

NORTH CAROLINA BAR ASSOCIATION DISPUTE RESOLUTION SECTION
TASK FORCE ON MEDIATION AND THE PRACTICE OF LAW

GUIDELINES FOR THE ETHICAL PRACTICE OF MEDIATION AND
TO PREVENT THE UNAUTHORIZED PRACTICE OF LAW

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INTRODUCTION

The use of mediation has continued to expand across North Carolina during the 1990's and with this use, the practice of mediation can intersect with the practice of law. As a result, the North Carolina Bar Association Dispute Resolution Section Council created a Task Force to review current mediation practices and develop guidelines for use by mediators to promote the ethical practice of mediation and to prevent the unauthorized practice of law.

THE PRACTICE OF MEDIATION IN NORTH CAROLINA

Mediation now spans the State of North Carolina in a broad range of programs. Many of these mediation programs are court based or court sponsored and others are based on federal authority, however, our State also has a rich history of community mediation centers. In fact, our State legislature has an established history of authorizing mediation conducted by both attorney and non-attorney mediators in a variety of settings. Thus, both attorney and non-attorney mediators make up the mediator population in North Carolina.

See Appendix A for a survey of legislatively authorized mediation programs and associated standards for mediators in North Carolina.

See Appendix B for a survey of independently established mediation programs and associated standards for mediators in North Carolina.

MEDIATION DEFINED

Given the broad practice of mediation in North Carolina, the term "mediation" is somewhat difficult to define. However, the Dispute Resolution Commission (hereinafter "DRC"), which serves as the governing body for North Carolina's Superior Court mediation program (see Appendix A), has adopted Standards of Professional Conduct which define mediation as follows:

Mediation is a private and consensual process in which an impartial person, a mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding among them. In mediation, the primary responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives. A mediator does not render decisions on the issues in dispute.

Preamble of the Standards of Professional Conduct adopted by the Dispute Resolution Commission in May 1996.

As noted above, mediation is practiced in North Carolina by both attorney and non-attorney mediators. (An attorney mediator is a mediator who is also an active member of the North Carolina State Bar.)

ETHICAL PRACTICES GOVERNANCE

As noted above, the DRC has adopted Standards of Professional Conduct which govern mediation practices for "Certified Mediators." Certified Mediators are mediators who have met requirements set by the DRC to conduct mediations under the auspices of specific state sponsored programs including, among others, the Superior Court and Farm Mediation programs. Other state-sponsored mediation programs such as the Industrial Commission and Office of Administrative Hearings programs have developed mediator certification which includes the DRC Standards as well as specific program requirements. Thus, all Certified Mediators are bound by the DRC Standards. In addition, non-certified mediators, when mediating in programs that apply the DRC Standards may also be bound by the same DRC Standards. Presumably the DRC Standards would supersede any other mediator standards that might also be in effect for a given mediator.

Mediators conducting sessions beyond the bounds of any program governed by the DRC, are bound by a range of professional standards. These include standards for Practitioner Members of the Academy of Family Mediators, the North Carolina Association of Professional Family Mediators, the Mediation Network of North Carolina, and standards developed by local community mediation centers. In addition, the AOC child custody mediation programs have adopted their own "Standards of Conduct" for mediators. It is also likely that some mediation is conducted where the mediator is not governed by any applicable standard.

UNAUTHORIZED PRACTICE OF LAW GOVERNANCE

The North Carolina State Bar provides oversight in this area pursuant to statute (GS 84-37). The Consumer Protection Committee of the State Bar serves to "inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law" (GS 84-37(a)). The Committee's authority is civil in nature and it may also offer advisory opinions regarding conduct that may constitute the unauthorized practice of law. The unauthorized practice of law is a misdemeanor (GS 84-8). Unauthorized practice generally refers to acts and services reserved for licensed legal practitioners that are carried out by non-licensed persons. The practice of law is generally defined in GS 84-2.1 as "to advise or give opinion upon the legal rights of any person firm or corporation."

GUIDELINES

A MEDIATOR SHALL NOT GIVE LEGAL ADVICE.

The practice of law can be practically defined as taking the facts of a particular case, applying the governing law and then giving advice based on these considerations. In the mediation context, a non-attorney mediator who takes the facts of a particular case, applies these facts to the law of the matter and advises a participant to the mediation as to this analysis, is committing the unauthorized practice of law.

In addition, the DRC Standards of Professional Conduct, provide some guidance regarding separating mediation from the provision of legal advice. Section VI, Separation of Mediation from Legal and Other Professional Advice, of the Standards provides: "A mediator shall limit himself solely to the role of mediator, and shall not give legal or other professional advice during the mediation."

However, the giving of legal information is generally not considered to be the unauthorized practice of law. Section VI of the DRC Standards continues with the following: "A mediator may, in areas where he is qualified by training and experience, raise questions regarding the information presented by the parties in the mediation session. However, the mediator shall not provide legal or other professional advice whether in response to statements or questions by the parties or otherwise."

It is generally thought that a non-attorney providing general printed legal information, such as the NCBA legal information brochures prepared by attorneys, whether in a mediation or elsewhere, is not the unauthorized practice of law. A mediator who applies general legal information to the

specific facts and gives advice based on these considerations at a mediation may be engaged in the unauthorized practice of law if the mediator is a not an attorney and may have engaged in the unethical practice of mediation if the mediator is an attorney. There are no bright lines.

A MEDIATOR SHOULD INFORM PARTIES TO A MEDIATION THAT THE MEDIATOR DOES NOT PROVIDE ADVICE REGARDING THE LEGAL EFFECT OF ANY MEMORANDA OF UNDERSTANDING OR OTHER SUMMARIES OF THEIR DISCUSSIONS PRODUCED IN THE MEDIATION SESSION.

THE MEDIATOR SHOULD DISCUSS WITH THE PARTIES WHETHER THE PARTIES SHOULD CONSULT INDEPENDENT COUNSEL BEFORE REACHING ANY AGREEMENT OR SIGNING ANY DOCUMENT PRODUCED IN THE MEDIATION SESSION.

One area of particular concern with respect to unauthorized practice of law issues rests in the drafting of a "Memorandum of Understanding" (hereinafter "MOU") or some other document based on the mediation. The MOU is a document that records the parties' mutually acceptable understanding of the issues discussed. Since the mediator should not offer advice as to the legal effect of an MOU and since there are no bright lines, the following guidelines are recommended for the good practice of mediation and to protect non-attorney mediators from allegations of the unauthorized practice of law:

1. The mediator should inform parties to a mediation that the mediator does not provide legal advice.
2. The mediator should encourage parties to consult independent counsel before creating any document the parties intend to be legally binding.
3. If the parties to a mediation wish to sign any memoranda of understanding or other summaries of their discussion, the mediator should offer no opinion regarding the legal effect of any such document.
4. If the parties choose to sign a memoranda of understanding or other summaries of the discussion, the mediator should not sign or initial any such document. If the mediator chooses or is required to sign or initial any memoranda of understanding or other summaries of the discussion, the mediator shall advise the parties in writing that the signature does not constitute an opinion regarding the content or legal effect of any such document.

Note: When a government authorized mediation program requires a written

and/or signed agreement at the conclusion of a mediation, then the mediator is not engaged in the unauthorized practice of law by assisting the parties in fulfilling the requirement for a written and/or signed agreement.

Elements to be considered for inclusion in an "Agreement to Mediate" and "Memorandum of Understanding" are set forth below. These sample documents and the language contained therein are intended to be a guide for practicing non-attorney mediators.

Note: Attorney mediators should look to the Model Rules of Professional Conduct as well as the DRC Standards for Mediators when considering the ethical use of MOU's or other documents at the mediation.

SAMPLE DOCUMENTS

See "Agreement to Mediate" and "Memorandum of Understanding" set forth below.

AGREEMENT TO MEDIATE

The language set forth below is intended to protect consumers from unethical mediation practices and from the unauthorized practice of law. It is not intended to be a complete listing of items that are generally included in an Agreement to Mediate such as addressing issues of confidentiality, disclosure of information and such. It is strongly recommended that mediators include language consistent with the following in an Agreement to Mediate.

It is understood that mediation is a private and consensual process in which an impartial person, the mediator, works with disputing parties to help them explore settlement, reconciliation, and understanding. In mediation, the responsibility for the resolution of a dispute rests with the parties.

The mediator's role is to facilitate communication and recognition among the parties and to encourage and assist the parties in deciding how and on what terms to resolve the issues in dispute. Among other things, a mediator assists the parties in identifying issues between them, reducing obstacles to communication, maximizing the exploration of alternatives and clarifying points of agreement. A mediator does not render decisions nor give legal advice on the issues in dispute.

Any Memorandum of Understanding generated by the mediation shall be a record of the parties' mutually acceptable understanding of the issues discussed. The mediator gives no opinion regarding the legal effect of this Agreement to Mediate, the Memorandum of Understanding, any summaries of the parties discussion or any resolution that is reached. Parties with any questions regarding their legal rights may wish to consult with an independent attorney.

It is understood and agreed that the mediator is a neutral, is not acting as an attorney for any party and shall not give legal advice. All participants are encouraged to consult with independent professionals including attorneys, accountants and others at any time during the mediation process.

Any "Agreement to Mediate" should include signature lines for participants, the mediator and the date.

MEMORANDUM OF UNDERSTANDING

The language set forth below is intended to protect consumers from unethical mediation practices and from the unauthorized practice of law. It is not intended to be a complete listing of items that are generally included in a Memorandum of Understanding. It is strongly recommended that mediators include language consistent with the following in a Memorandum of Understanding.

This Memorandum of Understanding is based on the parties' discussions in the mediation process and contains the parties mutually acceptable understanding of the issues discussed. The mediator gives no opinion regarding the legal effect of this Memorandum of Understanding or of any summaries of the parties discussion or any resolution that is reached. Parties with any questions regarding their legal rights may wish to consult with an independent attorney.

The parties mutually acceptable understanding of the issues discussed in mediation include the following:

APPENDIX A SURVEY OF LEGISLATIVELY AUTHORIZED NORTH CAROLINA MEDIATION PROGRAMS AND ASSOCIATED STANDARDS

1. Superior Court Mediated Settlement Conferences where the mediators are selected and paid for by the parties. The mediators include both attorney and non-attorney mediators who must be certified by the Dispute Resolution Commission to accept Court appointments.

The Dispute Resolution Commission (DRC) serves as the governing body for mediation in the Superior Court program and certifies both attorney and non-attorney mediators for Superior Court appointments. In May 1996, the DRC adopted Standards of Professional Conduct which govern DRC certified mediators and non-certified mediators while serving in legislatively authorized programs that have adopted said Standards of Professional Conduct.

Mediator Standards are for both attorney and non-attorney mediators and include a 40 hour mediation training approved by the DRC and observations of two sanctioned mediations. The mediator must also have at least 5 years experience either as an attorney or mediator. Non-attorney mediators must also complete a 6 hour course in legal terminology and civil procedure.

2. Mandatory Child Custody mediation is a program governed by the Administrative Office of the Courts and handles custody and visitation matters in District Court. The program employs mediators who have a mental health/social work background. The mediators in this program are primarily non-attorneys. The Administrative Office of the Courts provides training and oversight.

Mediator standards include a 40 hour Academy of Family Mediators (AFM) approved training program and a masters degree in human services. In addition, a mentoring program follows training and continuing education of 12 hours per year is required.

3. North Carolina Industrial Commission Mediation where the mediators include both attorney and non-attorneys who are paid for by the parties after being appointed by the Industrial Commission or selected by the parties with Industrial Commission approval. The mediators handle workers' compensation and state tort claims actions.

Mediator Standards include both the DRC certification noted above and additional education in the area of workers' compensation. Both attorney and non-attorney mediators who are certified by the DRC and meet the Industrial

Commission requirements are able to accept Industrial Commission mediation appointments. Non-certified mediators may be selected by the parties with Industrial Commission approval.

4. Office of Administrative Hearing Mediation where the mediators are selected and paid for by the parties. The mediators include both attorney and non-attorney mediators who are certified by the DRC and then eligible to accept OAH appointments.

Mediator Standards include the DRC certification as noted above.

5. Farm mediation program provides pre-lawsuit mediation between farmers and neighboring landowners with complaints about land use. The mediators are selected by and paid for by the parties.

Mediator Standards include the DRC certification as noted above.

6. Mediation between State Board and Charter Schools (SB 297)

7. Special Ed mediation (HB 1098)

8. Local School Board / County Commissioner budget dispute mediation program (SB 366)

9. Equitable Distribution Mediation Program

10. EEOC mediation programs provide mediation services for individuals with EEOC complaints. (DRC certified mediators)

11. Management and Accountability program for disputes between local boards and schools regarding school improvement plans.

APPENDIX B SURVEY OF INDEPENDENT MEDIATION PRACTICES

1. Community Mediation Centers in North Carolina are generally nonprofit organizations that provide a broad range of dispute resolution services with a focus on mediation. The mediators are usually community volunteers and include both attorney and non-attorney mediators (most are non-attorneys). Centers handle mediations in many diverse settings including District Court matters, business disputes, family issues including divorce and custody, schools and other community programs. There are currently 26 centers located across the State which are also part of a network, the Mediation Network of North Carolina. The Network provides local assistance and coordination of resources between network members and sets minimum training standards for community mediators.

2. Comprehensive family and divorce mediation services are provided by both attorney and non-attorney mediators. Such services may be part of a private mediation practice, a community mediation center or law practice.

Many of these mediators are members of The North Carolina Association of Professional Family Mediators (hereinafter the Association) which is an organization composed of family/divorce mediators who mediate custody/visitation, child and spousal support, and property distribution issues related to marital separation. The Association provides opportunities for family/divorce mediator professional development, continuing education, professional networking and resource sharing. Association members include attorney and non-attorney mediators who have private practices or are employed by agencies or community mediation centers. Nearly all Association members are also members of the Academy of Family Mediators (AFM) or the Association of Family and Conciliation Courts (AFCC). The AFM and AFCC are national multi-disciplinary organizations that have established minimum training requirements, continuing education and standards of practice for family/divorce mediators.

3. Better Business Bureau Mediation where individual mediator practitioners, including both attorney and non-attorney mediators provide mediation services in a range of business settings.

4. American Arbitration Association is a private nonprofit provider of dispute resolution services. The AAA maintains and trains panels of neutrals.

5. Private Adjudication Center is a private nonprofit provider of dispute resolution services. The PAC maintains and trains panels of neutrals.

6. Private Practitioners include both attorney and non-attorney mediators. Generally mediation services are provided on a fee for service basis by agreement of the participants. These mediators mediate disputes in many of the legislatively authorized programs noted above as well as within nonprofit and for profit organizations, academic settings including colleges and universities, church denominations, human service settings, and multi-party disputes within or between organizations and/or communities. Private practitioners have diverse backgrounds including, among others, organizational development, education, academia, counseling, business and law. Private practitioners generally follow one or more standards of mediator conduct including such standards as promulgated by the DRC, the AFM and the Society for Professionals in Dispute Resolution.

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