DISPUTE RESOLUTION COMMISSION
NEWS AND UPDATES
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Commission Seeks Comment
Proposed amendments to the MSC/FFS Training Guidelines and MSC Rule 4(c)(4).

MSC Rule 4(c)(4) - proposed language to mirror Advisory Opinion.

Please visit the Commission Seeks Comment webpage to view both proposed amendments.

Forward comments on or before March 3, 2023, to DRCMediators@nccourts.org

When Should Mediators Be Able To Write The Settlement Agreement For Parties?

By: Frank Laney

In the early 1990's I conducted mediations for divorcing couples and had a steady growing business. In most cases, one party or both had attorneys with whom they consulted, but those attorneys never came to the mediation meetings. So, I would draft a set of notes, recording the agreements the parties reached and one or the other would take it to an attorney to have it drafted into a binding separation agreement. Finally, I mediated with an elderly couple who had little money and neither had an attorney. I prepared my notes and gave them to the couple and instructed them to have an attorney prepare their separation agreement. They had great difficulty finding an attorney who was willing to undertake that task, except one who would write it for $10,000, which they thought was outrageous. They came back to me to discuss what to do next. I remember the old man, haltingly pointing to the diploma on my wall. "You're an attorney, aren't you?"
"Well, yes."
"Can't you write the agreement?"
I agreed to think about it. I read over all the relevant Bar ethics opinions (I had collected them in a file over the years), then reluctantly agreed with lots of warnings and caveats. After that, I proceeded to write separation agreements whenever the parties asked. I had many friends in the mediation field who thought I was crazy and that I was taking a big risk. But I went ahead, trying to provide the services that my clients wanted and needed.

All of that ended when in 1994 I began working for the Industrial Commission as Mediation Coordinator and then in 1997 began a 25-year stint mediating for the US Court of Appeals. But I tell this to let you see my point of view. Mediators who are attorneys can legally and ethically write final binding agreements for parties if the parties so request. Also, I had Bar opinions which, when construed together, I believed allowed this practice. Again, others in the field disagreed.

This all changed when the State Bar issued 2012 FEO 2 which stated that mediators cannot draft settlement agreements for both parties. If the mediator is not an attorney, then drafting any agreement is the unauthorized practice of law. If the mediator is an attorney, they would be undertaking joint representation of parties in conflict, which created an un-waivable conflict. That seemed to settle the matter, and then, (although I disagreed) the Commission codified this by adopting AO 28 (2013), which interprets Standards of Conduct 6 and 7 to prohibit any mediator from switching roles, becoming an attorney for one or both parties, and drafting an agreement for them. But until or unless the State Bar somehow modified or clarified its position, the Commission's views were essentially moot.

Please note that this still allows the mediator to write the agreement for parties who both have attorneys, doing so at the "direction" of those attorneys. Or, if one party is represented, that attorney should write the agreement, but the mediator con-

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tinues to play a role, making sure that all parties understand and agree to the final written agreement. However, the Commission recommends best practice is for the attorneys, not the mediator, to draft the agreement. The mediator may not provide legal advice to the parties, which can become complicated if drafting. If the mediator is simply acting as a scrivener, they must be mindful that by transferring terms for a settlement into an agreement, a mediator must also comply with the State Bar's Rules of Professional Conduct. If attorneys are present at the mediation, best practice is for the attorneys to draft the agreement.

Then in the spring of 2022, while preparing to take the 40-hour FFS training and become a divorce mediator, an attorney wrote the State Bar, asking if she could write settlement agreements for her future clients once they have reached a final agreement on all issues. *And the State Bar said, "yes"!!* A careful reading of 2012 FEO 2 and the latest letter from the State Bar shows that 2012 FEO 2 is predicated on the assumption that the mediator/attorney was serving/representing both parties in drafting the settlement agreement, which created an unwaivable conflict. The 2022 letter from the State Bar, stated in part:

"However, after the mediation is concluded, with informed consent confirmed in writing from both parties, you can represent one of them and draft the settlement agreement. Rule 1.12."

The Bar viewed the situation as one where the mediator had helped the parties reach an agreement and that task was completed. Afterward, one of the parties, with consent of the other, hired the mediator/attorney to draft the needed separation agreement. This serial representation did not create a conflict, as long as consent was acquired.

However, while the State Bar would allow this action by the attorney, the Standards of Professional Conduct for Mediators would prohibit the mediator from drafting the agreement. Standard 7(c) provides "[a] mediator who is a lawyer, therapist, or other professional…shall not advise, counsel, or represent any of the partis in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute…" Therefore, a mediator is prohibited from representing a party to a mediation, after the conclusion of the mediation, for the purposes of drafting an agreement.

With this new information in hand, I approached the DRC's Director, Tara Kozlowski, about modifying the Commission's position on this issue, including amending Standard 7 to allow a mediator to be subsequently hired by one party subject to consent and waiver by the other party. She was open but skeptical. I was bullish, believing that people of good will and open minds could craft a way past any obstacles. We had some phone calls, swapped some emails and were able to narrow the focus to several fundamental questions. To hash those out, we agreed to meet in Tara's office. Whereupon I discovered the huge stumps in the middle of the field that Tara had been talking about.

First, for the State Bar opinion to be operative, the mediation must be over. But when does a mediation end? The working definition seems to be when the parties have stopped talking due to either an agreement or impasse, they have paid the mediator's fee and the mediator has filed the Report of Mediator (ROM) with the court closing the mediation. Then, how does the mediator file the ROM ending the mediation process when no agreement has been written and signed by the parties? We decided that maybe we could call the filing of the ROM a ministerial task which could be done after the mediation was over.

The next issue was, without a written agreement to review and approve, how do the parties and mediator know the negotiations are completed? Experience has taught that in cases other than insured claims settled by the payment of money, the exact wording of the written agreement may be as complex as the negotiations that led to the initial decision to settle. If the mediator is retained by one spouse to write the agreement and the mediator, with all good will and honesty does so, but the mediator or the parties realize that a detail was overlooked in the mediation process, how is that now rectified? The attorney cannot go back to being a neutral mediator. Nor would it be ethical for the attorney/mediator, who may possess volumes of confidential information from the other spouse, to re-enter negotiations as an attorney representative. Nor could the attorney even give advice to the client-spouse on how that spouse could negotiate a resolution to the missing agreement, as that advice could be predicated on confidential information. Or another similar scenario, when the other party does not understand or disagrees with how part of the agreement is written, what role can/should the attorney/mediator play in straightening out the dispute? None?

Next, what about ancillary documents, such as QDROs, deeds etc.? If those can be drafted and, once signed, implemented by the attorney/mediator, can this person also draft an uncontested divorce complaint and represent one side in that proceeding? Undertaking this additional work may require communication with bankers, investment brokers, court officials and others. What are the boundaries of mediation confidentiality in this new terrain?

If the drafting representation will be limited to drafting only, how is that limit defined? When does it end?

Tara and I agreed, that if all went well, attorney/mediators could do a great service by writing separation agreements and other settlement agreements for the parties who do not have attorneys representing them. But in litigious situations, often not everything goes well. If one teeny tiny thing is off and needs to be fixed by going back into negotiation, there will be great pressure on the attorney/mediator to do this one little thing, even if it maybe crosses a line, because we have spent so much time and effort getting this far and we are so close and it would be a shame to throw all of that away and start over with another mediator or

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attorneys, so please, please, please?

As much as I really wanted to figure out a way for the Commission to craft rules allowing attorney/mediators to write agreements upon the parties' request and consent, we foresaw it quickly becoming a sticky swamp where the Commission could not delineate precise boundaries and bright lines that would keep mediators from wandering into dangerous situations from a legal ethics or mediator ethics standpoint.

As it stands, the State Bar Opinion, 2012 FEO 2, in conjunction with Standard 7 of the Standards of Professional Conduct for Mediators, prohibit a mediator from drafting an agreement for the parties when the mediation involves one or more pro se parties. The Commission recommends that an attorney, not the mediator, draft the agreement for mediations where all parties are represented by counsel. (Please be aware that the State Bar is considering bringing ethics charges against a mediator who drafted the mediated agreement when all parties were represented by attorneys, but the agreement arguably contained a legally unethical provision – an agreement not to report professional misconduct.)

I remain, and I think the Commission remains, open to further conversation and insight as to how we can create a pathway forward. We just to do not see it right now.

The views and analysis are those of Frank Laney and his only. He does not and is not speaking for the Dispute Resolution Commission, the NC Bar Association or its Dispute Resolution Section.

Frank C. Laney was Circuit Mediator for the US Court of Appeals for the Fourth Circuit for 25 years, mediating more than 5000 cases before retiring in April 2022. After serving as an ex-officio member of the NC Dispute Resolution Commission since its inception in 1995, he was appointed as a Commissioner in 2021. He is also an adjunct professor at Campbell University and North Carolina Central University Schools of Law and is a Senior Lecturing Fellow at high Point University School of Law. He teaches the Commission required training for mediator certification with CDSS. He has been a member of the NC Bar Association Dispute Resolution Committee/Section since its inception and is a past Section Chair. He chaired the joint Section-Commission committee responsible for the 2012 updating and rewriting of Alternative Dispute Resolution in North Carolina, A New Civil Procedure, serving as an author and co-editor of the book. In 2004, the Section presented him with the Peace Award.

Who is responsible for scheduling a Court Ordered Mediation?

Staff have received several inquiries the past few weeks as to who is responsible for scheduling a court-ordered mediation. Many complaints staff have heard is that the parties are not either not assisting with submitting possible meeting dates, or not responding to the mediator's request for dates. Mediators are referred to MSC and FFS Rule 6 (b)(5) Scheduling and Holding the Mediated Settlement Conference. Staff reminds all certified mediators it is their responsibility to schedule and conduct the conference prior to the conference deadline. In the absence of an agreement by all parties to meet on a selected day, it is the responsibility of the mediator to schedule a date and time for the conference. As a reminder, The Report of Mediator has a section where the mediator is to include who did attend the scheduled conference.

Mediators may also refer to AO-08(2005) states it is the duty of the mediator, and not that of the parties, to schedule the mediation within the timeframe established by the court for completion.

Be sure to contact staff with any questions or concerns.

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