Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 22 (2012)

(Adopted and Issued by the Commission on January 27, 2012)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he 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 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

Defendant's attorneys in a high-profile products liability case contacted the Commission. They explained that a mediated settlement conference had been held in the case. The parties had not been able to reach a final agreement. However, an offer was on the table at the time the mediation impassed, and they anticipated that negotiations would continue in the near future. Defendant's attorneys stressed that confidentiality was important to their client given that there were a number of potential plaintiffs who had not filed suit. Following the mediation and much to their client's distress, the plaintiff's attorney spoke with the press and revealed the amount of the settlement offer on the table.

Defendant's counsel stated that they understood that mediation was a confidential process. They asked whether plaintiff's counsel had, in speaking with the press, violated any statutes or rules governing the Mediated Settlement Conference Program. Though they did not single out the particular mediator who conducted their conference, they complained that, if mediation is not a confidential procedure, mediators are generally misleading attorneys and their clients on that point. They insisted that during opening sessions of conferences they had attended, it was routine for mediators to provide assurances that mediation is a confidential procedure and that "what is said in mediation stays in mediation."

Advisory Opinion

Under the following analysis, plaintiff's counsel did not violate any statutes or rules in revealing the tentative settlement offer to the press, and it is clear mediators should not make assurances of confidentiality where none exist.

There is much confusion among mediators about the subject of confidentiality. The duty of confidentiality is found in Standard 3 of the Standards of Conduct for Certified Mediators. It places a duty of confidentiality on certified mediators and no one else involved in the mediation process. A mediator would certainly be in violation of Standard 3 if he or she spoke to the press or public regarding a settlement offer.

However, mediators should be mindful that parties and their counsel are free to talk to the press or public about statements or conduct occurring during their mediation, including the fact and content of any offers to settle. Thus, mediators should be careful not to suggest or imply that the situation is otherwise and should avoid statements like "everything that goes on in mediation stays in mediation." Such statements are inaccurate and misleading.

Mediators' statements about confidentiality should make it clear that it is the mediator and not the parties who has a duty of confidentiality. After being notified of the limited confidentiality rules, if the parties indicate that confidentiality among the parties is an issue, then it would be the best practice for the mediator to explore whether the parties wish to negotiate a confidentiality agreement to govern their conduct during and after the mediation. If no such agreement can be reached, then the parties may go forward in mediation armed with a clear understanding that their subsequent negotiations will not be treated as confidential by the parties themselves.

Much of the confusion about the subject of confidentiality comes from the fact that mediators must explain both confidentiality and inadmissibility to the parties at the beginning of the process. Mediators often confuse one for the other or wrongly call both of them "confidentiality."

Inadmissibility is addressed in the Mediated Settlement Conference Program's enabling legislation, N.C.G.S. § 7A-38.1 (l), which provides that "evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section" shall be inadmissible in any proceeding in the case being mediated. This provision deals only with the inadmissibility of evidence in a court proceeding and affords no broader confidentiality protections. Inadmissibility and confidentiality are separate and distinct concepts, and mediators should be careful, accurate, and not misleading in explaining them to the parties.

Though the question before the Commission in this opinion relates to the Mediated Settlement Conference Program, similar enabling legislation and rules characterize the Family Financial Settlement, Clerk, and District Criminal Court Mediation Programs. Note, however, that Clerk Program Rule 6(b)(4)b. requires mediators to submit agreements reached in mediation to the clerk for review in guardianship, estate, and other matters which may be resolved only by order of the clerk. Also note that other court-ordered mediation programs may have confidentiality requirements that do apply to the parties, attorneys, and mediator. For example, the Mediation Program for the United States Court of Appeals for the Fourth Circuit requires that all participants not divulge the communications in mediation to anyone (see 4th Cir. R. 33).