



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 27 (2013)

(Adopted and Issued by the Commission on December 6, 2013, Amended September 20, 2024.)

Scheduling the Conference and Inability to Pay, Rule 6(b)(5) and Rule 7(e)

Mediators have a duty to schedule and hold a settlement conference without engaging the parties in discussion about their ability to pay.

Concern Raised

Self-represented 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 emailed 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 2(c)(1) of the Standards of Professional Conduct for Mediators (Standards). The judge allowed the 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 for Settlement Procedures in District Court Family Financial Cases (FFS Rules), and with Standards 3 and 7.

Advisory Opinion

N.C.G.S. § 7A-38.4A(i) provides that "...rules adopted by the Supreme Court shall set out a method whereby a party found by the court to be unable to pay the costs of the settlement procedures is 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 alerts 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.

Mediator wrongly pressed wife about paying his fee, and the mediator wrongly attempted to get husband to pay wife's share. The conversation with husband constituted a breach of Standard 3, 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 2, Impartiality, as the mediator took a position in favor of one party over the other, and a breach of Standard 7, Conflicts of Interest, as the mediator mixed his own financial business with the business of the parties in settling their dispute.

The mediator wrongly communicated information to the judge about wife's claim of indigence and wrongly provided mediator's opinion that the parties were uncooperative. This conversation constituted a breach of Standard 3(c), Confidentiality, and Standard 7, Conflicts of Interest. A mediator shall not converse with the court about the negotiations in the case or about the attitude or behavior of the parties, and a mediator shall not make judgmental comments about the parties to the court.

The most fundamental duty of mediators is to schedule and hold the settlement conference they are appointed or selected to conduct, FFS Rule 6(b)(5). Mediators pledge in their application for certification, in accordance with FFS Rule 8(a)(10), to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court under FFS Rule 7.

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.