

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING THE RULES OF MEDIATION
FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby amends the Rules of Mediation for Matters Before the Clerk of Superior Court. This order affects Rules [2](#), [4](#), and [6](#).

* * *

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties.** By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However, in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk.** In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties 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 county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at <https://www.ncdrc.gov>. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory.** ~~The Commission shall maintain for~~ For the consideration of the clerks, and those designating mediators for matters within the clerk's jurisdiction, ~~a directory~~ the Commission shall post a list of certified mediators who request appointments in those matters and ~~a directory of mediators who~~ are certified under these rules on its website at <https://www.ncdrc.gov>. If a mediator has supplied it to the Commission, the list shall also provide the mediator's designated attendance method and the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience. ~~The directory shall be provided to the clerks on the Commission's website at <https://www.ncdrc.gov>.~~

~~(d) **Disqualification of the Mediator.** Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.~~

(d) **Withdrawal or Disqualification of the Mediator.**

- (1) Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

- (2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the clerk.
- (3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

* * *

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) Attendance.

- ~~(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall attend the mediation using remote technology; for example, by telephone, videoconference, or other electronic means. The mediation shall conclude when an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or when an impasse is declared. Notwithstanding this remote attendance requirement, the mediation may be conducted in person if:
 - a. the mediator and all persons required to attend the mediation agree to conduct the mediation in person and to comply with all federal, state, and local safety guidelines that have been issued; or
 - b. the clerk, upon motion of a person required to attend the mediation and notice to the mediator and to all other persons required to attend the mediation, so orders.~~
- ~~(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.~~
- ~~(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing~~

~~board, the employee or agent shall have authority to negotiate on behalf of the governing board.~~

- ~~(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.~~
- ~~(5) Other persons may participate in a mediation at the discretion of the mediator.~~
- ~~(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.~~
- ~~(7) Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.~~

(1) **Persons Required to Attend.** The following persons shall attend a mediation:

- a. Any person ordered by the clerk to attend.
- b. Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.
- c. Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.
- d. An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

e. Other persons may participate in a mediation at the discretion of the mediator.

(2) Attendance Method.

a. Determination.

1. All parties and persons required to attend a mediation may agree to conduct the mediation in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

2. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has designated in the Mediator Information Directory that he or she will conduct mediations only using remote technology, then the mediation shall be conducted using remote technology.

3. If all parties and persons required to attend the mediation do not agree on an attendance method and the mediator has not selected remote technology as his or her designated attendance method in the Mediator Information Directory, then the mediation shall be conducted in person.

b. Order by Clerk; Mediator Withdrawal. The clerk, upon motion of a party and notice to the mediator and to all other parties and persons required to attend the mediation, may order that the mediation be conducted in person, using remote technology, or using a hybrid of in-person attendance and remote technology.

If the method of attendance ordered by the clerk is contrary to the attendance method the mediator has designated in the Mediator Information Directory, then the mediator may withdraw from the case under Rule 2(d).

(3) Scheduling. Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

- (4) **Excusing the Attendance Requirement.** Any person may be excused from the requirement to attend a mediation with the consent of all persons required to attend the mediation and the mediator.
- (5) **Safety Compliance.** The mediator and all parties and persons required to attend a mediation shall comply with all federal, state, and local safety guidelines that are in place for trial court proceedings at the time of the mediation.

(b) **Finalizing Agreement.**

- (1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

A designee may sign the agreement on behalf of a party only if the party does not attend the mediation and the party provides the mediator with a written verification that the designee is authorized to sign the agreement on the party's behalf.

- (2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

- (c) **Payment of the Mediator's Fee.** The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording.** There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a)(2). The rule describes the attendance methods used for mediations. If a mediation is conducted using remote technology, then the mediator should ensure that the parties are able to fully communicate with all other participants and videoconferencing is encouraged.

* * *

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator.**

- (1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.
- (2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

(b) **Duties of the Mediator.**

- (1) **Informing the Parties.** At the beginning of the mediation, the mediator shall define and describe for the parties:
 - a. the process of mediation;
 - b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;
 - c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;
 - d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;
 - e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;

- f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;
 - g. the duties and responsibilities of the mediator and the participants;~~and~~
 - h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule.;
 - i. the fact that Rule 4(d) prohibits any recording of the mediation; and
 - j. the fact that the parties may be subject to sanctions for violating these rules.
- (2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.
- (3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.
- (4) **Reporting Results of the Mediation.**
- a. The mediator shall report to the court in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.
 - b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.


(5) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

* * *

These amendments to the Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 May 2023.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of April 2023.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of April 2023.



GRANT E. BUCKNER
Clerk of the Supreme Court