



# ADVISORY OPINION OF THE THE NORTH CAROLINA DISPUTE RESOLUTION COMMISSION

## Opinion Number 39 (2018)

*(Adopted and Issued by the Commission on November 17, 2018.)*

### Concern Raised

Court staff in three judicial districts contacted the Commission over a two-week period regarding an MSC mediator. The mediator, they complained, was chronically neglecting his case management duties. He was frequently failing to file his Reports of Mediator timely, if at all, and, to schedule his conferences within the deadlines for completion set by the court. Court staff in one district reported having to grant extensions and sometimes even move trial dates because the mediator was overbooked. Staff in another district reported having to recruit substitute mediators at the last minute to fill in for the mediator so that parties would not lose their opportunity to mediate. In addition to his failure to fulfill his case management obligations, court staff reported that the mediator was unresponsive to their telephone calls and emails. In one district the mediator failed to respond to the request of a senior resident superior court judge that he meet with him to discuss his missing Reports of Mediator. Court staff expressed a great deal of frustration about having to spend so much time tracking the mediator down and responding to problems that the mediator's conduct created.

Commission staff filed a complaint against the mediator. The mediator failed to respond to the complaint. The Commission's Grievance Committee determined to suspend the mediator's certification for a one-year period and to require him to meet certain conditions in order to be reinstated.

### Advisory Opinion

Though this situation was extreme, it is not unusual for court staff to contact the Commission regarding mediators who are neglecting their case management duties. These situations are sometimes chronic and are always a source of great frustration for staff. Because the Commission is concerned about these complaints, it is taking this opportunity to remind mediators of their case management duties. Mediators who fail to meet their obligations may be disciplined.

Both MSC and FFS Program Rules and the Standards of Conduct place an obligation on mediators to **actively and effectively manage** their cases:

- MSC/FFS Rule 6(b)(4) provides that a mediator is to report on the outcome of each case assigned to him/her by filing a Report of Mediator using either AOC-CV-813 (MSC) or AOC-CV-827 (FFS) or using forms approved by local rule that at minimum collect the same information as the approved forms. Reports are to be fully completed and filed with the court within ten (10) days of the conclusion of a conference or within ten (10) days of a mediator being notified that the parties have reached a settlement. In other words, a Report is due whether a mediation is held or not.

In addition, if an agreement is reached, MSC Rule 6.(b)(4)b. provides that the mediator **shall advise** the parties that MSC Rule 4(c) requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the State or a subdivision thereof is a party to the action or before the expiration of the mediation deadline whichever is longer. FFS Rule 6.(b)(4)b. requires that consistent with FFS Rule 4.(b)(2), the mediator **shall advise** the parties to file their consent judgment or voluntary dismissal with the court within 30 days or before the expiration of the mediation deadline whichever is longer.

- **MSC/FFS Rule 6(b)(5) provides for mediators to schedule and conduct their conferences prior to the deadline for completion set out in the court’s order.** If the parties or their lawyers do not cooperate with the mediator in scheduling the case for mediation, the mediator is to take charge and select a date, time, and location for the conference (within the county where the action is pending) and notify those ordered to attend. Mediators should not wait until the last minute to schedule their conferences. Doing so can lead to circumstances where deadlines set by the court cannot be met.
- **Standard of Conduct 7(f) provides that a mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.**
- Beyond meeting the deadline for completion set out in the court’s order, both MSC 7(e) and FFS Rule 7(f) ask mediators, once a case is scheduled for mediation, to try and avoid postponements. Comments following both these Rules read identically:

“Non-essential requests for postponement work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.”

MSC Rules 7(e)(2) or FFS Rule 7(f)(2) provide guidance on what is good cause for a postponement. Both rules provide that good cause involves situations that are beyond the control of the parties.

Effective mediator case management is critical if our programs are to meet their statutory charge and be successful:

- Enabling legislation charges the MSC and FFS Programs not only with helping parties to settle their cases, but **with making the courts more efficient**. Our Programs can accomplish this goal only if mediators schedule their conferences within the deadlines set by the court and then timely inform the court of outcomes. When mediators do their job well, judges can better manage their dockets and better allocate their time, leading to more efficient courts. When mediators fail to do their job, these

efficiencies are compromised or lost and court staff must take time away from their important work to encourage mediators to comply with program rules.

- A disgruntled party whose case impasses after several hours in mediation could foreseeably complain to his/her local newspaper or state legislator, “I was forced to participate in and pay for a process that does not work. The only people benefitting from mediation are mediators and lawyers.” The best response the Commission has to refute such a charge is robust caseload data. Caseload statistics for the MSC and FFS Programs is pulled primarily from Reports of Mediator. If Reports don’t come in timely or aren’t fully completed, caseload statistics suffer and the programs appear less robust. This data is very important to the Commission as a measure of our program’s health and success. The Commission shares this data annually with judges, legislators, State Bar and NCBA officials, and the public. Commission staff routinely share it with parties who call complaining about having to participate in mediation or who did participate and were unhappy with their result. Research that the Commission sponsored a few years back found that Reports of Mediator were not being filed in 11 % of cases mediated. That is a significant data loss. In addition, tardy Reports which come in after cases are closed are typically not entered in the system, so that data is lost as well.

Sitting down at the table with parties to help them discuss and resolve their disputes is important work. Getting those parties to the table in the first place and then following through to report on their efforts is just as important. Mediators who fail to take this part of their job seriously are potentially harming the courts and the programs they serve and may be putting themselves at risk of disciplinary action.

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.