

# **Advisory Opinion of the NC Dispute Resolution Commission**

## **Advisory Opinion No. 23 (2012)**

(Adopted and Issued by the Commission on May 11, 2012)

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 and provide guidance to mediators and to protect the public.

### **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 at 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. Subsection (l) goes on to provide that no mediator “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 at 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 III 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 a previous Advisory Opinion No. 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 at a State Bar hearing only when subpoenaed to do so and should advise the Disciplinary Hearing Commission before testifying of the prohibitions set forth in the statutes and Standards of Conduct regarding a mediator's obligations to observe confidentiality. A mediator who speaks with a State Bar investigator would be doing so without the safeguards that would be in place in the context of a State Bar hearing.

Moreover, from a practical standpoint, the Commission does not believe that the refusal of a mediator to answer questions about an attorney's conduct will hamper an investigation. The parties, opposing counsel or other participants would normally have the same information as the mediator, and the investigator may speak with any or all of those individuals.

Note: If a State Bar investigator contacts an attorney-mediator regarding the attorney-mediator's own conduct, then State Bar Rule of Professional Conduct 8.1(b) provides that an attorney shall not, "...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6." As such, unless a Rule 1.6 exception is involved, Rule 8.1(b) requires an attorney-mediator to respond to an investigator's questions whether or not a subpoena was involved.