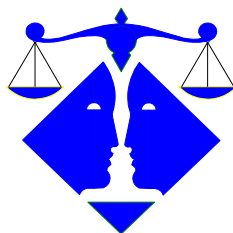


The DRC is operating all programs under new Rules that provide for remote attendance at all mediated settlement conferences unless all parties and persons required to attend and the mediator consent to attend the conference in-person while complying with safety guidelines, or by order of the Court. The remote attendance rules are temporary and shall revert to physical attendance when COVID-19 is no longer a threat.

The modification to MSC Rule 4 does not change the substantive advice provided in AO 35, where the mediator has an obligation to raise the issue of settlement authority with the parties/attorneys to the action. This advice provided within AO 35 remains accurate regardless of the attendance rule presumption.



**Advisory Opinion of the
NC Dispute Resolution Commission
Advisory Opinion No. 35 (2018)**

(Adopted and Issued by the Commission on February 2, 2018)

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 amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Plaintiff’s attorney contacted the Commission. He reported that defendant’s counsel had appeared for a superior court mediated settlement conference without his client. Defendant’s counsel reported that his client had informed him at the last minute that he was unable to attend the conference. Though his client was absent, defendant’s counsel suggested that the mediator proceed with holding the mediated settlement conference. The mediator agreed to proceed and, after discussion, an agreement was reached. Defendant’s counsel signed the agreement on behalf of his client.

Thereafter, defendant's attorney advised plaintiff's attorney that his client was refusing to abide by the terms of the agreement, maintaining that his lawyer had no authority to sign the agreement on his behalf. Plaintiff's attorney admits that he did not ask the defense attorney whether he had full authority to settle. He asks, in light of the defendant's absence, the following questions.

1. Did the mediator have an obligation to raise the issue of settlement authority with the defendant's attorney?
2. If so, what are the mediator's obligations to the process if s/he learns that the attorney does not have full settlement authority in the absence of his/her client?

ADVISORY OPINION

1. Did the mediator have an obligation to raise the issue of settlement authority with the defendant's attorney?

Yes.

MSC Rule 4.A(1)(a)(ii) provides that any party or person required to attend a mediated settlement conference shall physically attend unless all parties and persons required to attend and the mediator consent to excuse or modify the attendance requirement or unless physical attendance is waived by order of the court. Citing this rule, in Advisory Opinion No. 02 (2000), the Commission stated that it is highly preferable for all parties to be physically present at the conference, noting that when a party is absent, difficulties can occur. In that Advisory Opinion, the Commission suggested that even when all parties consent, a mediator should not waive the attendance requirement lightly and should encourage all parties required to be present to physically attend. In fact, one of the difficulties noted in Advisory Opinion No. 02 (2000) is the very situation presented in this inquiry, that "an absent party may later claim that his or her attorney did not have authority to settle the case."

Advisory Opinion No. 02 (2000) suggests that if the mediator determines that there is a compelling reason why a party cannot attend, the mediator should seek to ensure that arrangements are made to permit the party to participate via conference call. If the party will not be present physically or by conference call, the Advisory Opinion suggests that "the mediator should seek to protect the mediation process by encouraging the attorney to obtain from such client written authorization to settle the matter on the client's behalf..." The advisory opinion does not offer guidance as to whether the mediator should or should not proceed with the conference if the attorney does not obtain written settlement authority from his client. It states only that the mediator shall report the failure to attend on the Report of Mediator. (Note: Current MSC Rule 6.B(4) requires the mediator to report only the names of those in attendance without noting those who failed to appear.)

Recently adopted Advisory Opinions No. 24 (2013) and No. 25 (2013) also address attendance issues. These advisory opinions also provide that the mediator should encourage physical attendance and should make an effort to help the parties understand the attendance requirement

and the consequences of their decisions regarding attendance. In Advisory Opinion No. 24, the issue involved the appearance of an officer of a corporation without an attorney, and in Advisory Opinion No. 25, the issue was the attendance of an out-of-state attorney participant who had not been admitted pro hac vice. Under the facts presented in those advisory opinions, the Commission stressed that the mediator should not take it upon him or herself to act as the “attendance police”. In other words, these Opinions held that it was not the mediator’s responsibility to determine who should/could participate or to determine whether the conference should proceed. Rather, the Opinions held that the mediator should work with whomever appears for the mediation and facilitate their discussions. These Opinions are to be distinguished from Advisory Opinion No. 02 (2000) in that the absences noted did not raise issues of settlement authority. When the mediator learns that a party with settlement authority does not plan to appear or is absent, the mediator cannot simply proceed to facilitate the discussion with those who are present, but must take action to address the situation.

2. What are the mediator’s obligations to the process if s/he learns that an attorney does not have full settlement authority in the absence of his/her client?

In light of Advisory Opinions Nos. 02, 24, and 25, the Commission suggests that best practice in the scenario presented would include the following steps.

- 1) If notified in advance, the mediator should discuss the attendance rule with the attorney and strongly urge him to contact his client and encourage the client to attend in person.
- 2) If the client will not attend in person and all parties consent and the mediator determines that there is a compelling reason to excuse the party’s physical attendance, the mediator should seek to ensure that the party can be available by conference call.
- 3) If the client refuses to attend either in person or telephonically, or if the client fails to show up at the mediation, the mediator should ask the attorney to obtain the client’s written permission to settle the matter on the client’s behalf by email or text or other reasonable means.
- 4) Absent such written permission, the mediator should encourage the attorney to disclose to the other side the fact that he does not have full, written settlement authority. After full disclosure, those in attendance and the mediator may agree to proceed with the conference.
- 5) If the attorney refuses to disclose that he does not have full, written settlement authority, then the mediator may determine that it is appropriate to recess the mediation or, pursuant to Standard VIII, Integrity of the Process, withdraw from or terminate the mediation, being careful not to breach the mediator’s duty to maintain confidentiality under Standard III.B. A recess or a withdrawal will avoid a situation where the other party spends time and money on the mediation process with the understanding that an agreement may be reached, when, due to an absence of authority that may not, in fact, be possible.