

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING THE RULES FOR MEDIATED
SETTLEMENT CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby adopts the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, which appear on the following pages. These rules supersede the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, published at [367 N.C. 1010–52](#).

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 March 2020.

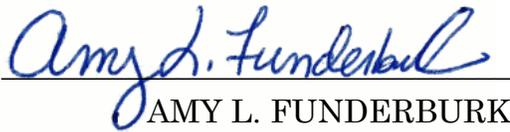
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions

Rule 1. Initiating Settlement Events

(a) **Purposes of Mandatory Settlement Procedures.** These rules are promulgated under N.C.G.S. § 7A-38.1 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 in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to, or after, those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures.** In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a superior court civil action, counsel shall advise his or her client regarding the settlement procedures approved by these rules, and shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Initiating the Mediated Settlement Conference by Court Order.**

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

(2) **Motion to Authorize the Use of Other Settlement Procedures.** The parties may move the senior resident superior court judge to authorize the use of another settlement procedure allowed by these rules, or by local rule, in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). The party requesting the authorization shall file a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action, [Form AOC-CV-829](#), within twenty-one days of the senior resident superior court judge's order requiring a conference. The motion shall include:

- a. the type of settlement procedure requested;

- b. the name, address, and telephone number of the neutral evaluator (neutral) selected by the parties;
- c. the rate of compensation of the neutral;
- d. that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral; and
- e. that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the conference as originally ordered by the court. If the motion is granted, then the court may order the use of any agreed upon settlement procedure authorized by Rule 10, Rule 11, Rule 12, or Rule 13, or by local rule of the superior court in the county or judicial district where the action is pending.

- (3) **Timing of the Order.** The senior resident superior court judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Both Rule 3(b) and subsection (c)(4) of this rule shall govern the content of the order and the date for completion of the conference.
- (4) **Content of the Order.** The court's order shall be on an Order for Mediated Settlement Conference in Superior Court and Trial Calendar Notice, [Form AOC-CV-811](#), and shall:
 - a. require that a mediated settlement conference be held in the case;
 - b. establish a deadline for the completion of the mediated settlement conference;
 - c. state clearly that the parties have the right to select their own mediator as provided by Rule 2;
 - d. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and
 - e. state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.
- (5) **Motion for Court-Ordered Mediated Settlement Conference.** In cases not ordered to participate in a mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that the

conference be ordered. The motion shall state the reasons why the order should be allowed and shall be served on the nonmovant. Any objections to the motion may be filed in writing with the senior resident superior court judge within ten days of the date of the service of the motion. The judge shall rule on the motion without a hearing and shall notify the parties or their attorneys of the ruling.

- (6) **Motion to Dispense with the Mediated Settlement Conference.** A party may move the senior resident superior court judge to dispense with a mediated settlement conference ordered by the judge. The motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Good cause may include, but is not limited to, the fact that the parties (i) have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a conference; or (ii) have elected to resolve their case through arbitration.

- (d) **Initiating the Mediated Settlement Conference by Local Rule.**

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

- (3) **Scheduling Conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to participate in a mediated settlement conference by local rule, the notice for the scheduling conference shall: (i) require that a mediated settlement conference be held in the case; (ii) establish a deadline for the completion of the mediated settlement conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator, in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.
- (4) **Application of Rule 1(c).** The provisions in subsections (c)(2), (c)(5), and (c)(6) of this rule shall apply to mediated settlement conferences initiated by local rule under subsection (d) of this rule, except for the time limitations set out in those subsections.
- (5) **Deadline for Completion.** The provisions of Rule 3(b), which state the deadline for completion of the mediated settlement conference, shall not apply to mediated settlement conferences conducted under subsection (d) of this rule. The deadline for completion of the mediated settlement conference shall be set by the senior resident superior court judge or the judge's designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline set by the court shall be well in advance of the trial date.
- (6) **Selection of the Mediator.** The parties may designate, or the senior resident superior court judge may appoint, a mediator under Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences that are conducted under subsection (d) of this rule.
- (7) **Use of Other Settlement Procedures.** The parties may utilize other settlement procedures under the provisions of subsection (c)(2) of this rule and Rule 10. However, the time limits and the method of moving the court for approval to utilize another settlement procedure set out in these rules shall not apply and shall be governed by local rules.

Comment

Comment to Rule 1(c)(6). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court

should consider Rule 4 or Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference

electronically, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of Parties.** Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, [Form AOC-CV-812](#) (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney 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 mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court.** If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing a Designation Form, requesting, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The Designation Form must be filed within twenty-one days of the court's order and shall state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a Designation Form requesting the appointment of a mediator, or in the event that the parties fail to file a Designation Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

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

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is 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 or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may

be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at <https://www.ncdrc.gov>.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory.** To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at <https://www.ncdrc.gov>, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

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

- (1) Any party may move the senior resident superior court judge of the judicial district where the action 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 senior resident superior court judge of the judicial district where the action is pending.
- (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 3. The Mediated Settlement Conference

(a) **Where the Mediated Settlement Conference Is to Be Held.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is

pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other parties required to attend.

(b) **When the Mediated Settlement Conference Is to Be Held.** As a guiding principle, the mediated settlement 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 under Rule 1(c)(1) shall state a deadline for completion for the conference, which shall be not less than 120 days, nor more than 180 days, after issuance of the court's order. The mediator shall set a date and time for the conference under Rule 6(b)(5).

(c) **Extending Deadline for Completion.** The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(d) **Recesses.** The mediator may recess the mediated settlement conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, then 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 the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance.**

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

a. Parties to the action, to include the following:

1. All individual parties.
2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the

conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws, partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

- b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.
- c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

- (2) **Physical Attendance Required.** 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 subsection (c) of this rule, or an impasse has been declared. Any party or person may have the attendance requirement excused or modified, including the allowance of the party or person's participation without physical attendance by:
- a. agreement of all parties, persons required to attend, and the mediator; or
 - b. order of the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend.
- (3) **Scheduling.** Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under 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 20 June 1985.

(b) **Notifying Lienholders.** Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement.**

- (1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.
- (2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed

agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

- (3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.
- (4) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee.** The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases.** Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

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

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then

the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(d), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties and their attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures 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 the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be

required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims. Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

Rule 5. Sanctions for Failure to Attend the Mediated Settlement Conference or Pay the Mediator's Fee

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the conference or pay the mediator's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, 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. The motion shall be served on 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 if the entire record, as submitted, is reviewed to determine whether the order is supported by substantial evidence.

Rule 6. Authority and Duties of the Mediator

(a) Authority of the Mediator.

- (1) Control of the Mediated Settlement Conference.** The mediator shall at all times be in control of the mediated settlement conference 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 prior to, and during, the mediated settlement conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(b) Duties of the Mediator.

- (1) Informing the Parties.** At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:
 - 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. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a 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 mediated settlement conference;
 - g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;
 - h. the duties and responsibilities of the mediator and the participants; and

- i. 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 circumstances bearing on possible bias, prejudice, or partiality.
- (3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.
- (4) **Reporting Results of the Mediated Settlement Conference.**
 - a. The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a conference was not ordered by the court. The report shall be filed on a Report of Mediator in Superior Court Civil Action, [Form AOC-CV-813](#), within ten days of the conclusion of the conference or within ten days of the mediator being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.
 - b. If an agreement upon all issues is reached prior to or at the mediated settlement conference, or during a recess of the conference, then the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal and state the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court. The mediator shall advise the parties that Rule 4(c) requires them to file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. The mediator shall indicate on the report that the parties have been so advised.
 - c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to

provide statistical data for evaluation of the mediated settlement conference program.

- d. A mediator who fails to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanction available through the court's contempt power. The senior resident superior court judge shall notify the Commission of any action taken against a mediator under this subsection.

- (5) **Scheduling and Holding the Mediated Settlement Conference.** It is the duty of the mediator to schedule and conduct the mediated settlement conference 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 to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

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

Comment

Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has

been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement.** When a mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (d) of this rule shall apply to an issue involving compensation of the mediator. Subsections (e) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order.** When a 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 the mediator a one-time, per-case administrative fee of \$150, due upon appointment.

(c) **Change of Appointed Mediator.** Under Rule 2(a), the parties may select a certified mediator to conduct the mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the \$150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (e) of this rule.

(d) **Indigent Cases.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. A mediator conducting a mediated settlement conference under these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and ask to be relieved of that party's obligation to pay a share of the mediator's fee using a Petition and Order for Relief from Obligation to Pay Mediator's Fee, [Form AOC-CV-814](#).

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

(e) **Postponements and Fees.**

- (1) As used in subsection (e) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for a session of the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.
- (2) A mediated settlement conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) 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 (iv) inclement weather exists, such that travel

is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee against a party.

- (3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.
- (4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of \$150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be \$300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.
- (5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (e) of this rule.

(f) **Payment of Compensation by Parties.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediated settlement conference.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

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

Comment to Rule 7(e). Nonessential 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. 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 a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Comment to Rule 7(f). If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require

that party to pay the mediator's fee and related expenses.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

- (1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or at least forty hours of Commission-certified family and divorce mediation training; and (ii) a sixteen-hour Commission-certified supplemental trial court mediation training.
- (2) The applicant must have the following training, experience, and qualifications:
 - a. An attorney-applicant may be certified if he or she:
 1. is a member in good standing of the North Carolina State Bar; or
 2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and
 3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.
 - b. A nonattorney-applicant may be certified if he or she:
 1. has completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the

unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and
3. has completed either:
 - i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to 1 January 2005, and has four years of professional, management, or administrative experience in a professional, business, or governmental entity; or
 - ii. ten years of professional, management, or administrative experience in a professional, business, or governmental entity, and possesses a four-year college degree from an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to 1 January 2005.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

- c. The applicant must complete the following observations:
 1. **All Applicants.** All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

2. **Nonattorney-Applicants.** Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(2)(c)(1) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.
3. **Conferences Eligible for Observation.** Conferences eligible for observation under subsection (a)(2)(c) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

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

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, [Form AOC-DRC-07](#).

All observers shall conform their conduct to the Commission’s policy on *Requirements for Observer Conduct*.

- (3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.
- (4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:
 - a. pending criminal charges;

- b. criminal convictions;
- c. restraining orders issued against him or her;
- d. failures to appear;
- e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;
- f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;
- g. judicial sanctions imposed against him or her in any jurisdiction; or
- h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

- (5) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.
- (6) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

- (7) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.
- (8) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.
- (9) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule 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 whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule 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 for certification under this rule. No application for certification renewal 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 the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission the applicant can demonstrate sufficient staff has discretion to waive the requirements set familiarity with North Carolina legal out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if terminology, court structure, and procedure.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator for matters in superior court shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

- (1) Conflict resolution and mediation theory.
- (2) Mediation process and techniques, including the process and techniques of trial court mediation.

- (3) Communication and information gathering skills.
- (4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.
- (5) Statutes, rules, and practices governing mediated settlement conferences in North Carolina.
- (6) Demonstrations of mediated settlement conferences.
- (7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.
- (8) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(b) Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the topics in subsection (a) of this rule and a discussion of the mediation and culture of insured claims. There shall be at least two simulations as described in subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance.

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

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC upon the recommendation of the Commission.

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures.** Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules, unless the court finds that the parties did not agree on all of the relevant details of the procedure, including the items in Rule 1(c)(2), or that, for good cause, the selected procedure is not appropriate for the case or the parties.

(b) **Other Settlement Procedures Authorized by These Rules.**

In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

- (1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).
- (2) Nonbinding arbitration under Rule 12 (a settlement procedure in which a neutral renders an advisory decision following summary presentations of the case by the parties).
- (3) Binding arbitration under Rule 12 (a settlement procedure in which a neutral renders a binding decision following presentations by the parties).
- (4) A summary trial (jury or non-jury) under Rule 13 (a settlement procedure that is either: (i) a nonbinding trial in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; or (ii) a binding trial in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer).

(c) **General Rules Applicable to Other Settlement Procedures.**

- (1) **When Proceeding Is Conducted.** Other settlement procedures ordered by the court under these rules shall be conducted no later than the date for completion set out in the court's original mediated settlement conference order, unless extended by the senior resident superior court judge.
- (2) **Authority and Duties of the Neutral.**
 - a. **Authority of the Neutral.**
 1. **Control of the Proceeding.** The neutral, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.
 2. **Scheduling the Proceeding.** The neutral, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

b. **Duties of the Neutral.**

1. **Informing the Parties.** At the beginning of the proceeding, the neutral, arbitrator, or presiding officer shall define and describe for the parties:
 - i. the process of the proceeding;
 - ii. the differences between the proceeding and other forms of conflict resolution;
 - iii. the costs of the proceeding;
 - iv. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(6) of this rule; and
 - v. the duties and responsibilities of the neutral and the participants.
 2. **Disclosure.** The neutral has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.
 3. **Reporting Results of the Proceeding.** The neutral, arbitrator, or presiding officer shall report the results of the proceeding to the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, [Form AOC-CV-817](#). The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures.
 4. **Scheduling and Holding the Proceeding.** It is the duty of the neutral, arbitrator, or presiding officer to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, arbitrator, or presiding officer, unless the deadline is changed by a written order of the senior resident superior court judge.
- (3) **Extensions of Time.** A party or a neutral may request that the senior resident superior court judge extend the deadline for completion of the settlement procedure. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. If the court grants the motion for an extension, then the order

shall set a new deadline for the completion of the settlement procedure. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

- (4) **Where the Proceeding Is Conducted.** The neutral, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time for and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.
- (5) **No Delay of Other Proceedings.** Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.
- (6) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or another civil action involving the same claim, except:
 - a. in proceedings for sanctions under subsection (c) of this rule;
 - b. in proceedings to enforce or rescind a settlement of the action;
 - c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or
 - d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, “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 a proceeding conducted under this rule, or during its recesses, shall be enforceable, unless the agreement has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is

presented or discussed in a conference or other settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

- (7) **No Record Made.** There shall be no record made of any proceedings under these rules, unless the parties have stipulated to binding arbitration or a binding summary trial, in which case any party, after giving adequate notice to opposing parties, may make a record of the proceeding.
- (8) **Ex Parte Communications Prohibited.** Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.
- (9) **Duties of the Parties.**
 - a. **Attendance.** All persons required to attend a mediated settlement conference under Rule 4 shall attend any other nonbinding settlement procedure authorized by these rules and ordered by the court, except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court, shall be those persons to whom the parties agree. Notice of the agreement shall be given to the court and the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, [Form AOC-CV-818](#).

b. **Finalizing Agreement.**

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, arbitration, or summary trial, then the parties to the agreement shall reduce the terms of the agreement to writing and sign it along with their counsel. A consent judgment or voluntary dismissal shall be filed with the court by such persons as the parties shall designate within fourteen days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is later. The person responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal to the neutral, arbitrator, or presiding officer, and all parties at the proceeding.
2. If an agreement that resolves all issues in the dispute is reached prior to the evaluation, arbitration, or summary trial, or while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing along with their counsel and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within fourteen days of the agreement or before the expiration of the deadline for completion of the proceeding, whichever is later.
3. When an agreement is reached upon all issues in the dispute, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise the judge of the persons who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee.** The parties shall pay the neutral's fee as provided by subsection (c)(12) of this rule.

(10) **Selection of Neutrals in Other Settlement Procedures.** The parties may select any person to serve as a neutral in a settlement procedure authorized under these rules. For arbitration, the parties may either select a single arbitrator or a panel of arbitrators. Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion to Use

Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, [Form AOC-CV-818](#), within twenty-one days after the entry of the order requiring a mediated settlement conference.

The motion shall state: (i) the name, address, and telephone number of the neutral; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

- (11) **Disqualification.** Any party may move the resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated any standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.
- (12) **Compensation of the Neutral.** A neutral's compensation shall be paid in an amount agreed to by 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.

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

- (13) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee.** Any person required to attend a settlement proceeding or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the proceeding. A party seeking sanctions against a person or a judge, upon his or her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions,

it shall do so after giving notice to the person, holding a hearing, and issuing a written order that contains both findings of fact that are supported by substantial evidence and conclusions of law.

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation.** Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation 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) **Preconference Submissions.** No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to the neutral and the other parties shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions.** No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing, not exceeding three pages in length, responding to a question from an opposing party. The response shall be served on all other parties, and the party sending the response shall certify such service to the neutral, but the response need not be filed with the court.

(e) **Neutral Evaluation Conference Procedure.** Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure.** Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties.**

- (1) **Neutral's Opening Statement.** At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(2)(b), the neutral shall define and describe for the parties:
 - a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and
 - b. the fact that any settlement reached will be only by mutual consent of the parties.
- (2) **Oral Report to Parties by Neutral.** In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising them of the neutral's opinion about the case. The opinion shall include a candid assessment of liability, an estimated settlement value, and the strengths and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.
- (3) **Report of Neutral to Court.** Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, [Form AOC-CV-817](#). The neutral's report shall inform the court when and where the conference was held, the names of those who attended, and the name of any party, attorney, or representative of an insurance carrier known to the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement upon all issues was reached by the parties and, if so, state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist Negotiations.** If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions.

Rule 12. Rules for Arbitration

In an arbitration, the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is nonbinding, unless: (i) neither party timely requests a trial de novo, in which case the arbitrator's decision is entered by the senior resident superior court judge as a judgment; or (ii) the parties agree that the arbitrator's decision shall be binding.

(a) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the North Carolina Canons of Ethics for Arbitrators promulgated by the Supreme Court. An arbitrator shall be disqualified and must recuse himself or herself in accordance with the North Carolina Canons of Ethics for Arbitrators.

(b) **Exchange of Information.**

- (1) **Prehearing Exchange of Information.** At least ten days before the date set for the arbitration hearing, the parties shall exchange in writing:
 - a. a list of witnesses that the party expects to testify;
 - b. a copy of documents or exhibits that the party expects to offer into evidence; and
 - c. a brief statement of the issues and contentions of the party.

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

- (2) **Exchanged Documents Considered Authenticated.** Any document exchanged by the parties may be received in the hearing as evidence without further authentication; however, the party against whom the document is offered may subpoena and examine as an adverse witness the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.
- (3) **Copies of Exhibits Admissible.** A copy of a document or exhibit that has been exchanged by the parties is admissible in an arbitration hearing in lieu of the original.

(c) **Arbitration Hearings.**

- (1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.
- (2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing conducted under these rules.
- (3) **Motions.** Designation of an action for arbitration does not affect a party's right to file a motion with the court.
 - a. The court, in its discretion, may consider and rule on a motion at any time. The court may defer consideration of an issue raised in a motion to the arbitrator for determination in the arbitration award. If the court defers the issue in the motion to the arbitrator, then the parties shall state their contentions regarding the motion to the arbitrator in the exchange of information that is required under subsection (b)(1) of this rule.
 - b. The pendency of a motion shall not be the cause for delaying an arbitration hearing, unless the court so orders.
- (4) **Law of Evidence Used as Guide.** The law of evidence does not apply in an arbitration hearing, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.
- (5) **Authority of Arbitrator to Govern Hearings.** An arbitrator shall have the authority of a judge to govern the conduct of hearings, except for the court's contempt power. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.
- (6) **Conduct of Hearing.** The arbitrator and the parties shall review the lists of witnesses, exhibits, and written statements concerning issues previously exchanged by the parties under subsection (b)(1) of this rule. The order of events during the hearing shall generally follow that of a trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses, and the presentation of exhibits.

However, in the arbitrator's discretion, the order of events may be varied.

- (7) **No Record of Hearing Made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to make a record of the arbitration hearing in any manner that does not interfere with the proceeding.
- (8) **Parties Must Be Present at Hearings; Representation.** Subject to the provisions of Rule 10(c)(9), all parties shall be present at hearings in person, or through a representative authorized to make binding decisions on the party's behalf, in all matters in controversy before the arbitrator. All parties may be represented by counsel or may appear pro se as permitted by law.
- (9) **Hearing Concluded.** The arbitrator shall declare the hearing concluded when all the evidence has been presented and any arguments that the arbitrator permits have been completed. In exceptional cases, the arbitrator has the discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing concludes.

(d) **The Award.**

- (1) **Filing the Award.** The arbitrator shall file an Arbitration Award – Superior Court, [Form AOC-CV-806](#), signed by the arbitrator, with the clerk of superior court in the county where the action is pending, and shall provide a copy of the award to the senior resident superior court judge within twenty days of the conclusion of the hearing or the receipt of post-hearing briefs, whichever is later. The award shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the arbitrator to have been absent from the arbitration without permission. The award form shall be used by the arbitrator as the arbitrator's report to the court and may also be used to record the arbitrator's award. If an agreement upon all issues was reached by the parties, then the award shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.
- (2) **Findings; Conclusions; Opinions.** No findings of fact, conclusions of law, or opinions supporting an award are required.
- (3) **Scope of Award.** The award must resolve all issues raised by the pleadings. The award may be in any amount supported by

the evidence and shall include interest, as provided by law. The award may include attorneys' fees, as permitted by law.

- (4) **Costs.** The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.
- (5) **Copies of Award to Parties.** The arbitrator shall deliver a copy of the award to all the parties or their counsel at the conclusion of the hearing, or the arbitrator shall serve the award after filing it with the court. A record shall be made by the arbitrator of the date and manner of service.

(e) **Trial De Novo.**

- (1) **Trial De Novo as of Right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing an Arbitration Demand for Trial De Novo, [Form AOC-CV-803](#) (Demand), with the court, and serving the Demand on all parties within thirty days of service of the arbitrator's award. A demand for a jury trial under Rule 38(b) of the North Carolina Rules of Civil Procedure does not preserve the right to a trial de novo. A demand by any party for a trial de novo, under this subsection, is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo under this subsection shall include all claims in the action.
- (2) **No Reference to Arbitration in Presence of Jury.** A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(f) **Judgment on the Arbitration Decision.**

- (1) **Termination of Action Before Judgment.** A dismissal or consent judgment may be filed at any time before entry of judgment on an award.
- (2) **Judgment Entered on Award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial de novo within thirty days after the award is served, then the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

(g) **Agreement for Binding Arbitration.**

- (1) **Written Agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. The agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.
- (2) **Entry of Judgment on a Binding Decision.** The arbitrator shall file the decision with the clerk of superior court, and it shall become a judgment in the same manner as set out in N.C.G.S. § 1-569.25.

(h) **Modification Procedure.** Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court-ordered arbitration.

Rule 13. Rules for Summary Trials

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

Rule 23 of the General Rules of Practice for the Superior and District Courts also provides for summary jury proceedings. While parties may request the court's permission to utilize that process, it may not be substituted in lieu of a mediated settlement conference or other procedures outlined in these rules.

(a) **Pre-summary Trial Conference.** Prior to the summary trial, counsel for the parties shall attend a pre-summary trial conference with the presiding officer selected by the parties under Rule 10(c)(10). The presiding officer shall issue an order that does the following:

- (1) Confirms the completion of discovery or sets a date for the completion.
- (2) Orders that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses.
- (3) Schedules all outstanding motions for hearing.

- (4) Sets dates by which the parties exchange:
 - a. a list of the party's respective issues and contentions for trial;
 - b. a preview of the party's presentation, including notations as to the document (e.g., deposition, affidavit, letter, or contract) that supports that evidentiary statement;
 - c. all documents or other evidence that the party will rely on in making its presentation; and
 - d. all exhibits that the party will present at the summary trial.
- (5) Sets the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day).
- (6) Establishes a procedure by which private, paid jurors will be located and assembled by the parties, if a summary jury trial is to be held, and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated.
- (7) Sets a date for the summary jury trial.
- (8) Addresses such other matters as are necessary to place the matter in a posture for summary trial.

(b) **Presiding Officer to Issue Order if Parties Unable to Agree.** If the parties are unable to agree upon the dates and procedures set out in subsection (a) of this rule, then the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

(c) **Stipulation to a Binding Summary Trial.** At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial will be binding on the parties and that the verdict will become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

(d) **Evidentiary Motions.** Counsel shall exchange and file motions in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree, prior to the hearing of the motions, as to whether the presiding officer's rulings will be binding in all subsequent hearings or nonbinding and limited to the summary trial.

(e) **Jury Selection.** In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial

order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors, or a lesser number as the parties agree, shall submit to questioning by the presiding officer and each party for such time as is allowed under the summary trial pretrial order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or a lesser number as the parties may agree, shall constitute the panel.

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

(f) **Presentation of Evidence and Arguments of Counsel.** Each party may make a brief opening statement. Following the opening statements, each side shall present its case within the time limits set in the summary trial pretrial order and may reserve a portion of its time for presenting rebuttal or surrebuttal evidence. Although closing arguments are generally omitted from a summary trial, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

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

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

(g) **Jury Charge.** In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and any additional instructions that the presiding officer deems appropriate.

(h) **Deliberation and Verdict.** In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry, and/or an inquiry as to damages. If, after diligent efforts and a reasonable time to deliberate, the jury is unable to reach a unanimous verdict, then the presiding officer may recall the jurors and encourage them to reach a verdict

quickly or inform them that they may return separate verdicts, in which case the presiding officer may distribute separate verdict forms.

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

(i) **Jury Questioning.** In a summary jury trial, the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if a brief conference is utilized, then it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pretrial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

(j) **Settlement Discussions.** Upon retirement of the jury in a summary jury trial or the presiding officer in a summary bench trial, the parties and/or their counsel shall meet for settlement discussions. Following the jury's verdict or decision by the court, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide input or guidance, as the presiding officer deems appropriate.

(k) **Modification of Procedure.** Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these rules for summary trial.

(l) **Report of Presiding Officer.** The presiding officer shall file a written report no later than ten days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of superior court in the county where the action is pending, with a copy of the report provided to the senior resident superior court judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. In the event that an agreement was reached upon all issues in the dispute, the report shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties to the court.

Rule 14. Local Rule Making

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

Rule 15. Definitions

(a) “Senior resident superior court judge,” as used throughout these rules, refers to the judge or, as appropriate, the judge’s designee.

The phrase “senior resident superior court judge” also refers to a special superior court judge assigned to any action designated as a mandatory complex business case under N.C.G.S. § 7A-45.4, and to any judge to whom a case is assigned under Rule 2.1 and Rule 2.2 of the General Rules of Practice for the Superior and District Courts.

(b) “NCAOC form” refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

Rule 16. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

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