

Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes and Permanency Mediation under the North Carolina Child Custody and Visitation Mediation Program

Child Custody and Visitation Mediation

***Comment:** Legislation establishing a statewide Custody and Visitation Program in North Carolina required that the North Carolina Administrative Office of the Courts “promulgate rules and regulations necessary and appropriate for the administration of the program” and that services provided be “uniform.” G.S. 7A-494. Uniform rules will protect families receiving such services, will allow meaningful statistical comparisons to be made, and allow both mediators and the mediation program to be periodically reevaluated. The Program is to be established in phases throughout North Carolina, beginning on July 1, 1989.*

1. Goals of Mediation. The goals of custody and visitation dispute mediation are centered in the reduction of the stress and anxiety experienced by children in separation and divorce by furnishing an alternative way for the parties to settle custody and visitation disputes. A trained mediator helps the parties reorganize the family, continue parenting their children despite separation, and begins an educational process which will allow parties to recognize and meet the needs of their children. Mediation provides a structured, confidential, non-adversarial setting which will help the parties make informed choices about matters involving their children, with the hope that such cooperative resolution will alleviate the acrimony between the parties, reducing attendant stress on both the parties and the child. A successful mediation will help the parties put a parenting plan in writing, will teach them to solve future problems without recourse to the courts, and thus reduce the stress of re-litigation of custody and visitation disputes.

2. Purpose of Program. The North Carolina Child Custody and Visitation Mediation Program is to provide the services of skilled mediators to further the goals set out above.

3. Definitions.

3.01. Mediation. A process whereby a trained, neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.02. Mediator. A trained, neutral third party who acts to encourage and facilitate the resolution of a dispute without prescribing what the resolution should be.

3.03. Parenting Agreement. A written agreement reached by the parties with the assistance of the mediator, which may be presented to the court for approval and adoption as an order of the court.



4. Administration of Program. The North Carolina Administrative Office of the Courts (NCAOC) is responsible for establishing the North Carolina Child Custody and Visitation Mediation Program and is to promulgate rules and regulations for the administration of the program. The Director of the NCAOC shall appoint necessary staff to plan, organize, and administer the program on a statewide basis. The NCAOC is to cooperate with each Chief District Court Judge and other district personnel in implementation and administration of the program.

4.01. Employment of Mediators. Mediators are to be employed by the Chief District Court Judge of the judicial district, after consultation with NCAOC Court Programs and Management Services staff concerning qualifications, salary and benefits, and are to be hired as full or part-time employees.

4.02. In-House Contracts Permitted. When deemed appropriate by the NCAOC, the Chief District Court Judge may contract for delivery of mediation services. Such contracts are to be approved by the Director of the NCAOC and are exempt from competitive bidding procedures under Chapter 143 of the General Statutes.

4.03. Administration of Funds. Funds appropriated by the General Assembly for the establishment and maintenance of mediation programs are to be administered by the NCAOC.

4.04. Multi-District Programs. The NCAOC may authorize all or part of a program in one district to be operated in conjunction with that of another district or districts.

4.05. Advisory Committee Established. The Director of the NCAOC shall appoint a Custody Mediation Advisory Committee of at least five members to advise the Child Custody and Visitation Mediation Program. Members of the committee are to receive the same per diem and travel expenses as members of state boards and commissions generally.

5. Local District Programs. Each local district program is to consist of a qualified mediator, or mediators, and such clerical staff as the NCAOC, in consultation with the local program, deems necessary. Each Chief District Court Judge should develop local rules to address custody mediation practices, including issues not addressed in statute.

6. Qualifications of Mediators. A person desiring to furnish mediation services must demonstrate that he or she:

- 1) Has at least a master's degree in psychology, social work, family counseling, or a comparable human relations discipline; and

- 2) Has completed at least 40 hours of training in mediation techniques by an instructor deemed qualified by the NCAOC; and
- 3) Has professional training and experience relating to child development, family dynamics, or comparable areas; and
- 4) Meets such other criteria as specified by the NCAOC.

6.01. Initial Training Period. A person just beginning to furnish mediation services in the North Carolina Child Custody and Visitation Mediation Program shall satisfy the following requirements for training and mentoring, to be completed in 6-12 months following employment, unless some or all of the requirements are waived by the Director of the NCAOC or his designee. The new mediator shall not conduct mediations without supervision until the individual is assessed by NCAOC staff and approved by the hiring authority.

- A. 18 hours of court observations of domestic trials involving child custody and visitation issues
- B. 18 hours of custody mediation observation with mediators approved the NCAOC
- C. 40 hours of mediation training in a program approved by the NCAOC
- D. 24 hours of co-mediation with mediators approved by the NCAOC
- E. Minimum 4 hours (2 sessions) solo mediation under observation by NCAOC staff
- F. Official assessment of knowledge, skills and performance of mediation conducted by NCAOC staff
- G. Approval to be a Child Custody and Visitation Mediator signed by the Custody Mediation Program Manager and sent to the hiring authority
- H. Attendance at a minimum of four new mediator meetings
- I. Attendance at any additional training required by NCAOC staff

6.02. Continuing Education. A mediator is to keep abreast of developments in the field through professional journals and bulletins as available. Further, a mediator is to participate in the annual trainings each year, consisting of a minimum of 16 hours (including a component on ethics) every two years, as approved by the Director of the



NCAOC or his designee. Mediators are encouraged to participate in co-mediation opportunities outside their districts with prior approval from the Custody Mediation Program Manager and the hiring authority.

6.03. Site Visits. NCAOC staff will conduct periodic site visits to the custody mediation programs in each district and report findings to the Chief District Court Judge. A report will also be kept on file at NCAOC. Staff at NCAOC shall be available to assist Chief District Court Judges in the periodic evaluation of mediators.

6.04. Professional Development. In the interest of quality assurance, program evaluation and continuous skill improvement, NCAOC staff shall provide in-service workshops, regional meetings, and co-mediation and observation opportunities. Mediators are expected to participate in at least one of these events per year. Reports and assessments collected during these interactions shall be shared with the mediator.

6.05. Mediator Ethics. See *Standards of Practice for Mediators in the North Carolina Child Custody and Visitation Mediation Program*.

7. Referral to Mediation. All actions initiated *under the provisions of Chapter 50 of the General Statutes* involving unresolved issues as to the custody or visitation of a minor child shall be ordered to mediation on such issues prior to the trial of the matter, unless the court waives mediation. Such actions include an action for custody or visitation in which no order has been previously entered, motions to modify orders previously entered, and actions to enforce custody and visitation orders. This mandatory referral procedure does not limit the right of the court to enter temporary and *ex parte* orders under the applicable statutory provisions, or to immediately enforce existing orders. The order of referral shall advise the parties that a show cause order may be issued, or other sanctions imposed, if they fail to appear at the orientation session, or the first mediation session. (See form AOC-CV-632, *Motion and Order to Waive Custody Mediation*.)

Comment: *In the opinion of the Custody Mediation Advisory Committee, the mandatory provisions of G.S. 50-13.1(b), the statutory authority for this section, apply only to actions brought under the provisions of Chapter 50 of the General Statutes. Actions instituted under the provisions of the Juvenile Code, as found in Chapter 7B of the General Statutes, often include issues of placement and visitation at the dispositional stage; such issues may, in appropriate cases, be referred for mediation by a district court judge. Actions brought under the provisions of Chapter 50B of the General Statutes (Domestic Violence) are inappropriate for mediation because they necessarily involve allegations of intimate partner abuse.*

8. Waiver of Mediation. On its own motion, or that of either party, the Chief District Court Judge may waive mediation for good cause when there is sufficient evidence of domestic

violence as defined herein by these rules. On its own motion, or that of either party, the court may waive the setting of a contested custody or visitation matter for mediation upon other findings of good cause. Other bases for good cause include, but are not limited to: 1) a showing of undue hardship to a party, 2) an agreement between the parties for private mediation, 3) allegations of abuse or neglect of the minor child, 4) allegations of alcoholism, 5) allegations of drug abuse, or 6) allegations of severe psychological, psychiatric, or emotional problems. In addition, where a party resides more than 50 miles from court, such distance may be considered good cause. (See form AOC-CV-632, *Motion and Order to Waive Custody Mediation*.)

9. Orientation. Prior to and separate from mediation, an orientation session shall be held at which the goals and procedures of the mediation process shall be explained to the parties to reduce apprehension and avoidance of the process. The AOC-A-208 intake form shall be completed. The parties shall be advised that if they fail to appear for the initial mediation session, an order to show cause might be issued and the non-appearing party could be found in contempt of the court. Personal appearance shall be required of the parties. If a party lives 50 miles or more from the courthouse, or in other extenuating circumstances determined by the mediator and with consent from the Chief District Court Judge, personal appearance may be waived. In those cases, the party shall complete orientation via online video conferencing. In the event that a party does not have the ability to use online video conferencing, self-directed online orientation may be offered to the party.

10. Attendance at Mediation Sessions. The mediation process shall consist of no more than three sessions, each of which shall not exceed two hours in length. A party must attend the orientation and first mediation session before deciding to withdraw from the process. The number of sessions may be extended by agreement of the parties with the permission of the Chief District Court Judge.

11. Neutral Stance of Mediator. While a mediator is to be neutral in promoting an agreement between the parties, the mediator is to be aware of the best interests of the children involved in the case. During the mediation process, the mediator is to help the parties avoid agreements which do not promote the best interests of the child.

12. The Mediation Process. The mediator should assist the parties in focusing on the needs of their child, the need to reorganize the family and use its strengths, the need to maintain continuity of relationships and stability in the child's life, and the options available to the parties which would accomplish those goals. The mediator should help the parties select from the range of options those which are sound and workable, in an effort to reach an agreement which will reduce the conflict in the family, benefiting both the parties and child.

12.01. Authority of Mediator. The mediator shall be in control at all times of the mediation process and the procedures to be followed in the mediation. The mediator



may suspend the mediation session if it becomes unsafe for any of the participants, including the mediator.

12.02. Location. The mediation proceeding shall be held in a private and safe location. When one or more parties cannot attend in person due to extenuating circumstance as determined by the mediator and with consent from the Chief District Court Judge, all parties will attend via online video conferencing. To avoid the appearance of unequal treatment, if one party cannot attend in person, then all parties shall use online video conferencing and no party shall be required to attend in person. Whenever parties have the ability to use online video conferencing, mediators shall use online video conferencing software to mediate in long-distance mediation cases. Telephone mediation is prohibited unless parties do not have the ability to use online video conferencing.

12.03. Confidentiality. The mediation proceeding, Intake Form, and all information gathered during DV screenings by the Custody Mediation Program, shall be confidential. Neither the mediator nor any party or other person involved in mediation sessions shall be competent to testify as to communications made during or in furtherance of such mediation sessions, provided there is no privilege as to communications made in furtherance of a crime or fraud. An individual shall not, however, obtain thereby immunity from prosecution for criminal conduct or be excused from the reporting requirement of G.S. 7A-543 or G.S. 108A-102.

12.04. Parenting Plan. A detailed and clearly written parenting agreement, or parenting plan, is the desired end-product of the mediation process. The parenting plan may include a designation of the party having legal or physical custody, and what duties and responsibilities such designation includes. The plan should also include a complete schedule of the child's time with each party, including holidays, vacation time, and special events. Arrangements may be made for special day observances, such as birthdays. The need of the child to maintain relationships with persons with whom the child has a substantial relationship may be addressed.

The mediator should help the parties reduce their agreement to writing and ensure that each party understands the written document. *Before the parties sign the proposed agreement*, the mediator shall mail a copy of the proposed agreement to parties and counsel, encourage each party to have their attorneys review the agreement with them prior to their signing the plan, and afford them a reasonable opportunity to do so. The mediator shall promptly submit the initial signed agreement, or any signed modification agreement to the court. An *Order Approving Parenting Agreement* is to be attached for the judge's signature. (See form AOC-CV-631.) Signed copies will be provided to both parties and their attorneys.



12.05. Plan Incorporated in Court Order. Where an initial signed agreement or a signed modification of that agreement is submitted to the court, it shall be incorporated in a court order unless the court finds good reason not to do so. (See form AOC-CV-631, *Order Approving Parenting Agreement*.) When incorporated, the agreement is enforceable as is any other court order. Even though designated “parenting agreement,” or some similar name, the incorporated agreement shall be considered a custody order or child custody determination within the meaning of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear.

12.06. Termination of Mediation. After the parties have attended at least the orientation and first mediation session, either or both of the parties may decide not to participate further in the mediation process, and the mediator shall report to the court that no agreement was reached.

Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator’s bias, undue familiarity with a party, or other prejudicial ground. Further, if the mediator determines that the case is not suitable for mediation due to domestic violence, a power imbalance between the parties, the presence of child abuse or neglect, or other reason, the mediator may report to the court that the case was not resolved. (See form AOC-CV-914, *Order to Calendar Custody or Visitation Dispute*.)

Where an agreement is not reached, the custody mediation office may make available information on community resources for families and children involved in a family reorganization.

12.07. Return to Mediation. The mediator shall explain to the parties that the needs of their children change over time, and encourage them to return to mediation if they are unable to resolve any problems caused by that factor, or other changes in circumstances. (See form AOC-CV-634, *Motion to Modify Custody*.)

12.08. Other Participants. At the mediator’s discretion and with the consent of all parties, other participants may be included in mediation sessions following the initial session.

12.09. Caucus with Parties. Caucusing can be a useful intervention for the sake of assessing direction and appropriateness of mediation. Although the majority of a typical session is conducted with all parties together, at the mediator’s discretion, and with consent of all parties, the mediator may utilize a caucus or shuttle mediation, allowing the mediator to speak to each participant individually.

12.10. Evaluation of Program. The NCAOC shall evaluate the program from time to time, and **shall** prepare a summary of the program activities to be included in the North Carolina Courts Annual Report of the Administrative Office of the Courts.

***Comment:** In addition to evaluation of the statistics compiled and submitted by the various programs, user satisfaction might be monitored by the use of exit interviews, and follow-up questionnaires and telephone interviews in a sampling of cases at some time after the completion of the process.*

12.11. Complaint Procedure. The written orientation materials provided to the parties shall advise them how a complaint about the mediator, or mediation process, can be filed with the Chief District Court Judge of the judicial district.

12.12. Custody mediators shall return phone calls and emails from parties and attorneys within a reasonable timeframe.

12.13. Procedure for Screening for Evidence of Domestic Violence*

*To be implemented in phases statewide.

Upon filing, every case shall be screened for the presence of Domestic Violence by an NCAOC trained and approved Domestic Violence Screener.

- 1) The presence of a **Threshold Marker** listed in Section 12.14(a) shall be sufficient evidence to recommend that there is “good cause” necessitating a waiver of mediation to the Chief District Court Judge or the Judge’s designee.
- 2) The presence of a **Red Flag** as defined in 12.15(b) may be sufficient evidence to recommend that there is “good cause” necessitating a waiver of mediation to the Chief District Court Judge or the Judge’s designee. The DV Screener may conduct a personal interview with a party if the use of an interview would assist the Screener in making a recommendation on a waiver.
- 3) If no Threshold Marker or Red Flag is present, but a party discloses the presence of domestic violence at any point prior to the mediation session, including in a request to waive mediation using AOC-CV-632, a DV Screener shall attempt to conduct a personal interview with the party using an AOC approved DV screening interview tool to determine whether to recommend that there is “good cause” necessitating a waiver of mediation to the Chief District Court Judge or the Judge’s designee.

If a Domestic Violence is present and the screener recommends a waiver of mediation, the screener shall prepare a form to present to the Chief District Court Judge or the

Judge's designee for a final determination. The form shall be redacted of the parties' personally identifying information, and shall contain:

- A statement by the DV Screener that the case is inappropriate for mediation;
- A list of any Threshold Markers present in the case;
- A list of any Red Flags present in the case;
- A summary of any personal interview conducted during a screening that led to the mediator's recommendation for waiver.

After reviewing the DV Screener's recommendation and supporting information, the Chief District Court Judge or the Judge's designee will decide whether the case is:

- Inappropriate for mediation, consistent with the DV Screener's recommendation;
- Appropriate for mediation, inconsistent with the DV Screener's recommendation;
- In need of additional screening by the DV Screener before the judge can make a final determination about the appropriateness for mediation

The Chief District Court Judge or the Judge's designee shall complete the form with the Judge's decision within 5 business days or prior to Orientation, whichever is earlier. If a Judge has waived the case from mediation, the DV Screener or the Clerk will notify the parties that the case has been waived from mediation, indicate the markers that qualify the case for waiver, and notify the parties of their next court date where they will have the opportunity to request an opt-in to mediation.

12.14 Domestic Violence Indicators

12. 14 (a) **Threshold Markers** The presence of one or more of the following Threshold Markers shall trigger a DV Screener's recommendation to the Judge to waive mediation:

- An active Domestic Violence Protective Order, including an Ex Parte Order, between the parties or between one of the parties and a minor child or children who is the subject of the custody action;
- Pending criminal charges in which one party is the Defendant and one party is the victim;
- Recent criminal conviction(s) between the parties (18 months or less preceding the filing of the custody action);
- A criminal no contact order in which one party is ordered to have no contact with the other party;
- A court order in a Chapter 50 case ordering one party to have no visitation with the minor child(ren)
- Pending criminal child abuse charges and/or a criminal no contact order with the minor child(ren) for one or both of the parties.



12.14 (b) **Red Flags** The presence of one or more Red Flags may trigger a Screener's recommendation to the Judge to waive mediation. Examples of Red Flags include, but are not limited to:

- A prior history of criminal or civil domestic violence actions between the parties that have been filed and/or charged and subsequently dismissed;
- A party has previously received services from a Domestic Violence Service or Sexual Assault agency because of a history of abuse between the parties, or has or has previously had a written safety plan in place because of a history of abuse between the parties;
- A party's unwillingness to provide the location of his or her residence because of a history of abuse between the parties;
- A party's extensive history of abuse with a third party, including pending criminal charges with a third party victim.

12.15 **Mediation After Finding of Domestic Violence**

If there is sufficient evidence of domestic violence, as defined by these rules, qualifying a waiver of mediation, and the Judge does not waive mediation, or if both parties opt-in to mediation despite the waiver, mediation and orientation will be conducted by a specially trained and NCAOC approved Domestic Violence Mediator. The DV Mediator will conduct the initial sessions separately to assess the readiness and safety of proceeding, and will hold them via web conferencing whenever possible.

Permanency Mediation Program

Comment: Legislation in G.S. 7B-202 establishing Permanency Mediation in North Carolina requires that the North Carolina Administrative Office of the Courts "establish a Permanency Mediation program" in phases statewide and to "promulgate policies and regulations necessary and appropriate for the administration of the program."

1. Purpose of Permanency Mediation. The purpose of the Permanency Mediation Program is to provide statewide and uniform services to resolve cases in which a juvenile is alleged or has been adjudicated to be abused, neglected, or dependent, or in which a petition or motion to terminate a parent's parental rights has been filed. Participants in the mediation shall include the parties and their attorneys, including the guardian ad litem and attorney advocate for the child. Others may participate by agreement of the parties, their attorneys, and the mediator, or by order of the court.

2. Definitions.



2.01. Mediator. A party who has a contract with the North Carolina Administrative Office of the Courts (NCAOC) to perform permanency mediation services.

2.02. Permanency Mediation Agreement. Any agreement reached by the parties as a result of the mediation, whether referred to as a “placement agreement,” “case plan,” or some similar name, which is reduced to writing, signed by each party, and submitted to the court as soon as practicable.

3. Administration of the Program. The NCAOC is responsible for establishing the program in phases statewide.

3.01. Contractual Services. The Director of the NCAOC is authorized to approve contractual agreements for permanency mediation services; such contracts are exempt from competitive bidding procedures.

3.02. Funding. Any funds appropriated by the General Assembly for the establishment and maintenance of permanency mediation programs shall be administered by the NCAOC.

4. Advisory Committee. The Custody Mediation Advisory Committee, established by the Director of the NCAOC, shall advise the NCAOC on matters of the Permanency Mediation Program.

