

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 17 (2010)

(Adopted and Issued by the Commission on September 18, 2010)

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 Commission issued Advisory Opinion No. 15 (2008) on November 7, 2008. That Opinion provided that a mediator should not agree to serve as a fiduciary when such work came to him/her as a result of a mediation that s/he conducted. A mediator who transitions to the role of fiduciary the Opinion reasoned, creates the perception that s/he has, “...manipulated the mediation process or the parties with the ultimate goal of furthering his/her own interests at the expense of the parties.” Such a perception serves to discredit the mediator and the mediation process and, ultimately, the courts and Commission.

A mediator has now contacted the Commission and explained that he mediated a case some time ago which resulted in impasse. Recently, he was contacted by one of the lawyers involved in the case and asked whether he would be willing to serve as an arbitrator in the same matter. Mediator asked whether Advisory Opinion No. 15 (2008) precludes his serving as an arbitrator?

Advisory Opinion

Advisory Opinion No. 15 (2008) was narrowly drafted to address only situations where a mediator agrees to serve as a “fiduciary” in a matter that s/he has previously mediated. A fiduciary relationship is one that is founded on trust and confidence and the fiduciary has a responsibility to act primarily for the benefit of others. A fiduciary holds a position analogous to that of a trustee and the role gives rise to certain legal responsibilities and accountabilities. Often the relationship is of a long term nature and the fiduciary may derive substantial monetary benefit from his/her service.

Mediators and arbitrators serve as neutrals and not fiduciaries. Both mediators and arbitrators share the same immediate mission, *i.e.*, conducting a proceeding to resolve the dispute. A mediator conducts a conference with the goal of helping the parties work their disputes out themselves and an arbitrator holds a hearing and renders an award which decides the matter for the parties. Given that the immediate mission is the same, the public would not be likely to view the transition from mediator to arbitrator with the same skepticism that it would view the transition from mediator to fiduciary, where the roles and obligations are fundamentally different. Mediation and arbitration proceedings are also generally time and interaction limited. A fiduciary, on the other hand, may serve for a period of months or even years and his or her service may generate an income stream. From a historical and professional practice perspective, the concept of “med-arb”, where a mediator transitions to the role of arbitrator in instances where the parties are unable to reach an agreement in mediation, is an old and accepted method of dispute resolution.

While Advisory Opinion No. 15 (2008) does not preclude a mediator from later serving as an arbitrator in the same dispute, the Commission cautions those making such a transition to be careful in doing so. The mediator in this instance should contact all the parties prior to the arbitration and remind them that he served as their mediator and obtain their written consent to now arbitrate the matter. The mediator should also engage in appropriate self-reflection before agreeing to serve. S/He may have spent several hours with the parties during mediation. In that time, did s/he develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise her/ his neutrality? Did s/he learn any confidential information during a caucus session that s/he may not be able to exclude from his thought process and that may inappropriately affect her/his decision? If the mediator has any concerns about his ability to be fully neutral, s/he should not serve.