



Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 27 (2013)

(Adopted and Issued by the Commission on December 6, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and decertification 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

Pro se Wife in an equitable distribution case advised her certified, court appointed mediator that she was indigent and had no funds to pay for his services. During an exchange of calls and emails, Mediator insisted she must agree to pay. When she continued to refuse, Mediator contacted Husband and pressed him to pay not only his, but Wife’s share of the fee. When no agreement to pay Wife’s share was forthcoming, Mediator e-mailed the parties and told them he was withdrawing. Thereafter, Mediator contacted the judge assigned to the case and advised her that the deadline for completion was looming, but no conference had been scheduled because the parties were uncooperative and Wife refused to pay his fee, though he believed she had the funds to do so. When Wife began to complain that Mediator was biased against her because she was indigent, Mediator contacted the judge, again, and asked to withdraw consistent with Standard II.C.(1) of the Standards of Professional Conduct for Mediators. The judge allowed Mediator to withdraw and appointed another mediator. The Commission’s Grievance Committee found that Mediator’s actions in the matter were inconsistent with Rule 7.E and Rule 6.A.(2) of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases (FFS Rules), and with Standards III and VII of the Standards of Professional Conduct for Mediators.

Advisory Opinion

N.C. Gen. Stat. § 7A-38.4A(i) provides that “...rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate

without cost...”. FFS Rule 7.E implements that section and provides that parties claiming indigence may file a motion with the court seeking relief from the obligation to pay their share of the mediator’s fee.

This rule itself should alert mediators to their duty to schedule and hold a settlement conference without engaging the parties in discussion about their ability to pay. If the parties initiate a discussion about their inability to pay, mediators should advise them of their right to petition the court for relief and direct them to form AOC-CV-828, *Petition And Order For Relief From Obligation To Pay All Or Part Of Mediator's Fee In Family Financial Case*. The mediator has no obligation to assist the party in completing or filing the form. Once the matter has been brought to the court’s attention, a mediator should refrain from making any demand for payment until the court has had an opportunity to hear the petition and make a determination.

After talking with Wife and pressing her about paying his fee, Mediator wrongly conducted two additional conversations. The first was with Husband, in which Mediator attempted to get Husband to pay Wife’s share. This conversation constituted a breach of Standard III, Confidentiality. The mediator should not have talked with Husband about Mediator’s private communications with Wife. The content of the conversation constituted a breach of Standard II, Impartiality, in that the mediator took a position in favor of one party over the other, and a breach of Standard VII, Conflicts of Interest, in that the mediator mixed his own financial business with the business of the parties in settling their dispute.

The second conversation was one with the judge about Wife’s claim of indigence and Mediator’s opinion that the parties were uncooperative. This conversation constituted a breach of Standard III, Confidentiality. No mediator may converse with the court about the negotiations in the case or about the attitude or behavior of the parties, and no mediator may make judgmental comments about the parties to the court. This conversation also violated Standard VII, Conflicts of Interest, as noted above.

The most fundamental duty of mediators is to schedule and hold the settlement conference they are appointed or selected to conduct (FFS Rule 6). By engaging in conversations about his fee with Wife, Husband, and the court and failing to schedule the conference, Mediator violated this important duty. In addition, mediators pledge in their application for certification, in accordance with FFS Rule 8.I., to accept as payment in full of a party’s share of the mediator’s fee, the fee ordered by the court pursuant to FFS Rule 7.

A mediator who is overly focused on his or her fee, refuses to schedule and conduct a settlement conference for a party claiming indigence, and seeks to withdraw as mediator violates FFS program rules and the Standards of Professional Conduct for Mediators.