

NAVIGATING THE ETHICS OF MEDIATION AND SETTLEMENT

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Code of Conduct

North Carolina Revised Rules of Professional Conduct (“N.C. Rules of Professional Conduct”) – apply to any forum for representing clients, including mediation and settlement discussions.

Court Program Rules – North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences (citations below are to the N.C. Administrative Code).

Case Law

Standards of Professional Conduct for Mediators – adopted by the North Carolina Supreme Court and enforced by the North Carolina Dispute Resolution Commission.

Advisory Opinions of the North Carolina Dispute Resolution Commission.

Confidentiality and Inadmissibility

Confidentiality applies only to mediator – Standard III

If confidentiality is a concern, enter into a confidentiality agreement at beginning of mediation or in separate settlement agreement.

Standard III exceptions.

Inadmissibility of Evidence

Rule 04 NCAC 10G.0103(h) – inadmissibility of mediator testimony in Commission case or civil proceeding – certain exceptions.

Advisory Opinion 30 (2014) – mediator who testified in action to enforce mediated settlement agreement was sanctioned by the Dispute Resolution Commission.

Advisory Opinion 03(2001) – confidentiality integral to mediation process – mediators should not give affidavits or testify in court as to statements made or conduct occurring in mediation unless pursuant to exceptions in Standards or statutes.

Rule 04 NCAC 10G.0103(f) – “Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted pursuant to the Rules ... are not subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim” with certain exceptions.

Rule 408 of North Carolina Rules of Evidence – compromise and offers to compromise - not admissible to prove liability or validity of claim – nor is evidence of conduct or statements made in compromise negotiations admissible – certain exceptions.

N.C. Rule of Professional Conduct 1.6 – lawyer may not reveal information acquired during professional relationship with client unless client gives informed consent.

Competence

N.C. Rule of Professional Conduct 1.1 – “... Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Standard I – Competence – mediator competence.

Communicating Offers to Client

N.C. Rule of Professional Conduct 1.4 – Communication – (a)(1) – A lawyer shall “promptly inform the client of any decision or circumstance with respect to which the client’s informed consent ... is required” by the Rules of Professional Conduct.

Comment 2 – A lawyer who receives an offer of settlement in a civil controversy must promptly inform the client unless the client has previously indicated that the proposal will be acceptable or unacceptable.

Mediator Impartiality

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

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

Advisory Opinion 33(2016) - the opinion holds that a mediator may not, under Standard VII.H, give gifts in expectation of referrals, as an advertisement of his/her mediation services, or as a “thank you” for selecting him/her as mediator, irrespective of the value of the gift. The opinion stresses that the exception set out in the Standard is very narrow: “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.”

Mediator Duty to Protect Integrity of Mediation Process

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

Advisory Opinion 16(2010) – best practice for a mediator is to engage the offending party and attorney and encourage them to disclose the information. If they refuse, then the mediator must terminate the session and withdraw from the mediation without violating the requirements of confidentiality.

Standard IV – Consent – mediator not to exert undue pressure; if a party has difficulty comprehending, mediator must determine if party can meaningfully participate.

Self-determination

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

Resist giving opinions unless requested as a last resort.

Ensuring self-determination helps to prevent challenges to mediated settlement agreements.

Good Faith

Not required. Not in the rules. Only requirement is to attend.

Attendance

Rule 04 NCAC 10G.0104(a) – Attendance

Note that the rule requires physical attendance unless the parties and mediator consent to a person's telephone participation or unless the Commission allows such person to attend by telephone. When telephone participation is permitted, such party or representative must bear the costs of all telephone calls and the mediator is to be allowed to communicate directly with the participant.

Advisory Opinions 24(2013) and 25(2013) – Mediators are to avoid taking positions in disputes over attendance. Absent an order dispensing with mediation, a mediator should conduct the conference and advise the parties to direct any questions about attendance to the court.

Pro Se Parties

Rule 04 NCAC 10G.0101(j) – Cases Involving Plaintiffs Not Represented by Counsel. Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation.

Approach by adjusters to settlement with pro se plaintiffs – fairness and transparency.

Advisory Opinion 31(2015) – In a case where one party is represented by counsel and one is pro se, the mediator may not prepare an agreement for the parties to sign.

Advisory Opinion 28(2013) – Mediator may not prepare an agreement for two pro se parties because to do so would be the “practice of law” and would therefore violate Standard VI. This opinion calls attention to N.C. State Bar 2012 Formal Ethics Opinion 2, which held that the attorney mediator could not prepare a binding business contract for two pro se parties at the conclusion of a successful mediation because the mediator had a “non-consentable” conflict of interest and would improperly practice law if he drafted a contract requested by the parties.

Standard VI – Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

Truth Telling in Negotiations

N.C. Rule of Professional Conduct 4.1 – Truthfulness in Statements to Others –
“In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.”

Misrepresentation – Comment 1 – “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.”

Statements of Fact – Comment 2 – “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category....”

Talking Directly to Opposing Party

N.C. Rule of Professional Conduct 4.2 – Communication with Person Represented by Counsel – “(a) During the representation of a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

In the Supreme Court of North Carolina

Order Adopting Amendments to the Standards of Professional Conduct for Mediators


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

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


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

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

Hudson, J.,
Recused.


For the Court

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


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

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

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

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

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

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

- A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.
- B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.
- C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

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

- A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.
- B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.
- C. The mediator shall decline to serve or shall withdraw from serving if:
 - (1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or
 - (2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

- A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during or after the mediated settlement conference. A mediator's filing with the appropriate court a copy of an agreement reached in mediation pursuant to a statute that mandates such filing shall not be considered to be a violation of this paragraph.

- B.** A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during or after the mediated settlement conference, unless that other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.
- C.** A mediator shall not disclose to court officials or staff any information communicated to the mediator by any participant within the mediation process, whether before, during or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator for the court; provided, however, when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. The confidentiality provisions above notwithstanding, if a mediator believes that communicating certain procedural matters to court personnel will aid the mediation, then with the consent of the parties to the mediation, the mediator may do so. In making any permitted disclosure, a mediator shall refrain from expressing personal opinions about a participant or any aspect of the case with court officials or staff.
- D.** The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation in the circumstances set forth in sections (1) and (2) below:

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

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

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

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

- (i) a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or
- (ii) a party or other participant in the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or
- (iii) a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

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

- E. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.
- F. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

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

- B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.
- C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.
- D. In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

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

- A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.
- B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.
- C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

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

- D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.
- E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

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

COMMISSION OFFICIAL COMMENT

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

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

- A. The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.
- B. Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.
- C. A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely

related to the dispute or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

- D. A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.
- E. A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.
- F. A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.
- G. A mediator shall not prolong a mediation for the purpose of charging a higher fee.
- H. A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.

A mediator should neither give nor accept any gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

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

- A. A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.
- B. If a mediator believes that the statements or actions of any participant, including those of a lawyer who the mediator believes is engaging in or has engaged in professional

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 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. 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 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.

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 16 (2010)

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

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

Concern Raised

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

Advisory Opinion

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

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

It is an abuse of the mediation process for the offending party and/or attorney to negotiate a settlement of an equitable distribution claim based on such a violation; and a mediator who

knows of such violations of statutes or orders would be participating with the parties in violating those disclosure requirements if s/he facilitates a settlement of the action. Thus, it would be a violation of the mediator's duty to facilitate a resolution of that action.

When a mediator learns of the intentional non-disclosure, it is best practice for the mediator to engage the offending participant in private conversation about the consequences of that party's decision. If the party persists in non-disclosure, the mediator must terminate the session and, if the party's decision remains the same, withdraw from the mediation altogether.

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 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

Advisory Opinion No. 25 (2013)

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

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

Concern Raised

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

Advisory Opinion

The mediator has a duty to serve as a neutral facilitator of the parties’ negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to rules promulgated by the Supreme Court, the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties’ negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

N.C. Gen Stat. §84-5 prohibits a corporation from practicing law, and case law interpreting the statute, with certain exceptions, holds that a non-attorney employee of a corporation may not litigate on behalf of a corporation. Furthermore, Rule 5.5(d) of the North Carolina Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law. Serving as a mediator, however, is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct

for Mediators, the mediator will not be assisting in the unauthorized practice of law by conducting the settlement conference as ordered by the court, and would not be in violation of Rule 5.5(d) by doing so. Absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court.

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

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

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 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. 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.