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Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 08-15
(Adopted and Issued by the Commission on November 7, 2008)

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

Concern Raised

The heirs of an estate had been unable to reach an agreement as to who should serve as the estate’s administrator/fiduciary. The Clerk of Superior Court in the county where the matter was pending referred the dispute to mediation. During the mediation, the heirs, all of whom were represented by counsel, reached an agreement which named their mediator as the administrator. When the agreement was later presented to the Clerk for approval, one of the heirs objected to the appointment arguing, in effect, that she thought it was a conflict of interest for the mediator to agree to serve as the administrator. That individual told the Clerk that she had expressed concerns about the arrangement during the mediation, but that her concerns had been brushed aside and she had not continued to object. Inquiry was made to the Commission as to where it was appropriate for the mediator to agree to serve as the administrator/fiduciary.

Advisory Opinion

Standard VII addresses conflicts of interest. That Standard provides that, “A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute”. Subsection E. of that Standard also provides that, “A mediator shall not use information obtained during a mediation for personal gain or advantage”.

In agreeing to serve as the administrator/fiduciary, the mediator may have had a pure motive and felt that he was going the extra mile to help these heirs settle their dispute. Nevertheless, in accepting the appointment, he failed to give due regard to the conflict between the parties interests and the fact that he stood to gain personally and financially from his appointment as administrator.

Significant fees are often associated with service as an administrator/fiduciary or guardian. A mediator who promotes himself or herself as available to serve in that capacity creates the impression that he or she manipulated the mediation process or the parties with the ultimate goal of furthering his/her own interests at the expense of those of the parties.

A mediator who accepts such an appointment at the offer or even insistence of the parties creates the same perception. In particular, that perception is created where, as reportedly here, the mediator allowed his name to be set forth in the agreement even after one of the heirs objected to the mediator's service as administrator. Such perceptions serve to discredit the mediator, the mediation process, the Clerk Mediation Program and, ultimately, the Commission and courts.

A mediator should remain focused exclusively on his or her role as mediator and should not solicit or accept an appointment as a fiduciary that flows from the mediation process. A mediator who accepts such an appointment creates the perception that he or she manipulated the mediation process and the parties to his or her own advantage in obtaining the appointment and, thus, compromised his/her neutrality in the process.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 08-14**

(Adopted and Issued by the Commission on May 16, 2008)

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

Concern Raised

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

Advisory Opinion

North Carolina's mediated settlement conference programs were designed to be "party-pay," meaning that the parties would directly compensate the mediator for his or her services. The party pay system has served our programs, courts and citizens well in that a cadre of talented mediators has developed over time and mediated settlement is now widely available in all our judicial districts. Though the party pay concept has been fundamental to the establishment, expansion and success of our programs, the Commission has always been mindful that, in creating a system funded by the parties, it has an obligation to insure that those who lack funds are not denied services. To that end, the original program rules provided that mediators participating in court-based programs must make their services available to indigent parties without charge. To reinforce this notion, applications for mediator certification require applicants to expressly agree to waive their fees with respect to indigent parties.

The Commission has never wavered in its commitment to those the court has determined are unable to pay and fully expects that all mediators, likewise, will take their obligation

toward indigent parties seriously. Nevertheless, the Commission appreciates the desire of legal aid organizations to identify and assemble a panel of mediators who have expressed a particular willingness to work with their clients. Therefore, consistent with program rules and the Standards of Professional Conduct for Mediators, mediators may assist the clients of organizations providing legal services for the indigent, and other indigent clients, by agreeing to mediate their disputes, if voluntarily selected, without charge or at a reduced rate, under the following guidelines:

1. A mediator may waive his/her fees, in whole or in part, for one or all parties to a dispute even if the resolution of the dispute generates funds for the indigent client. Consistent with Standard VII D, a mediator can not condition waiver of the fee upon the outcome of the dispute or case nor decide to assess a previously waived fee once a settlement in favor of the indigent party has been mediated.
2. Waiver in whole or in part for one or all parties does not require a court determination of indigency.
3. Consistent with Standard II, if the mediator agrees to waive a fee in whole or in part for one party, that fact must be disclosed to the opposing party as soon as practicable before the mediation. The purpose of the disclosure is to avoid any appearance of partiality.
4. If a mediator has a personal policy of waiving all or a portion of his/her fee for an indigent client, the mediator shall make that policy known to the other party(ies) before the parties negotiate whether the entire fee will be paid by parties other than the indigent client. An attempt to negotiate or shift the fee to other parties under these circumstances appears to give the mediator a stake in the settlement and engenders the perception of partiality.
5. A mediator may make it known to a legal service organization that the mediator is willing, if designated, to mediate without charge or at a reduced charge for the clients of legal services organizations for the indigent. The mediator's name may appear on a panel of available mediators for legal services. However, a mediator who has agreed to serve at no charge or a reduced charge is under no obligation to mediate a dispute in which s/he is selected, particularly if s/he has been called upon to mediate without charge on numerous occasions.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 07-13**

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

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

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

Concern Raised

During a superior court mediation, a party made representations to the mediator regarding a key fact in dispute. Later in a caucus session with the opposing party, the mediator learned information that the mediator believed irrefutably contradicted the key fact. The mediator returned to the party who made the initial assertion, angrily confronted him and, using foul language, suggested he had lied about the key fact. The party responded by telling the mediator that he found his demeanor and language unprofessional. The mediator collected himself and agreed, but the offended party withdrew from the mediation.

Advisory Opinion

Standard II of the Supreme Court's Standards of Professional Conduct for Mediators provides that, "A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute." Confronting a party in a hostile and accusatory manner and accusing him of lying, or words to that effect, is not only wholly inconsistent with this Standard, but counterproductive as evidenced by the party's quick exit from the conference and the resulting impasse. Rather, the mediator should have brought the contract back to the room, pointed out the inconsistency and asked the party to explain his earlier response.

Mediators have a duty to protect the integrity of the mediation process and to conduct the mediation with decorum. The Commission strongly cautions all mediators against using profanity, even in instances where the parties and their attorneys are using it.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 07-12**

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

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

Concern Raised

Prior to a family financial settlement conference, an attorney received a *Mediation Agreement* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify program rules or the Standards of Professional Conduct for Mediators? This Opinion applies to situations where the parties fail to select a mediator and the court is required to appoint a mediator pursuant to the Rules.

Advisory Opinion

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

Any agreement containing terms that modify or run counter to program rules and the Standards, violates the intentions of the General Assembly, Court and Commission in creating a framework to govern program operations and the conduct of mediators. Moreover, the *Mediation Agreement* in question disregards the pledge the certified mediator made pursuant to FFS Rule 8.F. which requires all applicants for family financial certification to agree to adhere to the Standards of Conduct and the court's Order referring the case to family financial settlement which provided that the conference was to be conducted in accordance with the Rules for the Family Financial Settlement Program.

Specifically, the *Mediation Agreement* provided for the court-appointed family financial mediator: 1) to charge a \$150.00 administrative fee; 2) to be reimbursed for any costs he incurs in quashing a subpoena served on him by one of the parties; 3) to give to the parties the “right” to discontinue the mediation at any time; 4) to freely express his opinions on the parties’ respective legal positions and to simultaneously serve as both their mediator and neutral evaluator; and 5) to discuss information disclosed in mediation with others, provided the parties give him written permission to do so. All the above provisions would modify, if not violate, existing provisions of the program rules or Standards.

The Commission also notes that the *Agreement* in question provides that while the mediator will explain the mediation process to the parties at the beginning of the conference, he will not normally permit the attorneys to make opening statements. He suggests that, in his experience, such statements contribute to a hostile atmosphere. Rather than opening statements, the mediator indicates that he will ask the parties and their attorneys questions about the issues they wish to address. While this is not a modification of the Rules *per se*, the Commission believes this language raises a practice issue. The opening session is designed to serve to two purposes. First, it gives the mediator an opportunity to explain the mediation process and the role of the mediator to the parties and their lawyers. Second, it give the parties the opportunity to sit down together and, perhaps for the first time, hear one another’s perspective on the facts and legal issues in dispute.

FFS Rule 6.A.(1) clearly states that the mediator is in control of the conference. A mediator has latitude, consistent with rules and standards, to conduct the proceeding as he or she sees fit. However, the Commission suggests that it may be important to the attorneys and parties to have an opportunity to address one another directly and to give each other their perspective on the dispute. This contributes to the sense that they have had an opportunity to state their case in their own terms and to heard by the other side and the mediator. Simply answering the mediator’s questions, may not permit a party the same opportunity to present the full picture as he or she sees it or to emphasize the issues and points that party feels are most important to them.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 07-11**

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

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

Concern Raised

In March of 2004, mediator conducted a superior court mediated settlement conference and helped the parties reach an agreement in a dispute over the availability and location of certain real property. Although no written agreement was drafted at the conclusion of the initial conference, the mediator filed a Report of Mediator with the court immediately after the settlement conference, reporting that the parties had reached an agreement and that the matter was fully resolved. However, during their mediated settlement conference, the parties agreed that immediately following their conference, they would travel to the site of their dispute to conduct a visual inspection of the property in question to ensure that what they had agreed to was a workable solution and to agree on any remaining details. The mediator did not accompany the parties to the site nor did he follow up with them after the site visit to ensure that they had reached a full agreement and that it was reduced to writing and signed. Some time later, the defendant sought to change the terms of the oral agreement. The plaintiff became angry, disavowed the agreement in full and sought a trial of the matter. The judge refused the plaintiff's request for a trial, telling her that the mediator had reported the matter settled. The plaintiff eventually agreed to the terms reached at the initial conference in order to avoid having the judge dismiss her case with prejudice. The defendant contacted the Commission to inquire about her mediator's conduct.

Advisory Opinion

The mediator was required by Mediated Settlement Conference Rule 4.A.(2) and Rule 4.C. (Rules effective March 4, 2006) to ensure that the agreement reached in mediated settlement was reduced to writing and signed. N.C.G. S. § 7A-38.1(*l*) expressly provides that agreements must be reduced to writing and signed to be enforceable. Oral agreements are not only not enforceable, but likely to lead to the situation that occurred here, *i.e.*, one of the parties equivocates, tempers fray and the

parties return to court. The mediator seriously erred in failing to require that the agreement be reduced to writing and violated program rules. If there were still unanswered questions at the end of the initial session, the mediator should have recessed the conference, reconvened it at the site location and proceeded to help the parties sort out any remaining details necessary to ensure a full agreement. The mediator should then have taken steps to reduce the agreement to writing or to had one of the attorneys do so.

One of the parties to the agreement was an association and member approval of the agreement was needed. The need for such approval does not obviate the mediator's responsibility to ensure that the agreement is reduced to writing at the conclusion of the conference. A clause inserted in the agreement and providing that the agreement is contingent on the congregation's approval would have resolved that issue.

Not only did the mediator fail in not requiring a signed writing, he should not have reported to the court that the matter was settled when, in fact, absent a writing, it was not. Judges rely on the reports of their mediators and do not want to undermine the mediator or the program by failing to uphold agreements that are reached in mediation. It is imperative that mediators take their case management responsibilities seriously. Reports of Mediator should not only be filed timely, but be both fully and accurately completed. To do otherwise, can compromise the integrity of both the mediator and the program, frustrate the court, and potentially harm parties who may find their rights compromised.

The mediator also filed his Report of Mediator (AOC-CV-813) with the court using an outdated copy of the form. Mediators have a responsibility to ensure that they are referring to current program rules and using current program forms when they conduct their mediations. Program forms and rules are posted on the Commission's web site or are available through its office.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 06-10**

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

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

Concern Raised

Certified superior court mediator contacted the Commission about a matter that arose at a mediation in which he was representing the defendant. The caller reported that he had arrived at the mediation with his paralegal. He explained that it was a complicated case and that he needed support staff there to assist him in keeping the paperwork organized. The plaintiff’s attorney objected to the presence of the paralegal. The mediator allowed the paralegal to attend. Later, the caller was involved in another mediation involving the same opposing counsel. When the caller arrived for this mediation with his paralegal, the plaintiff’s attorney again objected to the paralegal’s presence. The caller asks the Commission to clarify whether his paralegal may attend.

Advisory Opinion

Mediated Settlement Conference Rule 4.A.(1) addresses attendance at the conference. The Rule provides that the following persons shall attend: individual parties or their representatives, if the party is not a natural person or a governmental entity; a representative of any governmental entity that is a party; insurance company representatives; and at least one counsel of record for each party or participant. The Rule provides that these persons shall attend, but does not limit attendance only to these individuals. MSC Rule 6.A.(1) provides that the mediator shall at all times be in control of the conference and the procedures to be followed.

It is within a mediator’s discretion, to permit individuals other than those specified in Rule 4.A.(1) to attend and participate in a mediated settlement conference. If an opposing counsel or party objects to the inclusion of an individual, it is the mediator’s responsibility to resolve the matter prior to commencing the mediation of the case. The

mediator should try and mediate the matter of attendance first, but if the parties cannot reach an agreement, the mediator shall make a decision pursuant to Rule 6.A.(1).

In the event that the conduct of any such individual that the parties or the mediator have agreed to seat becomes counter-productive, the mediator has the discretion under Rule 6.A.(1) to exclude the individual from attending further.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 06-09**

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

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

Concern Raised

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

Advisory Opinion

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

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

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

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 05-08**

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

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

Concern Raised

Mediator asks the Commission whether he is obligated under program rules to schedule the mediated settlement conference. He notes that there is a pattern and practice in his judicial district of the plaintiff taking responsibility for scheduling the conference.

Advisory Opinion

The operating rules for both the Mediated Settlement Conference and Family Financial Settlement Programs make it clear that it is the mediator’s responsibility, and not the parties’, to schedule mediated settlement conferences in cases in which they have been either appointed or chosen as the mediator.

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

It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court’s order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

For purposes of the Family Financial Settlement Program, Rule 6.B.(5) reads almost identically.

There are two reasons why the Supreme Court placed the responsibility for scheduling

on the mediator. First, the General Assembly intended for the mediated settlement conference programs to operate with minimal administration on the part of court personnel and with no appropriation of tax dollars. Thus, the mediated settlement conference program uses professionals who are paid directly by the parties for their services as mediators and for their administrative services in scheduling mediations and reporting the results to the court. In accepting cases ordered to mediation by the court, a mediator agrees both to serve as a case manager for the court and as a facilitator of negotiations between the parties at the settlement conference.

Secondly, from a practical standpoint, the mediator, and not the parties, is in the best position to ensure that cases are scheduled timely. The parties themselves may not be motivated to hold their mediation within the time limits set by the court. In addition, *pro se* parties may have little or no awareness of program rules or the mediation process. Therefore, responsibility for the administration and scheduling of the settlement conference was placed on the mediator, not the parties. Recent rule changes emphasize this administrative duty of mediators by requiring that they file reports even when the parties settle their case prior to mediation.

The Commission has learned that there is a pattern and practice developing in which mediators defer to the parties in matters of scheduling. We can imagine instances in which the parties schedule mediation and do not need the assistance or prompting of a mediator to comply with the directives of the court. However, ultimate responsibility for scheduling rests with the mediator.

A mediator who fails to assume responsibility for scheduling his or her conference within the deadlines set out by the court fails to fulfill one of his/her major obligations as a mediator. As such, s/he may be subject to discipline by the courts that appoint and supervise him/her and by the Commission that is charged with regulating the conduct of mediators as set out in the Standards of Conduct and the Rules of the Supreme Court.

A mediator's obligations under the Rules of the Supreme Court and the Standards of Conduct are (1) to facilitate the parties' negotiations in a mediated settlement conference and (2) to schedule that conference and report its results to the court in a timely fashion. Under these guidelines the mediator is as much a case manager as s/he is a negotiations facilitator.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 04-07**

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

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

Concern Raised

Mediator was ordered to conduct a family financial mediation. After the case was scheduled, one of the parties filed for bankruptcy. Mediator asks whether he should proceed to conduct the mediation.

Advisory Opinion

A filing of a petition for bankruptcy under section 301, 302, or 303 of Title 11 of the United States Code results in an automatic stay of **any judicial**, administrative, or other action or proceeding that was or could have been commenced against the debtor prior to the filing of the petition (see 11 U.S.C. 362(a)(i)). This stay may preclude the holding of the mediation conference ordered by the district court. After a mediator learns that a bankruptcy petition has been filed, it is the better practice for the mediator to notify the parties that the mediation cannot proceed until the stay has been lifted. If one or both of the parties wish to proceed with the mediation, a “Motion for Relief of Automatic Stay” or other relief may be sought through the bankruptcy court pursuant to 11 U.S.C. 362(d).

Subsection (b) lists exceptions to the stay including one for the establishment or modification of an order for alimony, maintenance, or support (see 11 U.S.C. 362(b)(2)(A)(ii)). However, even if the parties agree that only issues of alimony, maintenance, or support will be discussed in the mediation, the Commission believes it is still prudent and the better practice for the mediator to advise the parties to contact the bankruptcy court or the bankruptcy trustee, if one has been appointed, and request permission to proceed. Issues of equitable distribution are not covered by this exception.

Parties that seek to proceed with mediation after a bankruptcy petition is filed may face sanctions under 11 U.S.C. 362(h). Subsection (h) provides that any individual injured by any willful violation of the stay shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

Upon learning that a bankruptcy petition has been filed in the case, the mediator shall report to the court that the bankruptcy has been filed and shall request that the court clarify the duty of the mediator.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 04-06**

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

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

Concern Raised

Mediator conducted a mediation for a couple with marital problems. The couple reached a separation agreement in mediation and it was reduced to writing. However, the agreement was never signed by the parties and now they have decided to divorce. The wife has asked the mediator to represent her in the ensuing domestic litigation. Mediator asks if he may do so since the separation and divorce are separate actions.

Advisory Opinion

Standard VII of the Standards of Professional Conduct for Mediators provides that a lawyer or other professional shall not advise or represent either of the parties in future matters concerning the subject of a dispute mediated by the attorney or other professional. The words “subject of the dispute” should be interpreted broadly. It is true, as the mediator suggests, that separation, custody, equitable distribution, and divorce are all technically separate legal actions. However, though the actions are separate and have a particular focus, the overall subject remains constant – a disintegrating family with the same husband and wife, the same children, and the same property and debts. Each separate action is but merely one component of a comprehensive system designed for the purpose of ending a marriage and determining the rights and responsibilities of the spouses.

Marital couples who meet with a mediator have adverse as well as common interests in regards to their divorce. A mediator who works with them as a neutral and who then becomes the representative of only one calls into question the mediator’s neutrality and the confidentiality of the mediation process. This appearance of impropriety, if not impropriety itself, can undermine not only a party’s confidence in a mediator and the mediation process, but that of the larger public as well.

For the reasons given above, the mediator should decline to represent either party on any matter arising out of the marital relationship.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 03-05**

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

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

Concern Raised

The mediator conducted a mediated settlement conference in a worker’s compensation case. The mediation resulted in an impasse. The parties were at some distance apart at the time the conference concluded. Later, the attorney for the injured worker wrote to the mediator. In his letter, the attorney identifies certain information that the mediator relayed to him during the conference. He asks the mediator to reveal the name of the conference participant who gave that information to him during a caucus session, *i.e.*, to tell him whether the words were said by the representative or attorney of the employer or by the attorney for the insurance company. The mediator realizes that the attorney has not only misquoted him, but is seeking to characterize the words as a threat, or as tantamount to a threat. The mediator does not believe that any such threat was intended. The mediator suspects that the attorney wants the information not for the purpose of clarifying matters and re-opening settlement negotiations, but rather to find a basis for a bad faith action, *i.e.*, the mediator believes that the attorney will try to argue that his client was being threatened with loss of her company provided health insurance if she does not settle in a way that satisfies the employer. The letter raises two issues for the mediator:

- 1) The attorney has not accurately reported what the mediator told him at the conference and attributed an intent that, the mediator believes, was not present. Can the mediator clarify both what was said and the spirit in which the words were offered?
- 2) Can the mediator identify the participant who originally gave the information to him provided that he first receives permission from the participant to make the disclosure?

Advisory Opinion

It is not unusual for parties to contact a mediator following an impasse and seek some clarification or other assistance and a mediator may respond. Through such *ex parte* conversations, the Commission believes that mediators can sometimes play an important

role in reviving or furthering settlement discussions. While mediators are not required or obligated to provide additional assistance or information once a case has impassed, they may do so if they believe it will assist the parties and lead to further settlement discussions and there is no violation of confidentiality. If, as in this case, the mediator believes that the information is being sought for some purpose other than furthering negotiations, the mediator may simply determine that nothing can be gained by further discussions with the party and simply not respond to the inquiry.

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

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

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 03-04**

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

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

Concern Raised

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

Advisory Opinion

There is no requirement in the statutes, program rules or Standards of Conduct that mediators retain their files. File retention is a matter that should be in the discretion of the individual mediator. Mediators should remember that they have a duty to ensure the confidentiality of the mediation process. A mediator may rely upon the parties to retain a copy of the settlement agreement in their files, instead of the mediator retaining a copy.

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 01-03**

(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
Opinion Number 00-02**

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

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

Concern Raised

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

Advisory Opinion

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

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

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

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

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 99-01**

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

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

Concern Raised

A certified superior court mediator describes the following situation and seeks a formal advisory opinion as to his responsibilities:

"Mediator M has been selected or appointed to mediate a case pending in Superior Court. Shortly before the scheduled mediation of that case, Mediator M receives a telephone conference call from Attorney P, who represents the plaintiff in the case, and Attorney D, who represents the defendant. Mediator M is informed that Attorney D has informed Attorney P that the defendant's liability insurance company will not increase its last offer of settlement at mediation. Attorney D so informed Attorney P in order to avoid unnecessary time and expense to both parties in mediating the case. However, Attorney D refuses to move to dispense with mediation. Attorney D believes that the Court will either deny the motion and/or become hostile to Attorney D and/or Attorney's D's client as a result of the motion. Attorney D understands his party's obligation to mediate and would rather mediate than file a motion to dispense with mediation. Attorney P informs Mediator M that he does not want to incur the time and expense of mediation or the time and expense of moving to dispense with mediation if the defendant has a closed mind. Attorney P requests that Mediator M impasse the mediation as a result of the parties' conference call. What should Mediator M do?

Advisory Opinion

The Commission advises Mediator M that, in the situation described above, he should proceed to schedule and to conduct a mediated settlement conference in this case.

NC Gen. Stat §7A-38.1, the enabling legislation for the Mediated Settlement Conference Program, provides that the purpose of the statute is to require parties to superior court civil actions and their attorneys to attend pretrial, mediated settlement conferences with the objective of voluntarily settling their disputes. Subsection (b) defines the mediator as a neutral who acts to encourage and to facilitate resolution of the action. Once a Senior Resident Superior Court Judge has issued an order requiring a conference to be held,

Mediated Settlement Conference Rule 6.B.(5) provides that it is the mediator's duty to schedule the conference and to conduct it prior to the conference completion deadline set out in the court's order. MSC Rule 4 provides that all parties to the action, insurance company representatives, and attorneys shall physically attend the conference, unless their presence is excused or modified by court order or agreement of all parties and the mediator.

For the mediator to report an impasse as a result of the conference call described above would thwart the intent of the statute and the Mediated Settlement Conference Rules which provide that the parties are to assemble and the mediator to provide for them a structured opportunity to discuss and to attempt to settle their case. In the scenario described above, neither the individual parties nor any insurance company representative participated in the discussion and there was no substantive discussion of the case or any attempt made to generate settlement options. The conversation described above cannot be characterized as a mediated settlement conference. The mediator is under a duty to schedule and to conduct a conference and should proceed to do so.