



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 19 (2011)

(Adopted and Issued by the Commission on May 6, 2011, Amended September 20, 2024.)

Compensation of the Mediator, Rule 7

A mediator may charge an advanced deposit for services but is prohibited from delaying the mediation if the advanced deposit has not been made. The mediation shall be conducted by the mediator regardless of a party's ability to pay the mediator's fee.

Concern Raised

A party-selected, Dispute Resolution Commission (Commission) certified family financial mediator postponed a family financial settlement conference because a party advised him that she did not have the funds to pay his required \$500.00 advance deposit. The party's attorney filed a Motion to Dispense With Mediated Settlement Conference based upon his belief that his client could not afford mediation. A district court judge later determined that the party did not have the funds to pay her share of the mediator's fee and granted the Motion to Dispense. This opinion addresses three issues:

- 1) Whether the Rules for Settlement Procedures in District Court Family Financial Cases (FFS Rules) permit the mediator to charge an advance deposit for his mediation services,**
- 2) Whether it was appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay, and**
- 3) Whether the court should dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?**

Advisory Opinion

- 1) Do the FFS Rules permit the mediator to charge an advance deposit for his services as a mediator?**

FFS Rule 7(a) provides that, "When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator."

Since the mediator in this scenario was party-selected, the terms of his compensation are governed by that agreement. Thus, he could require an advance deposit on his eventual fees. The terms for

a court-appointed mediator, by contrast, are set out in their entirety in FFS Rule 7 and may not be varied by agreement.

However, once the mediator has entered a contractual relationship with the parties and has begun the scheduling process, FFS Rule 8(a)(10), which limits the fee arrangement if a party claims inability to pay, applies. Thus, a mediator, who is selected by the parties and charges an advance deposit, should proceed with caution, and should keep in mind the provisos in this opinion.

2) Was it appropriate for the mediator to refuse to conduct the conference on the basis that the party could not pay the advance deposit?

FFS Rule 7(a) allows the parties and the mediator to agree on the terms of the mediator's compensation. However, mediators are also governed by FFS Rule 8(a)(10), which requires certified mediators, whether party-selected or court-appointed, to accept as payment in full of a party's share of the mediator's fee such amount as determined by the court under to FFS Rule 7.

The mediator's duty is to schedule and hold the mediated settlement conference under Rule 6(b)(5). Thus, ordinarily, it is inappropriate for the mediator to delay holding the conference because they determine that a party claims an inability to pay the mediator's fee, even when the party agreed to make an advance deposit.

A party may file a Motion with the Court to determine whether if they can pay the mediator's fee. The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules), Rule 7(d) makes clear that the court will hear the motion only after the case has been settled or tried. Thus, in a Superior Court case, that motion will be heard after mediation and the mediator should proceed with scheduling and holding the conference. No delay in scheduling or holding the conference should occur simply because the mediator learns that a party will not pay their advance deposit.

However, the FFS Rules allow the court to pay the mediator's fee from the marital estate. This difference was created by the drafters of the rule in recognition of a greater occurrence of such motions in equitable distribution (ED) cases and in light of the fact that other means of relief are available in that program.

Thus, if a party is found to be unable to pay in an ED case, but the marital estate can afford to pay the entire mediator's fee, the mediation could proceed with one party not paying, but the mediator getting their entire fee. However, because a party may file the Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fees, under both the MSC and FFS Rules, after the conclusion of the mediated settlement conference, the mediator may not delay holding the conference to enforce an advance deposit term of their agreement with the parties in the face of a party's claim of inability to pay.

The mediator is required to schedule and hold the conference in the face of a claim of inability to pay.

3) Should the court dispense with mediation when it determines that a party is unable to pay her share of the mediator's fee?

FFS Rule 1(d) does not state the grounds or factors the court should apply in ruling on a motion to dispense with mediation. However, the drafters made a clear policy choice in the rules that litigants would not be exempted from the requirement of mediation simply because they were indigent or because they lived a long distance from the site of the mediation. In return, they drafted a section of FFS Rule 7 to provide for participation in this pre-trial settlement program without costs and they drafted a section of FFS Rule 4 to provide for attendance by in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

In the FFS program, there are three methods by which indigent litigants may participate without costs: 1) the party is relieved entirely of the obligation to pay a share of the mediator's fee; 2) the court conducts a judicial settlement conference without cost to anyone; and 3) the court requires that the full mediator's fee be paid out of the marital estate.

A motion to dispense with mediation, under FFS Rule 1(d) should not be allowed simply due to a party's inability to pay or a party's remote location. It certainly should not be used to resolve the dilemma faced by the mediator in this scenario whose fee agreement called for an advance deposit. If the court finds that the party is indigent, it should simply say so and employ one of the tools at its disposal to let that party participate in the mediation. The mediator may not collect all their fee, but that is as it should be under the terms of the mediator's certification found in FFS Rule 8.

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.