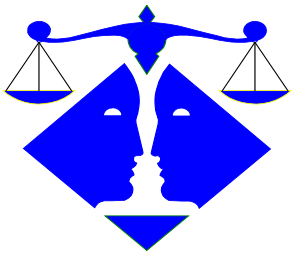

Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 12 (2007)

(Adopted and Issued by the Commission on May 18, 2007)

N.C. Gen. Stat. §7A-38.2(b) provides, "The administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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 ethical dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Prior to a family financial settlement conference, an attorney received a *Mediation Agreement* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify program rules or the Standards of Professional Conduct for Mediators? This Opinion applies to situations where the parties fail to select a mediator and the court is required to appoint a mediator pursuant to the Rules.

Advisory Opinion

In 1995, after determining that the Mediated Settlement Conference Program would be continued and expanded statewide, the Court's first order of business was to create the Dispute Resolution Commission for the purpose of certifying and regulating mediators. The Court and General Assembly agreed that program rules, certification requirements, standards of conduct and enforcement procedures were essential for a program in which parties were being ordered not only to participate, but to compensate their mediator. Absent such a framework, the Court could not ensure program credibility or protect the public.

Any agreement containing terms that modify or run counter to program rules and the Standards, violates the intentions of the General Assembly, Court and Commission in creating a framework to govern program operations and the conduct of mediators. Moreover, the *Mediation Agreement* in question disregards the pledge the certified mediator made pursuant to FFS Rule 8(a)(7). which requires all applicants for family financial certification to agree to adhere to the Standards of Conduct and the court's Order referring the case to family financial settlement which provided that the conference was to be conducted in accordance with the Rules for the Family Financial Settlement Program.

Specifically, the *Mediation Agreement* provided for the court-appointed family financial mediator: 1) to charge a $150.00 administrative fee; 2) to be reimbursed for any costs he incurs in quashing a subpoena

served on him by one of the parties; 3) to give to the parties the "right" to discontinue the mediation at any time; 4) to freely express his opinions on the parties' respective legal positions and to simultaneously serve as both their mediator and neutral evaluator; and 5) to discuss information disclosed in mediation with others, provided the parties give him written permission to do so. All the above provisions would modify, if not violate, existing provisions of the program rules or Standards.

The Commission also notes that the *Agreement* in question provides that while the mediator will explain the mediation process to the parties at the beginning of the conference, he will not normally permit the attorneys to make opening statements. He suggests that, in his experience, such statements contribute to a hostile atmosphere. Rather than opening statements, the mediator indicates that he will ask the parties and their attorneys questions about the issues they wish to address. While this is not a modification of the Rules *per se*, the Commission believes this language raises a practice issue. The opening session is designed to serve to two purposes. First, it gives the mediator an opportunity to explain the mediation process and the role of the mediator to the parties and their lawyers. Second, it gives the parties the opportunity to sit down together and, perhaps for the first time, hear one another's perspective on the facts and legal issues in dispute.

FFS Rule 6(a)(1) clearly states that the mediator is in control of the conference. A mediator has latitude, consistent with rules and standards, to conduct the proceeding as he or she sees fit. However, the Commission suggests that it may be important to the attorneys and parties to have an opportunity to address one another directly and to give each other their perspective on the dispute. This contributes to the sense that they have had an opportunity to state their case in their own terms and to heard by the other side and the mediator. Simply answering the mediator's questions, may not permit a party the same opportunity to present the full picture as he or she sees it or to emphasize the issues and points that party feels are most important to them.