# POSTED FOR COMMENT UNTIL OCTOBER 1, 2026

## DRAFT Advisory Opinion No. 48 (2026)

*(Adopted and Issued by the Commission on xxxxxx )*

## The Mediated Settlement Conference May Be Held Prior to the Completion of Discovery, Rule 3(b)

**The mediated settlement conference focuses the parties' attention on settlement rather than on trial preparation. The completion of discovery is not required for the parties to attend a court-ordered mediated settlement conference.**

### Concern Raised

Mediator contacted the Dispute Resolution Commission (Commission) to ask if the mediation should proceed when the parties have not completed the discovery process. The parties, and their counsel, expressed to the mediator that they did not wish to mediate the matter until discovery has been completed.

### Advisory Opinion

**May the mediator schedule and hold the mediation before the parties have completed the discovery process?**

**Yes.**

The North Carolina Administrative Office of the Courts assigns time standards for every court case filed within the State. The time standards provide North Carolina citizens with timely access to justice while keeping pending litigation cases on track. These time standards include the completion of court-ordered ADR procedures in certain case types, as required under rules adopted by the Supreme Court of North Carolina. The rules are designed to focus the parties' attention on settlement, rather than on trial preparation, and provide an opportunity for settlement negotiations to take place.

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Actions (MSC), and the Rules for Settlement Procedures in District Court Family Financial Cases (FFS), Rule 3(b), provide guiding principles that the conference should be held after the parties have had a reasonable time to conduct discovery, and well in advance of the trial date. However, there is no requirement that discovery be completed before the beginning of the mediation settlement conference. MSC and FFS Rule 3 (e) provides that "[t]he mediated settlement conference shall not be the cause for the delay of other proceedings in the case, including the completion of discovery…" In other words, failure to complete discovery in a reasonable time is not a reason to delay mediation.

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The mediator is always in control of the conference, under MSC and FFS Rule 6(a)(1). This gives the mediator discretion to begin the mediation process prior to the completion of discovery by the parties, especially if the deadline issued by the court is quickly approaching. Under MSC and FFS Rule 6(b)(5), the mediator is responsible for scheduling and conducting the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediated settlement conference deadline assigned by the court may be extended by the Judge, or their designee, to a new date either on the court's own motion, at the request of the mediator, or by consent of both parties. The process to request an extension of the deadline was intended to be simple, allowing the parties additional time to complete discovery, avoid scheduling conflicts, and bring pre-trial motions. Under MSC and FFS Rule 3(e), the senior resident Superior Court Judge may grant a request to extend the deadline for completion of the mediated settlement conference so long as the extension request does not delay other proceedings in the case, including the completion of discovery. If an order to extend the mediated settlement conference deadline is not issued by the court, the mediator must schedule and hold the conference prior to the initial deadline in the original court order.

A mediated settlement conference can be beneficial to all parties, even when scheduled prior to the completion of discovery. The mediator may work with the parties to resolve pending claims and pre-trial disputes or bring the parties to a better level of understanding of all issues before proceeding to trial. The mediator may also recess and reconvene the conference, as necessary, prior to the mediation deadline to allow the parties time to request, or produce, discovery.

Best practices for mediators:

- If all parties, and their counsel, notify the mediator that additional time is needed to complete discovery, the mediator should work with the parties to schedule the conference after discovery has been completed, but before the deadline.
- If the parties agree additional time is needed, but the deadline to complete the mediated settlement conference is imminent, either the mediator on their own suggestion or the parties by consent may seek an extension of the deadline by filing form, AOC-DRC-19. If the Order is signed by the Judge, or their designee, the mediator has additional time to schedule and hold the conference. If the Order is not signed, the original deadline remains in place, and the conference must be held before the deadline.
- If the mediation has been scheduled prior to the completion of discovery, the mediator should work with the parties to resolve any or all issues on the table. If the parties are not able to reach a final agreement on all issues, and the conference ends in impasse, the mediator may continue to mediate for the parties, and their counsel, as voluntary mediation.

Reminders for attorneys representing a party in mediation:

- MSC/FFS Rule 4 requires all parties to attend the conference. There are no exceptions to this rule based on incomplete discovery.
- MSC/FFS Rule 5 allows for sanctions if a party fails to attend the court-ordered mediated settlement conference.

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- Progress can be made even if the pending matter is not fully resolved in mediation. The parties may be able to resolve discovery issues during the mediated settlement conference.
- MSC/FFS Rule 7, no one party may unilaterally cancel a mediation. Once scheduled, the mediator may postpone the mediated settlement conference with the other party's consent, subject to fees under the Rule.