



Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 32 (2016)

(Adopted and Issued by the Commission on November 18, 2016)

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.

Concerns Raised

A court-appointed DRC certified mediator in a Family Financial Settlement (FFS) Program case asks for guidance in a situation involving a pro se Chinese speaking plaintiff and a pro se English speaking defendant.¹ Plaintiff has indicated that she will bring a family member to act as an interpreter for her and all parties agree to that arrangement. Mediator specifically asks for guidance about the following concerns:

- 1) May the mediator permit the family member of the pro se plaintiff to serve as her interpreter at the mediated settlement conference?**
- 2) If the parties choose to summarize their terms on a Mediation Summary form (AOC-DRC-18) at the conclusion of the conference, in what language should the document be drafted?**

¹ While the facts of this advisory opinion deal with a specific question asked of a Commission member involving an FFS case and two pro se parties, one of whom spoke Chinese, the conclusions and best practice suggestions herein would also apply in any MSC or FFS mediation involving two pro se parties, one of whom speaks a language other than English.

- 3) What are the recommended best practices for the mediator to follow to ensure that it is clear that the Mediation Summary was the product of a mediation involving at least one non-English speaking party?**

Advisory Opinion

- 1) May the mediator permit the family member of the pro se plaintiff to serve as her interpreter at the mediated settlement conference?**

Standard IV “Consent” provides in part: “A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party’s options within the process.” Standard IV(C) provides: “If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party’s capacity to comprehend, participate and exercise self-determination.” In this inquiry, the pro se plaintiff needs the services of a language interpreter as an accommodation, and wishes to bring a family member to the mediated settlement conference to act as her interpreter.

While the Administrative Office of the Court (AOC) maintains a list of trained and qualified language interpreters, and provides language interpreters in some court proceedings, the AOC does not provide them free of charge for mediated settlement conferences. (AOC interpreter staff can be reached at (919) 890-1407 or OLAS@nccourts.org). Many parties needing language accommodation are unable to afford the services of a trained and qualified language interpreter, and as here, elect to bring a family member/friend to the mediated settlement conference to act as an interpreter. The mediation process belongs to the parties and a party needing language accommodation is permitted to and responsible for, deciding who his/her interpreter should be. The mediator may permit the family member/friend to attend the conference and serve as interpreter for the party needing the accommodation, subject to the mediator’s exercise of his/her professional judgment that the family member/friend can interpret sufficiently to provide reasonable assurance of the party’s understanding during the conference, and unless doing so would not be in compliance with the applicable program rules. This accommodation facilitates the party’s capacity to understand the mediation process, the role of the mediator and the party’s options within the process as contemplated by Standard IV.

It is important that the thoughts and ideas of each party are heard and understood by the other party(ies) and the mediator. A literal word by word recitation is rarely possible since there is not a one-to-one correspondence between words or concepts in different languages. However, the mediator should clarify that the interpreter will relate as completely as possible all that is said during the conference and not just a summary and

should encourage the interpreter not to engage in conversation with a party separate and apart from the specific statements made and/or questions asked.

A mediator's duty under Standard IV does not, however, create a duty on the mediator to explore the availability of a trained and qualified language interpreter; rather it is the responsibility of the party needing the accommodation to make the decision as to the need for an interpreter and who the interpreter should be. If the mediator, in the exercise of his/her professional judgment is not satisfied that the interpreter can provide reasonable assurance of the party's understanding during the mediation process, the mediator should recess the mediation, encourage the party needing accommodation to locate another individual who is able to provide reasonable assurance, and reschedule the conference.

Caveat—If a mediator is conducting a mediation for the Industrial Commission (IC), s/he should be sure to follow the IC's protocol on the use of interpreters.

2) If the parties choose to summarize their terms on a Mediation Summary (AOC-DRC-18) at the conclusion of the conference, in what language should the document be drafted?

Since both parties are pro se in this case, the Commission recommends that any matters resolved at the mediated settlement conference be summarized on AOC-DRC-18, Mediation Summary, or a similar form.² Advisory Opinion 28 (2013) advises that the parties may prepare the Mediation Summary or the mediator may act as a scrivener. The Summary is not a binding agreement and neither the parties nor the mediator should sign it. The question arises, "In what language should the Mediation Summary be drafted?" Since English is the primary language used in North Carolina's courts, it is recommended that the Mediation Summary be drafted in English. The mediator should then read the Summary to the parties, ask the trained and qualified interpreter or the family member interpreter to interpret its terms for the non-English speaking plaintiff, facilitate a discussion to ensure that all parties understand the terms of the Summary and afford them an opportunity to make any necessary corrections.

3) What are the recommended best practices for the mediator to follow to ensure that it is clear that the Mediation Summary was the product of a mediation involving at least one non-English speaking party?

The pro se parties may take the Mediation Summary to an attorney/attorneys of their choice to have them prepare a binding contract for the parties' signatures or they may

² The mediator may wish to review the "Mediation Agreements" section in the Toolbox on the Commission's website for instructions and guidance in the use of forms when all parties are pro se, one party is pro se, or all parties are represented by counsel. If one party is represented by counsel and one is a pro se non-English speaking party, the mediator may wish to refer to Advisory Opinion 31 (2015).

bring the Summary to the court and seek entry of an appropriate order. To alert the court to the language access issue, it is recommended as a best practice that the mediator add a provision at the end of the Mediation Summary indicating that the Summary was read to the parties and interpreted for the non-English speaking party. When the Mediation Summary is presented to the court for entry of a memorandum of judgment in that court proceeding, the court may then utilize the services of a qualified translator and/or interpreter pursuant to policies and procedures adopted by AOC which may provide said services at no cost to the parties in order to complete the necessary examination to ensure that all parties understand and agree to the terms of the memorandum of judgment prior to entry by the court.

The Commission suggests that the following or similar language be added to the Mediation Summary (AOC-DRC-18) when a mediator is conducting a mediation involving a non-English speaking party:

“This Mediation Summary was drafted in English, read to the parties by the mediator in English, and interpreted by _____(name) for _____ (the non-English speaking party) in the following language:_____.”