

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 01-99

(Adopted and Issued by the Commission on August 27, 1999)

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and decertification 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.

Concern Raised

A certified superior court mediator describes the following situation and seeks a formal advisory opinion as to his responsibilities:

"Mediator M has been selected or appointed to mediate a case pending in Superior Court. Shortly before the scheduled mediation of that case, Mediator M receives a telephone conference call from Attorney P, who represents the plaintiff in the case, and Attorney D, who represents the defendant. Mediator M is informed that Attorney D has informed Attorney P that the defendant's liability insurance company will not increase its last offer of settlement at mediation. Attorney D so informed Attorney P in order to avoid unnecessary time and expense to both parties in mediating the case. However, Attorney D refuses to move to dispense with mediation. Attorney D believes that the Court will either deny the motion and/or become hostile to Attorney D and/or Attorney's D's client as a result of the motion. Attorney D understands his party's obligation to mediate and would rather mediate than file a motion to dispense with mediation. Attorney P informs Mediator M that he does not want to incur the time and expense of mediation or the time and expense of moving to dispense with mediation if the defendant has a closed mind. Attorney P requests that Mediator M impasse the mediation as a result of the parties' conference call. What should Mediator M do?"

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The Commission advises Mediator M that, in the situation described above, he should proceed to schedule and to conduct a mediated settlement conference in this case.

NC Gen. Stat §7A-38.1, the enabling legislation for the Mediated Settlement Conference Program, provides that the purpose of the statute is to require parties to superior court civil actions and their attorneys to attend pretrial, mediated settlement conferences with the objective of voluntarily settling their disputes. Subsection (b) defines the mediator as a neutral who acts to encourage and to facilitate resolution of the action. Once a Senior Resident Superior Court Judge has issued an order requiring a conference to be held, Mediated Settlement Conference Rule 6.B.(5) provides that it is the mediator's duty to

schedule the conference and to conduct it prior to the conference completion deadline set out in the court's order. MSC Rule 4 provides that all parties to the action, insurance company representatives, and attorneys shall physically attend the conference, unless their presence is excused or modified by court order or agreement of all parties and the mediator.

For the mediator to report an impasse as a result of the conference call described above would thwart the intent of the statute and the Mediated Settlement Conference Rules which provide that the parties are to assemble and the mediator to provide for them a structured opportunity to discuss and to attempt to settle their case. In the scenario described above, neither the individual parties nor any insurance company representative participated in the discussion and there was no substantive discussion of the case or any attempt made to generate settlement options. The conversation described above cannot be characterized as a mediated settlement conference. The mediator is under a duty to schedule and to conduct a conference and should proceed to do so.