ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 29 (2014)

(Adopted and Issued by the Commission on August 8, 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 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 3 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 3 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 3 applies only to the mediator and not to the attorneys or parties. A previous Advisory Opinion clarified that point. See A.O. 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 mediated settlement 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 Dispute Resolution Commission; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

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, or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, 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).

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.

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. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 mediators and to protect the public.