

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 20 (2011)

(Adopted and Issued by the Commission on September 9, 2011)

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

Attorney mediator mediated an agreement in a family financial case. The agreement was reached after hours and the attorney’s staff was no longer in the building. Since no one else was available to notarize the agreement and the mediator was a notary public, he proceeded to notarize the parties’ signatures on the agreement consistent with the requirements of N.C.G.S. § 50-20(d). Mediator has now had second thoughts and contacted the Commission and asked whether it was appropriate for him to notarize the agreement. He is concerned that he could be regarded as a beneficiary of the transaction since he was paid for his services in helping to mediate the agreement. Both parties were represented by counsel, who drafted the agreement.

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Inquiry #1 – May the attorney mediator notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(c)(6) provides that a notary shall not perform a notarial act when the, “...notary will receive directly from a transaction connected with the notarial act any commission, fee, advantage, right, title, interest, cash, property, or other consideration exceeding in value the fees specified in G.S. 10B-31, other than fees or other consideration paid for services rendered by a licensed attorney, a licensed real estate broker or salesperson, a motor vehicle dealer, or a banker.”

N.C.G.S. § 10B-60 charges the NC Secretary of State’s office with regulating notary conduct and enforcing the Notary Public Act, including the above provision. The Secretary of State’s Office has advised the Commission there is nothing that prohibits the attorney mediator from notarizing the agreement in the situation described above because he is not actually a beneficiary of the agreement itself, even though the agreement may provide for his compensation in conducting the conference. In essence, the mediator is

being compensated only for his service as a mediator and is not receiving some portion of the marital estate or otherwise benefitting from the underlying agreement.

Inquiry #2 – Could a certified, non-attorney mediator also notarize the agreement in the situation described above?

N.C.G.S. § 10B-20(k) provides that, “A notary public who is not an attorney licensed to practice law in this State is prohibited from rendering any service that constitutes the unauthorized practice of law. A non-attorney notary shall not assist another person in drafting, completing, selecting or understanding a record or transaction requiring a notarial act.” The Secretary of State’s office has advised the Commission that since the North Carolina State Bar has determined that serving as a mediator per se is not the practice of law, the above provision does not prohibit a non-attorney mediator from conducting mediations in North Carolina.

Since the parties in the situation described above were represented by counsel, who drafted the agreement, nothing should prohibit a non-attorney mediator from notarizing the parties’ signatures under the Secretary of State’s analysis set forth under Inquiry #1 above, *i.e.*, a non-attorney mediator would be no more a beneficiary than would an attorney mediator.