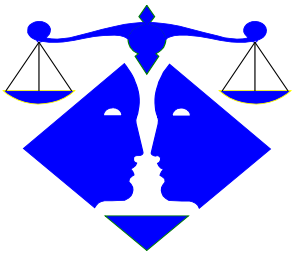

Advisory Opinion of the
NC Dispute Resolution Commission
Advisory Opinion No. 31 (2015)

(Adopted and Issued by the Commission on May 15, 2015)

N.C. Gen. Stat. §7A-38.2(b) provides, "[t]he administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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 practices. In adopting the policy and amendments thereto, and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Facts Presented

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.

First Concern

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

Advisory Opinion

As discussed by the Commission in Advisory Opinion 28 (2013), Standard 6 of the Standards of Professional Conduct for Mediators, entitled "Legal and Other Professional Advice Prohibited," 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 the mediator would be in violation of Standard 6 if s/he prepares 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 pro se 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.

Second Concern

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

Advisory Opinion

The second inquiry arises when the attorney for the defendant drafts a proposed settlement at the mediation for the pro se 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 pro se 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 pro se party that the mediator cannot give legal advice to any party, that the pro se party has the right to have an attorney review the draft agreement, that the mediator will recess the mediation for him/her to do so if that party wishes, 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 pro se party's desire.

In addition, in discussing the mediator's role in this circumstance, it is necessary to consider Standard 8.

That standard addresses the mediator's duty to protect the integrity of the mediation process and provides that 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." Section (b) of Standard 8 provides as follows:

> If a mediator believes that the statements or actions of a participant including those of a 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(e) of the North Carolina Rules of Professional Conduct."

The mediator shall do the following two things set out below in order to meet the requirements set out by the Standard 8.

1. The mediator shall read the document drafted by a party or the attorney.
2. 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.