

In the Supreme Court of North Carolina

Order Adopting Amendments To The Rules Implementing Statewide Mediated Settlement Conferences And Other Settlement Procedures In Superior Court Civil Actions

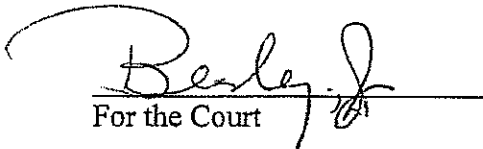
WHEREAS, section 7A-38.1 of the North Carolina General Statutes codifies a statewide system of court-ordered mediated settlement conferences to be implemented in superior court judicial districts in order to facilitate the resolution of civil actions within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

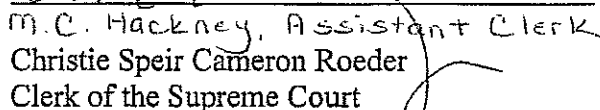
NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 15th day of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules of the North Carolina Supreme Court Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J.,
Recused.


For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February, 2014.


M.C. Hackney, Assistant Clerk
Christie Speir Cameron Roeder
Clerk of the Supreme Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

- A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.**
Pursuant to N.C.G.S. § 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the court pursuant to these Rules.
- B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.** In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise his or her client(s) regarding the settlement procedures approved by these Rules

and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

- (1) **Order by Senior Resident Superior Court Judge.** 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 pre-trial 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/her order upon motion of a party pursuant to Rule 1.C(6) 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 some other 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). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on a North Carolina Administrative Office of the Courts (NCAOC) form, and shall include:
 - (a) the type of other settlement procedure requested;
 - (b) the name, address and telephone number of the 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 selected; 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 mediated settlement conference as originally ordered by the court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-13 herein or by local rules of the superior court in the county or 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. Rules 1.C(4) and 3.B herein shall govern the content of the order and the date of completion of the conference.
- (4) **Content of Order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on a NCAOC form.
- (5) **Motion for Court Ordered Mediated Settlement Conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the senior resident superior court judge within 10 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.
- (6) **Motion to Dispense with Mediated Settlement Conference.** A party may move the senior resident superior court judge to dispense with the mediated settlement conference ordered by the judge. Such motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as non-binding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through arbitration.

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 said districts shall, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial 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/her order upon motion of a party pursuant to Rule 1.D(6) 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 mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) 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 (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement 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 mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to designate their own mediator and the deadline by which that designation should be made; (4) 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 (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.
- (4) **Application of Rule 1.C.** The provisions of Rules 1.C(2), (5) and (6) shall apply to Rule 1.D except for the time limitations set out therein.

- (5) **Deadline for Completion.** The provisions of Rule 3.B determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the senior resident superior court judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.
- (6) **Selection of Mediator.** The parties may designate or the senior resident superior court judge may appoint, mediators pursuant to the provisions of 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 conducted pursuant to Rule 1.D.
- (7) **Use of Other Settlement Procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C (2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

COMMENT TO RULE 1

Comment to Rule 1.C(6).

If a party is unable to pay the costs of the conference or lives a great distance from the conference site, the court may want to consider Rules 4 or 7 prior to dispensing with mediation for good cause. Rule 4 provides a way for a party to attend electronically and Rule 7 provides a way for parties to attend and obtain relief from the obligation to pay the mediator's fee.

RULE 2. DESIGNATION OF MEDIATOR

- A. **DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may designate a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Designation of Mediator by Agreement within 21 days of the court's order, however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the settlement conference. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon

the designation and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on a NCAOC form.

B. APPROVAL OF PARTY NOMINEE ELIMINATED. As of January 1, 2006, the former Rule 2.B rule allowing the approval of a non-certified mediator is rescinded. Beginning on that date, the court shall appoint mediators certified by the Dispute Resolution Commission (Commission), pursuant to Rule 2.C which follows.

C. APPOINTMENT OF MEDIATOR BY THE COURT. If the parties cannot agree upon the designation of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the designation of a mediator and have been unable to agree. The motion shall be on a form approved by the NCAOC.

Upon receipt of a motion to appoint a mediator, or failure of the parties to file a Designation of Mediator by Agreement with the court within 21 days of the court's order, the senior resident superior court judge shall appoint a mediator, certified pursuant to these Rules, who has expressed a willingness to mediate actions within the judge's district.

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

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from said district's court appointment list by the Commission or the senior resident superior court judge.

The Commission shall furnish to the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided

electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the 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.

- D. MEDIATOR INFORMATION DIRECTORY.** To assist the parties in designating a mediator, the Commission shall assemble, maintain and post on its website a list of certified superior court mediators. The list shall supply contact information for mediators and identify court districts that they are available to serve. Where a mediator has supplied it to the Commission, the list shall also provide biographical information, including information about an individual mediator's education, professional experience and mediation training and experience.
- E. DISQUALIFICATION OF MEDIATOR.** Any party may move the senior resident superior court judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

- A. WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties, and other parties required to attend.
- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to 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 pursuant to 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 suggestion of the mediator.

- D. **RECESSES.** The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

- E. **THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS.** The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

- (I) The following persons shall attend a mediated settlement conference:
 - (a) **Parties.**
 - (i) All individual parties;
 - (ii) Any party that is not a natural person or a governmental entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action or who has been authorized to negotiate on behalf of such party and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, if a specific procedure is required by law (*e.g.*, a statutory pre-audit certificate) or the party'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;

- (iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

 - (b) **Insurance Company Representatives.** 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 such carrier shall be represented at the 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 such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

 - (c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.
- (2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:
- (a) By agreement of all parties and persons required to attend and the mediator, or
 - (b) By order of the senior resident superior court judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.
- 3) **Scheduling.** Participants required to attend shall promptly notify the mediator after designation or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been

scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to 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 conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically recorded. If an agreement is upon all issues, 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 is upon all issues at the conference, the parties shall give a copy of their signed agreement, consent judgment or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.
- (3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action or before expiration of the mediation deadline, whichever is longer.
- (4) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s).

- D. PAYMENT OF MEDIATOR'S FEE.** The parties shall pay the mediator's fee as provided by Rule 7.
- E. RELATED CASES.** Upon application by 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 case 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 pursuant to this rule. Any such attorney, party, or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to 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 precludes recording either surreptitiously or with the agreement of the parties.

COMMISSION COMMENTS TO RULE 4

Commission Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, *i.e.*, voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

Commission Comment to Rule 4.E.

Rule 4.E was adopted to clarify a senior resident superior court judge's authority in those situations where there may be a case related to a superior court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a superior court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party or insurance carrier representative in the superior court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E specifically authorizes a senior resident superior court judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related superior court case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCE OR PAY MEDIATOR'S FEE

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section who fails to attend or to pay without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

- (1) **Control of Conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.
- (2) **Private Consultation.** The mediator may communicate privately with any participant prior to and during the 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 MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the conference:
 - (a) The process of mediation;
 - (b) The differences between mediation and other forms of conflict resolution;
 - (c) The costs of the mediated settlement conference;
 - (d) That the mediated settlement conference is not a trial, the mediator is not a judge and the parties retain their right to trial if they do not reach settlement;
 - (e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (g) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;
 - (h) The duties and responsibilities of the mediator and the participants; and
 - (i) 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 conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.
- (4) **Reporting Results of Mediation.**
 - (a) The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to or during a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a mediated settlement conference was not ordered by the court. Said report shall be filed on a NCAOC form within 10 days of the conclusion of the conference or of being notified of the settlement and shall include the names of those persons attending the mediated settlement conference if a conference was held. 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 at, prior to or during a recess of the conference, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s) and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court. The mediator shall advise the parties that Rule 4.C requires them to file their consent judgment or voluntary dismissal with the court within 30 days or within 90 days if the state or a political subdivision thereof is a party to the action, or before expiration of the mediation deadline, whichever is longer. The mediator shall indicate on the report that the parties have been so advised.
 - (c) The Commission or the NCAOC may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.
 - (d) Mediators who fail to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. Such sanctions shall include, but not be limited to, fines or other monetary penalties, decertification as a

mediator and any other sanction available through the power of contempt. The senior resident superior court judge shall notify the Commission of any action taken against a mediator pursuant to this section.

- (5) **Scheduling and Holding the Conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a 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 of more of the parties has not paid an advance fee deposit required by that agreement.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

- A. BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator. The terms of the parties' agreement with the mediator notwithstanding, Section D below shall apply to issues involving the compensation of the mediator. Sections E and F below shall apply unless the parties' agreement provides otherwise.
- B. BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of \$150 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of \$150 that is due upon appointment.
- C. CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A, the parties may select a certified mediator to conduct their 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 the \$150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B and any postponement fee due and owing pursuant to Rule 7.E.

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 fee. Any mediator conducting a settlement conference pursuant to 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 indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration 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 request.

E. POSTPONEMENTS AND FEES.

- (1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.
- (2) A conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reasons for the postponement and a finding of good cause by the mediator. Good cause shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including but not limited to, a party or attorney's illness, a death in a party or attorney's family, a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the Guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts or inclement weather such that travel is prohibitive. Where good cause is found, a mediator shall not assess a postponement fee.
- (3) The settlement of a case prior to the scheduled date for mediation shall be good cause provided that the mediator was notified of the settlement immediately after it was reached and the mediator received notice of the settlement at least 14 calendar days prior to the date scheduled for mediation.
- (4) Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of \$150 shall be paid to the mediator if the postponement is allowed, except that if the request for postponement is made within seven calendar days of the scheduled date for mediation, the fee shall be \$300. The

postponement fee shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

- (5) If all parties select the certified mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the named 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 conference.

COMMENTS TO RULE 7

Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage or any other out-of-pocket expenses associated with a court-ordered mediation.

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/her fee according to the amount of time s/he spent in an effort to schedule the matter 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.

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

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

The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. For certification, a person shall:

- A.** Have completed a minimum of 40 hours in a trial court mediation training program certified by the Commission, or have completed a 16-hour supplemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;
- B.** Have the following training, experience and qualifications:
 - (1)** An attorney may be certified if he or she:
 - (a)** is either:
 - (i)** a member in good standing of the North Carolina State Bar; or
 - (ii)** a member similarly in good standing of the bar of another state and a graduate of a law school recognized as accredited by the North Carolina Board of Law Examiners; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides 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 practice as an attorney; and
 - (b)** has at least five years of experience after date of licensure as a judge, practicing attorney, law professor and/or mediator or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B(1) or Rule 8.B(2).

- (2)** A non-attorney may be certified if he or she has:

- (a) completed a six-hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law and common legal issues arising in superior court cases, provided by a trainer certified by the Commission;
- (b) 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 claimed in Rule 8.B(2)(c);
- (c) completed either:
 - (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Commission; and after completing the 20-hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and possess 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 January 1, 2005, and have 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 possess 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 January 1, 2005.

C. Have Completed 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 case.
- (2) **Non-attorney applicants.** Non-attorney applicants for certification shall observe three mediated settlement

conferences in addition to those required by (1) above and which are conducted by at least two different mediators. At least one of these additional observations shall be of a superior court case.

- (3) Conferences eligible for observation.** Conferences eligible for observation under (1) and (2) above shall be those in cases pending before the North Carolina Superior Court, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the United States District Courts for North Carolina that are ordered to mediation or conducted by 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 which are mediated by agreement of the parties incorporating the rules for mediation of one of the entities named above.

All such conferences shall be conducted by certified superior court mediators pursuant to rules adopted by one of the above entities and shall be observed from their beginning to settlement or impasse. Observations shall be reported on an NCAOC form.

- (4) All observers shall conform their conduct to the Commission's Requirements for Observer Conduct.**

- D.** Demonstrate familiarity with the statute, rules and practice governing mediated settlement conferences in North Carolina;
- E.** Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. An applicant for certification shall disclose on his/her application(s) any of the following: any pending criminal matters; any criminal convictions; and any disbarments or other revocations or suspensions of any professional license or certification, including suspension or revocation of any license, certification, registration or qualification to serve as a mediator in another state or country for any reason other than to pay a renewal fee. In addition, an applicant for certification shall disclose on his/her application(s) any of the following which occurred within ten years of the date the application(s) is filed with the Commission: any pending disciplinary complaint(s) filed with, or any private or public sanctions(s) imposed by, a professional

licensing or regulatory body, including any body regulating mediator conduct; any judicial sanction(s); any civil judgment(s); any tax lien(s); or any bankruptcy filing(s). Once certified, a mediator shall report to the Commission within (30) days of receiving notice any subsequent criminal conviction(s); any disbarment(s) or revocation(s) of a professional license(s), other disciplinary complaint(s) filed with or actions taken by, a professional licensing or regulatory body; any judicial sanction(s); any tax lien(s); any civil judgment(s) or any filing(s) for bankruptcy.

- F. Submit proof of qualifications set out in this section on a form provided by the Commission;
- G. Pay all administrative fees established by the NCAOC upon the recommendation of the Commission;
- H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the court pursuant to Rule 7;
- I. Comply with the requirements of the Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.);
- J. Once certified, agree to make reasonable efforts to assist mediator certification applicants in completing their observation requirements.
- K. No mediator who held a professional license and relied upon that license to qualify for certification under subsections B(1) or B(2) above shall be decertified or denied recertification because that mediator's license lapses, is relinquished or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished or becomes inactive due to disciplinary action or the threat of same from his/her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or who becomes inactive, shall report such matter to the Commission.

If a mediator's professional license lapses, is relinquished or becomes inactive, s/he shall be required to complete all otherwise voluntary continuing mediator education requirements adopted by the Commission as part of its annual certification renewal process and to report completion of those hours to the Commission's office annually.

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 above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A.** Certified training programs for mediators seeking only certification as superior court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:
- (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 adopted by the Supreme Court;
 - (5) Statutes, rules and practice governing mediated settlement conferences in North Carolina;
 - (6) Demonstrations of mediated settlement conferences;
 - (7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed, and evaluated by program faculty; and
 - (8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practice 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 subjects in Rule 9.A and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).
- C. A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these Rules or attended in other states 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 established 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 upon all of the relevant details of the procedure, (including items a-e 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 mediated settlement conferences, the following settlement procedures are authorized by these Rules:
 - (1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party;
 - (2) **Arbitration (Rule 12).** Non-binding arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and binding arbitration, in which a neutral renders a binding decision following presentations by the parties; and
 - (3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, 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; and binding summary trials, 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 pursuant to these rules shall be conducted no later than the date of 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 Neutrals.**
 - (a) **Authority of neutrals.**
 - (i) **Control of proceeding.** The neutral evaluator, arbitrator or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.
 - (ii) **Scheduling the proceeding.** The neutral evaluator, arbitrator or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s). In the absence of agreement, such neutral shall select the date for the proceeding.
 - (b) **Duties of neutrals.**
 - (i) The neutral evaluator, arbitrator or presiding officer shall define and describe the following at the beginning of the proceeding.
 - (a) The process of the proceeding;
 - (b) The differences between the proceeding and other forms of conflict resolution;
 - (c) The costs of the proceeding;

- (d) The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(1) and Rule 10.C(6) herein; and
 - (e) The duties and responsibilities of the neutral(s) and the participants.
- (ii) **Disclosure.** Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.
 - (iii) **Reporting results of the proceeding.** The neutral evaluator, arbitrator or presiding officer shall report the result of the proceeding to the court on a NCAOC form. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.
 - (iv) **Scheduling and holding the proceeding.** It is the duty of the neutral evaluator, arbitrator or presiding officer to schedule the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the senior resident superior court judge.
- (3) **Extensions of Time.** A party or a neutral may request the senior resident superior court judge to extend the deadline for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.
 - (4) **Where Procedure is Conducted.** The neutral evaluator, arbitrator or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, 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 cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions or the trial of the case, except by order of the senior resident superior court judge.
- (6) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:
- (a) In proceedings for sanctions under this section;
 - (b) In proceedings to enforce or rescind a settlement of the action;
 - (c) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals; or
 - (d) In proceedings to enforce laws concerning juvenile or elder abuse.

As used in this section, the term “neutral observer” includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at the proceeding conducted under this subsection or during its recesses shall be enforceable unless it 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 mediated settlement conference or other settlement proceeding. No mediator, other neutral or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators

or other neutrals and proceedings to enforce laws concerning juvenile or elder abuse.

- (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 binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.
- (8) **Ex Parte Communication Prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.
- (9) **Duties of the Parties.**
 - (a) **Attendance.** All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, 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 such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference. The notice shall be on a NCAOC form.
 - (b) **Finalizing agreement.**
 - (i) If an agreement is reached on all issues at the neutral evaluation, arbitration or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within 14 days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) 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(s) to the neutral evaluator, arbitrator, or presiding officer, and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within 14 days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the senior resident judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s).

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C(12).

(10) **Selection of Neutrals in Other Settlement Procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the order requiring a mediated settlement conference.

The notice shall be on a NCAOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a 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, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

- (12) **Compensation of the Neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees 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 Neutral's Fee.** Any person required to attend a settlement procedure or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and the rules promulgated by the Supreme Court to implement that section, who fails to attend or to pay the fee without good cause, shall be subject to the contempt powers of the court and monetary sanctions imposed by a resident or presiding superior court judge. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, neutral fees, expenses, and loss of earnings incurred by persons attending the procedure. A party seeking sanctions against a person or a resident or presiding judge upon his/her own motion shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

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

- B. WHEN CONFERENCE IS TO BE HELD.** As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.
- C. PRE-CONFERENCE SUBMISSIONS.** No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, 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 evaluator and to the other parties pursuant to this paragraph shall not be filed with the court.
- D. REPLIES TO PRE-CONFERENCE SUBMISSIONS.** No later than 10 days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the court.
- E. CONFERENCE PROCEDURE.** Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.
- F. MODIFICATION OF PROCEDURE.** Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.
- G. EVALUATOR'S DUTIES.**
- (1) **Evaluator's Opening Statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C(2)(b):
- (a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions

are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Evaluator.** In addition to the written report to the court required under these rules at the conclusion of the neutral evaluation conference, the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing and shall not inform the court thereof.

(3) **Report of Evaluator to Court.** Within 10 days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the court using a NCAOC form. The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended and the names of any party, attorney or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure 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 non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the senior resident superior court judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

Arbitrator's Canon of Ethics. Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina (Canons). Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

- (1) **Pre-hearing Exchange of Information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:
- (a) Lists of witnesses they expect to testify;
 - (b) Copies of documents or exhibits they expect to offer into evidence; and
 - (c) A brief statement of the issues and contentions of the parties.

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

- (2) **Exchanged Documents Considered Authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is 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.** Copies of exchanged documents or exhibits are admissible in arbitration hearings in lieu of the originals.

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 (N.C.R.Civ.P.) shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these Rules.
- (3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.
 - (a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B(1).
 - (b) Pendency of a motion shall not be 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, except as to privilege, in an arbitration hearing 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.** Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. 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 list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order 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 record 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 representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.
- (9) **Hearing Concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

- (1) **Filing the Award.** The arbitrator shall file a written award signed by the arbitrator and filed with the clerk of superior court in the county where the action is pending, with a copy to the senior resident superior court judge within 20 days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be a NCAOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. 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 and conclusions of law or opinions supporting an award are required.
- (3) **Scope of Award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed 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 of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. 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 a written demand for trial *de novo* with the court, and service of the demand on all parties, on a NCAOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section 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.** Dismissals or a 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 30 days after the award is served, 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. Such 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. §1-569.1ff.

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 summary trials 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 also provide for summary jury trials. While parties may request of the court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. **PRE-SUMMARY TRIAL CONFERENCE.**

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C(10). That presiding officer shall issue an order which shall:

- (1) Confirm the completion of discovery or set a date for the completion;
- (2) Order 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) Schedule all outstanding motions for hearing;
- (4) Set dates by which the parties exchange:
 - (a) A list of parties' 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, contract) which supports that evidentiary statement;
 - (c) All documents or other evidence upon which each party will rely in making its presentation; and
 - (d) All exhibits to be presented at the summary trial.
- (5) Set 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) Establish 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) Set a date for the summary jury trial; and
 - (8) Address 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 Section A of this Rule, 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 be binding and the verdict 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 said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding 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 such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial 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 12 seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/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 non-binding 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 which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, 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 attorneys for each party without live testimony. Where the credibility of a witness is important, 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 by both 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 such additional instructions as 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, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict

quickly and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate 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, the decision shall be rendered no later than 10 days after the close of the hearing or filing of briefs whichever is longer.

- 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 such a conference is used, 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 pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.
- J. **SETTLEMENT DISCUSSIONS.** Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, 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 such 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 10 days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of the superior court in the county where the action is pending, with a copy to the senior resident court judge. The presiding officer's report shall inform the court of the absence of any party, attorney or insurance company representative 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. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING

The senior resident superior court judge of any 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 mediated settlement conferences in that district.

RULE 15. DEFINITIONS

- A. The term, senior resident superior court judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

- B. The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

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 N.C.R.Civ.P.