The Intermediary

A Bridge between the Dispute Resolution Commission and N.C.'s Certified Mediators

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From The Chair

by

J. Anderson "Andy" Little

The Commission recently published its Annual Report for Fiscal Year 2002/03. It is the eighth such report published by this body. Copies of the Report were distributed to Senior Resident Superior Court and Chief District Court Judges, NCBA officials, Commission appointing authorities and many others. I invite all certified mediators to visit the Commission's web site at www.ncdrc.org to view both the Report and copies of annual caseload statistics for the Mediated Settlement Conference and Family Financial Settlement Programs. (Click on "Dispute Resolution Commission" from the left-hand menu, then click on "Annual Report".) The Report will provide readers with information about what the Commission accomplished this past fiscal year and set forth some of our plans for the current year. If you have suggestions for other issues we should explore or concerns you would like us to address, please let me know. Many of the policy suggestions and rule revisions the Commission has proposed over the years started with comments from the field. The Commission has and will continue to look to its certified mediators for ideas and inspiration.

I want to thank those of you who returned your Continuing Mediator Education Report Forms along with your 2003/04 renewal materials and those who did not return the form then, but responded to our subsequent request for CME information. Many of you reported CME hours far in excess of the six we requested every two years. The Commission appreciates your dedication and commends you on your professionalism. If you have still not completed and returned the Report, I ask that you do so. The Commission believes that six hours of continuing education every two years is a modest request and we hope that all or nearly all of those who are certified in this State will comply.

The Commission recently adopted a new Advisory Opinion #06-04. The Opinion is printed in full on pages 3-4 of this edition of *The Intermediary*. In a nutshell, the mediator who requested the Opinion explained that he conducted a mediation for a couple experiencing marital difficulties. The mediation resulted in a separation agreement that was never signed. Now, the mediator asks whether he may represent the husband in the ensuing domestic litigation since, as he reasons, the separation and divorce are separate actions. The Advisory Opinion makes it clear that such representation would be a violation of Standard VII of the Standards of Professional Conduct for Mediators.

The Commission has had to discipline one mediator for violating Standard VII under circumstances very similar to those described in the Advisory Opinion. A hearing was recently conducted in another instance where the mediator sought to simultaneously conduct a family financial mediation and provide legal representation to both parties. Such conduct was found to be a violation of Standard VI which provides that a mediator

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The Commission invites its readers to comment on any articles presented in *The Intermediary* or to write articles for inclusion. Send your thoughts to the editor, Leslie Ratliff, at leslie.ratliff@nccourts.org. We look forward to hearing from you!

should limit him/herself solely to the role of mediator and not give legal or other professional advice during mediation. The Commission is very concerned about such conduct and believes it not only harms the parties, but will discredit our court's mediated settlement programs in the eyes of the public.

The Commission is very proud of the overall conduct of North Carolina mediators. Over the seven years since its inception, the Commission has only rarely had to discipline a mediator. The Commission has functioned largely as a proactive regulator focusing on educating and informing rather than punishing. In that vein, I ask all mediators to periodically review the Standards, and especially Standards VI and VII, and be ever mindful of their ethical obligations.

The Dispute Resolution Section of the NC Bar Association is holding its annual meeting on Friday, March 19, at the Bar Center in Cary. I hope you will make plans to attend. See you there. ♦

Commission Adopts Advisory Opinions

The Commission has recently adopted two Advisory Opinions. The Opinions are set out in full below.

All Opinions adopted by the Commission to date can be accessed at www.ncdrc.org. Click on "'Standards of Conduct" and then click on "Advisory Opinions". The Commission's policy on Advisory Opinions can also be accessed on the web site. Click on "Advisory Opinions Policy".

Mediators needing immediate advice may contact the Commission's office and request guidance from staff. Informal advice from staff does not carry the full weight of the Commission, but all such calls and the advice given are logged in for the protection of the mediator in the event a complaint is later filed. Commission members will be advised that the mediator had questions or concerns and solicited help from staff.

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 05-03

(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 06-04

(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.

CME Opportunities Abound

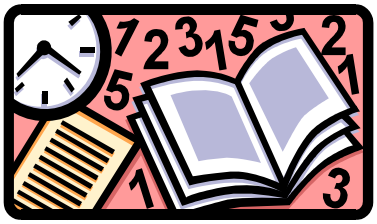
Mediators interested in obtaining Continuing Mediator Education (CME) hours do not have to look far. Some important opportunities are coming up in the near future:

The North Carolina Association of Professional Family Mediators is hosting an afternoon with nationally known mediator, author, trainer, and consultant Bernie Mayer on March 16, 2004, from 1:00-5:00 p.m. at the NC Academy of Trial Lawyers in Raleigh. Mr. Mayer will present a workshop on impasse – its causes and what a mediator can do to help move the process forward. Cost of the program in $50.00. For more information contact Michael Haswell at (919) 828-4011.

The NCBA Dispute Resolution Section will hold its annual meeting and continuing education program, "Successful Mediations: The Right Ingredients" on March 19, 2004, at the Bar Center in Cary. Program organizers are Lynn Gullick and Karen Britt Peeler. For more information, please call 1-800-228-3402 or visit www.ncbar.org/cle/brochure/827.pdf. There will be five video replays of this program.

Carolina Dispute Settlement Services is offering Collaborative Law Training on April 22-April 24, 2004, in Raleigh. There will be two days of basic training and one day of advanced training. The cost is $450.00. For more information, please contact 919-755-4646.

The NCBA is sponsoring "Worker's Compensation for Mediators: Training For The Industrial Commission Neutral" on June 3, 2004, at the Bar Center in Cary. Program organizers are Commission member Sherman Lee Criner and LeAnn Nease Brown. For more information, please 1-800-228-3402.



Upcoming Mediation Training

SUPERIOR COURT TRAINING

Beason & Ellis Conflict Resolution, LLC: 40-hour superior court mediator training course, April 28-May 2, 2004, in Wilmington, NC. For more information or to register, call (919) 419-9979. Web site: www.beasonellis.com.

Carolina Dispute Settlement Services: 40-hour superior court mediator training course, June 7-11, 2004, in Raleigh, NC. For more information or to register, contact Diann Seigle at (919) 755-4646, Ext.25, or (800) 960-3062. Web site: www.notrials.com.

Intercede Mediation/ADR Services: 40-hour superior court mediator training course, April 1-5, 2004, in Charlotte, NC. (A Mecklenburg County Bar, 26th Judicial District CLE Course. For information, call (704) 375-8624 or go to www.meckbar.org.) Web site: www.intercedemediation.com.

Mediation, Inc: 40-hour superior court mediator training course, April 28-May 2, 2004, in Raleigh, NC. For more information or to register, contact Thorns Craven at (336) 777-1477 or (800) 233-5848 (NC only). Web site: www.mediationincnc.com.

FAMILY FINANCIAL TRAINING

Atlanta Divorce Mediators, Inc: 40-hour family mediation training course, March 25-30, 2004, in Knoxville, TN; April 15-19, 2004, in Atlanta, GA; May 20-24, 2004, in Asheville, NC; June 3-7, 2004, in Atlanta, GA. For more information, contact Dr. Elizabeth Manley at (800) 862-1425. Web site: www.mediationtraining.net.

Mediation, Inc: 40-hour family mediation training course, March 3-7, 2004, in Chapel Hill, NC. See above for contact information.

ADDITIONAL TRAINING OPPORTUNITIES

Atlanta Divorce Mediators, Inc: *Complex issues in divorce mediation cases*, March 13, in Atlanta, GA; *Advanced Training in Child Issues: Mediating Parenting Plans,* March 12, 2004, in Atlanta, GA. *16-Hour Advanced Divorce Practicum,* April 22-23, 2004, in Atlanta, GA. See above for contact information.

For additional training opportunities see page 4 of this edition of The Intermediary.

Commission Recommends Revising Scheduling Priorities Rule

At its February meeting, the Dispute Resolution Commission voted to recommend to the Supreme Court that it consider revising Rule 3.1 of the Guidelines for Resolving Scheduling Conflicts to take into account the growth of mediated settlement programs in our State. The Commission's recommendation was prompted by calls it has received over time from mediators frustrated by last minutes cancellations of mediated settlement conferences due to conflicts with court proceedings.

Rule 3.1 sets out a framework for determining scheduling priorities, but does not factor mediated settlement into the mix.

More than 11,000 cases were ordered to superior court mediation last year with just under 6,650 actual mediations held. In addition to the superior court program, family financial mediation is now available in 25 district court districts. Given the growth in mediated settlement over the past decade and the contributions these programs are making to our justice delivery system, the Commission believed it was time to ask the Court to assess where mediated settlement should fall on the list of scheduling priorities.

The Commission is recommending that only superior or district court trials, hearings upon dispositive motions, and hearings upon motions scheduled for counties with less than one court session per month take precedence over scheduled mediated settlement conferences.

The Commission's recommendation was forwarded to the Court at the end of February.

Court of Appeals Mediation Program Continued

The Supreme Court has approved continuation of the Appellate Mediation Program which has been operating as a pilot in the Court of Appeals for the past 18 months. The Commission congratulates the Court of Appeals on this successful program. *The Intermediary* will have more on this important effort in the next edition.

Pushing The Envelope – "Collab-Arb"

Anyone who lives in or has driven through the Triangle area lately could not have helped but notice several full-size billboards towering over roads and highways. The billboards suggest to couples experiencing marital problems that they should consider collaborative divorce. The stark, black and white ads are sponsored by a prominent family law firm. A quick Google search under "Collaborative Law — North Carolina" instantly reveals that the billboard's sponsor is not the only law firm offering collaborative law services in this State.

In the attached article, Diann Seigle of Carolina Dispute Settlement Services (CDSS) and Mark Springfield of Carolina Collaborative Law Group (CCLG), push the envelope a little further, suggesting the possibility of combining collaborative law and arbitration to create a hybrid process, "Collab-Arb". CDSS and CCLG have sponsored collaborative law trainings and encouraged family lawyers to make the process available to their clients.

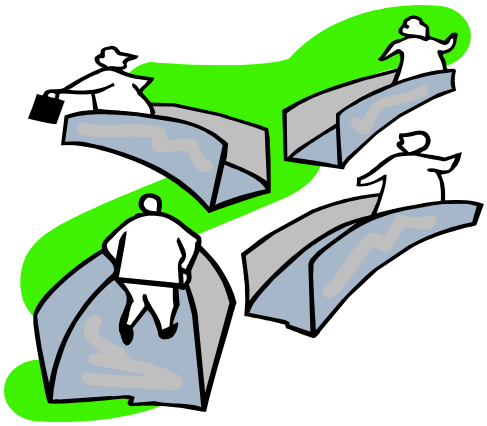
Collaborative Law and "Collab-Arb"

by

Diann Seigle and Mark Springfield

A relatively new form of Alternative Dispute Resolution called collaborative law is generating excitement among many attorney-mediators and family-law practitioners in North Carolina. Having had training in mediation and collaborative law and using many of the skills associated with good mediators, so-called "collaborative family lawyers" are offering an alternative to adversarial litigation in matters such as child custody, alimony, and equitable distribution. The heart of collaborative law is the voluntary disqualification of the attorneys from going to court. Freed from the competitive pressure of the adversarial system and protected from having honest disclosures used against them, the attorneys are able to help their clients have frank discussions and engage in problem-solving negotiations. Using a client-centered approach and supporting the parties in their difficult conversations, collaborative attorneys help their clients reach a resolution that preserves the relationships that must survive the conflict around separation and divorce. If settlement negotiations fail, then new counsel must be engaged to pursue a decision in court.

Although collaborative law has been around for more than a decade in some parts of the country, it is still relatively new to North Carolina. Introduced in 1998 as a pilot study in Raleigh, it was quickly taken up by the bar and a committee was formed to study it. Last year a statute was passed specifically recognizing the collaborative law process, sanctioning the agreement of the attorneys and their clients to disqualify the attorneys from litigation, and establishing procedures for staying litigation to allow the collaborative process to proceed when the parties so agree. (House Bill 1126)



In light of collaborative law's kinship to mediation, it is not surprising that some of the same issues that have arisen over the last two decades in the mediation field are surfacing in conversations among collaborative law practitioners. One such issue is the appropriateness of attempting to combine the non-adversarial process of collaborative law with arbitration, a more adversarial process.

A similar debate arose in the mediation field when the process called Med-Arb began to be popularized. The concept of combining collaborative law and arbitration contains the same tension as in the combination of mediation and arbitration. The collaborative law process has as a fundamental tenant self-determination by the parties in a non-adversarial context. Arbitration, on the other hand, is fundamentally an adversarial process that relies on a third party to determine the outcome.

Med-Arb is now a widely accepted ADR mechanism in which the disputing parties and a third party neutral (mediator) attempt to reach a voluntary agreement through mediation, and move to arbitration by the same third party neutral on any issues that cannot be resolved by the agreement of the parties. Many mediators continue to be uncomfortable with this marriage of different roles and will not agree to do

Med-Arb. Other mediators are comfortable with handling the two roles and believe that the benefits of finality outweigh any detraction from the mediation process.

Collab-Arb is in theory the process in which disputing parties represented by their attorneys attempt to reach a voluntary agreement through the collaborative law process. If they are unsuccessful in reaching an agreement on all issues, the parties move to an arbitration hearing before a third-party arbitrator with representation by the same attorneys who have been participating in the collaborative law process.

The question becomes to what extent the collaborative process is hampered where there is a possibility that the process will move to the more adversarial process of arbitration, and whether this concern is overridden by the benefits of introducing certainty into the process that all issues will be resolved.

The Debate Pro and Con

The objections to combining collaborative law and arbitration generally arise out of the concern that arbitration is too similar to court. The purpose behind the disqualification of the attorneys from going to court in the collaborative process is to remove the collaborative process from the adversarial system. Empowering clients to resolve their own disputes can be hindered when the process may ultimately rely on lawyers to present evidence and argue legal issues to an arbitrator. Creating an environment for problem-solving negotiations can be hampered if there is a concern that honest disclosures about needs and interests will be used to support or undermine positions taken in a more adversarial proceeding. Collaborative lawyers also talk of the "paradigm-shift" that must take place in their thinking as they engage in helping clients negotiate without the threat of court as the primary negotiating tool. Including arbitration in the process may make it more difficult for the lawyers to completely shift into a collaborative mindset.

The arguments in favor of combining collaborative law and arbitration generally center on the desire for finality and the concern that the collaborative process will not always result in a resolution. When the parties "impasse" in a collaborative law process, the cost to the client can be significant because new counsel, unfamiliar with the situation, must be hired to institute court proceedings. There may also be an emotional cost, where a client has come to trust his or her collaborative attorney and now must establish a new relationship with a different attorney. Finally, some clients may be hesitant to agree to a collaborative process if there is no certainty that it will end in a resolution of the issues.

Suggestions for the Effective Use of Collab-Arb

It is important to recognize that arbitration is by nature a non-collaborative process and that the arbitration process should bend to the collaborative process and not vice-versa. The inclusion of arbitration in the process should never be used as a threat. Indeed, even where arbitration is included in the participation agreement to use collaborative law, the ability to invoke arbitration should not be allowed unilaterally. In other words, the decision to invoke the arbitration clause should be a mutual decision.

The selection of an arbitrator should include consideration of whether the arbitrator can render decisions in a way that will not polarize the couple attempting to collaborate. The arbitration process should be restricted to very limited and precise issues. The attorneys must work hard to devise ways of submitting the facts to the arbitrator to minimize conflict and polarization. Thus, for instance, the parties might agree to a joint statement of facts that would form the basis of the arbitrator's decision.

Experienced collaborative law practitioners find that the vast majority of collaborative cases are resolved by agreement of the parties. In those rare instances when the collaborative process stalls, a careful and thoughtful use of arbitration may succeed in completing the collaborative process without the disqualification of the attorneys. ♦♦♦

* Diann Seigle is a counselor, mediator, and DRC member. She serves as Executive Director of CDSS.

** Mark Springfield is a solo practitioner who restricts his practice to mediation and collaborative family law. He is the President of CCLG.

The Intermediary thanks Ms. Seigle and Mr. Springfield for their submission and encourages others to share their articles and thoughts.

DRC Annual Report Published

The Dispute Resolution Commission's annual report for FY 2002/03 can be viewed on the Commission's web site at www.ncdrc.org. "Click on Dispute Resolution Commission", then click on "Annual Report".

Mediated Settlement Conference Brochures

Family Financial Settlement Rule 6.B.(6) requires all mediators to supply parties or their attorneys with a copy of an informational brochure prior to mediation. Copies of the approved brochure are available through the Commission's office at no charge. The Commission also has available an informational brochure for superior court mediation.