

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 14 (2008)

(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.

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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.