

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules of the North Carolina Supreme Court for the Dispute Resolution Commission

WHEREAS, section 7A-38.2 of the North Carolina General Statutes establishes the Dispute Resolution Commission to provide for the certification and qualification of mediators, other neutrals, and mediation and other neutral training programs, the regulation of mediators, other neutrals, and trainers and managers affiliated with certified or qualified programs, and

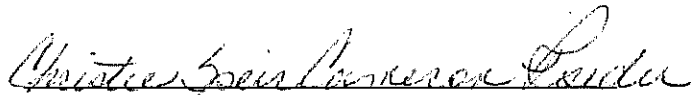
WHEREAS, N.C.G.S. § 7A-38.2(a) provides for this Court to implement section 7A-38.2 by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.2(a), the Supreme Court's Rules for the Dispute Resolution Commission are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st day of January, 2012.

Adopted by the Court in conference the 6th day of October, 2011. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Supreme Court's Rules for the Dispute Resolution Commission amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.


For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2011.


Christie Speir Cameron Baeder
Clerk of the Supreme Court

REVISED RULES OF THE NORTH CAROLINA SUPREME COURT FOR THE DISPUTE RESOLUTION COMMISSION

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I. OFFICERS OF THE COMMISSION

A. Officers. The North Carolina Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

B. Appointment; Elections.

- (1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina (Supreme Court).
- (2) The vice chair shall be elected by vote of the full Commission for a two-year term and shall serve in the absence of the chair.

C. Committees.

- (1) The chair may appoint such standing and *ad hoc* committees as are needed and designate Commission members to serve as committee chairs.
- (2) The chair may, with approval of the full Commission, appoint ex-officio members to serve on either standing or *ad hoc* committees. Ex-officio members may vote upon issues before committees but not upon issues before the Commission.

II. COMMISSION OFFICE; STAFF

- A. **Office.** The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.
- B. **Staff.** The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive secretary and to: (1) fix his or her terms of employment, salary and benefits; (2) determine the scope of his or her authority and duties and (3) delegate to the executive secretary the authority to employ necessary secretarial and staff assistants, with the approval of the director of the NCAOC.

III. COMMISSION MEMBERSHIP

- A. **Vacancies.** Upon the death, resignation or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy created by the death, resignation or permanent incapacitation be filled. The appointment of a successor shall be for the former member's unexpired term.
- B. **Disqualifications.** If, for any reason, a Commission member becomes disqualified to serve, that member's appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, the appointment of a successor shall be for the former member's unexpired term.
- C. **Conflicts of Interest and Recusals.** All members and ex-officio members of the Commission must:
 - (1) Disclose any present or prior interest or involvement in any matter pending before the Commission or its committees for decision upon which the member or ex-officio member is entitled to vote;
 - (2) Recuse himself or herself from voting on any such matter if his or her impartiality might reasonably be questioned; and
 - (3) Continue to inform themselves and to make disclosures of subsequent facts and circumstances requiring recusal.
- D. **Compensation.** Pursuant to N.C.G.S. § 138-5, ex-officio members of the Commission shall receive no compensation for their services but may be reimbursed for their out-of-pocket expenses necessarily incurred on behalf of the Commission and for their mileage, subsistence and other travel expenses at the per diem rate established by statutes and regulations applicable to state boards and commissions.

IV. MEETINGS OF THE COMMISSION

- A. Meeting Schedule.** The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.
- B. Quorum.** A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting except that decisions to dismiss complaints or impose sanctions pursuant to Rule VIII of these Rules or to deny certification or certification renewal or to revoke certification pursuant to Rule IX of these Rules shall require an affirmative vote consistent with those Rules.
- C. Public Meetings.** All meetings of the Commission for the general conduct of business and minutes of such meetings shall be open and available to the public except that meetings, portions of meetings or hearings conducted pursuant to Rules VIII and IX of these Rules may be closed to the public in accordance with those Rules.
- D. Matters Requiring Immediate Action.** If, in the opinion of the chair, any matter requires a decision or other action before the next regular meeting of the Commission and does not warrant the call of a special meeting, it may be considered and a vote or other action taken by correspondence, telephone, facsimile or other practicable method; provided, all formal Commission decisions taken are reported to the executive secretary and included in the minutes of Commission proceedings.

V. COMMISSION'S BUDGET

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

VI. POWERS AND DUTIES OF THE COMMISSION

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in this state and to ensure the availability of high quality mediation training programs and the competence of mediators. Specifically, the Commission is authorized and directed to do the following:

- A.** Review and approve or disapprove applications of (1) persons seeking to have training programs certified; (2) persons seeking certification as qualified to provide mediation training; (3) attorneys and non-attorneys seeking certification as qualified to conduct mediated settlement conferences and mediations; and (4) persons or organizations seeking reinstatement following a prior suspension or decertification.

- B.** Review applications as against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conference/mediation programs operating under the Commission's jurisdiction and as against such other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require their completion for approval.
- C.** Compile and maintain lists of certified trainers and training programs along with the names of contact persons, addresses and telephone numbers and make those lists available on-line or upon request.
- D.** Institute periodic review of training programs and trainer qualifications and re-certify trainers and training programs that continue to meet criteria for certification. Trainers and training programs that are not re-certified, shall be removed from the lists of certified trainers and certified training programs.
- E.** Compile, keep current and make available on-line lists of certified mediators, which specify the judicial districts in which each mediator wishes to practice.
- F.** Prepare, keep current and make available on-line biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers and the wider public.
- G.** Make reasonable efforts on a continuing basis to ensure that the judiciary; clerks of court; court administration personnel; attorneys; and to the extent feasible, parties to mediation; are aware of the Commission and its office and the Commission's duty to receive and hear complaints against mediators and mediation trainers and training programs.

VII. MEDIATOR CONDUCT

The conduct of all mediators, mediation trainers and managers of mediation training programs must conform to the Standards of Professional Conduct for Mediators (Standards) adopted by the Supreme Court and enforceable by the Commission and the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards. A certified mediator shall inform the Commission of any criminal convictions, disbarments or other revocations or suspensions of a professional license, complaints filed against the mediator or disciplinary actions imposed upon the mediator by any professional organization, judicial sanctions, civil judgments, tax liens or filings for bankruptcy. Failure to do so is a violation of these Rules. Violations of the Standards or other professional standards or any conduct otherwise discovered reflecting a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts or the mediation process may subject a mediator to disciplinary proceedings by the Commission.

VIII. INVESTIGATION AND REVIEW OF MATTERS OF ETHICAL CONDUCT, CHARACTER, AND FITNESS TO PRACTICE; CONDUCT OF HEARINGS; SANCTIONS

A. Establishment of the Committee on Standards, Discipline, and Advisory Opinions.

The chair of the Commission shall appoint a standing Committee on Standards, Discipline and Advisory Opinions (SDAO Committee) to review the matters set forth in Section B. below. Members of the Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest. The Commission's executive secretary shall serve as staff to the SDAO Committee.

B. Matters to Be Considered by SDAO Committee. The SDAO Committee shall review and consider the following matters:

- (1) Matters relating to the moral character of an applicant for mediator certification or certification renewal or of a certified mediator and appeals of staff decisions to deny an application for mediator certification or certification renewal on the basis of the applicant's character;
- (2) Matters relating to the moral character of any trainer or manager affiliated with a certified mediator training program or one that is an applicant for certification or certification renewal and appeals of staff decisions to deny an application for mediator training program certification or certification renewal on the basis of the character of any trainer or manager affiliated with the program;
- (3) Complaints by a member of the Commission, its staff, a judge, court staff or any member of the public regarding the character, conduct or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program or that allege a violation of the program rules or the Standards; and
- (4) The drafting of advisory opinions pursuant to the Commission's Advisory Opinion Policy.

C. Initial Staff Review and Determination.

- (1) **Review and Referral Of Matters Relating to Moral Character.** The executive secretary shall review information relating to the moral character of applicants for mediator or mediator training program certification or certification renewal, mediators and mediator training program managers and administrators (applicants) including matters which applicants are required to report under program rules.

The executive secretary may contact applicants to discuss matters reported and conduct background checks on applicants. Any third party

with knowledge of the above matters or any other information relating to the moral character of an applicant may notify the Commission. Commission staff shall seek to verify any such third party reports and may disregard those that cannot be verified. Commission staff may contact any agency where complaints about an applicant have been filed or any agency or judge that has imposed discipline.

All such reported matters or any other information gathered by Commission staff and bearing on moral character shall be forwarded directly to the SDAO Committee for its review, except those matters expressly exempted from review by the Guidelines for Reviewing Pending Grievances/Complaints, Disciplinary Actions Taken and Convictions (Guidelines). Matters that are exempted by the Guidelines may be processed by Commission staff and will not act as a bar to certification or certification renewal.

The executive secretary or the SDAO Committee may elect to take any matter relating to an applicant's moral character, including matters reported by third parties or revealed by background check, and process it as a complaint pursuant to Rule VIII.C.3 below. The executive secretary may consult with the chair prior to making such election.

(2) Executive Secretary Review of Oral or Written Complaints.

The executive secretary shall review oral and written complaints made to the Commission regarding the conduct, character or fitness to practice of a mediator or a trainer or manager affiliated with a certified mediator training program (respondent), except that the executive secretary shall not act on anonymous complaints unless staff can independently verify the allegations made.

- (a) Oral complaints.** If after reviewing an oral complaint, the executive secretary determines it is necessary to contact third party witnesses about the matter or to refer it to the SDAO Committee, the executive secretary shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary along with a release and to return it to the Commission's office, except that complaints initiated by a member of the Commission, SDAO Committee or Commission staff or by judges, other court officials or court staff need not be in writing and, upon request, the identity of the complaining party may be withheld from the respondent. The executive secretary shall not contact any third parties in the course of investigating a matter until such time as a signed summary and release have been returned to the Commission.
- (b) Written complaints.** Commission staff shall acknowledge all written complaints within 30 days of receipt. Written complaints may be made by letter or email or filed on the Commission's approved complaint form. If a complaint is not made on the

approved form, Commission staff shall require the complaining party to sign a release before contacting any third parties in the course of an investigation.

- (c) If a complaining party refuses to sign a complaint summary prepared by the executive secretary or to sign a release or otherwise seeks to withdraw a complaint after filing it with the Commission, the executive secretary or a SDAO Committee member may pursue the complaint. In determining whether to pursue a complaint independently, the executive secretary or a SDAO Committee member shall consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing is necessary, whether the complaining party has specifically asked to withdraw the complaint, the seriousness of the allegations made in the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation and whether there have been previous complaints filed regarding the respondent's conduct.
- (d) If the executive secretary asks a respondent to respond in writing to a complaint, the respondent shall be provided with a copy of the complaint and any supporting evidence provided by the complaining party. The respondent shall have 30 days from the date of the executive secretary's letter transmitting the complaint to respond. Upon request, the respondent may be afforded 10 additional days to respond to the complaint.
- (e) There shall be no statute of limitations on the filing of complaints.

(3) Initial Determination on Oral and Written Complaints.

After reviewing a Rule VIII.B.3 complaint and any additional information gathered, including information supplied by the respondent and any witnesses contacted, the executive secretary shall determine whether to:

- (a) **Recommend Dismissal.** The executive secretary shall make a recommendation to dismiss a complaint if s/he concludes that the complaint does not warrant further action. Such recommendation shall be made to the chair of the SDAO Committee. If after giving the complaint due consideration, the SDAO chair disagrees with the executive secretary's recommendation to dismiss, s/he may direct staff to refer the matter for conciliation or to the full SDAO Committee for review. If the chair agrees with the executive secretary, the complaint shall be dismissed with notification to the complaining party, the respondent and any witnesses contacted. The executive secretary shall note for the file why a determination was made to dismiss the complaint. Dismissed complaints shall remain on file with the Commission

for at least five years and the SDAO Committee may take such complaints into consideration if additional complaints are later made against the same respondent.

The complaining party shall have 30 days from the date of the letter sent by certified U.S. mail, return receipt requested, notifying him or her that the complaint has been dismissed to appeal the determination to the full SDAO Committee.

- (b) **Refer to Conciliation.** If the executive secretary determines that the complaint appears to be largely the result of a misunderstanding between the respondent and complainant or raises a best practices concern(s) or technical or relatively minor rule violation(s) resulting in minimal harm to the complainant, the matter may be referred for conciliation after speaking with the parties and concluding that they are willing to discuss the matter and explore the complainant's concerns. Once a matter is referred for conciliation, the executive secretary may serve as a resource to the parties, but shall not act as their mediator. Prior to or at the time a matter is referred for conciliation, Commission staff shall provide written information to the complainant explaining the conciliation process and advising him/her that the complaint will be deemed to be resolved and the file closed if the complainant does not notify the Commission within 90 days of the referral that conciliation either failed to occur or did not resolve the matter. If either the complaining party or the respondent refuses conciliation or the complaining party notifies Commission staff that conciliation failed, the executive secretary may refer the matter to the SDAO Committee for review or to the SDAO chair with a recommendation for dismissal.
- (c) **Refer to SDAO Committee.** Following initial investigation, including contacting the respondent and any witnesses, if necessary, the executive secretary shall refer all Rule VIII.B.3 matters to the full SDAO Committee when such matters raise concerns about possible significant program rule or Standards violations or raise a significant question about a respondent's character, conduct or fitness to practice. No matter shall be referred to the SDAO Committee until the respondent has been forwarded a copy of the complaint and a copy of these Rules and allowed a 30 day period in which to respond. Upon request, the respondent may be afforded 10 additional days to respond.

The respondent's response to the complaint and the responses of any witnesses or others contacted during the investigation shall not be forwarded to the complainant, except as provided for in N.C.G.S. § 7A-38.2(h) and there shall be no opportunity for rebuttal. The response shall be included in the materials forwarded to the SDAO Committee. If any witnesses were contacted, any

written responses or any notes from conversations with those witnesses shall also be included in the materials forwarded to the SDAO Committee.

- (4) **Confidentiality.** Commission staff will create and maintain files for all matters considered pursuant to Rule VIII.B. Those files shall contain information submitted by or about applicants and respondents including any notes taken by the executive secretary or Commission staff relative to reports regarding moral character of applicants or complaints about mediators, trainers or managers. All information in those files shall remain confidential until such time as the SDAO Committee completes its preliminary investigation and finds probable cause following deliberation pursuant to Rule VIII.D.2.

The executive secretary shall reveal the names of respondents to the SDAO Committee and the SDAO Committee shall keep the names of respondents and other identifying information confidential except as provided for in N.C.G.S. § 7A-38.2(h).

D. SDAO Committee Review and Determination on Matters Referred by Staff.

(1) SDAO Committee Review of Applicant Moral Character Issues and Complaints.

The SDAO Committee shall review all matters brought before it by the executive secretary pursuant to the provisions of Rule VIII.B above and may contact any other persons or entities for additional information. The chair or his/her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to the SDAO Committee's investigation and review of the matter.

(2) SDAO Committee Deliberation.

The SDAO Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

- (a) is a violation of the Standards or any other standards of professional conduct that are not in conflict with nor inconsistent with the Standards and to which the mediator, trainer or manager is subject;
- (b) is a violation of Supreme Court program rules or any other program rules for mediated settlement conference/mediation programs;
- (c) is inconsistent with good moral character (Mediated Settlement

Conference Program Rule 8.E., Family Financial Settlement Conference Rule 8.F. and District Criminal Court Rule 7.E.);

- (d) reflects a lack of fitness to conduct mediated settlement conferences/mediations or to serve as a trainer or training program manager (Rule VII above); and/or
- (e) discredits the Commission, the courts or the mediation process (Rule VII above).

(3) SDAO Committee Determination.

Following deliberation, the SDAO Committee shall determine whether to dismiss a matter, make a referral or impose sanctions.

- (a) **To Dismiss.** If a majority of SDAO Committee members reviewing an issue of moral character or a complaint finds no probable cause, the SDAO Committee shall dismiss the matter and instruct the executive secretary:
 - (i) to certify or recertify the applicant, if an application is pending, or to notify the mediator, trainer or manager by certified U.S. mail, return receipt requested, that no further action will be taken in the matter; or
 - (ii) to notify the complaining party and the respondent by certified U.S. mail, return receipt requested, that no further action will be taken and that the matter is dismissed. The complaining party shall have no right of appeal from the SDAO Committee's decision to dismiss the complaint. All witnesses contacted shall also be notified that the complaint has been dismissed.
- (b) **To Refer.** If a majority of SDAO Committee members determines that:
 - (i) any violation of the program rules or Standards that occurred was technical or relatively minor in nature, caused minimal harm to a complainant and did not discredit the program, courts or Commission, the SDAO Committee may:
 - (1) dismiss the complaint with a letter to the respondent citing the violation and advising him or her to avoid such conduct in the future, or
 - (2) refer the respondent to one or more members of the SDAO Committee to discuss the matter and explore ways that the respondent may avoid similar complaints in the future.

- (ii) the applicant or respondent's conduct has raised best practices or professionalism concerns, the SDAO Committee may:
 - (1) direct staff to dismiss the complaint with a letter to the respondent advising him/her of the SDAO Committee's concerns and providing guidance, or
 - (2) direct the respondent to meet with one or more members of the SDAO Committee who will informally discuss the SDAO Committee's concerns and provide counsel, or
 - (3) refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance; or
- (iii) the applicant or respondent's conduct raises significant concerns about his/her mental stability, mental health, lack of mental acuity or possible dementia, or concerns about possible alcohol or substance abuse, the SDAO Committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina State Bar's Lawyer Assistance Program (LAP) for evaluation or, if the applicant or respondent is not a lawyer, to a physician or other licensed mental health professional or to a substance abuse counselor or organization.

Neither letters nor referrals are viewed as sanctions under Rule VIII.E.10 below. Rather, both are intended as opportunities to address concerns and to help applicants or respondents perform more effectively as mediators. There may, however, be instances that are more serious in nature where the SDAO Committee may both make a referral and impose sanctions under Rule VIII. E.10.

In the event that an applicant or respondent is referred to one or more members of the SDAO Committee for counsel, to LAP or some other professional or entity and fails to cooperate regarding the referral; refuses to sign releases or to provide any resulting evaluations to the SDAO Committee; or any resulting discussions or evaluation(s) suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer or manager, the SDAO Committee reserves the right to make further determinations in the matter, including decertification. During a referral under (iii) above, the SDAO Committee may require the applicant or respondent to cease practicing as a mediator, trainer or manager during the referral period and until such time as the SDAO Committee has authorized his/her return to active practice. The SDAO Committee may condition a certification or renewal of recertification on the applicant's successful completion of the referral process.

Any costs associated with a referral, *e.g.*, costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

- (c) **To Propose Sanctions.** If a majority of SDAO Committee members find probable cause pursuant to Rule VIII.D.2 above, the SDAO Committee shall propose sanctions on the applicant or respondent, except as provided for in Rule VIII.D.3.(b)(i).

Within the 30 day period set forth in Rule VIII.D. 4 below, an applicant or respondent may contact the SDAO Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the SDAO Committee. The SDAO Committee shall have the authority to engage in such negotiations with the applicant or respondent. During the negotiation period, the respondent may request an extension of the time in which to request an appeal under Rule VIII.D.4 below. The executive secretary, in consultation with the SDAO Committee chair, may extend the appeal period up to an additional 30 days in order to allow more time to complete negotiations.

- (4) **Right of Appeal.** If a referral is made or sanctions are imposed, the applicant or respondent shall have 30 days from the date of the letter sent by U.S. certified mail, return receipt requested, transmitting the SDAO Committee's findings and action to appeal. Notification of appeal must be made to the Commission's office in writing. If no appeal is received within 30 days, the complainant, applicant or respondent shall be deemed to have accepted the SDAO Committee's findings and proposed sanctions.

E. Appeal to the Commission.

- (1) **The Commission Shall Meet to Consider Appeals.** An appeal of the SDAO Committee's determination pursuant to Rule VIII.D.4 above shall be heard by the members of the Commission, except that all members of the SDAO Committee who participated in issuing the determination on appeal shall be recused and shall not participate in the Commission's deliberations. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.
- (2) **Conduct of the Hearing.**
 - (a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties, special counsel to the Commission and members of the Commission who will hear the matter, copies of all documents considered by the SDAO Committee

and summaries of witness interviews and/or character recommendations.

- (b) Hearings conducted by the Commission pursuant to this rule shall be *de novo*.
 - (c) Applicants, complainants, respondents and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.
 - (d) All hearings will be open to the public except that for good cause shown the presiding officer may exclude from the hearing room all persons except the parties, counsel and those engaged in the hearing. No hearing will be closed to the public over the objection of an applicant or respondent.
 - (e) In the event that the applicant, complainant or respondent fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.
 - (f) Proceedings before the Commission shall be conducted informally, but with decorum.
 - (g) The Commission, through its counsel, and the applicant or respondent may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or respondent may cross-examine any witness called to testify by the other. Commission members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.
 - (h) The Commission's chair or designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.
- (3) **Date of Hearing.** An appeal of any sanction proposed by the SDAO Committee shall be heard by the Commission within 120 days of the date the notice of appeal is filed with the Commission.

- (4) **Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time and place of the hearing no later than 60 days prior to the hearing.
- (5) **Ex Parte Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.
- (6) **Attendance.** All parties, including applicants, complainants and respondents, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.
- (7) **Witnesses.** The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least 10 days prior to the hearing, the names of all witnesses who will be called to testify.
- (8) **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his/her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom, or a record made by a court reporter retained by a party are not part of the official record.
- (9) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the imposition of sanctions and, therefore, dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program, or (ii) find that there is clear and convincing evidence that grounds exist to impose sanctions and impose sanctions. The Commission may impose the same or different sanctions than imposed by the SDAO Committee. The Commission shall set forth its findings, conclusions and sanctions, or other action, in writing and serve its decision on the parties within 60 days of the date of the hearing.

(10) **Sanctions.** The sanctions that may be proposed by the SDAO Committee or imposed by the Commission include, but are not limited to, the following:

- (a) Private, written admonishment;
- (b) Public, written admonishment;
- (c) Completion of additional training;
- (d) Restriction on types of cases to be mediated in the future;
- (e) Reimbursement of fees paid to the mediator or training program;
- (f) Suspension for a specified term;
- (g) Probation for a specified term;
- (h) Certification or renewal of certification upon conditions;
- (i) Denial of certification or certification renewal;
- (j) Decertification;
- (k) Prohibition on participation as a trainer or manager of a certified mediator training program either indefinitely or for a period of time; and
- (l) Any other sanction deemed appropriate by the Commission.

11. Publication of SDAO Committee/Commission Decisions.

- (a) Names of respondents who have been reprimanded privately or applicants who have never been certified and have been denied certification shall not be published in the Commission's newsletter nor on its web site.
- (b) Names of respondents or applicants who are sanctioned under any other provision of Section E.10 above and who have been denied reinstatement under Section E.13 below shall be published in the Commission's newsletter and on its web site along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Commission may waive this requirement.
- (c) Chief district court judges and/or senior resident superior court judges in judicial districts in which a mediator serves, the NC State Bar and any other professional licensing/certification bodies to which a mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any sanction imposed upon a mediator except those named in Subsection a above.
- (d) If the Commission imposes sanctions as a result of a complaint filed by a third party, the Commission's office shall, on request, release copies of the complaint, response, counter response and Commission/Committee decision.

12. Appeal. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions imposing sanctions or denying applications for mediator or mediator training program certification.

An order imposing sanctions or denying applications for mediator or mediator training program certification shall be reviewable upon appeal and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

- 13. Reinstatement.** An applicant, mediator, trainer or manager who has been sanctioned under this rule may be reinstated as a certified mediator or as an active trainer or manager pursuant to Section E.13.h below. Except as otherwise provided by the SDAO Committee or Commission, no application for reinstatement may be tendered within two years of the date of the sanction or denial.
- (a) A petition for reinstatement shall be made in writing, verified by the petitioner and filed with the Commission's office.
 - (b) The petition for reinstatement shall contain:
 - (i) the name and address of the petitioner;
 - (ii) the offense or misconduct upon which the suspension or decertification or the bar to training or program management was based; and
 - (iii) a concise statement of facts claimed to justify reinstatement as a certified mediator or a trainer or program manager.
 - (c) The petition for reinstatement may also contain a request for a hearing on the matter to consider any additional evidence which the petitioner wishes to put forth, including any third party testimony regarding his or her character, competency or fitness to practice as a mediator, trainer or manager.
 - (d) The Commission's staff shall refer the petition to the Commission for review.
 - (e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 120 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section E above. At the hearing, the petitioner may:
 - (i) appear personally and be heard;
 - (ii) be represented by counsel;
 - (iii) call and examine witnesses;
 - (iv) offer exhibits; and
 - (v) cross-examine witnesses.
 - (f) At the hearing, the Commission may call witnesses, offer exhibits and examine the petitioner and witnesses.

- (g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:
 - (i) that the petitioner has rehabilitated his/her character; addressed and resolved any conditions which led to his/her suspension or decertification; completed additional training in mediation theory and practice to ensure his/her competency as a mediator, trainer or manager; and/or taken steps to address and resolve any other matter(s) which led to the petitioner's suspension, decertification or prohibition from serving as a trainer or manager and
 - (ii) the petitioner's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, District Criminal Court Mediation Program, or other program rules, or to the Commission, courts or public and
 - (iii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.
- (h) If the petitioner is found to have rehabilitated him or herself and is fit to serve as a mediator, trainer or manager, the Commission shall reinstate the petitioner as a certified mediator or as an active trainer or manager. However, if the suspension or decertification or the bar to training or management has continued for more than two years, the reinstatement may be conditioned upon the completion of additional training and observations as needed to refresh skills and awareness of program rules and requirements.
- (i) The Commission shall set forth its decision to reinstate a petitioner or to deny reinstatement in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by U.S. certified mail, return receipt requested, within 30 days of the date of the hearing.
- (j) If a petition for reinstatement is denied, the petitioner may not apply again pursuant to this section until two years have lapsed from the date the denial was issued.
- (k) The General Court of Justice, Superior Court Division in Wake County, shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal, and the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court in Wake County within 30 days of the date of the Commission's decision.

RULE IX. INVESTIGATION AND REVIEW OF APPLICATIONS FOR CERTIFICATION DENIED OR REVOKED FOR REASONS OTHER THAN THOSE PERTAINING TO ETHICS AND CONDUCT

A. Establishment of the Standing Committee on Certification of Mediators and Mediator Training Programs.

(1) Establishment of Certification Committee. The chair of the Commission shall appoint a standing Committee on Certification of Mediators and Mediator Training Programs (Certification Committee) to review the matters set forth in Section 2 below. Members of the Certification Committee shall recuse themselves from deliberating on any matter in which they cannot act impartially or about which they have a conflict of interest.

(2) Matters to Be Considered by Certification Committee. The Certification Committee shall review and consider the following matters:

(a) Appeals of staff decisions to deny an application filed by a person seeking mediator certification or recertification or by a mediator training program seeking certification or recertification, because of deficiencies that do not relate to conduct or ethics. The latter deficiencies shall be considered pursuant to Rule VIII.

(b) Complaints which are filed by a member of the Commission, its staff, or any member of the public about a certified mediator or certified mediator training program or an applicant for certification or certification renewal; except that, complaints relating to applicant, mediator, trainer or manager conduct or ethics shall be considered only pursuant to Rule VIII.

(3) The Investigation of Qualifications.

(a) Information obtained during the process of certification or renewal. Commission staff shall review all pending applications for certification and recertification to determine whether the applicant meets the non-ethics related qualifications set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission and any guidelines or other policies adopted by the Commission amplifying those rules. Commission staff may contact those reporting to request additional information and may consider any other information acquired during the investigation process that bears on the applicant's eligibility for certification or certification renewal.

(b) Complaints about mediator or mediator training program qualifications filed with the Commission. The staff of the Commission shall forward written complaints about the qualifications

of a certified mediator or certified mediator training program or any trainer or manager affiliated with such program (affected person/program) that do not pertain to ethics or conduct filed by any member of the general public, the Commission, or its staff to the Certification Committee for investigation. Copies of such complaints shall be forwarded by certified U.S. mail, return receipt requested, to the affected person.

However, in instances where Commission staff believes a complaint to be wholly without merit, the executive secretary shall refer the matter to the Certification Committee's chair rather than to the Certification Committee as set forth above. If after giving the complaint due consideration, the chair also believes that the complaint is wholly without merit, the complaint shall be dismissed with notification to the complaining party. The complaining party shall have 30 days from the date of notification to appeal the chair's determination to the full Certification Committee. The appeal shall be in writing and directed to the Commission's office.

- (c) **Investigation by the Certification Committee.** The Certification Committee shall investigate all matters brought before it by staff pursuant to the provisions of Sections a or b. The chair or designee may issue subpoenas for the attendance of witnesses and for the production of books, papers or other documentary evidence deemed necessary or material to any such investigation. The chair or designee may contact the following persons and entities for information concerning such application or complaint:
- (i) all references, employers, colleges and other individuals and entities cited in applications for mediator certification, including any and all other professional licensing or certification bodies to which the applicant is subject;
 - (ii) all proposed trainers cited in training program applications and in the case of applications for certification renewal, participants who have completed the training program; and
 - (iii) all parties bringing complaints about a mediator or a mediator training program's qualifications for certification or certification renewal and any other person or entity with information about the subject of the complaint.

All information in Commission files pertaining to the initial certification of a mediator or mediation training program or to renewals of such certifications shall be confidential.

- (d) **Probable Cause Determination.** The Certification Committee shall deliberate to determine whether probable cause exists to believe that the affected person/program or the applicant:
- (i) does not meet the qualifications for mediator certification set out in program rules adopted by the Supreme Court for mediated

settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules; or

- (ii) does not meet the qualifications for mediator training program certification as set out in program rules adopted by the Supreme Court for mediated settlement conference/mediation programs under the jurisdiction of the Commission or guidelines and other policies adopted by the Commission that amplify those rules.

If probable cause is found, that the application for certification or re-certification should be denied or the affected person/program's certification should be revoked.

4. Authority of Certification Committee to Deny Certification or Certification Renewal or to Revoke Certification.

- (a) If a majority of Certification Committee members reviewing a matter finds no probable cause pursuant to Section A.3.d above, Commission staff shall certify or recertify the affected person/program or applicant. If the investigation were initiated by the filing of a written complaint, the Certification Committee shall dismiss the complaint and notify the complaining party and the affected person/program or applicant in writing by certified U.S. mail, return receipt requested, that the complaint has been dismissed and that the affected person/program or applicant will be certified or re-certified. There shall be no right of appeal from the Certification Committee's decision to dismiss a complaint or to certify or re-certify an affected person/program or applicant.
- (b) If a majority of Certification Committee members reviewing a matter finds probable cause pursuant to Section A.3.d above, the Certification Committee shall deny certification or re-certification or revoke certification. The Certification Committee's findings, conclusions, and denial shall be in writing and forwarded to the affected person/program or applicant by certified U.S. mail, return receipt requested.
- (c) If the Certification Committee denies certification or re-certification or revokes certification, the affected person/program or applicant may appeal the denial or revocation to the Commission within 30 days from the date of the letter transmitting the Certification Committee's findings, conclusions and denial. Notification of appeal must be in writing and directed to the Commission's office. If no appeal is filed within 30 days, the affected person/program or applicant shall be deemed to have accepted the Certification Committee's findings and denial or revocation.

B. Appeal of the Denial to the Commission.

- (1) **The Commission Shall Meet.** An appeal of a denial or revocation by the Certification Committee pursuant to Section A.3.d above shall be heard by the members of the Commission, except that all members of the Certification Committee who participated in issuing the determination that is on appeal shall recuse themselves from participating. No matter shall be heard and decided by less than three Commission members. Members of the Commission shall recuse themselves when they cannot act impartially. Any challenges raised by the appealing party or any other party questioning the neutrality of a member shall be decided by the Commission's chair.
- (2) **Conduct of the Hearing.**
 - (a) At least 30 days prior to the hearing before the Commission, Commission staff shall forward to all parties; special counsel to the Commission, if appointed; and members of the Commission who will hear the matter, copies of all documents considered by the Committee and summaries of witness interviews and/or character recommendations.
 - (b) Hearings conducted by the Commission will be a *de novo* review of the Certification Committee's decision.
 - (c) The Commission's chair or his/her designee shall serve as the presiding officer. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and speedy investigation and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers or other documentary evidence.
 - (d) Special counsel supplied either by the North Carolina Attorney General at the request of the Commission or employed by the Commission may present the evidence in support of the denial or revocation of certification. Commission members may question any witnesses called to testify at the hearing.
 - (e) The Commission, through its counsel, and the applicant or affected person/program may present evidence in the form of sworn testimony and/or written documents. The Commission, through its counsel, and the applicant or affected person/program, may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The Commission shall consider all evidence presented and give it appropriate weight and effect.
 - (f) All hearings shall be conducted in private, unless the applicant or affected person/program requests a public hearing.
 - (g) In the event that the complainant, affected person/program, or applicant fails to appear without good cause, the Commission shall proceed to hear from those parties and witnesses who are present and make a

determination based on the evidence presented at the proceeding.

- (h) Proceedings before the Commission shall be conducted informally but with decorum.
- (3) **Date of Hearing.** An appeal of any denial by the Certification Committee shall be heard by the Commission within 120 days of the date of the letter transmitting the Certification Committee's findings, conclusions and denial or revocation.
- (4) **Notice of Hearing.** The Commission's office shall serve on all parties by certified U.S. mail, return receipt requested, notice of the date, time, and place of the hearing no later than 60 days prior to the hearing.
- (5) **Ex Parte Communications.** No person shall have any *ex parte* communication with members of the Commission concerning the subject matter of the appeal. Communications regarding scheduling matters shall be directed to Commission staff.
- (6) **Attendance.** All parties, including complaining parties and applicants, or their representatives in the case of a training program, shall attend in person. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or to allow witnesses to testify by telephone or through video conference with such limitations and conditions as are just and reasonable. If an attorney or witness appears by telephone or video conference, the Commission's staff must be notified at least 20 days prior to the proceeding. At least five days prior to the proceeding, the Commission's staff must be provided with contact information for those who will participate by telephone or video conference.
- (7) **Witnesses.** The presiding officer shall exercise his/her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office at least 10 days prior to the hearing the names of all witness who will testify for them.
- (8) **Transcript.** The Commission shall retain a court reporter to keep a record of the proceeding. Any party who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of tapes alone, non-certified transcripts therefrom or a record made by a court reporter retained by a party are not part of the official record.
- (9) **Commission Decision.** After the hearing, a majority of the Commission members hearing the appeal may: (i) find that there is not clear and convincing evidence to support the denial or revocation and, therefore dismiss the complaint or direct the Commission staff to certify or recertify the mediator or mediator training program; or (ii) find that there is clear and convincing evidence to

affirm the committee's findings and denial or revocation. The Commission shall set forth its findings, conclusions and denial in writing and serve it on the parties within 60 days of the date of the hearing.

(10) Publication of Committee/Commission Decisions.

- (a) Names of applicants for mediator certification or names of mediator training programs that are denied certification or recertification or who have had their certification revoked pursuant to this rule shall not be published in the Commission's newsletter or on its web site and the fact of that denial or revocation shall not be generally publicized.
- (b) Chief district court judges and/or senior resident superior court judges in districts which the mediator serves, the NC State Bar and any other professional licensing/certification bodies to which the mediator is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any denial or revocation of certification.

(11) Appeals. The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions denying an application or revoking a certification. An order denying or revoking certification pursuant to this rule shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal shall be filed within 30 days of the date of the Commission's decision.

(12) Reinstatement of Certification. A mediator or training program whose certification renewal has been denied or whose certification has been revoked under this rule may be re-certified or reinstated as a certified mediator or mediation training program pursuant to Section B.12.g below. An application for reinstatement may be tendered at any time the applicant believes that he/she/it is qualified to be reinstated.

- (a) A petition for reinstatement shall be made in writing, verified by the petitioner and filed with the Commission's office.
- (b) The petition for reinstatement shall contain:
 - (i) the name and address of the petitioner;
 - (ii) the qualification upon which the denial or revocation was based; and
 - (iii) a concise statement of facts claimed to justify certification or recertification as a certified mediator or mediator training program.
- (c) The petition for reinstatement or certification may also contain a request for a hearing on the matter to consider any additional evidence that the petitioner wishes to put forth.

- (d) The Commission's staff shall refer the petition to the Commission for review.
- (e) If the petitioner does not request a hearing, the Commission shall review the petition and shall make a decision within 60 days of the filing of the petition. That decision shall be final. If the petitioner requests a hearing, it shall be held within 90 days of the filing of the petition. The Commission shall conduct the hearing consistent with Section B above. At the hearing, the petitioner may:
 - (i) appear personally and be heard;
 - (ii) be represented by counsel;
 - (iii) call and examine witnesses;
 - (iv) offer exhibits; and
 - (v) cross-examine witnesses.
- (f) At the hearing, the Commission may call witnesses, offer exhibits and examine the petitioner and witnesses.
- (g) The burden of proof shall be upon the petitioner to establish by clear and convincing evidence:
 - (i) that the petitioner has satisfied the qualifications that led to the denial or revocation; and
 - (ii) that the petitioner has completed any paperwork required for reinstatement and paid any required reinstatement and/or certification fees.
- (h) If the petitioner is found to have met the qualifications and is entitled to be certified as a mediator or mediator training program, the Commission shall so certify.
- (i) If a petition for reinstatement is denied, the petitioner may apply again pursuant to this section at any time after the qualifications are met.
- (j) The Commission shall set forth its decision to certify a mediator or mediator training program or to deny certification in writing, making findings of fact and conclusions of law, and serve the decision on the petitioner by certified U.S. mail, return receipt requested, within 60 days of the date of the hearing.
- (k) The General Court of Justice, Superior Court Division in Wake County shall have jurisdiction over appeals of Commission decisions to deny reinstatement. An order denying reinstatement shall be reviewable upon appeal where the entire record as submitted shall be reviewed to determine whether the order is supported by substantial evidence.

Notice of review shall be filed with the Superior Court in Wake County within 30 days of the date of the Commission's decision.

X. INTERNAL OPERATING PROCEDURES

- A.** The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.
- B.** The Commission's procedures and policies may be changed as needed on the basis of experience.