



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 31 (2015)

(Adopted and Issued by the Commission on May 15, 2015; Amended September 20, 2024.)

Reducing an Agreement to Writing When One or More Parties are Self-Represented, Standards 4, 5, 6 and 8

Mediators may not prepare a settlement agreement for self-represented parties but should facilitate the parties having an attorney prepare a settlement agreement.

Concerns Raised

Mediator was appointed by the court for a court ordered mediation in a case in which an attorney represents the defendant, and the plaintiff is not represented by an attorney. The parties reach an agreement at the mediated settlement conference. Mediator specifically asks for guidance about the following concerns:

May the mediator prepare the mediated settlement agreement for the parties to sign?

What are the duties of the mediator when an attorney drafts a proposed settlement agreement for the self-represented party to sign at the mediated settlement conference?

Advisory Opinion

Question 1

May the mediator prepare the mediated settlement agreement for the parties to sign?

No.

Once an agreement is reached in a mediation, N.C.G.S. § 7A-38.1(l) requires that it be reduced to writing and signed by the parties. If one or more parties are self-represented, the mediator may not, consistent with the Standards of Professional Conduct for Mediators (“Standards”), Standard 6, prepare such document. However, if one or more of the parties is represented by an attorney, the mediator may invite the attorney to prepare the settlement agreement. Once the agreement has been prepared, the mediator should review it with the parties to ensure that it accurately records all of their agreement. The mediator should also encourage self-represented parties to seek legal or other professional advice before signing an agreement but should continue with the mediation if the party declines.

As discussed by the Dispute Resolution Commission (Commission) in Advisory Opinion 28 (2013), Standard 6 provides that “[a] mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.” As noted in that opinion, preparing a binding agreement for unrepresented parties constitutes the practice of law and, therefore, is a violation of Standard 6. Advisory Opinion 28 also applies to the facts outlined above, and mediators would be in violation of Standard 6 if they prepare the mediated settlement agreement for the parties and one or more of them is not represented by an attorney.

However, if the parties have reached agreement and the self-represented party wishes to consult an attorney before converting that agreement into an enforceable contract, the mediator may use a Mediation Summary (AOC-DRC-18) to summarize the essential elements of the parties’ agreement. That Mediation Summary does not provide space for the parties’ signatures and by its own terms is not a binding agreement.

An attorney representing a party may prepare an agreement, after which the mediator should continue to mediate to ensure that all parties agree to the writing and that the writing reflects their agreement. Once the agreement is affirmed and is signed by the parties, then the mediator shall file the Report of Mediator.

Question 2

What are the duties of the mediator when an attorney drafts a proposed settlement agreement for the self-represented party to sign at the mediated settlement conference?

The second inquiry arises when an attorney for a party drafts a proposed settlement at the mediation for the self-represented party to review and sign. While the Commission encourages self-determination by the parties in their decisions, Standard 4(d) makes it clear that, in appropriate circumstances, the mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process. This situation, in which there is an inherent power imbalance when one party is pro se, is one which is appropriate for the mediator to inform the self-represented party of the importance of seeking outside advice. Additionally, Standard 5(d) permits the mediator, after offering the information set out in Standard 4(d), to proceed with the mediation if the party declines to seek outside counsel.

In order to meet the requirements of Standard 4(d) and Standard 5(d), the mediator shall inform the self-represented party that the mediator cannot give legal advice to any party, that the self-represented party has the right to have an attorney review the draft agreement, that the mediator will recess the mediation if that party wishes to do so, and that the mediator informs the party of the importance of consultation with an attorney, or other professional prior to executing an agreement. If, after that information the party still desires to sign the agreement, the mediator may then acquiesce to the self-represented party’s desire.

In addition, in discussing the mediator’s role in this circumstance, it is necessary to consider the mediator’s duty to protect the integrity of the mediation process under Standard 8.

Standard 8(a) provides:

A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party-even if they cannot agree.

Standard 8(b) provides:

If a mediator believes that the statements or actions of a participant- including those of an attorney who the mediator believes is engaging in, or has engaged in, professional misconduct- ...jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If an attorney's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the attorney to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3€ of the North Carolina Rules of Professional Conduct.

In order to meet the requirements set out in Standard 8, the mediator shall do the following two things:

The mediator shall review with the parties the document drafted by the attorney; and

If the terms discussed by the parties in the presence of the mediator are not present or are misstated, the mediator shall raise questions with the parties and attorney about whether the agreement as drafted conveys the intent of the parties and should facilitate their discussions and negotiations to reach a complete agreement.

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and certification 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.