



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## **Advisory Opinion Number 12 (2007)**

*(Adopted and Issued by the Commission on May 18, 2007; Amended September 20, 2024.)*

### **A mediator may not modify the Rules for Settlement Procedures in District Court Family Financial Cases or the Standards of Professional Conduct for Mediators in their Agreement to Mediate service contract.**

#### **Concern Raised**

Prior to a family financial settlement conference, an attorney received an *Agreement to Mediate* from his client's court-appointed, family financial mediator. The attorney asks whether a mediator may, by the terms of an Agreement, modify the Rules for Settlement Procedures in District Court Family Financial Cases (FFS Rules) or the Standards of Professional Conduct for Mediators (Standards)? This Opinion applies to situations where the parties fail to select a mediator and the court is required to appoint a mediator pursuant to the Rules.

#### **Advisory Opinion**

Any agreement containing terms that modify or run counter to the FFS Rules and the Standards, violates the intentions of the General Assembly, Court, and Commission in creating a framework to govern program operations and the conduct of mediators. Moreover, the *Agreement to Mediate* in question disregards the pledge the certified mediator made pursuant to FFS Rule 8(a)(7), which requires all applicants for family financial certification to agree to adhere to the Standards and the court's Order referring the case to family financial settlement which provided that the conference was to be conducted in accordance with the FFS Rules.

Specifically, the *Agreement to Mediate* provided for the court-appointed family financial mediator: 1) to charge a \$150.00\* administrative fee; 2) to be reimbursed for any costs he incurs in quashing a subpoena served on him by one of the parties; 3) to give to the parties the "right" to discontinue the mediation at any time; 4) to freely express his opinions on the parties' respective legal positions and to simultaneously serve as both their mediator and neutral evaluator; and 5) to discuss information disclosed in mediation with others, provided the parties give him written permission

to do so. All the above provisions would modify, if not violate, existing provisions of the FFS Rules or Standards.

The Commission also notes that the *Agreement* in question provides that while the mediator will explain the mediation process to the parties at the beginning of the conference, he will not normally permit the attorneys to make opening statements. Rather than opening statements, the mediator indicates that he will ask the parties and their attorneys questions about the issues they wish to address. While this is not a modification of the FFS Rules *per se*, the Commission believes this language raises a practice issue. The opening session is designed to serve to two purposes. First, it gives the mediator an opportunity to explain the mediation process and the role of the mediator to the parties and their lawyers. Second, it gives the parties the opportunity to sit down together and, perhaps for the first time, hear one another's perspective on the facts and legal issues in dispute.

FFS Rule 6(a)(1) clearly states that the mediator is in control of the conference. A mediator has latitude, consistent with rules and standards, to conduct the proceeding as he or she sees fit. However, the Commission suggests that it may be important to the attorneys and parties to have an opportunity to address one another directly and to give each other their perspective on the dispute. This contributes to the sense that they have had an opportunity to state their case in their own terms and to heard by the other side and the mediator. Simply answering the mediator's questions, may not permit a party the same opportunity to present the full picture as he or she sees it or to emphasize the issues and points that party feels are most important to them.

*\*At the time Advisory Opinion 12 (2007) was adopted the Court-Appointed Administrative Fee was \$150. On June 10, 2020, the Supreme Court of North Carolina amended MSC Rule 7(b) and FFS Rule 7(b) to a \$175.00 one-time Administrative Fee.*

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.