

NORTH CAROLINA REPORTS

VOLUME 360

SUPREME COURT OF NORTH CAROLINA



7 OCTOBER 2005

17 NOVEMBER 2006

RALEIGH
2007

**Order Adopting Rules Implementing Mediation In Matters
Before The Clerk Of Superior Court**

WHEREAS, section 7A-38.3B of the North Carolina General Statutes establishes a statewide system of mediations to facilitate the settlement of matters pending before Clerks of Superior Court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) enables this Court to implement section 7A-38.3B by adopting rules and amendments to rules concerning said mediations.

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3B(b), Rules Implementing Mediation In Matters Before The Clerk Of Superior Court are hereby adopted. These amended Rules shall be effective on the 1st of March, 2006.

Adopted by the Court in conference the 26th day of January, 2006. The Appellate Division Reporter shall promulgate by publication as soon as practicable the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court adopted through this action in the advance sheets of the Supreme Court.

Newby, J.
For the Court

**RULES IMPLEMENTING MEDIATION IN MATTERS
BEFORE THE CLERK OF SUPERIOR COURT**

TABLE OF CONTENTS

1. Ordering the Mediation.
2. Selection of the Mediator.
3. Conducting the Mediation.
4. Duties of Participants in the Mediation.
5. Sanctions for Failure to Attend the Mediation.
6. Authority and Duties of Mediators.
7. Compensation of the Mediator.
8. Mediator Qualifications.
9. Mediator Training Program Qualifications.
10. Procedural Details.
11. Definitions.
12. Time Limits.

RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK.

A. PURPOSE OF MANDATORY MEDIATION.

These Rules are promulgated pursuant to G.S. 7A-38.3B to implement mediation in certain cases within the Clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings 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 other settlement efforts voluntarily either prior to or after the filing of a matter with the Clerk.

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 a party to a matter before the Clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.

(1) **Order by The Clerk of Superior Court.** The Clerk of Superior Court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the Clerk has original or exclusive jurisdiction, except those matters under NCGS Chapters 45 and 48 and those matters in which the jurisdiction of the Clerk is ancillary.

(2) **Content of Order.** The order shall be on an AOC form and shall:

- (a) require that a mediation be held in the case;
- (b) establish deadlines for the selection of a mediator and completion of the mediation;
- (c) state the names of the persons and entities who shall attend the mediation;

- (d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;
 - (e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and
 - (f) state that those persons shall be required to pay the mediator's fee in shares determined by the Clerk.
- (3) **Motion for Court Ordered Mediation.** In matters not ordered to mediation, any party, interested persons, or fiduciary may file a written motion with the Clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the N.C.R.C.P. on non-moving parties, interested persons, and fiduciaries designated by the Clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within 5 days after the date of the service of the motion. Thereafter, the Clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.
- (4) **Informational Brochure.** The Clerk shall serve a brochure prepared by the Dispute Resolution Commission explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C.(1) and 1.C.(3).
- (5) **Motion to Dispense With Mediation.** A named party, interested person, or fiduciary may move the Clerk of Superior Court to dispense with a mediation ordered by the Clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the Clerk may grant the motion.
- (6) **Dismissal of Petition For the Adjudication of Incompetence.** The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

RULE 2. SELECTION OF MEDIATOR.

- A. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may select a mediator cer-

tified by the Dispute Resolution Commission by agreement within a period of time as set out in the Clerk's order. However, the parties may only select mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the Clerk a Notice of Selection of Mediator by Agreement within the period set out in the Clerk's order; however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the selection and rate of compensation; and state under what Rules the mediator is certified. The notice shall be on an AOC form.

- B. APPOINTMENT OF MEDIATOR BY THE CLERK.** In the event a notice of selection is not filed with the Clerk within the time for filing stated in the Clerk's order, the Clerk shall appoint a mediator certified by the Dispute Resolution Commission. The Clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The Clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the Clerk.

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

- C. MEDIATOR INFORMATION DIRECTORY.** The Dispute Resolution Commission shall maintain for the consideration of the Clerks of Superior Court and those selecting mediators for matters within the Clerk's jurisdiction a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's web site.

- D. DISQUALIFICATION OF MEDIATOR.** Any person ordered to attend a mediation pursuant to these Rules may move the Clerk of Superior Court of the county in which the matter 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 selected or appointed

pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATION.

- A. WHERE MEDIATION IS TO BE HELD.** The mediation may be held in any location to which all the persons ordered to attend and the mediator agree. In the absence of such an agreement, the mediation shall be held in the courthouse or other public or community building in the county where the matter is pending. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the time and location of the mediation to all persons ordered to attend.
- B. WHEN MEDIATION IS TO BE HELD.** The Clerk's order issued pursuant to Rule 1.C.(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B.(5) and shall conduct the mediation before that date unless the date is extended by the Clerk.
- C. REQUEST TO EXTEND DEADLINE FOR COMPLETION.** The mediator or any person ordered to attend the mediation may request the Clerk of Superior Court to extend the deadline for completion of the mediation. Such request shall state the reasons the extension is sought and shall be delivered to all persons ordered to attend and the mediator. The Clerk may grant the request without hearing by setting a new deadline for the completion of the mediation, which date may be set at any time prior to the hearing. Notice of the Clerk's decision shall be delivered to all persons ordered to attend and the mediator by the person who sought the extension and shall be filed with the court.
- D. RECESSES.** The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.
- E. THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS.** The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the Clerk of Superior Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS.

A. ATTENDANCE.

- (1) Persons ordered by the Clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B. or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:
 - (a) By agreement of all persons ordered to attend and the mediator; or
 - (b) By order of the Clerk of Superior Court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.
- (2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.
- (3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.
- (4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.
- (5) Other persons may participate in the mediation at the discretion of the mediator.
- (6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any signifi-

cant problems they may have with dates for mediation sessions before the completion deadline and shall keep the mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

B. FINALIZING AGREEMENT.

- (1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the Clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the Clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).
- (2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the Clerk but they may be offered into evidence at the hearing of the matter and may be considered by the Clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to NCGS 7A-38. 3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

“This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter.”

- C. PAYMENT OF MEDIATOR'S FEE.** The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION.

If a person ordered to attend a mediation pursuant to these Rules fails to attend without good cause, the Clerk may impose upon the person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another 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 persons ordered to attend. The Clerk may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the Clerk imposes sanctions, the Clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS.

A. AUTHORITY OF MEDIATOR.

- (1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court that shall contain a provision prohibiting mediators from prolonging a mediation unduly.
- (2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

B. DUTIES OF MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the mediation:
 - (a) The process of mediation;
 - (b) The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;

- (c) That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
 - (d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (e) Whether and under what conditions communications with the mediator will be held in confidence during the conference;
 - (f) The inadmissibility of conduct and statements as provided by G.S. 7A-38.3B;
 - (g) The duties and responsibilities of the mediator and the participants; and
 - (h) That any agreement reached will be reached by mutual consent and reported to the Clerk as provided by rule.
- (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 mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.
- (4) **Reporting Results of Mediation.**
- (a) The mediator shall report to the court on an AOC form within 5 days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within 5 days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.
 - (b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the Clerk as required by Rule 4.B. Mediators

shall provide statistical data for evaluation of the mediation program as required from time to time by the Dispute Resolution Commission or the Administrative Office of the Courts. Mediators shall not be required to send agreements reached in mediation to the Clerk, except in Estate and Guardianship matters and other matters which may be resolved only by order of the Clerk.

- (c) Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.
- (5) **Scheduling and holding the mediation.** It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the Clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the Clerk of Superior Court.
- (6) **Distribution of mediator evaluation form.** At the mediation, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per person with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR.

- A. BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.
- B. BY ORDER OF THE CLERK.** When the mediator is appointed by the Clerk, the parties shall compensate the mediator for mediation services at the rate of \$125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of \$125 that is due upon appointment.
- C. PAYMENT OF COMPENSATION.** In matters within the Clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by

the parties. Payment shall be due upon completion of the mediation.

In all other matters before the Clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the Clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. CHANGE OF APPOINTED MEDIATOR. Parties who fail to select a mediator within the time set out in the Clerk's order and then desire a substitution after the Clerk has appointed a mediator, shall obtain the approval of the Clerk for the substitution. If the Clerk approves the substitution, the parties shall pay the Clerk's original appointee the \$125 one time, per case administrative fee provided for in Rule 7.B. unless the Clerk determines that to do so would be unnecessary or inequitable.

E. INDIGENT CASES. No person ordered to attend a mediation found to be indigent by the Clerk for the purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the Clerk of Superior Court to attend may move the Clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the Clerk shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The Clerk shall enter an order granting or denying the person's request. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from persons found by the court to be indigent.

F. POSTPONEMENTS.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

- (2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.
- (3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of \$125 shall be paid to the mediator if the postponement is allowed or if the request is within two (2) business days of the scheduled date the fee shall be \$250. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the Clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement.
- (4) If all persons ordered to attend select the 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.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.

Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Clerk of Superior Court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the Superior Court pursuant to G.S. 5A.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Clerk of Court mediators.

- A. For appointment by the Clerk as mediator in all cases within the Clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Dispute Resolution

Commission for either the superior or district court mediation programs;

- B. For appointment by the Clerk as mediator in guardianship and estate matters within the Clerk's jurisdiction, a person shall be certified as a mediator by the Dispute Resolution Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Dispute Resolution Commission pursuant to Rule 9 concerning estate and guardianship matters within the Clerk's jurisdiction;
- C. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;
- D. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission; and
- E. Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the Clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any county in which he or she has served as a mediator or the Standards of Conduct. 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 certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the Clerk of Superior Court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:
 - (1) Factors distinguishing estate and guardianship mediation from other types of mediations;
 - (2) The aging process and societal attitudes toward the elderly, mentally ill, and disabled;
 - (3) Ensuring full participation of Respondents and identifying interested persons and nonparty participants;

- (4) Medical concerns of the elderly, mentally ill and disabled;
- (5) Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;
- (6) Family dynamics relative to the elderly, mentally ill, and disabled and to the families of deceased persons;
- (7) Assessing physical and mental capacity;
- (8) Availability of community resources for the elderly, mentally ill and disabled;
- (9) Principles of guardianship law and procedure;
- (10) Principles of estate law and procedure;
- (11) Statute, Rules, and forms applicable to mediation conducted under these Rules; and
- (12) Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its web site.

- B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.B. 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 Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.
- C. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. PROCEDURAL DETAILS.

The Clerk of Superior Court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

RULE 11. DEFINITIONS.

- A.** The term, Clerk of Superior Court, as used throughout these rules, shall refer both to said Clerk or Assistant Clerk.
- B.** The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 12. 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 Rules of Civil Procedure.