Advisory Opinion Number 11 (2007)

(Adopted and Issued by the Commission on March 16, 2007; Amended September 20, 2024.)

Agreement Must Be Reduced to Writing and Signed at the End of the Mediation N.C.G.S. § 7A-38.1(*l*)

If an agreement is reached, the mediator must assure that it is reduced to writing and signed.

Concerned Raised

In March of 2004, mediator conducted a superior court mediated settlement conference and helped the parties reach an agreement in a dispute over the availability and location of certain real property. Although no written agreement was drafted at the conclusion of the initial conference, the mediator filed a Report of Mediator with the court immediately after the settlement conference, reporting that the parties had reached an agreement and that the matter was fully resolved. However, during their mediated settlement conference, the parties agreed that immediately following their conference, they would travel to the site of their dispute to conduct a visual inspection of the property in question to ensure that what they had agreed to was a workable solution and to agree on any remaining details. The mediator did not accompany the parties to the site nor did he follow up with them after the site visit to ensure that they had reached a full agreement and that it was reduced to writing and signed. Sometime later, the defendant sought to change the terms of the oral agreement. The plaintiff became angry, disavowed the agreement in full and sought a trial of the matter. The judge refused the plaintiff's request for a trial, telling her that the mediator had reported the matter settled. The plaintiff eventually agreed to the terms reached at the initial conference in order to avoid having the judge dismiss her case with prejudice. The defendant contacted the Dispute Resolution Commission (Commission) to inquire about her mediator's conduct.

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At the end of a mediation, if an agreement is reached, the mediator has a duty to ensure that it is reduced to writing and signed by the parties. If the parties are not yet ready to write and sign such an agreement, then the mediation is not concluded, and the mediator's job is not done. The mediator may recess the mediation and reconvene once the parties have worked out any remaining details. Then at that meeting the agreement may be reduced to writing and signed. However, absent such a written signed agreement, the matter has not settled, and the mediator must either delay

filing the Report of Mediator until the case has settled with a written, signed agreement or file a report declaring an impasse.

Under the Rules of Mediated Settlement Conferences and Other Settlement Procedures (MSC Rules), the mediator was required by Rule 4(c) to ensure that the agreement reached in mediated settlement was reduced to writing and signed. N.C.G.S. § 7A-38.1(*l*) expressly provides that agreements must be reduced to writing and signed to be enforceable. Oral agreements are not only not enforceable, but likely to lead to the situation that occurred here, *i.e.,* one of the parties equivocates, tempers fray and the parties return to court. The mediator seriously erred in failing to require that the agreement be reduced to writing and violated program rules. If there were still unanswered questions at the end of the initial session, the mediator should have recessed the conference, reconvened it at the site location and proceeded to help the parties sort out any remaining details necessary to ensure a full agreement. The mediator should then have taken steps to ensure the agreement was reduced to writing.

One of the parties to the agreement was an association and member approval of the agreement was needed. The need for such approval does not obviate the mediator's responsibility to ensure that the agreement is reduced to writing at the conclusion of the conference. The mediator should have recessed the mediation for the association to gain proper approval of the terms of the agreement.

Not only did the mediator fail in not requiring a signed writing, he should not have reported to the court that the matter was settled when, in fact it was not, as "remaining details" needed to be agreed upon and then voted upon by the association. Judges rely on the reports of mediators and do not want to undermine the mediator or the program by failing to uphold agreements that are reached in mediation. It is imperative that mediators take their case management responsibilities seriously. Reports of Mediator should not only be filed timely but be both fully and accurately completed. To do otherwise can compromise the integrity of both the mediator and the program, frustrate the court, and potentially harm parties who may find their rights compromised.

The mediator also filed his Report of Mediator (AOC-CV-813) with the court using an outdated copy of the form. Mediators have a responsibility to ensure that they are referring to current program rules and using current program forms when they conduct their mediations. Program forms and rules are posted on the Commission's web site or are available though it's office.

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.