

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 24 (2013)

(Adopted and Issued by the Commission on February 1, 2013)

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

A new party, a Georgia resident, was added to a superior court case just prior to a scheduled mediation. The new party’s attorney is a Georgia lawyer who has not been admitted to practice in North Carolina. That attorney contacted the mediator and asked whether he could participate in the mediation. Mediator asks the Commission whether, if he allows the out-of-state attorney to attend and participate, he will be facilitating the unauthorized practice of law.

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The mediator has a duty to serve as a neutral facilitator of the parties’ negotiations. Public policy encourages the process of bringing the parties together. While parties and their attorneys are required to attend pursuant to rules promulgated by the Supreme Court, the mediator is not required to police attendance issues. The mediator should proceed to hold the conference, facilitate the parties’ negotiations, and report to the court those individuals who were present at the conference. The parties should direct any questions about attendance to the court.

Pursuant to North Carolina Rules of Professional Conduct Rule 5.5(c)(2), a lawyer admitted to practice in another jurisdiction, but not in North Carolina, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer acts with respect to a matter that is reasonably related to a pending or potential mediation, the services are reasonably related to the lawyer’s representation of a client in a jurisdiction in which the lawyer is admitted to practice, and the services are not services for which pro hac vice admission is required. However, pursuant to Comment 6 to Rule 5.5, a lawyer must obtain admission pro hac vice in the case of a court-annexed mediation. Rule 5.5(d) prohibits a lawyer from assisting another person in the unauthorized practice of law.

When there is existing litigation and the court orders the case to mediation, a mechanism is in place for the lawyer to be admitted pro hac vice for the mediation. On the other hand, if the case is not in litigation, the lawyer may participate in the mediation without being admitted pro hac vice as long as the services are related to the lawyer's representation of that client in a jurisdiction in which the lawyer is admitted to practice.

In the event the lawyer is not admitted pro hac vice for the court-annexed mediation conference and absent an order of the court dispensing with the mediation, the mediator should hold the conference as originally ordered by the court and would not be in violation of Rule 5.5(d) of the North Carolina Rules of Professional Conduct. Serving as a mediator is not the practice of law, and therefore, as long as the lawyer mediator is acting as a mediator consistent with court-ordered program rules and the Standards of Professional Conduct for Mediators, the mediator will not be assisting in the unauthorized practice of law by conducting the settlement conference as ordered by the court.

In an effort to help the parties make informed decisions about attendance, and to help make their time spent at mediation more productive, mediators are encouraged to engage the parties and/or attorneys (whether together or separately) in conversation about attendance issues. Mediators may help the parties and/or attorneys become aware of attendance requirements and raise questions about the consequences of the decisions of the parties and/or attorneys regarding attendance.

This scenario also presents a "best practice" issue. Questions about attendance often arise before mediation is scheduled or held, and such disputes can become highly charged and confrontational. Mediators who go beyond the suggestions discussed above and take a position on an attendance issue may find themselves in an adversarial relationship with one or more parties. If there are concerns of lack of impartiality, the mediator may be in violation of Standard II, which requires the mediator to maintain impartiality toward the parties, and pursuant to Standard II.C, may be required to withdraw. If the mediator gives legal advice about attendance issues, this would violate Standard VI, which requires the mediator to limit himself or herself solely to the role of mediator and prohibits the mediator from giving legal or other professional advice during the mediation. Ultimately, as noted above, the parties should address attendance questions to the court.