

**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 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 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?

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As discussed by the Commission in Advisory Opinion 28 (2013), Standard VI of the Standards of Professional Conduct for Mediators, entitled “Separation of Mediation from Legal and Other Professional Advice,” 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 VI. Advisory Opinion 28 also applies to the facts outlined above, and the mediator would be in violation of Standard VI 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?

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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 IV (D) makes it clear that, in appropriate circumstances, the mediator must inform the parties of the importance of seeking legal, financial, tax or other professional advice before and during the mediation. 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 V (D) permits the mediator, after offering the information set out in Standard IV(D), to proceed with the mediation if the party declines to seek outside counsel .

In order to meet the requirements of Standard IV(D) and Standard V(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 VIII.

That standard addresses the mediator's duty to protect the integrity of the mediation process and provides that a "mediator shall...take reasonable steps...to limit abuses of the mediation process." Section B of Standard VIII provides as follows:

If a mediator believes that the statements or actions of a participant, including those of a lawyer, ...jeopardize or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation."

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

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.