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# Advisory Opinion of the
# NC Dispute Resolution Commission
## Advisory Opinion No. 39 (2018)

(Adopted and Issued by the Commission on November 17, 2018)

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

**Concern Raised**

Court staff in three judicial districts contacted the Commission over a two week period regarding an MSC mediator. The mediator, they complained, was chronically neglecting his case management duties. He was frequently failing to file his Reports of Mediator timely, if at all, and, to schedule his conferences within the deadlines for completion set by the court. Court staff in one district reported having to grant extensions and sometimes even move trial dates because the mediator was overbooked. Staff in another district reported having to recruit substitute mediators at the last minute to fill in for the mediator so that parties would not lose their opportunity to mediate. In addition to his failure to fulfill his case management obligations, court staff reported that the mediator was unresponsive to their telephone calls and emails. In one district the mediator failed to respond to the request of a senior resident superior court judge that he meet with him to discuss his missing Reports of Mediator. Court staff expressed a great deal of frustration about having to spend so much time tracking the mediator down and responding to problems that the mediator's conduct created.

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

**ADVISORY OPINION**

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

Both MSC and FFS Program Rules and the Standards of Conduct place an obligation on mediators to **actively and effectively manage** their cases:

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

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

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

- **Standard of Conduct VII.F provides that a mediator shall not knowingly contract for mediation services that cannot be timely delivered as directed by the court.**

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

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

MSC Rules 7.E(2) or FFS Rule 7.F(2) provide guidance on what is good cause for a postponement. Both rules provide that good cause involves situations that are beyond the control of the parties.

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

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

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

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 38 (2018)

(Adopted and Issued by the Commission on September 21, 2018)

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

## Advisory Opinion

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

**No.**

G.S. § 7A-38.4A, *Settlement procedures in district court actions*, provides:

> (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 the Dispute Resolution Commission; or
> (4) In proceedings to enforce laws concerning juvenile or elder abuse.
> . . . No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

While what a judge may or may not admit as evidence in a specific matter is beyond the purview of this Commission, this statute declares that statements made (offers or proposals) shall be inadmissible in any proceeding in the action or other civil action on the same claim. Whether a petition for attorney's fees is a "proceeding in the [same] action" or "other civil action on the same claim", such a petition is clearly within the reach of this statute. There are four exceptions in the statute, but they are unavailing in this instance. Whether the offers were made orally, in writing, made face to face or conveyed by the mediator, they are clearly "statements made and conduct occurring in a mediated settlement conference" and are therefore "inadmissible in any proceeding in the action or other civil actions on the same claim".

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

**No.**

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

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

Thus the mediator cannot be compelled to testify or produce evidence and the mediator notes under the earlier paragraph are inadmissible. Once again there are exceptions listed in the statute which are inapposite in this situation.

The same or similar language is found in section (l) of G.S. § 7A-38.1, *Mediated settlement conferences in superior court civil actions*. Therefore this opinion applies to that program as well.

The inadmissibility of evidence of offers made in mediation does not necessarily frustrate the desire to petition for attorney's fees based upon the history of negotiation. "No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding" (G.S. § 7A-48.4A).

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 37 (2018)

(Adopted and Issued by the Commission on September 21, 2018)

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

Court staff contacted the Commission about a mediator who was signing MSC Designation of Mediator forms naming herself as the mediator who would mediate the case. Court staff expressed concern that, even with the parties' permission, such practice was inconsistent with the MSC Program Rules and suggested that the practice could look bad to the public, i.e., mediators should not be assigning themselves to mediate cases. Court staff asks whether is appropriate for MSC mediators to be completing, signing and/or filing Designation forms with the court? Some court staff contacted by the Commission regarding this matter, indicated that this was not the only mediator in their district engaged in this practice.

## Advisory Opinion

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

**No.**

Mediated Settlement Conference Rule 2.A provides:

> **DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designation. The party filing the designation shall serve a copy on all

> parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

The above Rule establishes that for a mediator to be designated in a superior court case, the parties must first agree on the certified mediator who will conduct their conference. The mediator must, in turn, agree to serve and the parties and mediator must agree on the mediator's compensation. Once all that has been decided, the plaintiff's attorney or other party as agreed, is to use the approved AOC form, i.e., AOC-CV-812, to convey to the court the name of the certified mediator who is being designated by the parties, his/her contact information, and the rate of his/her compensation. The signature box on AOC-CV-812 reinforces the language in MSC Rule 2.A in that it is clearly labeled, "Signature of Party or Party's Attorney". As such, both Rule 2.A and AOC-CV-812 clearly contemplate that the plaintiff's attorney or another party is to complete, sign, and file the Designation. Nowhere in the Rule or form is there any language suggesting that it is appropriate for the mediator to assume this role or for the parties to delegate such responsibilities to the mediator.

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

Court staff indicates that they have been told by mediators that attorneys want them to complete, sign, and file Designation forms as a matter of the attorneys' convenience. It may be convenient for attorneys to have mediators assume this role, but it is not consistent with Rule 2.A and the signature block on AOC-CV-812 which clearly contemplates that plaintiff's counsel or another party is to complete, sign, and file the Designation. Moreover, to permit the mediator to assume this responsibility undermines attorney/party accountability in the event concerns are later raised about the Designation and the agreements purportedly reached by the parties and mediator that underlie it. As such, mediators should not complete, sign, or file Designation forms with the court. For purposes of this Opinion, the Commission defines "completing" a Designation to include the practice followed by some mediators, or anyone acting on their behalf, of preparing

Designations for lawyers, including inserting the name of a mediator, and then e-mailing a pdf of the completed form to the parties for them to sign and file. Court staff should not accept any Designation forms which they know to have been completed, signed, or filed by a mediator, or anyone acting on their behalf.

Some court staff have indicated that they are accepting Designations signed by mediators if they have received an email or other written confirmation from the plaintiff's attorney indicating that the mediator has been authorized to sign. The Commission does not believe this is a good practice in that it requires busy court staff to keep track of such authorizations and elevates the convenience of attorneys over that of court staff.

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number No. 36 (2018)

(Adopted and Issued by the Commission on September 21, 2018)

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 contacted the Commission to ask whether Standard VII.H would prohibit her from sponsoring a CME or CLE program and receiving an acknowledgement in some form of her sponsorship, for example, a sign identifying her as the sponsor or notice of her sponsorship appearing on registration or program materials. Mediator also asks whether she could sponsor a dinner or open bar at a CME or CLE event and receive similar acknowledgement.

## Advisory Opinion

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

**May the Mediator sponsor a dinner or open bar at a CME or CLE event and have her contribution acknowledged on a sign or on registration or program materials?**
**Yes, if the sponsorship directly relates to an educational benefit through a CME or CLE available to the public.**

Standard VII. H., the "gift rule", provides:

> 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.

This Standard, in essence, establishes a bright line in relation to gift giving. It is intended to deter mediators from giving gifts to attorneys for referrals or in expectation of referrals. Obviously, it would be a violation of this Standard for a mediator to buy rounds of golf for an attorney, to take the attorney out on the mediator's deep sea fishing boat for an excursion, or to invite the attorney to college or professional football or basketball games **when the mediator's intention in so doing is to secure referrals or additional referrals**. Such gifts would clearly amount to the buying of referrals.

This Standard also prohibits the giving of inconsequential gifts and promotional materials such as pens, calendars, coffee mugs, and mouse pads which typically bear the mediator's name and contact information. Clearly, the giving of such trinkets is not the buying of referrals in the sense suggested in the paragraph above. However, such trinkets could create a situation where a party may come to perceive a mediator as less than neutral. For example, a party could go to an opposing attorney's office for mediation and be escorted to a conference room where the pens on table, the calendar on the wall, and even the row of coffee mugs on the counter are all emblazoned with the mediator's name and phone number. The party could reasonably assume that the mediator has some kind of working relationship with opposing counsel. S/he might even become suspicious that the mediator will not give him/her a fair shake, especially if the party did not see similar promotional displays at his/her own attorney's office. If during mediation, that party does not feel the mediator is sufficiently empathetic to his/her interests, such suspicion could easily give way to a perception of bias followed by a complaint filed with the Commission. As such, the bright line in Standard VII.H is intended both to deter inappropriate mediator conduct **and** to avoid situations where a party may inadvertently be led to question a mediator's neutrality.

Standard VII.H does permit mediators to bring snacks to mediations and/or to buy lunch for the participants. In addition, small gifts may also be exchanged if they are necessary to meet cultural norms. These exceptions are permissible only if they are intended for the purpose of furthering the conference. Such offerings should be reasonable and the meals provided should not be lavish or costly.

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

is equally unlikely that such sponsorship would lead the public to question a mediator's neutrality. Additionally, the public would not likely link the sponsorship to a particular party or case. Conversely, a dinner or open bar event with a limited or restricted guest list, or by personal invitation only, is akin to a gift and violates the bright line rule.

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Advisory Opinion No. 35 (2018)

(Adopted and Issued by the Commission on February 2, 2018)

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 amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.

## Concern Raised

Plaintiff's attorney contacted the Commission. He reported that defendant's counsel had appeared for a superior court mediated settlement conference without his client. Defendant's counsel reported that his client had informed him at the last minute that he was unable to attend the conference. Though his client was absent, defendant's counsel suggested that the mediator proceed with holding the mediated settlement conference. The mediator agreed to proceed and, after discussion, an agreement was reached. Defendant's counsel signed the agreement on behalf of his client.

Thereafter, defendant's attorney advised plaintiff's attorney that his client was refusing to abide by the terms of the agreement, maintaining that his lawyer had no authority to sign the agreement on his behalf. Plaintiff's attorney admits that he did not ask the defense attorney whether he had full authority to settle. He asks, in light of the defendant's absence, the following questions.

1. Did the mediator have an obligation to raise the issue of settlement authority with the defendant's attorney?
2. If so, what are the mediator's obligations to the process if s/he learns that the attorney does not have full settlement authority in the absence of his/her client?

**ADVISORY OPINION**

l. Did the mediator have an obligation to raise the issue of settlement authority with the defendant's attorney?

Yes.

MSC Rule 4.A(1)(a)(ii) provides that any party or person required to attend a mediated settlement conference shall physically attend unless all parties and persons required to attend and the mediator consent to excuse or modify the attendance requirement or unless physical attendance is waived by order of the court. Citing this rule, in Advisory Opinion No. 02 (2000), the Commission stated that it is highly preferable for all parties to be physically present at the conference, noting that when a party is absent, difficulties can occur. In that Advisory Opinion, the Commission suggested that even when all parties consent, a mediator should not waive the attendance requirement lightly and should encourage all parties required to be present to physically attend. In fact, one of the difficulties noted in Advisory Opinion No. 02 (2000) is the very situation presented in this inquiry, that "an absent party may later claim that his or her attorney did not have authority to settle the case."

Advisory Opinion No. 02 (2000) suggests that if the mediator determines that there is a compelling reason why a party cannot attend, the mediator should seek to ensure that arrangements are made to permit the party to participate via conference call. If the party will not be present physically or by conference call, the Advisory Opinion suggests that "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…" The advisory opinion does not offer guidance as to whether the mediator should or should not proceed with the conference if the attorney does not obtain written settlement authority from his client. It states only that the mediator shall report the failure to attend on the Report of Mediator. (Note: Current MSC Rule 6.B(4) requires the mediator to report only the names of those in attendance without noting those who failed to appear.)

Recently adopted Advisory Opinions No. 24 (2013) and No. 25 (2013) also address attendance issues. These advisory opinions also provide that the mediator should encourage physical attendance and should make an effort to help the parties understand the attendance requirement and the consequences of their decisions regarding attendance. In Advisory Opinion No. 24, the issue involved the appearance of an officer of a corporation without an attorney, and in Advisory Opinion No. 25, the issue was the attendance of an out-of-state attorney participant who had not been admitted pro hac vice. Under the facts presented in those advisory opinions, the Commission stressed that the mediator should not take it upon him or herself to act as the "attendance police". In other words, these Opinions held that it was not the mediator's responsibility to determine who should/could participate or to determine whether the conference should proceed. Rather, the Opinions held that the mediator should work with whomever appears for the mediation and facilitate their discussions. These Opinions are to be distinguished from

Advisory Opinion No. 02 (2000) in that the absences noted did not raise issues of settlement authority. When the mediator learns that a party with settlement authority does not plan to appear or is absent, the mediator cannot simply proceed to facilitate the discussion with those who are present, but must take action to address the situation.

2. What are the mediator's obligations to the process if s/he learns that an attorney does not have full settlement authority in the absence of his/her client?

In light of Advisory Opinions Nos. 02, 24, and 25, the Commission suggests that best practice in the scenario presented would include the following steps.

1) If notified in advance, the mediator should discuss the attendance rule with the attorney and strongly urge him to contact his client and encourage the client to attend in person.

2) If the client will not attend in person and all parties consent and the mediator determines that there is a compelling reason to excuse the party's physical attendance, the mediator should seek to ensure that the party can be available by conference call.

3) If the client refuses to attend either in person or telephonically, or if the client fails to show up at the mediation, the mediator should ask the attorney to obtain the client's written permission to settle the matter on the client's behalf by email or text or other reasonable means.

4) Absent such written permission, the mediator should encourage the attorney to disclose to the other side the fact that he does not have full, written settlement authority. After full disclosure, those in attendance and the mediator may agree to proceed with the conference.

5) If the attorney refuses to disclose that he does not have full, written settlement authority, then the mediator may determine that it is appropriate to recess the mediation or, pursuant to Standard VIII, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator's duty to maintain confidentiality under Standard III.B. A recess or a withdrawal will avoid a situation where the other party spends time and money on the mediation process with the understanding that an agreement may be reached, when, due to an absence of authority that may not, in fact, be possible.

# Advisory Opinion of the
# NC Dispute Resolution Commission
## Advisory Opinion No. 34 (2018)

(Adopted and Issued by the Commission on February 2, 2018.)

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 amendments to the Policy and by issuing opinions, the Commission seeks to educate mediators and to protect the public.

### Concern Raised

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

### Advisory Opinion

### Question 1

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

**No.**

Standard VII, Conflicts of Interest, begins with "A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute." There is an inherent conflict of interest when a mediator conducts two mediations at the same time in that the mediator is or appears to be serving his own interests and not those of the parties.

Subsection G of Standard VII states that, "A mediator shall not prolong a mediation for the purpose of charging a higher fee." Pursuant to MSC Rule 6.A(1), the mediator is in

control of the conference, and as such determines the length of the opening statement, the needs of the parties during caucus sessions, and the amount of time the mediator spends in each caucus session. It would be very difficult for a mediator to be able to "time" the caucus sessions for the separate conferences so that no party is waiting an undue amount of time while the mediator is in caucus with a party in the other conference. As such, it is apparent that conducting simultaneous mediations is likely to result in one or both of the conferences being prolonged prior to settlement or impasse. By choosing to hold simultaneous conferences, the mediator is, in effect, prolonging the conference(s) which results in a higher fee, a violation of Standard VII.G.

The Commission is also concerned about the mediator's ability to maintain the confidentiality of all information obtained within the mediation process as required by Standard III, Confidentiality. In particular, Standard III.A provides that, "A mediator shall not disclose, directly or indirectly, to *any non-participant*, any information communicated to the mediator by a participant within the mediation…" The parties to each mediation are non-participants in the other, simultaneous mediation. Standard III.B provides that, "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…"
The mediator must keep track of a significant amount of information, and it may be very difficult to keep track of confidential information disclosed in each caucus during each mediation. The parties and/or their attorneys may express concerns about the protection of their confidential information which could result in a lack of trust or guarded participation in, or dissatisfaction with the process. In fact, this query came from an attorney to a Commission member, and the attorney raised this very concern.

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

## Question 2

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

**No.**

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
## Advisory Opinion No. 33 (2016)

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

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## 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.

# 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.

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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).

**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 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. 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. 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 practice. In adopting the Policy 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. 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 practice. In adopting the Policy 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
## Opinion Number 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 practice. 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 04-06). 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 Standards 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

Opinion Number 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 emails, Mediator insisted she must agree to pay. When she continued to refuse, Mediator contacted Husband and pressed him to pay not only his, but Wife's share of the fee. When no agreement to pay Wife's share was forthcoming, Mediator 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-38.4A(i) 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 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
## Opinion Number 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
## Opinion Number 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
## Opinion Number 24 (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

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

## Advisory Opinion

The mediator has a duty to serve as a neutral facilitator of the parties' negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to 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.

Pursuant to North Carolina Rules of Professional Conduct Rule 5.5(c)(2), a lawyer admitted to practice in another jurisdiction, but not in North Carolina, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer acts with respect to a matter that is reasonably related to a pending or potential mediation, the services are reasonably related to the lawyer's representation of a client in a jurisdiction in which the

lawyer is admitted to practice, and the services are not services for which pro hac vice admission is required. However, pursuant to Comment 6 to Rule 5.5, a lawyer must obtain admission pro hac vice in the case of a court-annexed mediation. Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law.
When there is existing litigation and the court orders the case to mediation, a mechanism is in place for the lawyer to be admitted pro hac vice for the mediation. On the other hand, if the case is not in litigation, the lawyer may participate in the mediation without being admitted pro hac vice as long as the services are related to the lawyer's representation of that client in a jurisdiction in which the lawyer is admitted to practice.

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

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

This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. 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. 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 prohibits the mediator from giving 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
## Opinion Number 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 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 (#01-03), 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
## 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.

There is much confusion among mediators about the subject of confidentiality. The duty of confidentiality is found in Standard III of the Standards of Conduct for Certified Mediators. It places a duty of confidentiality on certified mediators and no one else involved in the mediation process. A mediator would certainly be in violation of Standard III if he or she spoke to the press or public regarding a settlement offer.
However, mediators should be mindful that parties and their counsel are free to talk to the press or public about statements or conduct occurring during their mediation, including the fact and content of any offers to settle. Thus, mediators should be careful not to suggest or imply that the situation is otherwise and should avoid statements like "everything that goes on in mediation stays in mediation." Such statements are inaccurate and misleading.

Mediators' statements about confidentiality should make it clear that it is the mediator and not the parties who has a duty of confidentiality. After being notified of the limited confidentiality rules, if the parties indicate that confidentiality among the parties is an issue, then it would be the best practice for the mediator to explore whether the parties wish to negotiate a confidentiality agreement to govern their conduct during and after the mediation. If no such agreement can be reached, then the parties may go forward in mediation armed with a clear understanding that their subsequent negotiations will not be treated as confidential by the parties themselves.

Much of the confusion about the subject of confidentiality comes from the fact that mediators must explain both confidentiality and inadmissibility to the parties at the beginning of the process. Mediators often confuse one for the other or wrongly call both of them "confidentiality."

Inadmissibility is addressed in the Mediated Settlement Conference Program's enabling legislation, N.C.G.S. § 7A-38.1 (l), which provides that "evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section" shall be inadmissible in any proceeding in the case being mediated. This provision deals only with the inadmissibility of evidence in a court proceeding and affords no broader confidentiality protections. Inadmissibility and confidentiality are separate and distinct concepts, and mediators should be careful, accurate, and not misleading in explaining them to the parties.

Though the question before the Commission in this opinion relates to the Mediated Settlement Conference Program, similar enabling legislation and rules characterize the Family Financial Settlement, Clerk, and District Criminal Court Mediation Programs. Note, however, that Clerk Program Rule 6.B(4)(b) requires mediators to submit agreements reached in mediation to the clerk for review in guardianship, estate, and other

matters which may be resolved only by order of the clerk. Also note that other court-ordered mediation programs may have confidentiality requirements that do apply to the parties, attorneys, and mediator. For example, the Mediation Program for the United States Court of Appeals for the Fourth Circuit requires that all participants not divulge the communications in mediation to anyone (see 4th Cir. R. 33).

# Advisory Opinion of the
# NC Dispute Resolution Commission
## Opinion Number 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.B. provides that: "…the parties shall compensate the mediator for mediation services…." The term "mediation services" is not defined in either the MSC Rules or the MSC 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
## Opinion Number 20 (2011)

(Adopted and Issued by the Commission on September 9, 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

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

## Advisory Opinion

**Inquiry #1 – May the attorney mediator notarize the agreement in the situation described above?**

N.C.G.S. § 10B-20(c)(6) provides that a notary shall not perform a notarial act when the, "…notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker."

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

**Inquiry #2 – Could a certified, non-attorney mediator also notarize the agreement in the situation described above?**

N.C.G.S. § 10B-20(k) provides that, "A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A non-attorney notary shall not assist another person in drafting, completing, selecting or understanding a record or transaction requiring a notarial act." The Secretary of State's office has advised the Commission that since the North Carolina State Bar has determined that serving as a mediator per se is not the practice of law, the above provision does not prohibit a non-attorney mediator from conducting mediations in North Carolina.

Since the parties in the situation described above were represented by counsel, who drafted the agreement, nothing should prohibit a non-attorney mediator from notarizing the parties' signatures under the Secretary of State's analysis set forth under Inquiry #1 above, *i.e.*, a non-attorney mediator would be no more a beneficiary than would an attorney mediator.

# Advisory Opinion of the
# NC Dispute Resolution Commission
## Opinion Number 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
# Opinion Number 18 (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

Court staff have registered complaints with the Commission over a period of years about the failure of superior court mediators to comply with their case management duties, including failing to file Reports of Mediator, late filing of Reports [months after the ten day deadline established by Mediated Settlement Conference ("MSC") Rule 6.B(4)(a)], and filing incomplete Reports. This Advisory Opinion was initiated by the Commission after recently issuing a private reprimand to an experienced mediator for failing to file his Reports correctly over an extended period of time and after having been notified of his failure to comply with the Rules in the past.

## Advisory Opinion

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

Reports are also the single most important tool in assessing program performance. Court staff report monthly to the Administrative Office of the Courts on the number of cases mediated and settled in their judicial districts. When mediators do not report or report

late, their conferences and settlements may go uncounted with the result that MSC Program caseload statistics reported to the Supreme Court, the General Assembly, and to the public will not reflect the Program's true impact on the courts.

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

When mediators fail to fulfill their case management duties, court staff may have to step in to gather information and correct problems, thus taking time away from their other administrative responsibilities. It is a measure of how important the case management duty assigned to mediators is in that MSC Rule 6.B.(4) says: "Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the Court and sanctions."

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 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 #08-15 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 #08-15 precludes his serving as an arbitrator?

## Advisory Opinion

Advisory Opinion #08-15 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 #08-15 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
# Opinion Number 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
# Opinion Number 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
# Opinion Number 14 (2008)

(Adopted and Issued by the Commission on May16, 2008)

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

The North Carolina Bar Association Dispute Resolution Section's Pro Bono Committee asks whether a certified mediator may hold him or herself out as willing, if voluntarily selected, to mediate without charge or at a reduced charge for parties represented by legal service organizations for the indigent. The Section reports that legal aid organizations have asked the Section to assist it in identifying and assembling a panel of mediators who are willing to volunteer their services to assist their clients. The Section believes it is important for mediators to be involved in efforts to serve those who are unable to pay, and it asks the Commission whether mediators, consistent with program rules and the Standards of Professional Conduct for Mediators, may volunteer to work bro bono or at reduced fees in such cases and in other disputes in which one or more of the parties are, or appear to be, indigent.

## Advisory Opinion

North Carolina's mediated settlement conference programs were designed to be "party-pay," meaning that the parties would directly compensate the mediator for his or her services. The party pay system has served our programs, courts and citizens well in that a cadre of talented mediators has developed over time and mediated settlement is now widely available in all our judicial districts. Though the party pay concept has been fundamental to the establishment, expansion and success of our programs, the Commission has always been mindful that, in creating a system funded by the parties, it has an obligation to insure that those who lack funds are not denied services. To that

end, the original program rules provided that mediators participating in court-based programs must make their services available to indigent parties without charge. To reinforce this notion, applications for mediator certification require applicants to expressly agree to waive their fees with respect to indigent parties.

The Commission has never wavered in its commitment to those the court has determined are unable to pay and fully expects that all mediators, likewise, will take their obligation toward indigent parties seriously. Nevertheless, the Commission appreciates the desire of legal aid organizations to identify and assemble a panel of mediators who have expressed a particular willingness to work with their clients. Therefore, consistent with program rules and the Standards of Professional Conduct for Mediators, mediators may assist the clients of organizations providing legal services for the indigent, and other indigent clients, by agreeing to mediate their disputes, if voluntarily selected, without charge or at a reduced rate, under the following guidelines:

1. A mediator may waive his/her fees, in whole or in part, for one or all parties to a dispute even if the resolution of the dispute generates funds for the indigent client. Consistent with Standard VII D, a mediator can not condition waiver of the fee upon the outcome of the dispute or case nor decide to assess a previously waived fee once a settlement in favor of the indigent party has been mediated.

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

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

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

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 13 (2007)

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

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.

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
# Opinion Number 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
# Opinion Number 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(*ℓ*) expressly provides that agreements must be reduced to writing and signed to be enforceable. Oral agreements are not only not enforceable, but likely to lead to the situation that occurred here, *i.e.*, one of the parties equivocates, tempers fray and the parties return to court. The mediator seriously erred in failing to require that the agreement be reduced to writing and violated program rules. If there were still unanswered questions at the end of the initial session, the mediator should have recessed the conference, reconvened it at the site location and proceeded to help the parties sort out any remaining details necessary to ensure a full agreement. The mediator should then have taken steps to 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
# Opinion Number 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
# Opinion Number 09 (2006)

(Adopted and Issued by the Commission on August 25, 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 family financial mediator's attorney contacted the Commission's office. He explained that his client kept detailed information about divorcing couple's on his laptop, including information that identified the couple and reveal assets, debts, and accounts. The information pertained to couples currently involved in mediation as well as those who had completed the process. The laptop needed repairs. When he retrieved his machine following service, he discovered that the financial information was missing. The mediator returned to the store where staff sought to retrieve it. Staff was unable to locate the missing information and advised mediator that it might have been installed on another's machine, might be in cyberspace, or could have been erased. Attorney asks whether the mediator has any duty under the Standards of Conduct to advise those whose information is missing of the situation, so that they may act to protect themselves from financial loss or identify theft.

## Advisory Opinion

Confidentiality is integral to the mediation process. Standard III.A.of the NC Supreme Court's Standards of Professional Conduct for Mediators provides that, "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". The only exceptions to this absolute bar on disclosure address public safety; reporting mandated by statutes, *e.g.*,

reporting of child or elder abuse; and disciplinary proceedings involving a mediator or an attorney participating in a mediated settlement conference. If confidentiality is not preserved, the integrity of the mediation process is compromised. Participants will no longer feel free to speak frankly with their mediators and the public will no longer view mediated settlement as a confidential alternative to a public trial. Standard III places a clear duty on mediators to take every precaution to protect confidentially. **Implicit in the duty to protect confidentiality is the responsibility to notify a mediation participant who may be at risk because of a breach in confidentiality. Without notification, the participant will have no opportunity to take steps to protect his or her interests.**

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

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 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 <u>and</u> 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, p*ro 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
# Opinion Number 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
# Opinion Number 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
# Opinion Number 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* conversations, the Commission believes that mediators can sometimes play an important role in reviving or furthering settlement discussions. While mediators are not required or obligated to provide additional assistance or information once a case has impassed, they may do so if they believe it will assist the parties and lead to further settlement discussions and there is no violation of confidentiality. If, as in this case, the mediator believes that the information is being sought for some purpose other than furthering negotiations, the mediator may simply determine that nothing can be gained by further discussions with the party and simply not respond to the inquiry.

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

Unless the mediator previously had permission to identify the particular speaker to the opposing side, s/he should not do so now, unless s/he first contacts the individual and determines whether s/he has permission to reveal his or her identity (see Standard III.C.).

# Advisory Opinion of the
# NC Dispute Resolution Commission
# Opinion Number 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
# Opinion Number 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
# Opinion Number 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 of all parties 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 persons 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 facts 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 a 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
# Opinion Number 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.