



MEDIATION BENCHBOOK FOR COURT STAFF

**Mediated Settlement Conference Program (MSC)
Superior Court**

**First Edition
2015**

**North Carolina Dispute Resolution Commission
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www.ncdrc.org**



MEDIATION BENCHBOOK FOR COURT STAFF

MEDIATED SETTLEMENT CONFERENCE PROGRAM (MSC) SUPERIOR COURT

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time.”

***--President Abraham Lincoln
July, 1850***

“Mediation is the best tool we have in our civil superior courts today to help manage cases and resolve disputes.”

***--Judge Orlando Hudson, Sr. Resident Superior Court Judge, Judicial District 14
February, 2015***

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The information in this *Benchbook* is based upon the MSC Program Rules effective April 1, 2014. The publication is intended to provide useful information regarding the subjects covered, but may not contain all relevant information and is not intended to be legal advice. In the use of this book, it is recommended that the reader verify that the particular statute, rule, form, or case cited is current.

Please call the Commission at (919) 890-1415 with any questions.



Message from the Chair

Over the past several months the Commission has been working to develop a **Benchbook** for both judges and court staff on mediation and the Mediated Settlement Conference (MSC) Program in North Carolina. I am proud to be able to share the Commission's **Mediation Benchbook for Court Staff** with you.

This project came about largely for two reasons. First, the Commission wanted to develop a "go-to" publication about the MSC Program which would be readily accessible and a practical resource for court staff and senior resident superior court judges. This **Benchbook** is intended to be a nuts and bolts approach to operating the MSC Program by focusing on practical information and trouble-shooting. Second, the Commission is aware of demographics forecasting that large numbers of court officials and staff, members of the baby boomer generation, will be retiring over the next decade. The AOC tells us that some 82% of senior resident superior court judges, 79% of superior court judges, 70% of trial court administrators, 56% of superior court trial court coordinators, and 80% of judicial assistants will be eligible to retire in ten years! These startling numbers follow this Message. Recognizing that so many seasoned individuals will be leaving the system and that the AOC's resources are already stretched thin, the Commission wanted a handbook in place to assist those who currently are or will be implementing the MSC Program in the not too distant future.

The Commission would like to express its appreciation to the many people who contributed to this project with their knowledge, time, and useful suggestions on the substance and format of this publication. Experienced senior resident superior court judges and their staff were interviewed, helped to write chapters and served as editors. Their enthusiasm and support of the project were profound. While there is not enough space to credit all who contributed, there are some folks I need to single out as having been particularly critical to the effort: E. Deneen Barrier (TCC, District 14), Tueresa Hayden (TCC, District 22A), Ella Wrenn, (TCC, District 9), Michelle Bailey, (TCC District 10), many more, and of course, the Commission's dedicated staff.

In addition to the **Benchbook**, the Commission is working to develop a mentoring program for court staff, matching experienced staff with new hires and less experienced staff seeking information and guidance. Mentors would provide assistance by telephone and email and, where requested, site visits could occur with the Commission potentially underwriting mileage expenses.

The success of the MSC program has everything to do with the efforts and commitment of the judges and court staff in the trenches. The Commission extends its sincere thanks for your work in implementing and supporting the program. The Commission hopes you will find this **Benchbook** to be a valuable resource as you work to make this program stronger and more effective and efficient across North Carolina. Because we plan to update and re-publish it periodically, the Commission asks that you please let its staff know if you spot any problems or have suggestions for topics that should be addressed in future editions. Please feel free to contact us with questions or concerns that may arise as you implement the MSC program in your district.

With best wishes,

Gary Cash, Chair

NCAOC RETIREMENT PROJECTIONS

Title	Number of Current Employees	Employees Eligible to Retire in One Year	%	Employees Eligible to Retire in Three Years	%	Employees Eligible to Retire in Five Years	%	Employees Eligible to Retire in Seven Years	%	Employees Eligible to Retire in Ten Years	%
DC Judicial Assistant I	24	0	0.0%	0	0.0%	5	20.8%	5	20.8%	8	33.3%
DC Judicial Assistant II	32	1	3.1%	4	12.5%	5	15.6%	5	15.6%	7	21.9%
DC Trial Court Coordinator	33	4	12.1%	6	18.2%	9	27.3%	14	42.4%	15	45.5%
Family Court Administrator	9	1	11.1%	2	22.2%	3	33.3%	5	55.6%	5	55.6%
Family Court Case Coordinator	34	1	2.9%	4	11.8%	4	11.8%	6	17.6%	10	29.4
Family Court Coordinator II	2	0	0.0%	0	0.0%	0	0.0%	1	50.0%	2	100.0
SC Judicial Assistant I	12	3	25.0%	3	25.0%	4	33.3%	4	33.3%	5	41.7
SC Judicial Assistant II	21	1	4.8%	3	14.3%	3	14.3%	7	33.3%	8	38.1
SC Trial Court Coordinator	48	10	20.8%	15	31.3%	23	47.9%	24	50%	27	56.3%
Trial Court Administrator	10	3	30.0%	4	40.0%	6	60.0%	7	70.0%	7	70.0%
Chief DC Judge	42	15	35.7%	23	54.8%	27	64.3%	33	78.6%	37	88.1%
DC Judge	226	27	11.9%	47	20.8%	63	27.9%	75	33.2%	106	46.9%
Senior Resident SC Judge	50	21	42.0%	30	60.0%	36	72.0%	37	74.0%	41	82.0%
SC Judge	47	13	27.7%	20	42.6%	26	26%	33	70.2%	37	78.7%



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MEDIATION BENCHBOOK FOR COURT STAFF

MSC PROGRAM

Section I The Basics



Section I.A

Basic Definitions of the Mediation Process

- **Mediated Settlement Conference Defined.** G.S. 7A-38.1(b)(1) defines mediated settlement as a pre-trial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.
- **Mediation Defined.** G.S. 7A-38.1(b)(2) defines mediation as an informal process conducted by a mediator with the objective of helping the parties voluntarily settle their dispute.
- **Role of Mediator Defined.** G.S. 7A-38.1(b)(3) defines a mediator as a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not make an award or render a judgment as to the merits of the action. The mediator is also charged with serving as a case manager including scheduling cases for mediation and reporting outcomes, but not specific terms of any settlement, to the court.
- **Program Purpose.** G.S. 7A-38.1(a) charges the mediated settlement conference program with facilitating the settlement of superior court civil actions and with making civil litigation more economical, less costly, and a more positive experience for litigants. Pursuant to G.S. 7A-38.1, the MSC Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place.



Section I.B A Short History of the MSC Program

In October of 1990, a delegation of NC judges, lawyers, and AOC staff traveled to Florida to take a first-hand look at Florida's new Circuit Civil Mediation Program, including sitting in on some mediations. Impressed with what they saw, the group set about immediately drafting a statute to create a pilot program of "mediated settlement conferences" in North Carolina's superior courts. That program would reflect many of the features of Florida's novel program:

- **The parties pay the mediator.** Litigants, and not taxpayers, compensate the mediator for his or her services both in scheduling the case for mediation and in mediating it.
- **The mediator serves as case manager.** The mediator, and not court staff, work with the parties to: schedule the mediation, make arrangements for the physical location of the conference, ensure that the deadline for completion of the conference is met, and report back to the court on the outcome. The mediator also supports the mediation process by helping the parties stay on course and keep the process moving forward.
- **The parties have an opportunity to select their mediator.** The parties are given an opportunity to select their mediator with the idea that they will have more confidence in someone they have personally selected and, as a result, be more open to the process and the possibility of settlement.
- **Attorney participation.** Attorneys play an active role in the mediation process, advising their clients throughout the conference.

In November of 2002, the MSC Program Rules were revised to provide parties with other dispute resolution alternatives in addition to mediation. A dispute resolution menu was established. With the establishment of the menu, parties were free to select among mediated settlement, neutral evaluation, arbitration, and summary trial as alternative forms of dispute resolution to which their case could be referred. If the parties failed to select one of the other options, mediated settlement remained the default procedure. Over time, mediated settlement has remained the preferred process. In January of 2006, MSC Rule 1.C was revised to provide for mandatory referral to mediated settlement of all civil actions filed in superior court with the exception of actions in which a party is seeking the issuance of an

extraordinary writ or is appealing the revocation of a motor vehicle operator's license. Also in 2006, the rules were amended to require certification of all mediators serving this program whether mediating upon court appointment or party selection. This change was intended to ensure that all mediators participating in the Program were trained, were accountable to the Commission for their conduct, and passed a background check. Since 1991 and the adoption of the pilot legislation, mediated settlement has become institutionalized in North Carolina's superior courts and widely embraced by North Carolina attorneys. The MSC Program has also proven to be of tremendous value to the citizens and taxpayers of our State with approximately three thousand Superior Court civil cases settling each year as a result of mediation.



Section I.C The Benefits of Mediation

Mediated settlement conferences in superior court civil actions are intended to supplement, not replace, our traditional trial system. The mediation process is an important tool for helping our courts be more efficient and save taxpayer dollars. Mediation also offers advantages to the parties since it is less formal than a trial and focuses on consensus building and finding solutions.

1. Mediation Makes the Courts More Efficient.

“There is no doubt that mediation saves court time and is an efficient use of judicial resources by simply getting opposing parties to sit down, listen and talk.”

-----Judge Carl Fox, Sr. Resident Superior Court Judge, Judicial District 15B

- **Cases Settle.** Mediated settlement conferences work! More than half of all cases mediated settle *at the table*. Moreover, mediation’s contributions to settlement are not limited to the conference itself. In 2012, the Commission recruited several UNC-Chapel Hill Masters in Public Administration students as researchers. These students were asked to interview attorneys involved in cases which impasse at mediation, but eventually went on to settle. They asked the attorneys whether their mediation conference played any role in the final settlement of the case. Twenty-five percent of the attorneys who were contacted “strongly agreed” that mediation played a role in their final settlement. An additional 49% “agreed” or “somewhat agreed” that mediation played a role in their final settlement. This suggests that offers on the table or the dialogue begun in mediation can and often do survive impasse as attorneys and parties continue talking. The students also found that 52.8% of the cases that went on to settle, settled within eight weeks of the conference.

Since the attorneys (and sometimes parties) are aware that a filed case will be referred to mediation, the Commission also believes that mandatory mediation increases the possibility of settlements occurring prior to a conference.

- **Mediation Saves Court Time.** Mediated settlement conferences bring parties to the table earlier and reduce filing-to-disposition times in contested cases. In other words, mediation has given judges a tool to speed up the settlement process. That effect was apparent as early as the program’s pilot period when researchers at UNC-Chapel Hill’s then Institute of Government found that the program shaved seven weeks off filing-to-disposition times for cases mediated as opposed to those in a control group where mediation was not ordered. Those researchers also found that the program had the indirect effect of spurring earlier conventional settlement discussions. Since cases referred to mediation typically exit the court system faster than they would have otherwise, this may mean fewer motions, fewer hearings, less paperwork, and less involvement of staff and judicial time in their processing. And, as they say, “time is money;” when cases settle early in the process, not only is the court saved time, but taxpayers may be saved money in that the court system runs more efficiently.

Arguably, mediation’s impact on settlement and efficiency has extended beyond the courts and worked a sea change on the way attorneys practice law in North Carolina. Historically, most cases filed in court settled without the need for a trial. However, mediation has altered the timing of settlement. Prior to the establishment of the MSC Program, most cases settled relatively close to, if not just before, their trial date. Attorneys were reluctant to approach one another about settlement for fear that such overtures would be perceived as an admission of weakness. As such, settlement of the majority of cases—and sometimes all—on the trial calendar, occurred on the proverbial courthouse steps, many months or even years after filing. Anecdotal and statistical information suggests that the very fact that attorneys know their cases will be referred to mediation serves as a catalyst to encourage early negotiations which can lead to settlement. As such, a willingness to discuss settlement is no longer associated with weakness. (See the AOC’s Statistical Report for the MSC Program which shows the number of cases reported by court staff as having settled pre-mediation at the end of this Benchbook).

- **Court Calendars are Firmer.** Judges report that because mediated settlement has led to cases settling earlier, their dockets are leaner and firmer, allowing them to allocate their time more effectively and try the cases that must be tried.

2. **Mediation Benefits the Parties.**

“Mediation is a win-win for everyone involved. Even when the parties don’t settle at the table, many cases go on to settle, often as a result of the dialogue that began in mediation. When they do settle, the case is resolved, the parties go forward in their lives, and the court file can be closed, saving valuable court time and resources.”

- **Mediation Empowers Parties to Make Their Own Decisions.** Prior to the mediated settlement conference program, the parties were most often not directly involved in the settlement process. Now they are. A mediated settlement conference offers parties an informal opportunity to sit down together to try and resolve their disputes themselves. Mediation may be the first and only time that parties have been face-to-face to discuss their conflicts. They know more about their dispute than anyone and mediation offers them the opportunity to create a win/win situation where each can exit the conflict with enough to ensure closure. An informal process like mediation can prove to be especially helpful to *pro se* parties who may find themselves overwhelmed in a more formal proceeding.
- **Mediation Results in More Durable Agreements.** Some research suggests that parties are more likely to comply with the terms of the agreement they have fashioned themselves. In other words, it truly is the agreement of the parties and not one imposed on them by the court.
- **Mediation Can Help Repair and Preserve Relationships.** Relationships and the need to preserve them is readily apparent in mediations involving family members, e.g., custody mediations, guardianship mediations, and will caveat proceedings, or in disputes involving neighbors, e.g., boundary disputes or landlord/tenant conflicts. Relationships and the need to preserve them can also be important in other cases filed in civil superior court. For example, the disputing parties may be business entities that hope to be able to continue to do business once their immediate conflict is addressed and resolved. The litigants may be members involved in a dispute with their HOA or its governing board. The more informal mediation process and its emphasis on consensus building may help to not only resolve the dispute at hand, but also repair some of the damage between the parties with the result that they will be better able to move forward together.
- **Mediation Can Reduce Stress.** While litigation is inherently stressful for parties, researchers who evaluated the pilot MSC Program found that most litigants who actively participated in their conference liked the mediation process. They thought highly of their mediator; believed the process was fair; understood what was going on; and felt they had a chance not only to be heard, but to tell their side of the story. It is likely that the mediation process has the effect of making our legal system more accessible, easier to navigate, and appearing more user friendly to parties and the wider public.
- **Mediation Can Provide Confidentiality.** It is often the case that the parties do not want their discussions or the terms of their agreement made public. They

may be trying to ward off additional litigation, to protect business or trade secrets, or they may simply want to minimize bad publicity. Unlike in a traditional court setting, parties have the opportunity in mediation, if they wish, to agree to keep their discussions and settlement terms confidential.

- **A Mediated Settlement Agreement Provides Closure and Finality.** Once an agreement has been reached in mediation and signed, the parties can move forward with their lives without the need to worry that an appeal will be forthcoming.
- **Mediation Encourages Creative Problem-Solving and Solutions.** Remedies available in the litigation process are limited. The mediation process allows for more creativity in brainstorming solutions. Parties can fashion what works for them such as asking for or offering apologies. They can reach an agreement to work together on a common task or solution. Parties can settle on terms that can work for them, even though they may be unlike anything a court would ever impose.

“Although the goal of mediation is for parties to resolve their disputes, an often-overlooked benefit occurs when the parties leave with a better understanding of their cases after having participated in a realistic risk-benefit analysis. Prior to the introduction of mediation in North Carolina, parties were less likely to appreciate the value of their cases or the inherent risks in continuing with litigation. Rather than mere onlookers, litigants are now engaged in their disputes. “

-----Jacqueline R. Clare, Attorney and DRC Certified Mediator – Superior Court



Section I.D The Role of the Dispute Resolution Commission

The Dispute Resolution Commission (DRC) was established in 1995 at the same time the North Carolina General Assembly expanded the pilot Mediated Settlement Conference Program statewide. Enabling legislation, N.C. Gen. Stat. § 7A-38.2, charged the Commission with certifying mediators and mediation trainers and with regulating their conduct. In addition to these functions, the Commission provides input on dispute resolution policy in our courts, drafts program rules and rule revisions, issues advisory opinions, helps to support dispute resolution programs, and acts as a clearinghouse for information on dispute resolution in North Carolina.

The Commission has 16 seats and appointments are made by the Chief Justice (11 appointments), the Governor (1 appointment), the Speaker of the House (1 appointment), the President *Pro Tem* of the Senate (1 appointment), and the President of the State Bar (2 appointments). Membership is comprised of judges, mediators, attorneys, a Clerk, and knowledgeable members of the public. Members are drawn from across the state, including urban and rural areas.

The Commission helps to support four major programs:

- The superior court's Mediated Settlement Conference (MSC) Program (operating since 1991)
- The district court's Family Financial Settlement Conference (FFS) Program (sometimes also referred to as Equitable Distribution or ED mediation) (operating since 1997)
- The Clerk Mediation Program (operating since 2006)
- The District Criminal Court Mediation Program (this program is limited to certain, specific districts that have opted in) (operating since 2007)

The Commission has offices in Raleigh and operates a website at www.ncdrc.org. The Commission typically meets quarterly and its meetings are open to the public. Commission staff are available to answer questions from and provide information and advice to mediators, judges, court staff, attorneys, and the general public. Any judge or court staff wishing to bring a matter or a concern before the Commission is invited to do so by calling (919) 890-1415 or writing to:

The NC Dispute Resolution Commission
P.O. Box 2448
Raleigh, NC 27602
Email: DRCMediators@nccourts.org

The Commission's operations and that of its office are funded entirely by mediator certification fees.



MEDIATION BENCHBOOK FOR COURT STAFF

MSC PROGRAM

SECTION II The Role and Duties of Court Staff

“This Mediation Benchbook is a great resource for both existing and future MSC Program coordinators. I appreciate that the Commission is always there to provide support not only for the mediators, but the mediation coordinators/court staff as well.”

----- Michelle Bailey, Trial Court Coordinator, Judicial District 10



SECTION II.A

The Important Role of Court Staff

The General Assembly charged the Mediated Settlement Conference Program (MSC) with expediting settlement of cases and making North Carolina's superior courts more efficient. These goals can only be accomplished through the efforts and commitment of court staff to work effectively with their senior resident superior court judges, attorneys, and certified mediators. Court staff are absolutely essential to the success of the MSC Program.

"I believe in mediation. As Trial Court Coordinator, I support the program by maintaining communication with all involved in the process—my judge, the mediators, attorneys, parties and the Clerk's office. The challenge is to be the "hub" for each case—to monitor the status of each case at all times, and do my part to ensure that the process moves forward consistent with the Rules."

---Ella Wrenn, Trial Court Coordinator, Judicial District 9

To meet the important goals of the Mediated Settlement Conference (MSC) Program of moving cases through the court process more efficiently and quickly, it is critical that the MSC rules be implemented and followed. Court staff can support the program by working in conjunction with senior resident superior court judges to:

- **Foster a positive tone toward the mediation process and the MSC program;**
- **Make sure to refer all eligible cases to mediated settlement conferences;**
- **Encourage and work with your SRSCJ to enforce the MSC program rules;**
- **Encourage attorneys and *pro se* parties to cooperate with mediators in scheduling cases promptly;**
- **Encourage parties, attorneys, and mediators to meet the deadline for completion set by the court, and discourage unnecessary postponements;**
- **Discourage attorney attempts to intentionally delay the mediation process;**
- **Encourage attorneys to educate their clients about the mediation process and to be positive with their clients about their opportunity to participate in a mediated settlement conference;**
- **Encourage attorneys and parties to promptly pay mediators;**
- **Oversee the collection and submission of the caseload data needed by the legislature, AOC, and the Dispute Resolution Commission to evaluate the MSC Program; and**

- **Report mediators who fail to meet their case management responsibilities to the Commission or to your Senior Resident Superior Court Judge.**

The Commission sincerely thanks each and every Trial Court Administrator, Trial Court Coordinator, and Judicial Assistant who works hard every day to implement this program.



SECTION II.B

Navigating the DRC's Website

The Dispute Resolution Commission's website is located at www.ncdrc.org. There is extensive information on the site that can assist you in operating your district's Mediated Settlement Conference (MSC) Program. This portion of the *Benchbook* is designed to help you in navigating the Commission's website.

"I have found the Commission's website to be an invaluable resource. I can easily access the certified mediators who are eligible for court appointments in my district. I can refer attorneys and litigants to specific links to answer their questions."

---Tueresa Hayden, Trial Court Coordinator, Judicial District 22A

1. Program Rules.

On the Commission's home page, you can find a copy of the MSC Program Rules by clicking on "Program Information" from the menu on the left. Then select the Mediated Settlement Conference Program (Superior Court) and then click on "Program Rules." Commission staff will promptly notify you and your senior resident superior court judge by email whenever there are any revisions to the rules.

2. Program Forms.

You can also find a comprehensive list of all MSC Program Forms under the Mediated Settlement Conference Program (Superior Court), tab as above. Click on "MSC Forms." Some forms are also posted under the blue Tool Box icon that appears on the Commission's home page. From the home page, click on the icon and a menu will appear on your left with forms available for use in some common situations. Among the forms grouped together under the Toolbox are:

- Forms for recording agreements reached at mediation
- Forms for extending deadlines for completion of the conference
- Forms relating to mediator fee collection
- Forms for mediator substitution/withdrawal

You can direct mediators, *pro se* parties, or attorneys who contact you with questions related to these forms to the Toolbox.

3. List of Certified Mediators.

You can access the Commission's list of certified superior court mediators by clicking on "Finding a Mediator" from the menu on the left-hand side of the home page. A new browser will open. Then, from the left-hand menu select, "Mediated Settlement Conference Mediators (Superior Court)." A search screen will then appear. You can use the search screen three ways to:

- (a) **Search for an individual mediator.** To look up contact or other information for an individual mediator, enter the first few letters of the mediator's first or last name and click the "Search" button at the bottom of the screen. Clicking on the underlined name of the mediator will provide additional information about the mediator, including supplemental contact information, biographical information, and a list of districts the mediator serves for purposes of court appointment and party-selection.
- (b) **Search by district.** To search for a list of all mediators serving your judicial district for purposes of court appointments:
 - First, in the field labeled "Option" on your left, click the drop down arrow and select "Court Appointment."
 - Next, in the field to the right labeled "District," click the drop down box and select your judicial district.
 - Lastly, click the "Search" button at the bottom of the screen.

A list of mediators available for court appointment in your district should now appear. A count of the number of mediators available should appear at both the right-hand top and bottom of your screen. The screen itself should show the first 25 entries in alphabetical order by last name. Then, as mentioned above, clicking on the underlined name of an individual mediator will provide you with information for that particular mediator, including contact information, biographical information, and a list of districts the mediator serves. You can print a list of all available mediators serving your district by clicking on "**Detail Listing Report**" in the upper right-hand corner.

Attorneys and *pro se* parties may seek your assistance in locating information about mediators serving your district. You can refer them to the Commission's website, but be sure to direct them to click on "Party Selection" from the Option field in order to download a list of mediators willing to be party-selected in your district. Of course, you may also refer them to the Commission's office at (919) 890-1415 and we will be happy to orient them.



The Commission strongly encourages staff to appoint from the on-line list of mediators provided by the Commission, and not solely from a list printed from the website which, with the passage of time, may not be current. Mediators are often added and sometimes dropped from the list and contact information is updated regularly. Using the list on-line is the best way to ensure that you are working with the most current information available. The Commission suggests that you simply keep track of where you leave off each time you finish making appointments and then resume with the next name on the list. If you do make appointments from a paper copy of the Commission's list, be sure to routinely and regularly download an updated copy, perhaps weekly, but certainly no less frequently than monthly.

- (c) **Search by key word.** In making appointments to mediate, **MSC Rule 2.C** provides that judges have discretion to deviate from a strict rotation down the Commission's list **when there is good cause to do so.** Such good cause will typically be rare. However there may occasionally be instances where a court feels compelled to deviate from the list. For example, when the facts involved in a case are particularly complicated or the parties to a case both speak a foreign language, a senior resident superior court judge may want to appoint a mediator familiar with the type of dispute at issue or with the culture or language involved. In such instances, staff can use the key word search function to locate mediators with particular expertise or skills. It is possible to select up to five key words from the search menu. The search can be further broadened or narrowed by clicking buttons to tell the search engine to look for mediators whose biographical entries match one or all of the key words listed. Attorneys and members of the public can also use the key word search function to help them locate mediators with particular expertise or skills and that are available to serve upon party selection in the district. Again, such deviations from the rotation should be rare. Mediators are experts in the mediation process and getting people to talk. They typically do not need to be experts in the facts or law. The parties' attorneys play that role.

If any attorneys or parties ask you about becoming a certified superior court mediator, please encourage them to contact the Commission's office to learn about certification requirements and the steps involved in completing the process.

4. **MSC Program Caseload Statistics.**

The MSC Program caseload statistical reports for the state and for your individual judicial district are posted on the Commission's website. To see this material, click on "Program Information" from the main menu on the left side of the home page, then select the "Mediated Settlement Conference Program (Superior Court) option," then click on

“Program Statistics”. Annual statistical reports from 2002/03 onward are archived.



Some court staff report asking parties who are skeptical about the referral of their case to mediation to take a look at their district’s numbers. If the program is working well in your district and helping to settle a significant number of cases, your statistics may help persuade a doubtful party of the benefits of mediation and result in his or her attending the conference with a better attitude. You may want to stress to such parties that even if their case doesn’t settle in mediation, they can still benefit from the process. For example, the issues in dispute may be narrowed or their case may go on to settle later as their attorneys continue the discussion that was begun at mediation.

5. MSC Program Brochure.

The Commission publishes a brochure designed to introduce parties to the mediation process and the MSC Program. From the home page, you can download a copy of the brochure by clicking on “Program Information” from the left-hand menu. Then in the new window, select the MSC Program, and then click on “MSC Brochure.” You may also order copies of the brochure at no charge from the Commission’s office.



Some court staff enclose copies of the brochure with an Order to Mediate in cases involving *pro se* parties or out-of-state attorneys who may not be familiar with mediation or the Mediated Settlement Conference Program. The new “Guide to Superior Court Mediation for Parties not Represented by Attorneys” can also be included in mailings to *pro se* parties. (See Section IV herein.)

6. Complaint Packet.

The Dispute Resolution Commission both certifies mediators and regulates their conduct. If a party or attorney complains to you about a mediator’s conduct or fitness to practice, you may advise him or her to contact the Commission at (919) 890-1415 or direct him or her to the complaint packet posted on the Commission’s website. The packet may be accessed by clicking on “Ethics/Complaints/Continuing Education” from the left-hand menu on the home page, then clicking on “Complaints About Mediators.”

7. List of Court Contacts.

A list of MSC court contacts, *i.e.*, those identified by each district as the point person for their MSC Program for individual districts is posted on the Commission’s website. To see the list, click on “Program Information” on the left-hand menu on the home page, select the MSC Program option, and then, click on “Court Contacts.” This is information that

mediators will use to contact you when necessary. If your contact information changes at any time, please contact Commission staff so that we can keep this information current. Typically, telephone numbers are not included, since most staff have advised us that they prefer mediators to contact them in writing.

8. Advisory Opinions.

From time to time the Commission issues advisory opinions pursuant to its Advisory Opinion Policy. Generally, these are issued when an opinion that is requested by a mediator, a trainer, or a Commission member has general application or may potentially benefit mediators, the courts, or the public as formal statements of the Commission on a particular issue. An advisory opinion can also result when a mediator is disciplined and the Commission hopes to help other mediators avoid similar situations. Locate the Advisory Opinion Policy, a summary of the advisory opinions issued to date, and the full text of each advisory opinion on the website by clicking on “Ethics, Complaints/Continuing Education” on the left hand menu on the home page. Then, click on “Mediator Ethics.” The link for the “Advisory Opinion Policy” and “Advisory Opinions Adopted to Date” are options on the menu. When you choose “Advisory Opinions Adopted to Date,” you will see a summary of all of the opinions; just click on the opinion number to access the full text. The advisory opinions are listed in chronological order and the year adopted is entered in parenthesis, *e.g.* AO 25 (2013). A summary of advisory opinions issued to date is found in Section IV of this benchbook.



Section II.C

Reporting MSC Caseload Statistics

“We realize that court staff are busy people, and understand the challenges of learning a new system. That said, most court staff statewide have come on board with the CaseWise reporting system. Those who have done so have discovered that their initial resistance quickly disappeared, and that their job is much easier as a result of full implementation of CaseWise. Our goal is to help all districts implement the CaseWise system, so that our statistics are accurate, timely available, reflective of the hard work of court staff, and demonstrative of the success of our mediation programs.”

-----Stephanie Nesbitt, Court Management Specialist, Court Programs and Management Services, NC AOC

1. Mediator Case Management Responsibilities -- Reporting Outcomes.

MSC Rules provide for the mediator to be the case manager for purposes of the Program. That means that it is up to the mediator, and not court staff, to schedule the case for mediation and to make arrangements for the conference. It is also the mediator’s responsibility to ensure that the conference is held prior to the deadline set for completion by the court and to report back to the court on the outcome of the conference. MSC Rule 6 provides that the *Report of Mediator* (AOC–CV–813) is to be filed *in all cases referred to mediation* with the court within ten days of the completion of the conference or within ten days of the mediator learning that the case has settled. The importance of timely filing of reports by mediators cannot be overstated. MSC Rule 6.B(4)(d) provides that mediators who fail to report in a timely fashion may be sanctioned by the court. Most of the data needed for the MSC statistical reports comes from information on the reports filed by mediators.

2. Importance of Reporting -- Justifying Continuation of the MSC Program.

Court staff are busy people who are pulled in a lot of directions. The Commission understands that collecting and reporting MSC caseload statistics may not always be seen as a priority by staff. However, the fact is that these numbers matter and the Commission needs them to be able to justify continuation of the MSC Program.

Senior resident superior court judges and court staff spend considerable time and energy overseeing and supporting the operations of the MSC Program. Litigants ordered to participate spend considerable money on the services of mediators. Members of the General Assembly and Judicial Department and AOC officials all want to know that these efforts and funds are being spent productively. They want confirmation that the MSC Program is working and meeting the goals established for it by the legislature. That is, they want to know that the Program is helping to settle cases, making the courts more efficient, and making the litigation process more cost effective for litigants and taxpayers. Without information about the number of cases going to mediation and their outcomes, the Commission can't demonstrate that this is a successful program that benefits the courts, litigants, and taxpayers of our State. Support staff are key to the collection and reporting of information that is necessary for an evaluation of the MSC Program to occur. Thank you for all you do in this regard.

Recent research conducted by UNC-Chapel Hill MPA students found that over 11% of cases reported by court staff as disposed of without attending a conference (MEDB), were actually mediated. In those cases, the mediators simply failed to file their reports. Chronic failures to report inevitably lead to incomplete and inaccurate reporting, and ultimately compromise the perception of the efficacy of the program.

3. Resources Available -- Getting the Help You Need.

Court staff should use CaseWise to report mediated settlement conference caseload statistics. A number of excellent resources are available to assist you in understanding and using CaseWise:

- **AOC Staff.** AOC Court Programs' staff Stephanie Nesbitt and Mia La Motte are available to assist you in learning to use CaseWise for MSC statistical reporting purposes and to offer suggestions for administering your district's MSC Program. They can provide help over the telephone, by email, or can arrange for an onsite visit, if that would be helpful to you. **Stephanie can be reached at (919) 890-1204 or Stephanie.A.Nesbitt@nccourts.org, and Mia at (919) 890-1207 or Mia.M.LaMotte@nccourts.org.**
- **Webinar.** The AOC's Lori Cole designed a Webinar on CaseWise and MSC statistical reporting. The Webinar can be accessed at:

http://www.nccourts.org/citizens/cprograms/MSC_presenter/index.htm
- **CaseWise Training Manual.** The AOC's training manual for CaseWise contains specific information relating to MSC statistical reporting. A copy of the manual

can be obtained by contacting **Faith Taylor at (919) 890-1400 or at Faith.S.Taylor@nccourts.org.**

- **Mentoring Program.** The Commission is developing a mentoring program designed to match court staff experienced with CaseWise and program operations with those who are new hires or are less experienced. Mentors have agreed to be available by telephone or email, or even to arrange for site visits when necessary, either to come to you or to allow you to visit their office. The Commission will make every effort to pair staff seeking help with experienced staff from a similar district, e.g., matching staff from a rural, multi-county district with staff from a similar, nearby district. The Commission has committed to providing some funding for site visits. If you need such assistance, please contact the Commission's office.

4. CaseWise Codes -- Making Sure Your Reporting Counts.

It is absolutely critical in reporting your MSC referrals and outcomes that you correctly use the codes recognized by the AOC. The web address for the Casewise Manual which lists the codes is:

http://juno.nccourts.org/sites/default/files/Resources/court_services_casewise_training_manual_cs.pdf

Most of the time, you will need to "touch" CaseWise only twice per case when entering your MSC statistical information. That is, you will need to note that the case was ordered to a conference (OMSC) and the date, and, then, once you have received the Report of Mediator, note the outcome. The approved codes to be used in completing the MSC statistical reports are:

- Ordered or Submitted to MSC (OMSC)
- Voluntarily Submitted to MSC (VMSC)
- Ordered or Submitted to Other Settlement Procedure (MEDO)
- Ordered Exempted from MSC (MEDE)
- Reported Settled Prior to or During Recess (Upon Reliable Report) (MEDS)
- Reported All Issues Resolved at Conference (MEDA)
- Reported as an Impasse (Not Resolved at Conference) (MEDI)
- Disposed Without Session (MEDB) (this Code is used when a case was ordered to mediation, but has now been closed, i.e., a consent judgment or voluntary dismissal filed or a trial conducted, but no Report of Mediator was ever received and court staff have no indication that a conference was held.)

Additional Codes not necessary for statistical reporting, but which may be used to track mediation referrals in more detail follow:

Mediated Settlement Conference Deadline (MSCD)
Other Settlement Conference Deadline (OSCD)
Motion to Remove/Authorize Other Settlement Procedures (MOSP)
Motion for Order to MSC (MOTC)
Scheduling/Status Conference Required by Local Rule (SCLR)
Order to Designate Mediator (DSMD)
Report of Mediator Received (RMSC)
Motion to Dispense with MSC (MDSP)
Motion to Extend Time for MSC to Occur (MEXT)
Order to Extend Time for MSC to Occur (OEXT)
Superior Court Trial Date (SCTD)
Court Ordered (CO)
Party Selected (PS)



Use of the RMSC Code will give the Commission an idea, when compared with the OMSC number, of the percentage of mediators not filing their Reports of Mediator in a district. This information will enable the Commission to identify districts where it may need to increase outreach and mediator education. That information coupled with reports from court staff regarding chronically lax mediators, may help to ensure more comprehensive reporting throughout the State. The more information the Commission has about the Program and how it is operating, the better position it will be in to respond to questions from the legislature, make policy recommendations, advise court officials, and educate mediators.

Unfortunately, mediators sometimes fail to promptly submit their Reports of Mediator following the conclusion of a conference. The result may be that the report arrives after staff have reported the case as MEDB and closed it out in CaseWise. **Should staff go back in and correct the record to reflect that a conference was actually held? Yes, AOC staff advise the Commission that following receipt of the report, court staff should go back in to CaseWise and change the MEDB to an MEDA or MEDI or other code as reflected in the report.** The next quarterly AOC statistical report will pick up the change and reflect the updated outcome. Court staff should go ahead and correct the record even if an annual statistical report was published between the time the MEDB was reported and the receipt of the tardy Report of Mediator. Of course, if a mediator is chronically late, in filing his/her Reports of Mediator, the real solution may lie not so much in updating the record, but in addressing the failure of the mediator to file his/her reports on time.

5. Statewide Statistical Reports -- Getting the Word Out.

The AOC extracts information from an individual judicial district's CaseWise submissions relating to superior court mediated settlement conferences and uses it to generate a separate statistical report. Individual districts should receive quarterly cumulative reports from the AOC providing an opportunity for staff and senior resident superior court judges to review their caseload data for the MSC Program. Let the AOC know if you see any problems with your district's quarterly or annual reports. At the end of the fiscal year, the AOC publishes an annual statistical report for the MSC Program. That report shows annual caseload and conference outcome numbers for individual judicial districts as well as cumulative numbers for the state as a whole. The Commission distributes that report along with its own annual report of the Commission's activities for the year, to members of the General Assembly, Judicial Department officials, all Senior Resident Superior Court Judges, Chief District Court Judges, Clerks, NC State Bar and NC Bar Association officials, and NC law school faculty. A copy of the statistical report is also posted on the Commission's website. Archived statistical reports from 2002/03 onward can be found on the website by clicking on "Program Information" from the left-hand menu on the home page. Then select the "Mediated Settlement Conference Program (Superior Court) option," and click on "Program Statistics."

6. What the Statistics Tell Us...And Beyond.

Historically, the number of cases that settle at the conference (MEDA) has remained relatively consistent for this program — that is, just over half settle, typically around 52-58%, depending on the year. That number does not, however tell anything close to the full story. The MEDA number must be read in conjunction with the number of cases reported settled prior to or during a recess of the conference (MEDS) and the number for cases reported disposed without conference (MEDB). UNC School of Government students researching the MSC program in 2012 found that 11.2 percent of cases reported as disposed without ADR session (MEBD) were, in fact, mediated and that 56% of those cases actually settled at the conference. Moreover, a substantial number of cases are reported by mediators each year as having been settled prior to the conference or during a recess of it. The Commission strongly believes that the MSC Program is indirectly responsible for many of those settlements. Mediated settlement, the Commission believes, has changed the way litigators practice law, making it more acceptable for them to contact one another, sometimes very early in a case, to suggest a meeting to discuss settlement. Prior to the advent of the MSC Program, such overtures might have been seen as an admission of weakness and, likely, would not have occurred. Lastly, as a part of their study of mediated settlement, the UNC students contacted a sample of attorneys whose cases had been reported by mediators as impasse in mediation. They asked those attorneys what the eventual outcome of the case had been and whether mediation had influenced that outcome. The

students found that 68.6% of the cases that had impassed in mediation went on to settle within eight weeks of the conference. The majority of attorneys involved with these cases told the students that the dialogue begun at mediation and the offers generated, though not resulting in a settlement at the conference, had led to further discussions and overtures which eventually resulted in settlement. All told, a significant number of cases are being settled as a result of the MSC Program.



Take pride in your district's numbers. This Program could not exist absent your efforts and contributions. The Commission is grateful for your support of this program.



Section II.D Frequently Asked Questions & Troubleshooting

This section addresses some questions that trial court administrators, superior court trial court coordinators and judicial assistants have brought to the attention of Commission staff. Feel free to call the Commission at 919-890-1415 with any questions or comments you might have.

- 1. What cases can be ordered to mediated settlement and when?** Mediated settlement is mandatory in superior court civil actions. The only cases exempted are those in which a party is seeking an extraordinary writ or is appealing the revocation of a motor vehicle operator's license (MSC Rule 1.C(1) for districts initiating the conference by written order and MSC Rule 1.D(1) for districts using a system of scheduled orders or scheduling conferences). Cases are to be ordered to mediation as soon as practicable after the time for the filing of answers has expired (MSC Rule 1.C(3)). See AOC-CV-811, *Order for Mediated Settlement Conference in Superior Court and Trial Calendar Notice*.
- 2. What is the process for appointing a mediator?** MSC Rule 2.C requires that in making appointments to mediate, a senior resident superior court judge or his/her designee shall rotate through the list of certified MSC mediators provided by the Commission for the district. Appointments are to be made without regard to the race, gender, or religious affiliation of the mediator or whether s/he is an attorney. Rotation is intended to protect the court from charges of favoritism relative to the appointment process. The court should depart from that rotation only in instances where there is good cause to do so. It is important to understand that mediators are experts in facilitation and the mediation process, but they do not ordinarily need to be experts in the law or facts involved in a specific case. Short-lists are a clear violation of MSC Rule 2.C, even when such lists are assembled for the intended purpose of protecting litigants or local mediators. To be included on a district's court-appointed list, a mediator must affirmatively advise the Commission each year during the certification renewal period, that s/he wishes to be included and will serve if appointed. By selecting a district, the mediator affirms that s/he is familiar with the district's local rules. In addition, the mediator affirms that s/he will charge the parties only in accordance with MSC Rule 7.B. That rule provides that court-appointed mediators shall be compensated at the set rate of \$150.00 per professional hour with a one time, per case \$150.00 administrative fee. MSC Rule 7.E also allows for court-appointed mediators to assess postponement fees in appropriate circumstances. Court-appointed mediators may not charge for windshield time or seek reimbursement for mileage, hotels,

meals, or any other travel related expenses. Court-appointed mediators are also required to provide services at no charge to parties determined by the court to be indigent. The Commission asks that court staff advise it of any mediators on your district's court-appointed list who refuse court appointments when offered or fail to limit their charges to those authorized under MSC Rule 7.

Making your appointments directly from the Commission's online list will help ensure that you have the most current contact information for the mediator you are appointing and that s/he is not temporarily off the list due to illness or another reason. Please remember that the list is constantly in the process of being revised with mediators added and withdrawn and contact information updated. Simply note the name you last appointed somewhere in your records, and return to the name immediately following when you resume making your appointments.



If you learn that a mediator's contact information has changed, s/he is seriously ill and/or incapacitated, or has passed away and the Commission's list does not reflect this information, please let the Commission's office know so that the mediator can be contacted, if possible, and the master list updated. The Commission will appreciate your help.

- 3. What information can a mediator communicate to court staff?** The ethical conduct of mediators is governed by the North Carolina Supreme Court's Standards of Professional Conduct for Mediators. Standard III addresses confidentiality and broadly provides that mediators have a duty to maintain the confidentiality of all information obtained before, during, or after the mediation process. Except as required to complete a Report of Mediator, mediators should not communicate with court officials or staff regarding their mediations, including communicating information and correspondence pertaining to scheduling or attendance. There are a few exceptions to this broad requirement of confidentiality. Subsection C of Standard III provides that, when trying to collect fees, mediators may share parties' correspondence or communications relating to fees with court staff or officials. Subsection C also provides that in situations where a mediator believes that discussing procedural matters with court staff and officials will aid the mediation, he or she may do so, *but only with the consent of all of the parties*. During any such permitted discussion with court staff or officials regarding procedural matters, the mediator must refrain from expressing any personal opinions about the participants or any aspect of the case. MSC mediators should file their Report of Mediator with the court/SRSCJ in the county where the case was filed with a copy to the parties. Mediators should not be asked or required to attach a copy of any agreement reached in mediation to their Report of Mediator or to otherwise convey any agreement reached to the court.
- 4. Why do mediators need to be certified?** All mediators serving the MSC Program must be certified to conduct mediations in superior court, whether serving pursuant to court-appointment or party selection. The Commission is charged with overseeing the

certification process. Certification is important in that it helps to protect parties and the court by: (i) ensuring the quality and consistency of mediation services rendered throughout our superior courts and (ii) ensuring that mediators have training in mediator ethics, are accountable to the Commission for their conduct, and have passed a background check. The Commission can do virtually nothing to discipline non-certified mediators who engage in unethical conduct or who manifest a lack of fitness to practice. Family financial mediators may not conduct mediations in superior court unless they are also MSC certified.

5. **What is required for certification as a superior court mediator?** Certification requirements are rigorous in North Carolina and applicants must meet both threshold education and experience requirements, and mediation training requirements. Attorney applicants must be licensed and in good standing (in NC or elsewhere), and have at least five year's practice experience since licensure. Non-attorney applicants must demonstrate that they hold a 4-year degree from an accredited college or university and have either: (i) a combination of at least three years of mediation experience plus at least four years of relatively high level administrative, management, or professional experience, or (ii) have ten years of relatively high level administrative, management, or professional experience. All certification applicants must complete at least 40-hours of basic mediation training and non-attorney applicants must complete an additional six hours of training in NC court organization, legal terminology, and civil court procedure. All applicants must pass a background check. Please refer any attorneys or others interested in learning about certification to the Commission's office.



As noted above, court staff may only appoint certified mediators. If staff learns that a non-certified mediator has been selected to conduct a conference in superior court, please let Commission staff know so that they may advise the attorneys/parties involved that MSC Rule 2 requires certification and let the mediator know that the Commission will be happy to assist him/her in becoming certified.

6. **What if a party has a complaint about his/her mediator's conduct?** The Commission is charged by statute not only with certifying mediators, but with regulating their conduct. Court staff may refer any party or attorney with a concern about a mediator's conduct, either before, during, or after a conference, to the Commission. Those with a concern may also be directed to an approved complaint packet which may be accessed on the Commission's website. (From the menu on the left click on "Ethics/Complaint/Continuing Education," then click on "Complaints About Mediators.") All complaints will be carefully investigated and reviewed.
7. **Can another mediator be substituted for one appointed by the Court?** Parties ordered to mediation have 21 days in which to select their mediator (AOC-CV-812, *Designation of Mediator in Superior Court Civil Action*). Requests for substitution generally arise when attorneys have allowed that deadline to slip by and are unhappy with the mediator subsequently appointed by the court. A few years back, some districts reported being

overwhelmed with such requests. Staff in those districts expressed great frustration at having to appoint and then undo appointments because attorneys ignored deadlines. They asked the Commission for help. **In an effort to deter such requests, MSC Rule 7.C was revised to provide that courts may approve a substitution only upon receiving proof that the party(ies) seeking the substitution has/have paid the court's appointee the \$150.00 one time, per case administrative fee and all other amounts owed the mediator pursuant to MSC Rule 7.** (See also AOC-CV-836, *Consent Order for Substitution of Mediator, to be used when all parties agree to the substitution*). Though largely intended to protect staff, this rule also protects court-appointed mediators who often have scheduling time wrapped up in these cases before the substitution occurs. Some districts require that a letter from the mediator confirming payment accompany the motion or Consent Order. In other districts, court staff contact the mediator directly by telephone or e-mail to confirm that s/he was paid before allowing the substitution. Still others will accept a copy of a check made payable to the mediator as proof of payment. If a district wants to minimize the number of substitutions it must process, it should actively enforce this rule.



Some court staff have advised the Commission that, in their experience, rotating though the list of court-appointed mediators, as opposed to using a short list, can have the effect of limiting requests for substitutions. They report that if attorneys know, (i) that they may draw an unfamiliar individual as their mediator and (ii) that the Rule 7.C proof of payment requirement is strictly enforced in the district, they are more likely to submit their Designation forms in a timely fashion!

8. **Can a mediator withdraw once appointed or selected?** Yes, in rare instances, a court-appointed or party-selected mediator may need to withdraw from a case of his/her own volition. Such withdrawals are often necessitated by the serious illness of a mediator or a member of his/her family. Other times a mediator may need to withdraw for ethical reasons, say for example, a conflict with an attorney or party has become apparent or a party has objected to the mediator's service on grounds of lack of impartiality (see Standard II). The Commission is developing a form for mediators to use in this situation.



If a mediator advises you that s/he is withdrawing from a case for health reasons, please be sure to ask the mediator whether s/he has also notified the Commission or other districts s/he may be serving. If not, please encourage him/her to contact the Commission.

9. **Under what circumstances may a deadline for completion be extended?** MSC Rule 1.C(4) provides that the court's order referring a case to mediated settlement include a deadline for completion of the conference. The Commission respectfully suggests that courts be sparing in granting such requests and not lose sight of the fact that the enabling legislation for the MSC Program (see G.S. 7A-38.1(a) in Section IV herein) charges the program with making the courts more efficient. If extensions are too frequently or freely granted, postponing mediation can become a strategy or have the effect of dragging out the litigation process. Some districts have addressed this issue by granting extensions only up

to the scheduled trial date and then holding firm on that date. Others have limited the number of extensions available to parties, generally to no more than one or two. However, that said, there will be occasional cases in which a postponement of the deadline may be helpful to the ultimate resolution of the case. Since one of the purposes of the MSC Program is to expedite settlement of cases and firm up court calendars, the DRC encourages mediators to request extensions of deadlines that will fall well in advance of trial dates and to work with court staff so that cases do not “drift” through the system. Extensions of deadlines typically are more common than extensions of trial dates. The Commission suggests that, subject to the confidentiality rules noted in (3) above, the mediator may be helpful to court staff in determining whether an extension is warranted in the case.

Recognizing that some requests for extension are necessary, the Commission has developed forms to facilitate such requests. You can find them in the Commission’s Toolbox (click on the Toolbox icon on the Commission’s home page and look under the “Extending Deadlines” menu option). Please direct any mediators, attorneys, or *pro se* parties who call you about extensions to these materials and the procedures adopted by the Commission explaining their use:

- *Sample Mediator Cover Letter*, to be Sent with AOC-DRC-19 (to be used when the mediator is seeking the extension);
- AOC-DRC-19, *Order Without Motion Extending Date for Mediated Settlement Conference or Other Settlement Procedure Upon Stipulation of the Parties, Suggestion of the Mediator, or Upon the Court’s Own Motion* (to be used by mediators, by parties who are unanimous in seeking an extension, and by the court upon its own motion);
- AOC-CV-835, *Motion and Order Extending Completion Date for Mediated Settlement Conference* (to be used by parties, including *pro se* parties, who disagree on whether to extend the deadline).

Although the Commission encourages the use of the AOC-DRC-19 when the attorneys and/or parties agree to an extension, there is no prohibition against an attorney or a party using the AOC-CV-835 to file a motion and report the other party’s consent to the extension.

It is the responsibility of the mediator to conduct the mediation by the deadline set forth in the court’s order. When parties agree to seek an extension, their mediator is obligated to follow-up with them to ensure that the court has allowed the extension. Some mediators prefer to seek the extension themselves so that they know the request was made and they do not have to follow up with the parties. If a mediator chronically fails to meet deadlines and doesn’t notify the court, court staff may notify the Commission with an expression of concern or with a formal complaint. Mediators who fail to complete their conferences by

the deadline set by the court or who fail to promptly file legible, fully completed Reports of Mediator with the court following their conferences, are compromising the success of the program in that the statistics reported by court staff will be inaccurate.

10. **Should cases involving *pro se* parties be referred to mediated settlement?** Yes, there is no exception under the rules for cases involving *pro se* litigants. MSC Rule 1.C(1) does not exempt cases involving *pro se* parties from referral to mediation nor does Rule 1.C(6) include being *pro se* among the factors considered as good cause to grant a motion to dispense with mediation. Since mediation is an informal process, it may actually be a more user-friendly alternative for *pro se* parties than trial. If a *pro se* party advises court staff that s/he cannot afford to pay a mediator, please refer him/her to MSC Rule 7.D and form AOC-CV-814 (see Section 16, immediately below). Inability to pay is not an impediment to participating in mediation. If *pro se* parties call you seeking information about the mediation process or their role in the process, you may want to forward a copy of the Commission's brochure on the MSC Program to them along with a copy of the *Guide to Superior Court Mediation for Parties Not Represented by Attorneys* found in Section II.E in this *Benchbook*. Copies of the brochure and Guide are available from the Commission's office at no charge. You may also refer such callers to the Commission's office for assistance or direct them to the Commission's website at www.ncdrc.org where they can learn more about the mediation process.

Mediators listed on a district's court-appointed list may not ask court staff to exclude them from appointment to cases involving *pro se* parties nor may they decline to accept such appointments upon learning that one or more parties involved in a case is *pro se*.

11. **What should I tell a mediator who complains that *pro se* parties or attorneys are not cooperating with him/her in scheduling the case for mediation?** When you receive such complaints, the Commission suggests that you remind the mediator of his/her duty under MSC Rule 6.B(5) to schedule and conduct the conference prior to the deadline for completion set by the court. If parties or attorneys are not responding to communications from the mediator or they cannot agree on a date, time, or location for the conference, then the mediator should take charge and simply set the conference and notify the parties as to when and where it will occur.
12. **What should I say to a party who tells me that s/he wants to bring a family member or friend to the mediation as support?** MSC Rule 6.A(1) provides that the mediator is to be in control of the conference and such questions are usually best referred to the mediator. Please ask the party to contact his/her mediator.
13. **What if a party needs an interpreter at mediation?** It is the responsibility of the party or his/her attorney and not the mediator or the court to arrange for a foreign language interpreter. It is important that interpreters be trained and, if possible, certified by the AOC. This ensures that they have a certain level of fluency relative to both the foreign language in question and English and understand the kinds of legal terminology that may

come up in mediations ordered by the court. Parties or lawyers seeking foreign language interpreters may be referred to the AOC at (919) 890-1407 or, they may view lists of interpreters at the following two websites:

<http://www.nccourts.org/LanguageAccess/Documents/SpanishForeignLanguageRegistry.pdf>

<http://www.nccourts.org/LanguageAccess/Documents/StateFederallyCertifiedInterpreters.pdf>.

If a party is hearing impaired, court staff will need to make arrangements for an interpreter to attend. Please see the following *Guidelines for Accommodating Persons Who Are Deaf or Hard of Hearing in the Courts*:

<http://www.nccourts.org/LanguageAccess/Documents/GuidelinesdeafandHH.pdf>

If a non-native party or his/her attorney is searching for a mediator and tells you that they feel it is important that the mediator know something of the party's(ies') language or culture, you can refer the caller to the Commission's "Finding a Mediator" search screen. S/he can use the key word search function combined with the district field to locate mediators in the vicinity who have advised the Commission that they have at least some familiarity with the language or culture in question. The party or attorney should, of course, confirm that representation with the mediator. It is not likely that a mediator would conduct a mediation in a foreign language, since all parties and their attorneys would need to be fluent, but it may be helpful if a mediator is able to greet the parties in their native tongue and knows something about the body language and culture associated with the parties' country of origin.

14. **What if I learn that a party is handicapped or infirm?** If a party or attorney mentions any special needs to you that may affect where the mediation can be held, *e.g.*, the need for a wheelchair ramp or restrooms that will accommodate a wheelchair, be sure to tell him/her to let the mediator know, so arrangements can be made to accommodate his/her particular needs. There have been instances where mediations have been held in the home of an ill or elderly party unable to travel. Of course, a party with travel limitations may also be able to appear by telephone or Skype. If you are aware that an elderly or sick party takes medications and functions better or worse at certain times of the day, that is something that a party or attorney should also be asked to communicate to their mediator.
15. **What happens if a party or attorney raises security/safety concerns?** If a *pro se* party, an attorney, or mediator advises court staff of security concerns, *i.e.*, fears that another person scheduled to attend a mediation may be dangerous or unstable, the Commission asks that court staff make every effort to find a secure location in the courthouse to hold the mediation. Such concerns may be more likely to arise in district court family financial mediations, but could also be a concern in mediated settlement conferences in superior court.

16. What about parties who have no funds to pay their mediator fees? MSC Rule 7.D addresses the inability of parties to pay for mediation services. The Commission feels strongly that all parties should have access to mediation services even if they are unable to pay. To that end, the Commission encourages the use of AOC-CV-814, *Petition and Order For Relief from Obligation to Pay Mediator's Fee*. The form can be accessed from the Commission or the AOC's websites. Parties claiming indigency should complete the form and give a copy to their mediator at the conclusion of their conference. Directions on the form provide for the mediator to, in turn, attach a copy of AOC-CV-814 to his/her *Report of Mediator* (AOC-CV-813) before filing the report with the Clerk of Court and providing copies to the Senior Resident Superior Court Judge and all parties. A party must bring his/her claims of indigency before the court. It is not enough for the party to simply tell the mediator that s/he has no funds to pay. Thereafter, MSC Rule 7.D provides that the court shall make a determination on the *Petition* as to whether the party is unable to pay all or part of the fee. Because access to mediation services is so important, the filing of the *Petition* and a hearing on the question of indigency is the correct remedy in such situations as opposed to an MSC Rule 1.C(6) *Motion to Dispense with Mediated Settlement Conference*. Parties claiming or intending to claim indigency are under no obligation to advise their mediator of that information until the conclusion of the conference. Though the Commission hopes this would never happen, this approach is intended to eliminate any possibility that a mediator might try to avoid holding a conference or to rush one knowing that full payment will not be forthcoming at the conclusion of the proceeding. Once the court has made a determination as to a party's ability to pay, the mediator must accept that decision and may not contact, much less harass, a party for payment or insist that other parties involved in the case shoulder the obligation.

Court staff are often the first to learn of a party's claim of indigency. In such instances, staff can advise the party of AOC-CV-814 and explain that s/he should give it to the mediator at the conclusion of the conference. Staff can emphasize that the party must bring the matter before the court and that it is role of the court, and not the mediator, to determine whether all or part of the fee should be waived. Likewise, the Commission believes that best practice dictates that a mediator, upon learning of a party's claims of inability to pay, should advise the party of AOC-CV-814 and the need to bring his/her claims to the attention of the court.

17. What can or should I do when a mediator can't collect his/her fee? Mediators, especially court-appointed mediators, report that they sometimes have difficulty collecting their fees. The Commission believes it can be helpful for judges and court staff to set a tone in their districts that makes it clear that payment is expected and required unless a party is found to be indigent. It is especially important that attorneys understand that they should encourage their clients to bring their checkbooks to the conference and pay their mediator at its conclusion.

Court staff in some districts report that when they learn that a mediator has not been paid they will call or e-mail that party's attorney or a *pro se* party directly and ask that payment

be forwarded promptly. Staff who make this extra effort explain that they do so largely for three reasons: 1) the party was ordered by the court to pay and they want to send a message that parties should abide by the court's order; 2) a personal contact from court staff often gets results and is more efficient for court staff than having to process a Motion and Order for Show Cause Hearing; and 3) court staff recognize that scheduling and fee collection problems often fall disproportionately on court-appointed mediators. They also recognize that the remedy that mediators have when faced with a delinquency, AOC-CV-815, *Motion and Order for Show Cause Hearing*, has some significant drawbacks. Most significantly, the mediator has to take time out of his/her schedule to appear in court for a hearing. Staff say that many mediators simply do not bother with fee collection, believing it is not worth their time and trouble. They also say that they know of instances where mediators have left court-appointed lists because they grew tired of dealing with scheduling and fee collection problems. Those most likely to leave, they add, are the more experienced and capable mediators in their district. They view making a call or sending an email as a way to encourage experienced mediators to stay on their list. From a fee collection standpoint, it can also be helpful in cases involving *pro se* parties if court staff encloses a copy of the MSC Program brochure and/or the *Guide to Superior Court Mediation for Parties Not Represented by Attorneys* along with the order referring the case to mediation. Both explain that parties are expected to bring their checkbooks to mediation and to pay at the conclusion of their conference.



If you regularly hear complaints from mediators about certain attorneys whose clients rarely or never pay, you may want to ask your senior resident superior court judge to talk to that attorney and impress on him/her that clients have an obligation to pay their mediator and that the failure of his/her clients to pay could adversely affect your district's program.

Mediators often tell Commission staff that they are grateful for the efforts of court staff to encourage payment of their fees. Mediators know how busy you are and understand that you are not required to make that extra effort.

- 18. What are the mediator's case management duties?** MSC Rule 6 makes it clear that the mediator is responsible for the management of cases referred to mediation. What that means is that the mediator, and not court staff, is responsible for scheduling cases for mediation; notifying parties of the date, time, and location of mediation; making sure that all deadlines for completion are met; and notifying the court of the outcome of mediation by filing a legible, fully completed Report of Mediator, AOC-CV-813, within ten days of the completion of the conference. The administrative fee set forth in MSC Rule 7.B is specifically intended to compensate court-appointed mediators for these services. Mediators designated by the parties include administrative costs in their fees.

When mediators fail to fulfill their case management duties it harms the program. Research conducted by UNC students in 2012 revealed that of cases reported by court staff as "Disposed Without Attending ADR," 11.2% of them were, in fact, mediated, and 58% of

those cases settled as a result of mediation. The mediator had failed to file his/her Report of Mediator with the court in all of those cases. These omissions depress settlement rates and make the program appear less effective than it is.

Program rules expressly authorize senior resident superior court judges to discipline mediators who do not file their Reports of Mediator in a timely fashion. MSC Rule 6.B(4)(d) provides:

“Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator, and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.”

19. What if I receive a Report of Mediator after I have reported a case MEDB and closed it out?

Unfortunately, mediators sometimes fail to promptly submit their Reports of Mediator following the conclusion of a conference. The result may be that the report arrives after staff has reported the case as MEDB (disposed without attending ADR) in CaseWise or has closed it following receipt of a consent judgment or voluntary dismissal. AOC has advised the Commission that court staff can and should return to CaseWise following receipt of the tardy report and correct the record to reflect that a conference was actually held. In other words, staff should change the MEDB to an MEDA or MEDI or other code as reflected in the report. The next quarterly AOC statistical report will pick up the change and reflect the updated outcome. Court staff should go ahead and correct the record even if an annual statistical report was published between the time the MEDB was reported and the receipt of the tardy Report of Mediator. Of course, if a mediator is chronically late in filing his/her Reports of Mediator, the real solution may lie not so much in updating the record, but in asking your judge or the Commission to contact the mediator in question to discuss his/her failure to report timely.

20. What happens when a party declares bankruptcy after his/her case has been referred for mediation?

The filing of a petition for bankruptcy under section 301, 302, or 303 of Title 11 of the United States Code results in an automatic stay of any judicial proceeding that was or could have been commenced against the debtor prior to the filing of the petition (see 11 U.S.C. 362(a)(i)). Commission Advisory Opinion No. 07 (2004) suggests that when a mediator learns a party has filed for bankruptcy, s/he should notify the senior resident superior court judge who ordered the case into mediation directly or through court staff and ask whether the mediation should proceed. Court staff who learns from a *pro se* party or attorney that a bankruptcy has been filed in a case, should report that information to the mediator and the court.

- 21. What happens when an appeal of an issue in a case is filed after the case has been referred to mediation?** Commission Advisory Opinion No. 26 (2013) provides that when a mediator learns that an appeal has been filed in a case ordered to mediation and the mediator's duty to hold the conference has been called into question by a *pro se* party or lawyer, the mediator should seek guidance from the senior resident superior court judge, either directly or through court staff, on the issue of whether the conference is stayed by the appeal. If the parties agree to mediate even though the appeal is pending, the mediator may move forward with the conference. Court staff who learns from a party or attorney that an appeal has been filed in a case should also report that information to the mediator and to the court.
- 22. Should a case be ordered into mediation when one of the parties has not been served?** In most cases it may not be beneficial to mediate a case if a party has not been served. However, there may be some instances where there are multiple parties and only one was not served. If the others are interested and express a willingness to meet in order to try and settle the case as it relates to their interests, the court could send the case to mediation in the hope that it can be settled at least among those parties.
- 23. Should a case be ordered into mediation if the answer(s) has not been filed?** MSC Rule 1.C(3) provides that a case be sent to mediation as soon as practicable after the time for filing of the answer has passed. It may not be practicable to refer a case to mediation if no answer has been filed. In many districts court staff will put cases in which no answer has been filed on an administrative calendar or refer them to a status conference.
- 24. Can or should a case initially filed as a special proceeding, but later appealed to superior court, be ordered to mediation?** Will caveats, partition, or guardianship cases sometimes are appealed from the Clerk's order and end up in superior court. Once pending in superior court, such cases are eligible to be referred to mediation. Since not expressly exempted from mediation (see MSC Rule 1.C(1)), these cases are subject to mandatory referral to mediation. These types of cases can be excellent candidates for mediation because they frequently involve family members and relationship issues. It has been suggested by court staff that these cases ought to be initially set on an administrative calendar. At the call of the case, all appropriate parties involved can be identified; it can be determined who has counsel and who doesn't; a mediator can be selected or appointed; and the court can get some idea as to how long it will likely take for the parties to be ready to mediate.
- 25. Can two separate cases involving the same or similar parties and a related fact situation be mediated together?** Yes, if the parties request that both cases be mediated together, there is nothing in the rules which prohibits this. In such instance, a court-appointed mediator should charge only a single administrative fee and hourly fee for services.
- 26. What happens when there is a change of venue in a case that your district has ordered to mediation?** Be sure to inform court staff in the district to which the case is being

transferred that an order for mediation has been entered. You should also indicate the deadline and the name of the mediator appointed or selected. That way, staff in the district to which the case is being transferred can pick up where your district left off and ensure that the case keeps moving forward. Generally, there is no reason why the mediation could not proceed in the new district with the same mediator and deadline. Such cooperation may have the added benefit of deterring parties from changing venue in instances where their real motivation is to slow the processing of the case.

- 27. What happens if an entry of default has been entered against a party?** Rule 55 of the NC Rules of Civil Procedure sets out the process for obtaining a default judgment against a party. It is a two-step process; first, there is an entry of default by the Clerk upon motion of the opposing party, and then, a default judgment must be entered by the Court, if appropriate on the facts of the case. Until the judgment is entered by the Court, that party is still “in the case.” Therefore, that party against whom default has been entered but against whom a default judgment has not been entered should be included in the scheduling of the case and should attend. Where a default judgment has been entered by the Court after entry of default against a party, the case has been resolved as to that party, on the claim that was subject to the motion for entry of default and default judgment.

NOTE REGARDING USE OF THIS GUIDE:

This Guide was prepared at the request of court staff to assist *pro se* parties as they navigate the mediation process.

Court staff may request copies of this Guide from the Commission for distribution to *pro se* parties whose cases are referred to mediation.



SECTION II.E

The NC Dispute Resolution Commission's

**Guide to Superior Court Mediation for Parties
Not Represented by Attorneys**

If you are involved in a legal dispute in a North Carolina superior court, are proceeding without an attorney, and your case has been referred to a mediated settlement conference, this Guide, prepared by the North Carolina Dispute Resolution Commission (Commission), may be helpful to you. A party who proceeds without being represented by an attorney is also referred to as a “*pro se*” party.

What is a Mediated Settlement Conference?

Civil cases in the superior courts of North Carolina, with very few exceptions, are referred to mediated settlement conferences. While a mediated settlement conference is a legal proceeding and, as such, is conducted in an orderly fashion, it is a much less formal and intimidating process than a trial. The conference offers an opportunity for you to settle your case and be saved the time, expense, and stress involved in prolonged litigation. The mediator is there to help facilitate a discussion between those present for the conference and, hopefully, to help you reach an agreement. Your mediator is not a judge and will not advise you as to

what action you should or should not take. Instead, during the conference, you and any other party(ies) or attorneys involved in your case, with the assistance of the mediator, will discuss your dispute and brainstorm possible ways to settle it.

Your mediator's conduct is governed by ethical rules which prohibit him/her from telling the court or any other third party what happened in mediation. The parties are not, however, bound by the same requirement. If you want the parties to also be bound by confidentiality, you can ask your mediator to help you and the opposing party discuss and reach an agreement on confidentiality at the beginning of your conference.

The process generally begins with an opening session during which all parties have an opportunity to summarize the case from their individual perspectives. The mediator may then separate the parties and hold private discussions with each. Your mediator may use the term "caucus" to describe these private sessions. You may feel more comfortable talking frankly with your mediator in the private session, which can help the mediator identify common ground between the parties. Following each caucus session, the mediator will carry information and offers and counteroffers between the parties. If you are able to reach an agreement at mediation, your case may eventually be concluded with the filing of a voluntary dismissal or consent judgment. If you are not able to reach an agreement, your case will simply proceed to trial.

Participating in a Mediated Settlement Conference Without an Attorney

It can be difficult for you as an unrepresented (*pro se*) party to understand legal proceedings and you may be at a disadvantage because you are unrepresented, particularly if the other party has an attorney. For these reasons, the Commission strongly urges you to seek legal counsel. The Commission, however, also recognizes that sometimes a party cannot afford, or for other reasons, chooses not to hire an attorney. **If you will be participating in mediation without the benefit of counsel, please be aware that while the mediator will do his or her best to ensure a civil and full discussion of the issues, s/he cannot give legal advice to anyone participating in the conference.**

Before you proceed with your conference, you may want to read the North Carolina Supreme Court's *Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules)*. The Rules can be found on the Commission's website at www.ncdrc.org. (Click on "Program Information" from the menu on your left, then select "Mediated Settlement Conference Program," and then click on "Program Rules"). The Rules may help you better understand the mediation process and your responsibilities as an unrepresented (*pro se*) party. All of the program forms referenced below can be found on the Commission's website.

It is important to prepare ahead of time for your conference so that a meaningful discussion and, hopefully, settlement can occur. Some important things you can do prior to your mediation are:

- Let your mediator know well ahead of time if you have any accessibility issues which will affect where s/he schedules your mediation, *e.g.*, the need for a wheelchair ramp or handicapped accessible bathrooms. Also, let your mediator know if you function better or worse at certain times of the day due to prescription medications or health issues. If you have any significant concerns regarding your safety or security and believe the mediation should be held in a secure facility, that information should be communicated as well.
- If you need a foreign language interpreter, it is your responsibility, and not that of the mediator or court, to make arrangements in advance of your mediation to have an interpreter present. It is important that interpreters be trained and, if possible, certified by the North Carolina Administrative Office of the Courts (NCAOC). This ensures that they have a certain level of fluency relative to both the language in question and English and understand the kinds of legal terminology that may come up in mediations ordered by the court. If you need an interpreter, you may contact the NCAOC at (919) 890-1407 or, for a list of interpreters, you may access the following two websites:

<http://nccourts.org/LanguageAccess/Documents/SpanishForeignLanguageRegistry.pdf>

<http://www.nccourts.org/LanguageAccess/Documents/StateFederallyCertifiedInterpreters.pdf>.

If you are hearing impaired and will need a deaf interpreter at your mediation, contact court staff in the judicial district where your case is filed to inquire about getting an interpreter for your mediation. You should contact court staff well in advance of your mediation date.

- Plan ahead. Think about what you want to say about your case. You will want to be able to summarize your case from your perspective. Keep your comments brief, no more than a few minutes. Both sides will have an opportunity to speak and neither should interrupt the other.
- Come to the table with a positive attitude and be prepared not just to talk, but to listen. The mediation process is dependent to a large degree on the good will of the parties. If parties refuse to talk, won't listen to one another, or don't bargain in good faith, their discussions may never get off the ground.
- If you think there are documents, photos, or other evidence that could be helpful for your mediator to see in order to better understand the case or your perspective, you may want to bring them to the mediation. Do be aware though that your mediator may not have a lot of time to review materials. Be prepared to summarize them briefly and to explain why they are important. You should **not** bring witnesses to your mediation.

- Do some hard thinking about your case – come to mediation with a list of all the issues or points in your dispute that you believe need to be discussed for the matter to be settled. Also, think about your bottom line – what will need to happen for you to be able to resolve the conflict and feel a sense of closure? One important suggestion – be realistic in your thinking; mediation is not about winners and losers, but about consensus and finding common ground. Both sides must be willing to be flexible and to compromise for there to be any real chance of settlement.
- Make a commitment to yourself that you will keep your temper in check and be careful about what you say and how you say it. Harsh words, accusations, and profanity directed at the other side or even at your mediator will likely only make your situation worse and lessen the chances of a settlement. By the same token, remember that a smile, a kind word, and simple courtesy can go a long way.
- Try to get a good night’s sleep. Don’t worry about the process. You won’t be put on a witness stand, forced to reach an agreement, or to sign a document with which you are uncomfortable. If your case does not settle, your mediator will submit a report to the judge advising that the case did not settle and the matter will simply proceed to trial.

Your Role in the Process

The MSC Rules provide that the mediator is to be the case manager for purposes of your mediated settlement conference. That means that the mediator is charged with scheduling the case for mediation, conducting the conference, and reporting the outcome of the conference to the court. That said, the MSC Rules do place some responsibilities on the parties and those responsibilities are discussed below. You can download the forms referenced below through the Commission’s website at www.ncdrc.org. Most of the forms are accessible by clicking on the blue toolbox icon on the homepage. Use the menu on the left to locate forms for a particular purpose. Forms can also be found by clicking on “Program Information” from the home page menu, then clicking “Mediated Settlement Conference Program,” and then clicking “MSC Forms.”

- **ORDER OF REFERRAL.**

Mediated settlement conferences are mandatory in North Carolina’s superior court for all eligible cases. The court will refer your case to mediation either with a written order or notice. It is possible for parties to file a Motion to Dispense with their conference, but the court will require a good reason to withdraw its order and, as a general rule, such motions are rarely granted. See MSC Rule 1.

- **DESIGNATING A MEDIATOR.**

You and the opposing party(ies) will have the opportunity to designate a mediator of your choice within a time limit set by the court. **All parties must agree on the mediator to be designated and the mediator you choose must be certified by the Dispute**

Resolution Commission and should appear on the list of mediators serving the district in which your case is filed. If you and the others involved in your case can agree on a mediator, you will need to designate that mediator in writing and on the approved form (see below) within the time frame for selection set out in the court's order.

You can search for a certified mediator on the Commission's website. Click "Finding A Mediator," then select the "Mediated Settlement Conference Mediators (Superior Court)" option from the screen. You may obtain a list of mediators active in the judicial district where your case is pending by clicking the drop down arrow on the box labeled "district" near the center of the screen. Select the appropriate district, and then click the "Search" button at the bottom of the screen. If you don't know the number of the district in which your case is pending, click the word "here" in the third paragraph of the instructions to view a map of North Carolina judicial districts. Once the list appears, you may access additional information about a mediator by clicking on his/her underlined name, including his/her contact information

One way to try to obtain agreement on a mediator is to tentatively select two or three mediators from the list and submit your choices for consideration by the opposing attorneys or other unrepresented parties involved in your case. Upon agreement, the plaintiff will typically complete the *Designation of Mediator* (Form AOC-CV-812) to let the court know that a mediator has been selected. The Designation form should be mailed or otherwise delivered to the Senior Resident Superior Court Judge or his/her designee.

If you can't agree on a mediator, you may ask the court to appoint one for you by using the second page of the Designation Form. Or you may simply take no action and wait for the court to appoint a certified mediator to your case.

For more information on selecting a mediator or using the website to search for mediators, return to "Finding a Mediator" from the left-hand menu and, then, from the screen, click on "*Guide to Selecting a Mediator*" or you may call the Commission's office for help at (919) 890-1415. See MSC Rule 2.

- **SUBSTITUTION OF MEDIATOR.**

If a certified mediator has been appointed by the court (because the parties could not agree on a mediator before the time to designate a mediator had expired), and you thereafter wish to substitute a different certified mediator, the court may approve the substitution (but is not required to) only upon proof that the appointed mediator has been paid the \$150 one-time administrative fee, and any other fees that may be due and owing. Examples are any fees for mediation services rendered prior to the substitution, postponement fees, and the like. If all parties agree to the substitution, you can complete AOC-CV-836, *Consent Order for Substitution of Mediator*, and submit it to the Trial Court Administrator/Coordinator for the judge's signature. See MSC Rule 7.

- **SCHEDULING THE CONFERENCE.**

Your mediator will contact you to schedule a date and time for the conference. **Please respond promptly and be prepared to offer some dates when you can attend.** Most mediations are scheduled for either a half day or a full day. Unless the parties agree otherwise, your mediation will be scheduled in the county where the case is filed and may be held in the courthouse, the office of a lawyer involved in the case, the office of the mediator, or some other public place. See MSC Rule 3.A.

If a party fails to cooperate with the mediator in scheduling the conference, the mediator has the authority to simply choose a date and notify the parties when and where the session will occur. If a party willfully fails to attend, s/he may be subject to sanctions by the court. See MSC Rules 6.A(1) and 5.

- **EXTENDING THE DEADLINE FOR COMPLETION OF THE MEDIATED SETTLEMENT CONFERENCE.**

The court is required to set a deadline for completion of your conference. The deadline is specified in the *Order for Mediated Settlement Conference in Superior Court Action* (AOC-CV-811) or in the scheduling notice/order you received from the court. MSC Rules 1.C(4) or 1.D(2) or (3). Only the court has authority to extend the deadline it has set for completion of the conference.

If you are unavailable to attend a mediated settlement conference before the deadline for completion set by the court expires, you may seek an extension of the deadline to complete your mediation. Since courts will rarely extend the trial date set for a case, it is likely that any new deadline for completion of your conference will still fall before the trial date. If the opposing party(ies) or his/her attorneys(s) are willing to agree to an extension, you should advise your mediator. The mediator can suggest to the court that the deadline be extended and provide Form AOC-DRC-19 to the Trial Court Administrator/Coordinator for the court's approval. In the alternative, the parties can sign and submit AOC-DRC-19 directly to the court. If the opposing party(ies) will **not** agree to an extension, you can file a motion with the court (AOC-CV-835), and ask the senior resident superior court judge to extend the deadline. There are filing instructions on the form. See MSC Rule 3.

Please understand that the MSC Program and the mediation process are intended to make the courts more efficient and to save parties' time. As such, you should not seek an extension unless it is truly necessary to ensure your participation.

- **POSTPONING THE MEDIATED SETTLEMENT CONFERENCE ONCE A DATE HAS BEEN SET.**

If a conflict arises that prevents you from attending a scheduled mediation, let your mediator and the other parties know as soon as possible. You can ask your mediator to postpone the scheduled date for your mediation, and reschedule it for a date prior to the completion date set by the court. The mediator should ask you why you are seeking a postponement. Where a mediator finds good cause to postpone, s/he will not assess a

postponement fee. Good cause for a postponement is a situation that your mediator determines both prevents your attendance and is beyond your control. A sudden serious illness, an accident causing serious injury, or the death of a close family member are examples of good cause for a postponement. In a situation where the mediator does not find good cause, the rules provide for a postponement fee to be paid by the party seeking the postponement. Again, a mediator cannot extend the date for the conference beyond the deadline set by the court for its completion. If it becomes necessary to extend the court's deadline for completion, the court's approval must be sought. See MSC Rule 7.

- **ATTENDANCE IS MANDATORY.**

You must attend the conference. All parties are required to be physically present for mediation. Physical attendance often results in the parties being more engaged in the process. Moreover, a great deal of communication is non-verbal. Facial expressions and body language can be lost when a party appears by phone or electronic means.

If you live out-of-state or at some distance from the conference or are seriously ill or home bound, you may appear by telephone or through software such as Skype, **if all parties and the mediator agree to this arrangement.** If the other parties and/or mediator will not agree, you may seek permission from the senior resident superior court judge of the district where your case is pending by filing a motion with the court. The Commission and courts do not have a form for this. If you fail to attend the scheduled conference, you may be found in contempt and/or assessed monetary sanctions, such as being required to pay all the costs of mediation and any attorneys' fees incurred by other parties.

In some instances, persons other than the parties may be permitted to attend in the discretion of the mediator. For example, an elderly or ill individual may want to have a family member with him or her to provide support. Witnesses are not allowed to attend and the conference may not be recorded. See MSC Rules 4 & 5.

- **PAYMENT OF MEDIATOR'S FEE.**

The program rules require that the mediator's fees be paid in equal shares by the named parties, or as otherwise agreed to by the parties, or as ordered by the court. Multiple parties shall be considered as one party if they are represented by the same attorney. Mediators appointed by the court are paid \$150.00 per hour for their mediation services, plus a one-time, per case, scheduling fee of \$150.00. Appointed mediators may not charge for travel time. The fees of party selected mediators are negotiated between the mediator and the parties. Party selected mediators may charge for their travel time and expenses.

Come prepared to pay the mediator's fee. Mediator fees are due at the conclusion of the conference (except that a mediator may seek payment of his/her administrative fee earlier), so bring your checkbook with you to the proceeding. If the mediator prefers to

mail an invoice, please pay it upon receipt. If you don't pay your mediator promptly, you may, following a hearing, be found in contempt and fined — in addition to the mediator fees owed.

If you are unable to pay the mediator due to a lack of funds, it is not necessary for you to inform your mediator until the conclusion of your conference. What you will need to do is complete a copy of AOC-CV-814, *Petition and Order For Relief From Obligation To Pay Mediator's Fee* and take it to your conference with you. Once your conference has concluded, give the Petition to your mediator. Your Petition must go before the court, as it is the court's responsibility to make a determination on your ability to pay. While the *Petition* is before the court, your mediator should not communicate with you about his/her fee. Both you and your mediator must abide by whatever the court decides. See MSC Rules 5 and 7.

CONCLUDING THE CONFERENCE.

If you do reach an agreement with your opposing parties at your conference, either the mediator or an attorney present at the proceeding will summarize the matters discussed in writing and provide you with a copy. The mediator may use form AOC-DRC-18, "*Mediation Summary*," or a similar document. Because you are unrepresented, the mediator should not require you to sign the summary at the end of the conference. Rather, the mediator will likely advise you to take the document to an attorney to have it reviewed. The Commission strongly advises you to seek legal advice before you sign any document. In that way, your legal rights can be better protected. **Be aware that the unsigned, summary document alone has no legal effect and will not conclude your case.** Your case is closed either when 1) all the parties draft and sign a written, final settlement agreement and file a dismissal or a consent judgment with the court, or 2) the parties present their summary in court for entry of a memorandum of judgment by the court.

If the parties are not able to reach an agreement in mediation, your mediator will declare an impasse and your case will proceed to trial. Though your mediation did not end in settlement, that does not necessarily mean that the process was a failure. Issues are often narrowed during the discussion and the parties may leave the conference with a much better idea of what may be needed to reach a settlement down the road. If after some reflection, you find you would like to discuss matters further or even want an opportunity to reconsider the other side's proposal for settlement, it is perfectly appropriate to contact the opposing attorney or the other party, if s/he is also *pro se* to discuss settlement further or, even to contact the mediator, to explore whether it might be appropriate to reconvene the conference, assuming the other side is also willing to talk further.

If you have any further questions, please contact the Dispute Resolution Commission's office at 919-890-1415. Commission staff cannot give legal advice, but are happy to respond to your questions about the mediation process or the Mediated Settlement Conference Program.

Published by the North Carolina Dispute Resolution Commission in November, 2014, based on MSC Program Rules effective April 1, 2014. This document is not intended to serve as legal advice.



SECTION II.F **Getting Organized/Setting Up Your Mediation Program**

This Section is intended to offer suggestions as to procedures you can consider in the implementation of the MSC program in your district. These ideas arose out of discussions with court staff and represent some tools that have proven helpful in their districts. By no means is this an exhaustive list, and none of these are requirements.

1. Familiarize yourself with the Mediated Settlement Conference Program.

- (a) Read the enabling legislation. G.S. 7A-38.1. (Benchbook, Section IV)
- (b) Read the Program Rules. Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Cases. (Benchbook, Section IV). Review what the role of the mediator is in the MSC Program. (Benchbook, Section III).
- (c) Learn your way around the DRC website. www.ncdrc.org. Explore all of the tabs and familiarize yourself with where certain information can be located.
- (d) Read the Standards of Professional Conduct for Mediators. (Benchbook, Section IV).
- (e) Read the summary of Advisory Opinions issued to date. (Benchbook, Section IV).
- (f) Keep a copy of this Benchbook on your desk for easy reference.

2. Build solid relationships with your Clerk and assistant and deputy clerks.

"I find our program works best when I have a good and collegial relationship with my Clerk's office."

----- E. Deneen Barrier, Trial Court Coordinator, Judicial District 14

- (a) North Carolina's judicial districts range from single-county districts to multi-county districts. In all judicial districts your ability to effectively manage your program can be directly affected by your relationship with your assistant and deputy clerks. In multi-county

districts necessity demands building a solid relationship with the Clerk in each county, as it is impossible for a TCA, TCC, or JA to physically check court files for filings relevant to the mediation program.

(b) It may be helpful to try to establish a routine with one assistant or deputy clerk (in each county in your district) who is well-versed in CaseWise, and with whom you can freely communicate and exchange information. Work with someone who understands the deadlines in the mediation rules and who is willing to keep you informed as things you need to know come up.

(c) If the parties agree to designate a particular mediator, MSC Rule 2 provides that the “Plaintiff’s attorney or any party can file the Designation *with the court* within twenty-one (21) days of the date of the Order for Mediated Settlement Conference is filed” (AOC-CV-812). This form is also used to inform the court when the parties cannot agree on a mediator. (Section 2 is a Motion for Court Appointment of Mediator). Because Form 812 is used for both situations---designation by the parties or appointment by the court--- the Commission interprets the language of the rule to mean that Form 812 should be delivered to the SRSCJ, with copies to the parties and the mediator. After signature by the SRSCJ file the original with the Clerk, and keep a copy for your file.

(d) Communicate with the Clerk’s office (or the assistant or deputy clerk you’ve identified as a contact person) to clarify who sends out stamped, filed copies of file documents to the parties and the mediator.

3. Take advantage of the CaseWise tracking system.

(a) Accessing a case in CaseWise can show you the case status and most relevant information at a glance. Track and review case statuses at least once a week.

(b) Use “filters” to access a subset of information, such as “all cases where an answer has been filed.” By checking once a week, you can determine whether an answer has been filed, or an extension of time has been granted, and thus, when to send out the Order to Mediate.

(c) Input information into CaseWise as action is taken by your office, such as sending the Order to Mediate, Designation of Mediator, name of the mediator whether designated or appointed, receipt of Report of Mediator, etc.

4. Decide whether keeping paper copies of certain documents helps you track cases.

(a) You may want to keep an excel spreadsheet or notebook **by file stamped date** of the Order for Mediated Settlement Conference and the Designation of Mediator form. (That form is used whether the mediator is designated by the parties or appointed by the Court.)

(b) Keeping hard copies of the Designation Forms provides a reviewable record that you are in fact going down the list of mediators on the Commission's court-appointed list for your district.

5. Tips for managing the appointment process.

(a) The MSC Rules provide that the senior resident superior court judge is required to use the NC DRC's list of mediators in your district who will accept court appointments, in alphabetical order and in succession, (with a few exceptions). When applications for certification during the year outside of the renewal period are processed and approved by the Commission, the court appointment lists for the chosen judicial districts are immediately revised.

(b) Since the list changes with some frequency, the Commission recommends that you appoint from the online list so that you can make sure that all eligible mediators are actually in the queue. You can keep a running list in a separate document of all appointments made, and the dates, so that you can easily return to the next mediator on the list for the next appointment. Or, you could keep a *separate* notebook of hard copies of the Designation forms.

(c) In addition, court staff may want to print out the "Detailed Listing Report" of all mediators for your district and keep a paper copy on which to make notes of the date and case file number of each appointment, and any other relevant information. For instance, this can be a helpful tool for following up on mediators' reports. **CAVEAT: If you do this, you must remember to check the DRC website often for any additional mediators for your district, and incorporate them into your printed list.** You can access the enhanced list by clicking on "Finding a Mediator" on the left-hand menu on the home page, then "Mediated Settlement Conference Mediators," and then scroll down to select your district. Choose "Detailed Listing." This will give you in depth information about each mediator.

(d) If a case settles after court appointment of a mediator, but prior to the settlement conference, most districts do not give that mediator another appointment, but rather go to the next person on the list. Also, remind your mediators that even if a case settles before the mediation, s/he must still file a report of mediator within 10 days of learning that the case has settled. This is true even if the mediator chooses to waive any administrative or other fee that might be due.

6. Some suggested ways to be proactive.

(a) Some SRSCJs find it useful for their TCA/TCC/JA to insert pertinent notes on court calendars, (usually an administrative calendar) such as "attorneys report case settled, but final documents are not filed," or "the mediator's fee has not been paid," or "case impasse at mediation." or "Report of Mediator has not been filed." This provides the court with information at his/her fingertips without having to rummage through the court file.

(b) Some court staff have determined that making a courtesy call to attorneys a few days before the expiration of the twenty-one (21) days for designating a mediator is worth taking the time to do, as it can help remind attorneys of the deadline and lead to a designation by the parties, saving staff the time of making an appointment, and possibly, of making a substitution. Of course, this is not required and would be completely up to court staff to undertake or not.

(c) In your regular review in CaseWise of all of the pending superior court cases, you can check for the returns of service and the attorney affidavits regarding service. The return of service is important because the time to answer begins with that date. And, the Order of the case to mediation is to be sent out after the answer has been filed, or the time within which to answer has passed. Some court staff have expressed a willingness to call an attorney asking for them to file their return of service affidavit. This can help move the case along. Again, this is not the responsibility of court staff; however, in some instances, it could be very helpful to the process.

(d) Enforce the substitution of mediator rule set out in MSC Rule 7.C. Require proof of payment of any fees due the original mediator when the parties move to substitute under MSC Rule 7.C. Enforce the provision even if the mediator is willing to waive the fees. The Rule actually requires this, but many districts do not enforce it. Processing substitutions are another time stealer for court staff.

(e) Consider recommending to your SRSCJ a local rule/policy/guiding principle to limit/control the number of extensions of the mediation deadline that are granted in a particular case. MSC Rule 3.C does not include a “good cause” requirement for extending deadlines, but anecdotally, the Commission has learned that some parties and/or attorneys may postpone deadlines over and over to avoid mediation, which violates the spirit of the program and its rules. Some local districts have set a limit of one or two extensions per case. And, in any event, most districts strictly enforce trial dates and rarely would permit an extension of time after a trial date, effectively extending the date of the trial in cases that do not settle.

(f) Although court staff should not have to follow up with mediators who do not file their Reports of Mediator or fail to file them in a timely fashion, the reality is that there are mediators out there who fail to manage this aspect of their case management duties. If you do choose to follow-up, with the permission of your SRSCJ, remind the mediator that the court has the authority to impose sanctions, including removal from the court-appointed list in that district. And, the Commission has sanctioning authority as well, whether the mediator was designated or appointed by the court. Filing reports late is equally as damaging to the program as not filing at all.

(g) Remember that if a mediator is poorly managing his/her case management responsibilities, court staff or the SRSCJ has the option of filing a formal complaint with the Commission. Usually this occurs after multiple lapses on the part of the mediator over more

than just a short period of time. Most court staff have patience up to a point, and then frustration propels them to seek help from the Commission.

(h) It is important that mediators are paid for their work. If court-appointed mediators, in particular, have difficulty collecting their fees, they might be inclined to remove themselves from serving on the court-appointed cases. Although it is not the responsibility of court staff, several court staff have told the Commission that they will make courtesy calls to the parties and/or attorneys with a gentle reminder that they are under a court order to pay their mediator. Some court staff feel that this is a good use of their time in that it often does result in payment being made, saves the mediator his/her time in filing a Motion and Order to Show Cause and appearing before the court, and saves the court time by not having to hear the Motion.



MEDIATION BENCHBOOK
FOR COURT STAFF

MSC PROGRAM

SECTION III
The Role and Duties of the Mediator



SECTION III The Role and Duties of the Mediator

This *Benchbook* is not intended to be a resource for mediators and this section is included solely for the purpose of clarifying the role of the mediator for judges and court staff. Once appointed or designated to conduct a conference, mediators have the following responsibilities under the MSC Rules to:

- **Schedule the conference.** It is important that mediators perform this function and not delegate it to attorneys or parties. See Advisory Opinion No. 08 (2005) in which the mediators in a judicial district relinquished their scheduling responsibilities to plaintiffs. The Commission noted in the AO that MSC Rule 6.B(5) provides that it is duty of the mediator to schedule the conference and this responsibility may not be delegated or relinquished to plaintiffs or others. Plaintiffs, especially *pro se* plaintiffs, may not be aware of the rules and attorneys may not necessarily be motivated to hold a mediation or to move their case along quickly. The mediator is in the best position to ensure that a conference is promptly scheduled.

The MSC Program's enabling legislation charges it with expediting the settlement of cases and making the courts more efficient. The Program can't fulfill this charge if mediators don't take action to promptly schedule their cases for mediation. Mediators who contact court staff with the complaint that attorneys or parties aren't returning their calls or e-mail and cooperating with their efforts to schedule, should be reminded of their Rule 6.B(5) obligation and advised to proceed with scheduling even in the absence of input from the parties.

- **Find a location for the Conference.** MSC Rule 3.A provides that the conference shall be held in any location agreeable to the parties and the mediator. If they can't agree on a location, the mediator is to reserve a neutral place in the county where the action is pending. A court-appointed mediator from another county than where the action is pending may not require that the parties come to him or her, absent their agreement, in an effort to minimize time the mediator would spend on the road traveling to and from the conference. In addition, a court-appointed mediator may not seek reimbursement for his/her time and expenses in traveling to and from a mediation. Finding space for a

mediation can sometimes be difficult, especially for court-appointed mediators. Many mediators do not have office space in the districts they serve and parties, especially *pro se* parties, are sometimes reluctant to meet in the offices of attorneys involved in the case. Moreover, MSC Rule 7 does not provide for court-appointed mediators to be reimbursed for charges involved in renting space to conduct a mediation. While court staff are not required to assist mediators in finding space in the courthouse for their mediations, the Commission hopes that staff would be willing to assist mediators in instances where their courthouse has ample space and particularly in cases where there may be concerns about security and safety.

- **Conduct the conference by the deadline set by the court.** Again, the MSC Program cannot fulfill its charge to expedite the settlement of cases and make the courts more efficient, if deadlines are not met. The Commission encourages mediators not to seek extensions on behalf of parties in instances where the parties have not articulated good cause to justify the request. The court should not allow mediation to be used by attorneys or parties as a tool to drag out the litigation process. To ensure this does not happen, some districts have taken the following steps: 1) proactively encouraging parties, attorneys, and mediators to meet deadlines for completion, 2) sending a clear message that their trial dates are firm and will be pushed forward only in rare instances and only with good reason, and 3) capping the number of extensions of the deadline that can occur in a case, typically no more than one or two.
- **Bring the parties together for a face-to-face discussion.** MSC Rule 4 requires the physical attendance of parties and their lawyers at the conference. This Rule acknowledges that parties and their attorneys are more likely to be invested in the mediation process and their discussions and to make progress toward settlement when they are physically present. Despite this rule, mediators are sometimes pressured to forego an actual meeting by parties or their attorneys engaged in resisting mediation. In such instances, the mediator is typically asked to file a Report of Mediator indicating an impasse after a short telephone conversation. During that conversation, the mediator is usually told that mediation is a waste of time, there is no possibility of settlement, and the insurance company involved in the case is unwilling under any circumstances to increase the amount of its last offer. The Commission strongly discourages this practice and has repeatedly advised mediators that it is not permissible to hold a short telephone conference in lieu of the requirement of a face-to-face meeting (see Advisory Opinion No. 01 (1999)). To permit such to occur, thwarts both the MSC Program's enabling legislation and rules. If judges or court staff become aware that a mediator is permitting telephone conversations in lieu of face-to-face meetings or that such is a common practice in the district, please let the Commission know so that it may contact the mediator(s) in question or do more to educate the mediators and attorneys working in the district.

The above is not to suggest that the physical attendance requirement cannot be waived under appropriate circumstances and attendance allowed via telephone or Skype, *e.g.*, a party is elderly or infirm, hospitalized, or lives out-of-state. It is important to note that the Commission discourages mediators from permitting participation by telephone or Skype in the absence of a compelling justification. See Advisory Opinion No. 02 (2000).

The Commission also encourages judges and mediators to require the physical presence of insurance adjusters at conferences. Often, adjusters who agree to be available by phone can't be reached on the date of the mediation or get pulled away during the conference. The process works better when all stakeholders are present and focused on settling the dispute.

- **Control the Conference.** MSC Rule 6.A(1) provides that the mediator is to be in control of the conference. Though mediators are in charge of the conference, the Commission asks them not to get involved in disputes over attendance relative to parties or their lawyers. See Advisory Opinion No. 24 (2013) (party objects to the attendance of an out-of-state attorney) and 25 (2013) (party objects to a corporate representative appearing without counsel). The Commission encourages mediators to conduct the mediation with the parties and counsel who appear and to advise any party or attorney with concerns relating to attendance to raise them with the judge.

Mediators can make determinations regarding the attendance of third parties who appear at the conference, *e.g.*, an adult child who attends at the request of an elderly party, but are encouraged to first discuss the matter with the named parties and their counsel. Unlike trials, mediations are not open to the public and the press is not entitled to attend. A mediator may advise reporters that the conference is closed. MSC Rule 6.B(3) provides that the mediator, and not the parties or their attorneys, shall make the determination when to declare an impasse. The mediator must, however, consider the wishes of the parties in making that determination. MSC Rule 4.A(2) provides that the parties and their attorneys are required to attend until an agreement is reduced to writing and signed or an impasse declared by the mediator.

- **Report the Outcome.** Mediators are to file *Reports of Mediator* (AOC-CV-813) in all cases referred to them upon court appointment or party-selection, regardless of the outcome of the referral. Even if a mediation is not held due to an action taken by the court, *e.g.*, summary judgment is entered, the mediator still needs to file a report. These reports are critical in keeping the courts and court staff informed of what happens in a case, in allowing judges to more efficiently allocate their time, and in ensuring that accurate caseload statistics are available for the MSC Program. Reports should be submitted on time, be legible, and be fully completed. Mediators should file only one report per case, *i.e.*, it is not necessary for a mediator to file a report for each session held in a mediation. If a recess is taken, the mediator should wait until the subsequent session(s) is completed before filing his/her report. See MSC Rule 6.B(4).

- **Seek His/Her Fee.** It is critical that mediators be paid for their work. Capable mediators will not participate in the Program if collecting their fees becomes an ordeal. It is important to note that fee collection issues often fall disproportionately on court-appointed mediators who work more frequently with *pro se* and indigent parties and uncooperative attorneys. It is important that court officials and staff do what they can to encourage payment of mediator fees in their district.

Party-selected mediators are compensated by agreement of the parties. MSC Rule 7.A. The fees of court-appointed mediators are capped. Most court-appointed mediators are careful to charge fees consistent with MSC Rule 7.B and the other provisions of Rule 7. However, in the interest of protecting the public, it is important that court officials and staff be familiar with charges court-appointed mediators can and cannot assess under MSC Rule 7:

- Court-appointed mediators may not charge or seek reimbursement for travel time, mileage, hotels, meals, or any expense associated with renting a room(s) for the purpose of conducting a mediation. See MSC Rule 7.B.
- Court-appointed mediators may not charge a deposit to be paid prior to mediation nor may they refuse to hold a mediation because a deposit is not paid. See Advisory Opinion No. 19 (2011).
- The Commission discourages court-appointed mediators from charging parties for document review in advance of mediation, even though the parties have requested the review and agree to compensate the mediator for his/her time, except in instances where the review is beyond “routine.” i.e., the documents the mediator is asked to review are lengthy, i.e., exceeding 30 pages. See Advisory Opinion No. 21 (2012).
- Court-appointed mediators may charge their \$150 per case, administrative fee in advance of mediation. See MSC Rule 7.B.
- Court-appointed mediators may charge cancellation and postponement fees consistent with Rule MSC 7.E.
- Court-appointed mediators may not refuse to take appointments involving *pro se* or indigent parties. See MSC Rule 2.C.
- Court-appointed mediators must abide by the court’s ruling on a claim of indigency and may not pursue payment from a party the court determines unable to pay. Moreover, it is not appropriate for the mediator to harass other parties involved in a case in an effort to seek payment of an indigent parties’ share of the mediator’s fee. See MSC Rule 7.D, Rule 8.H., and Advisory Opinion No. 27 (2013).

Court staff are encouraged to contact the Commission regarding any mediator who appears to be overreaching in terms of the fees s/he seeks to collect or the manner in which s/he attempts to collect them.



MEDIATION BENCHBOOK FOR COURT STAFF

MSC PROGRAM

SECTION IV Additional Resources



SECTION IV.A
Enabling Legislation

§ 7A-38.1. Mediated settlement conferences in superior court civil actions.

(a) Purpose. – The General Assembly finds that a system of court-ordered mediated settlement conferences should be established to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State. Therefore, this section is enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.

(b) Definitions. – As used in this section:

- (1) "Mediated settlement conference" means a pretrial, court-ordered conference of the parties to a civil action and their representatives conducted by a mediator.
- (2) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute.
- (3) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a pending civil action. A mediator does not make an award or render a judgment as to the merits of the action.

(c) Rules of procedure. – The Supreme Court may adopt rules to implement this section.

(d) Statewide implementation. – Mediated settlement conferences authorized by this section shall be implemented in all judicial districts as soon as practicable, as determined by the Director of the Administrative Office of the Courts.

(e) Cases selected for mediated settlement conferences. – The senior resident superior court judge of any participating district may order a mediated settlement conference for any superior court civil action pending in the district. The senior resident superior court judge may by local rule order all cases, not otherwise exempted by the Supreme Court rule, to mediated settlement conference.

(f) Attendance of parties. – The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge. Nothing in this section shall require any party or other participant in the conference to make a settlement offer or demand which it deems is contrary to its best interests.

(g) Sanctions. – Any person required to attend a mediated settlement conference or other settlement procedure under this section who, without good cause, fails to attend or fails to pay

any or all of the mediator's or other neutral's fee in compliance with this section and the rules promulgated by the Supreme Court to implement this section is subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include the payment of fines, attorneys' fees, mediator and neutral fees, and the expenses and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and upon any person against whom the sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

(h) Selection of mediator. – The parties to a superior court civil action in which a mediated settlement conference is to be held pursuant to this section shall have the right to designate a mediator. Upon failure of the parties to designate a mediator within the time established by the rules of the Supreme Court, a mediator shall be appointed by the senior resident superior court judge.

(i) Promotion of other settlement procedures. – Nothing in this section is intended to preclude the use of other dispute resolution methods within the superior court. Parties to a superior court civil action are encouraged to select other available dispute resolution methods. The senior resident superior court judge, at the request of and with the consent of the parties, may order the parties to attend and participate in any other settlement procedure authorized by rules of the Supreme Court or by the local superior court rules, in lieu of attending a mediated settlement conference. Neutral third parties acting pursuant to this section shall be selected and compensated in accordance with such rules or pursuant to agreement of the parties. Nothing in this section shall prohibit the parties from participating in, or the court from ordering, other dispute resolution procedures, including arbitration to the extent authorized under State or federal law.

(j) Immunity. – Mediator and other neutrals acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators and other neutrals may be disciplined in accordance with enforcement procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(k) Costs of mediated settlement conference. – Costs of mediated settlement conferences shall be borne by the parties. Unless otherwise ordered by the court or agreed to by the parties, the mediator's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The rules adopted by the Supreme Court implementing this section shall set out a method whereby parties found by the court to be unable to pay the costs of the mediated settlement conference are afforded an opportunity to participate without cost. The rules adopted by the Supreme Court shall set the fees to be paid a mediator appointed by a judge upon the failure of the parties to designate a mediator.

(l) Inadmissibility of negotiations. – Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this

section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

- (1) In proceedings for sanctions under this section;
- (2) In proceedings to enforce or rescind a settlement of the action;
- (3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
- (4) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(m) Right to jury trial. – Nothing in this section or the rules adopted by the Supreme Court implementing this section shall restrict the right to jury trial. (1995, c. 500, s. 1; 1999-354, s. 5; 2005-167, s. 1; 2008-194, s. 8(a).)



SECTION IV.B

MSC Rules, Amendments Effective April 1, 2014

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to N.C.G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) Order by Senior Resident Superior Court Judge. The senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.C(6) only for good cause shown.

(2) Motion to Authorize the Use of Other Settlement Procedures. The parties may move the senior resident superior court judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on a North Carolina Administrative Office of the Courts (NCAOC) form, and shall include:

- (a)** the type of other settlement procedure requested;
- (b)** the name, address and telephone number of the neutral selected by the parties;
- (c)** the rate of compensation of the neutral;

- (d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected; and
- (e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-13 herein or by local rules of the superior court in the county or district where the action is pending.

- (3) **Timing of the Order.** The senior resident superior court judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C(4) and 3.B herein shall govern the content of the order and the date of completion of the conference.
- (4) **Content of Order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court-appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a NCAOC form.
- (5) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the senior resident superior court judge within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.
- (6) **Motion to Dispense with Mediated Settlement Conference.** A party may move the senior resident superior court judge to dispense with the mediated settlement conference ordered by the judge. Such motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

- (1) Order by Local Rule.** In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in all civil actions except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his/her order upon motion of a party pursuant to Rule 1.D(6) only for good cause shown.
- (2) Scheduling Orders or Notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) state the rate of compensation of the court-appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.
- (3) Scheduling Conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) state the rate of compensation of the court-appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

- (4) **Application of Rule 1.C.** The provisions of Rules 1.C(2), (5) and (6) shall apply to Rule 1.D except for the time limitations set out therein.
- (5) **Deadline for Completion.** The provisions of Rule 3.B determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the senior resident superior court judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.
- (6) **Selection of Mediator.** The parties may designate or the senior resident superior court judge may appoint, mediators pursuant to the provisions of Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.
- (7) **Use of Other Settlement Procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C (2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

COMMENT TO RULE 1

Comment to Rule 1.C(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

- A. **DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of

compensation of the mediator; state that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the court shall appoint mediators certified by the Dispute Resolution Commission (Commission), pursuant to Rule 2.C which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court within 21 days of the court's order, the senior resident superior court judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the judge's district.

In making such appointments, the senior resident superior court judge shall rotate through the list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart in a specific case from a strict rotation when, in the judge's discretion, there is good cause to do so.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from said district's court appointment list by the Commission or the senior resident superior court judge.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting

appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

- D. MEDIATOR INFORMATION DIRECTORY.** To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website a list of certified superior court mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.
- E. DISQUALIFICATION OF MEDIATOR.** Any party may move the senior resident superior court judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

- A. WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties, and other parties required to attend.
- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set a date and time for the conference pursuant to Rule 6.B(5).

- C. EXTENDING DEADLINE FOR COMPLETION.** The senior resident superior court judge may extend the deadline for completion of the mediated settlement

conference upon the judge's own motion, upon stipulation of the parties or upon suggestion of the mediator.

- D. **RECESSES.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

- E. **THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS.** The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party's governing documents (*e.g.*, articles of incorporation, bylaws, partnership agreement, articles of organization or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and

make recommendations to the applicable approval authority in accordance with that procedure;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance Company Representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator, or

(b) By order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

3) **Scheduling.** Participants required to attend shall promptly notify the mediator after designation or appointment of any significant problems they may have with dates for conference sessions before the completion

deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

- (1)** If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.
- (2)** If the agreement is upon all issues at the conference, the parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.
- (3)** If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action or before expiration of the mediation deadline, whichever is longer.
- (4)** When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise

who will file the consent judgment or voluntary dismissal(s).

- D. PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.
- E. RELATED CASES.** Upon application by any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party, or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the senior resident superior court judge who entered the order.
- F. NO RECORDING.** There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

COMMISSION COMMENTS TO RULE 4

Commission Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Commission Comment to Rule 4.E.

Rule 4.E was adopted to clarify a senior resident superior court judge's authority in those situations where there may be a case related to a superior court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a superior court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party or insurance carrier representative in the superior court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E specifically authorizes a senior resident superior court judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related superior court case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCE OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

- (1) Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator's

conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

- (2) **Private Consultation.** The mediator may communicate privately with any participant prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

B. DUTIES OF MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the conference:
 - (a) The process of mediation;
 - (b) The differences between mediation and other forms of conflict resolution;
 - (c) The costs of the mediated settlement conference;
 - (d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;
 - (e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;
 - (h) The duties and responsibilities of the mediator and the participants; and
 - (i) That any agreement reached will be reached by mutual consent.
- (2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.
- (3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should

end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) Reporting Results of Mediation.

- (a)** The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.
- (b)** If an agreement upon all issues is reached at, prior to or during a recess of the conference, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s) and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court. The mediator shall advise the parties that 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 political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. The mediator shall indicate on the report that the parties have been so advised.
- (c)** The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
- (d)** Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.

- (5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one of more of the parties has not paid an advance fee deposit required by that agreement.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

- A. BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.
- B. BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of \$150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of \$150 that is due upon appointment.
- C. CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee the \$150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.
- D. INDIGENT CASES.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

- (1)** As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.
- (2)** A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.
- (3)** The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.
- (4)** Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of \$150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be \$300. The postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

- (5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one time, per case administrative fee when two or more cases are mediated together and set his/her fee according to the amount of time s/he spent in an effort to schedule the matter for mediation. The mediator may charge a flat fee of \$150 if scheduling was relatively easy or multiples of that amount if more effort was required.

Comment to Rule 7.E.

Non-essential requests for postponements 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.

Comment to Rule 7.F.

If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Commission, or have completed a 16-hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) a member in good standing of the North Carolina State Bar; or

(ii) a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B(1) or Rule 8.B(2).

(2) A non-attorney may be certified if he or she has:

(a) completed a six-hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law and common legal issues arising in superior court cases, provided by a trainer certified by the Commission;

- (b)** provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B(2)(c);
- (c)** completed either:

 - (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Commission; and after completing the 20-hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005, and have four years of professional, management or administrative experience in a professional, business or governmental entity; or
 - (ii) ten years of professional, management or administrative experience in a professional, business or governmental entity and possess a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to January 1, 2005.

C. Have Completed the Following Observations:

- (1) All applicants.** All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court case.
- (2) Non-attorney applicants.** Non-attorney applicants for certification shall observe three mediated settlement conferences in addition to those required by (1) above and which are conducted by at least two different mediators. At least one of these additional observations shall be of a superior court case.
- (3) Conferences eligible for observation.** Conferences eligible for observation under (1) and (2) above shall be those in cases pending before the North Carolina Superior Court, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the United States

District Courts for North Carolina that are ordered to mediation or conducted by agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation which are mediated by agreement of the parties incorporating the rules for mediation of one of the entities named above.

All such conferences shall be conducted by certified superior court mediators pursuant to rules adopted by one of the above entities and shall be observed from their beginning to settlement or impasse. Observations shall be reported on an NCAOC form.

(4) All observers shall conform their conduct to the Commission's Requirements for Observer Conduct.

- D.** Demonstrate familiarity with the statute, rules and practice governing mediated settlement conferences in North Carolina;
- E.** Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters; any criminal convictions; and any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by a professional licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.
- F.** Submit proof of qualifications set out in this section on a form provided by the Commission;

- G.** Pay all administrative fees established by the NCAOC upon the recommendation of the Commission;
- H.** Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7;
- I.** Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.);
- J.** Once certified, agree to make reasonable efforts to assist mediator certification applicants in completing their observation requirements.
- K.** No mediator who held a professional license and relied upon that license to qualify for certification under subsections B(1) or B(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or who becomes inactive, shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A.** Certified training programs for mediators seeking only certification as superior court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:
- (1)** Conflict resolution and mediation theory;
 - (2)** Mediation process and techniques, including the process and techniques of trial court mediation;
 - (3)** Communication and information gathering skills;
 - (4)** Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;
 - (5)** Statutes, rules and practice governing mediated settlement conferences in North Carolina;
 - (6)** Demonstrations of mediated settlement conferences;
 - (7)** Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed, and evaluated by program faculty; and
 - (8)** Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practice governing mediated settlement conferences in North Carolina.
- B.** Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).
- C.** A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

- D. To complete certification, a training program shall pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

- A. **ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.** Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C(2)); or that for good cause, the selected procedure is not appropriate for the case or the parties.
- B. **OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.** In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:
 - (1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party;
 - (2) **Arbitration (Rule 12).** Non-binding arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and binding arbitration, in which a neutral renders a binding decision following presentations by the parties; and
 - (3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.
- C. **GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.**
 - (1) **When Proceeding is Conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the senior resident superior court judge.

(2) Authority and Duties of Neutrals.

(a) Authority of neutrals.

- (i) Control of proceeding.** The neutral evaluator, arbitrator or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.
- (ii) Scheduling the proceeding.** The neutral evaluator, arbitrator or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

- (i)** The neutral evaluator, arbitrator or presiding officer shall define and describe the following at the beginning of the proceeding.
 - (a)** The process of the proceeding;
 - (b)** The differences between the proceeding and other forms of conflict resolution;
 - (c)** The costs of the proceeding;
 - (d)** The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(l) and Rule 10.C(6) herein; and
 - (e)** The duties and responsibilities of the neutral(s) and the participants.
- (ii) Disclosure.** Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.
- (iii) Reporting results of the proceeding.** The neutral evaluator, arbitrator or presiding officer shall report the result of the proceeding to the court on a NCAOC form. The NCAOC may require the neutral to provide statistical

data for evaluation of other settlement procedures on forms provided by it.

- (iv) **Scheduling and holding the proceeding.** It is the duty of the neutral evaluator, arbitrator or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the senior resident superior court judge.
- (3) **Extensions of Time.** A party or a neutral may request the senior resident superior court judge to extend the deadline for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.
- (4) **Where Procedure is Conducted.** The neutral evaluator, arbitrator or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.
- (5) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.
- (6) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

 - (a) In proceedings for sanctions under this section;

- (b) In proceedings to enforce or rescind a settlement of the action;
- (c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
- (d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term “neutral observer” includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference or other settlement proceeding.

No mediator, other neutral or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals and proceedings to enforce laws concerning juvenile or elder abuse.

- (7) **No Record Made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.
- (8) **Ex Parte Communication Prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.
- (9) **Duties of the Parties.**

(a) Attendance. All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules and ordered by the court except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules and ordered by the court shall be those persons to whom the parties agree. Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference. The notice shall be on a NCAOC form.

(b) Finalizing agreement.

- (i)** If an agreement is reached on all issues at the neutral evaluation, arbitration or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within 14 days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer, and all parties at the proceeding.
- (ii)** If an agreement is reached upon all issues prior to the evaluation, arbitration or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 14 days or before the expiration of the deadline for completion of the proceeding whichever is longer.
- (iii)** When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s).

(c) Payment of neutral's fee. The parties shall pay the neutral's fee as provided by Rule 10.C(12).

(10) Selection of Neutrals in Other Settlement Procedures. The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference.

The notice shall be on a NCAOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) Disqualification. Any party may move a resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of the Neutral. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may

include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses, and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person or a resident or presiding judge upon his/her own motion shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

- A. NATURE OF NEUTRAL EVALUATION.** Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.
- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.
- C. PRE-CONFERENCE SUBMISSIONS.** No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.
- D. REPLIES TO PRE-CONFERENCE SUBMISSIONS.** No later than 10 days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) Oral Report to Parties by Evaluator. In addition to the written report to the court required under these rules at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) Report of Evaluator to Court. Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended and the names of any party, attorney or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s)

designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

- H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial de novo, in which case the decision is entered by the senior resident superior court judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina (Canons). Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

- (1) Pre-hearing Exchange of Information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:
- (a)** Lists of witnesses they expect to testify;
 - (b)** Copies of documents or exhibits they expect to offer into evidence; and
 - (c)** A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

- (2) Exchanged Documents Considered Authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may

subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

- (3) **Copies of Exhibits Admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings in lieu of the originals.

C. ARBITRATION HEARINGS.

- (1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.
- (2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these Rules.
- (3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.
 - (a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B(1).
 - (b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.
- (4) **Law of Evidence Used as Guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.
- (5) **Authority of Arbitrator to Govern Hearings.** Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for

the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

- (6) **Conduct of Hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.
- (7) **No Record of Hearing Made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.
- (8) **Parties must be Present at Hearings; Representation.** Subject to the provisions of Rule 10.C(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.
- (9) **Hearing Concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

- (1) **Filing the Award.** The arbitrator shall file a written award signed by the arbitrator and filed with the clerk of superior court in the county where the action is pending, with a copy to the senior resident superior court judge within 20 days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be a NCAOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or

voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

- (2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.
- (3) **Scope of Award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.
- (4) **Costs.** The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.
- (5) **Copies of Award to Parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

- (1) **Trial *De Novo* as of Right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court, and service of the demand on all parties, on a NCAOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.
- (2) **No Reference to Arbitration in Presence of Jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

- (1) **Termination of Action Before Judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

- (2) **Judgment Entered on Award.** If the case is not terminated by dismissal or consent judgment and no party files a demand for trial *de novo* within 30 days after the award is served, the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

- (1) **Written Agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.
- (2) **Entry of Judgment on a Binding Decision.** The arbitrator shall file the decision with the clerk of superior court and it shall become a judgment in the same manner as set out in N.C.G.S. §1-569.1ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C(10). That presiding officer shall issue an order which shall:

- (1) Confirm the completion of discovery or set a date for the completion;
- (2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;
- (3) Schedule all outstanding motions for hearing;
- (4) Set dates by which the parties exchange:
 - (a) A list of parties' respective issues and contentions for trial;
 - (b) A preview of the party's presentation, including notations as to the document (*e.g.* deposition, affidavit, letter, contract) which supports that evidentiary statement;
 - (c) All documents or other evidence upon which each party will rely in making its presentation; and
 - (d) All exhibits to be presented at the summary trial.
- (5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence and closing arguments (total time is usually limited to one day);
- (6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;
- (7) Set a date for the summary jury trial; and
- (8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A of this Rule, the

presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

- C. STIPULATION TO A BINDING SUMMARY TRIAL.** At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.
- D. EVIDENTIARY MOTIONS.** Counsel shall exchange and file motions *in limine* and other evidentiary matters which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.
- E. JURY SELECTION.** In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first 12 seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.

Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks or other visual means are encouraged, but shall be stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry, and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than 10 days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

- K. MODIFICATION OF PROCEDURE.** Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.
- L. REPORT OF PRESIDING OFFICER.** The presiding officer shall file a written report no later than 10 days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of the superior court in the county where the action is pending, with a copy to the senior resident court judge. The presiding officer's report shall inform the court of the absence of any party, attorney or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING

The senior resident superior court judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS

- A.** The term, senior resident superior court judge, as used throughout these rules, shall refer both to said judge or said judge's designee.
- B.** The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.



SECTION IV.C

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

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PREAMBLE

These Standards of Professional Conduct for Mediators (Standards) shall apply to all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission) or who are not certified, but are conducting court-ordered mediations in the context of a program or process that is governed by statutes, as amended from time to time, which provide for the Commission to regulate the conduct of mediators participating in the program or process. Provided, however, that if there is a specific statutory provision that conflicts with these Standards, then the statute shall control.

These Standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for mediator conduct. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public and the courts to conduct

themselves in a manner that will merit that confidence. (See Rule VII of the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist them in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issues in dispute. In mediation, the ultimate decision whether and on what terms to resolve the dispute belongs to the parties and the parties alone.

I. Competency: A mediator shall maintain professional competency in mediation skills and, where the mediator lacks the skills necessary for a particular case, shall decline to serve or withdraw from serving.

- A. A mediator's most important qualification is the mediator's competence in procedural aspects of facilitating the resolution of disputes rather than the mediator's familiarity with technical knowledge relating to the subject of the dispute. Therefore a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and upgrade those skills on an ongoing basis.
- B. If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, the mediator shall notify the parties and withdraw if requested by any party.
- C. Beyond disclosure under the preceding paragraph, a mediator is obligated to exercise his/her judgment as to whether his/her skills or expertise are sufficient to the demands of the case and, if they are not, to decline from serving or to withdraw.

II. Impartiality: A mediator shall, in word and action, maintain impartiality toward the parties and on the issues in dispute.

- A. Impartiality means absence of prejudice or bias in word and action. In addition, it means a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.
- B. As early as practical and no later than the beginning of the first session, the mediator shall make full disclosure of any known relationships with the parties or their counsel that may affect or give the appearance of affecting the mediator's impartiality.
- C. The mediator shall decline to serve or shall withdraw from serving if:
 - (1) a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or

(2) the mediator determines he/she cannot serve impartially.

III. Confidentiality: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

- A. A mediator shall not disclose, directly or indirectly, to any non-participant, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during or after the mediated settlement conference. A mediator's filing with the appropriate court a copy of an agreement reached in mediation pursuant to a statute that mandates such filing shall not be considered to be a violation of this paragraph.
- B. A mediator shall not disclose, directly or indirectly, to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during or after the mediated settlement conference, unless that other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.
- C. A mediator shall not disclose to court officials or staff any information communicated to the mediator by any participant within the mediation process, whether before, during or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator for the court; provided, however, when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. The confidentiality provisions above notwithstanding, if a mediator believes that communicating certain procedural matters to court personnel will aid the mediation, then with the consent of the parties to the mediation, the mediator may do so. In making any permitted disclosure, a mediator shall refrain from expressing personal opinions about a participant or any aspect of the case with court officials or staff.
- D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements made in preparation for, during or as a follow-up to mediation in the circumstances set forth in sections (1) and (2) below:

(1) A statute requires or permits a mediator to testify or to give an affidavit or to tender a copy of any agreement reached in mediation to the official designated by the statute.

If, pursuant to Family Financial Settlement (FFS) and Mediated Settlement Conference (MSC) Rule 5, a mediator has been subpoenaed by a party to testify about who attended or failed to attend a mediated settlement

conference/mediation, the mediator shall limit his/her testimony to providing the names of those who were physically present or who attended by electronic means.

If, pursuant to FFS and MSC Rule 5, a mediator has been subpoenaed by a party to testify about a party's failure to pay the mediator's fee, the mediator's testimony shall be limited to information about the amount of the fee and who had or had not paid it and shall not include statements made by any participant about the merits of the case.

(2) To a participant, non-participant, law enforcement personnel or other persons affected by the harm intended where public safety is an issue, in the following circumstances:

- (i)** a party or other participant in the mediation has communicated to the mediator a threat of serious bodily harm or death to be inflicted on any person, and the mediator has reason to believe the party has the intent and ability to act on the threat; or
- (ii)** a party or other participant in the mediation has communicated to the mediator a threat of significant damage to real or personal property and the mediator has reason to believe the party has the intent and ability to act on the threat; or
- (iii)** a party's or other participant's conduct during the mediation results in direct bodily injury or death to a person.

If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar (State Bar) or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).

E. Nothing in this Standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identified or identifiable.

F. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the

mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.

IV. Consent: A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator and the party's options within the process.

- A. A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.
- B. A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.
- C. If a party appears to have difficulty comprehending the process, issues or settlement options or difficulty participating in a mediation, the mediator shall explore the circumstances and potential accommodations, modifications or adjustments that would facilitate the party's capacity to comprehend, participate and exercise self-determination. If the mediator then determines that the party cannot meaningfully participate in the mediation, the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstance of the mediation, including subject matter of the dispute, availability of support persons for the party and whether the party is represented by counsel.
- D. In appropriate circumstances, a mediator shall inform the parties of the importance of seeking legal, financial, tax or other professional advice before, during or after the mediation process.

V. Self Determination: A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute and shall refrain from being directive and judgmental regarding the issues in dispute and options for settlement.

- A. A mediator is obligated to leave to the parties full responsibility for deciding whether and on what terms to resolve their dispute. He/She may assist them in making informed and thoughtful decisions, but shall not impose his/her judgment or opinions for those of the parties concerning any aspect of the mediation.
- B. A mediator may raise questions for the participants to consider regarding their perceptions of the dispute as well as the acceptability of proposed options for settlement and their

impact on third parties. Furthermore, a mediator may suggest for consideration options for settlement in addition to those conceived of by the parties themselves.

- C. A mediator shall not impose his/her opinion about the merits of the dispute or about the acceptability of any proposed option for settlement. A mediator should resist giving his/her opinions about the dispute and options for settlement even when he/she is requested to do so by a party or attorney. Instead, a mediator should help that party utilize his/her own resources to evaluate the dispute and the options for settlement.

This section prohibits imposing one's opinions, advice and/or counsel upon a party or attorney. It does not prohibit the mediator's expression of an opinion as a last resort to a party or attorney who requests it and the mediator has already helped that party utilize his/her own resources to evaluate the dispute and options.

- D. Subject to Standard IV.D above, if a party to a mediation declines to consult an independent counsel or expert after the mediator has raised this option, the mediator shall permit the mediation to go forward according to the parties' wishes.
- E. If, in the mediator's judgment, the integrity of the process has been compromised by, for example, inability or unwillingness of a party to participate meaningfully, inequality of bargaining power or ability, unfairness resulting from non-disclosure or fraud by a participant or other circumstance likely to lead to a grossly unjust result, the mediator shall inform the parties of the mediator's concern. Consistent with the confidentiality required in Standard III, the mediator may discuss with the parties the source of the concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate the obligation of confidentiality.

VI. Separation of Mediation from Legal and Other Professional Advice: A mediator shall limit himself or herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide only if the mediator can do so consistent with these Standards. Mediators may respond to a party's request for an opinion on the merits of the case or suitability of settlement proposals only in accordance with Section V.C. above.

COMMISSION OFFICIAL COMMENT

Although mediators shall not provide legal or other professional advice, mediators may respond to a party's request for an opinion on the merits of the case or the suitability of settlement proposals only in accordance with Section V.C above, and mediators may provide information that they are qualified by training or experience to provide only if it can be done consistent with these Standards.

VII. Conflicts of Interest: A mediator shall not allow any personal interest to interfere with the primary obligation to impartially serve the parties to the dispute.

- A.** The mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.
- B.** Where a party is represented or advised by a professional advocate or counselor, the mediator shall place the interests of the party over his/her own interest in maintaining cordial relations with the professional, if such interests are in conflict.
- C.** A mediator who is a lawyer, therapist or other professional and the mediator's professional partners or co-shareholders shall not advise, counsel or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute or an out growth of the dispute when the mediator or his/her staff has engaged in substantive conversations with any party to the dispute. Substantive conversations are those that go beyond discussion of the general issues in dispute, the identity of parties or participants and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential pursuant to Standard III is a substantive conversation.

A mediator who is a lawyer, therapist or other professional may not mediate the dispute when the mediator or the mediator's professional partners or co-shareholders has advised, counseled or represented any of the parties in any matter concerning the subject of the dispute, an action closely related to the dispute, a preceding issue in the dispute or an out growth of the dispute.

- D.** A mediator shall not charge a contingent fee or a fee based on the outcome of the mediation.
- E.** A mediator shall not use information obtained or relationships formed during a mediation for personal gain or advantage.
- F.** A mediator shall not knowingly contract for mediation services which cannot be delivered or completed as directed by a court or in a timely manner.
- G.** A mediator shall not prolong a mediation for the purpose of charging a higher fee.
- H.** A mediator shall not give or receive any commission, rebate or other monetary or non-monetary form of consideration from a party or representative of a party in return for referral or expectation of referral of clients for mediation services, except that a mediator may give or receive de minimis offerings such as sodas, cookies, snacks or

lunches served to those attending mediations conducted by the mediator and intended to further those mediations or intended to show respect for cultural norms.

A mediator should neither give nor accept any gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.

VIII. Protecting the Integrity of the Mediation Process. A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

- A.** A mediator shall make reasonable efforts to ensure a balanced discussion and to prevent manipulation or intimidation by either party and to ensure that each party understands and respects the concerns and position of the other even if they cannot agree.
- B.** If a mediator believes that the statements or actions of any participant, including those of a lawyer who the mediator believes is engaging in or has engaged in professional misconduct, jeopardize or will jeopardize the integrity of the mediation process, the mediator shall attempt to persuade the participant to cease his/her behavior and take remedial action. If the mediator is unsuccessful in this effort, s/he shall take appropriate steps including, but not limited to, postponing, withdrawing from or terminating the mediation. If a lawyer's statements or conduct are reportable under Standard III.C(2), the mediator shall report the lawyer to the State Bar or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3.



SECTION IV.D

DRC Advisory Opinions Summary

NOTE: The following thirty (30) summaries describe the focus of each formal advisory opinion issued by the Commission to date. Each is designated by the number of the advisory opinion, e.g. AO 28, and the year of issuance, (2013). Beside the title of each advisory opinions is a short topic describing the substance of the opinion. The full text of each advisory opinion can be found on the Commission’s website at www.ncdrc.org. (Click on “Ethics/Complaints/Continuing Education” from the menu on the left, select “Mediator Ethics,” and then select “Advisory Opinions Adopted to Date.” Click on the number of the opinion to open the full text).

AO 30 (2014) (mediator testimony). Mediator was subpoenaed to testify and did testify in an action to enforce a mediated settlement agreement reached at mediation. The parties did not object to the testimony and the court did not compel the testimony. The mediator did not alert the Court to Standard III and his duty to preserve confidentiality. The Commission reaffirmed its opinion formerly set out in its Advisory Opinion 03 (2001) and stressed that mediators in court-ordered mediations and certified mediators in all mediations, unless exempted by Standard III, should not voluntarily testify as to statements made or conduct occurring at a mediation. Instead, a mediator should alert the Court by motion or otherwise of his/her duty of confidentiality under Standard III. It is irrelevant that the parties do not object to the testimony. The mediator in this case was sanctioned by the Commission.

AO 29 (2014) (inadmissibility of statements and conduct at mediation). This opinion discusses the duty of the mediator to define and describe the separate and distinct concepts of confidentiality and inadmissibility at the beginning of the mediation. Mediator mediated a civil superior court case in which the plaintiff alleged sexual harassment by the defendant. Plaintiff was also the complaining witness in a criminal action against the defendant arising out of the same facts. G.S. 7A-38.1(l) provides that “evidence of statements made and conduct occurring in a mediated settlement conference...shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim...” (emphasis added). Participants in a mediated settlement conference in a civil case may be required to testify in a criminal matter. Although the mediator is under a duty to discuss confidentiality and inadmissibility, any discussion about how these concepts apply to the parties and their conversations in mediation is the responsibility of the attorneys for the parties.

AO 28 (2013) (drafting of agreements). At the conclusion of a successful mediation, a divorcing couple, both of whom are pro se ask the mediator to prepare a binding agreement for their signatures, and further, to file a court action on their behalf to incorporate their agreement into a consent order. Standard VI of the Standards of Professional Conduct for Mediators provides that a mediator “shall limit himself/herself solely to the role of mediator, and shall not give legal or other professional advice during the mediation.” The opinion holds that the mediator may not prepare an agreement or file an action with the court because both activities are the “practice of law” under N.C. Gen. Stat. 84-2.1, and to do either would be a violation of Standard VI. This opinion also calls attention to N.C. State Bar 2012 Formal Ethics Opinion 2 which held that the attorney mediator could not prepare a binding business contract for two pro se parties at the conclusion of a successful mediation because the mediator had a “non-consentable” conflict of interest, and would improperly practice law if he drafted a contract requested by the parties.

AO 27 (2013) (indigency). Pro se wife in an equitable distribution case informed her court-appointed mediator during the scheduling process that she was unable to pay his fees. Mediator insisted she must pay and when she refused, contacted her husband and sought payment of Wife’s share of the mediator fee from Husband; told the judge that he believed she could pay and that the parties were being unreasonable; failed to schedule a mediation; and upon Wife’s allegation of the mediator’s bias against her, withdrew from the case under Standard II.C.(1). Once a Mediator learns of a party’s claim of inability to pay, the Mediator should advise them of their right to file Form AOC-CV-828, Petition and Order for Relief From Obligation To Pay All Or Part of Mediator’s Fee in Family Financial Cases. Thereafter s/he should have no more communication about inability to pay and should schedule the mediation. This opinion holds that Mediator’s actions were inconsistent with FFS Rule 7.E and FFS Rule 6.A.(2) in that he failed to schedule the mediation, and with Standards III, Confidentiality, (conversations with Husband and judge), Standard II, Impartiality, (Mediator took a position in favor of the Husband), and Standard VII, Conflicts of Interest, (Mediator mixed his own financial business interests with the business of the parties), and became overly focused on his fee.

AO 26 (2013) (appeal is filed). Mediator learns that an appeal has been filed in a case that s/he has been assigned to mediate. The party filing the motion insists that the appeal divests the trial court of jurisdiction and stays the mediation. The opposing party wishes to proceed with the mediation. The Commission advises the mediator that it is ultimately the responsibility of the parties to seek clarification from the trial court in this instance. However, if they take no action, the mediator should seek guidance from trial court staff as to whether the mediation is stayed upon appeal of the case or it may proceed.

AO 25 (2013) (attendance). At a court-ordered conference, a party objects to a corporation attending without legal counsel. The Commission advises mediators to avoid taking positions in disputes over attendance. Absent an order of the court dispensing with mediation, a mediator should conduct the conference and advise the parties to direct any questions about attendance to the court. In simply conducting the conference, an attorney mediator is not facilitating the unauthorized practice of law.

AO 24 (2013) (attendance). At a court-ordered conference, a party objected to the attendance of an out-of-state attorney when the attorney had not been admitted pro hoc vice. The Commission advises mediators to avoid taking positions in disputes over attendance. Absent an order of the court dispensing with mediation, a mediator should conduct the conference and advise the parties to direct any questions about attendance to the court. In simply conducting the conference, an attorney mediator is not facilitating the unauthorized practice of law.

AO 23 (2012) (mediator testimony). Program enabling legislation provides for mediator testimony at State Bar disciplinary hearings regarding an attorney's conduct in mediation. However, where no subpoena is involved, the Commission does not read the legislation broadly to permit mediators to answer a State Bar investigator's questions in preliminary stages of an investigation. A note following the Opinion addresses situations where an attorney-mediator is him or herself the subject of the investigation.

AO 22 (2012) (confidentiality). Standard III of the Standards of Professional Conduct for Mediators places a duty of confidentiality on mediators. Unlike their mediator, the parties and their counsel are not bound by Standard III and are free to talk to the public or press about statements or conduct occurring in the mediation. If the parties want to negotiate their own confidentiality agreement, the mediator should assist them.

AO 21 (2012) (mediator fees/pre-mediation review). When a mediator is asked by one party to a mediation to review documents in advance of the conference, a mediator may charge for the time spent in that review. However, to maintain neutrality, the mediator should obtain permission of all parties before undertaking the review, even if one party offers to pay the entire fee associated with the review. Mediators are urged not to charge for routine document review, such as short case summaries or briefs.

AO 20 (2011) (authority to notarize). An attorney or non-attorney mediator who is also a notary public may notarize an agreement resulting from a mediation that s/he conducted.

AO 19 (2011) (mediator fees/advance deposit). Party selected mediators may charge an advance deposit for their services mediating, but may not postpone or refuse to conduct a mediation when a party is unable to pay the deposit. A party should never be denied the opportunity to mediate because s/he or cannot pay some or all of the mediator's fee.

AO 18 (2011) (case management responsibilities). Mediator was disciplined privately by the Commission for neglecting his case management responsibilities, including failing to complete his Reports of Mediator fully and to file them timely. Opinion stresses the need for mediators to take their case management responsibilities seriously and to fulfill all their reporting obligations.

AO 17 (2010) (serving as arbitrator). A mediator is not precluded from serving as an arbitrator in a case that s/he has previously mediated. This Opinion distinguishes the situation where a

mediator transitions to the role of arbitrator from the situation where a mediator becomes a fiduciary. AO 8-15 addresses the latter situation and advises that mediators should not solicit or accept an appointment as a fiduciary when that appointment flows from the mediation process. AO 10-17 provides guidance on making the transition from mediator to arbitrator.

AO 16 (2010) (mediator confidentiality). During a caucus session held during the mediation of a family financial dispute, the wife and her attorney told the mediator confidentially that they had intentionally failed to disclose the existence of a valuable marital asset on their inventory affidavit. The mediator asks whether the mediation can continue in the face of this nondisclosure. The Opinion provides that, in these circumstances, the best practice would be for the mediator to engage the offending party and encourage her and her attorney to disclose the asset. If they refuse, then the mediator must terminate the session and withdraw from the mediation without violating the requirements of confidentiality.

AO 15 (2008) (mediator may not serve as fiduciary) During a Clerk referred mediation of a dispute over who should serve as an estate's administrator/fiduciary, the mediator agreed to allow the parties to appoint him as the administrator/fiduciary. The Commission believes that soliciting or even accepting such an appointment at the insistence of the parties, can create the impression that the mediator manipulated the mediation process with the ultimate goal of furthering his or her own interests. A mediator should remain focused exclusively on his or her role as mediator and should not solicit or accept such an appointment.

AO 14 (2008) (pro bono mediation). This Advisory Opinion addresses a proposal to form a panel of volunteer mediators willing to serve pro bono in mediations involving clients of legal services organizations. The Opinion discusses fees, including disclosure of waiver and negotiation of the shifting of payment to another party, both in the context of service on the proposed panel and in the context of any other mediation where a mediator has agreed to serve pro bono or for a reduced fee relative to at least one party.

AO 13 (2007) (neutrality). A mediator should not compromise his/her neutrality by overtly accusing a party of being untruthful during mediation or by using language tantamount to such an accusation. A mediator should not confront a party in a hostile or abusive manner. Such actions compromise the mediator's neutrality. A mediator should not use profane language during mediation even if the parties or their lawyers are using such language.

AO 12 (2007) (agreement to mediate must be consistent with program rules and standards). A court-appointed mediator distributed a copy of an agreement to mediate and asked the parties to sign it prior to their mediated settlement conference. The agreement contained terms that modified and even ran counter to program rules and the Standards of Professional Conduct for Mediators. The Commission determined that a court-appointed mediator may not, through the use of an agreement to mediate, modify program rules or the Standards.

AO 11 (2007) (duties of the mediator). Mediator failed to reduce the terms of an agreement reached in mediation to writing in accordance with MSC Rule 4.A.(2) and 4.C. Moreover,

mediator should not have reported to the Senior Resident Superior Court Judge in his Report of Mediator that the case had been settled when there was no writing. Mediator should have accompanied the parties on their site visit to ensure that all the details were ironed out and then assisted them in reducing their agreement to writing.

AO 10 (2006) (attendance of non-parties). MSC Rule 4.A.(1) addresses who shall attend a conference. Pursuant to Rule 6.A.(1), the mediator has discretion to determine who else may be present. If there is a dispute between the parties regarding whether an individual may attend, it is best practice for the mediator to try and mediate the matter first. If the mediator cannot help the parties reach an agreement on the issue, then the mediator should make a determination as to whether the individual in question may attend.

AO 09 (2006) (disclosure of breach of confidentiality). The mediator has a duty to warn parties when confidentiality is breached and parties are at financial or other risk because of the breach. The situation which gave rise to this opinion involved financial information that was removed from a mediator's laptop during service and that could not be re-located and restored.

AO 08 (2005) (duty to schedule conference). It is the duty of the mediator, and not that of the parties, to schedule the mediation within the timeframe established by the court for completion.

AO 07 (2004) (bankruptcy petition filed). Upon learning that a bankruptcy petition has been filed in a case, a mediator shall report to the court that the bankruptcy has been filed and shall request that the judge who referred the matter to mediation advise the mediator as to whether s/he should hold the conference.

AO 06 (2004) (conflict of interest). A mediator who conducts a mediation for a couple that is separating may not thereafter represent either the husband or wife in divorce proceedings.

AO 05 (2003) (mediator assistance after impasse). As long as he or she does not reveal any confidential information, a mediator may, following an impasse, continue to assist a party or parties who contact the mediator in an effort to revive discussions or to clarify something that was said at mediation. If the mediator believes that the party who contacted him/her has a nefarious motive, the mediator is not obligated to respond or to involve him or herself further in the matter.

AO 04 (2003) (file retention). It is discretionary with individual mediators as to how long they retain mediation files, but mediators should consider confidentiality concerns in making decisions regarding file retention.

AO 03 (2001) (confidentiality/no affidavits or testimony). Confidentiality is integral to the success of the mediation process. Mediators should be vigilant in their efforts to preserve confidentiality and should not give affidavits or testify in court as to statements and conduct

occurring in connection with a mediation unless the communication is permitted by an exception set forth in a statute or Standard.

AO 02 (2000) (attendance in person). It is preferable for parties to physically attend a mediation conference rather than participating by telephone. A mediator should not waive or modify the attendance requirement absent some compelling reason to do so.

AO 01(1999) (duty to hold conference). Once a case has been ordered to mediation, a mediator has a duty to assemble the parties and hold the conference prior to the deadline for completion. A mediator may not simply report an impasse based on a representation by the parties that the case cannot be settled.

INSERT GRAPH

