



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion No. 43 (2022)

(Adopted and Issued by the Commission on September 30, 2022; Amended September 20, 2024.)

Mining Metadata and Recording the Conference, Rule 4

The mediator or a party to a mediated settlement conference shall not mine metadata from a mediated settlement conference or record the mediated settlement conference.

Concern Raised

Mediator contacted the Dispute Resolution Commission (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.

Rule 4(f) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Actions; Rule 4(e) of the Rules for Settlement Procedures in District Court Family Financial Cases; Rule 4(d) of the Rules of Mediation for Matters Before the Clerk of Superior Court; Rule 4(e) of the Rules of Mediation for Matters in District Criminal Court; and Rule 5(b)(5) of the Rules for Mediation for Farm Nuisance Disputes (the Rules) 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 the text of a message (such as messages in a Chat feature), closed captioning record, or an image in the metadata contains confidential information. 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 Rules prohibit recording of the conference to enforce the Commission's goal of open conversation between the parties, without fear of retaliation. The Commission 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 Commission 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 Commission cautions the mediator and parties that they may not access such data after the conference is over.

As a best practice, the Commission suggests that, when possible, it is preferred that the mediator use a platform or computer account 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.

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.