

In the Supreme Court of North Carolina
Order Adopting Rules Implementing the Year 2000
Prelitigation Mediation Program

WHEREAS, section 66-283 of the North Carolina General Statutes establishes a program to provide for mediation of Year 2000 disputes as defined by the statute, and

WHEREAS, 283(b) provides for this Court to implement section 66-283 by adopting rules

NOW, THEREFORE, pursuant to N.C.G.S. §66-283(b), Rules Implementing The Year 2000 Prelitigation Mediation Program are hereby adopted. These rules shall be effective on the 1st day of January, 2000.

Adopted by the Court in conference the 2nd day of December, 1999.
The Appellate Division Reporter shall publish the Rules Implementing The Year 2000 Prelitigation Mediation Program in their entirety in the Advance Sheets of the Supreme Court and the Court of Appeals, at the earliest practicable date.

Freeman, J.
For the Court

Witness my hand and the Seal of the Supreme Court of North Carolina, this the 7th day of December, 1999.

Christie Speir Cameron
Clerk of the Supreme Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING THE YEAR 2000 PRELITIGATION MEDIATION PROGRAM

RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION YEAR 2000 MEDIATION.

A. A person with a claim for damages allegedly resulting from a Year problem may initiate mediation by filing a Request for Prelitigation Mediation of Year 2000 Dispute (Request) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the Administrative Office of the Courts and be available through the clerk of superior court. The party filing the Request shall mail a copy of the Request by certified mail, return receipt requested, to each party to the dispute.

B. The clerk of superior court shall accept the Request and shall file it in a miscellaneous file under the name of the requesting party.

RULE 2. SELECTION OF MEDIATOR

A. **Time Period for Selection.** The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file their Notice of Selection of Certified Mediator by Agreement.

B. **Selection of Certified Mediator by Agreement.** The clerk shall provide each party to the dispute with a list of certified mediators who have expressed a willingness to mediate Year 2000 disputes in the judicial district encompassing the county in which the Request was filed. If the parties are able to agree on a certified mediator to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice). Such Notice shall state the name, address, and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The notice shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk in the county in which the Request was filed.

C. **Nomination of Non-Certified Mediator by Agreement.** The parties may by agreement select a mediator who is not certified but who, in the opinion of the parties, is otherwise qualified by training or experience to mediate the dispute. If the parties agree on a non-certified mediator, the party who filed the Request shall file with the clerk a Nomination of Non-Certified Mediator (Nomination) and shall simultaneously deliver a copy of the Nomination to the senior resident superior court judge. Such Nomination shall state the name, address, and telephone number of the non-certified mediator selected; state the training, experience, or other

qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and the parties to the dispute have agreed upon the selection and rate of compensation.

The senior resident superior court judge shall rule on the said Nomination without a hearing, shall approve or disapprove the parties' nomination and shall notify the parties of his or her decision. The Nomination and the court's approval or disapproval shall be on a form prepared and distributed by the Administrative Office of the Courts and available through the clerk of superior court in the county where the Request was filed.

D. **Court Appointment of Mediator.** If the parties to the dispute cannot agree on selection of a mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator (Motion) and simultaneously deliver a copy to the senior resident superior court judge who shall appoint the mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified, non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator if one is on the list. If no preference is expressed, the senior resident superior court judge may appoint a certified attorney mediator or a certified non-attorney mediator. The Clerk shall notify the mediator and the parties of the appointment of the mediator.

E. **Mediator Information Directory.** To assist parties in learning more about the qualifications and experience of certified mediators, the clerk of superior court in the county in which the Request was filed shall make available to the disputing parties a central directory of information on all certified mediators who wish to mediate cases in that county, including those who wish to mediate prelitigation Year 2000 disputes. The Dispute Resolution Commission shall be responsible for distributing and updating the directory.

RULE 3. THE PRELITIGATION YEAR 2000 MEDIATION.

A. **When Mediation Is to be Completed.** The mediation shall be completed within 60 days of the Notice of Selection of Certified Mediator by Agreement or the date of the order appointing a mediator to conduct the mediation.

B. **Extensions.** A party may file a motion with the clerk seeking to extend the 60 day period set forth in subpart A above. Such request shall state the reasons the extension is sought and explain why the mediation cannot be completed within 60 days of the mediator's appointment. The senior resident superior court judge may grant the motion by entering a written order establishing a new date for completion of the mediation.

C. **Where the Conference Is to be Held.** Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place

and making arrangements for the mediation and for giving timely notice of the date, time, and location of the mediation to all parties named in the Request or their attorneys.

D. **Recesses**. The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a thirty day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

E. **Duties of Parties, Attorneys and Other Participants**. Rule 4 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference to the extent it is consistent with prelitigation disputes.

If an agreement is reached in 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 or stenographically recorded.

F. **Sanctions for Failure to Attend**. Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

Comment to Rule 4.E.

N.C. Gen. Stat. §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.

RULE 4. AUTHORITY AND DUTIES OF THE MEDIATOR

A. Authority of Mediator.

- (1) **Control of Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed.
- (2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.
- (3) **Scheduling the Conference**. The mediator shall make a good faith effort to schedule the conference at a time that is convenient for the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the conference.

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 differences between mediation and other forms of conflict resolution;
 - (c) The costs of mediation;
 - (d) That the mediation is not a trial, the mediator is not a judge and the parties may pursue their dispute in court if mediation is not successful and they so choose.
 - (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 G. S. 7A-38.1(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 circumstance bearing on possible bias, prejudice, or partiality.
- (3) Declaring Impasse. It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.
- (4) Scheduling and Holding the Conference. It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 3 above. Rule 3 shall be strictly observed by the mediator unless an extension has been granted in writing by the senior resident superior court judge.
- (5) Certification. The mediator has a duty to timely file a Certification as required by Rule 3.

RULE 5. COMPENSATION OF THE MEDIATOR.

A. **By Agreement.** When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

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 \$125 per hour. The parties shall also pay to the mediator a one time, per case administrative fee of \$125, except that no administrative fees, fees for services or other fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate

in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session.

C. **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 dispute, subsequent to the trial of the action. In ruling on such motions, the Judge shall apply the criteria enumerated in 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.

D. **Payment of Compensation by Parties.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares. 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 mediation.

E. **Postponement Fees.** As used herein, the term "postponement" shall mean rescheduling or not proceeding with a mediated settlement conference once a date for the settlement conference has been agreed upon and scheduled by the parties and the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference. A conference may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and consent of the mediator and the opposing attorney/party. If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be \$125. If the settlement conference is postponed within three (3) business days of the scheduled date, the fee shall be \$250, except that no postponement fees shall be assessed any party if all parties waive mediation in writing pursuant to Rule 6 at least seven (7) business days prior to the occurrence of an initial mediation session or a party with an affirmative defense refuses in writing to participate in mediation pursuant to Rule 7 at least seven (7) business day prior to the occurrence of an initial mediation session. Postponement fees 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 5.B.

F. **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 senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and findings and the imposition of any and all lawful sanctions by a resident or presiding superior court judge.

RULE 6. WAIVER OF MEDIATION.

All parties to a Year 2000 dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation (Waiver) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The disputant who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request. No costs shall be assessed any party if all parties waive mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 7. AFFIRMATIVE DEFENSE

If a party to the dispute is entitled to an affirmative defense pursuant to G.S. 1-539.26, that party may refuse to participate in the mediation. A party refusing mediation shall advise the mediator in writing of his or her refusal. The Refusal of Prelitigation Mediation (Refusal) shall be on a form prescribed by the Administrative Office of the Courts and available through the clerk. The party refusing to participate shall file the Refusal with the clerk and mail a copy to the mediator and to all parties. No costs shall be assessed any party if a party with an affirmative defense advises the mediator in writing of his or her refusal to participate in mediation at least seven (7) business days prior to the occurrence of an initial mediation session.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED.

A. **Contents of Certification.** Following the conclusion of mediation, the receipt of a waiver of mediation signed by all parties to the Year 2000 dispute, or the receipt of a refusal of a party with an affirmative defense under G.S.1-539.26 to participate in mediation, the mediator shall prepare a Mediator's Certification in Prelitigation Year 2000 Dispute (Certification) on a form prescribed by the Administrative Office of the Courts and available through the clerk. If a mediation were held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation were not held, the Certification shall state that all parties waived mediation in writing pursuant to Rule 7 above, that a party with an affirmative defense under G.S. 1-539.26 refused to participate with good cause, or that the mediation was not held for other, specified reasons. The mediator shall identify any parties named in the Request who failed, without good cause, to attend or participate in mediation.

B. **Deadline for Filing Mediator's Certification.** The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation or a refusal to participate. The mediator shall serve a copy of the Certification on each of the parties named in the request.

RULE 9. CERTIFICATION AND DECERTIFICATION OF MEDIATORS OF YEAR 2000 DISPUTES.

Mediators certified to conduct prelitigation mediation of Year 2000 disputes shall be subject to all rules and regulations regarding certification, conduct, discipline, and decertification applicable to mediators serving the Mediated Settlement Conferences Program and any such additional rules and regulations as adopted by the Dispute Resolution Commission and applicable to mediators of Year 2000 disputes.

RULE 10. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

The Dispute Resolution Commission may specify a curriculum for a Year 2000 mediation training program and may set qualifications for trainers.

RULE 11. RESPONSIBILITY FOR ENFORCEMENT.

The Senior Resident Superior Court Judge or his/her designee shall be responsible for enforcing these rules and shall enter appropriate court orders as necessary to enforce these rules.