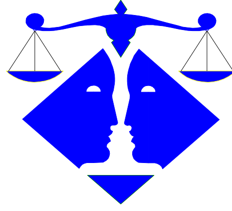

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 42 (2021)

(Adopted and Issued by the Commission on June 25, 2021)

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 practice. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

In a dispute over the enforcement of a memorandum of settlement signed by attorneys on behalf of their clients, the Court of Appeals determined the plain meaning of N.C.G.S. § 7A-38.1(l), requires mediated settlement agreements contain the signature of the named parties to the action, holding that an agreement signed by an attorney on behalf of their client, regardless of whether given authority, is unenforceable.

The opinion states: "N.C.G.S. § 7A-38.1(l) does not permit authorized agents to sign on behalf of a party. In adopting the language of N.C.G.S. § 7A-38.1(l), the General Assembly unambiguously omitted the authority to sign by authorized agent as it has included in other statute of frauds contexts." *Id.* The Court of Appeals held that "[t]he failure of the parties to sign the mediated settlement agreement renders it unenforceable as a matter of law." *Id.*

The court noted in footnote 5, quoting *House v. Stokes*, 66 N.C. App. 636, 641 (1984), "[t]he statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made". In *Mitchell*, one party denied having authorized the attorney to sign.

ADVISORY OPINION

What are the duties of the mediator when a party is unable to sign a settlement agreement reached during a mediation?

In *Mitchell v. Boswell, No. COA19-1077 (N.C. Ct. App. Nov. 3, 2020),* the Court of Appeals held "the applicable statute of frauds by its plain terms requires the parties, not their attorneys, to sign a mediated settlement agreement. The failure of the parties to sign the mediated settlement agreement renders it unenforceable as a matter of law". The court observed in footnote 5 "[t]he statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made," quoting *House v. Stokes*, 66 N.C. App. 636, 641 (1984). In *Mitchell,* the signing attorney allegedly had verbal authority from his client to sign the mediated settlement agreement. The client denied having given authority.

A party who will not be physically present at a mediated settlement conference is responsible for arranging electronic signing capacity and if that cannot be done, for providing written verification of someone with authority to sign on the party's behalf. The mediator is not required to determine the legal adequacy of the written verification provided. However, if a party who will not be physically present at the time the final agreement is to be signed has not made arrangements for electronic signature or provided written verification that the party's designee has authority to sign on the party's behalf, the mediator shall encourage the party or party's attorney to notify all other parties of the lack of ability to execute a final agreement prior to commencing the mediation. After full disclosure, the parties may commence the settlement conference.

When the mediator learns that a party required to attend under MSC 4(a) does not plan to attend, best practice includes the following steps.

1) If notified in advance, the mediator should discuss the attendance rule with the parties and/or their counsel and strongly encourage compliance with the attendance rule.

2) If all parties consent and the mediator determines that there is a compelling reason to excuse the party's attendance, the mediator should seek to determine that the party can be available through electronic means to sign the final agreement, or be able to provide written verification that the party's designee has authority to sign on the party's behalf.

3) If the party refuses to attend either in person or through remote technology, or fails to appear at the mediation, the mediator should ask the attorney if the party has provided written verification that the party's designee has authority to sign on the party's behalf.

4) Absent such written designation, the mediator should encourage the party and/or the party's attorney to disclose to the other side the fact that the party has not provided written verification that the party's designee has authority to sign on the party's behalf. After full disclosure, those in attendance and the mediator may agree to commence the conference. Unless impasse occurs, the conference is not concluded until the requirements of MSC 4(c)

are met. Recess may be an appropriate tool to continue the conference until all required signatures are obtained.

5) If a party does not consent to disclose that arrangements have not been made to finalize a settlement agreement through electronic signature or written verification that the party's designee has authority to sign on the party's behalf, the mediator may determine that it is appropriate to recess the mediation or, pursuant to Standard 8, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator's duty to maintain confidentiality under Standard 3(b). A recess or a withdrawal may avoid a situation where the other party spends time and money on the mediation process with the understanding that a final agreement may be reached, when the inability to execute a final agreement means a final agreement cannot be reached during the conference.

6) This Advisory Opinion does not modify the attendance rules in MSC 4(a), impose additional requirements regarding authority to make decisions in the mediated settlement conference or impose additional duties or obligations on representatives of corporations or governmental entities in mediated settlement conferences. See Rule 4(a) for requirements regarding attendance and authority.

This Advisory Opinion supersedes AO 2 and AO 35 only in regard to signing authority required for a mediated settlement agreement.