Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 21 (2012)

(Adopted and Issued by the Commission on January 27, 2012)

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

Mediator was court appointed to mediate a superior court case. The attorneys asked him to review some documents prior to and in preparation for the mediated settlement conference. Mediator asks whether he may charge for his time in reviewing these documents.

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Program Rules

Mediated Settlement Conference Program (MSC) Rule 7.Bprovides that: "…the parties shall compensate the mediator for mediation services…." The term "mediation services" is not defined in either the MSC Rules or the MSC Program's enabling legislation.

However, beginning with the drafting committee for the MSC Pilot Program in 1990-91 and continuing through present day discussions of the Commission, the term has referred to conversations and activities that further the mediation process, including reviewing documents and discussing the case with attorneys. For that reason, the drafting committee and Commission made recommendations to the North Carolina Supreme Court, and the Court decided, there would be no prohibition against *ex parte* conversations prior to the conference, although the requirement to disclose the fact of those consultations at the beginning of the conference was added in 1995 in the interest of promoting mediator impartiality.

The Commission considers the activities of reviewing documents and talking with attorneys to be "mediation services" and understands that mediators engage in those activities to become more conversant with the issues in dispute. (Note: When a mediator is court appointed, the term "mediation services" does not include fees associated with travel to or from the location of the conference, including fees for mileage, lodging or food expenses. When a mediator is party selected, the term "mediation services" may include charges for travel time, mileage, lodging,

food and other travel related expenses agreed upon between the parties and mediator in advance of the conference.)

Family Financial Settlement Rule 6.A(2) takes a different approach to the issue of pre-mediation private conversations. It provides that the mediator may not confer with the parties in advance of the mediation without the explicit consent of the parties. If that consent is sought and given, however, the answers to the questions this opinion addresses are the same as those for superior court mediators.

Standards of Professional Conduct for Mediators

It is impossible in this short space to discuss all the scenarios in which a mediator may need to decide whether to charge for time spent preparing for mediation. Most of those decisions, in reality, will not be answered by reference to the program rules or the Standards of Professional Conduct for Mediators, although questions about the mediator's impartiality may arise from time to time. Note that Standard II provides that, " a mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute."

Business Decisions

Most of the questions about whether to bill for mediation services that occur before the conference commences will be made by mediators with an eye to doing what makes good business sense. In the face of a unilateral request to review documents, the Commission suggests that mediators seek and obtain permission of all parties involved before going forward. Making a decision to review documents and charge without all parties' consent almost ensures that there will be controversy when the final invoice is issued. The mediator's credibility almost certainly will suffer under those circumstances.

The Commission believes this is so even when one party offers to pay for all of the mediator's charges in connection with document review. Without notice and agreement from the other side, no mediator who is frequently chosen by the parties would choose to charge and collect fees under those circumstances.

The Commission strongly suggests that court-appointed mediators not charge for routine review of documents and short conversations with attorneys about the nature of the case. This is particularly true if those conversations occur during the scheduling process. Review of case summaries or briefs of up to 15-30 pages would fall under that caution as well.

Beyond those levels of preparation, most mediators who are selected by the parties on a routine basis would charge for preparation only if they first sought and received permission to do so by the parties. However, even where the document review requested by one party or another is extensive, many mediators still choose not to charge for that time and describe it as a "loss leader," a cost of doing business. The Commission urges court-appointed mediators to take the same approach, particularly if they wish to develop a practice in which they seek to be selected by the parties.

In adopting this Opinion, the Commission recognizes that the North Carolina Industrial Commission's mediation rules provide that Industrial Commission appointed mediators are to be paid for mediation services "at the conference" which would necessitate a different response to this inquiry.