Opinion clarified that point. See Advisory Opinion No. 22 (2012). The parties and other participants are under no duty of confidentiality, unless they negotiate a confidentiality agreement for that mediation. Preferably, that agreement would be reached at the beginning of the mediation and would be reduced to writing.

“Inadmissibility” is addressed in the enabling legislation for the mediated settlement conference program in superior court civil actions. N.C. Gen. Stat. §7A-38.1(l) provides that “[e]vidence of statements made and conduct occurring in a mediated settlement conference ... shall not be subject to discovery and shall be inadmissible in any proceeding *in the action or other civil actions on the same claim...* (emphasis added).”

Note that on the facts presented, testimony was sought in a *criminal* proceeding involving the same conduct that was the subject of the civil litigation and discussed in the mediation ordered in that case. Under the language of the statute, statements made and conduct occurring during the mediation process in the civil case may be *admissible* in the criminal proceeding. Participants in a mediated settlement conference in a civil case may be required to testify in a criminal matter.

Rule 6.B of the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules) sets out the duties of the mediator, and MSC Rule 6.B(1) describes those matters that the mediator should address in his or her opening statement, including (1)(f): “whether and under what conditions communications with the mediator will be held in confidence during the conference,” and (1)(g): “[t]he inadmissibility of conduct and statements as provided by N.C.G.S. §7A-38.1.”

That section enumerates several exceptions to the inadmissibility protection. They are:

- (1) In proceedings for sanctions under this section;
- (2) In proceedings to enforce or rescind a settlement of the action;
- (3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
- (4) In proceedings to enforce laws concerning juvenile or elder abuse.

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The other exception that is particularly relevant to this inquiry is found in wording that precedes those specific exceptions as previously discussed: “statements made and conduct occurring in a mediated settlement conference shall be inadmissible in any proceeding *in the action or other civil* actions on the same claim...” (emphasis added).

The mediator is under a duty to define and describe confidentiality and inadmissibility at the beginning of the mediation. Doing so in a correct, clear, succinct, and non-threatening manner can be a challenging task for mediators. While mediators have the duty to define and describe these concepts, any legal interpretation is the responsibility of the attorneys for the parties.

Please note that Rule 408 of the N.C. Rules of Evidence, which provides that evidence of conduct or statements made in compromise negotiations are not admissible to prove liability for or invalidity of a claim or its amount, may apply to mediated settlement conferences. However, mediators are not required to comment on that rule at the beginning of the conference under Rule 6 of the Rules Implementing Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

## THANKS FOR RENEWING YOUR CERTIFICATION!

The 2014-2015 mediator certification renewal period ended on August 31, 2014, and the Commission would like to thank all mediators who renewed their certifications and will continue to serve the courts and the citizens of North Carolina during the new fiscal year. Our mediated settlement conference programs could not operate without the contributions of our certified mediators. The Commission wishes all of you a successful year and hopes that you will continue to enjoy working as a mediator!



## **Advisory Opinion No. 30 (2014)**

(Adopted by the Commission on August 8, 2014)

(Subject to comment period ending October 10, 2014)

### **Concern Raised**

Mediator conducted a court-ordered mediated settlement conference in a complicated case involving a large real estate development, which was in financial trouble. Mediator reported that an agreement was reached at mediation as to all issues with a voluntary dismissal with prejudice to be filed within approximately six weeks. Thereafter, plaintiff filed a motion seeking to enforce the mediated settlement agreement and served a subpoena on the Mediator. The Mediator brought his notes from the mediation and testified about what had occurred at the mediation, including testifying as to the parties' discussion during the conference, their settlement proposals, the conduct of the parties, and the terms of their agreement. No objection to the Mediator's testimony was made. The Mediator did not alert the Court to Standard III and his duty to preserve confidentiality. The Court did not compel his testimony.

May a Mediator testify when he is subpoenaed to testify in a proceeding to enforce a mediated settlement agreement when none of the parties objects to his testimony?

### **Advisory Opinion**

The enabling legislation for the Mediated Settlement Conference Program in Superior Court Civil Matters and Other Settlement Procedures, N.C. Gen. Stat. §7A-38.1(l), provides that:

“No mediator ... shall be compelled to testify or produce evidence concerning statements made and conduct occurring in the anticipation of, during, or as a follow-up to a mediated settlement conference...pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.”

A mediator of a court-ordered mediated settlement conference may not be compelled under N.C. Gen. Stat. §7A-38.1(l) to testify in a proceeding to enforce or rescind an agreement reached in that mediated settlement conference. That prohibition applies to testimony about statements made and conduct occurring in a mediated settlement conference, which is defined in 7A-38.1(b)(1) as “a pre-trial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.” It does not apply to testimony about statements made and conduct occurring in a voluntary mediation, meaning one that is conducted by agreement of the parties and is not court-ordered.

If the parties to a voluntary mediation want to have this provision apply to their mediation, they should either ask the court to order mediation under the authority of 7A-38.1 or enter into an agree-

*(Continued on next page)*

ment that the mediation will be governed by that statute and the Supreme Court Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. In the latter event, the protection probably would be provided, but under a theory of waiver and estoppel rather than direct application of the statute. To summarize, a mediator may not be compelled to testify in any civil proceeding about statements and conduct occurring in a court-ordered mediated settlement conference, meaning mediations that are ordered by the court under statutory authority.

The facts in this advisory opinion involve a scenario in which the mediator was subpoenaed to court, but was not ordered by the court to testify. The mediator was served with a subpoena, a device described in the Rules of Civil Procedure as a means to effectuate attendance, testimony and the production of documents.” However, the Rules of Civil Procedure also contain mechanisms to call to the attention of the court reasons why compliance should not be required. The mediator’s failure to call the court’s attention to the mediator’s obligations of confidentiality renders his testimony voluntary. The Commission’s decision published as Advisory Opinion No. 03 (2001) applies. The mediator should not voluntarily testify and should alert the court to the mediator’s duty of confidentiality, a duty that cannot be waived by the parties or the mediator.

In Advisory Opinion 03 (2001), the certified mediator was asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. The Commission advised that the Mediator should not give the affidavit nor provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." The opinion notes as follows:

“Standard III.A prohibits the communication of any information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard III.A does not provide for any exceptions to confidentiality beyond the statutory duty to report certain information. There is no exception for instances where the parties agree to the affidavit or deposition. Confidentiality is essential to the success of mediation. Absent a statutory duty to disclose information, the standards obligate mediators to protect and foster confidentiality.”

The Commission herein reaffirms its opinion in Advisory Opinion No. 03 (2001) and extends it to conclude that mediators in court-ordered mediations and certified mediators in all mediations (unless exempted by Standard III) should call to the court’s attention (either by motion to quash, a request to be excused made in open court on the basis of the mediator’s duties or by such other procedure available under the circumstances presented) the mediator’s duty of confidentiality in any civil proceeding where the mediator is called upon to testify. Those mediators should not voluntarily testify in any such cases and should alert the court by motion or otherwise to the mediator’s duty of confidentiality.

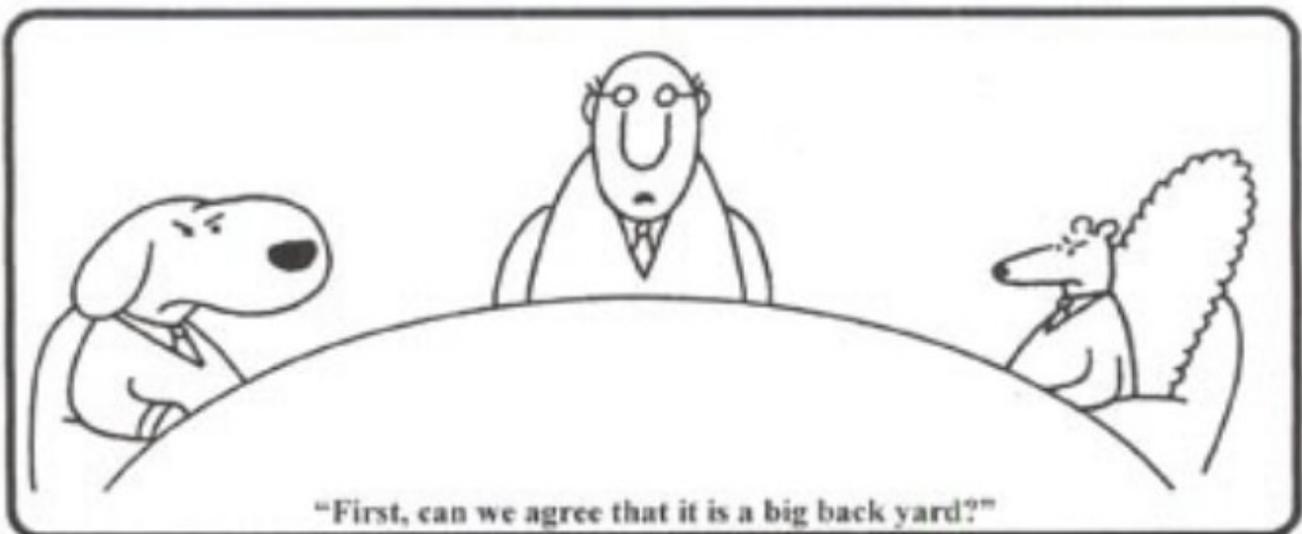
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Standard III does not provide an exception to the duty of confidentiality when the parties are in agreement that the mediator may testify. An agreement of the parties to allow disclosure of information is not contemplated in any of the exceptions set out in Standard III. It is irrelevant that the parties do not object to the testimony. The Mediator breached his duty to maintain the confidentiality of the mediation process when he testified as to statements made and conduct occurring at the conference.

The Commission encourages all mediators who are facing an ethical dilemma or who have a question about rule interpretation or the Standards to contact the Commission's office and request guidance. If time is of the essence, mediators may seek immediate assistance from Commission staff over the telephone or by e-mail. If time is not a factor, mediators may request a written opinion from the Commission. Written Advisory Opinions carry the full weight of the Commission and are issued when the Commission believes that a question and the Commission's response may be of interest to the wider mediator community. To view the [Advisory Opinions Policy](#), go to [www.ncdrc.org](http://www.ncdrc.org) and click on "Mediator Ethics" and then click on "Advisory Opinions Policy".

[Previously adopted Opinions](#) are archived on the web and may be searched using your keyboard's "Ctrl + F" function. **Also note that the all of the Commission's advisory opinions issued to date have been re-numbered sequentially, with the year adopted in parentheses after the AO number.**

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## NEW COMMENT POLICY!!!!

The Commission wants YOUR feedback!

### Comment Policy of the North Carolina Dispute Resolution Commission

(Adopted by The Dispute Resolution Commission on May 16, 2014.)

There shall be a thirty-day comment period (the "Comment Period") for proposed program rules and rule changes, amendments to the Standards of Professional Conduct for Mediators (the "Standards"), and proposed advisory opinions (the "Proposal"). Comments shall be invited by the Dispute Resolution Commission (the "Commission") upon approval by the Commission of the Proposal. The Commission may send the Proposal to the North Carolina Supreme Court for consideration or shall adopt a proposed advisory opinion only at the end of the Comment Period, a subsequent committee review of the comments received, and a majority vote after review of the committee's recommendations and comments received.

The Comment Period shall begin with the posting of the Proposal on the Commission website and shall end thirty days thereafter; Commission staff shall post the Proposal as soon as possible after the vote by the Commission. Commission staff shall also e-mail the Proposal to all certified mediators and all judges who will be affected by the rule, rule change, Standard or advisory opinion along with instructions for making written comments. All comments received during the Comment Period shall be forwarded to the committee charged by the Chair of the Commission to review them.

*NOTE: To comment on the proposed Advisory Opinions on pages 5-10 and the revisions to Standard III on page 12, go to the Commission's website, [www.ncdrc.org](http://www.ncdrc.org), and click on "Commission Seeks Comment."*

**THE COMMISSION THANKS OUTGOING COMMISSION MEMBERS FOR THEIR CONTRIBUTIONS TO THE WORK OF THE COMMISSION AND THEIR COMMITMENT TO OUR MEDIATED SETTLEMENT CONFERENCE PROGRAMS AND COURTS:**

**J. Anderson "Andy" Little, Chair**

**M. Ann Anderson, Certification and Training Standards Committee Chair**

**Jacqueline R. Clare, Standards and Advisory Opinions Committee Chair**

**N. Victor Farah, Commission member**

## DRC APPROVES CHANGES TO STANDARD III, CONFIDENTIALITY

*(Subject to 30-day comment period and approval by the NC Supreme Court)*

D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation in the circumstances set forth in sections (1), ~~and (2)~~, and (3) below:

**(1)** A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rules a hearing is held pursuant to a motion for sanctions for either failure ~~5~~, a mediator has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement conference/mediation, or failure to pay the mediator's fee, the mediator who mediated that action and testifies either as the movant or pursuant to subpoena shall limit his/her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by any participant that are not relevant to that decision. ~~providing the names of those who were physically present or who attended by electronic means.~~

~~If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.~~

**(2)** If subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S.7A-38.1(l), N.C.G.S.7A-38.4(A)(j), and N.C.G.S.7A-38.3(B)(g).

**(32)** To a participant, non--participant, law enforcement personnel or other persons affected by the harm intended where public safety is an issue, in the following circumstances:

- (i)** a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or
- (ii)** a party or other 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
- (iii)** a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

**(4)** If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D. ~~(23)~~ above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

## UPDATE ON ADVERTISING GUIDELINES

*Revisions to the Advertising Guidelines were posted to the DRC website for comment. No comments were received and the Advertising Guidelines , Revised, are effective July 26, 2014.*



### **Advertising Guidelines**

**(Adopted by the Dispute Resolution Commission on May 16, 2003;**

**(Revised and adopted on May 16, 2014.)**

#### **1. REPRESENTATION OF MEDIATOR CERTIFICATION(S)**

When advertising that s/he is certified by this Commission, a mediator shall specify certification by the NC Dispute Resolution Commission, Dispute Resolution Commission, NCDRC or DRC. A mediator should not identify him/herself as certified by the Administrative Office of the Courts or the Courts. Because of the number of mediation programs now operating in the North Carolina courts, it could be misleading to the public and the bar for a mediator simply to offer him/herself as “certified” without specifying the program or the type of mediation to which the certification pertains. Thus, a mediator shall also identify that s/he is certified to conduct superior court mediations, family financial mediations, district criminal court mediations and/or mediations of estate and guardianship cases. A family financial mediator certified by the Dispute Resolution Commission shall not hold him or herself out as certified to mediate custody or visitation matters.

Although both the Superior Court and Family Financial Settlement Program Rules provide a menu of dispute resolution processes, certification pertains only to the mediated settlement conference option. Because the DRC does not certify neutral evaluators, arbitrators, or presiding officers, a mediator shall not hold him/herself out as certified by the Commission to serve in these capacities.

If a mediator allows his/her certification to lapse, *i.e.*, the mediator does not renew prior to August 31<sup>st</sup> of any given fiscal year, the mediator shall immediately remove any certification designation from his/her letterhead, business cards, website and/or other advertising. If a mediator voluntarily relinquishes his/her certification and notifies this Commission or if this Commission revokes a mediator’s certification, the mediator shall immediately remove the certification designation from his/her letterhead, stationery and/or other advertising.

#### **APPROVED EXAMPLES:**

NCDRC Certified Mediator – Superior Court & Family Financial, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

NCDRC Certified Superior Court Mediator, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

DRC Certified Mediator – Superior Court, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

DRC – Certified Family Financial Mediator, Clerk of Court, Special Proceedings, Estates & Guardianship, District Criminal Court

## **2. REPRESENTATION OF OTHER QUALIFICATIONS, INCLUDING DEGREES HELD ON THE COMMISSION’S WEBSITE**

When advertising or marketing his/her mediation practice to the public, a mediator shall avoid making any false or potentially misleading representations regarding his/her education, work experience, training or other qualifications to serve as a mediator.

The Commission is particularly concerned about the number of unaccredited or self-accredited institutions, including on-line institutions, now awarding undergraduate and advanced degrees. The Commission requires that undergraduate or graduate level degrees submitted for purposes of certification, be awarded by institutions which have been accredited by accrediting authorities recognized by either the Council for Higher Education (CHEA) or the U.S. Department of Education. Moreover, the institution must have been so accredited or provisionally accredited at the time the applicant attended and graduated. The Commission requires that professional degrees submitted by applicants for purposes of certification, be awarded by institutions of higher learning that were both accredited or provisionally accredited by nationally recognized accrediting authorities **and** that were recognized by the appropriate licensing authorities operating in North Carolina during the time the applicant attended and graduated.

The Commission affords mediators an opportunity to post biographical information on the Commission’s website at [www.ncdrc.org](http://www.ncdrc.org) as a way to market their practices and to acquaint attorneys and the public with their qualifications and experience. The Commission has determined that mediators shall **not** identify themselves in their postings as holding degrees from or as completing course work at institutions that were not accredited or provisionally accredited during the period of their attendance as noted in the paragraph above or, if professional schools, were not recognized by North Carolina licensing authorities during the time the applicant attended and/or graduated. If a mediator has questions about whether an institution s/he attended is recognized as accredited or is recognized by North Carolina licensing authorities, s/he may contact the Commission’s office.

The Commission strongly discourages mediators and mediation trainers working with Commission certified programs from coupling notice of DRC mediator or training program certification with representations in documents, including but not limited to, letterhead, business cards, brochures, or other advertising materials, that the mediator/trainer holds certain, specified degrees when those degrees were awarded by unaccredited or self-accredited institutions or institutions not recognized by North Carolina licensing authorities during the time the mediator or mediation trainer attended and/or graduated.

*Many a small thing has been made by the right kind of advertising.*

*Mark Twain*

# Upcoming Mediator Certification Training



## Upcoming Mediator Certification Training

(Certified by DRC)

### *Superior Court Training*

#### *40-Hour and 16-Hour Supplemental*

**Carolina Dispute Settlement Services:** 40-hour superior court mediator training course, on October 20 - 24, 2014, in Raleigh, NC. For more information or to register, Contact Diann Seigle at (919) 755-4646 or visit CDSS' web site: [www.notrials.com](http://www.notrials.com).

**Mediation, Inc:** 40-hour superior court mediator training course on October 13 - 17, 2014, in Chapel Hill, NC. For more information or to register, contact Andy Little at (919) 967-6611 or (888) 842-6157, or visit Meidation, Inc's web site at [www.mediationincnc.com](http://www.mediationincnc.com).

**Mediation, Inc:** 16-hour supplemental training on October 15 - 17, 2014, in Chapel Hill, NC.

### *Family Financial Training*

#### *40-Hour and 16-Hour Supplemental*

**Mediation, Inc:** 40-hour family mediation training course, November 3 - 7, 2014, in Chapel Hill, NC. See above for contact information.

**Mediation, Inc:** 16-hour supplemental course, November 5 - 7, 2014, in Chapel Hill, NC. See above for contact information.

**Success Consulting and Mediation:** 42-hour "Divorce and Mediation Training for Professionals." For more information, contact Melissa Heard at (770) 778-7618 or visit their web site at [www.mediationtraining.net](http://www.mediationtraining.net).

### *6-Hour Training*

**Carolina Dispute Settlement services:** 6-hour training TBA. See above for contact information.

**Mediation, Inc:** 6-hour training course on October 4, 2014, in Raleigh, NC. See above for contact information.

**The ADR Center (Wilmington):** 6-hour course TBA. For more information contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

# CME OPPORTUNITIES

## *More CME and Training Opportunities*

**The ADR Center (Wilmington)** is presenting the following programs. For more information or to register, contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

“Advanced Mediation Training on Having Difficult Conversations,” on September 12, 2014.

“Basic Mediation Training in the District Criminal Court Program” on September 24-26, 2014.

“Basic Mediation Training (3-day training for ADR Center volunteers) on October 1-3, 2014, January 28-30, 2015, and April 15-17, 2015.

**Dispute Settlement Center (Orange County)** is presenting the following courses in Carrboro:

“Mediation Lite” on October 2, 2014.

“A Mindful Approach to Conflict (NEW) on October 15 and 22, 2014.

“Conflict Resolution for Educators” on October 27, 2014

The Center also provides conflict coaching. For more information go to [www.disputesettlement.org](http://www.disputesettlement.org) or call (919) 929-8800.

## *Clerk Training*

**Mediation, Inc:** 10-hour Clerk mediator training course available on DVD. For more information or to register, contact Andy Little at (919) 967-6611 or (888) 842-6157, or visit their web site at [www.mediationincnc.com](http://www.mediationincnc.com).

**The ADR Center (Wilmington):** 10-hour live Clerk mediator training course. For more information or to register, contact John J. Murphy at (910) 362-8000 or email [johnm@theADRcenter.org](mailto:johnm@theADRcenter.org), or visit their web site at [www.theADRcenter.org](http://www.theADRcenter.org).

***“Some people see things that are and ask, why?”***

***Some people dream of things that never were and ask, why not?”***

***Some people have to go to work and don’t have time for all of that.”***

***—George Carlin***

# Nuts & Bolts

## *Practical Information and Tips for Mediators*



- ◇ **What should I do if a party tells me s/he is indigent?** MSC/FFS Rule 7 address indigency. Parties determined to be indigent are not liable for their mediator fees and mediators are expected to absorb the loss as a cost of doing business and of helping to ensure that all parties have access to the mediation process. Parties may not simply claim to be indigent. They must seek a determination from the court and the court must find that they are, in fact, indigent and unable to pay all or part of the fee. Parties seeking a determination of indigency may apply to the court using the AOC form, “Petition and Order for Relief from Obligation to Pay Mediator’s Fee,” AOC-CV-814 (MSC Program); AOC\_CV-828 (FFS Program). Parties are not obligated to inform their mediator that they will seek a determination until after their conference has been held. Forms AOC-CV-814 and AOC-CV-828 instruct a party seeking relief from payment to bring the Petition to the conference and, at the conclusion of the proceeding, to give it to his/her mediator. Instructions on the form further provide for the mediator to, in turn, attach the Petition to his/her Report of Mediator and file it with the court. If a party advises a mediator prior to mediation that s/he is unable to pay, the mediator may refer the party to MSC/FFS Rule 7 and AOC-CV-814/AOC-CV-828 and explain that the court must make a determination of indigency for fees to be waived. The mediator, of course, has no obligation to assist the party in completing the form.

Mediators serving pursuant to a court appointment may not initiate a conversation with parties regarding their ability to pay and may not refuse services upon learning that a party intends to file a Petition seeking relief. Once they have agreed to accept a case, mediators serving pursuant to party selection may not inquire about a party’s ability to pay and may not refuse services upon learning that the party intends to seek relief. The Commission suggests that mediators may want to take copies of form AOC-CV-814/AOC-CV-828 to their mediations and provide a copy to any party who asserts an inability to pay. A mediator should not communicate further with a party about his or fees until such time as the court has had an opportunity to hear the matter and make a determination.

- ◇ Copies of AOC-CV-814 can be found under the Toolbox icon on the Commission’s website at [www.ncdrc.org](http://www.ncdrc.org). AOC-CV-814 and 828 can be found under forms at [www.nccourts.org](http://www.nccourts.org).

## ***JUMPING TO CONCLUSIONS?***

**This exercise can reveal how much or how little you jump to conclusions when presented with a set of facts, and may be useful information for you in your mediation practice. This exercise comes from a Mediation Channel blogpost on 10/5/08.**

### **THE CASH REGISTER EXERCISE**

To complete the exercise, read the following story. Below it are 12 statements about the story. After you read the story, determine whether each of the 12 statements is

**T** – true;

**F** – false ; or

**?** – you do not have enough information to determine whether the statement is true or false

Allow yourself no more than 5 minutes to complete the exercise. Ready? Here goes:

#### **The Story**

A businessman had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. The contents of the cash register were scooped up, and the man sped away. A member of the police force was notified promptly.

#### **12 Statements about the Story**

A man appeared after the owner had turned off his store lights.

The robber was a man.

The man did not demand money.

The man who opened the cash register was the owner.

The store owner scooped up the contents of the cash register and ran away.

Someone opened a cash register.

After the man who demanded the money scooped up the contents of the cash register, he ran away.

While the cash register contained money, the story does not state how much.

The robber demanded money of the owner.

It was broad daylight when the man appeared.

The story concerns a series of events in which only three persons are referred to: the owner of the store, a man who demanded money, and a member of the police force.

The following events in the story are true: someone demanded money, a cash register was opened, its contents were scooped up, and a man dashed out of the store.



**SEE PAGE 19 FOR CORRECT ANSWERS TO THE CASH REGISTER EXERCISE**

**DRC COMMISSION AND EX-OFFICIO MEMBERS PAUSE FOR A GROUP PHOTO  
AFTER A PRODUCTIVE ANNUAL RETREAT AUGUST 8-9, 2014, IN ASHEVILLE, NC**



*FRONT ROW:* Victor Farah, Lucas Armeña, Judge Jesse Caldwell, Stephanie Nesbitt, Tueresa Hayden, Judge Joseph Turner, Judge Gary Cash; *BACK ROW:* John Schafer, Frank Laney, Ann Anderson, Susan Hicks, Andy Little, Ellen Rose, Judge Yvonne Mims Evans, Leslie Ratliff, Judge Douglas McCullough.

**COMMISSION CALENDAR**

- |                            |   |
|----------------------------|---|
| <b>November 14, 2014</b>   | <b>DRC Meeting, NC Judicial Center</b>                              |
| <b>January 30-31, 2015</b> | <b>Dispute Resolution Section Meeting, NCBA,<br/>Pinehurst, NC.</b> |
| <b>February 27, 2015</b>   | <b>DRC Meeting, Greensboro location TBA</b>                         |
| <b>May 15, 2015</b>        | <b>DRC Meeting, NC Judicial Center</b>                              |
| <b>August 14-15, 2015</b>  | <b>Annual Retreat, Location TBA</b>                                 |

*Answers to Cash Register Exercise: Statement 3 is False, 6 is True, and the rest are ?*

*Thank you for reading The Intermediary! We welcome your comments and suggestions and invite your contributions.*