

**NORTH DAKOTA JUDICIAL ETHICS ADVISORY COMMITTEE
OPINION 2015-1**

ISSUE

Whether a surrogate judge of the North Dakota Supreme Court may act as a private mediator, including charging a fee for and advertising for mediation services.

ANALYSIS

Rule 3.9 of the North Dakota Code of Judicial Conduct prohibits a judge from acting as an arbitrator or mediator unless expressly authorized by law. However, the Compliance portion of the North Dakota Code of Judicial Conduct, Sections A and B, exempt part-time and pro-tempore judges from compliance with Rule 3.9. Section C of the Compliance portion of the Code of Judicial Conduct states that a retired judge who is eligible for recall to judicial service shall comply with the provisions of the Code governing part-time judges. Section A(1) requires a part-time judge to comply with all rules should the judge use the judge's office or title.

The various Rules of the North Dakota Code of Judicial Conduct does not use the term "surrogate judge". That term is found at North Dakota Century Code § 27-17 - 03. The Compliance portion of the Code provides that a "surrogate judge" is a "judge within the meaning of this Code". It is the Committee's opinion that, for purposes of applying the Compliance portion of the Code of Judicial Conduct, "surrogate judge" is the equivalent of retired judge eligible for recall to judicial duties. Therefore, Rule 3.9 does not prohibit a surrogate judge of the North Dakota Supreme Court from acting as a private mediator.

Rule 3.12 of the North Dakota Code of Judicial Conduct states that a judge may accept reasonable compensation for extrajudicial activities unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity or impartiality.

Rule 3.1 of the North Dakota Code of Judicial Conduct prohibits a judge from using court premises, staff, stationery, equipment or other resources for extrajudicial activities.

General Code requirements regarding compliance with the law (Rule 1.1), promoting confidence in the judiciary (Rule 1.2) and avoiding abuse of the prestige of judicial office (Rule 1.3) do apply to a surrogate judge acting as a private mediator.

An issue addressed by other jurisdictions is whether and how a judge may advertise his or her experience as a judge. The District of Columbia opined that a judge may include general biographical information including the fact of the judge's prior judicial experience. 1992 WL 12659982 (Ad. Comm. Jud. Cond. DC Ct.) Maryland opined that a judge may indicate his or her judicial status in solicitations for mediation services, but may not state the number of years of his or her judicial experience. 2008 WL 8681326(MD Jud. Eth. Comm.) In contrast, Ohio is of the opinion that a retired or part-time judge may not use his or her title in the context of mediation services, and that doing so constitutes "dishonesty, fraud, deceit or misrepresentation." 2013 WL 5826955 (OH Bd.Com.Griev.Disp.)

CONCLUSION

A surrogate judge of the North Dakota Supreme Court may act as a private mediator. The judge may charge a reasonable fee for his or her services. The judge may not use court premises, staff, stationery, equipment or other resources for mediation services. The Committees is of the opinion that the judge may advertise his or her mediation services and may include his or her judicial status and years of experience in advertisements.