



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 40 (2020)

(Adopted and Issued by the Commission on March 24, 2020.)

Concern Raised

Mediator contacted the Commission to ask if a mediator may, after the conclusion of a mediation, whether successful or unsuccessful, thereafter serve in the role of a parenting coordinator for the parties if either assigned by the presiding judge or selected by the parties themselves.

Advisory Opinion

May a Mediator act as a parenting coordinator for the parties after conducting a mediation involving the same parties out of the same cause of action.

No.

Standard 7. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

- (c). A mediator who is a lawyer, therapist, or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard 3 is a substantive conversation.

A mediator who is a lawyer, therapist, or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute, or an outgrowth of the dispute.

This Standard provides a bright line rule on what will be considered a conflict of interest for a mediator. A conflict arises when a mediator acts as a professional in any capacity with one of, or both of, the parties in any matter concerning the subject of the dispute, before or after the mediation. The mediator may not mediate a case if the mediator has previously engaged in a professional relationship with one or both of

the parties, if the matter to be mediated involves the same dispute, is an action closely related to the dispute, or is an outgrowth of the dispute. Additionally, the Standard prohibits a mediator from engaging in a professional relationship with one or more of the parties to a mediation, after a mediation has concluded, if the new professional relationship involves the same dispute, is an action closely related to the dispute, or is an outgrowth of the dispute. The relationship is considered professional when the person providing services obtains confidential or private information from the party requesting services.

The Parenting Coordinator is granted authority pursuant to NCGS § 50-92. The statutory language contained in NCGS § 50-92 does not specifically reference advising, counseling or representing the parties. However, a Parenting Coordinator is often immersed within the family dynamics throughout the duration of the PC's appointment. The Parenting Coordinator is acting as a professional and may be asked to make decisions based on their knowledge of the family and their surrounding circumstances. The intent of Standard 7(c) is to avoid a conflict by disallowing a mediator from engaging in a past or future, professional relationship with a party where the mediator has gained, or is able to gain, confidential information from a party during the mediation process. In the event a mediator gains confidential information during a family financial mediation, the information could influence the mediator/parenting coordinator's decision-making process in the future, thus affecting the PC's ability to remain neutral. Additionally, the Association of Family and Conciliation Courts issued *Guidelines for Parenting Coordination* (2019) that provides, "[a] professional shall not act as a PC with co-parents or others directly involved in the parenting coordination process if they previously provided professional services to the same parties....This includes, but is not limited to, service as a confidential mediator, court evaluator, child's attorney, guardian ad litem, child advocate, therapist, consultant, co-parenting counselor or coach." (Association of Family and Conciliation Courts, 2019). The Commission recognizes the Association of Family and Conciliation Courts as providing best practices for parenting coordinators.

The DRC continues to uphold the premise that mediators should not be in a position where they could benefit or profit from knowledge they learned in mediation. The Commission believes that later employment or the prospect of such employment arising out of a mediation creates a financial conflict or the appearance of a conflict. See AO 15 (2008) where a mediator was prohibited from becoming the administrator of the estate which was the subject of the mediation. See also AO 17 (2010), AO 20 (2011) and AO 21 (2012), where the Commission determined that a mediator may engage in roles supportive of the resolution of the dispute being mediated, even for pay, such as arbitrating, acting as a notary or reviewing documents.

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.