

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 15 (2008)

(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.

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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.