

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 08-05

(Adopted and Issued by the Commission on February 11, 2005.)

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

Mediator asks the Commission whether he is obligated under program rules to schedule the mediated settlement conference. He notes that there is a pattern and practice in his judicial district of the plaintiff taking responsibility for scheduling the conference.

Advisory Opinion

The operating rules for both the Mediated Settlement Conference and Family Financial Settlement Programs make it clear that it is the mediator’s responsibility, and not the parties’, to schedule mediated settlement conferences in cases in which they have been either appointed or chosen as the mediator.

For purposes of the Mediated Settlement Conference Program, Rule 6.B.(5), which specifies mediator duties, is controlling:

It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court’s order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

For purposes of the Family Financial Settlement Program, Rule 6.B.(5) reads almost identically.

There are two reasons why the Supreme Court placed the responsibility for scheduling on the mediator. First, the General Assembly intended for the mediated settlement conference programs to operate with minimal administration on the part of court personnel and with no appropriation of tax dollars. Thus, the mediated settlement

conference program uses professionals who are paid directly by the parties for their services as mediators and for their administrative services in scheduling mediations and reporting the results to the court. In accepting cases ordered to mediation by the court, a mediator agrees both to serve as a case manager for the court and as a facilitator of negotiations between the parties at the settlement conference.

Secondly, from a practical standpoint, the mediator, and not the parties, is in the best position to ensure that cases are scheduled timely. The parties themselves may not be motivated to hold their mediation within the time limits set by the court. In addition, *pro se* parties may have little or no awareness of program rules or the mediation process. Therefore, responsibility for the administration and scheduling of the settlement conference was placed on the mediator, not the parties. Recent rule changes emphasize this administrative duty of mediators by requiring that they file reports even when the parties settle their case prior to mediation.

The Commission has learned that there is a pattern and practice developing in which mediators defer to the parties in matters of scheduling. We can imagine instances in which the parties schedule mediation and do not need the assistance or prompting of a mediator to comply with the directives of the court. However, ultimate responsibility for scheduling rests with the mediator.

A mediator who fails to assume responsibility for scheduling his or her conference within the deadlines set out by the court fails to fulfill one of his/her major obligations as a mediator. As such, s/he may be subject to discipline by the courts that appoint and supervise him/her and by the Commission that is charged with regulating the conduct of mediators as set out in the Standards of Conduct and the Rules of the Supreme Court.

A mediator's obligations under the Rules of the Supreme Court and the Standards of Conduct are (1) to facilitate the parties' negotiations in a mediated settlement conference and (2) to schedule that conference and report its results to the court in a timely fashion. Under these guidelines the mediator is as much a case manager as s/he is a negotiations facilitator.