



THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

The Attorney's Guide to Mediation

This Guide covers best practices on how to navigate a case through mediation under the Dispute Resolution Commission's Program Rules and the Standards of Conduct.

The NC State Bar governs approximately 28,000 attorneys across the state. The Dispute Resolution Commission (Commission) has certified approximately 1400 mediators across the state. As most individuals do not read rule sets that do not directly apply to them, many attorneys may not have reviewed the Commission's program rules – even though the mediation rules do apply to the attorneys. This course will provide NC attorneys a glimpse of their responsibilities when attending mediation with a client as well as the mediator's responsibilities. (Note: MSC/FFS Rules 4 and 7 deal with parties/attorneys and other participants; Rule 6 provides the mediator's responsibilities)

1. The Commission.
 - a. The general assembly created the Dispute Resolution Commission in 1995 by enacting NCGS 7A-38.2. The Commission is composed of 18 Members who are appointed to their seat for a 3-year term. The Commission has three staff, all of which are part-time, but are readily available to answer your questions.
 - b. The general assembly created five mediation programs, listed below. The enabling statutes provide the Supreme Court of North Carolina the authority to adopt rules to implement each program's rules of procedure. The Commission works with the Supreme Court to help enforce the rules and has been specifically tasked with certifying and regulating mediators who mediate under the five mediation programs.
 - i. Superior Court Mediated Settlement Conferences (MSC). NCGS § 7A-38.1.
 1. All matters filed in superior court except two small exceptions.
 - ii. Family Financial Program (FFS). NCGS § 7A-38.4A.
 1. Equitable distribution claims and other matters by consent.
 - iii. Clerk Mediation Program (Clerk). NCGS § 7A-38.3B.
 1. Estate and Guardianship and other matters under the Clerk's jurisdiction – rarely used.
 - iv. District Criminal Court (DCC). NCGS § 7A-38.3D.
 1. Voluntary mediation for low-level, non-violent, misdemeanor cases.
 - v. Farm Nuisance Program (Farm). NCGS § 7A-38.3.
 1. Only pre-litigation program – rarely used.
2. This program will focus on the MSC and FFS Rules as well as the Standards of Conduct for Mediators (NCGS 7A-38.2) and how to navigate a mediation.
 - a. Note: The MSC and FFS programs are very similar and only deviate from each other in a few areas.
3. Types of cases that automatically fall into mediation.
 - a. MSC - In all civil actions, except for two minor exceptions, the senior resident superior court judge shall require all persons to attend a pretrial mediated settlement conference. MSC Rule 1(c)(1).

- i. MSC Rule 1(c)(2) provides for the use of other settlement procedures if consent by all parties and conditions are met. Mediation is the default.
 - ii. MSC Rule 1(c)(6) allows a party to file a motion to waive mediation for good cause.
 - 1. Good cause: parties have participated in a settlement procedure, such as non-binding arbitration or neutral evaluation.
 - 2. Parties are opting for arbitration.
 - a. ** if you entered pre-litigation mediation with a certified mediator, you will be more likely to have your motion granted. A judge may deny the motion to waive if the first mediator was not certified.
 - b. FFS - In all equitable distribution matters, the scheduling order must include a requirement that the parties and their counsel attend a mediated settlement conference. FFS Rule 1(c)(1).
 - i. FFS Rule 1(c)(3) provides for the ability to use other settlement procedures if the parties have agreed to the following: the procedure to be used; the neutral to be employed; and the amount of compensation of the neutral. Mediation is the default.
 - ii. FFS Rule 1(d) a party may file a motion to dispense with the settlement procedure for good cause.
4. The Order to Mediate.
 - a. MSC - The parties or their counsel will receive an Order to Mediate after the time for filing of answers has expired. MSC Rule 1(c)(3).
 - i. Be aware of your district's procedures.
 - b. FFS - The court shall issue a scheduling order at the scheduling and discovery conference that shall include a requirement that the parties and their council attend a mediated settlement conference. FFS Rule 1(c)(1).
 - i. Scope: any other family issue existing may be negotiated or decided at the ED settlement proceeding. FFS Rule 1(c)(2).
 - 1. Note: in districts where a custody mediation program has been established, parties must agree to negotiate custody but only after they have fulfilled the custody program requirements.
 - 2. The custody mediation program may not touch the financial aspect of custody, as this falls under the jurisdiction of the family financial program.
5. Counsel's responsibilities.
 - a. Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures. MSC/FFS Rule 1(b).
 - i. Upon being retained to represent any party to a superior court action or family financial issue, counsel shall advise his or her client regarding the settlement procedures approved by these rules.
 - b. Designation of the Mediator. MSC/FFS Rule 2. Party Selected.
 - i. MSC - The parties have 21 days from the court's order to mediate to designate a mediator. MSC Rule 2(a).
 - ii. FFS - The parties may designate a mediator at the S&D Conference. FFS Rule 2(a).
 - iii. Party selected mediators.
 - 1. All parties must agree to the designated mediator. One party may not unilaterally designate.

- a. Designated mediators may determine their fees and expenses. MSC/FFS Rule 7(a). All parties shall agree to the terms of the mediator's agreement, when they party-select a specific mediator. For example: the mediator's hourly rate; travel expenses; cancellation fees; etc...
- iv. Things to consider when selecting a Mediator.
 - 1. The DRC maintains a list of all certified mediators who are willing to accept party-selected matters for each program. Run through the How to Find a Mediator.
 - 2. Consider the location of the mediator – will you be paying them to drive, or will you be driving to them.
 - 3. Review the mediator's profile to know if they have designated as remote only, in person only, or hybrid.
 - 4. Consider the expense of the mediator and your parties' ability to pay the mediator.
 - 5. All certified mediators are bound by the Standards of Conduct, so know the Standards.
 - a. Impartiality. The mediator must disclose any known relationship with a party or a party's counsel that may give the appearance of affecting the mediator's impartiality. Please discuss mediator selection with your clients to avoid last minute disclosure of a relationship. Standards of Conduct, Standard 2.
 - b. Conflict Check! Conflict of Interest. This is a very narrow standard for mediators. The Standards of Conduct, Standard 7.
 - i. A mediator who is a lawyer, therapist, or other professional may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any proceeding issue in the dispute, or in any outgrowth of the dispute.
 - ii. For attorney-mediator's watching this program - the converse is also true, once you mediate you may not represent a party to the mediation in a matter arising out of the original dispute. This applies to the mediator's professional partners and co-shareholders.
- c. Designation of the Mediator. MSC/FFS Rule 2. Court-Appointed.
 - i. MSC - If the parties cannot agree or fail to file a Designation of Mediator form within the 21-day period, the court will appoint a mediator to the case. MSC Rule 2(b).
 - ii. FFS - If the parties cannot agree or fail to designate a mediator at the S&D conference, the court will appoint a mediator to the case. FFS Rule 2(b).
 - iii. Court appointed mediators.
 - 1. Fees are set by the Rules. MSC/FFS Rule 7(b).
 - a. One-time administrative fee of \$175 is due at the time of the appointment.

- i. If the case settles, is dismissed, or has a default judgment entered, the admin fee is still due.
 - b. Hourly fee is \$150, and the mediator may not charge for travel or expenses.
 - c. Postponements fees are defined in each set of rules. MSC Rule 7(e) and FFS Rule 7(f).
- d. Please note: If the parties fail to designate a mediator within the time set forth by the rules, the court will appoint a mediator to the case.
 - i. What happens when a mediator is appointed to the case and the attorneys/parties want to substitute the mediator and use a party selected mediator.
 - ii. This is a more common occurrence in MSC matters as the parties only have 21 days from the Order to Mediate to file their designation. A Substitution of Mediator form is posted on the Commission’s website. MSC/FFS Rule 7(c).
 - 1. The Rule provides the court may approve the substitution only upon proof of payment of the \$175 one-time administrative fee to the appointed mediator, plus any other monies due for mediation services to date.
 - 2. The Substitution form must be filed with the court and the order entered before the court-appointed mediator is relieved of their duties.
 - a. If an Order to substitute is not issued by the court, the mediator will continue to work on the case and schedule the mediation.
- e. MSC/FFS Rule 4 covers the specific duties of the parties, attorneys and other participants in Mediated Settlement Conference.
 - i. The party and their counsel shall attend the conference. MSC/FFS Rule 4(a).
 - 1. (See next slide for better description of attendance.)
 - 2. Mediators are not the attendance police. Any attendance dispute should be brought before the court.
 - ii. Scheduling. Work with the mediator to schedule the conference. Assist in scheduling the conference prior to the mediation deadline issued by the court. MSC Rule 4(a)(3) and FFS Rule 4(b).
 - iii. Notice to Lienholders in superior court matters. It is the duty of the party(ies) or attorney(s) to notify the lienholder of claimant of the date, time and location of the mediated settlement conference, and request the lienholder or claimant’s attendance at the conference. MSC Rule 4(b).
 - iv. Finalize the agreement. If an agreement is reached, the parties shall reduce the essential terms of the agreement to writing. Notify the court of the settlement and file the appropriate consent orders or voluntary dismissals. MSC/FFS Rule 4(c).
 - 1. The finalized agreement must contain all essential terms. Leaving terms to be finalized at a later date may result in an unenforceable agreement. Please see Judge Gale’s order in Howard v. Iomaxis, LLC, 2020 NCBC 36, found on the NC Judicial Branch website, www.nccourt.gov/courts/business-court.
 - 2. The mediator is not responsible for alerting the attorneys that the finalized agreement does not contain all the essential terms necessary. Mediators are prohibited from providing legal advice, Standard 6.
 - v. Pay the mediator’s fee. MSC/FFS 4(d).

1. Unless otherwise agreed to by the parties or by order of the court, the mediator's fee shall be paid in equal shares by the parties at the completion of the conference. MSC Rule 7(f) and FFS Rule 7(d).
 - a. In superior court matters, multiple parties represented by the same counsel shall be considered one party for payment purposes.
 2. Please note, payment of the mediator's fee is court ordered. Failure to pay the mediator's fee is sanctionable by the contempt powers of the court. If a party fails to pay the mediator fee, the mediator may file and Motion for Show Cause and ask for sanctions to include the mediator fee, fines, attorneys' fees, expenses and loss of earning incurred by persons attending the conference. MSC/FFS Rule 5.
 3. Inability to Pay. Any party may move the court for relief from paying the mediator's fee. After the conclusion of the mediation, the party unable to pay shall notify the mediator and file a Petition and Order for Relief from Obligation to Pay Mediator's Fee, AOC-CV-814. MSC Rule 7(d) and FFS Rule 7(f).
- f. No recording (or taping) of a mediation. MSC Rule 4(f) and FFS Rule 4(e).
- g. Attendance!
- i. Rule 4(a)(2). The idea is for the parties to agree on the method that best suits them for the mediation. If they are not able to agree, then the rules will default to either in person or remote. The only time the mediation defaults to remote is if the mediator has made a designation on their mediator profile to indicate they will only conduct remote mediation. ALL other circumstances fall to in person as the default.
 - ii. Know how to check the mediator's profile.
6. Mediator's responsibilities.
- a. Protecting the Integrity of the Mediation Process. Standards of Conduct, Standard 8.
 - i. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.
 1. If a lawyer's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the lawyer to either the NC State Bar or the court having jurisdiction over the matter.
 - b. The Mediator shall be in control of the conference at all times. MSC/FFS Rule 6(a)(1).
 - c. Communications.
 - i. MSC - Private Communications. The Mediator may hold private communications with the parties prior to the conference. MSC rule 6(a)(2).
 1. The mediator is required to provide full disclosure of any interaction with a party prior to the beginning of the mediation. It is recommended that all interactions be disclosed as they occur, or before, to avoid the appearance of bias by the mediator.
 2. Pre-conference interaction with the mediator may also affect fees, where the mediator may need to seek permission from all parties to charge according to pre-mediation work done and not an equal 50/50 share.
 - ii. FFS - No Ex-Parte Communications prior to the conference. FFS Rule 6(a)(2).
 1. The Mediator may hold private conferences with the parties during the mediation only, unless the mediator has consent by all parties.

- a. Exception: scheduling matters.
 - iii. Confidential communications. Standard 3. Confidentiality.
 - 1. A mediator is bound by confidentiality before, during and after the conference. The mediation “process” begins at contact and runs until the matter settles or impasses.
 - 2. Standard 3 prohibits the mediator from disclosing information regarding the mediation to court staff or a nonparticipant third party. Additionally, the mediator must maintain confidential information shared by a party during the mediation.
 - 3. Confidentiality only binds the mediator, not the parties, from discussing what occurred before, during, or after the mediation.
 - a. There are a few exceptions under Standard 3(d).
 - b. If the parties want the negotiations to be confidential to all who attend, they will need to enter into a non-disclosure agreement of their own. Without this extra step the parties can provide a nice statement to the press regarding the offers made during the mediation.
 - 4. Admissibility is covered by statute.
 - a. Specifically, NCGS 7A-38.1(l) discusses inadmissibility of negotiations in superior court mediations and NCGS 7A-38.4A(j) covers the inadmissibility of negotiations in family financial mediations.
 - d. Describing the mediation. The mediator shall define and describe the mediation process to all parties. MSC/FFS Rule 6(b)(1).
 - i. This process is clearly defined in each rule set, please allow the mediator to complete this process, even if your client is well-prepared and you have heard the spiel a hundred times.
 - ii. Consent by the parties. A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party’s options within the mediation process. Standards of Conduct, Standard 4.
 - e. Disclosure. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality. From the party’s perspective! MSC/FFS Rule 6(b)(2). This is also required in Standard 2.
 - f. Declaring an Impasse. Only the mediator may determine when the case has reached an impasse. The mediator may also call a recess and reconvene the mediation on another day if the party’s need time to gather information or process the offer on the table. MSC/FFS Rule 6(b)(3).
 - i. The mediator is trained to recess or discontinue the mediation if all parties cannot meaningfully participate in the mediation. Standard 4(c) Consent.
 - g. The mediator shall file a Report of Mediator reporting the results of the conference. MSC/FFS Rule 6(b)(4).
 - i. The report shall be filed within 10 days of the conclusion of the conference and shall contain the names of the persons who attended the conference.
 - ii. If an agreement was reached, the report shall indicate if the matter will be concluded by consent judgement or dismissal and who will be handing up the proper paperwork to the court.

- h. The mediator shall schedule and hold the mediated settlement conference. MSC/FFS Rule 6(b)(5).
 - i. The mediator shall make an effort to schedule the conference for a time convenient to all parties. If the parties do not agree on a date or time, the mediator shall select a date and time for the mediation.
 - ii. The deadline for mediation shall be strictly observed.
7. Resources
- a. Call the Commission!
 - b. The Commission's website is full of useful information. (Mediator Toolbox)
 - i. Forms available to attorneys with a case in superior court mediation.
 1. Designation of Mediator, AOC-CV-812
 2. Mediator Evaluation Form, AOC-DRC-09
 3. Mediated Settlement Agreement, AOC-DRC-15 and 16.
 4. Mediation Summary, AOC-DRC-18
 5. Order without Motion Extending Completion Date for Mediated Settlement Conference...Upon Stipulation of the Parties..., AOC-DRC-19.
 6. Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, AOC-DRC-20
 7. Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, AOC-CV-818.
 8. Motion and Order Extending Completion Date for Mediated Settlement Conference and Other Settlement Procedure, AOC-CV-835.
 9. Consent Order for Substitution of Mediator, AOC-CV-836
 10. Petition and Order for Relief from Obligation to Pay Mediator's Fee, AOC-CV-814.
 - ii. Forms available to attorneys with a case in family financial mediation.
 1. Designation of Mediator in Family Financial Case, AOC-CV-825
 2. Mediator Evaluation Form, AOC-DRC-09
 3. Mediated Settlement Agreement, AOC-DRC-17
 4. Mediation Summary, AOC-DRC-18
 5. Order without Motion Extending Completion Date for Mediated Settlement Conference...Upon Stipulation of the Parties..., AOC-DRC-19.
 6. Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, AOC-DRC-20
 7. Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference or Judicial Settlement Conference in Family Financial Case, AOC-CV-826
 8. Motion and Order Extending Completion Date for Mediated Settlement Conference and Other Settlement Procedure, AOC-CV-835
 9. Consent Order for Substitution of Mediator, AOC-CV-836
 10. Petition and Order for Relief from Obligation to Pay Mediator's Fee, AOC-CV-814.
 - iii. Form the Commission does not make available – Motion to Waive Mediation.
 - c. Advisory Opinions

- i. The DRC has issued 43 Advisory Opinions since 1999. Advisory Opinions are common law for mediators and provides excellent guidance for attorneys as well.
- 8. Common questions from an attorney walking into mediation.
 - a. Can the mediator draft the agreement?
 - i. NO NO No no no no no. A mediator may not give legal advice. Drafting is legal advice according to the NCSB.
 - ii. A mediator may act as a scrivener only if all named parties are represented at the mediation by counsel, even the parties who do not have a seat at the table.
 - b. If the opposing side is refusing to attend, does my client and I need to attend?
 - i. Yes! The Report of Mediator will show the court who followed orders and who failed to comply with the court order.
 - c. Can I file sanctions against the opposing party for failing to show for mediation?
 - i. Yes! Cite the Rules and the programs enabling statutes.
 - 1. MSC/FFS Rule 5, paragraph 2 states, “A party seeking sanctions against another party or person shall do so in a written motion...”
 - 2. NCGS 7A-38.1(g) and NCGS 7A-38.4A(e) for FFS.
 - 3. You may ask for expenses to and from the mediation, lost wages, etc.
 - d. Can I bring my client’s mother to the mediation?
 - i. Maybe. Remember, the Report of Mediator will reflect all who attend any portion of the settlement conference. The mediator controls the mediation. Therefore, if the opposing party is adamantly against the mother attending the mediation then the mediator may ask the mother to leave so as not to disrupt the mediation process. On the other hand, the mediator may allow the mother to stay if the client will be more responsive to the process and opposing party does not object.
 - e. Can I call the mediator and ask questions two months later?
 - i. Yes, however the Commission does not require the mediator to maintain their notes. A mediator may shred all of their notes from the mediation as they are leaving the building. If the mediator recalls the information you wish to obtain, they may be able to assist.
 - f. Can I subpoena the mediator into court?
 - i. Yes and no. Issuing a subpoena to a mediator is strongly discouraged as the mediator is very limited on what testimony they can provide. The information they can testify to is already listed on the Report of Mediator. The mediator is bound by confidentiality and may not disclose, even to the court, any discussion or behavior observed before, during, or after a mediation.
 - ii. Standard 3. Confidentiality.
 - 1. Standard 3(d)(2) allows a mediator to testify if a statute requires or permits the mediation to do so. The mediator may also testify in a hearing held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator’s fee. The mediator may only testify if they are the movant or under subpoena. The mediator’s testimony is limited to relevant facts only.
 - iii. The FFS statute, NCGS § 7A—38.4A(j) and the MSC statute, NCGS § 7A-38.1(n) provide “[n]o mediator...present at a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference...in any civil proceeding for any purpose...except to attest

to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or the Dispute Resolution Commission, and proceedings to enforce laws concerning juvenile or elder abuse.”

Should you have any questions, or concerns regarding the NCDRC’s Mediation Programs, please reach out to staff by calling 919-890-1415 or email DRCMediators@nccourts.org.