

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 19 (2011)

(Adopted and Issued by the Commission on May 6, 2011)

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.

Concern Raised

A party-selected, 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 Family Financial Settlement Conference (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 into a contractual relationship with the parties and has begun the scheduling process, FFS Rule 8.I, 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 and to change any of the provisions of that rule which are applicable to court-appointed mediators. However, mediators are also governed by FFS Rule 8.I, 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 pursuant to FFS Rule 7.

The mediator's duty is to schedule and hold the mediated settlement conference (see Rule 6.B(5)). Thus, ordinarily, it is inappropriate for the mediator to delay holding the conference because s/he determines that a party claims an inability to pay the mediator's fee, even when the party agreed to make an advance deposit. The only time it is appropriate to delay the conference is to give the party time to ask the court to determine whether s/he has the ability to pay the mediator's fee if program rules allow that motion prior to the conference.

Superior Court Mediated Settlement Conference ("MSC") 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 his/her advance deposit. Indeed, the mediator's fee may not be paid by that party at all if the court determines that the party is unable to pay his/her share of the fee.

The rule is a bit different in the FFS program in District Court. There is no requirement in Rule 7.E that the court delay hearing a motion for relief from the obligation to pay the mediator's fee until the conclusion of the case. 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.

In particular, the court has the power in the FFS program to require that the mediator's fee be paid out of the marital estate. 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 his/her entire fee. It is appropriate, then, for a mediator to delay the conference in an

ED case, but only to allow time for a party to seek a ruling from an appropriate judge as to his/her ability to pay. However, because it is possible in both the MSC and FFS programs to delay that motion until after the settlement conference, the mediator may not delay it to enforce, in effect, an advance deposit term of his/her agreement with the parties in the face of a party's claim of inability to pay.

There is obvious tension between FFS Rule 7 which allows the parties and the mediator to set the terms of the mediator's fee by agreement, FFS Rule 6 which requires that the mediator schedule and hold the conference, and FFS Rule 8 which requires mediators to mediate cases with indigent litigants as a term of the mediator's certification. That tension is resolved in this instance by requiring that the mediator 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 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 participation by electronic or other means than physical attendance.

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.

An FFS Rule 1 motion to dispense with mediation 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 of his/her fee, but that is as it should be under the terms of the mediator's certification found in FFS Rule 8.