



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

*As of May 1, 2023, the DRC is operating the MSC, FFS, Clerk, DCC and Farm Nuisance under new Attendance.*

*The Attendance Rules do not change the substitutive 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.*

## **Opinion Number 02 (2000)**

*(Approved by the Commission on August 25, 2000.)*

### **Concern Raised**

Certified mediator asks for guidance on when a mediator can allow a party or insurance company representative to participate in a mediated settlement conference by telephone.

### **Advisory Opinion**

MSC Rule 4(a)(2) provides that any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed or an impasse declared. The attendance requirement may be excused or modified by agreement of all parties and persons required to attend and the mediator. As such, a mediator should not consider excusing or modifying the attendance requirement unless all parties and persons required to attend have consented. If a party unilaterally contacts a mediator and requests that the attendance requirement be excused or modified, the mediator should explain the Rule and suggest the party first discuss his or her request with the other parties and persons required to attend the conference. Whenever possible, the Commission believes it is highly preferable for all parties to be physically present at the conference, including an adjuster or other insurance company representative with authority to settle the case. In that way, parties have an opportunity to hear all the discussions, to come face-to-face with the other side to hear their view of the facts in dispute and their assessment of the case; to be an active participant in formulating offers and counteroffers; and to take ownership of the agreement, including signing it at the conclusion of the conference. When parties are absent, difficulties can occur. For example: a) an absent party may later claim that his or her attorney did not have authority to settle the case; b) an agreement may not be reduced to writing because a party attending by telephone cannot sign and then later repudiates the agreement; or c) an insurance company official with authority to settle and who is to be available on standby may go to a meeting, to lunch, or leave for the day when his or her input is needed most.

The Commission suggests that even when all parties consent, a mediator should not consider waiving or modifying the attendance requirement lightly. Mediators should encourage individual

parties and insurance company representatives to be physically present at the conference unless some compelling reason dictates otherwise. If there is such a compelling reason, the mediator should seek to ensure that arrangements are made to permit the party to participate via conference call. The party should be able to participate in both general and private sessions with the aid of a speakerphone and to speak confidentially with his or her attorney as needed.

When a mediator learns that a party will not be present physically, 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. In the event a party fails to physically attend a conference and has not had the attendance requirement excused or modified by agreement of all parties and the mediator or by order of the senior resident superior court judge, MSC Rule 6(b)(4) requires the mediator to report the failure to attend to the court.

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.