Superior Court Mediation Guide For Parties not Represented by Attorneys

N.C. Dispute Resolution Commission

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About the North Carolina Dispute Resolution Commission

The North Carolina Dispute Resolution Commission was established in October of 1995, pursuant to N.C. Gen. Stat. § 7A-38.2. The Commission is charged primarily with certifying and regulating private mediators who serve the courts of this State. The Commission also recommends policy, rules, and rule revisions relating to dispute resolution in North Carolina's courts; provides support to court-based mediation programs; certifies mediation training programs; serves as a clearinghouse for information about court-based mediation programs; assists other State agencies interested in or providing dispute resolution services to their constituencies; publishes a newsletter and maintains a website.

About the North Carolina Judicial Branch

The mission of the North Carolina Judicial Branch is to protect and preserve the rights and liberties of all the people as guaranteed by the Constitutions and laws of the United States and North Carolina by providing a fair, independent and accessible forum for the just, timely and economical resolution of their legal affairs.

About the North Carolina Administrative Office of the Courts

The mission of the North Carolina Administrative Office of the Courts is to provide services to help North Carolina's unified court system operate more efficiently and effectively, taking into account each courthouse's diverse needs, caseloads, and available resources

If you are in a legal dispute involving family financial issues, are proceeding without an attorney, and the court has referred your case to a mediated settlement conference, this Guide, prepared by the North Carolina Dispute Resolution Commission (NCDRC) may be helpful to you. From this point on, a party who proceeds without being represented by an attorney will also be referred to as a "*pro se"* party.

A family financial dispute involves issues such as equitable distribution (division of marital assets and debts during divorce) and/or child or spousal support. Situations where a party is alleged to have violated an agreement or a court order involving a family financial issue may also be referred to a mediated settlement conference. A conference can be ordered by the court or requested by an attorney or party. Parties participating in a conference may also agree to discuss issues like child support and visitation.

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

What is a Mediated Settlement Conference?

Civil cases in the superior courts of North Carolina, with very few exceptions, are referred to mediated settlement conferences. A mediated settlement conference (conference) is a legal proceeding that is much less formal and intimidating than a trial. The conference offers an opportunity for you to settle your case and be saved the time, expense, and stress involved in prolonged litigation. The mediator is there to help facilitate a discussion between those present for the conference and, hopefully, to help you reach an agreement. The mediator is not a judge and will not advise you as to what action you should or should not take. Instead, during the conference, you and any other party(ies) or attorneys involved in your case, with the assistance of the mediator, will discuss your dispute and brainstorm possible ways to settle it.

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

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

Participating in a Mediated Settlement Conference Without an Attorney

It can be difficult for *pro se* parties to understand legal proceedings and you may feel that you are at a disadvantage because you are unrepresented, particularly if the other party has an attorney. For these reasons, the NCDRC strongly urges you to seek legal advice. The NCDRC, 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 their best to ensure a civil and full discussion of the issues, however, they cannot give legal advice to anyone participating in the conference.**

Before proceeding with your conference, you may want to read the *North Carolina Supreme Court's Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions (MSC Rules)*. The Rules can be found on the NCDRC's website at www.ncdrc.gov. (Scroll down to the "More Information" section, then

select “Program Information”, then select “Mediated Settlement Conference Program,” and then click on “Program Rules”). The Rules may help you better understand the mediation process and your responsibilities as pro se party. All of the program forms referenced below can be found on the NCDRC’s website.

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

- Let your mediator know well ahead of time if you have any health or accessibility issues which will affect when and where s/he schedules your mediation, *e.g.,* the need for a wheelchair ramp or handicapped accessible bathrooms. If you have any significant concerns regarding your safety or security and believe the mediation should be held in a secure facility, that information should be communicated to your mediator as well.

- If you need a foreign language interpreter, it is your responsibility, and not that of the mediator or court, to make arrangements in advance of your mediation to have an interpreter present. It is important that interpreters be trained and, if possible, certified by the North Carolina Administrative Office of the Courts (NCAOC). If you need an interpreter, contact the NCAOC at (919) 890-1407 or, for a list of interpreters you may access a list on the NCAOC Do You Need a Court Interpreter website.

If you are hearing impaired and will need a deaf interpreter at your mediation, please review the NCAOC Guidelines for Accommodating Persons Who Are Deaf Or Hard Of Hearing In The Courts.

- Plan ahead. Think about what you want to say about your case. You will want to be able to summarize your case from your perspective. Keep your comments brief, no more than a few minutes. Both sides will have an opportunity to speak and neither should interrupt the other.

- Come to the table with a positive attitude and be prepared to talk and to listen. The mediation process is dependent to a large degree on the good will of the parties. If parties refuse to talk, won’t listen to one another, or don’t bargain in good faith, their discussions may never get off the ground.

- If you think there are documents, photos, or other evidence that could be helpful for your mediator to see in order to better understand the case or your perspective, you may want to bring them to the mediation. Do be aware though that your mediator may not have a lot of time to review materials. Be prepared to summarize them briefly and to explain why they are important. You should **not** bring witnesses to your mediation.

- Do some hard thinking about your case. Come to mediation with a list of all the issues or points in your dispute that you believe need to be discussed for the matter to be

settled. Also, think about your bottom line, what will need to happen for you to be able to resolve the conflict and feel a sense of closure? One important suggestion is to be realistic in your thinking; mediation is not about winners and losers, but about consensus and finding common ground. Both sides must be willing to be flexible and to compromise for there to be any real chance of settlement.

- Make a commitment to yourself that you will keep your temper in check and be careful about what you say and how you say it. Harsh words, accusations, and profanity directed at the other side or even at your mediator will likely only make your situation worse and lessen the chances of a settlement. By the same token, remember that a smile, a kind word, and simple courtesy can go a long way.

- Try to get a good night's sleep. Don't worry about the process. You won't be put on a witness stand, forced to reach an agreement, or to sign a document with which you are uncomfortable. If your case does not settle, your mediator will submit a report to the judge advising that the case did not settle and the matter will simply proceed to trial.

Your Role in the Process

The MSC Rules provide that the mediator is to be the case manager for purposes of your mediated settlement conference. That means that the mediator is charged with scheduling the case for mediation, conducting the conference, and reporting the outcome of the conference to the court. The MSC Rules do place some responsibilities on the parties and those responsibilities are discussed below. You can download the forms referenced below through the NCDRC's website at www.ncdrc.gov. Most of the forms are accessible by clicking on the Toolbox section on the homepage. From the menu, click on the Mediated Settlement Program, then click on "forms".

ORDER OF REFERRAL.

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

DESIGNATING A MEDIATOR.

You and the opposing party(ies) will have the opportunity to designate a mediator of your choice within a time limit set by the court**. All parties must agree on the mediator to be designated and the mediator you choose must be certified by the NCDRC and should appear on the list of mediators serving the district in which your case is filed.** If the parties agree on a mediator, you will need to designate that mediator in writing and on the approved form (see below) within the time frame for selection set out in the court's order.

You can search for a certified mediator on the NCDRC's website. Click "Find A Mediator," then select the "Mediated Settlement Conference Mediators (Superior Court)" option from the screen. You may obtain a list of mediators active in the judicial district where your case is pending by clicking the dropdown 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 of mediators appears, you may access additional information about a mediator by clicking on his/her underlined name, including his/her contact information.

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

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

For more information on selecting a mediator view the "Guide to Selecting Mediator" located on the NCDRC's website next to the Find a Mediator link, or you may call the NCDRC's office for help at (919) 890-1415. (MSC Rule 2.)

SUBSTITUTION OF MEDIATOR.

If a certified mediator has been appointed by the court (because the parties could not agree on a mediator before the time to designate a mediator had expired), and you thereafter wish to substitute a different certified mediator, the court may approve the substitution (but is not required to) only upon proof that the appointed mediator has been paid the $175 one-time administrative fee, and any other fees that may be due and owing. Examples are any fees for mediation services rendered prior to the substitution, postponement fees, and the like. If all parties agree to the substitution, you can complete AOC-CV-836, *Consent Order for Substitution of Mediator*, and submit it to the Trial Court Administrator/Coordinator for the judge's signature. (MSC Rule 7.)

SCHEDULING THE CONFERENCE.

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

of a lawyer involved in the case, the office of the mediator, or some other public place. (MSC Rule 3(a))

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

EXTENDING THE DEADLINE FOR COMPLETION OF THE MEDIATED SETTLEMENT CONFERENCE.

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

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

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

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

If a conflict arises that prevents you from attending a scheduled mediation, let your mediator and the other party(ies) 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. (MSC Rule 7.)

ATTENDANCE IS MANDATORY.

You must attend the conference. All parties and parties required to attend a conference may agree to conduct the mediation in person, using remote technology, or using a hybrid of in person and remote technology. If all parties and persons required to attend a conference cannot agree on the attendance method, and the mediator has selected on their mediator profile that he/she will conduct conference only using remote technology, then the conference shall be conducted by remote technology, which includes by either internet means or by phone. However, if the parties and person required to attend the conference do not agree on an attendance method, and the mediator has not selected an attendance method on their profile, then the conference shall be conducted in person.

Any mediation conducted in person shall be done in strict compliance with all federal state, and local safety guidelines that are in place for trial court proceedings at the conference.

Witnesses are not allowed to attend, and the conference cannot be recorded. (MSC Rules 4 & 5.)

PAYMENT OF MEDIATOR'S FEE

The program rules require that the mediator's fees be paid in equal shares by the named parties, or as otherwise agreed to by the parties, or as ordered by the court. Multiple parties shall be considered as one party if they are represented by the same attorney. Mediators appointed by the court are paid $150.00 per hour for their mediation services, plus a one-time, per case, administrative fee of $175.00. Appointed mediators may not charge for travel time. 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 the parties 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. You will need to complete a copy of form AOC-CV-814, *Petition and Order For Relief From Obligation To Pay Mediator's Fee* and file it with the court at the completion of the mediated settlement conference. Follow the instructions on the form when filing with the court. Once your conference has concluded, notify the mediator that

you will be filing the *Petition* and ask that this information be noted on his/her *Report of Mediator.* Your *Petition* must go before the court, as it is the court's responsibility to decide 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.

CONCLUDING THE CONFERENCE.

If you do reach an agreement with your opposing parties at your conference, and all parties are not represented, either one of the parties or the mediator will record the matters discussed in writing and may use form AOC-DRC-18, "*Mediation Summary*," or a similar document. This summary should not be signed by the parties or the mediator and is not intended to be a binding agreement. **Be aware that the unsigned summary document alone has no legal effect as a binding agreement and will not conclude your case.** Your agreement is binding, and the case is closed when either 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. You may wish to consult with an attorney after the mediation to draft a final agreement based upon the Mediation Summary for signatures and for filing with the court. The NCDRC strongly encourages you to see legal advice before you sign any documents.

If any other party in your conference is represented by counsel, and agreement is reached, the attorney but not the mediator may draft a settlement agreement using AOC-CV-15 or AOC-CV-16 or a similar form for all of the parties to consider and review.

Because you are unrepresented, the mediator will not be able to offer you any legal advice. The mediator will most likely tell you it is important to have a legal document reviewed before you sign it, and that s/he will recess the mediation for you if you wish to have an attorney review the agreement before you sign it. The mediator will read the draft agreement prepared by the attorney and help facilitate any discussions about revisions or changes to it. The NCDRC strongly advises you to seek legal advice before you sign any document. In that way, your legal rights can be better protected. If you determine that you do not wish to consult an attorney and you convey your acceptance of the agreement and your decision to sign it to the mediator, the mediator will ask all parties to sign it, and will distribute copies to all parties and attorney(s).

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

If you have any further questions, please contact the NCDRC's office at 919-890-1415 or by email DRCMediators@nccourts.org. The NCDRC staff cannot give legal advice but are happy to respond to your questions about the mediation process or the Mediated Settlement Conference Program.

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