CAROLINA DISPUTE SETTLEMENT SERVICES
"WHAT SHOULD A LAWYER LOOK FOR IN AN ETHICAL MEDIATOR?"

Live Program: Tuesday, June 27, 2017
9:00 a.m. – 11:15 a.m.

AGENDA

9:00 am	Welcome, Introductions, Training Goals	Frank Laney
9:10 am	Overview of Standards of Conduct, Advisory Opinions, Program Statutes	Frank Laney Leslie Ratliff
10:30 am	Examination of AO 28, AO 31, and State Bar 2012 FEO 2 Practicalities of Dealing with Pro-se Parties In Mediation Expectations Upon Settlement/What Should the Mediator Do?	Frank Laney Harriet Hopkins Christy Foppiano
11:15	End of CME Session	

Frank C. Laney has served as Circuit Mediator for the US Court of Appeals for the Fourth Circuit for 20 years, mediating in excess of 3700 cases. He is also an adjunct professor at North Carolina Central and Campbell Schools of Law, an ex-officio member of the NC Dispute Resolution Commission and is Chair of the ADR Committee of the NC State Judicial Council. Annually he teaches mediation in Belarus. He is the former Mediation Coordinator for the NC Industrial Commission, a former partner in Mediation Inc. and for three years in the early 1990's limited his private practice in Raleigh to mediation. He has been a member of the NC Bar Association Dispute Resolution Committee/Section since its inception, and is a past Section Chair. He chaired the joint Section-Commission committee responsible for the 2012 updating and rewriting of *Alternative Dispute Resolution in North Carolina, A New Civil Procedure,* serving as an author and co-editor of the book. In 2004, the Section presented him with the Peace Award. He was a consultant with the NC Bar Association's Mediated Settlement Conference and District Court Arbitration Pilot Programs. He co-chaired the committees that developed the Family Financial Settlement and Clerk Mediation Programs. Mr. Laney is certified as a Superior Court, Family Financial and Clerk Program mediator by the NC Dispute Resolution Commission and as a practitioner member of the Academy of Family Mediators. He was born in Charlotte and raised in North Carolina, spending his early childhood in Taylorsville, a small town in the foothills of the Blue Ridge Mountains, and attending Martin Middle School and Broughton High School in Raleigh. Mr. Laney attended NC State University and UNC Law School.

His wife, Anne Whaley Laney, is Principal Flutist with the North Carolina Symphony. They have two children, William and Megan. William just completed his master's degree at NC State University and Megan attends UNC.

In his free time Mr. Laney works with the Boy Scout troop he was a member of as a boy and where his son got his Eagle. He is Past President of the Green Hope Band Boosters and most years sings with the North Carolina Master Chorale, which gives him the opportunity to sing with his wife and the North Carolina Symphony. He serves on the vestry of St. Paul's Episcopal Church in Cary.

Education
B.A., Psychology, NC State University, 1979
J.D., University of North Carolina School of Law, 1982

Christie M. Foppiano is a lawyer, certified Superior Court Mediator, arbitrator and owner of Foppiano Mediations. For most of her career, Christie was in private practice where she handled a wide variety of civil cases and later served as General Counsel of a mental health non-profit. She has refocused her career exclusively on alternative dispute resolution and is dedicated to the collaborative and peaceful resolution of disputes, particularly in the area of family law. Christie trains individuals to become mediators in the NC Office of State Human Resources' program and to become superior court mediators. She is also excited to be a member of Separating Together, a family law collaborative practice group

Christie is a North Carolina native who graduated from the NC School of Science and Mathematics and the University of North Carolina at Chapel Hill where she was Phi Beta Kappa. Christie received her JD from the University of Tennessee in 1995 and served on the Tennessee Law Review.

Leslie Ratliff has worked in dispute resolution since 1987. She has been the Executive Director of the NC Dispute Resolution Commission since 1995. Prior to relocating to North Carolina, she served as an active mediator in South Florida and managed dispute resolution programs for the Eleventh Judicial Circuit (Dade County) and, later, the Fifteenth Judicial Circuit (Palm Beach County).

Ms. Ratliff is a lawyer who is admitted to practice in Florida and Kansas and she also holds a master's degree in public administration with an emphasis in court administration. She is married to Raleigh lawyer, Steven Carr, and is the mother of two young adults.

Harriet Hopkins has served as the Deputy Director of the NC Dispute Resolution Commission since 2013. Prior to that, she practiced law for many years in Durham County, in the areas of workers' compensation, social security disability, personal injury, real estate and advance care planning. She mediated superior court and family financial cases having been certified in both programs in 1996 and 2001 respectively, and cases before the NC Industrial Commission. She also served as an arbitrator in the 14th Judicial District for more than a decade.

Among other positions, Harriet served as a board member and President of the NC Association of Women Attorneys, as Chair of the Legal Services of North Carolina's "Access to Justice" campaign for the 14th Judicial District, as a Council member of the Dispute Resolution Section of the NCBA, and as a Trustee for Carolina Friends School in Durham, NC.

In the Supreme Court of North Carolina

Order Adopting Amendments to the Standards of Professional Conduct for Mediators

WHEREAS, Sect. 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission under the Judicial Department and charges it with the administration of mediator certification and regulation of mediator conduct and decertification, and

WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to adopt standards for the conduct of mediators and of mediator training programs participating in the proceedings conducted pursuant to N.C.G.S.Sect.7A-38.1, 7A-38.3, 7A-38.4A, 7A-38.3B, and 7A-38.3.C.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Standards of Professional Conduct for Mediators are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Standards of Professional Conduct for Mediators amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J., Recused.

Beasley, J.
For the Court

Witness my hand and seal of the Supreme Court of North Carolina, this the 5th day of February, 2014.

M.C. Hackney, Assistant Clerk
Christie Speir Cameron Roeder
Clerk of the Supreme Court

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

These Standards of Professional Conduct for Mediators (Standards) shall apply to all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission) or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time to time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these Standards, then the statute shall control.

These Standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.

B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.

C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.

C. The mediator shall decline to serve or shall withdraw from serving if:

(1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or
(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: 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, directly or indirectly, to any non-participant, 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 with the appropriate court a copy of an agreement reached in mediation pursuant to a statute that mandates such filing shall not be considered to be a violation of this paragraph.

B. A mediator shall not disclose, directly or indirectly, to any participant, 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 that other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.

C. A mediator shall not disclose to court officials or staff any information communicated to the mediator by any participant within the mediation process, whether before, during or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator for the court; provided, however, when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. The confidentiality provisions above notwithstanding, if a mediator believes that communicating certain procedural matters to court personnel will aid the mediation, then with the consent of the parties to the mediation, the mediator may do so. In making any permitted disclosure, a mediator shall refrain from expressing personal opinions about a participant or any aspect of the case with court officials or staff.

D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation in the circumstances set forth in sections (1) and (2) below:

(1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rule 5, a mediator has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement conference/mediation, the mediator shall limit his/her testimony to providing the names of those who were physically present or who attended by electronic means.

If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.

(2) To a participant, non-participant, law enforcement personnel or other persons affected by the harm intended where public safety is an issue, in the following circumstances:

(i) a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(ii) a party or other participant in the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or

(iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

E. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

F. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: 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.

A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.

D. In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.

B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.

E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: 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.

A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these Standards. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C above.

COMMISSION OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.

C. 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 out growth of the dispute when the mediator or his/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 III 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 out growth of the dispute.

D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.

E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.

F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.

G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.

H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.

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 actual or perceived impartiality.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.

B. If a mediator believes that the statements or actions of any 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, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If a lawyer's statements or conduct are reportable under Standard III.C(2), the mediator shall report the lawyer to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 01 (1999)

(Adopted and Issued by the Commission on August 27, 1999)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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 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.

NC Gen. Stat §7A-38.1, the enabling legislation for the Mediated Settlement Conference Program, 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, Mediated Settlement Conference 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, 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 Mediated Settlement Conference 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. 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.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 02 (2000)

(Adopted and Issued by the Commission on August 25, 2000)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Certified Mediator asks for guidance on when a mediator can allow a party or insurance company representative to participate in a mediated settlement conference by telephone.

Advisory Opinion

Rule 4.A (2) provides that any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed or an impasse declared. The attendance requirement may be excused or modified by agreement or all parities and persons required to attend and the mediator. As such, a mediator should not consider excusing or modifying the attendance requirement unless all parties and person required to attend have consented. If a party unilaterally contacts a mediator and requests that the attendance requirement be excused or modified, the mediator should explain the Rule and suggest the party first discuss his or her request with the other parties and persons required to attend the conference.

Whenever possible, the Commission believes it is highly preferable for all parties to be physically present at the conference, including an adjuster or other insurance company representative with authority to settle the case. In that way, parties have an opportunity to hear all the discussions, to come face-to-face with the other side to hear their view of the faces in dispute and their assessment of the case; to be an active participant in formulating offers and counter-offers; and to take ownership of the agreement, including signing it at the conclusion of the conference. When parties are absent, difficulties can occur. For example: a) an absent party may later claim that his or her attorney did not have authority to settle the case; b) an agreement may not be reduced to writing because a party attending by telephone cannot sign and then later repudiates the agreement; or c) an insurance company official with authority to settle and who is to be available on standby may go to a meeting, to lunch, or leave for the day when his or her input is needed most.

The Commission suggests that even when all parties consent, a mediator should not consider waiving or modifying the attendance requirement lightly. Mediators should encourage individual parties and insurance company representatives to be physically present at the conference, unless some compelling reason dictates otherwise. If there is such compelling reason, the mediator should seek to ensure that arrangements are made to permit the party to participate via conference call. The party should be able to participate in both general and private sessions with the aid of a speakerphone and to speak confidentially with his or her attorney as needed.

When a mediator learns that a party will not be present physically, the mediator should seek to protect the mediation process by encouraging the attorney to obtain from such client written authorization to settle the matter on the client's behalf. In the event a party fails to physically attend a conference and has not had the attendance requirement excused or modified by agreement of all parties and the mediator or by order of the Senior Resident Superior Court Judge, Rule 6.B (4) requires the mediator to report the failure to attend to the court.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 03 (2001)

(Adopted and Issued by the Commission on May 18, 2001)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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: 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 are waived if both parties and their attorneys agree that the mediator may give the affidavit or be deposed.

Advisory Opinion

The Commission advises that the Mediator should not give the affidavit nor should he provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." Standard III.A prohibits the communication of <u>any</u> information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard III.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 of the
NC Dispute Resolution Commission

Advisory Opinion No. 04 (2003)

(Adopted and Issued by the Commission on May 16, 2003)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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

Advisory Opinion

There is no requirement in the statutes, program rules or Standards of Conduct that mediators 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 of the NC Dispute Resolution Commission

Advisory Opinion No. 05 (2003)

(Adopted and Issued by the Commission on November 7, 2003)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

The mediator conducted a mediated settlement conference in a worker's compensation case. The mediation resulted in an impasse. The parties were at 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 him, 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

It is not unusual for parties to contact a mediator following an impasse and seek some clarification or other assistance and a mediator may respond. Through such *ex parte*

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 06 (2004)

(Adopted and Issued by the Commission on February 6, 2004)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Mediator conducted a mediation for a couple with marital problems. The couple reached a separation agreement in mediation and it was 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

Standard VII of the Standards of Professional Conduct for Mediators 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 in regards to 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 of the
NC Dispute Resolution Commission

Advisory Opinion No. 07 (2004)

(Adopted and Issued by the Commission on March 18, 2004.)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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 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 (see 11 U.S.C. 362(a)(i)). This stay may preclude the holding of the mediation conference ordered by the district court. After a mediator learns that a bankruptcy petition has been filed, it is the better practice for the mediator to 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 of Automatic Stay" or other relief may be sought through the bankruptcy court pursuant to 11 U.S.C. 362(d).

Subsection (b) lists exceptions to the stay including one for the establishment or modification of an order for alimony, maintenance, or support (see 11 U.S.C. 362(b)(2)(A)(ii)). However, even if the parties agree that only issues of alimony, maintenance, or support 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(h). Subsection (h) 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 report to the court that the bankruptcy has been filed and shall request that the court clarify the duty of the mediator.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 08 (2005)

(Adopted and Issued by the Commission on February 11, 2005.)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Mediator asks the 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 Conference and Family Financial Settlement Programs 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.

For purposes of the Mediated Settlement Conference Program, Rule 6.B (5), which specifies mediator duties, is controlling:

> It is the duty of the mediator to schedule the conference and conduct it 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 with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

For purposes of the Family Financial Settlement Program, 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 program uses 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, *pro se* 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 his or her conference within the deadlines set out by the court fails to fulfill one of his/her major obligations as a mediator. As such, s/he may be subject to discipline by the courts that appoint and supervise him/her and by the Commission that is charged with regulating the conduct of mediators as set out in the Standards of Conduct and the Rules of the Supreme Court.

A mediator's obligations under the Rules of the Supreme Court and the Standards of Conduct 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 s/he is a negotiations facilitator.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 10 (2006)

(Adopted and Issued by the Commission on November 3, 2006)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Certified superior court mediator contacted the 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

Mediated Settlement Conference Rule 4.A (1) addresses attendance at the conference. The Rule 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. The Rule provides that these persons shall attend, but does not limit attendance only to these individuals. MSC 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 Rule 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 Rule 6.A (1) to exclude the individual from attending further.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 11 (2007)

(Adopted and Issued by the Commission on March 16, 2007)

N.C. Gen. Stat. §7A-38.2(b) provides, "The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on ethical dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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. Some time 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 Commission to inquire about her mediator's conduct.

Advisory Opinion

The mediator was required by Mediated Settlement Conference Rule 4.A (2) and Rule 4.C. (Rules effective March 4, 2006) to ensure that the agreement reached in mediated settlement was reduced to writing and signed. N.C.G. S. § 7A-38.1(*e*) 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 reduce the agreement to writing or to had one of the attorneys do so.

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. A clause inserted in the agreement and providing that the agreement is contingent on the congregation's approval would have resolved that issue.

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, absent a writing, it was not. Judges rely on the reports of their 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 its office.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 12 (2007)

(Adopted and Issued by the Commission on May 18, 2007)

N.C. Gen. Stat. §7A-38.2(b) provides, "The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on ethical dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Prior to a family financial settlement conference, an attorney received a *Mediation Agreement* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify program rules or the Standards of Professional Conduct for Mediators? 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

In 1995, after determining that the Mediated Settlement Conference Program would be continued and expanded statewide, the Court's first order of business was to create the Dispute Resolution Commission for the purpose of certifying and regulating mediators. The Court and General Assembly agreed that program rules, certification requirements, standards of conduct and enforcement procedures were essential for a program in which parties were being ordered not only to participate, but to compensate their mediator. Absent such a framework, the Court could not ensure program credibility or protect the public.

Any agreement containing terms that modify or run counter to program 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 *Mediation Agreement* in question disregards the pledge the certified mediator made pursuant to FFS Rule 8.F which requires all applicants for family financial certification to agree to adhere to the Standards of Conduct 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 Rules for the Family Financial Settlement Program.

Specifically, the *Mediation Agreement* 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 program 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. He suggests that, in his experience, such statements contribute to a hostile atmosphere. 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 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 give 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.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 13 (2007)

(Adopted and Issued by the Commission on August 10, 2007)

N.C. Gen. Stat. §7A-38.2(b) provides, "The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on ethical dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

This particular Opinion is an outgrowth of complaint that was filed with the Commission.

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 withdrew from the mediation.

Advisory Opinion

Standard II of the Supreme Court's Standards of Professional Conduct for Mediators provides that, "A mediator shall, in word and action, maintain impartiality toward the parties and on the issues 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 contract 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 Commission strongly cautions all mediators against using profanity, even in instances where the parties and their attorneys are using it.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 15 (2008)

(Adopted and Issued by the Commission on November 7, 2008)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 Commission as to where it was appropriate for the mediator to agree to serve as the administrator/fiduciary.

Advisory Opinion

Standard VII addresses conflicts of interest. That Standard provides that, "A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute". Subsection E. of that Standard also provides that, "A mediator shall not use information obtained 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 his/her 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 Clerk Mediation Program 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 he or she manipulated the mediation process and the parties to his or her own advantage in obtaining the appointment and, thus, compromised his/her neutrality in the process.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 16 (2010)

(Adopted and Issued by the Commission on February 26, 2010)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

During the course of 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 Standard III 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 VIII addresses the mediator's duty to protect the integrity of the mediation process. The Standard provides that, "A mediator shall…take reasonable steps…to limit abuses of the mediation process." Section B provides that, "If a mediator believes that the actions of a participant….jeopardize conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation."

Parties to an equitable distribution action are required by N.C. Gen. Stat. §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 s/he facilitates 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 III, 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 of the
NC Dispute Resolution Commission

Advisory Opinion No. 17 (2010)

(Adopted and Issued by the Commission on September 18, 2010)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

The Commission issued Advisory Opinion No. 15 (2008) on November 7, 2008. That Opinion provided that a mediator should not agree to serve as a fiduciary when such work came to him/her as a result of a mediation that s/he conducted. A mediator who transitions to the role of fiduciary the Opinion reasoned, creates the perception that s/he has, "...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 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 Advisory Opinion No. 15 (2008) precludes his serving as an arbitrator?

Advisory Opinion

Advisory Opinion No. 15 (2008) was narrowly drafted to address only situations where a mediator agrees to serve as a "fiduciary" in a matter that s/he has 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 his/her 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 Advisory Opinion No. 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. S/He may have spent several hours with the parties during mediation. In that time, did s/he develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise her/ his neutrality? Did s/he learn any confidential information during a caucus session that s/he may not be able to exclude from his thought process and that may inappropriately affect her/his decision? If the mediator has any concerns about his ability to be fully neutral, s/he should not serve.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 19 (2011)

(Adopted and Issued by the Commission on May 6, 2011)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

A party-selected, 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 Family Financial Settlement Conference (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 into a contractual relationship with the parties and has begun the scheduling process, FFS Rule 8.I, 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 and to change any of the provisions of that rule which are applicable to court-appointed mediators. However, mediators are also governed by FFS Rule 8.I, 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 pursuant to FFS Rule 7.

The mediator's duty is to schedule and hold the mediated settlement conference (see Rule 6.B(5)). Thus, ordinarily, it is inappropriate for the mediator to delay holding the conference because s/he determines that a party claims an inability to pay the mediator's fee, even when the party agreed to make an advance deposit. The only time it is appropriate to delay the conference is to give the party time to ask the court to determine whether s/he has the ability to pay the mediator's fee if program rules allow that motion prior to the conference.

Superior Court Mediated Settlement Conference ("MSC") 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 his/her advance deposit. Indeed, the mediator's fee may not be paid by that party at all if the court determines that the party is unable to pay his/her share of the fee.

The rule is a bit different in the FFS program in District Court. There is no requirement in Rule 7.E that the court delay hearing a motion for relief from the obligation to pay the mediator's fee until the conclusion of the case. 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.

In particular, the court has the power in the FFS program to require that the mediator's fee be paid out of the marital estate. 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 his/her entire fee. It is appropriate, then, for a mediator to delay the conference in an

ED case, but only to allow time for a party to seek a ruling from an appropriate judge as to his/her ability to pay. However, because it is possible in both the MSC and FFS programs to delay that motion until after the settlement conference, the mediator may not delay it to enforce, in effect, an advance deposit term of his/her agreement with the parties in the face of a party's claim of inability to pay.

There is obvious tension between FFS Rule 7 which allows the parties and the mediator to set the terms of the mediator's fee by agreement, FFS Rule 6 which requires that the mediator schedule and hold the conference, and FFS Rule 8 which requires mediators to mediate cases with indigent litigants as a term of the mediator's certification. That tension is resolved in this instance by requiring that the mediator 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 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 participation by electronic or other means than physical attendance.

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.

An FFS Rule 1 motion to dispense with mediation 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 of his/her fee, but that is as it should be under the terms of the mediator's certification found in FFS Rule 8.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 21 (2012)

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

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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

Program Rules

Mediated Settlement Conference Program (MSC) Rule 7.Bprovides 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 Program'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.)

Family Financial Settlement 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.

Standards of Professional Conduct for 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, in reality, will not be answered by reference to the program rules or the Standards of Professional Conduct for Mediators, although questions about the mediator's impartiality may arise from time to time. Note that Standard II provides that, " a mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute."

Business Decisions

Most of the questions about whether to bill for mediation services that occur before the conference commences will be made by mediators with an eye to 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. Review of case summaries or briefs of up to 15-30 pages would fall under that caution as well.

Beyond those levels of preparation, most mediators who are selected by the parties on a routine basis would 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 one party or another is extensive, many mediators still choose not to charge for that time and describe it as a "loss leader," 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 of the NC Dispute Resolution Commission

Advisory Opinion Number 22 (2012)

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

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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

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

Advisory Opinion

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 23 (2012)

(Adopted and Issued by the Commission on May 11, 2012)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate and provide guidance to mediators and to protect the public.

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 at 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. Subsection (l) goes on to provide that 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 … 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 at 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 III 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 a previous Advisory Opinion No. 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 at a State Bar hearing only when subpoenaed to do so and should advise the Disciplinary Hearing Commission before testifying of the prohibitions set forth in the statutes and Standards of Conduct regarding a mediator's obligations to observe confidentiality. A mediator who speaks with a State Bar investigator would be doing so without the safeguards that would be in place in the context of a State Bar hearing.

Moreover, from a practical standpoint, the Commission does not believe that the refusal of a mediator to answer questions about an attorney's conduct will hamper an investigation. The parties, opposing counsel or other participants would normally have the same information as the mediator, and the investigator may speak with any or all of those individuals.

Note: If a State Bar investigator contacts an attorney-mediator regarding the attorney-mediator's own conduct, then State Bar Rule of Professional Conduct 8.1(b) provides that an attorney shall not, "...knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6." As such, unless a Rule 1.6 exception is involved, Rule 8.1(b) requires an attorney-mediator to respond to an investigator's questions whether or not a subpoena was involved.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 25 (2013)

(Adopted and Issued by the Commission on February 1, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 rules promulgated by the Supreme Court, 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. Gen Stat. §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 Rules of Professional Conduct 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, 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 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 II, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard II.C, may be required to withdraw. Additionally, if the mediator gives legal advice about attendance issues, this would violate Standard VI, 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. Ultimately, as noted above, the parties should address attendance questions to the court.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 26 (2013)

(Adopted and Issued by the Commission on May 17, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 Commission for guidance.

Advisory Opinion

N.C. Gen Stat. §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, 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 of the NC Dispute Resolution Commission

Advisory Opinion No. 27 (2013)

(Adopted and Issued by the Commission on December 6, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Pro se 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 e-mails, 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 e-mailed 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 II.C (1) of the Standards of Professional Conduct for Mediators. The judge allowed 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 Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases (FFS Rules), and with Standards III and VII of the Standards of Professional Conduct for Mediators.

Advisory Opinion

N.C. Gen. Stat.§ 7A-38.1(k) provides that "...rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are 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 should alert 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 to 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.

After talking with Wife and pressing her about paying his fee, Mediator wrongly conducted two additional conversations. The first was with Husband, in which Mediator attempted to get Husband to pay Wife's share. This conversation constituted a breach of Standard III, 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 II, Impartiality, in that the mediator took a position in favor of one party over the other, and a breach of Standard VII, Conflicts of Interest, in that the mediator mixed his own financial business with the business of the parties in settling their dispute.

The second conversation was one with the judge about Wife's claim of indigence and Mediator's opinion that the parties were uncooperative. This conversation constituted a breach of Standard III, Confidentiality. No mediator may converse with the court about the negotiations in the case or about the attitude or behavior of the parties, and no mediator may make judgmental comments about the parties to the court. This conversation also violated Standard VII, Conflicts of Interest, as noted above.

The most fundamental duty of mediators is to schedule and hold the settlement conference they are appointed or selected to conduct (FFS Rule 6). By engaging in conversations about his fee with Wife, Husband, and the court and failing to schedule the conference, Mediator violated this important duty. In addition, mediators pledge in their application for certification, in accordance with FFS Rule 8.I, to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to FFS Rule 7.

A mediator who is overly focused on his or her fee, refuses to schedule and conduct a settlement conference for a party claiming indigence, and seeks to withdraw as mediator violates FFS program rules and the Standards of Professional Conduct for Mediators.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 28 (2013)

(Adopted and Issued by the Commission on December 6, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practices. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

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 Standard VII.C and Advisory Opinion No. 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

(1) Preparation of Agreement

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 VI, of The Standards of Professional Conduct for Mediators, which is entitled "Separation of Mediation from Legal and Other Professional Advice," begins as follows: "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 VI in preparing such a document.

N.C. Gen. Stat. §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 Commission notes that the North Carolina 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 the mediator drafts such a contract, he or she would be, according to the State Bar, practicing law. Accordingly, the mediator would do so in violation of Standard VI.

The Commission also cautions certified mediators to review North Carolina State Bar 2012 Formal Ethics Opinion 2. In that opinion, a lawyer-mediator was asked by unrepresented business people 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 VI.

(2) Filing Action to Incorporate Agreement into Court Order

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. Gen. Stat. §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 VI, as discussed above. He would also be in violation of Standard VII, which provides in pertinent part that "[a] mediator who is a lawyer ... 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 ...". It is clear that the mediator would violate Standards VI and VII if he files an action to incorporate the agreement into a court order by consent under the facts of this inquiry.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 29 (2014)

(Adopted and Issued by the Commission on August 8, 2014)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practices. In adopting the Policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Mediator mediated a civil superior court case in which the plaintiff alleged sexual harassment against the defendant. The mediation did not result in a settlement. The plaintiff was also the complaining witness in a criminal action against the defendant for assault on a female and sexual battery. Those criminal charges arose out of the same facts alleged in the civil case.

At the trial of the criminal case, defense counsel called defense counsel in the civil case to testify about statements made in the mediation of the civil case, including the offers to settle made by the plaintiff. Defense counsel argued that they should be admitted in the criminal matter to show the motive of the plaintiff in initiating criminal charges against the defendant. Despite objections by the prosecutor, the trial judge in the criminal case allowed the testimony of the defense attorney in the civil case about statements and offers made during the mediation of the civil case.

The mediator in the civil case had made opening remarks at the mediation and explained the notion of mediator confidentiality. The mediator also explained that statements made and conduct occurring in that mediation would not be admissible in any proceeding in the civil case pursuant to N.C. Gen. Stat. §7A-38.1. However, the mediator did not explain that such evidence could be admitted in a criminal case according to that section.

Should the mediator explain to the parties at the beginning of a mediated settlement conference that inadmissibility of statements made and conduct occurring in a mediated settlement conference is limited to proceedings in the action that is being mediated and may be admissible in criminal actions and the other actions enumerated in N.C. Gen. Stat. §7A-38.1?

Advisory Opinion

The Commission reminds mediators that "inadmissibility" and "confidentiality" are separate and distinct concepts, and mediators should be careful in explaining the differences to the parties at a mediated settlement conference. The mediator can look to the enabling legislation for the superior court mediated settlement conference program (N.C. Gen. Stat. §7A-38.1) and Standard

III of the Standards of Professional Conduct for Mediators for guidance in explaining and understanding these principles.

"Confidentiality" relates only to the mediator as outlined in Standard III of the Standards of Professional Conduct for Mediators. Subject to the exceptions stated therein and in N.C. Gen. Stat. §7A-38.1, a mediator shall not disclose, directly or indirectly, to any non-participant, including the court that ordered the mediation, any information communicated to the mediator by a participant within the mediation process.

Standard III applies only to the mediator and not to the attorneys or parties. A previous Advisory Opinion clarified that point. See A.O. No. 22 (2012). The parties and other participants are under no duty of confidentiality, unless they negotiate a confidentiality agreement for that mediation. Preferably, that agreement would be reached at the beginning of the mediation and would be reduced to writing.

"Inadmissibility" is addressed in the enabling legislation for the mediated settlement conference program in superior court civil actions. N.C. Gen. Stat. §7A-38.1(l) provides that "[e]vidence of statements made and conduct occurring in a mediated settlement conference ... shall not be subject to discovery and shall be inadmissible in any proceeding *in the action or other civil actions on the same claim*... (emphasis added)."

Note that on the facts presented, testimony was sought in a *criminal* proceeding involving the same conduct that was the subject of the civil litigation and discussed in the mediation ordered in that case. Under the language of the statute, statements made and conduct occurring during the mediation process in the civil case may be *admissible* in the criminal proceeding. Participants in a mediated settlement conference in a civil case may be required to testify in a criminal matter.

Rule 6.B of the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules) sets out the duties of the mediator, and MSC Rule 6.B(1) describes those matters that the mediator should address in his or her opening statement, including (1)(f): "whether and under what conditions communications with the mediator will be held in confidence during the conference," and (1)(g): "[t]he inadmissibility of conduct and statements as provided by N.C.G.S. §7A-38.1."

That section enumerates several exceptions to the inadmissibility protection. They are:

(1) In proceedings for sanctions under this section;
(2) In proceedings to enforce or rescind a settlement of the action;
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

The other exception that is particularly relevant to this inquiry is found in wording that precedes those specific exceptions as previously discussed: "statements made and conduct occurring in a mediated settlement conference shall be inadmissible in any proceeding *in the action or other civil* actions on the same claim..." (emphasis added).

The mediator is under a duty to define and describe confidentiality and inadmissibility at the beginning of the mediation. Doing so in a correct, clear, succinct, and non-threatening manner can be a challenging task for mediators. While mediators have the duty to define and describe these concepts, any legal interpretation is the responsibility of the attorneys for the parties.

Please note that Rule 408 of the N.C. Rules of Evidence, which provides that evidence of conduct or statements made in compromise negotiations are not admissible to prove liability for or invalidity of a claim or its amount, may apply to mediated settlement conferences. However, mediators are not required to comment on that rule at the beginning of the conference under Rule 6 of the Rules Implementing Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 30 (2014)

(Adopted and Issued by the Commission on August 8, 2014)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practices. In adopting the Policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 Standard III 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 objects to his testimony?

Advisory Opinion

The enabling legislation for the Mediated Settlement Conference Program in Superior Court Civil Matters and Other Settlement Procedures, N.C. Gen. Stat. §7A-38.1(l), provides that:

"No mediator … shall be compelled to testify or produce evidence concerning statements made and conduct occurring in the 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 any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse."

A mediator of a court-ordered mediated settlement conference may not be compelled under N.C. Gen. Stat. §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 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 7A-38.1 or enter into an agreement that the mediation will be governed by that statute and the Supreme Court Rules Implementing Statewide 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 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 described in the Rules of Civil Procedure as a means to effectuate attendance, testimony and the production of documents." However, the 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 A.O. #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 should not give the affidavit nor provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." The opinion notes as follows:

> Standard III.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 III.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.

The Commission herein reaffirms its opinion in A.O. #03 (2001) and extends it to conclude that mediators in court-ordered mediations and certified mediators in all mediations (unless exempted by Standard III) 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 III 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 III. 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 of the

NC Dispute Resolution Commission

Advisory Opinion No. 31 (2015)

(Adopted and Issued by the Commission on May 15, 2015)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28,1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practices. In adopting the policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Facts Presented

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.

First Concern

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

Advisory Opinion

As discussed by the Commission in Advisory Opinion 28 (2013), Standard VI of the Standards of Professional Conduct for Mediators, entitled "Separation of Mediation from Legal and Other Professional Advice," 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 VI. Advisory Opinion 28 also applies to the facts outlined above, and the mediator would be in violation of Standard VI if s/he prepares 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 pro se 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.

Second Concern

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

Advisory Opinion

The second inquiry arises when the attorney for the defendant drafts a proposed settlement at the mediation for the pro se party to review and sign. While the Commission encourages self-determination by the parties in their decisions, Standard IV (D) makes it clear that, in appropriate circumstances, the mediator must inform the parties of the importance of seeking legal, financial, tax or other professional advice before and during the mediation. 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 pro se party of the importance of seeking outside advice.

Additionally, Standard V (D) permits the mediator, after offering the information set out in Standard IV(D), to proceed with the mediation if the party declines to seek outside counsel .

In order to meet the requirements of Standard IV(D) and Standard V(D), the mediator shall inform the pro se party that the mediator cannot give legal advice to any party, that the pro se party has the right to have an attorney review the draft agreement, that the mediator will recess the mediation for him/her to do so if that party wishes, 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 pro se party's desire.

In addition, in discussing the mediator's role in this circumstance, it is necessary to consider Standard VIII.

That standard addresses the mediator's duty to protect the integrity of the mediation process and provides that a "mediator shall…take reasonable steps…to limit abuses of the mediation process." Section B of Standard VIII provides as follows:

> If a mediator believes that the statements or actions of a participant, including those of a lawyer, …jeopardize or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation."

The mediator shall do the following two things set out below in order to meet the requirements set out by the Standard VIII.

1. The mediator shall read the document drafted by a party or the attorney.
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 of the
NC Dispute Resolution Commission

Advisory Opinion No. 32 (2016)
(Adopted and Issued by the Commission on November 18, 2016)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concerns Raised

A court-appointed DRC certified mediator in a Family Financial Settlement (FFS) Program case asks for guidance in a situation involving a pro se Chinese speaking plaintiff and a pro se 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 pro se 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?**

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[1] While the facts of this advisory opinion deal with a specific question asked of a Commission member involving an FFS case and two pro se parties, one of whom spoke Chinese, the conclusions and best practice suggestions herein would also apply in any MSC or FFS mediation involving two pro se 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

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

Standard IV "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 IV(C) provides: "If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination." In this inquiry, the pro se 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 his/her 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 his/her 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 IV.

It is important that the thoughts and ideas of each party are heard and understood by the other party(ies) 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 IV 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 his/her 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 Industrial Commission (IC), s/he should be sure to follow the IC's protocol on the use of interpreters.

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

Since both parties are pro se in this case, the Commission recommends that any matters resolved at the mediated settlement conference be summarized on AOC-DRC-18, Mediation Summary, or a similar form.[2] Advisory Opinion 28 (2013) advises that the parties may prepare the Mediation Summary or the mediator may act as a scrivener. 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 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.

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?**

The pro se parties may take the Mediation Summary to an attorney/attorneys of their choice to have them prepare a binding contract for the parties' signatures or they may

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[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 pro se, or all parties are represented by counsel. If one party is represented by counsel and one is a pro se non-English speaking party, the mediator may wish to refer to Advisory Opinion 31 (2015).

bring the Summary 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 indicating that the Summary was read to the parties and interpreted for the non-English speaking party. When the Mediation Summary 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 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 (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 of the
NC Dispute Resolution Commission

Advisory Opinion No. 33

(Adopted and Issued by the Commission on November 18, 2016)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of mediator certification, regulation of mediator conduct, and certification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department." On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

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 which may be made available to attendees at a meeting of the organization.

ADVISORY OPINION

(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?

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 Commission first looks to Standard VII.H of the Standards of Professional Conduct for Certified Mediators.

> VII.H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.
>
> 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 actual or perceived impartiality.

Based on the facts of the inquiry, the mediator is using the mouse pads as an advertisement for mediation services. Therefore, the mouse pads will be given in return for referral or expectation of referral of clients for mediation services. Such gifts are not permitted under Standard VII.H, regardless of their monetary value.

Section VII.H carves out an exception to the rule against gift-giving, as follows:

> VII.H...except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.

The facts presented to the Commission in this Advisory Opinion do not fall within the exception set out in Standard VII.H and, thus, the giving of the mouse pads is not permissible.

The Commission cautions certified mediators that the giving or receiving of gifts or other items of monetary value outside the context of the mediation may be perceived by participants or the general public as affecting the mediator's

impartiality. The purpose of Standard VII is to emphasize the responsibility each mediator has to protect the impartiality necessary to serve in that capacity.

> (2) May the mouse pads be donated to an organization of attorneys which may be made available to attendees at a meeting of the organization?

Again, the Commission looks to Standard VII of the Standards of Professional Conduct for Certified Mediators and determines that the result is the same. The Commission concludes that the mouse pads are intended to be an advertising tool regardless of whether they are distributed by mail or donated to an attorney organization.

The people who would receive the mouse pads at the conference are attorneys and as such are in a position to exercise significant influence over the selection of mediators for their clients' cases. The Commission concludes that the mouse pads to be donated to an attorney organization and made available to attendees at a conference of that organization are things of value creating an expectation of referral of clients for mediation services, and further, that they do not fall within the exception set out in Standard VII.H.

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LAWYER-MEDIATOR'S PREPARATION OF CONTRACT FOR PRO SE PARTIES TO MEDIATION

Adopted: January 25, 2013

Opinion rules that a lawyer-mediator may not draft a business contract for pro se parties to mediation.

Inquiry:

May a mediator, who is also a lawyer, draft a business contract for two business proprietors at the conclusion of a successful mediation concerning a matter that is not currently the subject of litigation when neither party is represented by individual counsel?

Opinion:

No. It is a non-consentable conflict of interest.

Rule 1.12(a) allows a lawyer to represent a party in connection with a matter in which the lawyer participated personally and substantially as a mediator if all parties to the proceeding give informed consent, confirmed in writing. However, under Rule 1.7(a), joint representation of two parties to an agreement presents a concurrent conflict of interest even if the lawyer-mediator has their consent.

Although Rule 1.7(b) provides for circumstances under which a lawyer may represent joint clients, an analysis of the risks associated with the proposed joint representation leads to the conclusion that such representation is not appropriate. Therefore, the lawyer-mediator should not draft the business contract.

When contemplating joint representation, a lawyer must consider whether the interests of the parties will be adequately protected if they are permitted to give their informed consent to the representation, and whether an independent lawyer would advise the parties to consent to the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation to all clients. *See* Rule 1.7, cmt. [15]. As stated in comment [29] to Rule 1.7, the representation of multiple clients "is improper when it is unlikely that impartiality can be maintained."

The complex issues that must be addressed when crafting a comprehensive business contract may result in adverse interests. Even if the parties agree on the broad outlines of a business contract at the conclusion of the mediation, a disinterested lawyer will not be able to conclude that the interests of each party can be completely represented. With respect to the terms on which there appear to be agreement, one or both parties may benefit from a disinterested lawyer's advice as to whether the agreement meets with the party's legitimate objectives, and what other procedural alternatives may be available to achieve more favorable terms. In the instant inquiry, neither party is represented by individual counsel.

Joint representation could lead to questions about the integrity of the mediation process. The lawyer's duty to provide each client with necessary and appropriate advice might require informing one party that they made a "bad deal" during the mediation process. It is untenable for a lawyer to counsel a client that an agreement the lawyer-mediator has assisted him to reach in mediation may not be in that client's best interests. If the ultimate agreement turns out to be one-sided and unfavorable to one party, the lawyer-mediator's role could be closely scrutinized.

Finally there is the risk that the proposed joint representation will fail or that the business contract will be the subject of future litigation between the two parties. In either event, the parties will have to retain new lawyers for the subsequent litigation.

For the reasons cited above, the lawyer-mediator in the facts presented may not jointly represent both parties by drafting their new business contract.

Regardless of the above analysis, the lawyer-mediator will be governed by the Supreme Court's Standards of Professional Conduct for Mediators, which may also prohibit the lawyer's representation of one or more of the parties following the mediation.

This opinion does not prohibit a lawyer-mediator from assisting the parties in preparing a written summary reflecting the parties' mutually acceptable understanding of the issues resolved in the mediation, as long as the lawyer-mediator does not represent to the *pro se* parties that the summary is being prepared as a legally enforceable document.

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Plaintiff(s)

VERSUS

Name Of Defendant(s)

MEDIATION SUMMARY

In a mediation conference held on the _____ day of _____, 20____, in _____, NC, the parties to this lawsuit entered into settlement discussions. The following is a summary of the understandings they have reached, but were unable to conclude with a written agreement.

This writing is a summary of the parties' agreements for them and/or their attorneys as a guide to drafting a formal, written settlement agreement. The parties intend that this summary, whether signed or not, is not a contract of settlement, is not binding upon them, may not be enforced in a court of law, and is not to be filed with the court.

The mediation process is not completed by filling in this form, but should be completed by the deadline set out in the court's order. The parties may do one of the following: 1) ask the court to extend the deadline to complete the mediation process; 2) draft and sign a written settlement agreement, and file a dismissal or consent judgment; or 3) take this summary to a court hearing for entry of a memorandum of judgment.

(Over)

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§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

(a) Purpose. – The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.

(b) Definitions. – As used in this section:

(1) "Mediated settlement conference" means a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.

(2) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute.

(3) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not make an award or render a judgment as to the merits of the action.

(c) Rules of procedure. – The Supreme Court may adopt rules to implement this section.

(d) Statewide implementation. – Mediated settlement conferences authorized by this section shall be implemented in all judicial districts as soon as practicable, as determined by the Director of the Administrative Office of the Courts.

(e) Cases selected for mediated settlement conferences. – The senior resident superior court judge of any participating district may order a mediated settlement conference for any superior court civil action pending in the district. The senior resident superior court judge may by local rule order all cases, not otherwise exempted by the Supreme Court rule, to mediated settlement conference.

(f) Attendance of parties. – The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(g) Sanctions. – Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause, fails to attend or fails to pay any or all of the mediator's or other neutral's fee in compliance with this section and the rules promulgated by the Supreme Court to implement this section is subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include the payment of fines, attorneys' fees, mediator and neutral fees, and the expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and upon any person against whom the sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(h) Selection of mediator. – The parties to a superior court civil action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate a mediator within the time

established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge.

(i) Promotion of other settlement procedures. – Nothing in this section is intended to preclude the use of other dispute resolution methods within the superior court. Parties to a superior court civil action are encouraged to select other available dispute resolution methods. The senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with such rules or pursuant to agreement of the parties. Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law.

(j) Immunity. – Mediator and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(k) Costs of mediated settlement conference. – Costs of mediated settlement conferences shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate without cost. The rules adopted by the Supreme Court shall set the fees to be paid a mediator appointed by a judge upon the failure of the parties to designate a mediator.

(l) Inadmissibility of negotiations. – 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:

(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 any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

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 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 any agency established to enforce standards of conduct for

mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(m) Right to jury trial. – Nothing in this section or the rules adopted by the Supreme Court implementing this section shall restrict the right to jury trial. (1995, c. 500, s. 1; 1999-354, s. 5; 2005-167, s. 1; 2008-194, s. 8(a); 2015-57, s. 1.)

§ 7A-38.2. Regulation of mediators and other neutrals.

(a) The Supreme Court may adopt standards of conduct for mediators and other neutrals who are certified or otherwise qualified pursuant to G.S. 7A-38.1, 7A-38.3, 7A-38.3B, 7A-38.3D, 7A-38.3E, and 7A-38.4A, or who participate in proceedings conducted pursuant to those sections. The standards may also regulate mediator and other neutral training programs. The Supreme Court may adopt procedures for the enforcement of those standards.

(b) The administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs shall be conducted through the Dispute Resolution Commission, established under the Judicial Department. The Supreme Court shall adopt rules and regulations governing the operation of the Commission. The Commission shall exercise all of its duties independently of the Director of the Administrative Office of the Courts, except that the Commission shall consult with the Director regarding personnel and budgeting matters.

(c) The Dispute Resolution Commission shall consist of 16 members: five judges appointed by the Chief Justice of the Supreme Court, at least two of whom shall be superior court judges, and at least two of whom shall be district court judges; one clerk of superior court appointed by the Chief Justice of the Supreme Court; two mediators certified to conduct superior court mediated settlement conferences and two mediators certified to conduct equitable distribution mediated settlement conferences appointed by the Chief Justice of the Supreme Court; one certified district criminal court mediator who is a representative of a community mediation center appointed by the Chief Justice of the Supreme Court; two practicing attorneys who are not certified as mediators appointed by the President of the North Carolina State Bar, one of whom shall be a family law specialist; and three citizens knowledgeable about mediation, one of whom shall be appointed by the Governor, one by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. Members shall initially serve four-year terms, except that one judge, one mediator, one attorney, and the citizen member appointed by the Governor, shall be appointed for an initial term of two years. Incumbent members as of September 30, 1998 shall serve the remainder of the terms to which they were appointed. Members appointed to newly-created membership positions effective October 1, 1998 shall serve initial terms of two years. Thereafter, members shall serve three-year terms and shall be ineligible to serve more than two consecutive terms. The Chief Justice shall designate one of the members to serve as chair for a two-year term. Members of the Commission shall be compensated pursuant to G.S. 138-5.

Vacancies shall be filled for unexpired terms and full terms in the same manner as incumbents were appointed. Appointing authorities may receive and consider suggestions and recommendations of persons for appointment from the Dispute Resolution Commission, the Family Law, Litigation, and Dispute Resolution Sections of the North Carolina Bar Association, the North Carolina Association of Professional Family Mediators, the North Carolina Conference of Clerks of Superior Court, the North Carolina Conference of Court Administrators, the Mediation Network of North Carolina, the Dispute Resolution Committee of the Supreme Court, the Conference of Chief District Court Judges, the Conference of Superior Court Judges, the Director of the Administrative Office of the Courts, and the Child Custody Mediation Advisory Committee of the Administrative Office of the Courts.

(d) An administrative fee, not to exceed two hundred dollars ($200.00), may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediation training programs operating under this Article. The fees collected may be used by the Director of the Administrative Office of the Courts to

establish and maintain the operations of the Commission and its staff. Notwithstanding the provisions of G.S. 143C-1-2(b), certification and renewal fees collected by the Dispute Resolution Commission are nonreverting and are only to be used at the direction of the Commission.

(e) The chair of the Commission may employ an executive secretary and other staff as necessary to assist the Commission in carrying out its duties. The chair may also employ special counsel or call upon the Attorney General to furnish counsel to assist the Commission in conducting hearings pursuant to its certification or qualification and regulatory responsibilities. Special counsel or counsel furnished by the Attorney General may present the evidence in support of a denial or revocation of certification or qualification or a complaint against a mediator, other neutral, training program, or trainers or staff affiliated with a program. Special counsel or counsel furnished by the Attorney General may also represent the Commission when its final determinations are the subject of an appeal.

(f) In connection with any investigation or hearing conducted pursuant to an application for certification or qualification of any mediator, other neutral, or training program, or conducted pursuant to any disciplinary matter, the chair of the Dispute Resolution Commission or his/her designee, may:

(1) Administer oaths and affirmations;

(2) Sign and issue subpoenas in the name of the Dispute Resolution Commission or direct its executive secretary to issue such subpoenas on its behalf requiring attendance and the giving of testimony by witnesses and the production of books, papers, and other documentary evidence;

(3) Apply to the General Court of Justice, Superior Court Division, for any order necessary to enforce the power conferred in this section.

(g) The General Court of Justice, Superior Court Division, may enforce subpoenas issued in the name of the Dispute Resolution Commission and requiring attendance and the giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(h) The Commission shall keep confidential all information in its files pertaining to the certification of mediators, the qualification of other neutrals, the certification or qualification of training programs for mediators or other neutrals, and the renewal of such certifications and qualifications. However, disciplinary matters reported by an applicant for certification or qualification, a mediator, other neutral, trainer, or manager shall be treated as a complaint as set forth below. The Commission shall also keep confidential the identity of those persons requesting informal guidance or the issuance of formal advisory opinions from the Commission or its staff.

Unless an applicant, mediator, other neutral, or training program trainer or manager requests otherwise, all information in the Commission's disciplinary files pertaining to a complaint regarding the conduct of an applicant, mediator, other neutral, trainer, or manager shall remain confidential until such time as a preliminary investigation is completed and a determination is made that probable cause exists to believe that the applicant, mediator, neutral, trainer, or manager's words or actions:

(1) Violate standards for the conduct of mediators or other neutrals;

(2) Violate other standards of professional conduct to which the applicant, mediator, neutral, trainer, or manager is subject;

(3) Violate program rules; or

(4) Consist of conduct or actions that are inconsistent with good moral character or reflect a lack of fitness to serve as a mediator, other neutral, trainer, or manager.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and training programs that have been certified or qualified.

(i) The Commission shall conduct its initial review of all applications for certification and certification renewal or qualification and qualification renewal in private. The Commission shall also conduct its initial review of complaints regarding the qualifications of any certified mediator, other neutral, or training program, but not involving issues of ethics or conduct, in private. Appeals of denials of applications for certification, qualification, or renewal and appeals of revocations of certification or qualification for reasons that do not relate to ethics or conduct, shall be heard by the Commission in private unless the applicant, certified mediator, qualified neutral, or certified or qualified training program requests a public hearing.

(j) The Commission shall conduct in private its initial review of all matters relating to the ethics or conduct of an applicant for certification, qualification, or renewal of certification or qualification or the ethics or conduct of a mediator, other neutral, trainer, or training program manager. If an applicant appeals the Commission's initial determination that sanctions be imposed, the hearing of such appeal by the Commission shall be open to the public, except that for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of an applicant, mediator, other neutral, trainer, or training program manager.

(k) Appeals of final determinations by the Commission to deny certification or renewal of certification, to revoke certification, or to discipline a mediator, trainer, or training program manager shall be filed in the General Court of Justice, Wake County Superior Court Division. Notice of appeal shall be filed within 30 days of the date of the Commission's decision. (1995, c. 500, s. 1; 1998-212, s. 16.19(b), (c); 2005-167, ss. 2, 4; 2007-387, ss. 2, 3; 2010-169, s. 21(b); 2011-145, s. 15.5; 2011-411, s. 5.)

§ 7A-38.4A. Settlement procedures in district court actions.

(a) The General Assembly finds that a system of settlement events should be established to facilitate the settlement of district court actions involving equitable distribution, alimony, or support and to make that litigation more economical, efficient, and satisfactory to the parties, their representatives, and the State. District courts should be able to require parties to those actions and their representatives to attend a pretrial mediated settlement conference or other settlement procedure conducted under this section and rules adopted by the Supreme Court to implement this section.

(b) The definitions in G.S. 7A-38.1(b)(2) and (b)(3) apply in this section.

(c) Any chief district court judge in a judicial district may order a mediated settlement conference or another settlement procedure, as provided under subsection (g) of this section, for any action pending in that district involving issues of equitable distribution, alimony, child or post separation support, or claims arising out of contracts between the parties under G.S. 52-10, G.S. 52-10.1, or Chapter 52B of the General Statutes. The chief district court judge may adopt local rules that order settlement procedures in all of the foregoing actions and designate other district court judges or administrative personnel to issue orders implementing those settlement procedures. However, local rules adopted by a chief district court judge shall not be inconsistent with any rules adopted by the Supreme Court.

(d) The parties to a district court action where a mediated settlement conference or other settlement procedure is ordered, their attorneys, and other persons or entities with authority, by law or contract, to settle a party's claim, shall attend the mediated settlement conference or other settlement procedure, unless the rules ordering the settlement procedure provide otherwise. No party or other participant in a mediated settlement conference or other settlement procedure is required to make a settlement offer or demand that the party or participant deems contrary to that party's or participant's best interests. Parties who have been victims of domestic violence may be excused from physically attending or participating in a mediated settlement conference or other settlement procedure.

(e) Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause fails to attend or fails to pay any or all of the mediator or other neutral's fee in compliance with this section is subject to the contempt powers of the court and monetary sanctions imposed by a district court judge. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and upon any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable upon appeal, and the entire record shall be reviewed to determine whether the order is supported by substantial evidence.

(f) The parties to a district court action in which a mediated settlement conference is to be held under this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules adopted by the Supreme Court, a mediator shall be appointed by a district court judge.

(g) A chief district court judge or that judge's designee, at the request of a party and with the consent of all parties, may order the parties to attend and participate in any other settlement procedure authorized by rules adopted by the Supreme Court or adopted by local district court rules, in lieu of attending a mediated settlement conference. Neutrals acting under this section shall be selected and compensated in accordance with rules adopted by the Supreme Court. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law.

Nothing herein shall prohibit the parties from participating in mediation at a community mediation center operating under G.S. 7A-38.5.

(h) Mediators and other neutrals acting under this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court under G.S. 7A-38.2.

(i) Costs of mediated settlement conferences and other settlement procedures shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. The 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 settlement procedures is afforded an opportunity to participate without cost to that party and without expenditure of State funds.

(j) 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:

(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 any agency established to enforce standards of conduct for mediators or other neutrals; or
(4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties against whom enforcement is sought and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

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 any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(k) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in settlement procedures conducted under this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission.

(l) An administrative fee not to exceed two hundred dollars ($200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operating under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff. The administrative fee

shall be set by the Director of the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

(m) The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the chief district court judge of any district to report statistical data about settlement procedures conducted under this section for administrative purposes.

(n) Nothing in this section or in rules adopted by the Supreme Court implementing this section shall restrict a party's right to a trial by jury.

(o) The Supreme Court may adopt rules to implement this section. (1997-229, s. 1; 1998-212, s. 16.19(a); 1999-354, s. 6; 2000-140, s. 1; 2001-320, s. 2; 2001-487, s. 39; 2005-167, s. 3; 2008-194, s. 8(c); 2015-57, s. 4.)