

MEDIATION BENCHBOOK FOR
DISTRICT COURT JUDGES

Family Financial Settlement Conference Program (FFS)
District Court

First Edition
2015

North Carolina Dispute Resolution Commission
901 Corporate Center Drive
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www.ncdrc.org



MEDIATION BENCHBOOK FOR DISTRICT COURT JUDGES

FAMILY FINANCIAL SETTLEMENT CONFERENCE PROGRAM (FFS) DISTRICT 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 district courts today to help manage cases and resolve disputes.”

***--Judge Robert Rader, Chief District Court Judge, Judicial District 10
April, 2015***

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The information in this ***Benchbook*** is based upon the FFS 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 Family Financial Settlement Conference (FFS) Program in North Carolina. I am proud to be able to share the Commission's **Mediation Benchbook for District Court Judges** with you.

This project came about largely for two reasons. First, the Commission wanted to develop a "go-to" publication about the FFS Program which would be readily accessible and a practical resource for district court judges and court staff. This **Benchbook** is intended to be a nuts and bolts approach to operating the FFS 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 88% of chief district court judges, 47% of district court judges, 56% of family court administrators, 46% of District Court Trial Court Coordinators and 55% of District Court Judicial Assistants will be eligible to retire in ten years! These startling numbers follow this Message. Recognizing that so many seasoned individuals will likely 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 FFS 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 district 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 project: Ellen Rose, Family Court Administrator, District 10; Nancy Capps, Trial Court Coordinator, District 17A; Monica Hughes, Trial Court Coordinator, District 18; Sharon Orr, Trial Court Coordinator, District 29B; Stephanie Nesbitt, AOC Court Programs, and of course, the Commission's dedicated staff.

The success of the FFS 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 FFS program in your district.

With best wishes,

Judge Gary Cash, Chair
Dispute Resolution Commission

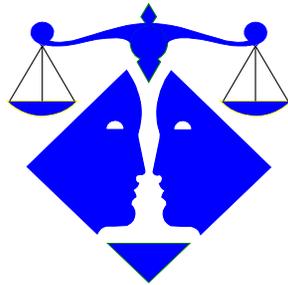
NCAOC RETIREMENT PROJECTIONS

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 DISTRICT COURT JUDGES

FFS PROGRAM

Section I
The Basics



SECTION I.A
Basic Definitions of the Mediation Process
FFS Program

- **Mediation Defined.** N.C. Gen. Stat. §7A-38.4A(b) incorporates the definition of “mediation” set out in G.S. 7A-38.1(b)(2) as an informal process conducted by a mediator with the objective of helping the parties voluntarily settle their dispute.

- **Role of Mediator Defined.** N.C. Gen. Stat. §7A-38.4A(b) incorporates the definition of a “mediator” set out in G.S.7A-38.1(b)(3) 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.** N.C. Gen. Stat. §7A-38.4A(a) provides that a system of settlement events should be established to facilitate the settlement of district court actions involving equitable distribution, alimony, or support and to make that litigation more economical, efficient, and satisfactory to the parties, their representatives, and the State.



SECTION I.B A Short History of the FFS Program

In 1997, the General Assembly adopted N.C. Gen. Stat. §7A-38.4 establishing a pilot program for pretrial mediated settlement of equitable distribution disputes (disputes concerning the division of marital assets and debts). The new legislation and pilot Family Financial Settlement (FFS) Program were modeled on the successful civil mediation program in North Carolina's superior courts. In 1998, implementation of the FFS Program began in pilot districts. That same year, enabling legislation and rules were revised to provide for a dispute resolution menu. Menu options as set forth in the revised program rules included: 1) mediated settlement, 2) early neutral evaluation, 3) judicial settlement conference (where authorized locally), and 4) any other dispute resolution procedure authorized under local rule. Under the new menu, mediated settlement remained the default procedure, *i.e.*, parties would participate in mediated settlement unless they took action to select one of the other menu options and notified the court of their selection.

At the conclusion of the Program's pilot phase, the General Assembly adopted N.C. Gen. Stat. §7A-38.4A authorizing statewide expansion of the Family Financial Settlement (FFS) Program. Amended program rules were written and adopted by the Supreme Court effective October 1, 2001.

Mediation of equitable distribution disputes is now mandatory in North Carolina and the parties may also agree to talk about other matters relating to their divorce, including child support, alimony and custody and visitation. Post-divorce support disputes may also be referred to mediation.

Important characteristics of the FFS Program are set out below:

- **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 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.
- **The mediator serves as case manager.** The mediator, and not court staff, work with the parties to: schedule the mediation and make arrangements for 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 by keeping the process moving forward.
- **Attorney participation.** Attorneys play an active role in the mediation process, actively participating in and advising their clients throughout the conference.

Since adoption of the pilot legislation, mediated settlement in family financial cases has become institutionalized in North Carolina's district courts and widely embraced by North Carolina attorneys. The FFS Program has also proven to be of tremendous value to the citizens and taxpayers of our State with over one thousand cases settling each year as a result of mediation.



SECTION I.C

The Benefits of Mediation

Mediated settlement conferences in district court family financial 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.

“Mediation helps people resolve issues between them more effectively than going to trial where there is often an escalation of unresolved conflict rather than understanding which can result in a positive resolution of issues by joint agreement of the parties.”

---Judge Marcia Morey, Chief District Court Judge, District 14

1. Mediation Makes the Courts More Efficient.

Cases Settle. Mediated settlement conferences work! On average, more than sixty percent of all family financial cases mediated settle *at the table*. In addition, mediation’s contributions to settlement are not limited to the conference itself. Since attorneys (and sometimes, the parties) are aware that a filed case will be referred to mediation, the Commission believes that mandatory mediation serves as a catalyst, increasing the possibility of settlement discussions and resolution occurring prior to the conference, prior to the referral to mediation, and perhaps even prior to the case being filed with the court. Moreover, when cases fail to settle in mediation, the dialogue begun there can and often does survive the impasse, as attorneys and parties continue to talk.

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 superior court cases which were 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. The students also found that 52.8% of the cases that went on to settle, settled within eight weeks of the conference.

Although this study was conducted with cases in the mediated settlement conference program in superior court civil actions, the Commission believes that comparable results would be obtained were FFS cases similarly longitudinally researched.

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. A study of the MSC program during the time of the pilot program by researchers at UNC-Chapel Hill’s then Institute of Government found that mediation 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 courts are more efficient.

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 to try the cases that must be tried.

2. **Mediation Benefits the Parties.**

Mediation Empowers Parties to Make Their Own Decisions. Prior to implementation of the FFS 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 and with the help of their attorneys, to try and resolve their disputes themselves. Parties involved in a divorce know more about their children, their finances, and their property than their attorneys or their judge will ever know. They also know more about their needs and what will be necessary to allow them to exit the conflict with a real sense of closure. Mediation encourages parties to draw on that information and whatever good will and trust remain between them for the purpose of crafting their own resolution, one which best addresses their needs as well as those of their children. 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 an agreement they have fashioned themselves as opposed to one imposed by the court. Mediation agreements are truly the parties' own, as they are the product of their discussions and mutually arrived at solutions. The notion of durability may be especially important in family cases where emotions often run high and minor children or long-term support issues may necessitate the parties' interactions for years to come.

Mediation Can Help Repair and Preserve Relationships. Relationships, and the need to preserve them, can be especially important in family disputes. Parties often have children they must continue to co-parent or long-term support obligations that may be payable for years to come. The more informal mediation process with its emphasis on discussion and consensus building is a softer approach to divorce than the traditional adversarial process which pits one party against the other. Protracted litigation and trial takes a toll, often destroying any shred of goodwill or trust that remains between the couple. The mediation process, on the other hand, tries to build on whatever good will and trust remain. If mediation is successful, not only is an agreement reached, but, hopefully, the parties will have set the tone for their future interactions. Of course, if parties can communicate better and work things out themselves, they will be less likely to resort to the courts, which benefits taxpayers.

Mediation Can Provide Confidentiality. Divorce is devastating for many people and the last thing they want is a public airing of their dirty laundry. Because family issues and financial matters tend to be so highly personal and private, it is often the case that the parties want to handle their divorce privately and behind closed doors. The mediation process helps to keep matters confidential. Discussion occurs behind closed doors rather than in open court and the parties need not reveal the terms of their agreement.

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. This can be especially helpful where the issues and allegations may have been highly charged and emotionally draining for the parties. Finality can help the parties—which then benefits their children-- regain some emotional equilibrium going forward.

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 settle on terms that can work for them, even though they may be unlike anything a court would have imposed.

“Mediation is empowering for the parties. If they reach a resolution, there is a strong sense of ownership and participation. In the family law context, parties are often dividing their life’s work to date. Most people prefer to have a hand in making a decision, rather than having a decision made for them. Even when the parties do not reach a resolution in mediation, the process allows significant insight into the strengths and weaknesses of their case.”

---Richard G. Long, Jr., Attorney and DRC Certified FFS Mediator, Union County



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 then pilot Mediated Settlement Conference (MSC) Program (superior court) 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 clearing house 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 who are not certified as mediators, a Clerk, and knowledgeable members of the public. Members are drawn from across the state, including urban and rural areas.

A number of ex-officio members also assist the Commission with its work. Ex-officio members include chairs emeriti and liaisons from other mediation programs or associations, *e.g.*, the NCBA's Dispute Resolution Section, Mediation Network of North Carolina, and Industrial Commission.

The Commission helps to support four major programs:

- The superior court Mediated Settlement Conference (MSC) Program (operating since 1991)
- The district court 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 judicial 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 those of its office are funded entirely by mediator certification fees.



MEDIATION BENCHBOOK
FOR DISTRICT COURT JUDGES

FFS PROGRAM

SECTION II
**The Role and Duties of
District Court Judges**



SECTION II.A The Important Role of the Chief District Court Judge

The General Assembly charged the Family Financial Mediated Settlement Conference (FFS) Program with expediting settlement of cases and making North Carolina's district courts more efficient. These goals can only be accomplished through the leadership of the chief district court judges.

The importance of the Court's enthusiasm for the FFS program, insistence on compliance with program rules, and active support of the court staff and mediators who are implementing it, cannot be overstated. The FFS program is most effective when the chief district court judge or his/her designee actively oversees and manages his/her district's program. When the Court is actively on board, time has shown, the bar will follow.

For the FFS Program to have a positive impact by reducing filing-to-disposition times and to function optimally as a caseload management tool for judges, the Commission urges each chief district court judge or his/her designee to actively manage the FFS Program in his or her district in the following ways:

- **Foster a positive tone toward the mediation process and the FFS program;**
- **Refer all eligible cases to mediated settlement conferences;**
- **Insist that FFS Program Rules are followed;**
- **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 to cooperate with mediators in scheduling cases promptly;**
- **Encourage parties, attorneys, and mediators, whenever possible, to meet the deadline for completion set by the court, and discourage unnecessary postponements;**

- **Encourage attorneys and parties to promptly pay mediators;**
- **Encourage mediators to report promptly on the outcomes of their mediations, and when they chronically fail to do so, be prepared, pursuant to FFS Rule 6.B(4)(d), to sanction them yourself or to report them to the DRC;**
- **Be aware of the inadmissibility provisions set forth in G.S. 7A-38.4A(j) and the confidentiality requirements placed on mediators by their Standards of Conduct both of which restrain mediators from testifying about what occurred in mediation, except for the very limited purposes set forth in G.S. 7A-38.4A(j); and**
- **Be sure to have your staff collect and regularly submit the caseload data needed by the legislature, AOC, and the Dispute Resolution Commission to evaluate the FFS Program.**



SECTION II.B Duties of District Court Judges

The Rules for the FFS Program place certain duties on district court judges or their designees, as noted below. This section also discusses the nuts and bolts provisions of the Rules.

- 1. Ordering cases to mediated settlement conferences. FFS Rule 1.**
 - (a)** **FFS Rule 1(C)** provides that at the scheduling conference mandated by N.C. Gen. Stat. §50-21(d) in all equitable distribution cases in all judicial districts, the court shall include in its scheduling order a requirement that the parties attend a mediated settlement conference, or if the parties agree, another settlement procedure authorized by the program rules or by local rule.
 - (b)** The scheduling Order shall 1) require the mediated settlement conference or other settlement proceeding be held; 2) establish a deadline for completion of the mediation; 3) state that the parties shall be required to pay the neutral's fee at the conclusion of the conference or proceeding. **FFS Rule 1.C(4).**
 - (c)** The Court may order the parties to attend a mediated settlement conference pursuant to the FFS Rules in any other action involving any family financial issues and in contempt proceedings in all family financial issues. **FFS Rule 1.C(5)(b).**
 - (d)** 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 that is not more than 150 days after the issuance of the order, unless extended by the court. **FFS Rule 3.B.**

2. Dispensing with mediation. FFS Rule 1.D.

As a practical matter, motions to dispense with mediation are rarely granted in most judicial districts.

- (a)** A party may move the court to dispense with a mediated settlement conference for good cause shown. **FFS Rule 1.D.** The Court may dispense with the requirement to attend a mediated settlement conference or other settlement procedure *only* for good cause shown. **FFS Rule 1.C(1).**
- (b)** Good cause may include the fact that the parties have participated in another settlement procedure such as non-binding arbitration or neutral evaluation prior to the order for a mediated settlement conference, or that one of the parties has alleged domestic violence. **FFS Rule 1.D.** Good cause does not necessarily include the expense or time involved with travel to a mediation, or an inability to pay the mediator's fee. See Comment to Rule 1.
- (c)** The fact that a party is *pro se* and/or indigent does not constitute good cause for dispensing with a mediated settlement conference.

3. Selection of Other Settlement Procedure. FFS Rules 1.C(1), 1.C(3), (10), (11), (12), and (13).

- (a)** The parties may move the court to authorize the use of an alternate settlement procedure, including neutral evaluation, judicial settlement conference, if allowed by local rules, or any other settlement procedures described and authorized by local rules. **FFS Rule 10.B.**
- (b)** If the parties want to request an alternate procedure a motion must be filed on an approved AOC form within 21 days of the court's order requiring that a mediated settlement conference be held. **FFS Rule 1.C(3), AOC-CV-826.**
- (c)** The motion shall indicate that all parties agree to: 1) the settlement procedure chosen by the parties; 2) the neutral selected to conduct the process; and 3) the neutral's compensation. **FFS Rule 1.C(3).** The court can then order the use of the alternate procedure.

- (d) If all parties cannot agree on (1)-(3) in subsection (c) above, the judge will order that the parties participate in a mediated settlement conference as originally ordered by the court.
- (e) Where the settlement proceeding ordered is a judicial settlement conference, the parties will not be required to pay for the neutral. **FFS Rule 1(C)4.**

4. Designating/Appointing a Mediator. FFS Rule 2.

FFS Rule 2.A provides that the parties may designate a mediator certified by the Commission as a family financial mediator, or alternatively, they may nominate a mediator who is not certified, subject to the court's approval. If the parties take no action to select a mediator or cannot agree on one, Rule 2.B provides for the court to appoint a certified family financial mediator.

(Superior court (MSC) certification is not interchangeable with FFS certification and the court must appoint a certified FFS mediator.)

Unlike the superior court's Mediated Settlement Conference (MSC) Program which requires all participating mediators to be certified, FFS Program Rule 2.A permits the parties to select a non-certified mediator with the approval of the court. Rule 2.A notwithstanding, the NC Dispute Resolution Commission (DRC) strongly believes that it is in the interests of the parties to select a certified mediator. Certified mediators have completed substantial training in mediation theory and process, program rules, mediator ethics, and NC family law. Moreover, the DRC can more effectively regulate certified mediators. While, theoretically, non-certified mediators conducting court-ordered family financial mediations are subject to the Supreme Court's Standards of Professional Conduct for Mediators, the Commission has more limited ability to sanction such mediators.

(a) Designation of a Mediator. FFS Rule 2.

- i. The parties may designate a certified mediator within 21 days of the court's order. The designation should be delivered to the court on the approved AOC form. **FFS Rule 2.A. Form AOC-CV-825.**
- ii. If the parties wish to designate a mediator that is not certified by the Commission, they must file a Nomination of Non-Certified Family Financial Mediator at the scheduling conference. The nomination must state the name, address, telephone number of the mediator; his/her training, experience or other qualifications; rate of compensation; and that the mediator and all parties have

agreed to the nomination and compensation. There is a section on AOC-CV-825 to provide this information. **FFS Rule 2.A. Form AOC-CV-825.**

(b) Appointment of a Mediator. FFS Rule 2.B.

- i. If the parties take no action or cannot agree upon a mediator within the time allowed, the court will appoint a mediator to conduct their conference. The Court will appoint a certified FFS mediator from the Commission's published list (on its website) by rotation through the list. **FFS Rule 2.B.** Thus, short, local lists are prohibited by the Rules.

Blind rotation down the list protects the Court from potential allegations of favoritism. It is also an excellent way to encourage your local bar to self-select their mediators in a timely fashion. If attorneys know that their failure to timely designate may result in the assignment of an unfamiliar mediator, they may be more inclined to make a prompt designation.

District court judges have discretion to depart from the rotation when there is good cause to do so. However, for the reasons noted above, the Commission believes that such departures should be rare.

To see the list of mediators available for court-appointment in your judicial district go to the Commission's website, www.ncdrc.org. Click on "Finding a Mediator" in the left hand menu. Click on the FFS program. In the field labeled "Option" click on the drop down arrow and select "court-appointment." In the field to the right, click on the "District" tab, scroll down, and select your district. All FFS certified mediators eligible for court-appointment in your district will appear in alphabetical order.

- ii. Mediators who are court-appointed may not charge for windshield time, mileage, hotels, or other expenses related to their travel to and from the conference. Comment to **FFS Rule 7.B.**
- iii. A mediator may not refuse a court-appointment based upon the fact that a party or parties is indigent and/or appearing *pro se*. **FFS Rules 2.B and 8.I.**

- iv. By selecting judicial districts in which s/he desires court-appointments, the mediator is affirmatively agreeing to accept the appointment and also affirming that s/he is familiar with the local rules.

5. Mediator Disqualification/Withdrawal. FFS Rule 2.D.

- (a) **Disqualification.** Any party may move for the disqualification of a mediator. For good cause shown, the court shall disqualify the mediator, and the parties or the court will designate or appoint a replacement mediator pursuant to **FFS Rule 2**. The determination of good cause shown shall be in the discretion of the judge. **FFS Rule 2.D.** A mediator may disqualify himself or herself. **FFS Rule 2.D.**
- (b) **Withdrawal.** A court-appointed or party selected mediator who finds that s/he is unable to conduct a conference may withdraw for good cause. The withdrawal may involve multiple cases and be for an extended period, e.g., if health issues are involved, or the withdrawal may be case specific, such as a mediator becomes aware of a conflict he has with a particular party. Letters and forms facilitating withdrawal can be found under the Toolbox icon on the Commission’s website (click on the Toolbox at www.ncdrc.org and then select “Substitution/Withdrawal as Mediator” from the menu on the left.
- (c) **Standard II.C of the Supreme Court’s Standards of Professional Conduct for Mediators** provides that a mediator shall decline to serve or shall withdraw from serving if:
 - i. a party objects to his/her serving on grounds of lack of impartiality, and after discussion, the party continues to object; or
 - ii. the mediator determines s/he cannot serve impartially.

6. Substitution of Mediator. FFS Rule 7.C.

- (a) Parties who do not select a mediator at the scheduling conference pursuant to FFS Rule 2.A and then desire a substitution of the mediator appointed by the court, must obtain court approval for the substitution. **FFS Rule 7.C, AOC-CV-836.**
- (b) The court may approve the substitution ONLY upon proof of payment to the original mediator of the \$150 administrative fee, and any other amount due and owing the mediator pursuant to FFS Rules 7B and 7D.

FFS Rule 7.C clearly states that the proof of payment must be produced **BEFORE** the substitution may be granted. **FFS Rule 7.C, AOC-CV-836.**

This Rule, which was adopted in response to concerns expressed by superior court staff, imposes a substitution fee as a disincentive and is intended to protect court staff from becoming over-extended due to excessive requests for substitution. Diligent enforcement of the substitution fee will help prevent such requests from becoming a burden in a district.

- (c) To access **AOC-CV-836**, click on the “Toolbox” icon on the DRC website, and select “Substitution/Withdrawal as Mediator”, then click on the sample form, **AOC-CV-836, Consent Order for Substitution of Mediator**. It is also posted on the NC Courts System website under “Forms.”

7. Location of the Conference. FFS Rule 3.A.

The conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, the mediator has the authority and is responsible for reserving a neutral place in the county where the action is pending. **FFS Rule 3.A.**

Mediators may from time-to-time seek assistance from court staff in scheduling conferences in the courthouse. One of the parties may have raised security concerns or a pro se party may object to meeting in the office of the opposing counsel or even the mediator. And, in cases involving allegations of domestic violence, a neutral place with law enforcement oversight might be warranted. If there is available space in a district’s courthouse, it can be helpful to offer the space for the conference.

A court-appointed mediator who resides at some distance from the county where the case is filed may not insist that the parties come to his/her county of residence for the proceeding or meet him/her half way. If the parties cannot agree on a location, the mediator must schedule the proceeding to be held in the county where the action is pending.

8. Extending Deadlines. FFS Rule 3.C.

- (a) The judge may extend the deadline within which to complete the mediated settlement conference upon suggestion of the mediator, stipulation of the parties, or upon the court’s own motion. **FFS Rule 3.C. See AOC-DRC-19, Order Extending Deadline.**

- (b) Since one of the purposes of the FFS Program is to expedite settlement of cases and firm up court calendars, the DRC encourages mediators to seek extensions of deadlines only when necessary and set a new deadline that will fall well in advance of trial dates. Mediators are also encouraged 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 conference may not be cause for the delay of other proceedings in the case, including the trial of the case, except by order of the court. **FFS Rule 3.E.**

It is the responsibility of the mediator to conduct the mediation by the deadline set forth in the court’s order, seeking extensions him/herself as necessary or ensuring that the parties have done so. 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 or ask a judge to consider sanctioning the mediator pursuant to FFS Rule 6.B(4)(d).

- (c) For forms relating to extensions, see the “Toolbox” on the DRC’s website, www.ncdrc.org. Click on the toolbox graphic. Click on “Extending deadlines.” See “Procedures Extending Deadlines,” *Order Without Motion* AOC-DRC-19, and *Motion and Order Extending Time*, AOC-CV-835.

9. **Modifying Attendance Requirements. FFS Rule 4.A(2)**

- (a) **FFS Rule 4.A(1)** sets out the requirements as to who must attend the mediated settlement conference. These are: the parties and at least one counsel of record for each party whose counsel has appeared in the action.
- (b) The mediator has the discretion to permit or refuse to allow other persons to attend the mediated settlement conference (those not required to attend under FFS Rule 4.)
- (c) Any person or party required to attend shall physically attend from beginning until settlement or impasse. **FFS Rule 4.A(2).**
- (d) A party or person required to attend may be excused from physically attending upon agreement of all persons or parties required to attend and the mediator, **FFS Rule 4.A(2)(a)**, or by order of the court, upon motion of a party and notice to all parties and persons required to attend and the mediator. **FFS Rule 4.A(2)(b).**

- (e) The FFS Rules contemplate a face-to-face mediated settlement conference except in unusual circumstances. Where appropriate, however, in the court's discretion, a party may be permitted to attend by telephone, Skype, or other electronic means. Comment to FFS Rule 1.

Much communication is non-verbal and through body language. The Commission believes it is always preferable for parties to physically attend and participate in person at their conference. As such, the Commission suggests that judges grant motions to excuse physical attendance only where it is warranted; for example, the party seeking to be excused resides at considerable distance from the mediation or is seriously ill or home-bound.

- (f) **Sanctions for Failure to Attend.** Any person required to attend the conference and who fails to attend without good cause is subject to the contempt powers of the court and monetary sanctions may be imposed by a presiding district court judge, including, but not limited to, the payment of fines, attorney fees, mediator fees, expenses, and loss of earnings incurred by persons who did attend. **FFS Rule 5, Comment to FFS Rule 7.D.**

10. Finalizing and Drafting Agreements.

- (a) **Finalizing the agreement.** If the parties conclude the conference with a final, written document which contains all of the terms of their agreement for property distribution, but **do not** intend to submit it to a court for approval, all parties must sign the agreement and the signatures must be formally acknowledged as required by N.C. Gen. Stat. §50-20(d). If the parties conclude the conference with a final, written document which contains all of the terms of their agreement but they **do** intend to submit it to the court for approval, the agreement need only be signed and need not be formally acknowledged. **FFS Rule 4.B(1)(a).** (Caveat - If both parties are *pro se*, the mediator may only prepare a summary of their agreement and may not permit the parties to sign it in the mediator's presence (see Advisory Opinion No. 28 (2013) and subsections (d) and (e) below.)
- (b) **Agreement reached without final, written document.** If the parties reach agreement on all issues but are unable to complete a final, written document or to have their signatures formally acknowledged (in the case where the parties do not intend to submit the agreement to the court for approval), the parties shall summarize their understanding in written form, (see (d) below) and use it as a guide to writing a final

agreement. And, as in (a) above, if the parties, after a final, written agreement is completed, wish to submit it to the court for approval, it must be signed but need not be acknowledged. **FFS Rule 4.B(1)(b)**.

- (c) In all cases in which an agreement is reached at mediation **FFS Rule 4.B(2)** requires that a consent judgment and/or voluntary dismissal be filed by the parties with the court within 30 days of the conclusion of the mediation process, or the expiration of the mediation deadline, *whichever is later*. **FFS Rule 4.B(2)**. The mediator must report to the court that the matter has been settled and who reported the settlement. **FFS Rule 4.B(2)**. The mediator should not attach a copy of the settlement with his/her Report of Mediator, and local rules may not require him/her to do so. **FFS Rule 6.B(4)(a)**.

The Commission brings the following information to the court's attention because the court may be asked by pro se parties to enter a consent judgment based upon the mediator's summary of their discussion at a mediated settlement conference.

- (d) **Mediator drafting of agreements involving a pro se party(ies)**. The NC State Bar has issued a Formal Ethics Opinion holding that an attorney-mediator may not prepare a binding business agreement at the end of a mediated settlement conference involving two *pro se* parties because the attorney-mediator had a non-consentable conflict of interest, and would be improperly practicing law to do so. **NC State Bar FEO 2012-2**. A non-attorney mediator in this situation would be engaging in the unauthorized practice of law. N.C. Gen. Stat. §84-2.1.

In light of FEO 2012-2, the DRC issued Advisory Opinion No. 28 (2013) which holds that a mediator should not draft an agreement which pro se parties intend to serve as an enforceable contract. To do so would violate **FEO 2012-2**, the Bar opinion, **N.C. Gen. Stat. §84-2.1** (if a non-attorney mediator), and **Standard VI** of the Standards of Professional Conduct for Mediators which limits the mediator to his/her role as mediator and forbids him/her from giving any legal advice.

- (e) **Where one party is represented and the other is pro se, the attorney may draft the agreement for the parties' signatures and the agreement may be signed in the mediator's presence.** The attorney may use **AOC-DRC-17. Advisory Opinion 31 (2015)** discusses the mediator's duties in such situations.
- (f) Two forms have been posted on the DRC website which mediators may use in FFS cases. **AOC-DRC-17, Mediated Settlement Agreement (FFS**

Program), can be used where one or both parties to a family financial mediation is represented and they reach final agreement on all issues. **AOC-DRC-18**, Mediation Summary, is suggested in those mediations involving only *pro se* parties where an agreement is reached. It may also be used in those situations in which the parties have reached agreement on some, but not all of the issues in the case, or when the parties are unable to prepare a final, written agreement at the mediation and/or have their signatures formally acknowledged.

The mediator may act as a “scrivener” in preparing **AOC-DRC-18**, but the Mediation Summary should not be signed by the parties or the mediator. Thereafter, the *pro se* parties may have the summary reviewed and finalized by an attorney, the parties may reach a final agreement with or without the help of an attorney after the mediated settlement conference, or the parties may bring their Mediation Summary before the court for entry as a consent order. (See **Advisory Opinion No. 28 (2013)**.)

To access suggested Mediation Settlement Agreement Forms, click on the Toolbox logo on the Commission’s website, www.ncdrc.org. Then click on “Mediation Settlement Agreement Forms.” **AOC-DRC-17** and **AOC-DRC-18** are also posted under “Forms” on the NC Court System website. The Advisory Opinions are also posted on the Commission’s website. Click on “Ethics/Complaint/Continuing Education” from the menu on the left, then “Mediator Ethics”, then “Advisory Opinions Adopted to Date”.

11. Report of Mediator. AOC-CV-827.

- (a)** The mediator must file a Report of Mediator in equitable distribution and other district court family financial cases whether the mediation was ordered by the court or was voluntarily submitted to mediation by the parties. The Report must be filed within 10 days of the completion of the mediation process. **FFS Rule 6.B(4)(a)**.
- (b)** The mediator must also file a Report of Mediator in cases referred to mediation, but which settle either prior to or during a recess of the conference. The Report must be filed within 10 days of the mediator being notified of the settlement. **FFS Rule 6.B(4)(a)**.
- (c)** Reports of Mediator shall be fully completed, including specifying the names of those who attended if a conference was held, the outcome of the proceeding and, if any agreement was reached, who will file the consent judgment and/or voluntary dismissal in the case. If a partial

agreement was reached at the conference, the report shall state what issues remain for trial. **FFS Rule 6.B(4)(b)**.

- (d) Any written agreement reached at the mediation shall not be attached to and filed with the Report of Mediator. To do so would be a breach of the mediator's duty of confidentiality. **Standard III**.
- (e) Local Rules cannot require mediators to submit the written agreement of the parties reached as a result of the mediation process to the court with the Report of Mediator. **FFS Rule 6.B(4)(a), Comment to Rule 4.B**.
- (f) Mediators who fail to report as required by **FFS Rule 6.B(4)(b)** shall be subject to sanctions by the court. **FFS Rule 6.B(4)(d)**.

12. Mediator Fees.

- (a) **Court-appointed mediators.** Court-appointed mediator fees are capped at \$150.00 per hour for mediation services plus a one-time, per case administrative fee of \$150.00. Court-appointed mediators may not charge for travel time, mileage, hotels or other expenses, and must observe caps on fees. **FFS Rule 7.B, Comment to FFS Rule 7.B**. The Commission has adopted an advisory opinion which provides that court-appointed mediators may charge for pre-mediation document review when that review is non-routine in nature and both parties agree to the review. **Advisory Opinion No. 21 (2012)**.
- (b) **Indigent parties.** A party may move the court for a finding of indigence and if granted by the court, the mediator must waive the indigent party's share of the mediation fee. **FFS Rules 7.E, 8.I, Advisory Opinion No. 27 (2013) and Advisory Opinion No. 19 (2011)**. The 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. Once a mediator has been notified that a party is claiming indigency, the mediator should forbear seeking his/her fee until the court reviews the matter. The moving party uses **AOC-CV-828**.

*Ideally an indigent party will prepare and sign a Petition and Order for Relief from Obligation to Pay Mediator's Fee, **AOC-CV-828**, and provide it to the mediator at the end of the conference. Then, the mediator should attach the Petition to his/her Report of Mediator.*

- (c) **Postponement Fees.** Mediators may in appropriate circumstances charge a postponement fee ("postponement" is defined in **FFS Rule 7.F(1)** as both rescheduling or not proceeding with a mediation once a

date for a conference has been set). When there is no finding of good cause, a \$150 fee shall be due to the mediator if the postponement is allowed. If the postponement is requested within seven calendar days of the scheduled date for mediation, the fee shall be \$300. Unless the parties agree otherwise, postponement fees will be paid by the party requesting the postponement. **FFS Rule 7.F(4)**

- (d) **Equal shares of mediator fees paid by the parties.** Unless otherwise agreed to by the parties, the mediator fee shall be paid in equal shares by the named parties. **FFS Rule 7.D.**
- (e) **Payment due at completion.** Payment is due upon completion of the conference unless otherwise agreed to by the mediator, except that the \$150.00 administrative fee due a court-appointed mediator is due upon appointment. **FFS Rule 7.B and 7.D.** As a practical matter, most mediators do not assess the administrative fee until the mediation has concluded.
- (f) **Court enforcement of mediator fees.** The court may be called upon to help enforce the payment of mediator fees. **FFS Rule 5** provides that any person required to pay a portion of a mediator's fee and who fails to pay without good cause shall be subject to the contempt powers of the court and to monetary sanctions imposed by a presiding district court judge. **FFS Rule 5.**

The DRC encourages the court to enforce the rules regarding mediator payment. In some districts, a district court judge or his/her designee will call or write the delinquent party or his/her attorney with a reminder to pay the mediator. Other districts require a mediator to file a motion seeking an order for payment of his/her fee. After all, where court-appointed, the parties are subject to a court order requiring payment. For the program to be effective, all orders of the court should be enforced, including those requiring payment of the mediator's fees.

- (g) **Applicable AOC forms.** Forms applicable to fee collection are found in the "Toolbox" on the DRC's website. Click on Toolbox, then "Collecting Fees", and also under "Forms" on the NC Court System website:
 - i. Collections letter for unpaid balance of mediator's fee
 - ii. AOC-CV-828, Petition and Order for Relief from Obligation to Pay Mediator's Fee
 - iii. AOC-CV-815, Motion and Order for Show Cause Hearing

- iv. AOC-CV-816, Order of Contempt for Non-Payment of Mediator's Fees

13. Imposing Sanctions Against Mediators.

A mediator who chronically fails to comply with his or her FFS case management duties under the Rules is undermining the success of the FFS program. The Commission is charged with regulating the conduct of mediators; the court also has the inherent authority to sanction mediators for failure to comply with the Rules.

- (a) **Failure to meet deadlines.**
Completing the family financial settlement conference within the deadline imposed by the court contributes to the efficiency of the courts and helps to meet the statutory mandate of the FFS program.
- (b) **Failure to file Report of Mediator.** Reports of Mediator are critical to the continued success of the FFS program in district court. Mediators who fail to report at all or who fail to report in a timely fashion are compromising the Commission's ability to track the disposition of cases by mediation which in turn can adversely skew the statistics as to the efficacy of the program. **FFS Rule 6.B(4)(d) specifically authorizes the court to sanction mediators who fail to report as required by FFS Rule 6.B(4).** Sanctions include, but are not limited to, fines or other monetary penalties, decertification as a mediator in that judicial district, and any other sanction available through the power of contempt, in the discretion of the court.

14. Sanctions Against Parties.

- (a) **Failure to attend.** Upon motion of a party seeking sanctions against a person or party who fails to attend without good cause, the court may exercise its contempt powers and impose monetary sanctions such as payment of fines, attorney fees, mediator fees, expenses, and loss of earnings incurred by person who did attend. **FFS Rule 5.**

The Commission has issued an Advisory Opinion to the effect that mediators are not "the attendance police" and should try to work with whomever appears pursuant to the FFS Rule 4 attendance requirement. The Opinion advises the mediator to direct the parties to bring any questions/concerns they may have about attendance to the attention of the court. (See Advisory Opinion No. 24 (2014). One party's attorney was a

Georgia lawyer who had not been admitted to practice in North Carolina. The opinion advises the mediator to conduct the mediation with those parties and persons present.) However, as a practical matter in an FFS case, if one party fails to attend, the conference cannot move forward.

- (b) Failure to pay mediator’s fee.** The court may exercise its contempt powers and impose monetary sanctions against a party who fails to pay a mediator’s fee without good cause. **FFS Rule 5.**
- (c)** Upon motion of a party seeking sanctions, after notice and a hearing, the court may impose sanctions and if so, must prepare a written order making findings of fact and conclusions of law. **FFS Rule 5.**
- (d) No Recording.** The parties are prohibited from making any stenographic, audio, or video recording of the mediation process whether the recording is made surreptitiously or with the agreement of the parties. **FFS Rule 4.D.**

Confidentiality is integral to the success of the mediation process and the Commission suggests that the court use its inherent authority to enforce this prohibition.

15. Providing Assistance to Pro Se Parties. Please see the “Guide to Family Financial Mediation for Parties Unrepresented by Attorneys” in Section IV herein.

- (a)** Payment of mediator fees. See Paragraph 12 above.
- (b)** Drafting agreements. See Paragraph 10 above.
- (c)** Pro-se guide to Mediation. See Section IV.

16. Mediator Testimony.

As a district court judge, you may be faced with a situation in which an attorney for a party or a party may subpoena the mediator to testify in an action to enforce or set aside a mediated settlement agreement. This section provides some guidance as to the mediator’s obligations under the Standards, in particular, the mediator’s duty to maintain confidentiality.

The enabling legislation for the FFS program provides that evidence of statements made and conduct occurring in a mediated settlement conference

or other settlement proceeding by anyone present ***shall not be subject to discovery and shall be inadmissible*** in any proceeding in the action or other civil action on the same claim, except in 1) proceedings for sanctions; 2) in proceedings to enforce or rescind a settlement of the action; 3) in disciplinary hearings before the State Bar or an agency established to enforce standards of conduct for mediators or other neutrals; or 4) in proceedings to enforce laws concerning elder or child abuse. **N.C. Gen. Stat. §7A-38.1(l)**.

The statute also provides that “no mediator, other neutral, or neutral observer present at a mediated settlement conference shall be compelled to testify or produce evidence concerning statements made and conduct occurring before, during or after a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, *including proceedings to enforce or rescind a settlement of the action,*” except as to the signing of an agreement, and excepting those situations set out in 1, 3 and 4 above. In other words, the parties, but not the mediator, are permitted to testify in a proceeding to enforce or rescind a settlement of the action. **N.C. Gen. Stat. §7A-38.1(l)**. (emphasis added). Proceedings for sanctions ((1) above) include sanctions for failure to attend and failure to pay the mediator.

In addition to the statute, **Standard III** of the Standards of Professional Conduct for Mediators obligates mediators to maintain the confidentiality of all information obtained within the mediation process. The Commission has long regarded confidentiality as a foundation of the mediation process. There are several narrow exceptions to this blanket admonition against disclosure. A mediator may testify or give an affidavit where a statute requires it, when a party has failed to pay the mediator fee (mediator must limit his/her testimony to information about the amount of the fee and who did or did not pay), or when a party seeks sanctions for another party or person’s failure to appear (mediator must limit testimony to who did or did not attend). An important exception to Standard III allows a mediator to report threats made by a participant of bodily harm or significant property damage when the mediator has a reasonable belief that the participant may act on the threat. The mediator may also report actual harm occurring from the participant’s conduct during the mediation.

In an advisory opinion issued in 2012, the Commission took the position that a mediator may not discuss statements made or conduct occurring during a mediation with an investigator from the NC State Bar and may only be compelled to testify to the matters explicitly allowed under the statute if subpoenaed to a disciplinary hearing involving an attorney at the mediation. **Advisory Opinion No. 23 (2012)**.

Note that the confidentiality provisions relate only to the mediator, other neutral, or observer, and not to the parties or other participants, absent an agreement regarding confidentiality. **Advisory Opinion No. 22 (2012)**.

Under these same principles, a mediator should not prepare statements or affidavits, or allow himself or herself to be deposed, even if all parties consent. **Advisory Opinion No. 03 (2001)**.

Upon receipt of a subpoena, the Commission advises the mediator to appear as directed under its terms, take a copy of the enabling legislation and **Standard III**, and be prepared to discuss the limitations as to what s/he may disclose. In the absence of a subpoena, upon request for information by any person as to any matter occurring before, during or after the mediation, the mediator should cite the statute and Standard III and decline to reveal any confidential information except as what may fall within one of the enumerated exceptions.

*The Commission recently issued another advisory opinion related to mediator testimony, **Advisory Opinion No. 29 (2014)** and an opinion regarding statutory requirements regarding inadmissibility and confidentiality of the mediation process, **Advisory Opinion No. 30 (2014)**. See Section IV herein.*

17. Mediator Communication with the Court.

It is important to note that the above-referenced confidentiality provisions of **Standard III** and the enabling legislation also apply to and restrict the mediator's communications with the court and court staff. However, another narrow exception was added to **Standard III.C**, effective April 1, 2014, and provides that:

"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." (emphasis added). **Standard III.C**.

18. Collecting and Reporting Caseload Statistics.

The AOC and Commission ask all judicial districts to report caseload statistics for their Family Financial Mediated Settlement Conference Programs. Use of CaseWise reporting has streamlined data collection and reporting efforts. This information is critical if the Commission is to be able to evaluate the FFS Program and to justify its continued existence to members of the legislature, officials of the Judicial Department, litigants, and the public, as an effective

dispute resolution tool. Statistical information can also be helpful locally when parties complain of referrals to mediation or the costs involved in mediation. Being able to demonstrate that the Program resolves cases can help to defuse such criticisms. Although the reporting is likely handled by court staff, the Commission urges district court judges to support staff in their efforts for timely and accurate reporting. Links to resources for reporting statistics are included in the **Benchbook for Court Staff** which has been sent to each judicial assistant in the FFS program. Juno should be consulted periodically for updates to reporting requirements and Codes.

19. Local Rulemaking.

The chief district court judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with the FFS Rules or **N.C. Gen. Stat. §7A-38.4. FFS Rule 13**. Local Rules may not expand the exclusions of cases that SHALL be ordered to mandatory mediation. Local Rules also may not require a mediator to attach a copy of a settlement agreement reached at mediation to his/her Report of Mediator.

20. Advisory Opinions of the Commission.

From time to time the Commission issues non-binding advisory opinions pursuant to its Advisory Opinion Policy. Generally an advisory opinion (AO) will be 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 such matters. An advisory opinion can also result from the imposition of sanctions against a certified mediator or training program, or if the issue considered relates to a matter that interfaces with the NC State Bar or other professional regulatory agency regarding inconsistencies and/or conflicts between the Commission's rules and the rules of that agency.

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 Ed" on the left hand menu on the home page. Then, click on "Mediator Ethics." The link for the "Advisory Opinion Policy" and "Advisory Opinions" are options on the menu. When you choose "Advisory Opinions," you will see a summary of all of the opinions; just click on the opinion number to access the full text.

A summary of the advisory opinions adopted to date is set out in Section IV of this Benchbook.



MEDIATION BENCHBOOK
FOR DISTRICT COURT JUDGES

FFS PROGRAM

Section III
The Role and Duties of the Mediator



SECTION III.B

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 FFS Rules:

- **To schedule the conference.** It is important that mediators perform this function and not delegate it to attorneys or parties. FFS 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 plaintiff 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. See Advisory Opinion No. 08 (2005) in which the Commission advises that MSC Rule 6.B(5) was violated where the mediators in a judicial district relinquished their scheduling responsibilities to plaintiffs.

The FFS 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 prompt action to schedule their cases for mediation. Mediators who contact court staff with the complaint that attorneys or parties aren't returning their calls or emails and cooperating with their efforts to schedule, should be reminded of their FFS Rule 6.B(5) obligation and advised to proceed with scheduling, if necessary, even in the absence of input from the parties.

- **To find a location for the conference.** FFS 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 that where the action is pending, may not require that the parties come to him or her or meet him or her half way, 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, FFS 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 room and particularly in cases where there may be concerns about security and safety, such as cases in which there are allegations of domestic violence.

- **To conduct the conference by the deadline set by the court.** Again, the FFS 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.
- **To bring the parties together for a face-to-face discussion.** FFS 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 and that there is no possibility of settlement. 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)). Permitting this thwarts the intent of both the FFS 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).

Notwithstanding the foregoing, in some circumstances the mediator may deem it necessary to separate the parties and in some cases, conduct individual opening sessions with each. Where a party has expressed safety concerns or fearfulness, e.g. in cases involving allegations of domestic violence or abuse, the mediator may exercise his/her judgment and keep the parties separate for all or part of the mediated settlement conference.

- **To control the conference.** FFS 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 Advisory Opinion No. 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 court.

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.

- **To facilitate discussions and assist the parties in reaching an agreement.** During mediation, the mediator's role is to facilitate the parties' discussions and help them to search for solutions to their disputes. A mediator will typically have a joint opening session with the parties and their attorneys and then move to caucus sessions where the parties and mediator meet privately to speak more frankly about the case and options for settlement. During the caucus period, the mediator will carry offers and counteroffers between the parties. It may also be helpful to understand what a mediator should not be doing: A mediator is not a judge and should not make decisions for the parties, but rather should help them come to their own conclusions. While a mediator may provide general legal information to the parties, s/he is not permitted to provide legal advice. Lastly, a mediator is not a therapist.

When both parties are represented and are able to reach an agreement during their conference, the mediator may reduce their agreement to writing; however, some mediators consider it to be a better practice to turn to one of the attorneys present and ask him/her to put the parties' terms in writing.

If both parties are *pro se* and an agreement is reached on all issues or some issues at the mediated settlement conference, the mediator is not permitted to prepare an

agreement which the parties intend to be binding. Instead, the mediator shall summarize the matters agreed upon in writing on AOC-DRC-18, "*Mediation Summary*" or a similar document. The mediator should not require the parties to sign the *Summary* at the end of the conference, nor should the mediator sign the summary. See Advisory Opinion No. 28 (2013). In this situation, the mediator must declare an impasse, as no final, signed agreement can be reached at the mediation. The Report of Mediator should reflect that the case was impassed. **The unsigned summary document has no legal effect and does not conclude the case.** The 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 one of the parties is represented by an attorney and one is not, and the parties reach agreement, the attorney present can prepare an agreement at the mediation. The mediator should advise any *pro se* party that the mediator cannot give him/her legal advice, that the *pro se* party has the right to have an attorney review the draft agreement, that the mediator will recess the mediation for the *pro se* party to do so if that party wishes, and that it is important to take the document to an attorney to have it reviewed before signing any document. After these advisements, if the *pro se* party thereafter determines to sign the agreement, the mediator may acquiesce in the decision and the party may sign. See Advisory Opinion No. 31 (2015). If a signed agreement is completed, the mediator will report the case as settled on his/her Report of Mediator.

If the parties are unable to reach an agreement on all or part of the issues in mediation, the mediator will declare an impasse and the case will proceed to trial.

FFS 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. FFS Rule 4.B 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.

- **To report the outcome. Mediators are to file *Reports of Mediator (AOC-CV-827)* in all cases referred to them upon court-appointment or party-selection, regardless of the outcome of the case.** 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 FFS 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 FFS Rule 6.B(4).

- **To 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. FFS Rule 7.A. The fees of court-appointed mediators are capped. Most court-appointed mediators are careful to charge fees consistent with FFS 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 FFS 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 FFS Rules 2.B, 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 FFS Rule 7.B.
- Court-appointed mediators may charge cancellation and postponement fees consistent with Rule FFS 7.F.
- Court appointed mediators may not refuse to take appointments involving *pro se* or indigent parties. See FFS Rule 2.B.
- Court-appointed mediators must abide by the court’s ruling on a claim of indigency and may not pursue payment from a party whom 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 FFS Rule 7.E, Rule 8.I, 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 DISTRICT COURT JUDGES

Section IV
Additional Resources



SECTION IV.A

Enabling Legislation

§ 7A-38.4A. Settlement procedures in district court actions.

(a) The General Assembly finds that a system of settlement events should be established to facilitate the settlement of district court actions involving equitable distribution, alimony, or support and to make that litigation more economical, efficient, and satisfactory to the parties, their representatives, and the State. District courts should be able to require parties to those actions and their representatives to attend a pretrial mediated settlement conference or other settlement procedure conducted under this section and rules adopted by the Supreme Court to implement this section.

(b) The definitions in G.S. 7A-38.1(b)(2) and (b)(3) apply in this section.

(c) Any chief district court judge in a judicial district may order a mediated settlement conference or another settlement procedure, as provided under subsection (g) of this section, for any action pending in that district involving issues of equitable distribution, alimony, child or post separation support, or claims arising out of contracts between the parties under G.S. 52-10, G.S. 52-10.1, or Chapter 52B of the General Statutes. The chief district court judge may adopt local rules that order settlement procedures in all of the foregoing actions and designate other district court judges or administrative personnel to issue orders implementing those settlement procedures. However, local rules adopted by a chief district court judge shall not be inconsistent with any rules adopted by the Supreme Court.

(d) The parties to a district court action where a mediated settlement conference or other settlement procedure is ordered, their attorneys, and other persons or entities with authority, by law or contract, to settle a party's claim, shall attend the mediated settlement conference or other settlement procedure, unless the rules ordering the settlement procedure provide otherwise. No party or other participant in a mediated settlement conference or other settlement procedure is required to make a settlement offer or demand that the party or participant deems contrary to that party's or participant's best interests. Parties who have been victims of domestic violence may be excused from physically attending or participating in a mediated settlement conference or other settlement procedure.

(e) 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 or other neutral's fee in compliance with this section is subject to the contempt powers of the court and monetary sanctions imposed by a district court judge. 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 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 hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable upon appeal, and the entire record shall be reviewed to determine whether the order is supported by substantial evidence.

(f) The parties to a district court action in which a mediated settlement conference is to be held under this section shall have the right to designate a mediator. Upon failure of the parties to designate within the time established by the rules adopted by the Supreme Court, a mediator shall be appointed by a district court judge.

(g) A chief district court judge or that judge's designee, at the request of a party and with the consent of all parties, may order the parties to attend and participate in any other settlement procedure authorized by rules adopted by the Supreme Court or adopted by local district court rules, in lieu of attending a mediated settlement conference. Neutrals acting under this section shall be selected and compensated in accordance with rules adopted by the Supreme Court. Nothing herein shall prohibit the parties from participating in other dispute resolution procedures, including arbitration, to the extent authorized under State or federal law. G.S. 7A-38.4A Nothing herein shall prohibit the parties from participating in mediation at a community mediation center operating under G.S. 7A-38.5.

(h) Mediators and other neutrals acting under 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 under G.S. 7A-38.2.

(i) Costs of mediated settlement conferences and other settlement procedures 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. The rules adopted by the Supreme Court shall set out a method whereby a party found by the court to be unable to pay the costs of settlement procedures is afforded an opportunity to participate without cost to that party and without expenditure of State funds.

(j) 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 hearings 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 subsection, 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 section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral, or neutral observer present at a settlement proceeding under this section, 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.

(k) The Supreme Court may adopt standards for the certification and conduct of mediators and other neutrals who participate in settlement procedures conducted under this section. The standards may also regulate mediator training programs. The Supreme Court may adopt procedures for the enforcement of those standards. The administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission.

(l) An administrative fee not to exceed two hundred dollars (\$200.00) may be charged by the Administrative Office of the Courts to applicants for certification and annual renewal of certification for mediators and mediator training programs operating under this section. The fees collected may be used by the Director of the Administrative Office of the Courts to establish and maintain the operations of the Commission and its staff. The administrative fee G.S. 7A-38.4A shall be set by the Director of the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

(m) The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the chief district court judge of any district to report statistical data about settlement procedures conducted under this section for administrative purposes.

(n) Nothing in this section or in rules adopted by the Supreme Court implementing this section shall restrict a party's right to a trial by jury.

(o) The Supreme Court may adopt rules to implement this section. (1997-229, s. 1; 1998-212, s. 16.19(a); 1999-354, s. 6; 2000-140, s. 1; 2001-320, s. 2; 2001-487, s. 39; 2005-167, s. 3; 2008-194, s. 8(c).)



SECTION IV.B

FFS Rules, Amendments Effective April 1, 2014

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

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RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to N.C.G.S. § 7A-38.4A, 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 district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action or claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by N.C.G.S. § 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

- (1) Equitable Distribution Scheduling Conference.** At the scheduling conference mandated by N.C.G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these Rules, unless excused by the court pursuant to Rule 1.C(6) or by the court or mediator pursuant to Rule 4.A(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.
- (2) Scope of Settlement Proceedings.** All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to N.C.G.S. § 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

- (3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference.** The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the district court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on a North Carolina Administrative Office of the Courts (NCAOC) form at the scheduling conference and shall state:

- (a)** the settlement procedure chosen by the parties;
 - (b)** the name, address and telephone number of the neutral selected by the parties;
 - (c)** the rate of compensation of the neutral; and
 - (d)** that all parties consent to the motion.
- (4) Content of Order.** The court's order shall (1) require the mediated settlement conference or other settlement proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the court's scheduling order, or if no scheduling order is entered, shall be on a NCAOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

- (5) Court-Ordered Settlement Procedures in Other Family Financial Cases.**
- (a) By Motion of a Party.** Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the court to order the parties to participate in a settlement

procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the court within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(b) By Order of the Court. Upon its own motion, the court may order the parties and their attorneys to attend a mediated settlement conference pursuant to these Rules in any other action involving family financial issues and in contempt proceedings in all family financial issues.

The court may order a settlement procedure other than a mediated settlement conference only upon motion of the parties and a finding that the circumstances outlined in subsection (3) above have been met. The court shall consider the ability of the parties to pay for the services of a mediator or other neutral before ordering the parties to attend a settlement procedure pursuant to this section and shall comply with the provisions of Rule 2 with reference to the appointment of a mediator.

D. MOTION TO DISPENSE WITH SETTLEMENT PROCEDURES.

A party may move the court to dispense with the mediated settlement conference or other settlement procedure ordered by the judge. The motion shall state the reasons for which the relief is sought. For good cause shown, the court 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 under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) or that one of the parties has alleged domestic violence.

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 FAMILY FINANCIAL MEDIATOR BY

AGREEMENT OF THE PARTIES. The parties may designate a certified family financial mediator certified pursuant to these Rules by agreement by filing with the court a Designation of Mediator by Agreement at the scheduling 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.

In the event the parties wish to designate a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the nomination and rate of compensation, if any. The court shall approve said nomination if, in the court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on a NCAOC form. A copy of each such form submitted to the court and a copy of the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, they shall so notify the court and request that the court appoint a mediator. The motion shall be filed at the scheduling conference 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 on a mediator. 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, the court shall appoint a family financial mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the court's district.

In making such appointments, the court 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 district court judges 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 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 that district's court appointment list by the Commission or by the chief district court judge.

The Commission shall furnish to the district court judges of each judicial district a list of those certified family financial mediators requesting appointments in that district. That 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 district court judges of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

C. MEDIATOR INFORMATION. To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website a list of certified family financial 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.

D. DISQUALIFICATION OF MEDIATOR. Any party may move a court 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 selected 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 to 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 persons 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 mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued pursuant to Rule 1.C(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference pursuant to Rule 6.B(5).

C. EXTENDING DEADLINE FOR COMPLETION. The district 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 during the conference, 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 court.

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.

(b) Attorneys. At least one counsel of record for each party 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.B 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 by:

(b) agreement of all parties and persons required to attend and the mediator; or

(c) order of the court, 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 selection 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 on June 20, 1985.

B. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, the parties shall reduce the essential terms of the agreement to writing.

(a) If the parties conclude the conference with a written document containing all of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, the agreement shall be signed by all parties but need not be formally acknowledged. In all cases, the mediator shall report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court.

(b) If the parties reach an agreement at the conference for property distribution and do not later intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall summarize their understanding in written form and shall use it as a memorandum and guide to writing such agreements as may be required to give legal effect to its terms. If the parties later intend to submit their agreement to the court for approval the agreement must be in writing and signed by the parties but need not

be formally acknowledged. The mediator shall facilitate the writing of the summary memorandum and shall either:

- (i) report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or, in the mediator's discretion,
 - (ii) declare a recess of the conference. If a recess is declared, the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.
- (2) In all cases where an agreement is reached after being ordered to mediation, whether prior, during the mediation or during a recess, the parties shall file their consent judgment or voluntary dismissal(s) with the court within 30 days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.
- (3) A settlement agreement resolving the distribution of property reached at a proceeding conducted under this section or during its recesses which has not been approved by a court shall not be enforceable unless it has been reduced to writing, signed by the parties and acknowledged as required by N.C.G.S. § 50-20(d).

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule VII.

D. 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.

COMMENT TO RULE 4

Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) 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 on 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.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES 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-38.4A 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 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 during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

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-38.4A(j);
 - (h)** The duties and responsibilities of the mediator and the participants;
and
 - (i)** The fact 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 circumstance 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 district court family financial 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. If partial agreements are reached at the conference, the report shall state what issues remain for trial. 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 was reached, 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 as required by Rule 4.B(2). The mediator shall advise the parties that consistent with Rule 4.B(2) above, their consent judgment or voluntary dismissal is to be filed with the court within 30 days or before expiration of the mediation deadline, whichever is longer, and the mediator's report shall indicate 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 court. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a mediator and any other sanctions available through the power of contempt. The court shall notify the Commission of any action taken against a mediator pursuant to this section.

- (5) **Scheduling and Holding the Conference.** The mediator shall 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 changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or holding the conference because one or 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 selected by agreement of 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 E. below shall apply to issues involving the compensation of the mediator. Sections D 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, which accrues upon appointment.
- C. CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A, the parties may select a certified mediator or nominate a non-certified mediator to conduct their mediated settlement conference. Parties who fail to select a 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 and 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.F.
- D. PAYMENT OF COMPENSATION BY PARTIES.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fees shall be paid in equal shares by the named parties. Payment shall be due and payable upon completion of the conference.
- E. INABILITY TO PAY.** No party found by the court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rules 7.B and C may move the court to pay according to the court's determination of that party's ability to pay.

In ruling on such motions, the judge may consider the income and assets of the movant and the outcome of the action. The court shall enter an order granting or denying the party's motion. In so ordering, the court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the court issued pursuant to this rule.

- F. 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.

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.

Comment to Rule 7.D.

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

Comment to Rule 7.F.

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.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as family financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience. Each applicant for certification must demonstrate that she/he has a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least 12 hours of education in basic family law (a) by attending workshops and programs on topics such as separation and divorce, alimony and post-separation support, equitable distribution, child custody and support and domestic violence; (b) by engaging in independent study such as viewing or listening to video or audio programs on those family law topics; or (c) by demonstrating equivalent experience, including demonstrating that his or her work experience satisfies one of the categories set forth in the Commission's Policy on Interpreting and Implementing the First Unnumbered Paragraph of FFS Rule 8.A, *e.g.*, that the applicant is an experienced family law judge, board certified family lawyer and, in addition, shall:

- (1)** Be an Advanced Practitioner member of the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university, or
- (2)** Have completed a 40-hour family and divorce mediation training approved by the Commission pursuant to Rule 9, or, if already a certified superior court mediator, have completed the 16-hour family mediation supplemental course pursuant to Rule 9, and have additional experience as follows:

- (a) as a member in good standing of the NC State Bar or as 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, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor and/or mediator or a person with equivalent experience; or
- (b) as a licensed psychiatrist pursuant to N.C.G.S. § 90-9 *et seq.*, with at least five years of experience in the field after the date of licensure; or
- (c) as a licensed psychologist pursuant to N.C.G.S. § 90-270.1 *et seq.*, with at least five years of experience in the field after the date of licensure; or
- (d) as a licensed marriage and family therapist pursuant to N.C.G.S. § 90-270.45 *et seq.*, with at least five years of experience in the field after date of licensure; or
- (e) as a licensed clinical social worker pursuant to N.C.G.S. § 90B-7 *et seq.*, with at least five years of experience in the field after date of licensure; or
- (f) as a licensed professional counselor pursuant to N.C.G.S. § 90-329 *et seq.*, with at least five years of experience in the field after date of licensure; or
- (g) as an accountant certified in North Carolina with at least five years of experience in the field after date of certification.

- B.** If not licensed to practice law in one of the United States, have completed a six- hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Commission. Attorneys licensed to practice law in states other than North Carolina shall complete this requirement through a course of self-study as directed by the Commission's executive secretary.
- C.** If not licensed to practice law in North Carolina, provide three letters of reference to the Commission as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice and experience as required by Rule 8.A.

- D.** Have observed as a neutral observer with the permission of the parties two mediations involving custody or family financial issues conducted by a mediator who is certified pursuant to these rules, or who is an Advanced Practitioner Member of the ACR or who is a NCAOC custody mediator. Conferences eligible for observation shall also include those conducted in disputes prior to litigation of family financial issues which are mediated by agreement of the parties and which incorporate these Rules.

If the applicant is not an attorney licensed to practice law in one of the United States, s/he must observe three additional mediations of civil or family cases or of disputes prior to litigation which are conducted by a mediator certified by the Commission and are conducted pursuant to an order of a court or agreement of the parties incorporating the mediation rules of a North Carolina state or federal court. All such conferences shall be observed from their beginning to settlement or impasse. Observations shall be reported on an NCAOC form.

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

- E.** Demonstrate familiarity with the statutes, rules and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.
- F.** 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 or any criminal convictions; 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 10 years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanction(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, other disciplinary complaints 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.
- G.** Submit proof of qualifications set out in this section on a form provided by the Commission.

- H. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission.
- I. 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.
- J. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation training, attendance at conferences or seminars relating to mediation skills or process and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed eight hours of family law training, including tax issues relevant to divorce and property distribution and eight hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if 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. No application for recertification shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under Rules which were promulgated after the date of his/her original certification.

- K. Once certified, agree to make reasonable efforts to assist mediator certification applicants in completing their observation requirements.
- L. No mediator who held a professional license and relied upon that license to qualify for certification under subsection 8.A(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, relinquished or 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 as 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.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A.** Certified training programs for mediators certified pursuant to Rule 8.A(2) shall consist of a minimum of 40 hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:
- (1)** Conflict resolution and mediation theory;
 - (2)** Mediation process and techniques, including the process and techniques typical of family and divorce 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 conducted pursuant to these Rules;
 - (6)** Demonstrations of mediated settlement conferences with and without attorneys involved;
 - (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;
 - (8)** An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support and post separation support;
 - (9)** An overview of family dynamics, the effect of divorce on children and adults and child development;
 - (10)** Protocols for the screening of cases for issues of domestic violence and substance abuse; and
 - (11)** Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.
- B.** Certified training programs for mediators certified pursuant to Rule 8.A(2) shall consist of a minimum of 16 hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. 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 or approved by the ACR with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the ACR may be approved by the Commission if they are in substantial compliance with the Standards set forth in this rule. The Commission may require attendees of an ACR

approved program to demonstrate compliance with the requirements of Rules 9.A(5) and 9.A(8) either in the ACR approved training or in some other acceptable course.

- D. To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with 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 court may order the use of those procedures listed in Rule 10.B unless the court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

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), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.
- (2) **Judicial Settlement Conference** (Rule 12), in which a district court judge assists the parties in reaching their own settlement, if allowed by local rules.
- (3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (N.C.G.S. § 50-41 *et seq.*) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C(6)).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

- (1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the court's order or no later than the deadline for completion set out in the court's order, unless extended by the court. The neutral shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines

for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

- (2) Extensions of Time.** A party or a neutral may request the court to extend the deadlines 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. The court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.
- (3) Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.
- (4) 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 court.
- (5) 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 subsection, 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 section or during its recesses shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the North Carolina General Statutes. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, other neutral or neutral observer present at a settlement proceeding under this section, 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.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) 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.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the court.

(b) Finalizing Agreement.

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the North Carolina General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and

notarized, and judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court shall designate.

- (ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the North Carolina General Statutes and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the court within 30 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 court 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), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedure or Pay Neutral's Fee. Any person required to attend a settlement procedure or pay a neutral's fee in compliance with N.C.G.S. § 7A-38.4A 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 the court. 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 to the action, or the court on its own motion, seeking sanctions against a party or attorney, 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.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection by Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

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 at the scheduling conference or the court appearance when settlement procedures are considered by the court. The notice shall be on a NCAOC form as set out in Rule 2 herein. 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.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a court 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, but is not limited to circumstances where, 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 Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the court.

(b) Duties of Neutrals.

(i) The neutral 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 admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(1) and Rule 10.C(6) herein; and
 - (e) The duties and responsibilities of the neutral and the participants.
- (ii) **Disclosure.** The 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, settlement judge or other neutral shall report the result of the proceeding to the court in writing within 10 days in accordance with the provisions of Rules 11 and 12 herein on a NCAOC form. The NCAOC, in consultation with the Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.
- (iv) **Scheduling and Holding the Proceeding.** It is the duty of the neutral 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 unless said time limit is changed by a written order of the court.

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 a candid assessment of the merits of the case, 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, 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 to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator 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, if he or she deems it necessary, 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 the merits of the case, 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 therefor. 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, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals 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 at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. SETTLEMENT JUDGE. A judicial settlement conference shall be conducted by a district court judge who shall be selected by the chief district court judge. Unless specifically approved by the chief district court judge, the district court judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. CONDUCTING THE CONFERENCE. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

- C. CONFIDENTIAL NATURE OF THE CONFERENCE.** Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.
- D. REPORT OF JUDGE.** Within 10 days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state the name of the person(s) designated to file the consent judgment or voluntary dismissals with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court

RULE 13. LOCAL RULE MAKING

The chief district court judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

- A.** The word, court, shall mean a judge of the district court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant and trial court coordinator.
- 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.
- C.** The term, family financial case, shall refer to any civil action in district court in

which a claim for equitable distribution, child support, alimony or post separation support is made or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.



SECTION IV.C

REVISED STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Effective April 1, 2014

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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

Advisory Opinions Summary

NOTE: The following thirty-one (31) 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 31 (2015) (drafting agreement, one *pro se* and one represented party). This opinion discusses the duties of the mediator when an attorney representing one party drafts a proposed settlement agreement for a *pro se* party at the conclusion of the mediated settlement conference. The opinion states that given the inherent power imbalance when one party is *pro se*, it is appropriate for the mediator to inform the *pro se* party of the importance of seeking outside advice. The opinion sets out advisements that the mediator should provide to the *pro se* party, and if, thereafter, the *pro se* party determines to sign the agreement, permits the mediator to then acquiesce to the *pro se* party’s desire to sign the agreement. Prior to signing, however, the opinion also states that the mediator’s duty under Standard VIII requires him/her to 1) read the document drafted by a party or the attorney, and 2) raise questions with the parties and attorney about whether the agreement as drafted conveys the intent of the parties, and facilitate their discussions and negotiations to reach a complete agreement.

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.

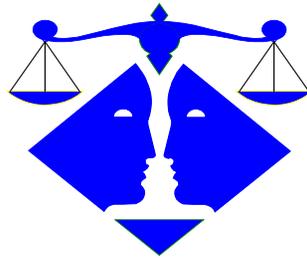
AO 02 (2000) (attendance in person). It is preferable for parties to physically attend a mediation conference rather than participating by telephone. A mediator should not waive or modify the attendance requirement absent some compelling reason to do so.

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.

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 IV.E

The NC Dispute Resolution Commission's

Guide to Family Financial Mediation for Parties Not Represented by Attorneys

This Guide was prepared by the North Carolina Dispute Resolution Commission (Commission). The Commission certifies and regulates the mediators serving the Family Financial Settlement Program.

If you are an unrepresented party (a party without legal representation, also known as a *pro se* party) in a dispute involving family financial issues, this *Guide* may be helpful to you. A family financial dispute is one involving issues arising out of divorce, such as equitable distribution (division of marital assets and debts during divorce), child or spousal support, and disputes in which a party is alleged to have violated an agreement or court order involving a family financial issue.

In North Carolina, all equitable distribution claims are first scheduled by the court for a scheduling conference and you as a party to the case will be notified of the date, time, and location of the conference. At the scheduling conference, the court will likely order the parties to attend a mediated settlement conference. A party or attorney can also request that a conference be scheduled. The court may also refer disputes arising out of the divorce involving other family financial issues such as alimony or post-separation support to mediation. The parties also have the option to select another settlement procedure such as neutral evaluation or a judicial settlement conference. They can inform the court of their choice at the scheduling conference. Parties participating in a conference may also agree to

discuss issues such as child support, custody and/or visitation. Since almost all cases are ordered to mediation (as opposed to neutral evaluation or judicial settlement conference), this Guide is designed to help you understand what happens after the parties are ordered to attend a mediated settlement conference.

What is a mediated settlement conference?

Family financial cases filed in North Carolina's district courts are routinely referred to mediated settlement conferences. While a mediated settlement conference is a legal proceeding and, as such, conducted with respect to all in attendance, 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, stress, and expense involved in lengthy 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 your spouse or partner and any attorneys involved in your case will, with the assistance of the mediator, discuss your dispute and brainstorm possible ways to settle it.

Conferences generally begin with a joint opening session during which your mediator will explain the process and give the parties an opportunity to summarize the case from their perspective. If you are uncomfortable meeting face-to-face with your spouse or former partner, let your mediator know. Following the opening session, the mediator will then likely separate you and your spouse or former partner and his/her attorney (if s/he is represented) and hold private discussions with you. Your mediator may use the term "caucus" to describe these private sessions. If no joint session is held initially, you will go directly to caucus sessions where the mediator will explain the process to you and your spouse or former partner separately and learn about your perspectives of the case. You may feel more comfortable talking frankly with your mediator during the private sessions, 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 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 *pro se* parties 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/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 *Rules of the North Carolina Supreme Court Implementing Settlement Procedures In Equitable Distribution And Other Family Financial Cases (FFS Rules)*. These 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 "Family Financial Settlement Program (District Court)", and then click on "Program Rules"). The *Rules* may help you better understand the mediation process and your responsibilities as a *pro se* party. All of the program forms referenced below can be found on the Commission's website.

The Commission hopes that you will approach your opportunity to mediate with a positive attitude and a willingness to be flexible and compromise. This is your chance to settle your case without the need for lengthy litigation or a trial. If you can reach an agreement, you will likely accomplish two important things:

- By virtue of working things out yourselves, you and your spouse or former partner will have determined the outcome of your case. You, more than anyone, are the authorities on your financial situation and the needs of your children, if any. You have the best and most complete information to make decisions regarding the care of your children and the division of your property. Research indicates that when parties make their own decisions, they are more likely to feel better about the outcome and to follow-through on the commitments they made. Think about it...do you really want a judge, who doesn't know you or your kids, deciding your future?
- By virtue of working things out yourselves, you and your spouse or former partner may be able to preserve any goodwill that remains between you. Parties who endure lengthy and often painful divorce litigation or the ordeal of a trial rarely exit the system in a positive frame of mind. They are often hostile to their former partner and continue down the road as adversaries. When children are involved, it is especially important to preserve goodwill between the parents. Mediation's focus on cooperation and consensus building can help you do that and set the tone for positive interactions down the road. The mediation process may even assist you in restoring some sense of trust and repairing lines of communication. You may no longer be joint partners, but you will remain joint parents.

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 may affect where s/he schedules your mediation, *e.g.*, the need for a wheelchair ramp or a handicapped accessible bathroom. 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, such as the courthouse, 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. You will also need to pay the interpreter for his/her services. 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, 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 conference date. The AOC pays for the deaf interpreter's fees and costs.

- Think about what you want to say in the opening session of your conference. You should 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 they refuse to talk, won't really listen to one another, or don't bargain in good faith, their discussions will never get off the ground.
- If you think there are documents or other evidence that could be helpful for your mediator to see in order to better understand the case from 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 so be prepared to briefly summarize them and to explain why they are important. You should **not** bring witnesses to your mediation.
- Local Rules for equitable distribution and other family financial issues in your district may require you to provide a financial affidavit about your income, expenses, assets, and debts as part of your case. This affidavit is often required by the court to be filed

prior to a mediation being scheduled. As it can be difficult to discuss a resolution of issues without concrete financial information, it is suggested that you bring current financial information to the mediation. In his/her scheduling of the mediation, your mediator may suggest that you bring your financial information with you to the mediated settlement conference.

- 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 settle the dispute 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 watch what you say. Divorce is difficult and spouses or former partners are often angry. Harsh words, accusations, and profanity directed at the other side or even at your mediator will likely only make the 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 fret 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 court advising the court that the case did not settle, and the matter will simply proceed to trial.

Your Role in the Process

The FFS 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 though, the FFS Rules do place some responsibilities on the parties and those responsibilities are discussed below. (You can download the forms referenced below on the Commission’s website at www.ncdrc.org. Most of the forms can be accessed 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 “Family Financial Settlement Program (District Court)”, and then clicking “FFS Forms”).

- **ORDER OF REFERRAL.**

Mediated settlement conferences are mandatory in family financial cases filed in North Carolina’s district courts. 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. FFS Rule 1.

- **DESIGNATING A MEDIATOR.**

You and your spouse or former partner will have the opportunity to designate a mediator of your choice within a time limit set by the court. **Both parties must agree on the mediator to be designated.** If you agree on a mediator, you will need to designate that mediator in writing using the approved form (see below) within the time frame for selection set out in the court's order.

The Commission strongly suggests that the mediator you choose be trained and certified to conduct family financial mediations. You can search for such a mediator on the Commission's website. (Click "Finding A Mediator", then select the "Family Financial Settlement Mediators (District 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, including his/her contact information, by clicking on his/her underlined name. Most mediators have also supplied biographical information, sometimes detailed, regarding their education, career, and interests.

It can sometimes be difficult for parties to agree on a mediator. It may be helpful for you to select two or three mediators from the list and submit your choices to your spouse or former partner for his/her consideration or, if s/he has one, to his/her attorney. Your spouse, former partner, or his/her attorney may also make some suggestions. If you can reach agreement, the plaintiff or his/her attorney will typically complete the *Designation of Mediator* form (AOC-CV-825) to let the court know that a mediator has been selected. The *Designation* form should be mailed or otherwise delivered to court staff in the district where your case is filed and who is charged with administering the FFS Program. (To see a list of these staff, click on "Program Information" from the home page menu, then click on "Family Financial Settlement Program (District Court)", and then click "Court Contacts").

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 mediator to your case. The court will appoint only a FFS trained and certified mediator.

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. FFS Rule 2.

- **SUBSTITUTION OF MEDIATOR.**

If a 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 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 both parties agree to the substitution, you can complete AOC-CV-836, *Consent Order for Substitution of Mediator*, and submit it to court staff for the judge's signature. FFS 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 you and your spouse or former partner agree otherwise, your mediation will be scheduled in the county where the case is filed and might be held in the courthouse, the office of a lawyer involved in the case, the office of the mediator, or other public place. FFS 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 their session will occur. If a party willfully fails to attend, s/he may be subject to sanctions by the court. FFS Rules 5 and 6.A(1).

- **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 Family Financial Cases* (AOC-CV-824) or other scheduling notice/order you received from the court. FFS Rules 1.C(1) or 1.C(4). 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 or his/her attorney are willing to agree to an extension, you should advise your mediator. The mediator can suggest to the court that it extend the deadline and send a letter or submit AOC-DRC-19 for the court's consideration. In the alternative, the parties can sign and submit AOC-DRC-19 to the court themselves. If your spouse or former partner will **not** agree to an extension, you can file a motion with the court (AOC-CV-835), and ask the court to extend its deadline. There are filing instructions on the form. FFS Rule 3. C.

Please understand that the FFS Program and the mediation process are intended to make the courts more efficient and to save parties' time as well. 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 party 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. FFS 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 your spouse or former partner and the mediator agree to this arrangement. If the other party and/or mediator will not agree, you may seek permission from the court. The Commission and courts do not have a form for this, so you will need to file a motion. It is important that you attend. 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 the other party.

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

The program rules require that the mediator's fee be paid in equal shares by the parties, unless otherwise agreed to by the parties, or as ordered by the court. In other words, unless you agree, you will typically pay one-half your mediators fee and your spouse or former partner will pay the other half. 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 or expenses. Mediators selected by the parties are

paid an hourly fee by agreement between the mediator and the parties, and may charge for 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-828, *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 and ask that it be attached to his/her *Report of Mediator* and filed with the court. 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. FFS Rules 5 and 7.

- **CONCLUDING THE CONFERENCE.**

Whether an agreement is reached on all issues, some issues, or no issues at the mediated settlement conference, the mediator is not permitted to provide you as an unrepresented party with any legal advice. **The Commission strongly advises you to seek legal advice before you sign any document. In this way, your legal rights can be better protected.**

If both parties are unrepresented by attorneys and you reach an agreement at your conference, the mediator will **not** be permitted to prepare a binding agreement for you. S/he will summarize the matters discussed in writing and provide you with a copy. Your terms may be recorded on AOC-DRC-18, "*Mediation Summary*" or a similar document. This *Summary* is not intended to be a binding agreement and the mediator should not require you to sign the *Summary* at the end of the conference. The mediator will likely advise you to take the document to an attorney to have it reviewed. **Be aware that the unsigned, Summary document alone has no legal effect and will not conclude your case.** Your case is closed only 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. However, be aware that if there are issues that were not resolved, the case remains open pending an order addressing those issues.

If one of the parties is represented by an attorney and one is not, and the parties reach agreement, the attorney present can prepare an agreement at the mediation. You then will have the chance to review the written document and can make the choice to sign or not to sign the document at the mediation. **The Commission strongly recommends that you consult with an attorney of your choice prior to signing any document.** You are permitted to

request, and the mediator should offer, that the mediation be recessed in order for you to consult with an attorney and have him/her review the document. If you decide that you do not want to consult with an attorney or to request a recess in order to do so, you may choose to sign the agreement as drafted by your spouse or former partner's attorney.

If the parties are unable to reach an agreement on all or part of the issues in mediation, your mediator will declare an impasse and your case will proceed to trial.

If you have any 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 Family Financial Settlement Conference Program.

This Guide, published by the North Carolina Dispute Resolution Commission in August, 2015, is based upon the Revised Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases adopted by the NC Supreme Court, effective April 15, 2014.

This document is not intended to serve as legal advice.

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