

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 2001-5

Issued October 5, 2001

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: It is improper under Section 2921.43(A)(1) of the Ohio Revised Code and DR 9-101(B) of the Ohio Code of Professional Responsibility for a court-employed attorney/mediator to conduct a private fee-paid mediation of any case pending on the docket of the employing court. A court-employed attorney/mediator is not prohibited from conducting private fee-paid mediations of matters that are not pending before the employing court or of civil cases pending in jurisdictions outside the court in which the attorney/mediator is employed.

OPINION: This opinion addresses court-employed attorney/mediators conducting private fee-paid mediations of civil cases.

Is it proper for a court-employed attorney/mediator to conduct a private fee-paid mediation of a civil case referred by the assigned judge to the court mediation program but which cannot be timely scheduled for court mediation prior to the final pre-trial date?

A common pleas court employs two attorneys part-time in the court mediation program. The primary job duty of the attorney/mediators is to mediate civil cases filed in the court and referred by the assigned judge to the court mediation program. No additional fee, beyond the court's filing fee, is charged to the parties for the court-based mediation. The court may refer a case to the court mediation program upon the request of the parties or *sua sponte*. Both attorney/mediators maintain a private mediation practice outside the court.

Due to the large volume of cases referred to the court mediation program, an attorney/mediator's schedule is full several months in advance. Timely scheduling of a court-based mediation prior to the court's scheduled pre-trial date is particularly difficult when a continuance of a scheduled mediation date is requested by a party.

To resolve mediation scheduling problems, the court adopted a local rule permitting private mediation prior to the final pre-trial date. If a party requests a continuance, the administrative assistant to the mediator confirms whether it is possible to reschedule the court-based mediation prior to the final pre-trial date. If there is no available mediation session time available, the continuance will be denied unless the party requesting the continuance secures the agreement of all parties to the continuance and the requesting party agrees to pay the fee for the private mediation, unless otherwise agreed upon by the

parties. Upon agreement, the parties may select a mediator from the court's list of private mediators.

A court-employed attorney/mediator is a judicial employee subject to Ohio Ethics Law. The Board of Commissioners on Grievances and Discipline is the appropriate entity to advise judicial employees on the application of Ohio Ethics Law. Ohio Rev. Code Ann. §§ 102.01(B), 102.01(F)(2), 102.08 (West 1994). A judicial employee who is an attorney is also subject to the Ohio Code of Professional Responsibility. The Board of Commissioners on Grievances and Discipline is the appropriate entity to advise attorneys on the application of the Ohio Code of Professional Responsibility. Gov. Bar R. V §2(C).

The pertinent provision of Ohio Ethics Law is set forth below.

Section 2921.43 (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:

- (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his [her] official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
- (2) Additional or greater fees or costs than are allowed by law to perform his [her] official duties.

The pertinent provision of the Ohio Code of Professional Responsibility is DR 9-101(B).

DR 9-101(B) A lawyer shall not accept private employment in a matter in which he [she] had [has] substantial responsibility while he [she] was [is] a public employee.

It is the Board's view that Section 2921.43(A)(1) of the Ohio Revised Code prohibits a court-employed attorney/mediator from receiving outside compensation for the performance of his or her official job duty. Under the facts presented, it is the official job duty of a court-employed attorney/mediator to mediate civil cases ordered to the court mediation program by the assigned judge. Because each case pending on the court's docket may be referred to the court mediation program by the assigned judge, the court-employed attorney/mediator should not conduct a private fee-paid mediation of any case pending on the docket of the employing court.

DR 9-101(B) of the Ohio Code of Professional Responsibility prohibits an attorney from accepting private employment in a matter in which the attorney had [has] substantial responsibility as a public employee. A court-employed attorney mediator whose official duty is to mediate cases referred to the court mediation program has "substantial responsibility" in the matter. Even if the case is assigned to one attorney/mediator, it is

the Board's view that none of the attorney/mediators in the court mediation program should conduct private fee-paid mediation of any civil case referred to the court mediation program in which they are employed.

Nevertheless, these rules do not prohibit a court-employed attorney/mediator from conducting private fee-paid mediations of matters not pending before the employing court or of civil cases pending in jurisdictions outside the court in which the attorney/mediator is employed. If a matter is not pending before the employing court or if a civil case is under the jurisdiction of a court outside the jurisdiction of the court in which the attorney/mediator is employed, then the attorney/mediator does not have an official duty to mediate the matter and does not have substantial responsibility in the matter. However, before conducting such private fee-paid mediations, a court-employed attorney/mediator must determine whether his or her employment agreement with the court permits such outside employment.

For the reasons stated above, the Board advises as follows. It is improper under Section 2921.43(A)(1) of the Ohio Revised Code and DR 9-101(B) of the Ohio Code of Professional Responsibility for a court-employed attorney/mediator to conduct a private fee-paid mediation of any case pending on the docket of the employing court. A court-employed attorney/mediator is not prohibited from conducting private fee-paid mediations of matters that are not pending before the employing court or of civil cases pending in jurisdictions outside the court in which the attorney/mediator is employed.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.