



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 36 (2018)

(Adopted and Issued by the Commission on September 21, 2018.)

Concern Raised

Mediator contacted the Commission to ask whether Standard 7(h) would prohibit her from sponsoring a CME or CLE program and receiving an acknowledgement in some form of her sponsorship, for example, a sign identifying her as the sponsor or notice of her sponsorship appearing on registration or program materials. Mediator also asks whether she could sponsor a dinner or open bar at a CME or CLE event and receive similar acknowledgement.

Advisory Opinion

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.

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 public.

Standard 7(h), the “gift rule”, provides:

A mediator shall not give 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 a 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.

This Standard, in essence, establishes a bright line in relation to gift giving. It is intended to deter mediators from giving gifts to attorneys for referrals or in expectation of referrals. Obviously, it would be a violation of this Standard for a mediator to buy rounds of golf for an attorney, to take the attorney out on the

mediator's deep-sea fishing boat for an excursion, or to invite the attorney to college or professional football or basketball games **when the mediator's intention in so doing is to secure referrals or additional referrals**. Such gifts would clearly amount to the buying of referrals.

This Standard also prohibits the giving of inconsequential gifts and promotional materials such as pens, calendars, coffee mugs, and mouse pads which typically bear the mediator's name and contact information. Clearly, the giving of such trinkets is not the buying of referrals in the sense suggested in the paragraph above. However, such trinkets could create a situation where a party may come to perceive a mediator as less than neutral. For example, a party could go to an opposing attorney's office for mediation and be escorted to a conference room where the pens on table, the calendar on the wall, and even the row of coffee mugs on the counter are all emblazoned with the mediator's name and phone number. The party could reasonably assume that the mediator has some kind of working relationship with opposing counsel. S/he might even become suspicious that the mediator will not give him/her a fair shake, especially if the party did not see similar promotional displays at his/her own attorney's office. If during mediation, that party does not feel the mediator is sufficiently empathetic to his/her interests, such suspicion could easily give way to a perception of bias followed by a complaint filed with the Commission. As such, the bright line in Standard 7(h) is intended both to deter inappropriate mediator conduct **and** to avoid situations where a party may inadvertently be led to question a mediator's neutrality.

Standard 7(h) does permit mediators to bring snacks to mediations and/or to buy lunch for the participants. In addition, small gifts may also be exchanged if they are necessary to meet cultural norms. These exceptions are permissible only if they are intended for the purpose of furthering the conference. Such offerings should be reasonable, and the meals provided should not be lavish or costly.

Sponsoring a CME or CLE program or speaker, that is available to the general public, 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. 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 and violates the bright line rule.

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.