



Advisory Opinion of the NC Dispute Resolution Commission Advisory Opinion No. 43 (2022)

(Adopted and Issued by the Commission on September 30, 2022)

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.

Concern Raised

Mediator contacted the Commission to ask if the metadata from a remote mediation could be retrieved, by any person or party, after the conclusion of a mediated settlement conference.

ADVISORY OPINION

May a person retrieve, or use any data or metadata related to the mediation process that has been created or stored by remote technology providers?

No.

MSC Rule 4(f), FFS Rule 4(e), Clerk Rule 4(d), DCC Rule 4(e), and Farm Nuisance Rule 5(b)(5) all provide the following language:

“No Recording. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.”

Metadata is data that provides information about other data. The metadata recorded on a device may be used for identification and discovery of parts of a record. Metadata can include a title, abstract, author, date, keywords, contents, quality of statistical data, characteristics of digital materials, information about the creator, copyright holder, and public licensing. It is possible that the text of a message (such as messages in a Chat feature), closed captioning record, or an image to be contained in the metadata. Metadata may be stored in the same file or structure as the data, as embedded or internal metadata, or it can be stored in a

separate file or field from the described data. Regardless of the form, content, or storage location, metadata from a mediated settlement conference shall not be accessed or retrieved by any person.

The DRC program rules prohibit recording of the conference to enforce the Commission's goal of open conversation between the parties, without fear of retaliation. The DRC continues to uphold the principle that information shared in a mediated settlement conference shall be confidential as to the mediator and the exchange of information between the parties shall not be admissible in court, subject to statutory exceptions.

The DRC recognizes that with some electronic remote communication platforms, data or metadata may be recorded without the knowledge or consent of the mediator or the participants and is beyond their control. However, the DRC cautions the mediator and parties that they may not access such data after the conference is over.

As a best practice, the DRC suggests that, when possible, it is preferred that the mediator use a platform or computer program owned or controlled by the mediator. Then, hopefully, any metadata that is generated or recorded will be in the possession of the mediator and thus not available for searching or mining by parties or their affiliates.

In summary: No Retrieval of Data or Metadata from Remote Technology Providers. No person shall access, retrieve, or use any data or metadata related to the mediation process created or stored by remote technology providers.