OPEN FOR COMMENT UNTIL MAY 28, 2024

Advisory Opinion No. 43 (2022)

(Adopted and Issued by the Commission on September 30, 2022, Amended August xx 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.

Advisory Opinion No. 42 (2021)

(Adopted and Issued by the Commission on June 25, 2021, Amended August xx 2024.)

Settlement Authority and Signing the Agreement, N.C.G.S. § 7A-38.1(*l*)

When a party is absent from a mediation, the mediator shall inquire about settlement authority at the beginning of the conference. When a party is not physically present, the mediator shall verify any designee signing an agreement has written authority to do so.

Concern Raised

In *Mitchell v. Boswell, 274 NC App 174, 851 S.E. 2d 646 (2020),* the North Carolina Court of Appeals held "the applicable statute of frauds by its plain terms requires the parties, not their attorneys, to sign a mediated settlement agreement. The failure of the parties to sign the mediated settlement agreement renders it unenforceable as a matter of law." In a dispute over the enforcement of a memorandum of settlement signed by attorneys on behalf of their clients, the Court of Appeals determined the plain meaning of N.C.G.S. § 7A-38.1(*l*) requires mediated settlement agreements contain the signature of

the named parties to the action, holding that an agreement signed by an attorney on behalf of their client, regardless of whether given authority, is unenforceable.

The opinion states: "N.C.G.S. § 7A-38.1(*l*) does not permit authorized agents to sign on behalf of a party. In adopting the language of N.C.G.S. § 7A-38.1(*l*), the General Assembly unambiguously omitted the authority to sign by authorized agent as it has included in other statute of frauds contexts." *Id.* The Court of Appeals held that "[t]he failure of the parties to sign the mediated settlement agreement renders it unenforceable as a matter of law." *Id.*

The court noted in footnote 5, quoting *House v. Stokes*, *66 N.C. App. 636, 641 (1984)*, "The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made." In *Mitchell v. Boswell,* one party denied having authorized the attorney to sign. Thereafter, the North Carolina General Assembly modified the statutory language in N.C.G.S. § 7A-38.1(*l*) to allow a party to assign a designee to sign a settlement agreement on their behalf. The North Carolina Supreme Court then amended the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) Rule 4(c), effective October 1, 2021, to allow a designee to sign on behalf of a party if the designee shows written authorization to do so.

Advisory Opinion

What are the duties of the mediator when a party is unable to sign a settlement agreement reached during a mediation?

N.C.G.S. § 7A-38.1(*l*) requires mediated settlement agreements be reduced to writing and signed by the parties to the action. It is the mediator's duty to see that this is accomplished in a mediation where a settlement is reached. If a party is not physically present, then the party may sign by electronic means, or the party must give written authorization to a designee who is present at the mediation. If a party fails to satisfy one of these conditions for signing an agreement, then the mediator should encourage disclosure by the absent party. If disclosure is refused, then the mediator should consider postponing or terminating the mediation.

In *Mitchell v. Boswell*, the court observed in footnote 5 "The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made." *House v. Stokes, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675 (1984)*. Such a holding does not apply here, where Boswell has not admitted entering into the memorandum of settlement below or on appeal, and instead contends he did not enter into the contract." In *Mitchell v. Boswell,* the signing attorney allegedly had verbal

authority from his client to sign the mediated settlement agreement. The client denied having given authority.

A party who will not be physically present at a mediated settlement conference is responsible for arranging electronic signing capacity and if that cannot be done, for providing written verification of someone with authority to sign on the party's behalf. The mediator is not required to determine the legal adequacy of the written verification provided. However, if a party who will not be physically present at the time the final agreement is to be signed has not made arrangements for electronic signature or provided written verification that the party's designee has authority to sign on the party's behalf, the mediator shall encourage the party or party's attorney to notify all other parties of the lack of ability to execute a final agreement prior to commencing the mediation. After full disclosure, the parties may commence the settlement conference.

When the mediator learns that a party required to attend under MSC Rule 4(a) does not plan to attend, best practice includes the following steps.

1. If notified in advance, the mediator should discuss the attendance rule with the parties and/or their counsel and strongly encourage compliance with the attendance rule.

2. If all parties consent and the mediator determines that there is a compelling reason to excuse the party's attendance, the mediator should seek to determine that the party can be available through electronic means to sign the final agreement, or be able to provide written verification that the party's designee has authority to sign on the party's behalf.

3. If the party refuses to attend either in person or through remote technology, or fails to appear at the mediation, the mediator should ask the attorney if the party has provided written verification that the party's designee has authority to sign on the party's behalf.

4. Absent such written designation, the mediator should encourage the party and/or the party's attorney to disclose to the other side the fact that the party has not provided written verification that the party's designee has authority to sign on the party's behalf. After full disclosure, those in attendance and the mediator may agree to commence the conference. Unless impasse occurs, the conference is not concluded until the requirements of MSC Rule 4(c) are met. Recess may be an appropriate tool to continue the conference until all required signatures are obtained.

5. If a party does not consent to disclose that arrangements have not been made to finalize a settlement agreement through electronic signature or written verification that the party's designee has authority to sign on the party's behalf, the mediator may determine that it is appropriate to recess the mediation or, pursuant to the

Standards of Professional Conduct for Mediators (Standards), Standard 8, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator's duty to maintain confidentiality under Standard 3(b). A recess or a withdrawal may avoid a situation where the other party spends time and money on the mediation process with the understanding that a final agreement may be reached, when the inability to execute a final agreement means a final agreement cannot be reached during the conference.

6. This Advisory Opinion does not modify the attendance rules in MSC Rule 4(a), impose additional requirements regarding authority to make decisions in the mediated settlement conference or impose additional duties or obligations on representatives of corporations or governmental entities in mediated settlement conferences. See MSC Rule 4(a) for requirements regarding attendance and authority.

Advisory Opinion No. 41 (2021)

(Adopted and Issued by the Commission on March 5, 2021, Amended August xx 2024.)

Notifying Lienholders, Rule 4(b)

The mediator does not owe a duty to a lienholder unless the lienholder becomes a participant in the mediated settlement conference. Under the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, Rule 4(b), the attorneys or parties shall notify the lienholder of the scheduled mediation.

Concern Raised

Mediator contacted the Dispute Resolution Commission (Commission) to ask if a mediator has a duty to communicate with a lienholder after the mediation has been scheduled, but prior to the mediation. The lienholder reached out to the mediator after reviewing the file and discovering the Designation of Mediator.

Advisory Opinion

Does a Mediator have a duty to communicate with a lienholder?

No.

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules), which govern attendance at a mediated settlement conference, do not require the attendance of a lienholder under Rule 4(a)(1). Rather, MSC Rule 4(b) provides the attorneys or parties shall notify the lienholder of the scheduled mediation and shall request the lienholder to attend.

MSC Rule 4(b) provides:

> Notifying Lienholders. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

The above rule requires the attorney or party to the action to contact the lienholder to notify them of the meditated settlement conference. However, until the lienholder attends the mediation, they are considered a nonparticipant. The mediator holds no duty to the lienholder prior to the mediation and is precluded from discussing the mediation with a nonparticipant under the Standards of Professional Conduct for Mediators (Standards), Standard 3. Confidentiality.

Standard 3. Confidentiality provides:

> A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.
>
> (a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

The mediator may confirm the fact that they have been appointed by the court to mediate the case (as this is in the public record and is not confidential) or direct the lienholder to the party or their attorney for information regarding the settlement conference without violating the Standards or MSC Rules. However, the mediator is under no obligation to respond to the lienholder.

Once the lienholder is invited to participate in the mediation, and the lienholder attends the conference, they become a participant at the mediation. As a participant to the mediation, the mediator may disclose information regarding the mediation to the

lienholder, so long as the information was not communicated in confidence to the mediator under Standard 3(b).

Standard 3(b) Confidentiality provides:

> A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

Advisory Opinion No. 40 (2020)

(Adopted and Issued by the Commission on March 24, 2020, Amended August xx 2024.)

Mediator Accepting Role as a Parenting Coordinator, Standard 7

A mediator shall not serve as a Parenting Coordinator for parties after mediating the same cause of action for the parties.

Concern Raised

Mediator contacted the Dispute Resolution Commission (Commission) to ask if a mediator may, after the conclusion of a mediation, whether successful or unsuccessful, thereafter serve in the role of a Parenting Coordinator (PC) for the parties if either assigned by the presiding judge or selected by the parties themselves.

Advisory Opinion

May a mediator act as a PC for the parties after conducting a mediation involving the same parties out of the same cause of action?

No.

The Standards of Professional Conduct for Mediators (Standards), Standard 7. Conflicts of Interest provides a mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

Standard 7(c) provides:

> A mediator who is a lawyer, therapist, or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his or her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard 3 is a substantive conversation.
>
> A mediator who is a lawyer, therapist, or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute, or an outgrowth of the dispute.

This Standard provides a bright line rule on what will be considered a conflict of interest for a mediator. A conflict arises when a mediator acts as a professional in any capacity with one or both of, the parties in any matter concerning the subject of the dispute, before or after the mediation. The mediator may not mediate a case if the mediator has previously engaged in a professional relationship with one or both of the parties, if the matter to be mediated involves the same dispute, is an action closely related to the dispute, or is an outgrowth of the dispute. Additionally, the Standard prohibits a mediator from engaging in a professional relationship with one or more of the parties to a mediation, after a mediation has concluded if the new professional relationship involves the same dispute, is an action closely related to the dispute, or is an outgrowth of the dispute. The relationship is considered professional when the person providing services obtains confidential or private information from the party requesting services.

The PC is granted authority pursuant to N.C.G.S. § 50-92. The statutory language contained in N.C.G.S. § 50-92 does not specifically reference advising, counseling or representing the parties. However, a PC is often immersed within the family dynamics throughout the duration of the PC's appointment. The PC is acting as a professional and may be asked to make decisions based on their knowledge of the family and their surrounding circumstances. The intent of Standard 7(c) is to avoid a conflict by disallowing a mediator from engaging in a past or future, professional relationship with a party where the mediator has gained, or is able to gain, confidential information from a party during the mediation process. In the event a mediator gains confidential information during a family financial mediation, the information could influence the

mediator/parenting coordinator's decision-making process in the future, thus affecting the PC's ability to remain neutral. Additionally, the Association of Family and Conciliation Courts issued *Guidelines for Parenting Coordination* (2019) that provides, "[a] professional shall not act as a PC with co-parents or others directly involved in the parenting coordination process if they previously provided professional services to the same parties….This includes, but is not limited to, service as a confidential mediator, court evaluator, child's attorney, guardian ad litem, child advocate, therapist, consultant, co-parenting counselor or coach." (Association of Family and Conciliation Courts, 2019, page 6.). The Commission recognizes the Association of Family and Conciliation Courts as providing best practices for parenting coordinators.

The Commission continues to uphold the premise that mediators should not be in a position where they could benefit or profit from knowledge they learned in mediation. The Commission believes that later employment or the prospect of such employment arising out of a mediation creates a financial conflict or the appearance of a conflict. See AO 15 (2008) where a mediator was prohibited from becoming the administrator of the estate which was the subject of the mediation. However, see AO 17 (2010), AO 20 (2011) and AO 21 (2012), where the Commission determined that a mediator may engage in roles supportive of the resolution of the dispute being mediated, even for pay, such as arbitrating, acting as a notary, or reviewing documents.

Advisory Opinion No. 39 (2018)

(Adopted and Issued by the Commission on November 17, 2018, Amended August xx 2024.)

A Mediator's Duty, Rule 6

Mediators shall actively and effectively manage their cases by scheduling and holding the mediated settlement conference and by timely filing the Report of Mediator.

Concern Raised

Court staff in three judicial districts contacted the Dispute Resolution Commission (Commission) over a two-week period regarding a Commission certified superior court mediator. The mediator, they complained, was chronically neglecting his case management duties. He was frequently failing to timely file his Reports of Mediator, if at all, and was failing to schedule his conferences within the deadlines for completion set by the court. Court staff in one district reported having to grant extensions and

sometimes even move trial dates because the mediator was overbooked. Court staff in another district reported having to recruit substitute mediators at the last minute to fill in for the mediator so that parties would not lose their opportunity to mediate. In addition to his failure to fulfill his case management obligations, court staff reported that the mediator was unresponsive to their telephone calls and emails. In one district the mediator failed to respond to the request of a senior resident superior court judge that he meet with him to discuss his missing Reports of Mediator. Court staff expressed a great deal of frustration about having to spend so much time tracking the mediator down and responding to problems that the mediator's conduct created.

Commission staff filed a complaint against the mediator. The mediator failed to respond to the complaint. The Commission's Grievance Committee determined to suspend the mediator's certification for a one-year period and to require him to meet certain conditions in order to be reinstated.

Advisory Opinion

Though this situation was extreme, it is not unusual for court staff to contact the Commission regarding mediators who are neglecting their case management duties. These situations are sometimes chronic and are always a source of great frustration for court staff. Because the Commission is concerned about these complaints, it is taking this opportunity to remind mediators of their case management duties. Mediators who fail to meet their obligations may be disciplined.

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court (MSC), the Rules for Settlement Procedures in District Court Family Financial Cases (FFS) , the Rules of Mediation for Matters Before the Clerk of Superior Court, the Rules of Mediation for Matters in District Criminal Court, the Rules of Mediation for Farm Nuisance Disputes, and the Standards of Professional Conduct for Mediators (Standards) place an obligation on mediators to **actively and effectively manage** their cases:

- For example, MSC/FFS Rule 6(b)(4) provides that a mediator is to report on the outcome of each case assigned to them by filing a Report of Mediator using either AOC-CV-813 (MSC) or AOC-CV-827 (FFS) or using forms approved by local rule that at minimum collect the same information as the approved forms. **Reports are to be fully completed and filed with the court within ten (10) days of the conclusion of a conference or within ten (10) days of a mediator being notified that the parties have reached a settlement. In other words, a Report is due whether a mediation is held or not.**

- In addition, if an agreement is reached, MSC Rule 6(b)(4)(b) provides that the mediator **shall advise** the parties that MSC Rule 4(c) requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the State or a subdivision thereof is a party to the action or before the expiration of the mediation deadline whichever is later. FFS Rule 6(b)(4)(b) requires that consistent with FFS Rule 4(b)(2), the mediator **shall advise** the parties to file their consent judgment or voluntary dismissal with the court within 30 days or before the expiration of the mediation deadline whichever is later.

- **MSC/FFS Rule 6(b)(5) provides for mediators to schedule and conduct their conferences prior to the deadline for completion set out in the court's order.** If the parties or their lawyers do not cooperate with the mediator in scheduling the case for mediation, the mediator is to take charge and select a date, time, and location for the conference (within the county where the action is pending) and notify those ordered to attend. Mediators should not wait until the last minute to schedule their conferences. Doing so can lead to circumstances where deadlines set by the court cannot be met.

  Standard 7(f) provides that a mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.

  Beyond meeting the deadline for completion set out in the court's order, both MSC 7(e) and FFS Rule 7(f) ask mediators, once a case is scheduled for mediation, to try to avoid postponements. Comments following both these Rules read identically:

  > Non-essential requests for postponement work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

MSC Rule 7(e)(2) and FFS Rule 7(f)(2) provides guidance on what is good cause for a postponement. Both rules provide that good cause involves situations that are beyond the control of the parties.

Effective mediator case management is critical if our programs are to meet their statutory charge and be successful:

- Enabling legislation charges the MSC and FFS Programs not only with helping parties to settle their cases, but **with making the courts more efficient**. Court-ordered mediation can accomplish this goal only if mediators schedule their conferences within the deadlines set by the court and then timely inform the court of outcomes. When mediators do their job well, judges can better manage their dockets and better allocate their time, leading to more efficient courts. When mediators fail to do their job, these efficiencies are compromised or lost and court staff must take time away from their important work to encourage mediators to comply with program rules.

- A disgruntled party whose case impasses after several hours in mediation could foreseeably complain to their local newspaper or state legislator, "I was forced to participate in and pay for a process that does not work. The only people benefitting from mediation are mediators and lawyers." The best response the Commission has to refute such a charge is robust caseload data. Caseload statistics for the MSC and FFS Programs is pulled primarily from Reports of Mediator. If Reports do not come in timely or are not fully completed, caseload statistics suffer, and the programs appear less robust. This data is very important to the Commission as a measure of our program's health and success. The Commission shares this data annually with judges, legislators, State Bar and NCBA officials, and the public. Commission staff routinely share it with parties who call complaining about having to participate in mediation or who did participate and were unhappy with their result. Research by the Commission found that Reports of Mediator were not being filed in 11 % of cases mediated. That is a significant data loss. In addition, tardy Reports which come in after cases are closed are typically not entered in the system, so that data is lost as well.

Sitting down at the table with parties to help them discuss and resolve their disputes is important work. Getting those parties to the table in the first place and then following through to report on their efforts is just as important. Mediators who fail to take this part of their job seriously are potentially harming the courts and the programs they serve and may be putting themselves at risk of disciplinary action.

Advisory Opinion Number 38 (2018)

(Adopted and Issued by the Commission on September 21, 2018, Amended August xx 2024.)

Exclusion of Evidence of Negotiations in Separate Proceeding, N.C.G.S. § 7A-38.4A

Evidence of offers made and rejected during a mediated settlement conference may not be introduced in support of a motion for attorney's fees in the same action. Such a motion is a "proceeding in the action" and therefore, evidence of statements made in the conference is barred by N.C.G.S. §7A-38.4A. The use of the mediator's notes is also barred by the statute.

Concern Raised

During a divorce mediation, an attorney asserted that evidence of offers made and rejected in mediation could be used later in the same action to support a motion for attorney's fees. The mediator inquired if this was correct and whether he should inform future mediation clients of this. The mediator's second question was whether his notes relating to offers and counteroffers could be used as evidence for this same purpose.

Advisory Opinion

Question 1

May offers and proposals be used as evidence for attorney's fees in the same action?

No.

N.C.G.S. § 7A-38.4A(j) provides:

> Evidence of 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, except:
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> (1) In proceedings for sanctions under this section;
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> (2) In proceedings to enforce or rescind a settlement of the action;
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> (3) In disciplinary proceedings before the State Bar or the Dispute Resolution Commission; or
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> (4) In proceedings to enforce laws concerning juvenile or elder abuse.
>
> . . .
>
> No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

A petition for attorney's fees is clearly a "proceeding in the action" as presented in this inquiry. None of the four exceptions set out in the statute apply to the petition, and therefore evidence of offers made and rejected during mediation is barred by the statute. Regardless of whether such evidence is based on verbal or written statements of a

mediation participant, or on such statements relayed by the mediator, they fall within the language of the statute and are therefore "inadmissible in any proceeding in the action or other civil actions on the same claim."

Question 2

May a mediator's notes related to offers and proposals be used as evidence for attorney's fees in the same action?

No.

The above quoted statute prohibits statements made in mediation from being admitted as evidence "in any proceeding in the action or other civil actions on the same claim." There is no exception for the mediator's notes. N.C.G.S. § 7A-38.4A(j) continues as follows:

> No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or the Dispute Resolution Commission, and proceedings to enforce laws concerning juvenile or elder abuse.

Accordingly, the mediator cannot be compelled to testify or produce evidence, and the mediator's notes are inadmissible, with certain exceptions not applicable in this inquiry.

The same or similar language is found in N.C.G.S. § 7A-38.1. Therefore, this advisory opinion applies to mediated settlement conferences in superior court civil actions as well.

Advisory Opinion Number 37 (2018)

(Adopted and Issued by the Commission on September 21, 2018, Amended August xx 2024.)

Designation of Mediator, Rule 2(a)

Only a party, or a party's counsel, may complete the Designation of Mediator form. A mediator shall not pre-populate a Designation of Mediator form with their information and distribute the form to the parties or their counsel.

Concern Raised

Court staff contacted the Dispute Resolution Commission (Commission) about a mediator who was signing a Designation of Mediator (Designation Form) form naming herself as the mediator who would mediate the case. Court staff expressed concern that, even with the parties' permission, such practice was inconsistent with the Rules for Mediated Settlement and Other Settlement Procedures in Superior Court Action (MSC) and suggested that the practice could look bad to the public, i.e., mediators should not be assigning themselves to mediate cases. Court staff asks whether it is appropriate for MSC mediators to complete, sign and/or file the Designation forms with the court? Some court staff contacted by the Commission regarding this matter indicated that this was not the only mediator in their district engaged in this practice.

Advisory Opinion

May mediators complete, sign, and/or file with the court AOC-CV-812, Designation of Mediator in Superior Court Civil Action?

No.

MSC Rule 2(a) provides:

> **DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all the parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of the compensation; and (iv) that the mediator is certified under these rules.

The above Rule establishes that for a mediator to be designated in a superior court case, the parties must first agree on the certified mediator who will conduct their conference. The mediator must, in turn, agree to serve and the parties and mediator must agree on the mediator's compensation. Once all that has been decided, the plaintiff's attorney or other party as agreed, is to use the approved AOC form, i.e., AOC-CV-812, to convey to the court the name of the certified mediator who is being designated by the parties, their contact information, and the mediator's rate of compensation. The signature box on

AOC-CV-812 reinforces the language in MSC Rule 2(a) in that it is clearly labeled, "Signature of Party or Party's Attorney". As such, both Rule 2(a) and AOC-CV-812 clearly contemplate that the plaintiff's attorney or another party is to complete, sign, and file the Designation Form. Nowhere in the Rule or Designation Form is there any language suggesting that it is appropriate for the mediator to assume this role or for the parties to delegate such responsibilities to the mediator.

Rule 2(a) reads as it does because having the plaintiff's attorney or other party be responsible for completing, signing, and filing the Designation Form serves to protect the court. If a self-represented party later complains that they were not consulted on the identity of the mediator selected, an opposing party seeks to substitute another mediator for the one named in the Designation Form, or a mediator complains that they were not consulted about serving and did not agree on the compensation set forth in the Designation Form, the court can look to the attorney/party who filed the Designation Form for an explanation. And, as court staff noted above and the Commission agrees, allowing mediators to appoint themselves to conduct mediations does not pass the public perception test and creates the potential for a conflict of interest.

Court staff indicates that they have been told by mediators that attorneys want them to complete, sign, and file Designation Forms as a matter of the attorneys' convenience. It may be convenient for attorneys to have mediators assume this role, but it is not consistent with Rule 2(a) and the signature block on AOC-CV-812 which clearly contemplates that plaintiff's counsel, or another party is to complete, sign, and file the Designation Form. Mediators shall not complete, sign, or file Designation Forms with the court. For purposes of this Opinion, the Commission defines "completing" a Designation Form to include the practice followed by some mediators, or anyone acting on their behalf, of preparing Designation Forms for lawyers, including inserting the name of a mediator, and then e-mailing a pdf of the completed form to the parties for them to sign and file. Court staff should not accept any Designation Forms which they know to have been completed, signed, or filed by a mediator, or anyone acting on their behalf.

Though this Advisory Opinion addresses a question raised by superior court staff and the actions of a superior court mediator, it has broader applicability. Neither the Rules for Settlement Procedures in District Family Financial Cases (FFS), Rule 2(a) nor the Rules of Mediation for Matters Before the Clerk of Superior Court (Clerk) 2(a) provide for the parties to delegate the responsibility to complete, sign, and/or file Designation Forms to the mediators they have chosen to conduct the mediation. For that reason and for the other reasons set forth above, FFS and Clerk mediators should not sign Designation Forms and district court and Clerk staff should not accept any such Designation Forms that they are aware were completed, signed, and/or filed by FFS or Clerk mediators.

Advisory Opinion 36 Archived August xx 2024. (Substantive content included in AO 33)

Advisory Opinion 35 Archived August xx 2024. (Substantive content included in AO 42 and 24)

Advisory Opinion No. 34 (2018)

(Adopted and Issued by the Commission on February 2, 2018, Amended August xx 2024.)

Mediator Conducting Simultaneous Mediations and Billing Full Rate for Each Mediation, Standard 7.

A mediator shall not conduct simultaneous mediations and bill their full rate for each mediation.

Concern Raised

An attorney for a party at a mediated settlement conference reported to the Dispute Resolution Commission (Commission) that the mediator simultaneously conducted a second mediation involving a separate dispute and separate parties at the same time and place as the mediated settlement conference in which the attorney participated. The mediator charged the parties in each mediation the mediator's full hourly rate and assessed an administrative fee for each conference.

Advisory Opinion

Question 1

May a mediator simultaneously conduct two mediated settlement conferences in unrelated cases involving different parties?

No.

The Standards of Professional Mediators (Standards), Standard 7, Conflicts of Interest, begins with "A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute." There is an

inherent conflict of interest when a mediator conducts two mediations at the same time in that the mediator is or appears to be serving his own interests and not those of the parties.

Subsection (g) of Standard 7 states that, "A mediator shall not prolong a mediation for the purpose of charging a higher fee." Pursuant to Rule 6(a)(1) of both the Rules for Mediated Settlement Conferences and Other Settlement Procedures and the Rules for Settlement Procedures in District Court Family Financial Cases, the mediator is in control of the conference, and as such determines the length of the opening statement, the needs of the parties during caucus sessions, and the amount of time the mediator spends in each caucus session. It would be very difficult for a mediator to be able to "time" the caucus sessions for the separate conferences so that no party is waiting an undue amount of time while the mediator is in caucus with a party in the other conference. As such, it is apparent that conducting simultaneous mediations is likely to result in one or both of the conferences being prolonged prior to settlement or impasse. By choosing to hold simultaneous conferences, the mediator is, in effect, prolonging the conference(s) which results in a higher fee, a violation of Standard 7(g).

The Commission is also concerned about the mediator's ability to maintain the confidentiality of all information obtained within the mediation process as required by Standard 3, Confidentiality. In particular, Standard 3(a) provides that, "A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation…." The parties to each mediation are non-participants in the other, simultaneous mediation. Standard 3(b) provides that, "A mediator shall not disclose *to any participant,* directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process…."

The mediator must keep track of a significant amount of information, and it may be very difficult to keep track of confidential information disclosed in each caucus during each mediation. The parties and/or their attorneys may express concerns about the protection of their confidential information which could result in a lack of trust or guarded participation in or dissatisfaction with the process. In fact, this query came from an attorney to a Commission member, and the attorney raised this very concern.

Standard 3 reflects the bedrock importance of the mediator's duty to preserve the confidentiality of all information disclosed within the mediation process, and the Commission, therefore, discourages a mediator from conducting simultaneous mediations under any circumstances, even if all parties agree to do so.

Question 2

May the mediator assess the mediator's full hourly rate and administrative fee for each mediated settlement conference?

No.

The Commission suggests that convening two mediations at the same time and place and charging all parties at a mediator's full hourly rate violates Standard 7 in that it places the mediator's financial benefit ahead of the mediator's primary obligation to impartially serve the parties.

Advisory Opinion No. 33 (2016)

(Adopted and Issued by the Commission on November 18, 2016, Amended August xx 2024.)

Gift Giving, Standard 7(h)

A mediator shall not give or receive a gift to or from a party or representative of a party in return for a referral or due to an expectation of referral of clients for mediation services.

Concern Raised

Certified attorney mediator requests advice concerning her plan to mail a holiday card to many of the attorneys in her geographic area and to include a mouse pad with the mediator's website printed thereon. The mouse pads have already been purchased at a cost of approximately $1.60 each. If the mediator is not allowed to distribute the mouse pads as an advertising tool in this way, she asks if she may donate the mouse pads to an organization of attorneys by making the mousepads available to attendees at a meeting of the organization.

Advisory Opinion

Question 1

May the mediator distribute items of small monetary value, such as mouse pads, pens, calendars, calculators or post-it notes, as an advertising tool, either by mail or otherwise?

Yes.

The inquiry occurs with regular frequency and has a broad application for mediators who contemplate making gifts to prospective clients as a part of their promotional efforts or to regular clients as a "thank you" for previously selecting them to mediate their cases. In responding to this inquiry, the Dispute Resolution Commission (Commission) first looks to the Standards of Professional Conduct for Certified Mediators (Standards).

Standard 7(h). Conflicts of Interest provides:

> A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of referral of clients for mediation services.
>
> A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality. However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

The mouse pad contemplated here is an advertising tool, intended to keep the mediator's name and contact information before an attorney or other person involved in the mediator selection process. It is not a "form of consideration" or an advanced payment in return for a future referral, and therefore does not violate the first sentence of Standard 7(h). While any advertising is certainly done with the hope that it will generate future business, advertising does not constitute consideration, which is an element of an enforceable contract. There is no contract formed or expected when a mediator distributes an advertisement. According to Black's Law Dictionary, something given for past actions is not consideration, thus a gift to a mediator for doing a good job yesterday or a gift to a lawyer for hiring the mediator last year is not consideration. However, such a gift for past service, if excessive, may violate the next sentence of the standard, as discussed below.

Although it is not consideration, the mouse pad is a gift, controlled by the second sentence of Standard 7(h). While that sentence begins with what seems to be an absolute prohibition on giving or receiving gifts by a mediator, the sentence ends with the qualifier "that raises a question as to the mediator's impartiality." To judge the application of this provision, the Commission uses an "objectively reasonable" standard. It is not objectively reasonable that a litigant will be concerned about partiality or bias upon seeing the mediator's name on a mouse pad, pen, or calendar in the attorney's office where the mediation is taking place. Such items are advertising tools intended to keep the mediator's name and contact information before an attorney or other person involved in the mediator selection process.

The Commission declines to set a firm line as to the value of an item "that raises a question as to the mediator's impartiality." It is noted that the US Department of State set a gift limit of $480 for its employees, the federal courts hold that gifts under $156 need not be reported and North Carolina Judges must disclose gifts of over $500. The most analogous North Carolina statute, N.C.G.S. § 138A-32(a), parallel with Standard 7(h), prohibits receiving anything of value "in return for being influenced." With that in mind, the Commission believes that mouse pads, pens, cups, mugs, water bottles, note pads, calendars, post-it notes and other such items that one can receive from advertisers at a vendor's booth at a convention does not raise an objectively reasonable question as to the

mediator's impartiality. One consideration is that items of this nature are openly available to all present. They are advertisements, spreading the name and identifying the services offered by the purveyor. Anyone who comes by may take such an item. This is contrasted with some potential gifts that are of higher value and typically distributed on a more selective basis, such a round of golf, overnight stays at a vacation location, deep sea fishing trips, tickets to sporting events or travel not related to the mediator's services. Although the cost of a lunch may fall into the "does not raise a question" category, a mediator should not accept payment for a meal from one party unless all parties are invited by the host. Also included in the permitted gift category are flowers, nuts, candy, cookies, fruit and other consumables frequently given at holiday times or as a celebration or congratulations.

The Commission cautions certified mediators that the giving or receiving of gifts or other items of monetary value outside the context of the mediation, whether reasonable or not, may be perceived by participants or the general public as affecting the mediator's impartiality. The purpose of Standard 7 is to emphasize the responsibility each mediator has to protect the impartiality necessary to serve in that capacity.

Question 2

May the mouse pads be donated to an organization of attorneys by making the mousepads available to attendees at a meeting of the organization?

Yes.

Question 3

May the Mediator sponsor a CME or CLE program or speaker and have her contribution acknowledged on a sign or on registration and/or program materials?

Yes.

Question 4

May the Mediator sponsor a dinner or open bar at a CME or CLE event and have her contribution acknowledged on a sign or on registration or program materials?

Yes, if the sponsorship directly relates to an educational benefit through a CME or CLE available to the participating public.

Sponsoring a CME or CLE program or speaker, that is available to the general public who registers and attends, does not involve the giving of a gift to an individual and those attending a CME or CLE event are unlikely to view the mediator's sponsorship as a gift to them personally. The contribution is instead made to the sponsoring entity and those attending are likely to see such a contribution as intended to advance the legal or mediator professions in general and to simply heighten awareness of the mediator's

name. It is equally unlikely that such sponsorship would lead the public to question a mediator's neutrality. Additionally, the public would not likely link the sponsorship to a particular party or case. Conversely, a dinner or open bar event with a limited or restricted guest list, or by personal invitation only, is akin to a gift "that raises a question as to the mediator's impartiality."

Advisory Opinion Number 32 (2016)

(Adopted and Issued by the Commission on November 18, 2016, Amended August xx 2024.)

The best practices for a mediator conducting a mediated settlement conference where at least one participant is a non-English speaking self-representing party are defined below.

Concerns Raised

A court-appointed Dispute Resolution Commission (Commission) certified mediator in a Family Financial Settlement case asks for guidance in a situation involving a self-representing Chinese-speaking plaintiff and a self-representing English-speaking defendant.[1] Plaintiff has indicated that she will bring a family member to act as an interpreter for her and all parties agree to that arrangement. Mediator specifically asks for guidance about the following concerns:

1) **May the mediator permit the family member of the self-represented plaintiff to serve as her interpreter at the mediated settlement conference?**

2) **If the parties choose to summarize their terms on a Mediation Summary Form (AOC-DRC-18) at the conclusion of the conference, in what language should the document be drafted?**

[1] While the facts of this advisory opinion deal with a specific question asked of a Commission member involving an FFS case and two self-representing parties, one of whom spoke Chinese, the conclusions and best practice suggestions herein would also apply in any MSC or FFS mediation involving two self-representing parties, one of whom speaks a language other than English.

3) **What are the recommended best practices for the mediator to follow to ensure that it is clear that the Mediation Summary was the product of a mediation involving at least one non-English speaking party?**

Advisory Opinion

Question 1

May the mediator permit the family member of the self-representing plaintiff to serve as her interpreter at the mediated settlement conference?

Yes.

Standards of Professional Conduct for Mediators (Standards), Standard 4 "Consent" provides in part: "A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process." Standard 4(c) provides: "If a party appears to have difficulty comprehending the mediation process, issue or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate and exercise self-determination." In this inquiry, the self-representing plaintiff needs the services of a language interpreter as an accommodation and wishes to bring a family member to the mediated settlement conference to act as her interpreter.

While the Administrative Office of the Court (AOC) maintains a list of trained and qualified language interpreters, and provides language interpreters in some court proceedings, the AOC does not provide them free of charge for mediated settlement conferences. (AOC interpreter staff can be reached at (919) 890-1407 or OLAS@nccourts.org). Many parties needing language accommodation are unable to afford the services of a trained and qualified language interpreter, and as here, elect to bring a family member/friend to the mediated settlement conference to act as an interpreter. The mediation process belongs to the parties and a party needing language accommodation is permitted to and responsible for, deciding who the interpreter should be. The mediator may permit the family member/friend to attend the conference and serve as interpreter for the party needing the accommodation, subject to the mediator's exercise of their professional judgment that the family member/friend can interpret sufficiently to provide reasonable assurance of the party's understanding during the conference, and unless doing so would not be in compliance with the applicable program rules. This accommodation facilitates the party's capacity to understand the mediation process, the role of the mediator and the party's options within the process as contemplated by Standard 4.

It is important that the thoughts and ideas of each party are heard and understood by the other parties and the mediator. A literal word by word recitation is rarely possible since there is not a one-to-one correspondence between words or concepts in different

languages. However, the mediator should clarify that the interpreter will relate as completely as possible all that is said during the conference and not just a summary and should encourage the interpreter not to engage in conversation with a party separate and apart from the specific statements made and/or questions asked.

A mediator's duty under Standard 4 does not, however, create a duty on the mediator to explore the availability of a trained and qualified language interpreter; rather it is the responsibility of the party needing the accommodation to make the decision as to the need for an interpreter and who the interpreter should be. If the mediator, in the exercise of their professional judgment is not satisfied that the interpreter can provide reasonable assurance of the party's understanding during the mediation process, the mediator should recess the mediation, encourage the party needing accommodation to locate another individual who is able to provide reasonable assurance, and reschedule the conference.

Caveat—If a mediator is conducting a mediation for the North Carolina Industrial Commission (IC), they should be sure to follow the IC's protocol on the use of interpreters.

Question 2

If the parties choose to summarize their terms on a Mediation Summary Form (AOC-DRC-18) at the conclusion of the conference, in what language should the document be drafted?

Since both parties are self-representing in this case, the Commission recommends that any matters resolved at the mediated settlement conference be summarized on AOC-DRC-18, Mediation Summary Form, or a similar form.[2] Advisory Opinion 28 (2013) advises that the parties may -assist the parties in reducing to writing the terms in the Mediation Summary Form. The Summary is not a binding agreement and neither the parties nor the mediator should sign it. The question arises, "In what language should the Mediation Summary Form be drafted?" Since English is the primary language used in North Carolina's courts, it is recommended that the Mediation Summary be drafted in English. The mediator should then read the Summary to the parties, ask the trained and qualified interpreter or the family member interpreter to interpret its terms for the non-English speaking plaintiff, facilitate a discussion to ensure that all parties understand the terms of the Summary and afford them an opportunity to make any necessary corrections.

Question 3

[2] The mediator may wish to review the "Mediation Agreements" section in the Toolbox on the Commission's website for instructions and guidance in the use of forms when all parties are pro se, one party is self-representing, or all parties are represented by counsel. If one party is represented by counsel and one is a self-represented non-English speaking party, the mediator may wish to refer to Advisory Opinion 31 (2015).

What are the recommended best practices for the mediator to follow to ensure that it is clear that the Mediation Summary Form was the product of a mediation involving at least one non-English speaking party?

The self-representing parties may take the Mediation Summary Form to an attorney/attorney of their choice to have them prepare a binding contract for the parties' signatures or they may bring the Mediation Summary Form to the court and seek entry of an appropriate order. To alert the court to the language access issue, it is recommended as a best practice that the mediator add a provision at the end of the Mediation Summary Form indicating that the Summary was read to the parties and interpreted for the non-English speaking party. When the Mediation Summary Form is presented to the court for entry of a memorandum of judgment in that court proceeding, the court may then utilize the services of a qualified translator and/or interpreter pursuant to policies and procedures adopted by the AOC which may provide said services at no cost to the parties in order to complete the necessary examination to ensure that all parties understand and agree to the terms of the memorandum of judgment prior to entry by the court.

The Commission suggests that the following or similar language be added to the Mediation Summary Form (AOC-DRC-18) when a mediator is conducting a mediation involving a non-English speaking party:

> *"This Mediation Summary was drafted in English, read to the parties by the mediator in English, and interpreted by _____(name) for _____ (the non-English speaking party) in the following language:_____."*

Advisory Opinion Number 31 (2015)

(Adopted and Issued by the Commission on May 15, 2015, Amended August xx 2024.)

Reducing an Agreement to Writing When One or More Parties are Self-Represented, Standards 4, 5, 6 and 8

Mediators may not prepare a settlement agreement for self-represented parties but should facilitate the parties having an attorney prepare a settlement agreement.

Concerns Raised

Mediator was appointed by the court for a court ordered mediation in a case in which an attorney represents the defendant, and the plaintiff is not represented by an attorney. The

parties reach an agreement at the mediated settlement conference. Mediator specifically asks for guidance about the following concerns:

1) **May the mediator prepare the mediated settlement agreement for the parties to sign?**

2) **What are the duties of the mediator when an attorney drafts a proposed settlement agreement for the self-represented party to sign at the mediated settlement conference?**

Advisory Opinion

Question 1

May the mediator prepare the mediated settlement agreement for the parties to sign?

No.

Once an agreement is reached in a mediation, N.C.G.S. § 7A-38.1(*l*) requires that it be reduced to writing and signed by the parties. If one or more parties are self-represented, the mediator may not, consistent with the Standards of Professional Conduct for Mediators ("Standards"), Standard 6, prepare such document. However, if one or more of the parties is represented by an attorney, the mediator may invite the attorney to prepare the settlement agreement. Once the agreement has been prepared, the mediator should review it with the parties to ensure that it accurately records all of their agreement. The mediator should also encourage self-represented parties to seek legal or other professional advice before signing an agreement but should continue with the mediation if the party declines.

As discussed by the Dispute Resolution Commission (Commission) in Advisory Opinion 28 (2013), Standard 6 provides that "[a] mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation." As noted in that opinion, preparing a binding agreement for unrepresented parties constitutes the practice of law and, therefore, is a violation of Standard 6. Advisory Opinion 28 also applies to the facts outlined above, and mediators would be in violation of Standard 6 if they prepare the mediated settlement agreement for the parties and one or more of them is not represented by an attorney.

However, if the parties have reached agreement and the self-represented party wishes to consult an attorney before converting that agreement into an enforceable contract, the mediator may use a Mediation Summary (AOC-DRC-18) to summarize the essential elements of the parties' agreement. That Mediation Summary does not provide space for the parties' signatures and by its own terms is not a binding agreement.

An attorney representing a party may prepare an agreement, after which the mediator should continue to mediate to ensure that all parties agree to the writing and that the writing reflects their agreement. Once the agreement is affirmed and is signed by the parties, then the mediator shall file the Report of Mediator.

Question 2

What are the duties of the mediator when an attorney drafts a proposed settlement agreement for the self-represented party to sign at the mediated settlement conference?

The second inquiry arises when an attorney for a party drafts a proposed settlement at the mediation for the self-represented party to review and sign. While the Commission encourages self-determination by the parties in their decisions, Standard 4(d) makes it clear that, in appropriate circumstances, the mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process. This situation, in which there is an inherent power imbalance when one party is pro se, is one which is appropriate for the mediator to inform the self-represented party of the importance of seeking outside advice. Additionally, Standard 5(d) permits the mediator, after offering the information set out in Standard 4(d), to proceed with the mediation if the party declines to seek outside counsel.

In order to meet the requirements of Standard 4(d) and Standard 5(d), the mediator shall inform the self-represented party that the mediator cannot give legal advice to any party, that the self-represented party has the right to have an attorney review the draft agreement, that the mediator will recess the mediation if that party wishes to do so, and that the mediator informs the party of the importance of consultation with an attorney, or other professional prior to executing an agreement. If, after that information the party still desires to sign the agreement, the mediator may then acquiesce to the self-represented party's desire.

In addition, in discussing the mediator's role in this circumstance, it is necessary to consider the mediator's duty to protect the integrity of the mediation process under Standard 8.

Standard 8(a) provides:

> A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party-even if they cannot agree.

Standard 8(b) provides:

> If a mediator believes that the statements or actions of a participant- including those of an attorney who the mediator believes is engaging in, or has engaged in, professional misconduct- …jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If an attorney's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the attorney to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3€ of the North Carolina Rules of Professional Conduct.

In order to meet the requirements set out in Standard 8, the mediator shall do the following two things:

1. The mediator shall review with the parties the document drafted by the attorney; and

2. If the terms discussed by the parties in the presence of the mediator are not present or are misstated, the mediator shall raise questions with the parties and attorney about whether the agreement as drafted conveys the intent of the parties and should facilitate their discussions and negotiations to reach a complete agreement.

Advisory Opinion No. 30 (2014)

(Adopted and Issued by the Commission on August 8, 2014, Amended August xx 2024.)

Mediator Testimony in Hearing on Motion to Enforce Settlement, N.C.G.S. § 7A-38.1(*l*)

A mediator may not testify or produce evidence in a proceeding to enforce a mediated settlement agreement, regardless of whether there is an objection to such evidence, except "to attest to the signing of any agreements." Such testimony or evidence is barred by N.C.G.S. § 7A-38.1(*l*).

Concern Raised

Mediator conducted a court-ordered mediated settlement conference in a complicated case involving a large real estate development, which was in financial trouble. Mediator

reported that an agreement was reached at mediation as to all issues with a voluntary dismissal with prejudice to be filed within approximately six weeks. Thereafter, plaintiff filed a motion seeking to enforce the mediated settlement agreement and served a subpoena on the mediator. The mediator brought his notes from the mediation and testified about what had occurred at the mediation, including testifying as to the parties' discussion during the conference, their settlement proposals, the conduct of the parties, and the terms of their agreement. No objection to the mediator's testimony was made. The mediator did not alert the court to Standards of Professional Conduct for Mediators (Standards) Standard 3 and his duty to preserve confidentiality. The court did not compel his testimony.

May a mediator testify when he is subpoenaed to testify in a proceeding to enforce a mediated settlement agreement when none of the parties object to his testimony?

Advisory Opinion

The enabling legislation for mediated settlement conferences in superior court civil matters, N.C.G.S. §7A-38.1(*l*), provides:

> No mediator … shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference…pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or Dispute Resolution Commission, and proceedings to enforce laws concerning juvenile or elder abuse.

Accordingly, a mediator of a court-ordered mediated settlement conference may not be compelled under N.C.G.S. § 7A-38.1(l) to testify in a proceeding to enforce or rescind an agreement reached in that mediated settlement conference. That prohibition applies to testimony about statements made and conduct occurring in a mediated settlement conference, which is defined in N.C.G.S. § 7A-38.1(b)(1) as "a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator." It does not apply to testimony about statements made and conduct occurring in a voluntary mediation, meaning one that is conducted by agreement of the parties and is not court ordered.

If the parties to a voluntary mediation want to have this provision apply to their mediation, they should either ask the court to order mediation under the authority of N.C.G.S. § 7A-38.1 or enter into an agreement that the mediation will be governed by that statute and the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. In the latter event, the protection probably would be provided, but under a theory of waiver and estoppel rather than direct application of the statute. To summarize, a mediator may not be compelled to testify in

any civil proceeding about statements made and conduct occurring in a court-ordered mediated settlement conference, meaning mediations that are ordered by the court under statutory authority.

The facts in this advisory opinion involve a scenario in which the mediator was subpoenaed to court but was not ordered by the court to testify. The mediator was served with a subpoena, a device as described in Rule 45 of the North Carolina Rules of Civil Procedure as a means to effectuate attendance, testimony and the production of documents. However, the North Carolina Rules of Civil Procedure also contain mechanisms to call to the attention of the court reasons why compliance should not be required. The mediator's failure to call the court's attention to the mediator's obligations of confidentiality renders his testimony voluntary. The Commission's decision published as Advisory Opinion 03 (2001) applies. The mediator should not voluntarily testify and should alert the court to the mediator's duty of confidentiality, a duty that cannot be waived by the parties or the mediator.

In Advisory Opinion 03 (2001), the certified mediator was asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. The Commission advised that the mediator may not give the affidavit nor provide information at a deposition. Providing such information is a violation of the Standards. Standard 3(a) provides that: "A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference."

The Commission herein reaffirms its opinion in Advisory Opinion 03 (2001) and extends it to conclude that mediators in court-ordered mediations and certified mediators in all mediations (unless exempted by Standard 3) should call to the court's attention (either by motion to quash, a request to be excused made in open court on the basis of the mediator's duties or by such other procedure available under the circumstances presented) the mediator's duty of confidentiality in any civil proceeding where the mediator is called upon to testify. Those mediators should not voluntarily testify in any such cases and should alert the court by motion or otherwise to the mediator's duty of confidentiality.

Standard 3 does not provide an exception to the duty of confidentiality when the parties are in agreement that the mediator may testify. An agreement of the parties to allow disclosure of information is not contemplated in any of the exceptions set out in Standard 3. It is irrelevant that the parties do not object to the testimony. The mediator breached his duty to maintain the confidentiality of the mediation process when he testified as to statements made and conduct occurring at the conference.

Advisory Opinion No. 29 (2014)

(Adopted and Issued by the Commission on August 8, 2014, Amended August xx 2024.)

Testimony in Related Criminal Proceeding, N.C.G.S. § 7A-38.1(*l*)

N.C.G.S. § 7A-38.1(*l*) bars the admission of statements made and conduct occurring in a mediated settlement conference "in any proceeding in the action or other civil actions on the same claim." A criminal proceeding related to the mediated claim does not fall under the inadmissibility provisions of the statute, and therefore such evidence may be admitted in the criminal proceeding.

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 in 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 the statements made and offers to settle 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 concept 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.G.S. § 7A-38.1. However, the mediator did not explain that such evidence could be admitted in a criminal case.

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.G.S. § 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 superior court mediated settlement conferences (N.C.G.S. § 7A-38.1) and Standard 3 of the Standards of Professional Conduct for Mediators (Standards) for guidance in explaining and understanding these principles.

"Confidentiality" relates only to the mediator as outlined in Standard 3 of the Standards. Subject to the exceptions stated therein and in N.C.G.S. § 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. Advisory Opinion 22 (2012) clarified that point. 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 mediated settlement conferences in superior court civil actions. N.C.G.S. § 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 Rules for 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 at the beginning of the mediated settlement conference, 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): "the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1."

N.C.G.S. § 7A-38.1(*l*) enumerates several exceptions to the inadmissibility protection as follows:

> (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.

As discussed above, the other exception that is particularly relevant to this inquiry is found in wording that precedes those specific exceptions.

N.C.G.S. § 7A-38.1(*l*) provides:

> Evidence of 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…

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 North Carolina 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, MSC Rule 6 does not require mediators to comment on that rule at the beginning of the conference.

Opinion Number 28 (2013)

(Adopted and Issued by the Commission on December 6, 2013, Amended August xx 2024.)

Preparing a Separation Agreement of Other Settlement Document, Standard 6

Mediator may not prepare a separation agreement or other settlement document nor file a court action for either or both of the parties.

Concern Raised

A certified mediator, who is a lawyer, is asked by a married couple to mediate an agreement to divide their property and to assign spousal support. The married couple has separated and intends to divorce, but the parties are not represented by legal counsel and have not filed pleadings with the court. They advise the mediator that they are not interested in retaining attorneys to assist them with the mediation. The mediator conducts the mediation, and the parties reach an agreement on all issues. The couple then advises the mediator that they want him to prepare a binding agreement for their signatures. Mediator asks the following:

1) Whether he may ethically prepare the agreement for the couple under the circumstances described and, if so, what the ethical responsibilities and constraints are that he should consider in undertaking this task?

The parties also ask the mediator to help them file their agreement with the court. The mediator understands that because he has served as their mediator, he cannot now represent one of them in the action. (See the Standards of Professional Conduct for Mediators (Standards), Standard 7(c) and Advisory Opinion 6 (2004)). However, he questions whether he can provide other assistance to them in finalizing their agreement and asks the following:

2) Whether he may file an action on their behalf for the sole purpose of having their agreement incorporated into a court order by consent?

Advisory Opinion

Question 1

Under Standard 6, a mediator may not prepare a separation agreement, settlement agreement or any other legal documents for self-represented parties. If any of the parties are represented by an attorney, the mediator should request that attorney prepare such documents. Also, pursuant to Standard 6, a mediator may not prepare or file any documents or pleadings in court on behalf of one or more parties.

This inquiry is based upon facts that occur with great frequency. A divorcing couple asks a mediator for assistance with the resolution of financial and other issues involved in the dissolution of their marriage. They do so with the intent of "one-stop shopping." They want to hire the mediator to help them discuss their issues and help them make decisions, and they want the mediator to prepare legal documents that will effectuate their agreement, whether by contracts, property settlement agreements, deeds, and/or consent orders. It is understandable that family mediators may be sympathetic to the desire of parties for an economical settlement and may find themselves in the position of being asked to draft binding and enforceable contracts of settlement.

Standard 6, "Legal and Other Professional Advice Prohibited," states, "A mediator shall limit himself or herself solely to the role of mediator and shall not give legal or other professional advice during the mediation." Accordingly, to answer the first question of this inquiry, it is necessary to decide whether the preparation of a binding agreement for unrepresented parties constitutes the practice of law. If it does, then the mediator would be in violation of Standard 6 in preparing such a document.

N.C.G.S. § 84-2.1 states that the phrase "practicing law" means "performing any legal service for any other person, firm or corporation, with or without compensation …." The Dispute Resolution Commission (Commission) notes that the North Carolina State Bar

(State Bar) is the agency responsible for regulating the practice of law in North Carolina, and therefore, of particular importance in this inquiry is how the State Bar interprets "practicing law" within the meaning of the statute. In response to the Commission's inquiry of the State Bar, the Commission was informed that persons who "draft" contracts for others are "practicing law."

It is clear from the facts presented in this inquiry that the parties have asked the mediator to draft a contract settling the issues of their divorce; therefore, if mediators draft such contracts, they would be, according to the State Bar, practicing law. Accordingly, the mediator would do so in violation of Standard 6.

The Commission also cautions certified mediators to review State Bar 2012 Formal Ethics Opinion 2. In that opinion, a lawyer-mediator was asked by unrepresented businesspeople to draft a business contract that would resolve the matters in dispute in the mediation. The State Bar opined that the attorney's conflict of interest in representing two adverse parties could not be waived because he had mediated their dispute. In other words, the attorney had a "non-consentable conflict of interest" and would improperly practice law if he drafts the contract requested by the parties. The facts of the present inquiry are similar, particularly given that the parties are not represented by legal counsel. Accordingly, when a certified mediator is presented with a fact situation as set forth in the present inquiry, the mediator should also consider the ramifications of his actions in light of the State Bar opinion.

The certified mediator may not draft the parties' settlement agreement in the circumstances presented. To do so would be in violation of Standard 6.

Question 2

To answer the second question, the Commission must first look to whether the preparation and filing of an action in a court of law is the practice of law. If it is, then the analysis in answer to the first question above would apply, and the mediator should not file the action.

N.C.G.S. § 84-2.1 states that the phrase "practicing law" means "performing any legal service for any other person, firm or corporation, with or without compensation …." Clearly the preparation and filing of a lawsuit is a legal service and, therefore, the practice of law. If the lawyer-mediator assists the divorcing couple by filing an action to incorporate the agreement into a court order, then he would be practicing law, and thus, mixing the roles of mediator and lawyer.

If the mediator performs this task, and mixes the roles of mediator and lawyer, he runs the risk of violating Standard 6, as discussed above. He would also be in violation of Standard 7(c).

Standard 7(c). Conflicts of Interest provides:

> A mediator who is a lawyer … may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any preceding issue in the dispute, or in any outgrowth of the dispute.

It is clear that the mediator would violate Standards 6 and 7 if he files an action to incorporate the agreement into a court order by consent under the facts of this inquiry.

Advisory Opinion Number 27 (2013)

(Adopted and Issued by the Commission on December 6, 2013, Amended August xx 2024.)

Scheduling the Conference and Inability to Pay, Rule 6(b)(5) and Rule 7(e)

Mediators have a duty to schedule and hold a settlement conference without engaging the parties in discussion about their ability to pay.

Concern Raised

Self-represented wife in an equitable distribution case advised her certified, court appointed mediator that she was indigent and had no funds to pay for his services. During an exchange of calls and emails, mediator insisted she must agree to pay. When she continued to refuse, mediator contacted Husband and pressed him to pay not only his, but wife's share of the fee. When no agreement to pay wife's share was forthcoming, mediator emailed the parties and told them he was withdrawing. Thereafter, mediator contacted the judge assigned to the case and advised her that the deadline for completion was looming, but no conference had been scheduled because the parties were uncooperative and wife refused to pay his fee, though he believed she had the funds to do so. When wife began to complain that mediator was biased against her because she was indigent, mediator contacted the judge, again, and asked to withdraw consistent with Standard 2(c)(1) of the Standards of Professional Conduct for Mediators (Standards). The judge allowed the mediator to withdraw and appointed another mediator. The Commission's Grievance Committee found that mediator's actions in the matter were inconsistent with Rule 7(e) and Rule 6(a)(2) of the Rules for Settlement Procedures in District Court Family Financial Cases (FFS Rules), and with Standards 3 and 7.

Advisory Opinion

N.C.G.S. § 7A-38.4A(i) provides that "…rules adopted by the Supreme Court shall set out a method whereby a party found by the court to be unable to pay the costs of the settlement procedures is afforded an opportunity to participate without cost…." FFS Rule 7(e) implements that section and provides that parties claiming indigence may file a motion with the court seeking relief from the obligation to pay their share of the mediator's fee.

This rule itself alerts mediators to their duty to schedule and hold a settlement conference without engaging the parties in discussion about their ability to pay. If the parties initiate a discussion about their inability to pay, mediators should advise them of their right to petition the court for relief and direct them to form AOC-CV-828, *Petition And Order For Relief From Obligation To Pay All Or Part Of Mediator's Fee In Family Financial Case*. The mediator has no obligation to assist the party in completing or filing the form. Once the matter has been brought to the court's attention, a mediator should refrain from making any demand for payment until the court has had an opportunity to hear the petition and make a determination.

Mediator wrongly pressed wife about paying his fee, and the mediator wrongly attempted to get husband to pay wife's share. The conversation with husband constituted a breach of Standard 3, Confidentiality. The mediator should not have talked with husband about mediator's private communications with wife. The content of the conversation constituted a breach of Standard 2, Impartiality, as the mediator took a position in favor of one party over the other, and a breach of Standard 7, Conflicts of Interest, as the mediator mixed his own financial business with the business of the parties in settling their dispute.

The mediator wrongly communicated information to the judge about wife's claim of indigence and wrongly provided mediator's opinion that the parties were uncooperative. This conversation constituted a breach of Standard 3(c), Confidentiality, and Standard 7, Conflicts of Interest. A mediator shall not converse with the court about the negotiations in the case or about the attitude or behavior of the parties, and a mediator shall not make judgmental comments about the parties to the court.

The most fundamental duty of mediators is to schedule and hold the settlement conference they are appointed or selected to conduct, FFS Rule 6(b)(5). Mediators pledge in their application for certification, in accordance with FFS Rule 8(a)(10), to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court under FFS Rule 7.

(Adopted and Issued by the Commission on May 17, 2013, Amended August xx 2024.)

A mediator conducting a mediated settlement conference where a participant has filed a notice of appeal shall contact court staff only as to whether the matter is stayed upon appeal.

Concern Raised

Mediator was assigned to conduct a mediated settlement conference in a superior court case and worked with the parties to schedule a date for mediation. Thereafter, the mediator received a notice of appeal of an order denying the defendant's motion to dismiss, which raised the doctrine of sovereign immunity. The attorney for the defendant contacted the mediator and asked to have the mediation conference postponed due to the pending appeal. The attorney insisted that the filing of the appeal immediately divested the trial court of its jurisdiction in the matter and that, as such, the mediation ordered by the court should not proceed.

The mediator contacted the plaintiff's counsel and was advised that the plaintiff wanted the mediation to go forward as scheduled. The mediator contacted the defendant's attorney to advise him that unless the attorney obtained an order of the court either staying the case or postponing the mediation, the mediator intended to hold the conference as scheduled. Defense counsel insisted that he and his client would not appear for mediation, if held. The mediator contacted the Dispute Resolution Commission for guidance.

Advisory Opinion

N.C.G.S. § 1-294 provides that a timely notice of appeal stays all further proceedings in the court below on the judgment appealed from or upon the matter addressed therein, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. Once a party gives notice of appeal, the trial court is divested of its jurisdiction if the appeal is an immediately appealable interlocutory order. However, when a party appeals a non-appealable interlocutory order, such appeal does not deprive the trial court of jurisdiction and the trial court may proceed with trying the case. *RPR & Associates, Inc. v. The University of North Carolina-Chapel Hill, et al., 153 N.C. App. 342 (2002)*, appeal dismissed, and disc. review denied, 357 N.C. 166 (2003).

An interlocutory order that affects a substantial right is immediately appealable, and it is the trial court that has the authority to determine whether its order affects a substantial right of the parties or is otherwise immediately appealable. (A party may apply to the appellate court for a stay if the trial court chooses to proceed with the matter.) Accordingly, a trial judge would need to determine on a case-by-case basis whether the matter is stayed or if the court still has jurisdiction, which would allow the mediation to proceed.

Upon learning that an appeal has been filed and that the mediator's duty to hold the conference has been called into question, the mediator should look to the trial court for guidance While it remains the responsibility of the parties to seek clarification from the court, if they do not, the mediator should seek guidance from the court, through court staff, only as to whether the matter is stayed upon appeal or whether the case, including mediation, will proceed through the trial court.

A mediator should not make a determination as to whether to proceed with mediation; it is up to the trial judge to decide whether the interlocutory order is appealable. Moreover, mediators should avoid being drawn into disputes between attorneys over such legal issues and making such determinations, which would only serve to undermine the neutrality of the mediator.

Advisory Opinion Number 25 (2013)

(Adopted and Issued by the Commission on February 1, 2013, Amended August xx 2024.)

Attendance at a Mediated Settlement Conference by an Unrepresented Corporation, Rule 4.

The mediator is not required to police the attendance issues and may allow an unrepresented corporation to participate and attend a mediation under Rule 4.

Concern Raised

One of the parties to a court-ordered superior court mediation is a corporation. An officer of the corporation filed the answer and several motions relating to discovery on behalf of the corporation. No outside counsel has made an appearance on behalf of the corporation. The attorney for one of the other parties informed the mediator assigned to the case that he would not participate in the mediation unless the corporation obtained legal counsel to participate in the mediation. Mediator now asks what he should do if the corporation does not have an attorney present for the mediation. He also asks whether, if he convenes the conference and allows the corporate officer to negotiate on the corporation's behalf, he would be facilitating the unauthorized practice of law.

Advisory Opinion

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) and the Rules for Settlement Procedures in District Court Family Financial Cases (FFS)

the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties' negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

N.C.G.S. § 84-5 prohibits a corporation from practicing law, and case law interpreting the statute, with certain exceptions, holds that a non-attorney employee of a corporation may not litigate on behalf of a corporation. Furthermore, Rule 5.5(d) of the North Carolina State Bar Rules of Professional Conduct (RPC) prohibits a lawyer from assisting another person in the unauthorized practice of law. Serving as a mediator, however, is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct for Mediators (Standards), the mediator will not be assisting in the unauthorized practice of law by conducting the settlement conference as ordered by the court, and would not be in violation of RPC Rule 5.5(d) by doing so. Absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court.

In an effort to help the parties make informed decisions about attendance, and to help make their time spent at mediation more productive, mediators are encouraged to engage the parties (whether together or separately) in conversation about attendance issues. Mediators may help the parties become aware of the attendance requirements, raise questions about the consequences of the parties' decisions regarding attendance, help the parties identify persons who need to be a part of their team's discussions and negotiations at mediation, and help the parties identify the appropriate officials who may meet the attendance requirements.

This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. Mediators who go beyond the suggestions discussed above and take a position on an attendance issue may find themselves in an adversarial relationship with one or more parties. If there are concerns of lack of impartiality, the mediator may be in violation of Standard 2, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard 2(c), may be required to withdraw. Additionally, if the mediator gives legal advice about attendance issues, this will violate Standard 6, which requires the mediator to limit himself or herself solely to the role of mediator and instructs the mediator not to give legal or other professional advice during the mediation. However, if a party not required to attend becomes disruptive to the mediation process, the mediator may remove the disruptive party from the mediation under Rule 6(a) of the MSC and FFS Rules. Ultimately, as noted above, the parties should address attendance questions to the court.

Opinion Number 24 (2013)

(Adopted and Issued by the Commission on February 1, 2013, Amended August xx 2024.)

Attendance at a Mediated Settlement Conference by an Out-Of-State Attorney Representing a Party at the Mediated Settlement Conference, Rule 4.

The mediator is not required to police the attendance issues and may allow parties not required to attend under Rule 4 to participate and attend a mediated settlement conference.

Concern Raised

A new party, a Georgia resident, was added to a superior court case just prior to a scheduled mediated settlement conference. The new party's attorney is a Georgia lawyer who has not been admitted to practice in North Carolina. That attorney contacted the mediator and asked whether he could participate in the mediated settlement conference. Mediator asks the Dispute Resolution Commission (Commission) whether, if he allows the out-of-state attorney to attend and participate, he will be facilitating the unauthorized practice of law.

Advisory Opinion

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) and the Rules for Settlement Procedures in District Court Family Financial Cases (FFS) , the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties' negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

Pursuant to Rule 5.5(c)(2) of the North Carolina State Bar Rules of Professional Conduct (RPC), a lawyer admitted to practice in another jurisdiction, but not in North Carolina, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer acts with respect to a matter that is reasonably related to a pending or potential mediation, the services are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice, and the services are not services for which pro hac vice admission is required. However, pursuant to Comment 6 to RPC Rule 5.5, a lawyer must obtain admission pro hac vice in the case of a court-ordered mediation. RPC Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law.

When there is existing litigation and the court orders the case to mediation, a mechanism is in place for the lawyer to be admitted pro hac vice for the mediation. On the other hand, if the case is not in litigation, the lawyer may participate in the mediation without being admitted pro hac vice as long as the services are related to the lawyer's representation of that client in a jurisdiction in which the lawyer is admitted to practice.

In the event the lawyer is not admitted pro hac vice for the court-ordered mediation conference and absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court and would not be in violation of RPC Rule 5.5(d) Serving as a mediator is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct for Mediators (Standards), the mediator will not be assisting in the unauthorized practice of law by conducting the settlement conference as ordered by the court.

In an effort to help the parties make informed decisions about attendance, and to help make their time spent at mediation more productive, mediators are encouraged to engage the parties and/or attorneys (whether together or separately) in conversation about attendance issues. Mediators may help the parties and/or attorneys become aware of attendance requirements and raise questions about the consequences of the decisions of the parties and/or attorneys regarding attendance.

This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. A mediator should not waive the attendance requirement lightly and should encourage all parties required to be present. The Commission suggests that even when all parties consent, a mediator should not consider waiving or modifying the attendance requirement lightly. Mediators who go beyond the suggestions discussed above and take a position on an attendance issue may find themselves in an adversarial relationship with one or more parties. If there are concerns of lack of impartiality, the mediator may be in violation of Standard 2, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard 2(c), may be required to withdraw. If the mediator gives legal advice about attendance issues, this would violate Standard 6, which requires the mediator to limit himself or herself solely to the role of mediator and prohibits the mediator from giving legal or other professional advice during the mediation. However, if a party not required to attend becomes disruptive to the mediation process, the mediator may remove the disruptive party from the mediation under Rule 6(a) of the MSC and FFS Rules. Ultimately, as noted above, the parties should address attendance questions to the court.

Advisory Opinion Number 23 (2012)

(Adopted and Issued by the Commission on May 11, 2012, Amended August xx 2024.)

Mediator Testimony in State Bar Disciplinary Proceeding, N.C.G.S. § 7A-38.1(*l*)

Absent a subpoena, a mediator may not speak to a State Bar investigator concerning conduct occurring during a mediated settlement conference by an attorney whose client has filed a grievance against the attorney. However, pursuant to an exception set out in N.C.G.S. § 7A-38.1(*l*), the mediator may be compelled to testify in a disciplinary proceeding before the State Bar.

If a State Bar investigator contacts a mediator about the attorney-mediator's own behavior, the mediator must respond, with certain exceptions relating to lawyer-client confidentiality, to the investigator's questions, even when there is not a subpoena.

Concern Raised

A mediator was contacted by a State Bar investigator who told the mediator that he was investigating a grievance filed against an attorney by the attorney's client. The grievance involved conduct that the client alleged occurred during a superior court mediated settlement conference, and the investigator explained that he wished to talk to the mediator about what occurred at the mediation. Mediator asks whether he may speak with the investigator about the attorney's conduct.

Advisory Opinion

N.C.G.S. § 7A-38.1(*l*) provides that evidence of statements made and conduct occurring in a mediated settlement conference are not subject to discovery and are inadmissible in any proceeding in the action or other civil actions on the same claim and then lists a few situations where this prohibition does not apply. One of the exceptions is a disciplinary proceeding before the State Bar.

N.C.G.S. § 7A-38.1(*l*) provides:

> "No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference … in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except … disciplinary hearings before the State Bar….

Clearly, the intent of the statute is to allow mediators to cooperate with the State Bar when subpoenaed to testify related to a disciplinary hearing regarding an attorney's conduct in mediation. However, when no subpoena is involved, the Commission does not read this subsection broadly to permit mediators to answer an investigator's questions in

the preliminary stages of an investigation into a grievance, even in instances where other participants in the mediation raise no objections to or even encourage the mediator's cooperation. Moreover, the State Bar has advised the Commission that, absent a subpoena, State Bar Rules of Professional Conduct would not require an attorney-mediator to speak with an investigator about another attorney's conduct.

The Commission has long regarded confidentiality as a foundation of the mediation process. Standard 3 obligates mediators to maintain the confidentiality of all information obtained within the mediation process. The only exceptions include instances where mediators are under a statutory obligation to report the information or public safety is at risk. In Advisory Opinion 03 (2001), the Commission cautioned mediators not to provide affidavits or to allow themselves to be deposed regarding what occurred at a mediation, even at the request or with the permission of all parties involved in the conference. A mediator may testify in relation to a State Bar hearing only when subpoenaed to do so and before testifying should advise the State Bar Disciplinary Hearing Commission or its investigator of the prohibitions set forth in the statutes and Standards of Professional Conduct for Mediators (Standards) regarding a mediator's obligations to observe confidentiality.

Note: If a State Bar investigator contacts an attorney-mediator regarding the attorney-mediator's own conduct**,** pursuant to N.C.G.S. §§ 7A-38.1(*l*), 7A-38.3B(h), 7A-38.3D(k), 7A-38.3F(h), 7A-38.4A(j), and Standard 3(d)(5), the attorney-mediator is permitted to respond to an investigator's questions whether or not a subpoena is involved.

Advisory Opinion Number 22 (2012)

(Adopted and Issued by the Commission on January 27, 2012*, Amended August xx 2024*.)

Duty of Confidentiality Applies to Mediator Only, Standard 3

Standard 3 of the Standards of Professional Conduct for Mediators places a duty of confidentiality on certified mediators and no one else involved in the mediation process. Attorneys and other participants do not have a duty of confidentiality, and mediators should be careful not to conflate the concepts of inadmissibility and confidentiality when explaining the mediation process to participants.

Concern Raised

Defendant's attorneys in a high-profile products liability case contacted the Dispute Resolution Commission (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 mediated settlement conferences. 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.

The duty of confidentiality is found in Standard 3 of the Standards of Professional Conduct for Professional Mediators (Standards). 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.

Inadmissibility is addressed in the enabling legislation for mediated settlement conferences at N.C.G.S. § 7A-38.1(*l*), which provides that "[e]vidence 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 action or other civil actions on the same claim," except in proceedings for sanctions, to enforce or rescind a settlement, in disciplinary hearings before the State Bar or Dispute Resolution Commission, or in proceedings to enforce laws concerning juvenile or elder abuse. 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 mediated settlement conferences in superior court, similar enabling legislation and rules characterize mediated settlement conferences in family financial cases, district criminal court cases, and matters before the Clerk of Superior Court. 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).

Advisory Opinion Number 21 (2012)

(*Adopted and Issued by the Commission on January 27, 2012, Amended August xx 2024*.)

Mediator's Fee, Rule 7

A court-appointed mediator may charge the hourly court-appointed rate for reviewing documents prior to the mediated settlement conference.

Concern Raised

Mediator was court appointed to mediate a superior court case. The attorneys asked him to review some documents prior to and in preparation for the mediated settlement conference. Mediator asks whether he may charge for his time in reviewing these documents.

Advisory Opinion

Rule 7(b) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions(MSC Rules), provides that: "…the parties

shall compensate the mediator for mediation services…." The term "mediation services" is not defined in either the MSC Rules or the MSC's enabling legislation. However, beginning with the drafting committee for the MSC Pilot Program in 1990-91 and continuing through present day discussions of the Commission, the term has referred to conversations and activities that further the mediation process, including reviewing documents and discussing the case with attorneys. For that reason, the drafting committee and Commission made recommendations to the North Carolina Supreme Court, and the Court decided, there would be no prohibition against *ex parte* conversations prior to the conference, although the requirement to disclose the fact of those consultations at the beginning of the conference was added in 1995 in the interest of promoting mediator impartiality.

The Commission considers the activities of reviewing documents and talking with attorneys to be "mediation services" and understands that mediators engage in those activities to become more conversant with the issues in dispute. (Note: When a mediator is court appointed, the term "mediation services" does not include fees associated with travel to or from the location of the conference, including fees for mileage, lodging or food expenses. When a mediator is party selected, the term "mediation services" may include charges for travel time, mileage, lodging, food, and other travel related expenses agreed upon between the parties and mediator in advance of the conference.)

The Rules for Settlement Procedures in District Court Family Financial Cases , Rule 6(a)(2) takes a different approach to the issue of pre-mediation private conversations. It provides that the mediator may not confer with the parties in advance of the mediation without the explicit consent of the parties. If that consent is sought and given, however, the answers to the questions this opinion addresses are the same as those for superior court mediators.

It is impossible in this short space to discuss all the scenarios in which a mediator may need to decide whether to charge for time spent preparing for mediation. Most of those decisions, will not likely be answered by reference to the program rules or the Standards of Professional Conduct for Mediators (Standards). However, questions about the mediator's impartiality may arise from time to time, and Standard 2 provides that, "a mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute."

Most of the questions about whether to bill for mediation services that occur before the conference commences will be made by mediators with a goal of doing what makes good business sense. In the face of a unilateral request to review documents, the Commission suggests that mediators seek and obtain permission of all parties involved before going forward. Making a decision to review documents and charge without all parties' consent almost ensures that there will be controversy when the final invoice is issued. The mediator's credibility almost certainly will suffer under those circumstances.

The Commission believes this is so even when one party offers to pay for all of the mediator's charges in connection with document review. Without notice and agreement

from the other side, no mediator who is frequently chosen by the parties would choose to charge and collect fees under those circumstances.

The Commission strongly suggests that court-appointed mediators not charge for routine review of documents and short conversations with attorneys about the nature of the case. This is particularly true if those conversations occur during the scheduling process.

Beyond those levels of preparation, mediators who are selected by the parties on a routine basis should charge for preparation only if they first sought and received permission to do so by the parties. However, even where the document review requested by a party is extensive, mediators may choose not to charge for that time and describe it as a cost of doing business. The Commission urges court-appointed mediators to take the same approach, particularly if they wish to develop a practice in which they seek to be selected by the parties.

In adopting this Opinion, the Commission recognizes that the North Carolina Industrial Commission's mediation rules provide that Industrial Commission appointed mediators are to be paid for mediation services "at the conference" which would necessitate a different response to this inquiry.

Advisory Opinion Number 20 (2011)

(Adopted and Issued by the Commission on September 9, 2011, Amended August xx 2024.)

Mediator's Notarization of Settlement Agreement, Standard 7

The North Carolina Secretary of State's Office has advised the Dispute Resolution Commission there is nothing that prohibits the attorney mediator or non-attorney mediator, both of whom are notaries, from notarizing a settlement agreement.

Concern Raised

Attorney mediator mediated an agreement in a family financial case. The agreement was reached after hours, and the attorney's staff was no longer in the building. Since no one else was available to notarize the agreement and the mediator was a notary public, he proceeded to notarize the parties' signatures on the agreement consistent with the requirements of N.C.G.S. § 50-20(d). Mediator has now had second thoughts and contacted the Dispute Resolution Commission (Commission) and asked whether it was appropriate for him to notarize the agreement. He is concerned that he could be regarded

as a beneficiary of the transaction since he was paid for his services in helping to mediate the agreement. Both parties were represented by counsel, who drafted the agreement.

Advisory Opinion

Question 1

May the attorney mediator notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(c)(6) provides that a notary shall not perform a notarial act when:

> The notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.

N.C.G.S. § 10B-60 charges the North Carolina Secretary of State's office with regulating notary conduct and enforcing the Notary Public Act, including the above provision. The Secretary of State's Office has advised the Commission there is nothing that prohibits the attorney mediator who is also a notary from notarizing the agreement in the situation described above because he is not actually a beneficiary of the agreement itself, even though the agreement may provide for his compensation in conducting the conference. In essence, the mediator is being compensated only for his service as a mediator and is not receiving some portion of the marital estate or otherwise benefitting from the underlying agreement.

Question 2

May a certified, non-attorney mediator also notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(k) provides:

> A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A non-attorney notary shall not assist another person in drafting, completing, selecting, or understanding a record or transaction requiring a notarial act.

When the parties represented by counsel, who draft the agreement, or in a situation where self-representing parties draft an agreement, nothing should prohibit a non-attorney mediator from notarizing the parties' signatures under the Secretary of State's analysis set forth under question 1 above*, i.e.,* a non-attorney mediator would be no more a beneficiary than would an attorney mediator.

Advisory Opinion Number 19 (2011)

(Adopted and Issued by the Commission on May 6, 2011, Amended August xx 2024.)

Compensation of the Mediator, Rule 7

A mediator may charge an advanced deposit for services but is prohibited from delaying the mediation if the advanced deposit has not been made. The mediation shall be conducted by the mediator regardless of a party's ability to pay the mediator's fee.

Concern Raised

A party-selected, Dispute Resolution Commission (Commission) certified family financial mediator postponed a family financial settlement conference because a party advised him that she did not have the funds to pay his required $500.00 advance deposit. The party's attorney filed a Motion to Dispense With Mediated Settlement Conference based upon his belief that his client could not afford mediation. A district court judge later determined that the party did not have the funds to pay her share of the mediator's fee and granted the Motion to Dispense. This opinion addresses three issues:

1) Whether the Rules for Settlement Procedures in District Court Family Financial Cases (FFS Rules) permit the mediator to charge an advance deposit for his mediation services,

2) Whether it was appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay, and

3) Whether the court should dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?

Advisory Opinion

1) Do the FFS Rules permit the mediator to charge an advance deposit for his services as a mediator?

FFS Rule 7(a) provides that, "When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator."

Since the mediator in this scenario was party-selected, the terms of his compensation are governed by that agreement. Thus, he could require an advance deposit on his eventual

fees. The terms for a court-appointed mediator, by contrast, are set out in their entirety in FFS Rule 7 and may not be varied by agreement.

However, once the mediator has entered a contractual relationship with the parties and has begun the scheduling process, FFS Rule 8(a)(10), which limits the fee arrangement if a party claims inability to pay, applies. Thus, a mediator, who is selected by the parties and charges an advance deposit, should proceed with caution, and should keep in mind the provisos in this opinion.

2) Was it appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay the advance deposit?

FFS Rule 7(a) allows the parties and the mediator to agree on the terms of the mediator's compensation. However, mediators are also governed by FFS Rule 8(a)(10), which requires certified mediators, whether party-selected or court-appointed, to accept as payment in full of a party's share of the mediator's fee such amount as determined by the court under to FFS Rule 7.

The mediator's duty is to schedule and hold the mediated settlement conference under Rule 6(b)(5). Thus, ordinarily, it is inappropriate for the mediator to delay holding the conference because they determine that a party claims an inability to pay the mediator's fee, even when the party agreed to make an advance deposit.

A party may file a Motion with the Court to determine whether if they can pay the mediator's fee. The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules), Rule 7(d) makes clear that the court will hear the motion only after the case has been settled or tried. Thus, in a Superior Court case, that motion will be heard after mediation and the mediator should proceed with scheduling and holding the conference. No delay in scheduling or holding the conference should occur simply because the mediator learns that a party will not pay their advance deposit.

However, the FFS Rules allow the court to pay the mediator's fee from the martial estate. This difference was created by the drafters of the rule in recognition of a greater occurrence of such motions in equitable distribution (ED) cases and in light of the fact that other means of relief are available in that program.

Thus, if a party is found to be unable to pay in an ED case, but the marital estate can afford to pay the entire mediator's fee, the mediation could proceed with one party not paying, but the mediator getting their entire fee. However, because a party may file the Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fees, under both the MSC and FFS Rules, after the conclusion of the mediated settlement conference, the mediator may not delay holding the conference to enforce an advance deposit term of their agreement with the parties in the face of a party's claim of inability to pay.

The mediator is required to schedule and hold the conference in the face of a claim of inability to pay.

3) Should the court dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?

FFS Rule 1(d) does not state the grounds or factors the court should apply in ruling on a motion to dispense with mediation. However, the drafters made a clear policy choice in the rules that litigants would not be exempted from the requirement of mediation simply because they were indigent or because they lived a long distance from the site of the mediation. In return, they drafted a section of FFS Rule 7 to provide for participation in this pre-trial settlement program without costs and they drafted a section of FFS Rule 4 to provide for attendance by in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

In the FFS program, there are three methods by which indigent litigants may participate without costs: 1) the party is relieved entirely of the obligation to pay a share of the mediator's fee; 2) the court conducts a judicial settlement conference without cost to anyone; and 3) the court requires that the full mediator's fee be paid out of the marital estate.

A motion to dispense with mediation, under FFS Rule 1(d) should not be allowed simply due to a party's inability to pay or a party's remote location. It certainly should not be used to resolve the dilemma faced by the mediator in this scenario whose fee agreement called for an advance deposit. If the court finds that the party is indigent, it should simply say so and employ one of the tools at its disposal to let that party participate in the mediation. The mediator may not collect all their fee, but that is as it should be under the terms of the mediator's certification found in FFS Rule 8.

Advisory Opinion Number 18 (2011)

(Adopted and Issued by the Commission on May 6, 2011, Amended August xx 2024.)

Filing Report of Mediator, Rule 6

The mediator is required to file a report of mediator timely and completely at the conclusion of the mediated settlement conference.

Concern Raised

Court staff have registered complaints with the Dispute Resolution Commission (Commission) over a period of years about the failure of superior court mediators to comply with their case management duties, including failing to file Reports of Mediator,

late filing of reports [months after the ten-day deadline established by Rule 6(b)(4)(a) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) and Rule 6(b)(4)(a) of the Rules for Settlement Procedures in District Court Family Financial Cases (FFS) and filing incomplete reports. This Advisory Opinion was initiated by the Commission after recently issuing a private reprimand to an experienced mediator for failing to file his reports correctly over an extended period of time and after having been notified of his failure to comply with the MSC and FFS Rules in the past.

Advisory Opinion

It is important that a mediator's reports be filed timely and completely. First, reports of Mediator are an important case management tool for judges and their staff, allowing them to have more control of their dockets and better allocation of their time. When reports are not filed timely and complete, these efficiencies are compromised. To clear up any confusion that may exist about reporting the "results" of mediated settlement conferences, it is the duty of all mediators to file a report with the court, even when a conference is not held due to a case being disposed of prior to scheduling or conducting the conference.

Reports are also the single most important tool in assessing program performance. Court staff report monthly to the Administrative Office of the Courts on the number of cases mediated and settled in their judicial districts. When mediators do not report or report late, their conferences and settlements may go uncounted with the result that MSC and FFS Program caseload statistics reported to the Supreme Court, the General Assembly, and to the public will not reflect the true impact on the courts of mediation.

Second, certified mediators have the opportunity to earn fees as private providers of court-mandated mediation services. However, the same MSC and FFS Rules that afford that opportunity to certified mediators also require them to perform certain case management duties under the rules, including scheduling and holding the mediated settlement conference within the time frame assigned by the court and reporting the results of the conference. In assigning a case management role to mediators, the legislature intended to minimize the need for the involvement of court staff, and thus taxpayer dollars, in operating mediation programs within the courts. This trade-off of opportunity and duty is one of the most important features of the court-ordered mediation programs in North Carolina. Without it, there would be no mediation programs and no certified mediators.

When mediators fail to fulfill their case management duties, court staff may have to step in to gather information and correct problems, thus taking time away from their other administrative responsibilities. It is a measure of how important the case management duty assigned to mediators is in that MSC and FFS Rule 6(b)(4)(d) provide that a mediator who fails to report as required by these rules shall be subject to the contempt power of the Court and sanctions.

The assignment of case management duties, including the filing of timely and complete reports, is as integral to the design of the mediation programs in this State as is certification itself. Simply put, the price for making money in the court system as a certified mediator is completion of administrative duties assigned by the rules. Failure to carry out those duties subjects mediators to the contempt powers of the court and to discipline, including decertification, by the Commission.

Advisory Opinion Number 17 (2010)

(Adopted and Issued by the Commission on September 18, 2010, Amended August xx 2024.)

Mediator Later Serving as Arbitrator, Standard 7

A mediator may serve as a mediator and later serve as an arbitrator for the same parties in the same dispute.

Concern Raised

The Dispute Resolution Commission (Commission) issued Advisory Opinion (AO) 15 (2008) on November 7, 2008. That AO provided that a mediator should not agree to serve as a fiduciary when such work came as a result of a mediation that they conducted. A mediator who transitions to the role of fiduciary the Opinion reasoned, creates the perception that they have, "…manipulated the mediation process or the parties with the ultimate goal of furthering his/her own interests at the expense of the parties." Such a perception serves to discredit the mediator and the mediation process and, ultimately, the courts and Commission.

A mediator has now contacted the Commission and explained that he mediated a case some time ago which resulted in an impasse. Recently, he was contacted by one of the lawyers involved in the case and asked whether he would be willing to serve as an arbitrator in the same matter. Mediator asked whether AO 15 (2008) precludes his serving as an arbitrator?

Advisory Opinion

AO 15 (2008) was narrowly drafted to address only situations where a mediator agrees to serve as a "fiduciary" in a matter they previously mediated. A fiduciary relationship is one that is founded on trust and confidence and the fiduciary has a responsibility to act primarily for the benefit of others. A fiduciary holds a position analogous to that of a trustee and the role gives rise to certain legal responsibilities and accountabilities. Often the relationship is of a long-term nature and the fiduciary may derive substantial monetary benefit from their service.

Mediators and arbitrators serve as neutrals and not fiduciaries. Both mediators and arbitrators share the same immediate mission*, i.e.,* conducting a proceeding to resolve the dispute. A mediator conducts a conference with the goal of helping the parties work their disputes out themselves and an arbitrator holds a hearing and renders an award which decides the matter for the parties. Given that the immediate mission is the same, the public would not be likely to view the transition from mediator to arbitrator with the same skepticism that it would view the transition from mediator to fiduciary, where the roles and obligations are fundamentally different. Mediation and arbitration proceedings are also generally time and interaction limited. A fiduciary, on the other hand, may serve for a period of months or even years and his or her service may generate an income stream. From a historical and professional practice perspective, the concept of "med-arb", where a mediator transitions to the role of arbitrator in instances where the parties are unable to reach an agreement in mediation, is an old and accepted method of dispute resolution.

While AO 15 (2008) does not preclude a mediator from later serving as an arbitrator in the same dispute, the Commission cautions those making such a transition to be careful in doing so. The mediator in this instance should contact all the parties prior to the arbitration and remind them that he served as their mediator and obtain their written consent to now arbitrate the matter. The mediator should also engage in appropriate self-reflection before agreeing to serve. They may have spent several hours with the parties during mediation. In that time, did they develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise their neutrality? Did they learn any confidential information during a caucus session that they may not be able to exclude from his thought process and that may inappropriately affect their decision? If the mediator has any concerns about their ability to be fully neutral, they should not serve.

Advisory Opinion Number 16 (2010)

(Adopted and Issued by the Commission on February 26, 2010, Amended August xx 2024.)

Mediator's Duty Concerning Intentional and Unlawful Non-Disclosure by Participant, Standard 8

Standard 8 of the Standards of Professional Conduct for Mediators requires mediators to protect the integrity of the mediation process. When a party in an equitable distribution action intentionally refuses to disclose information in mediation when such disclosure is required by statute, a mediator must terminate the mediated settlement conference.

Concern Raised

During a mediated settlement conference in an equitable distribution action, the certified mediator learned, in a confidential private session with the wife and her attorney, that they intentionally had not disclosed to her husband and his attorney the existence of a valuable marital asset. After exploring the consequences of continued non-disclosure with the mediator, the wife and her attorney told the mediator that they would not reveal the asset to the other side, and they reminded the mediator of her duty under the Standards of Professional Conduct for Mediators (Standards), Standard 3, to keep the matter of the non-disclosed asset confidential. Inquiry was made to the Commission as to whether the mediator should continue to serve as mediator under these circumstances.

Advisory Opinion

Standard 8 addresses the mediator's duty to protect the integrity of the mediation process and shall take reasonable steps to limit abuses of the mediation process.

Standard 8(b) provides:

> If a mediator believes that the statements or actions of a participant—including those of a lawyer who the mediator believes is engaging in, or has engaged in, professional misconduct—jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from, or terminating the mediation.

Parties to an equitable distribution action are required by N.C.G.S. § 50-21(a) to prepare an inventory affidavit setting out their assets and liabilities; and, in addition, they are required to do so by many of the district courts' local rules. This fact creates a different set of expectations for settlement negotiations with respect to truth telling and disclosure of information than those that exist in other negotiations. Parties, or their attorneys, who intentionally hide assets in the mediation of an equitable distribution claim, or who do not disclose them upon becoming aware of their existence, are violating state statutes and/or orders of the court.

It is an abuse of the mediation process for the offending party and/or attorney to negotiate a settlement of an equitable distribution claim based on such a violation; and a mediator who knows of such violations of statutes or orders would be participating with the parties in violating those disclosure requirements if they facilitate a settlement of the action. Thus, it would be a violation of the mediator's duty to facilitate a resolution of that action.

When a mediator learns of the intentional non-disclosure, it is best practice for the mediator to engage the offending participant in private conversation about the

consequences of that party's decision. If the party persists in non-disclosure, the mediator must terminate the session and, if the party's decision remains the same, withdraw from the mediation altogether.

In withdrawing from the mediation, the mediator shall not violate the mediator's duty under Standard 3, Confidentiality. A simple statement such as, "A dilemma exists that prohibits me from continuing," with no further explanation or elaboration, should suffice to end the mediator's participation.

Advisory Opinion Number 15 (2008)

(Adopted and Issued by the Commission on November 7, 2008, Amended August xx 2024.)

Mediator Accepting Role as Administrator of Estate, Standard 7

A mediator should remain focused exclusively on their role as mediator and may not solicit or accept an appointment as a fiduciary that flows from the mediation process.

Concern Raised

The heirs of an estate had been unable to reach an agreement as to who should serve as the estate's administrator/fiduciary. The clerk of superior court in the county where the matter was pending referred the dispute to mediation. During the mediation, the heirs, all of whom were represented by counsel, reached an agreement which named their mediator as the administrator. When the agreement was later presented to the clerk for approval, one of the heirs objected to the appointment arguing, in effect, that she thought it was a conflict of interest for the mediator to agree to serve as the administrator. That individual told the clerk that she had expressed concerns about the arrangement during the mediation, but that her concerns had been brushed aside and she had not continued to object. Inquiry was made to the Dispute Resolution Commission (Commission) as to where it was appropriate for the mediator to agree to serve as the administrator/fiduciary.

Advisory Opinion

The Standards of Professional Conduct for Mediators (Standards), Standard 7 provides that, "A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute." Subsection (e). of the Standard also provides that, "A mediator shall not use information obtained, or relationships formed, during a mediation for personal gain or advantage."

In agreeing to serve as the administrator/fiduciary, the mediator may have had a pure motive and felt that he was going the extra mile to help these heirs settle their dispute. Nevertheless, in accepting the appointment, he failed to give due regard to the conflict between the parties' interests and the fact that he stood to gain personally and financially from his appointment as administrator.

Significant fees are often associated with service as an administrator/fiduciary or guardian. A mediator who promotes himself or herself as available to serve in that capacity creates the impression that he or she manipulated the mediation process or the parties with the ultimate goal of furthering their own interests at the expense of those of the parties.

A mediator who accepts such an appointment at the offer or even insistence of the parties creates the same perception. In particular, that perception is created where, as reportedly here, the mediator allowed his name to be set forth in the agreement even after one of the heirs objected to the mediator's service as administrator. Such perceptions serve to discredit the mediator, the mediation process, the Rules of Mediation for Matters before the Clerk of Superior Court and, ultimately, the Commission and courts.

A mediator should remain focused exclusively on his or her role as mediator and should not solicit or accept an appointment as a fiduciary that flows from the mediation process. A mediator who accepts such an appointment creates the perception that they manipulated the mediation process and the parties to their own advantage in obtaining the appointment and, thus, compromised their neutrality in the process.

Advisory Opinion Number 14 (2008)

(Adopted and Issued by the Commission on May16, 2008, Amended August xx 2024.)

A mediator may provide work at no cost, or reduced fees under the conditions listed within this Advisory Opinion.

Concern Raised

The North Carolina Bar Association Dispute Resolution Section's Pro Bono Committee (Section) asks whether a certified mediator may hold him or herself out as willing, if voluntarily selected, to mediate without charge or at a reduced charge for parties represented by legal service organizations for the indigent. The Section reports that legal aid organizations have asked the Section to assist it in identifying and assembling a panel of mediators who are willing to volunteer their services to assist their clients. The Section believes it is important for mediators to be involved in efforts to serve those who are

unable to pay, and it asks the Commission whether mediators, consistent with the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Actions, the Rules for Settlement Procedures in District Court Family Financial Cases, the Rules of Mediation for Matters Before the Clerk of Superior Court, the Rules of Mediation for Matters in District Criminal Court, the Rules for Mediation for Farm Nuisance Disputes, and the Standards of Professional Conduct for Mediators (Standards), may volunteer to work pro bono or at reduced fees in such cases and in other disputes in which one or more of the parties are, or appear to be, indigent.

Advisory Opinion

North Carolina's mediated settlement conference programs were designed to be "party-pay," meaning that the parties would directly compensate the mediator for his or her services. The party pay system has served our programs, courts, and citizens well in that a cadre of talented mediators has developed over time and mediated settlement is now widely available in all our judicial districts. The Commission has always been mindful that, in creating a system funded by the parties, it has an obligation to ensure that those who lack funds are not denied services. To that end, the original program rules provided that mediators participating in court-based programs must make their services available to indigent parties without charge. To reinforce this notion, applications for mediator certification require applicants to expressly agree to waive their fees with respect to indigent parties.

Consistent with the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Actions, the Rules for Settlement Procedures in District Court Family Financial Cases, the Rules of Mediation for Matters Before the Clerk of Superior Court, the Rules of Mediation for Matters in District Criminal Court, the Rules for Mediation for Farm Nuisance Disputes, and the Standards of Professional Conduct for Mediators , mediators may assist the clients of organizations providing legal services for the indigent, and other indigent clients, by agreeing to mediate their disputes, if voluntarily selected, without charge or at a reduced rate, under the following guidelines:

1. A mediator may waive their fees, in whole or in part, for one or all parties to a dispute even if the resolution of the dispute generates funds for the indigent client. Consistent with Standard 7(d), a mediator cannot condition waiver of the fee upon the outcome of the dispute or case nor decide to assess a previously waived fee once a settlement in favor of the indigent party has been mediated.

2. Waiver in whole or in part for one or all parties does not require a court determination of indigency.

3. Consistent with Standard 2, if the mediator agrees to waive a fee in whole or in part for one party, that fact must be disclosed to the opposing party as soon as practicable before the mediation. The purpose of the disclosure is to avoid any appearance of partiality.

4. If a mediator has a personal policy of waiving all or a portion of theirfee for an indigent client, the mediator shall make that policy known to the other party(ies) before the parties negotiate whether the entire fee will be paid by parties other than the indigent client. An attempt to negotiate or shift the fee to other parties under these circumstances appears to give the mediator a stake in the settlement and engenders the perception of partiality.

5. A mediator may make it known to a legal service organization that the mediator is willing, if designated, to mediate without charge or at a reduced charge for the clients of legal services organizations for the indigent. The mediator's name may appear on a panel of available mediators for legal services. However, a mediator who has agreed to serve at no charge or a reduced charge is under no obligation to mediate a dispute in which they have been selected, particularly if they have been called upon to mediate without charge on numerous occasions.

Advisory Opinion Number 13 (2007)

(Adopted and Issued by the Commission on August 10, 2007, Amended August xx 2024.)

Neutrality of the Mediator, Standard 2

The best practice for a mediator dealing with contradictory information without accusing a party of lying.

Concern Raised

During a superior court mediation, a party made representations to the mediator regarding a key fact in dispute. Later in a caucus session with the opposing party, the mediator learned information that the mediator believed irrefutably contradicted the key fact. The mediator returned to the party who made the initial assertion, angrily confronted him and, using foul language, suggested he had lied about the key fact. The party responded by telling the mediator that he found his demeanor and language unprofessional. The mediator collected himself and agreed, but the offended party left the mediation.

Advisory Opinion

A mediator should maintain a professional demeanor throughout the mediation process and not form judgments as to who may be lying. When presented with contradictory information, the mediator should ask the parties about the inconsistency without accusing either party of lying. A mediator using foul or profane language is never appropriate.

The Standards of Professional Conduct for Mediators (Standards), Standard 2, provides that, "A mediator shall, in word and action, maintain impartiality toward the parties and on the issue in dispute." Confronting a party in a hostile and accusatory manner and accusing him of lying, or words to that effect, is not only wholly inconsistent with this Standard, but counterproductive as evidenced by the party's quick exit from the conference and the resulting impasse. Rather, the mediator should have brought the information back to the room, pointed out the inconsistency and asked the party to explain his earlier response.

Mediators have a duty to protect the integrity of the mediation process and to conduct the mediation with decorum. The Dispute Resolution Commission strongly cautions all mediators against using profanity, even in instances where the parties and their attorneys are using it.

Advisory Opinion Number 12 (2007)

(Adopted and Issued by the Commission on May 18, 2007, Amended August xx 2024.)

A mediator may not modify the Rules for Settlement Procedures in District Court Family Financial Cases or the Standards of Professional Conduct for Mediators in their Agreement to Mediate service contract.

Concern Raised

Prior to a family financial settlement conference, an attorney received an *Agreement to Mediate* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify the Rules for Settlement Procedures in District Court Family Financial Cases (FFS Rules)_or the Standards of Professional Conduct for Mediators (Standards)? 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

Any agreement containing terms that modify or run counter to the FFS 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 *Agreement to Mediate* 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 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 FFS Rules.

Specifically, the *Agreement to Mediate* 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 FFS 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. 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 FFS 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.

**At the time Advisory Opinion 12 (2007) was adopted the Court-Appointed Administrative Fee was $150. On June 10, 2020, the Supreme Court of North Carolina amended MSC Rule 7(b) and FFS Rule 7(b) to a $175.00 one-time Administrative Fee.*

Advisory Opinion Number 11 (2007)

(Adopted and Issued by the Commission on March 16, 2007, Amended August xx 2024.)

Agreement Must Be Reduced to Writing and Signed at the End of the Mediation N.C.G.S. § 7A-38.1(*l*)

If an agreement is reached, the mediator must assure that it is reduced to writing and signed.

Concern Raised

In March of 2004, mediator conducted a superior court mediated settlement conference and helped the parties reach an agreement in a dispute over the availability and location of certain real property. Although no written agreement was drafted at the conclusion of the initial conference, the mediator filed a Report of Mediator with the court immediately after the settlement conference, reporting that the parties had reached an agreement and that the matter was fully resolved. However, during their mediated settlement conference, the parties agreed that immediately following their conference, they would travel to the site of their dispute to conduct a visual inspection of the property in question to ensure that what they had agreed to was a workable solution and to agree on any remaining details. The mediator did not accompany the parties to the site nor did he follow up with them after the site visit to ensure that they had reached a full agreement and that it was reduced to writing and signed. Sometime later, the defendant sought to change the terms of the oral agreement. The plaintiff became angry, disavowed the agreement in full and sought a trial of the matter. The judge refused the plaintiff's request for a trial, telling her that the mediator had reported the matter settled. The plaintiff eventually agreed to the terms reached at the initial conference in order to avoid having the judge dismiss her case with prejudice. The defendant contacted the Dispute Resolution Commission (Commission) to inquire about her mediator's conduct.

Advisory Opinion

At the end of a mediation, if an agreement is reached, the mediator has a duty to ensure that it is reduced to writing and signed by the parties. If the parties are not yet ready to write and sign such an agreement, then the mediation is not concluded, and the mediator's job is not done. The mediator may recess the mediation and reconvene once the parties have worked out any remaining details. Then at that meeting the agreement may be reduced to writing and signed. However, absent such a written signed agreement, the matter has not settled, and the mediator must either delay filing the Report of Mediator until the case has settled with a written, signed agreement or file a report declaring an impasse.

Under the Rules of Mediated Settlement Conferences and Other Settlement Procedures (MSC Rules), the mediator was required by Rule 4(c) to ensure that the agreement reached in mediated settlement was reduced to writing and signed. N.C.G.S. § 7A-38.1(*l*) expressly provides that agreements must be reduced to writing and signed to be enforceable. Oral agreements are not only not enforceable, but likely to lead to the situation that occurred here, *i.e.,* one of the parties equivocates, tempers fray and the parties return to court. The mediator seriously erred in failing to require that the agreement be reduced to writing and violated program rules. If there were still unanswered questions at the end of the initial session, the mediator should have recessed the conference, reconvened it at the site location and proceeded to help the parties sort

out any remaining details necessary to ensure a full agreement. The mediator should then have taken steps to ensure the agreement was reduced to writing.

One of the parties to the agreement was an association and member approval of the agreement was needed. The need for such approval does not obviate the mediator's responsibility to ensure that the agreement is reduced to writing at the conclusion of the conference. The mediator should have recessed the mediation for the association to gain proper approval of the terms of the agreement.

Not only did the mediator fail in not requiring a signed writing, he should not have reported to the court that the matter was settled when, in fact it was not, as "remaining details" needed to be agreed upon and then voted upon by the association. Judges rely on the reports of mediators and do not want to undermine the mediator or the program by failing to uphold agreements that are reached in mediation. It is imperative that mediators take their case management responsibilities seriously. Reports of Mediator should not only be filed timely but be both fully and accurately completed. To do otherwise can compromise the integrity of both the mediator and the program, frustrate the court, and potentially harm parties who may find their rights compromised.

The mediator also filed his Report of Mediator (AOC-CV-813) with the court using an outdated copy of the form. Mediators have a responsibility to ensure that they are referring to current program rules and using current program forms when they conduct their mediations. Program forms and rules are posted on the Commission's web site or are available though it's office.

Advisory Opinion Number 10 (2006)

(Adopted and Issued by the Commission on November 3, 2006, Amended August xx 2024.)

Attendance, Rule 4(a)(1)

Over the objection of attorney A, the mediator has the discretion to allow attorney B's paralegal to attend the mediated settlement conference.

Concern Raised

Certified superior court mediator contacted the Dispute Resolution Commission (Commission) about a matter that arose at a mediation in which he was representing the defendant. The caller reported that he had arrived at the mediation with his paralegal. He explained that it was a complicated case and that he needed support staff there to assist him in keeping the paperwork organized. The plaintiff's attorney objected to the presence of the paralegal. The mediator allowed the paralegal to attend. Later, the caller was

involved in another mediation involving the same opposing counsel. When the caller arrived for this mediation with his paralegal, the plaintiff's attorney again objected to the paralegal's presence The caller asks the Commission to clarify whether his paralegal may attend.

Advisory Opinion

Rule 4(a)(1) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) and Rule 4(a)(1) of the Rules for Settlement Procedures in District Court Family Financial Cases (FFS) address attendance at the conference. MSC Rule 4(a)(1) provides that the following persons shall attend: individual parties or their representatives, if the party is not a natural person or a governmental entity; a representative of any governmental entity that is a party; insurance company representatives; and at least one counsel of record for each party or participant. FFS Rule 4(a)(1) provides that all individual parties, and at least one counsel of record for each party whose counsel has appeared in the case, shall attend the mediated settlement conference. These Rules provide that these persons shall attend but does not limit attendance only to these individuals. MSC and FFS Rule 6(a)(1) provides that the mediator shall at all times be in control of the conference and the procedures to be followed.

It is within a mediator's discretion, to permit individuals other than those specified in Rule 4(a)(1) to attend and participate in a mediated settlement conference. If an opposing counsel or party objects to the inclusion of an individual, it is the mediator's responsibility to resolve the matter prior to commencing the mediation of the case. The mediator should try and mediate the matter of attendance first, but if the parties cannot reach an agreement, the mediator shall make a decision pursuant to Rules 6(a)(1).

In the event that the conduct of any such individual that the parties or the mediator have agreed to seat becomes counter-productive, the mediator has the discretion under Rules 6(a)(1) to exclude the individual from attending further.

Advisory Opinion Number 09 (2006)

(Adopted and Issued by the Commission on August 25, 2006, Amended August xx 2024.)

Mediator's Duty in Response to Risk of Confidentiality Breach, Standard 3

Standard 3 of the Standards of Professional Conduct for Mediators places a duty of confidentiality on a mediator as to information communicated to the mediator during the mediation process. Implicit in this duty is an obligation to notify

mediation participants, who may be at risk because of a breach in confidentiality, so the participants will have an opportunity to protect their interests.

Concern Raised

Certified family financial mediator's attorney contacted the Commission's office. He explained that his client kept detailed information about divorcing couples on his laptop, including information that identified the couples and revealed assets, debts, and accounts. The information pertained to couples currently involved in mediation as well as those who had completed the process. The laptop needed repairs. When he retrieved his machine following service, he discovered that the financial information was missing. The mediator returned to the store where staff sought to retrieve it. Staff was unable to locate the missing information and advised mediator that it might have been installed on someone else's computer, might be in cyberspace, or could have been erased. Attorney asks whether the mediator has any duty under the Standards of Professional Conduct for Mediators (Standards) to advise those whose information is missing of the situation so that they may act to protect themselves from financial loss or identify theft.

Advisory Opinion

Confidentiality is integral to the mediation process. Standard 3(a) of the Standards provides that, "A mediator shall not disclose, to any non-participant, directly of indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference." The only exceptions to this absolute bar on disclosure are set forth in Standard 3 and do not apply in this situation. If confidentiality is not preserved, the integrity of the mediation process is compromised. Participants will no longer feel free to speak frankly with their mediators and the public will no longer view mediated settlement as a confidential alternative to a public trial. Standard 3 places a clear duty on mediators to take every precaution to protect confidentially. **Implicit in the duty to protect confidentiality is the responsibility to notify a mediation participant who may be at risk because of a breach in confidentiality. Without notification, the participant will have no opportunity to take steps to protect his or her interests.**

A requirement of notification protects not only the public but the credibility of mediators and mediation programs as well and, in general, is consistent with good public policy (see N.C.G.S. § 75-65).

Advisory Opinion Number 08 (2005)

(Adopted and Issued by the Commission on February 11, 2005, Amended August xx 2024.)

Scheduling the Mediated Settlement Conference, Rule 6(b)(5)

The mediator is responsible for scheduling the mediated settlement conference even when local practice dictates otherwise.

Concern Raised

Mediator asks the Dispute Resolution Commission (Commission) whether he is obligated under program rules to schedule the mediated settlement conference. He notes that there is a pattern and practice in his judicial district of the plaintiff taking responsibility for scheduling the conference.

Advisory Opinion

The operating rules for both the mediated settlement conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC) and Settlement Procedures in District Court Family Financial Cases (FFS) make it clear that it is the mediator's responsibility, and not the parties', to schedule mediated settlement conferences in cases in which they have been either appointed or chosen as the mediator.

MSC Rule 6(b)(5) provides:

> It is the duty of the mediator to schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

FFS Rule 6(b)(5) reads almost identically.

There are two reasons why the Supreme Court placed the responsibility for scheduling on the mediator. First, the General Assembly intended for the mediated settlement conference programs to operate with minimal administration on the part of court personnel and with no appropriation of tax dollars. Thus, the mediated settlement conference programs use professionals who are paid directly by the parties for their services as mediators and for their administrative services in scheduling mediations and reporting the results to the court. In accepting cases ordered to mediation by the court, a mediator agrees both to serve as a case manager for the court and as a facilitator of negotiations between the parties at the settlement conference.

Secondly, from a practical standpoint, the mediator, and not the parties, is in the best position to ensure that cases are scheduled timely. The parties themselves may not be motivated to hold their mediation within the time limits set by the court. In addition, self-

represented parties may have little or no awareness of program rules or the mediation process. Therefore, responsibility for the administration and scheduling of the settlement conference was placed on the mediator, not the parties. Recent rule changes emphasize this administrative duty of mediators by requiring that they file reports even when the parties settle their case prior to mediation.

The Commission has learned that there is a pattern and practice developing in which mediators defer to the parties in matters of scheduling. We can imagine instances in which the parties schedule mediation and do not need the assistance or prompting of a mediator to comply with the directives of the court. However, ultimate responsibility for scheduling rests with the mediator.

A mediator who fails to assume responsibility for scheduling the conference within the deadlines set out by the court fails to fulfill one of their major obligations as a mediator. As such, they may be subject to discipline by the courts that appoint and supervise them and by the Commission that is charged with regulating the conduct of mediators as set out in the Standards of Professional Conduct for Mediators (Standards) and the mediation rules adopted by the Supreme Court.

A mediator's obligations under the mediation rules adopted by the Supreme Court and the Standards are (1) to facilitate the parties' negotiations in a mediated settlement conference and (2) to schedule that conference and report its results to the court in a timely fashion. Under these guidelines the mediator is as much a case manager as they are a negotiations facilitator.

Advisory Opinion Number 07 (2004)

(Adopted and Issued by the Commission on March 18, 2004, Amended August xx 2024.)

After a mediator learns that a bankruptcy petition has been filed, the mediator shall notify the parties that the mediation cannot proceed until the stay has been lifted or the mediator is informed that an exception applies, and the parties have been given permission to proceed from the bankruptcy court.

Concern Raised

Mediator was ordered to conduct a family financial mediation. After the case was scheduled, one of the parties filed for bankruptcy. Mediator asks whether he should proceed to conduct the mediation.

Advisory Opinion

A filing of a petition for bankruptcy under section 301, 302, or 303 of Title 11 of the United States Code (U.S.C.) results in an automatic stay of **any judicial**, administrative, or other action or proceeding that was or could have been commenced against the debtor prior to the filing of the petition (11 U.S.C. 362(a)(i)). This stay may preclude the holding of the mediation conference ordered by the trial court. After a mediator learns that a bankruptcy petition has been filed, the mediator shall notify the parties that the mediation cannot proceed until the stay has been lifted. If one or both of the parties wish to proceed with the mediation, a Motion for Relief from Automatic Stay or other relief may be sought through the bankruptcy court pursuant to 11 U.S.C. 362(d). An Order without Motion Extending Completion Date for Mediated Settlement Conference or Other Settlement Procedures Upon Stipulation of the Parties, Suggestion of the Mediator, or Upon the Court's Own Order, AOC-DRC-19, may be filed to allow the parties additional time to resolve the Motion for Relief from Automatic Stay.

Subsection (b) lists exceptions to the stay including one for the establishment or modification of domestic support obligations (11 U.S.C. 362(b)(2)(A)(ii)). However, even if the parties agree that only issues of domestic support obligations will be discussed in the mediation, the Commission believes it is still prudent and the better practice for the mediator to advise the parties to contact the bankruptcy court or the bankruptcy trustee, if one has been appointed, and request permission to proceed. Issues of equitable distribution are not covered by this exception.

Parties that seek to proceed with mediation after a bankruptcy petition is filed may face sanctions under 11 U.S.C. 362(k). Subsection (k)(1) provides that any individual injured by any willful violation of the stay shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Upon learning that a bankruptcy petition has been filed in the case, the mediator shall notify the parties that the mediation cannot proceed until the stay has been lifted or the mediator is informed that an exception applies and the parties have been given permission to proceed from the bankruptcy court. If the bankruptcy court does not give permission for the mediated settlement conference to proceed, the mediator shall report to the trial court, on the report of mediator, that the bankruptcy has been filed and mediation was not held.

Advisory Opinion Number 06 (2004)

(Adopted and Issued by the Commission on February 6, 2004, Amended August xx 2024.)

Mediator's Future Representation of a Party, Standard 7

After conducting a mediation, the mediator/attorney shall not represent any party in future matters that arise from the same cause of action.

Concern Raised

Mediator conducted a mediation for a couple with marital problems. The couple reached an agreement in mediation and the terms were reduced to writing. However, the agreement was never signed by the parties and now they have decided to divorce. The wife has asked the mediator to represent her in the ensuing domestic litigation. Mediator asks if he may do so since the separation and divorce are separate actions.

Advisory Opinion

The Standards of Professional Conduct for Mediators (Standards), Standard 7 provides that a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of a dispute mediated by the attorney or other professional. The words "subject of the dispute" should be interpreted broadly. It is true, as the mediator suggests, that separation, custody, equitable distribution, and divorce are all technically separate legal actions. However, though the actions are separate and have a particular focus, the overall subject remains constant – a disintegrating family with the same husband and wife, the same children, and the same property and debts. Each separate action is but merely one component of a comprehensive system designed for the purpose of ending a marriage and determining the rights and responsibilities of the spouses.

Marital couples who meet with a mediator have adverse as well as common interests regarding their divorce. A mediator who works with them as a neutral and who then becomes the representative of only one calls into question the mediator's neutrality and the confidentiality of the mediation process. This appearance of impropriety, if not impropriety itself, can undermine not only a party's confidence in a mediator and the mediation process, but that of the larger public as well.

For the reasons given above, the mediator should decline to represent either party on any matter arising out of the marital relationship.

Advisory Opinion Number 05 (2003)

(Adopted and Issued by the Commission on November 7, 2003, Amended August xx 2024.)

Discussions after Impasse has been Declared, Rule 6 and Standard 3

Under certain circumstances after impasse has been declared, a mediator may have a discussion with an attorney for a party about what was said at the mediated settlement conference.

Concern Raised

The mediator conducted a mediated settlement conference in a worker's compensation case. The mediation resulted in an impasse. The parties were some distance apart at the time the conference concluded. Later, the attorney for the injured worker wrote to the mediator. In his letter, the attorney identifies certain information that the mediator relayed to him during the conference. He asks the mediator to reveal the name of the conference participant who gave that information to him during a caucus session, *i.e.,* to tell him whether the words were said by the representative or attorney of the employer or by the attorney for the insurance company. The mediator realizes that the attorney has not only misquoted them, but is seeking to characterize the words as a threat, or as tantamount to a threat. The mediator does not believe that any such threat was intended. The mediator suspects that the attorney wants the information not for the purpose of clarifying matters and re-opening settlement negotiations, but rather to find a basis for a bad faith action, *i.e.,* the mediator believes that the attorney will try to argue that his client was being threatened with loss of her company provided health insurance if she does not settle in a way that satisfies the employer. The letter raises two issues for the mediator:

> **1) The attorney has not accurately reported what the mediator told him at the conference and attributed an intent that, the mediator believes, was not present. Can the mediator clarify both what was said and the spirit in which the words were offered?**
>
> **2) Can the mediator identify the participant who originally gave the information to him provided that he first receives permission from the participant to make the disclosure?**

Advisory Opinion

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC), allow for ex parte communications between the mediator and a party and their counsel. However, the Rules for Settlement Procedures in District Court Family Financial Cases prohibit ex parte communication before, during, or after the conference without permission from all parties. It is not unusual for parties in a MSC mediation to contact a mediator following an impasse and seek some clarification or other assistance and a mediator may respond. Through such *ex parte* conversations, the Dispute Resolution Commission (Commission) believes that MSC mediators can sometimes play an important role in reviving or furthering settlement discussions. While mediators are not required or obligated to provide additional assistance or information once a case has impassed, they may do so if they believe it will assist the parties and lead to further settlement discussions and there is no violation of confidentiality under the Standards for Professional Conduct of Mediators (Standards), Standard 3. If, as in this

case, the mediator believes that the information is being sought for some purpose other than furthering negotiations, the mediator may simply determine that nothing can be gained by further discussions with the party and simply not respond to the inquiry.

Confidentiality can sometimes be an issue when *ex parte* communications occur post-mediation. It may be that the best course of action for the MSC mediator is to offer to re-convene the mediation and bring the parties back together. When the parties are face-to-face again, the mediator avoids breaching confidentiality protections. Further, the mediator ensures that they will not, through some lapse in memory, make a misstatement and further confuse and complicate matters.

Unless the mediator previously had permission to identify the particular speaker to the opposing side, they should not do so now, unless the mediator first contacts the individual and determines whether they have permission to reveal his or her identity.

Advisory Opinion Number 04 (2003)

(Adopted and Issued by the Commission on May 16, 2003, Amended August xx 2024.)

A mediator is not required to retain their mediation files.

Concern Raised

Certified mediators have asked the Commission for guidance regarding the retention of their mediation files.

Advisory Opinion

There is no requirement in the statutes, in the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Actions, the Rules for Settlement Procedures in District Court Family Financial Cases, the Rules of Mediation for Matters Before the Clerk of Superior Court, the Rules of Mediation for Matters in District Criminal Court, the Rules for Mediation for Farm Nuisance Disputes, or the Standards of Professional Conduct for Mediators that require a mediator to retain their files. File retention is a matter that should be in the discretion of the individual mediator. Mediators should remember that they have a duty to ensure the confidentiality of the mediation process. A mediator may rely upon the parties to retain a copy of the settlement agreement in their files, instead of the mediator retaining a copy.

Advisory Opinion Number 03 (2001)

(Adopted and Issued by the Commission on May 18, 2001, Amended August xx 2024.)

Confidentiality of Statements Made in Opening Session, Standard 3

A mediator may not agree to provide an affidavit or be deposed concerning statements made during the opening session of a mediated settlement conference, even if the parties and their attorneys agree. Absent a statutory duty, a mediator is bound by the confidentiality provisions of the Standard.

Concern Raised

Certified mediator has been asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. Certified mediator seeks clarification on the following issues:

1) Whether the opening session when all parties are present is confidential; and

2) Whether confidentiality protections in the Standards of Professional Conduct for Mediators (Standards) are waived if both parties and their attorneys agree that the mediator may give the affidavit or be deposed.

Advisory Opinion

The Dispute Resolution Commission (Commission) advises that the mediator may not give the affidavit, nor provide information at a deposition. Providing such information is a violation of the Standards. Standard 3(a) provides that: "A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference." Standard 3(a) prohibits the communication of any information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard 3(a) does not provide for any exceptions to confidentiality beyond the statutory duty to report certain information. There is no exception for instances where the parties agree to the affidavit or deposition. Confidentiality is essential to the success of mediation. Absent a statutory duty to disclose information, the Standards obligate mediators to protect and foster confidentiality.

Advisory Opinion 2 Archived August xx 2024. (Substantive content included in AO 24)

Advisory Opinion Number 01 (1999)

(Adopted and Issued by the Commission on August 27, 1999, Amended August xx 2024.)

Conference, Rule 6

A mediator cannot declare an impasse prior to conducting a mediated settlement conference.

Concern Raised

A certified superior court mediator describes the following situation and seeks a formal advisory opinion as to his responsibilities.

Mediator M has been selected or appointed to mediate a case pending in Superior Court. Shortly before the scheduled mediation of that case, Mediator M receives a telephone conference call from Attorney P, who represents the plaintiff in the case, and Attorney D, who represents the defendant. Mediator M is informed that Attorney D has informed Attorney P that the defendant's liability insurance company will not increase its last offer of settlement at mediation. Attorney D so informed Attorney P in order to avoid unnecessary time and expense to both parties in mediating the case. However, Attorney D refuses to move to dispense with mediation. Attorney D believes that the Court will either deny the motion and/or become hostile to Attorney D and/or Attorney's D's client as a result of the motion. Attorney D understands his party's obligation to mediate and would rather mediate than file a motion to dispense with mediation. Attorney P informs Mediator M that he does not want to incur the time and expense of mediation or the time and expense of moving to dispense with mediation if the defendant has a closed mind. Attorney P requests that Mediator M impasse the mediation as a result of the parties' conference call. What should Mediator M do?

Advisory Opinion

The Dispute Resolution Commission (Commission) advises Mediator M that, in the situation described above, he should proceed to schedule and to conduct a mediated settlement conference in this case.

N.C.G.S. § 7A-38.1, the enabling legislation for the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC), provides that the purpose of the statute is to require parties to superior court civil actions and their attorneys to attend pretrial, mediated settlement conferences with the objective

of voluntarily settling their disputes. Subsection (b) defines the mediator as a neutral who acts to encourage and to facilitate resolution of the action. Once a Senior Resident Superior Court Judge has issued an order requiring a conference to be held, MSC Rule 6(b)(5) provides that it is the mediator's duty to schedule the conference and to conduct it prior to the conference completion deadline set out in the court's order. MSC Rule 4 provides that all parties to the action, insurance company representatives, and attorneys shall physically attend the conference, in person or by remote technology, unless their presence is excused or modified by court order or agreement of all parties and the mediator. For the mediator to report an impasse as a result of the conference call described above would thwart the intent of the statute and the MSC Rules which provide that the parties are to assemble and the mediator to provide for them a structured opportunity to discuss and to attempt to settle their case. Similarly, with regard to mediated settlement conferences in District Court Family Financial Cases, the parties, and attorneys, are required to attend the mediated settlement conference in person or by remote technology unless excused by the consent of the mediator and all parties. In the scenario described above, neither the individual parties nor any insurance company representative participated in the discussion and there was no substantive discussion of the case or any attempt made to generate settlement options. The conversation described above cannot be characterized as a mediated settlement conference. The mediator is under a duty to schedule and to conduct a conference and should proceed to do so.