

**Advisory Opinion of the
NC Dispute Resolution Commission
Opinion Number 08-14**

(Adopted and Issued by the Commission on May 16, 2008)

N.C. Gen. Stat. §7A-38.2(b) provides, "The 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 ethical 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

The North Carolina Bar Association's Dispute Resolution Section has been approached by North Carolina Legal Aid. Legal Aid lawyers have expressed reservations to the Section about asking mediators to waive their fees relative to services they provide to clients of the agency. Legal Aid has asked the Section to assist it in identifying and assembling a panel of mediators who are willing to volunteer their services to assist Legal Aid clients. The Section believes it is important for mediators to be involved in efforts to serve those who are unable to pay and it asks the Commission whether it may, consistent with program rules and the Standards of Professional Conduct for Mediators, assist Legal Aid in the formation of such a panel.

Advisory Opinion

North Carolina's mediated settlement conference programs were designed to be "party-pay", meaning that the parties would directly compensate the mediator for his or her services. The party pay system has served our programs, courts, and citizens well in that a cadre of talented mediators has developed over time and mediated settlement is now widely available in all our judicial districts. Though the party pay concept has been fundamental to the establishment, expansion and success of our programs, the Commission has always been mindful that, in creating a system funded by the parties, it has an obligation to insure that those who lack funds are not denied services. To that end, those who drafted the original program rules provided that mediators participating in court-based programs must make their services available to indigent parties without charge. To reinforce this notion, applications for mediator certification require applicants to expressly agree to waive their fees with respect to indigent parties.

The Commission has never wavered in its commitment to those the court has determined are unable to pay and fully expects that all mediators will likewise take their obligation to indigent parties seriously. Nevertheless the Commission can understand and appreciate why Legal Aid would want to identify and assemble a panel of mediators who have expressed a particular willingness to work with their clients and are in a position to

comfortably forego their fees. Consistent with program rules and the Standards of Professional Conduct for Mediators, the Section may assist Legal Aid in establishing a panel and the mediators who agree to serve on that panel may ethically make it known that they are willing, if voluntarily selected, to mediate without charge or at a reduced rate, for Legal Aid clients. Mediators may agree to serve on this panel and provide Legal Aid clients with services for free or at a reduced rate, even if those clients have not actually been determined by the court to be indigent or they receive a substantial recovery either at the mediation or thereafter.

That panel members have agreed to serve Legal Aid clients at no charge or at a reduced rate does not necessarily mean that they must waive or reduce their fees relative to the other side, though they are free to do so. It is permissible for panel members to negotiate their fees with the other side, either prior to or during mediation, including discussing whether the other side is willing to assume all or a portion of the fees that would otherwise be due and owing on the part of the Legal Aid client.

Standard II would require panel members to disclose to the other party that they reducing or waiving their fees for the Legal Aid client. Consistent with Standard II and Mediated Settlement Conference Rule 6.B.(1)(c) and Family Financial Settlement Rule 6.B.(1)(c) this disclosure should occur both before the mediation and at the beginning of the conference. If during negotiations held either before or during mediation, the other party agrees to pay some or all of the fee that would otherwise be owed by the Legal Aid client, that fact must be disclosed as well, either prior to the mediation or as soon as the mediator becomes aware that the other party has assumed that responsibility.