



ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

Advisory Opinion Number 37 (2018)

(Adopted and Issued by the Commission on September 21, 2018; Amended September 20, 2024.)

Designation of Mediator, Rule 2(a)

Only a party, or a party's counsel, may complete the Designation of Mediator form. A mediator shall not pre-populate a Designation of Mediator form with their information and distribute the form to the parties or their counsel.

Concern Raised

Court staff contacted the Dispute Resolution Commission (Commission) about a mediator who was signing a Designation of Mediator (Designation Form) form naming herself as the mediator who would mediate the case. Court staff expressed concern that, even with the parties' permission, such practice was inconsistent with the Rules for Mediated Settlement and Other Settlement Procedures in Superior Court Action (MSC) and suggested that the practice could look bad to the public, i.e., mediators should not be assigning themselves to mediate cases. Court staff asks whether it is appropriate for MSC mediators to complete, sign and/or file the Designation forms with the court? Some court staff contacted by the Commission regarding this matter indicated that this was not the only mediator in their district engaged in this practice.

Advisory Opinion

May mediators complete, sign, and/or file with the court AOC-CV-812, Designation of Mediator in Superior Court Civil Action?

No.

MSC Rule 2(a) provides:

DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES. Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all the parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of the compensation; and (iv) that the mediator is certified under these rules.

The above Rule establishes that for a mediator to be designated in a superior court case, the parties must first agree on the certified mediator who will conduct their conference. The mediator must, in turn, agree to serve and the parties and mediator must agree on the mediator's compensation. Once all that has been decided, the plaintiff's attorney or other party as agreed, is to use the approved AOC form, i.e., AOC-CV-812, to convey to the court the name of the certified mediator who is being designated by the parties, their contact information, and the mediator's rate of compensation. The signature box on AOC-CV-812 reinforces the language in MSC Rule 2(a) in that it is clearly labeled, "Signature of Party or Party's Attorney". As such, both Rule 2(a) and AOC-CV-812 clearly contemplate that the plaintiff's attorney or another party is to complete, sign, and file the Designation Form. Nowhere in the Rule or Designation Form is there any language suggesting that it is appropriate for the mediator to assume this role or for the parties to delegate such responsibilities to the mediator.

Rule 2(a) reads as it does because having the plaintiff's attorney or other party be responsible for completing, signing, and filing the Designation Form serves to protect the court. If a self-represented party later complains that they were not consulted on the identity of the mediator selected, an opposing party seeks to substitute another mediator for the one named in the Designation Form, or a mediator complains that they were not consulted about serving and did not agree on the compensation set forth in the Designation Form, the court can look to the attorney/party who filed the Designation Form for an explanation. And, as court staff noted above and the Commission agrees, allowing mediators to appoint themselves to conduct mediations does not pass the public perception test and creates the potential for a conflict of interest.

Court staff indicates that they have been told by mediators that attorneys want them to complete, sign, and file Designation Forms as a matter of the attorneys' convenience. It may be convenient for attorneys to have mediators assume this role, but it is not consistent with Rule 2(a) and the signature block on AOC-CV-812 which clearly contemplates that plaintiff's counsel, or another party is to complete, sign, and file the Designation Form. Mediators shall not complete, sign, or file Designation Forms with the court. For purposes of this Opinion, the Commission defines "completing" a Designation Form to include the practice followed by some mediators, or anyone acting on their behalf, of preparing Designation Forms for lawyers, including inserting the name of a mediator, and then e-mailing a pdf of the completed form to the parties for them to sign and file. Court staff should not accept any Designation Forms which they know to have been completed, signed, or filed by a mediator, or anyone acting on their behalf.

Though this Advisory Opinion addresses a question raised by superior court staff and the actions of a superior court mediator, it has broader applicability. Neither the Rules for Settlement Procedures in District Family Financial Cases (FFS), Rule 2(a) nor the Rules of Mediation for Matters Before the Clerk of Superior Court (Clerk) 2(a) provide for the parties to delegate the responsibility to complete, sign, and/or file Designation Forms to the mediators they have chosen to conduct the mediation. For that reason and for the other reasons set forth above, FFS and Clerk mediators should not sign Designation Forms and district court and Clerk staff should not accept any such Designation Forms that they are aware were completed, signed, and/or filed by FFS or Clerk mediators.