Coates' Canons Blog: Public Records Mediation and Attorneys' Fees Provisions

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In this **blog post**, I summarized the changes in the personnel privacy laws contained in the ethics bill, **S.L. 2010-169**. This post summarizes two more changes included in that legislation. One establishes both an optional and a mandatory mediation procedure for resolving disputes about public records requests. The other amends the statute governing the award of attorneys' fees in public records lawsuits.

Mediation of Public Records Disputes

The ethics legislation creates a mandatory mediation requirement that applies whenever a civil action is brought under **Chapter 132 (the Public Records Act)**. In addition, the law authorizes parties to a public records dispute to request voluntary mediation prior to the filing of an action. The goal of mediation in this context is to expedite possible resolution of disputes and avoid the time and expense of litigation. The mediation process is designed to help the parties understand the strengths and weaknesses of their case, and to facilitate mutually agreeable settlements. The mediator facilitates, but has no authority to impose a settlement or ruling on the parties. Costs of the mediation are assessed to the parties.

Voluntary mediation may be initiated by any party to a public records dispute by filing a request for mediation with the clerk of the superior court in the county where the lawsuit could be brought. The clerk will provide each party with a list of certified mediators. The parties may agree on a choice of mediator, or if they can't agree, the senior resident superior court judge will make the selection. Note that this process applies when a dispute exists, but no lawsuit has been filed. It may be initiated by any party but other parties are not required to participate. The legislation suggests that the rules should provide an exemption from mandatory mediation if the parties attempted to mediate the dispute voluntarily, prior to filing a lawsuit.

Mandatory mediation applies when a lawsuit has actually been filed, and must be initiated no later than 30 days after the "responsive pleadings" (the defendant's answer to the complaint, and the plaintiff's reply to a counter-claim, if applicable) have been filed. The process for selecting the mediator is the same as described above for voluntary mediation. Although the process is described as mandatory, the parties may waive mediation by providing written notice to the mediator. No costs are assessed if the waiver is submitted before the first mediation session.

The rules and procedures for mandatory mediation are the same as for other mandatory mediation requirements that already exist under state law, the main one being the mediated settlement conference in superior court civil actions (**G.S. 7A-38.1**). Attorneys in private practice are probably familiar with this process. The voluntary mediation process is new, and the courts may have to develop forms and rules to implement it. The existing court-ordered mediation programs are administered by the **Dispute Resolution Commission**, and their **website** contains resources and information about the process. The legislation authorizes the Supreme Court to adopt additional rules and standards to implement the new public records dispute mediation law.

There are a few things to consider in structuring mediations involving public agencies. One issue is who should represent a public agency in the mediation. The agency may wish to designate one board member or an employee to represent it in the mediation. If the entire board, a majority of the board, or a committee or majority of a committee established by the board, were to attend the mediation, the open meetings law would require the sessions to be open to the public. A mediation process that did not trigger the open meetings law requirements was validated by the North Carolina Court of Appeals in ***Gannet Pacific Corp. v. City of Asheville and Buncombe County***. In that case, each of the two public agencies involved in the dispute designated an individual board member to represent the them in the mediation sessions. Then the representatives met with their respective boards and their attorneys in closed session to discuss their legal options and positions.

In addition, settlements are public record under the Public Records Act. Although the settlement statute might not apply to a voluntary pre-litigation mediation, under the basic public records requirements, all documents created or received by the public agency in connection with the process will be public record, unless a specific exception applies. So either way, documents related to the settlement of a public records dispute are likely to be public records themselves.

Finally, it is interesting to note that the new mediation law contains the following provision: "Nothing in this section shall prevent a party seeking production of public records from seeking injunctive or other relief, including production of public records prior to any scheduled mediation." **G.S. 7A-38.3E**. This seems to allow a party to petition the court to obtain the very records that are the subject of a mediation before the mediation occurs. Perhaps it is intended to allow temporary or immediate relief under circumstances where it is necessary to prevent harm or preserve the status quo, but the language does not limit the relief that may be sought to these terms.

Attorneys' Fees

The general rule in litigation is that parties pay their own costs, and judges may require one party to pay a prevailing party's attorneys' fees only when authorized by law. Within the Public Records Act, **G.S. 132-9**has allowed the "prevailing party" in a lawsuit to compel the disclosure of public records to recover attorneys' fees unless the court finds that the agency acted with substantial justification in denying access to the public records or in other circumstances where the award of attorneys' fees would be unjust. This provision has been changed.

The new ethics legislation allows a party who "substantially prevails" to recover attorneys' fees unless the court finds that the public agency "acted in reasonable reliance on any of the following:

(1) A judgment or an order of a court applicable to the governmental unit or governmental body.

(2) The published opinion of an appellate court, an order of the North Carolina Business Court, or a final order of the Trial Division of the General Court of Justice.

(3) A written opinion, decision, or letter of the Attorney General."

(An additional provision prevents the award of attorneys' fees against a public hospital created under Article 2 of Chapter 131E, if the court finds that the action was brought by on behalf of a competing health care provider "for obtaining information to be used to gain a competitive advantage." G.S. 132-9(e).)

The changes in the attorneys' fees provision may well affect the way public agencies respond to some types of public records requests. There are certainly many situations in which the law is not clear about whether access to a particular record may or must be provided. Public agencies rely on many sources, including their own attorneys, who in turn rely on court cases from North Carolina and perhaps other states, as well as resources and advice from the School of Government, the League of Municipalities, the Association of County Commissioners, the School Boards Association, and others. The new law does not preclude reliance on these sources and there is no reason for public agencies to refrain from consulting them. However, if litigation is expected and there is no North Carolina case that provides clear guidance, many public agencies will likely seek an Attorney General's opinion.

The process of obtaining an Attorney General's opinion may delay access to the requested records. There is nothing in the new law that specifically deals with the question of whether the obligation to provide records "as promptly as possible" (**G.S. 132-6(a)**) is tolled while the agency waits for a requested Attorney General's opinion. Nonetheless, it is likely that many public agencies will rely on this "safe harbor" before releasing public records, in order to protect against the possibility of having to pay attorneys' fees.

Under the **statute,** assessments of attorneys' fees must be paid from the operating expenses of the agency. They may be assessed against an individual employee only upon a finding that the employee knowingly and intentionally violated the public records law. An individual is not liable if he or she relies on the advice of an attorney. This "safe harbor" provision has not been changed, and a person may still rely on the advice of the public agency's or any other attorney to avoid personal liability.

These changes became effective October 1, 2010.

Links

- www.ncleg.net/Sessions/2009/Bills/House/PDF/H961v9.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_132.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_7A/GS_7A-38.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-9.html
- www.nccourts.org/courts/CRS/councils/DRC/Default.asp
- appellate.nccourts.org/opinions/?c=2&pdf=26111
- www.ncleg.net/Sessions/2009/Bills/House/PDF/H961v8.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-6.html