



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion No. 33 (2016)

(Adopted and Issued by the Commission on November 18, 2016; Amended September 20, 2024.)

Gift Giving, Standard 7(h)

A mediator shall not give or receive a gift to or from a party or representative of a party in return for a referral or due to an expectation of referral of clients for mediation services.

Concern Raised

Certified attorney mediator requests advice concerning her plan to mail a holiday card to many of the attorneys in her geographic area and to include a mouse pad with the mediator's website printed thereon. The mouse pads have already been purchased at a cost of approximately \$1.60 each. If the mediator is not allowed to distribute the mouse pads as an advertising tool in this way, she asks if she may donate the mouse pads to an organization of attorneys by making the mousepads available to attendees at a meeting of the organization.

Advisory Opinion

Question 1

May the mediator distribute items of small monetary value, such as mouse pads, pens, calendars, calculators or post-it notes, as an advertising tool, either by mail or otherwise?

Yes.

The inquiry occurs with regular frequency and has a broad application for mediators who contemplate making gifts to prospective clients as a part of their promotional efforts or to regular clients as a "thank you" for previously selecting them to mediate their cases. In responding to this inquiry, the Dispute Resolution Commission (Commission) first looks to the Standards of Professional Conduct for Certified Mediators (Standards).

Standard 7(h). Conflicts of Interest provides:

A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of referral of clients for mediation services.

A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality. However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation

conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

The mouse pad contemplated here is an advertising tool, intended to keep the mediator's name and contact information before an attorney or other person involved in the mediator selection process. It is not a "form of consideration" or an advanced payment in return for a future referral, and therefore does not violate the first sentence of Standard 7(h). While any advertising is certainly done with the hope that it will generate future business, advertising does not constitute consideration, which is an element of an enforceable contract. There is no contract formed or expected when a mediator distributes an advertisement. According to Black's Law Dictionary, something given for past actions is not consideration, thus a gift to a mediator for doing a good job yesterday or a gift to a lawyer for hiring the mediator last year is not consideration. However, such a gift for past service, if excessive, may violate the next sentence of the standard, as discussed below.

Although it is not consideration, the mouse pad is a gift, controlled by the second sentence of Standard 7(h). While that sentence begins with what seems to be an absolute prohibition on giving or receiving gifts by a mediator, the sentence ends with the qualifier "that raises a question as to the mediator's impartiality." To judge the application of this provision, the Commission uses an "objectively reasonable" standard. It is not objectively reasonable that a litigant will be concerned about partiality or bias upon seeing the mediator's name on a mouse pad, pen, or calendar in the attorney's office where the mediation is taking place. Such items are advertising tools intended to keep the mediator's name and contact information before an attorney or other person involved in the mediator selection process.

The Commission declines to set a firm line as to the value of an item "that raises a question as to the mediator's impartiality." It is noted that the US Department of State set a gift limit of \$480 for its employees, the federal courts hold that gifts under \$156 need not be reported and North Carolina Judges must disclose gifts of over \$500. The most analogous North Carolina statute, N.C.G.S. § 138A-32(a), parallel with Standard 7(h), prohibits receiving anything of value "in return for being influenced." With that in mind, the Commission believes that mouse pads, pens, cups, mugs, water bottles, note pads, calendars, post-it notes and other such items that one can receive from advertisers at a vendor's booth at a convention does not raise an objectively reasonable question as to the mediator's impartiality. One consideration is that items of this nature are openly available to all present. They are advertisements, spreading the name and identifying the services offered by the purveyor. Anyone who comes by may take such an item. This is contrasted with some potential gifts that are of higher value and typically distributed on a more selective basis, such a round of golf, overnight stays at a vacation location, deep sea fishing trips, tickets to sporting events or travel not related to the mediator's services. Although the cost of a lunch may fall into the "does not raise a question" category, a mediator should not accept payment for a meal from one party unless all parties are invited by the host. Also included in the permitted gift category are flowers, nuts, candy, cookies, fruit and other consumables frequently given at holiday times or as a celebration or congratulations.

The Commission cautions certified mediators that the giving or receiving of gifts or other items of monetary value outside the context of the mediation, whether reasonable or not, may be perceived by participants or the general public as affecting the mediator's impartiality. The purpose of

Standard 7 is to emphasize the responsibility each mediator has to protect the impartiality necessary to serve in that capacity.

Question 2

May the mouse pads be donated to an organization of attorneys by making the mousepads available to attendees at a meeting of the organization?

Yes.

Question 3

May the Mediator sponsor a CME or CLE program or speaker and have her contribution acknowledged on a sign or on registration and/or program materials?

Yes.

Question 4

May the Mediator sponsor a dinner or open bar at a CME or CLE event and have her contribution acknowledged on a sign or on registration or program materials?

Yes, if the sponsorship directly relates to an educational benefit through a CME or CLE available to the participating public.

Sponsoring a CME or CLE program or speaker, that is available to the general public who registers and attends, does not involve the giving of a gift to an individual and those attending a CME or CLE event are unlikely to view the mediator's sponsorship as a gift to them personally. The contribution is instead made to the sponsoring entity and those attending are likely to see such a contribution as intended to advance the legal or mediator professions in general and to simply heighten awareness of the mediator's name. It is equally unlikely that such sponsorship would lead the public to question a mediator's neutrality. Additionally, the public would not likely link the sponsorship to a particular party or case. Conversely, a dinner or open bar event with a limited or restricted guest list, or by personal invitation only, is akin to a gift "that raises a question as to the mediator's impartiality."

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.