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 practices. In adopting the Policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Mediator conducted a court-ordered mediated settlement conference in a complicated case involving a large real estate development, which was in financial trouble. Mediator reported that an agreement was reached at mediation as to all issues with a voluntary dismissal with prejudice to be filed within approximately six weeks. Thereafter, plaintiff filed a motion seeking to enforce the mediated settlement agreement and served a subpoena on the Mediator. The Mediator brought his notes from the mediation and testified about what had occurred at the mediation, including testifying as to the parties' discussion during the conference, their settlement proposals, the conduct of the parties, and the terms of their agreement. No objection to the Mediator's testimony was made. The Mediator did not alert the Court to Standard III and his duty to preserve confidentiality. The Court did not compel his testimony.

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

Advisory Opinion

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

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

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

If the parties to a voluntary mediation want to have this provision apply to their mediation, they should either ask the court to order mediation under the authority of 7A-38.1 or enter into an agreement that the mediation will be governed by that statute and the Supreme Court Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions. In the latter event, the protection probably would be provided, but under a theory of waiver and estoppel rather than direct application of the statute. To summarize, a mediator may not be compelled to testify in any civil proceeding about statements and conduct occurring in a court-ordered mediated settlement conference, meaning mediations that are ordered by the court under statutory authority.

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

In A.O. #03 (2001), the certified mediator was asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. The Commission advised that the Mediator should not give the affidavit nor provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." The opinion notes as follows:

> Standard III.A prohibits the communication of any information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard III.A does not provide for any exceptions to confidentiality beyond the statutory duty to report certain information. There is no exception for instances where the parties agree to the affidavit or deposition. Confidentiality is essential to the success of mediation. Absent a statutory duty to disclose information, the standards obligate mediators to protect and foster confidentiality.

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

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

Advisory Opinion of the
NC Dispute Resolution Commission

Advisory Opinion No. 29 (2014)

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

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

Concern Raised

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

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

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

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

Advisory Opinion

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

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

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

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

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

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

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

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

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

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

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

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 28 (2013)

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

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

Concern Raised

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

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

The parties also ask the mediator to help them file their agreement with the court. The mediator understands that because he has served as their mediator, he cannot now represent one of them in the action. (See Standard VII.C and Advisory Opinion No. 6 (2004)). However, he questions whether he can provide other assistance to them in finalizing their agreement and asks the following:

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

Advisory Opinion

(1) Preparation of Agreement

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

Standard VI, of The Standards of Professional Conduct for Mediators, which is entitled "Separation of Mediation from Legal and Other Professional Advice," begins as follows: "A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation." Accordingly, to answer the first question of this inquiry, it is necessary to decide whether the preparation of a binding agreement for unrepresented parties constitutes the practice of law. If it does, then the mediator would be in violation of Standard VI in preparing such a document.

N.C. Gen. Stat. §84-2.1 states that the phrase "practicing law" means "performing any legal service for any other person, firm or corporation, with or without compensation ...". The Commission notes that the North Carolina State Bar is the agency responsible for regulating the practice of law in North Carolina, and therefore, of particular importance in this inquiry is how the State Bar interprets "practicing law" within the meaning of the statute. In response to the Commission's inquiry of the State Bar, the Commission was informed that persons who "draft" contracts for others are "practicing law."

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

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

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

(2) Filing Action to Incorporate Agreement into Court Order

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

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

If the mediator performs this task, and mixes the roles of mediator and lawyer, he runs the risk of violating Standard VI, as discussed above. He would also be in violation of Standard VII, which provides in pertinent part that "[a] mediator who is a lawyer ... shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an outgrowth of the dispute ...". It is clear that the mediator would violate Standards VI and VII if he files an action to incorporate the agreement into a court order by consent under the facts of this inquiry.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 26 (2013)

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

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

Concern Raised

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

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

Advisory Opinion

N.C. Gen Stat. §1-294 provides that a timely notice of appeal stays all further proceedings in the court below on the judgment appealed from or upon the matter addressed therein, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. Once a party gives notice of appeal, the trial court is divested of its jurisdiction if the appeal is an immediately appealable interlocutory order. However, when a party appeals a non-appealable interlocutory order, such appeal does not deprive the trial court of jurisdiction and the trial court may proceed with trying the case. RPR & Associates, Inc. v. The University of

North Carolina-Chapel Hill, et al., 153 N.C. App. 342 (2002), appeal dismissed and disc. review denied, 357 N.C. 166 (2003).

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

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

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion 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

Advisory Opinion No. 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

Advisory Opinion No. 03 (2001)

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

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

Concern Raised

Certified Mediator has been asked to give an affidavit or to agree to be deposed for the purpose of clarifying what was said or not said during the opening session of a mediation. Certified Mediator seeks clarification: 1) whether the opening session when all parties are present is confidential; and 2) whether confidentiality protections in the Standards of Professional Conduct for Mediators are waived if both parties and their attorneys agree that the mediator may give the affidavit or be deposed.

Advisory Opinion

The Commission advises that the Mediator should not give the affidavit nor should he provide information at a deposition. Providing such information is a violation of the Standards of Professional Conduct for Mediators. Standard III.A provides that: "Apart from statutory duties to report certain kinds of information, a mediator shall not disclose, directly or indirectly, to any non-party, any information communicated to the mediator by a party within the mediation process." Standard III.A prohibits the communication of <u>any</u> information and does not distinguish among the opening session, caucuses or any other stage in the mediation process. Moreover, Standard III.A does not provide for any exceptions to confidentiality beyond the statutory duty to report certain information. There is no exception for instances where the parties agree to the affidavit or deposition. Confidentiality is essential to the success of mediation. Absent a statutory duty to disclose information, the Standards obligate mediators to protect and foster confidentiality.