

## **Lessons Learned from DRC Advisory Opinions and Mediation Practice**

**(2 hours)**

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**Rene Ellis** attended West Virginia University, where she received her undergraduate degree, and Duke Law School, graduating in 1986. From 1990 through 1992, Ms. Ellis was the Executive Director of Duke's Private Adjudication Center. She is a co-founder and partner in Beason & Ellis Conflict Resolution, LLC, Ms. Ellis is nationally renowned for her mediation and arbitration skills, has taught mediation advocacy and negotiation at Duke Law School and to thousands of attorneys seeking mediator training. She has been appointed as a Special Master in federal and state courts in complex cases.

**Bonnie Weyher** obtained her undergraduate and law degrees from UNC. She graduated with honors from UNC Law in 1977, and served on the North Carolina Law Review. Ms. Weyher is a founding partner in the insurance defense firm of Yates, McLamb and Weyher, co-founding the firm in 1983 after practicing in New York City for several years. Ms. Weyher is a Past President of the North Carolina State Bar, and has held numerous positions in voluntary and mandatory bars. She has extensive experience as a mediator, arbitrator, and litigator.

The North Carolina Dispute Resolution Commission is responsible for certifying and regulating mediators pursuant to enabling legislation. As part of its many services, it also provides advisory opinions on issues confronting mediators. All of the Commission's opinions are published online at [www.nccourts.org/drc](http://www.nccourts.org/drc).

**1. May a mediator testify when he is subpoenaed to testify in a proceeding to enforce a mediated settlement agreement when none of the parties object to his testimony?**

**INCORRECT SURVEY ANSWERS: (1) Yes. Once party testimony is given, the mediator may testify. (2) Yes if limited to non-confidential mediation statements.**

In this case, the parties did not object to the testimony, nor did the court compel the testimony. The mediator did not alert the Court to Standard III.

Confidentiality (North Carolina Standard of Professional Conduct for Mediators) and his/her duty to preserve confidentiality. The Commission held in its advisory opinion that the mediator should have alerted the Court by motion or otherwise of his/her duty. It held that the lack of objection to the testimony was not relevant. "The Commission reaffirmed its opinion formerly set out in its Advisory Opinion 03(2001) and stressed that mediators in court-ordered mediations and certified mediators in all mediations, unless exempted by Standard III, should not voluntarily testify as to statements made or conduct occurring at a mediation." The Commission sanctioned the mediator. See NC Dispute Resolution Commission Advisory Opinion No. 30 (2014).

**2. May a mediator charge for time reviewing documents?**

**INCORRECT SURVEY ANSWERS:** (1) No. The Commission expects that mediators should read and review all materials submitted for mediation as part of his/her regular hourly mediation fee. (2) It depends. If one side submits information but the other does not, the mediator may charge one side an additional fee.

The Commission indicated that a mediator may charge for document review. In order to maintain neutrality, the Commission cautioned that the mediator should obtain permission from all parties before charging for review, even if one party agrees to pay for review time. It also urged mediators not to charge for routine document review, such as short case summaries. See NC Dispute Resolution Commission Advisory Opinion No. 21 (2012).

**3. May a mediator serve as an arbitrator in a case that s/he has previously mediated?**

**INCORRECT SURVEY ANSWERS:** (1) No. The Dispute Resolution Commission does not believe that the mediator is in a position to maintain the requisite impartiality required as an arbitrator and expressly prohibits service. (2). Yes. But only if the mediator serves as a member of a panel of arbitrators.

The Commission held that a mediator is permitted to serve as an arbitrator in a case that s/he has previously mediated. The Commission distinguished this

situation from its prior Advisory Opinion 15 (2008) precluding a mediator from transitioning to the role of a fiduciary after serving as a mediator when that appointment comes out of the mediation. This Opinion provides guidance on making the allowed transition from mediator to arbitrator. See NC Dispute Resolution Commission Advisory Opinion No. 17 (2010).

**4. May a mediator angrily confront a party whom he wholeheartedly believes is lying? (This might be one for which we create a video?)**

**INCORRECT SURVEY ANSWERS:** (1) Yes. In certain situations, the Commission understands that it is perfectly appropriate for mediators to make it clear to parties and counsel that enough is enough. To protect the integrity of the process, it may be warranted to identify those situations in which you know a party is being untruthful even if you have to raise your voice. (2) Yes. But only if someone is yelling at you.

This opinion makes it clear that a mediator should not overtly accuse a party of being untruthful or by otherwise using language so suggestive that it becomes the equivalent. It held that a mediator is not to confront a party in any hostile or abusive way, nor use profane language during mediation no matter what others are using. See North Carolina Dispute Resolution Advisory Opinion No. 13 (2007).

**5. May a Mediator prepare an MSA for the parties to the mediation when one is unrepresented?**

**INCORRECT SURVEY ANSWERS:** (1) Yes. This is best practice. You do not want an unrepresented party preparing a mess of an MSA. (2) You should have the unrepresented party write it out and then correct it with the help of opposing counsel.

No.

The advisory opinion referencing, Standard VI of the Standards of Professional Conduct for Mediators, entitled “Separation of Mediation from Legal and Other Professional Advice, “states that “[a] mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.” Further if the attorney drafts the agreement certain additional clarifications are required by the mediator. See North Carolina Dispute Resolution Advisory Opinion No. 31 (2015).

**6. Are the Mediated Settlement Conferences and the discussions therein confidential?**

**INCORRECT SURVEY ANSWERS:** (1) Yes. Everything in the mediation is confidential. (2) Everything except the mediator’s opening statement.

No.

The advisory opinion clarifies the mediator's responsibility to discuss the separate and distinct concepts of inadmissibility and confidentiality. Defense counsel was called to testify in a *criminal* action about offers made at mediation. Confidentiality applies only to the mediator and not to the parties absent a separate agreement. (See North Carolina Dispute Resolution Advisory Opinion No. 22 (2012) clarifying that distinction.)

See North Carolina Dispute Resolution Advisory Opinion No. 29 (2014).

**7. Do mediators have to answer questions asked by State Bar investigators about lawyer conduct during the mediation?**

**INCORRECT SURVEY ANSWERS: (1) Yes. This is an exception to mediator confidentiality. (2) Yes. But only if it is a written request.**

Mostly, no. There are some exceptions.

“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.” The Commission Bar investigation nor is it consistent with the basic tenets of the mediation practice. (See North Carolina Dispute Resolution Advisory Opinion No. 23 (2012).

**8. May a mediator file a report to the court that the mediation is settled without a written agreement?**

**INCORRECT SURVEY ANSWERS: (1) Yes. As long as the mediator is confident that the case is going to settle, filing the report is fine. (2) Yes. As long as they get a written confirmation in twenty four hours, filing the report as settled is acceptable.**

No.

The agreement must be reduced to writing pursuant to the enabling statute, the MSC rules, and it is just best practice. “The mediator was required by Mediated Settlement Conference Rule 4.A (2) and Rule 4.C. (Rules effective March 4, 2006) to ensure that the agreement reached in mediated settlement was reduced to writing and signed. N.C.G. S. § 7A-38.1(l) expressly provides that agreements must be reduced to writing and signed to be enforceable.”

The subject parties of this Advisory Opinion had a dispute about the alleged mediation agreement. Following the mediation, they scheduled a site visit to address some additional issues in the agreement. The mediator did not attend the site visit. But, the mediator had reported a settlement. Despite plaintiff’s request to go forward with the trial, the judge denied the request based on the mediator’s report. “Mediator failed to reduce the terms of an agreement reached in See North Carolina Dispute Resolution Advisory Opinion No. 11 (2007).

**9. One party objects to counsel allowing paralegal to attend the mediation conference and insists that she be excused from participation? Who has the ultimate authority to decide?**

**INCORRECT SURVEY ANSWERS:** (1) All parties have to agree on who attends the mediation. (2) They must get permission from the clerk of court.

The mediator. Rule 6 .A.1.

See North Carolina Dispute Resolution Advisory Opinion No. 10 (2006).

**10. Mediator is informed by parties that no offer will be made at mediation and parties are not inclined to file a motion to dispense. What are the mediator's options?**

**INCORRECT SURVEY ANSWERS:** (1) The mediator may convene a mediation via telephone and then declare an impasse. (2) The mediator may file a report and declare an impasse.

The mediator must proceed to schedule the mediation and go forward with the mediation. The Commission concluded that to declare an impasse without physically convening a conference and having a structured substantive discussion would not be consistent with the intent of the enabling legislation and the MSC rules.

See North Carolina Dispute Resolution Advisory Opinion No. 01 (1999).