



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Opinion Number 18 (2011) **(Adopted and Issued by the Commission on May 6, 2011.)**

Concern Raised

Court staff have registered complaints with the Commission over a period of years about the failure of superior court mediators to comply with their case management duties, including failing to file Reports of Mediator, late filing of Reports [months after the ten-day deadline established by Mediated Settlement Conference (“MSC”) Rule 6(b)(4)a], and filing incomplete Reports. This Advisory Opinion was initiated by the Commission after recently issuing a private reprimand to an experienced mediator for failing to file his Reports correctly over an extended period of time and after having been notified of his failure to comply with the Rules in the past.

Advisory Opinion

It is important that a mediator’s Reports be filed timely and completely. First, Reports of Mediator are an important case management tool for judges and their staff, allowing them to have more control of their dockets and better allocation of their time. When Reports are not filed timely and complete, these efficiencies are compromised. To clear up any confusion that may exist about reporting the “results” of mediated settlement conferences, it is the duty of all mediators to file a Report with the court, even when a conference is not held due to a case being disposed of prior to scheduling or conducting the conference.

Reports are also the single most important tool in assessing program performance. Court staff report monthly to the Administrative Office of the Courts on the number of cases mediated and settled in their judicial districts. When mediators do not report or report late, their conferences and settlements may go uncounted with the result that MSC Program caseload statistics reported to the Supreme Court, the General Assembly, and to the public will not reflect the Program’s true impact on the courts.

Second, certified mediators have the opportunity to earn fees as private providers of court-mandated mediation services. However, the same Rules that afford that opportunity to certified mediators also require them to perform certain case management duties under the Rules, including scheduling and holding the mediated settlement conference within the time frame assigned by the court and reporting the results of the conference. In assigning a case management role to mediators, the legislature intended to minimize the need for the involvement of court staff, and thus taxpayer dollars, in operating mediation programs within the courts. This trade-off of opportunity and duty is one of the most important features of the court-ordered mediation programs in North Carolina. Without it, there would be no mediation programs and no certified mediators.

When mediators fail to fulfill their case management duties, court staff may have to step in to gather information and correct problems, thus taking time away from their other administrative responsibilities. It

is a measure of how important the case management duty assigned to mediators is in that MSC Rule 6(b)(4)d says: “A mediator who fails to report as required by this rule shall be subject to the contempt power of the Court and sanctions.”

The assignment of case management duties, including the filing of timely and complete Reports, is as integral to the design of the mediation programs in this State as is certification itself. Simply put, the price for making money in the court system as a certified mediator is completion of administrative duties assigned by the Rules. Failure to carry out those duties subjects mediators to the contempt powers of the court and to discipline, including decertification, by the Commission.

While Advisory Opinion 15 (2008) does not preclude a mediator from later serving as an arbitrator in the same dispute, the Commission cautions those making such a transition to be careful in doing so. The mediator in this instance should contact all the parties prior to the arbitration and remind them that he served as their mediator and obtain their written consent to now arbitrate the matter. The mediator should also engage in appropriate self-reflection before agreeing to serve. S/He may have spent several hours with the parties during mediation. In that time, did s/he develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise her/ his neutrality? Did s/he learn any confidential information during a caucus session that s/he may not be able to exclude from his thought process and that may inappropriately affect her/his decision? If the mediator has any concerns about his ability to be fully neutral, s/he should not serve.

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.