Myths of Mediation – Three Dangerous Myths About NC Superior Court mediations

Originally published by *North Carolina Lawyer's Weekly* on May 24, 2016.
By Jonathan E. Buchan

A myth, according to my well-worn companion Webster's Ninth New Collegiate Dictionary, is "an unfounded and false notion." The thicket of rules and statutory provisions governing mediated settlement conferences in North Carolina Superior Court cases has given rise to a few dangerous myths that can trip up counsel and parties who don't deal with mediations regularly.

This mythology trap is especially true as to the provisions relating to the duties of the parties and their legal counsel regarding (1) the confidentiality of information exchanged during the mediation process, and (2) the admissibility of statements made and conduct occurring during the mediation process. Here's a handy primer on three key myths about superior court mediated settlement conferences and suggested solutions to the problems they raise.

Myth No. 1: All North Carolina mediations are governed by N.C.G.S. §7A-38.1 and the Rules Implementing Statewide Mediated Settlement Conferences ("Mediation Rules").

Fact: The provisions of N.C.G.S. §7A-38.1 and the Mediation Rules apply only to "court-ordered" mediations. (See, §7A-38.1(b)) Mediations may be "court-ordered" by a specific order entered by a senior resident superior court judge or by local rules specifically ordering all superior court civil cases in that district to be mediated. (See §7A-38.1(e))

Thus, pre-litigation mediated settlement conferences (and potentially some post-complaint "early litigation" mediated conferences) will not be covered by the provisions in the statute and rules. (Note that mediations in federal civil cases are subject to that district's local rules. For example, LCvR 16.3 of the Western District

of North Carolina provides that once a mediated settlement conference is ordered, its conduct shall be governed by the state court mediation rules, with minor modifications. The Eastern District and Middle District local rules make no reference to the state court statute and rules, but establish their own mediation procedures.)

Solution: Where a superior court mediated settlement conference has not yet been ordered specifically by the court or generally by local rule, the parties might consider stipulating in writing in advance that the mediation will be governed by the N.C. statute and the Mediation Rules. Otherwise, the provisions in the statute regarding the inadmissibility of statements and conduct during the mediation process will not apply. (For federal court cases, be sure to consult the local rules of that district.)

Myth No. 2: The "Vegas Rule" applies to court-ordered mediations: What happens in mediation stays in mediation, and the parties may not reveal or publicize their discussions on liability or settlement proposals or settlement amounts.

Fact: There is nothing in N.C.G.S. §7A-38.1 or the Mediation Rules that prevents parties or their counsel from revealing publicly what the other parties to the mediated settlement conference say about their cases or offer in settlement. Thus, if one party wants to leave the mediation at the end of the day and announce at a press conference that he turned down $5 million to settle his claim, nothing in the statute or Mediation Rules prevents that. (See, N.C. Dispute Resolution Commission Advisory Opinion No. 22 (2012)).

Solution: Even when N.C.G.S. §7A-38.1 and the Mediation Rules apply, parties who want to maintain the confidentiality of information discussed or revealed during the mediated settlement conference should enter into a written confidentiality agreement prior to the conference. Of course, the mediator is required by the Standards of Professional Conduct for Mediators, Rule III, not to disclose, directly or indirectly, to any nonparticipant any information communicated to the mediator by a participant within the mediation process (including pre-conference exchanges). There are limited exceptions to the mediator's requirement of confidentiality involving threats of harm to persons or property.

Myth No. 3: Nothing said or done by a party or its counsel during a mediated settlement conference can be admitted as evidence in a court proceeding.

Fact: If the mediated settlement conference is not one governed by N.C.G.S. §7A-38.1 and the Mediation Rules (for example, a pre-litigation mediated settlement conference), then the inadmissibility provisions of N.C.G.S. §7A-38.1(l) do **not** apply. Such settlement discussions will still be covered by the evidentiary restrictions found in N.C. R. Evid. 408 (or F. R. Civ. P. 408), but will not be subject to the stricter prohibitions of admissibility in N.C.G.S. §7A-38.1(l).
Even when the mediated settlement conference is one governed by N.C.G.S. §7A-38.1 and the Mediation Rules, counsel and their clients should be aware of the limits of the restrictions on admissibility found in the statute: "Evidence of statements made and conduct occurring during a mediated settlement conference" conducted under the statute "shall not be subject to discovery and shall be inadmissible in any proceeding **in the action or other civil actions on the same claim**." Thus, the statements and conduct could be admissible in criminal actions and in other civil actions based on different claims.

Note that, even where the statute and Mediation Rules govern, such evidence is admissible in proceedings for sanctions, in proceedings to enforce or rescind a settlement of the action, in disciplinary proceedings before the N.C. State Bar and in proceedings to enforce laws relating to juvenile or elder abuse. Finally, no evidence otherwise discoverable becomes inadmissible simply because it has been presented or discussed in a mediated settlement conference.

Solution: Determine in advance of the mediation whether it is one governed by N.C.G.S. §7A-38.1 and the Mediation Rules. If not, consider whether the parties would like to stipulate in writing that the mediation will be governed by the N.C. statute and Mediation Rules, thereby invoking the inadmissibility provisions of N.C.G.S. §7A-38.1. And, in any event, be aware of the limitations of the restrictions on admissibility under that statute. (See, N.C. Dispute Resolution Commission Advisory Opinion No. 29 (2014)).

Jon Buchan has been a North Carolina Dispute Resolution Commission certified Superior Court Mediator since 2007, and has served as mediator in a broad range of civil matters. He has also litigated civil cases in state and federal courts for over three decades ranging from commercial and banking disputes, to intellectual property matters, to First Amendment and defamation disputes, to product liability cases. Essex Richards' mediation team also includes partners Rob Blair and John Daniel. Rob Blair mediates family law cases including divorce, separation, and child custody, and John Daniel mediates commercial, small business, and real estate disputes.