



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## Opinion Number 37 (2018)

*(Adopted and Issued by the Commission on September 21, 2018.)*

### Concern Raised

Court staff contacted the Commission about a mediator who was signing MSC Designation of Mediator forms 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 MSC Program Rules 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 is appropriate for MSC mediators to be completing, signing and/or filing 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.

Mediated Settlement Conference 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, his/her contact information, and the rate of his/her 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. Nowhere in the Rule or 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 s/he was 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 s/he was not consulted about serving and did not agree on the compensation set forth in the Designation, the court can look to the attorney/party who filed the 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. Moreover, to permit the mediator to assume this responsibility undermines attorney/party accountability in the event concerns are later raised about the Designation and the agreements purportedly reached by the parties and mediator that underlie it. As such, mediators should not complete, sign, or file Designation forms with the court. For purposes of this Opinion, the Commission defines “completing” a Designation to include the practice followed by some mediators, or anyone acting on their behalf, of preparing Designations 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.

Some court staff have indicated that they are accepting Designations signed by mediators if they have received an email or other written confirmation from the plaintiff’s attorney indicating that the mediator has been authorized to sign. The Commission does not believe this is a good practice in that it requires busy court staff to keep track of such authorizations and elevates the convenience of attorneys over that of court staff.

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 Family Financial Settlement Rule 2(a). nor Clerk Mediation Program Rule 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, Family Financial Settlement and Clerk Program mediators should not sign Designation forms and district court and Clerk staff should not accept any such Designations that they are aware were completed, signed, and/or filed by FFS or Clerk Program mediators.

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of the certification and qualification of mediators and other neutrals, and mediator and other neutral training programs 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. Later, the Policy was revised to provide that an Opinion be issued in instances where a mediator is disciplined publicly. In adopting the Policy and amendments thereto and issuing opinions, the Commission seeks to educate mediators and to protect the public.