

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 09-06

(Adopted and Issued by the Commission on August 25, 2006)

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

Concern Raised

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

Advisory Opinion

Confidentiality is integral to the mediation process. Standard III.A. of the NC Supreme Court's Standards of Professional Conduct for Mediators provides that, “A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process”. The only exceptions to this absolute bar on disclosure address public safety; reporting mandated by statutes, *e.g.*, reporting of child or elder abuse; and disciplinary proceedings involving a mediator or an attorney participating in a mediated settlement conference. If confidentiality is not preserved, the integrity of the mediation process is compromised. Participants will no longer feel free to speak frankly with their mediators and the public will no longer view mediated settlement as a confidential alternative to a public trial. Standard III places a clear duty on mediators to take every precaution to protect confidentially. **Implicit in the**

duty to protect confidentiality is the responsibility to notify a mediation participant who may be at risk because of a breach in confidentiality. Without notification, the participant will have no opportunity to take steps to protect his or her interests.

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