

LR 83.9a PURPOSE OF MEDIATED SETTLEMENT CONFERENCES

These rules govern reference of selected civil actions for mediated settlement conferences. Their purpose is to provide for an informal process conducted by a mediator with the objective of helping the parties reach a mutually acceptable settlement of their dispute. The rules are not intended to force settlement upon any party. The rules shall be construed to secure the speedy, fair, and economical resolution of controversies while preserving the right of all parties to a conventional trial.

LR 83.9b SELECTION OF CASES FOR MEDIATED SETTLEMENT CONFERENCES

(a) **Automatic Selection by these Rules.** Several categories of civil cases are automatically selected for mediated settlement conferences, without specific order by the Court. These categories include, according to the nature of suit designations made in opening the case in CM/ECF or as listed within the court forms appearing at www.ncmd.uscourts.gov, (1) contract [categories 110-140 and 160-195, specifically excluding 150-153], (2) tort [all categories, 310-385], (3) civil rights [all categories, 440-444], (4) employment and labor [all categories, 710-791], (5) property rights [all categories, 820-840], (6) antitrust [category 410], (7) banks and banking [category 430], (8) securities/commodities/ exchange [category 850], and (9) environmental matters [category 893]. The parties to these actions shall discuss mediation plans at the Fed.R.Civ.P. 26(f) meeting of the parties and report such plans in their Rule 26(f) Report in preparation for the entry of an initial pretrial order. See LR16.1(b)(c) and (d). Cases wherein the United States is a party or the plaintiff appears *pro se* are not included within this automatic selection for mediation.

(b) **Discretionary Selection by the Court.** In its discretion, the Court may order a mediated settlement conference in any action not automatically selected under section (a), above. After entry of such an order, the parties shall have 21 days to file a statement identifying an agreed-upon mediator. If a mediator is not selected by the parties within such period, the court shall appoint a mediator in the manner provided by these rules.

(c) **Stipulated Selection by the Parties.** In any case where selection for a mediated settlement conference is not automatic under section (a) of this rule, the parties may file a stipulation for mediation. In such stipulation, the parties may state any agreements they have reached regarding the identity of the mediator, the timing of the conference, and any modification of the procedures described by these rules.

(d) **Exemption from Mediation.** Any party, or parties jointly, may file a motion for exemption from mediation. Such a motion will be granted only on a showing of good cause. A general assertion that a case is not likely to settle or that settlement possibilities are remote does not constitute good cause.

LR 83.9c MEDIATORS

(a) **Certification.** The clerk shall maintain a list of mediators who have agreed to serve under these rules. The list shall identify areas of subject matter expertise of each mediator according to the categories identified in LR 83.9b(a) and include such biographical information as each mediator may wish to provide. Attorneys who have been certified as mediators pursuant to the rules of the North Carolina Supreme Court and who have a total of at least 8 years of civil trial practice, judgeship on a state or federal court, and/ or membership on the faculty of an accredited law school may serve on the panel of mediators. ~~Further, attorneys who were on the Court's panel of arbitrators as of December 1, 1993 may serve on the panel of mediators.~~ Appointment to the list does not guarantee any mediator that he or she will be appointed to serve in any case before the Court.

(b) **Compensation of Mediators.** Mediators under these rules shall be compensated by the parties at ~~the an~~ hourly rate and in a manner set by the Chief Judge, except that in the case of an agreed-upon mediator, the parties may agree to greater compensation and expense reimbursement. ~~The~~Unless otherwise agreed by the parties and the mediator, the parties shall make payment directly to the mediator at the termination of the mediated settlement conference, whether or not the case is settled. ~~The~~When a mediator is Court-appointed, the mediator shall be compensated for up to 2 hours of preparation time and for the time expended in the conference. ~~The, and the~~ only compensable expense of the mediator ~~is~~may be travel mileage at the ordinary government rate. ~~The~~For all mediations, each party or third party represented by separate counsel is responsible for that party's equal share of the mediator's fee and ~~travel expense shall be paid in one equal share by the plaintiff (or plaintiffs), one equal share by the defendant (or defendants), and one equal share by any third party (or parties),~~expenses, unless otherwise agreed by all parties or ordered by the Court in the interest of fairness.

(c) **Compensation of Mediators when a Party is Unable to Pay.** If a party contends it is unable to pay its share of the mediator's fee, that party shall, ~~before~~no later than 7 days after the mediation conference has concluded, file a motion with the Court to be relieved of the obligation to pay. The motion shall be accompanied by an affidavit of financial standing. The mediated settlement conference should proceed without payment by the moving party, and the Court will rule on the motion upon completion of the case. The Court will take into consideration the outcome of the case, whether by settlement or judgment, and may relieve the party of its obligation to pay the mediator if payment would cause a substantial financial hardship. If the party is relieved of its obligation, the mediator shall remain uncompensated as to that portion of his or her fee, a circumstance that reflects the mediator's duty of pro bono service.

(d) Procedure for Mediators to seek a Remedy when a Party Has Not Paid.
In the event that a mediator, after reasonable good-faith efforts to collect on an outstanding mediation invoice, has not been paid by a party which has not otherwise been

excused by the Court from such payment, the mediator may petition the Court for an order regarding the payment of same. The mediator shall serve such petition upon all parties in a format and with appropriate notices as otherwise required by these Local Civil Rules for non-dispositive motions, and any filing or hearing regarding such petition shall only address the time spent in or preparing for the mediation, allowed administrative fees and expenses, and the purported nonpayment of same. The mediator and the parties shall not disclose any aspect of the mediation conference or the parties' settlement negotiations that is considered "confidential" under these Local Rules or pursuant to any applicable North Carolina court rules or standards of professional conduct governing mediators and court-ordered mediations.

LR 83.9d SELECTION OF THE MEDIATOR

(a) **Selection by Agreement.** The parties are encouraged to select their own mediator by agreement. If, within 21 days of the initial pretrial order, the parties submit to the clerk a statement identifying an agreed-upon mediator, such statement shall be effective to select the mediator, and the clerk will notify the mediator of his or her selection. The parties may select an agreed-upon mediator who is not on the clerk's list of certified mediators, but any such mediator must, prior to service, agree to be bound by all provisions of these rules.

(b) **Selection by the Clerk.** If no timely statement pursuant to section (a) of this rule is submitted, the clerk shall appoint a mediator from the certified list. The appointment is within the discretion of the clerk, who may consider subject matter expertise in making the appointment. The clerk shall give notice of the appointment to the mediator and the parties.

(c) **Disqualification.** On motion made to the Court not later than 21 days before a scheduled mediated settlement conference, a mediator may be disqualified by the Court for bias or prejudice as provided in 28 U.S.C. §§144. Further, a mediator shall disqualify himself or herself if the mediator could be required to do so under 28 U.S.C. §§455 if he or she were a justice, judge, or magistrate judge.

(d) **Copies of the Pleadings.** On request of the mediator, the clerk shall furnish to the mediator a copy of the complaint, answer, and any third-party pleadings in the action.

LR 83.9e PROCEDURES FOR MEDIATED SETTLEMENT CONFERENCES

(a) **Time Period for the Mediated Settlement Conference.** The mediated settlement conference shall be held during the discovery period unless the Court specifically orders otherwise.

(b) **Scheduling the Mediated Settlement Conference.** The mediated settlement conference ~~shall ordinarily be held in the office of the mediator, but~~ may be held at

any ~~other~~ place agreed to by the parties and the mediator, or as otherwise determined by the mediator if such agreement is not reached within a reasonable period of time before the scheduled mediation. Because of space limitations, the federal courthouses are generally not available for mediated settlement conferences. After conferring with the attorneys for the parties regarding scheduling matters, the mediator shall determine the place and time of the conference (within the period established by these rules), and give notice to the parties.

(c) **Submission of Position Papers to Mediator.** ~~No later than seven (7) days.~~ Position papers or other written mediation statements may be submitted to a mediator in the parties' discretion or upon the mediator's request. As a general rule, any such paper or statement shall be reasonable in length given the nature and scope of the matter being mediated, and should be submitted within a reasonable period of time before the scheduled date of the mediated settlement conference, any party may submit a. If considered "confidential position paper to the mediator. The position" by the submitting party, any such paper shall be limited in length to five (5) pages, double spaced, and may be accompanied by up to five (5) pages of exhibits. Position papers are confidential, or statement shall be held so by the mediator, and need not be served on other parties designated as such. The purpose of these submissions is to help the mediator become familiar with the assertions of the parties, and the parties may agree to the submission of additional information if they believe the information will facilitate the mediated settlement conference. The mediator may charge the submitting party for the time spent reviewing such papers or statements, subject to any separate agreement by the parties to otherwise divide such charge. In the mediator's discretion, such charge may be included on a confidential or other separate invoice to the party or parties being invoiced for the same.

(d) **Duties of Parties, Representatives, and Attorneys.** The following persons shall be physically present at the entire mediated settlement conference unless ~~excused~~ otherwise agreed to by the parties and consented to by the mediator:

(1) Individual parties; an officer, manager, or director of a corporate or other entity party, such representative to have full authority to negotiate on behalf of the entity and to approve or recommend a settlement (although another authorized representative with such authority may be available by telephone or other electronic means), unless the Court by order or all parties and the mediator by consent agree to another arrangement for participation by a representative with such authority;

(2) At least one attorney of record for each represented party; ~~and~~

(3) A representative of the insurance carrier for any party against whom a claim is made. The representative must have full authority to settle the claim ~~and~~ (although an additional representative with such authority may be available by telephone or other electronic means), unless the Court by order or all parties and the mediator by consent agree to another arrangement for participation by a representative with such authority. Such representative must be a person other than the carrier's outside counsel; and

(4) Where any party is a governmental or other public entity, by an employee or agent who is not such party's outside counsel and who has full authority to settle the claim. Where any settlement with such a governmental or other public entity must subsequently be approved by a governing body, the authorized representative who is present may enter into a settlement agreement containing such a condition. Any report of mediator shall reflect that such a condition to settlement exists.

Upon reaching a settlement agreement at a mediated settlement conference, the parties shall forthwith reduce the agreement to writing and prepare a stipulation of dismissal ~~or~~ consent judgment or other appropriate filing for presentation to the Court.

(e) Authority of the Mediator. The mediator is authorized by these rules to exercise control over the mediated settlement conference and to direct all proceedings therein. The mediator is specifically authorized to meet or consult privately with any party or their counsel before, during or after the conference. ~~The mediator may report in writing, and to the Court, with copies~~ take such other action as allowed by these Local Rules or pursuant to the parties, any conduct of any party that may be in violation of these applicable North Carolina court rules for mediated settlement conferences governing mediators and court-ordered mediations.

(f) Duties of the Mediator. At the beginning of the mediated settlement conference, the mediator shall describe the following matters to the parties:

- (1) The process of mediation,
- (2) The differences between mediation and other forms of conflict resolution,
- (3) The costs of the mediated settlement conference,
- (4) The fact that the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement,
- (5) The circumstances under which the mediator may meet alone with either of the parties or any other person,
- (6) The conditions under which communications with the mediator will be held in confidence during the conference,
- (7) The inadmissibility of negotiating statements and offers at trial,
- (8) The fact that the Court will not permit parties in other litigations to conduct discovery regarding the mediation in this case,
- (9) The duties and responsibilities of the mediator and the parties, and
- (10) The fact that any agreement reached will be reached by mutual consent of the parties.

The mediator may recess or suspend the conference at any time and set a schedule for reconvening. It is the duty of the mediator to determine if an impasse has been reached or mediation should for any reason be terminated. ~~He~~ The mediator shall then inform the parties that mediation is terminated.

(g) Agreement to Modify Mediation Procedures. By agreement ~~filed with the Court, of~~ the parties, and with the consent of the mediator, the parties may modify the

mediation procedures described in these rules, except that the parties may not alter time limitations set by these rules or by order of the Court.

(h) **Sanctions for Failure to Appear.** If a party or other person is required but fails to attend a mediated settlement conference without good cause, the Court may impose on that person ~~(or any associated party)~~ any lawful sanction, including, but not limited to, ~~the imposing of the cost~~imposition of attorney's fees, mediator's fees, and expenses of persons incurred in attending the conference.

(i) **Inadmissibility of Negotiations.**

(1) Evidence of statements made and conduct occurring in a mediated settlement conference or otherwise in communications with a mediator during the mediation process, whether attributable to a party, the mediator, or a neutral observer present at the conference (e.g., mediator candidate, interpreter, person studying dispute resolution), shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

- (i) In proceedings for sanctions under these rules;
- (ii) In proceedings to enforce or rescind a settlement of the action;
- (iii) In disciplinary proceedings before the Court, the North Carolina State Bar, or any agency established to enforce standards of conduct for mediators; or
- (iv) In proceedings to enforce laws concerning juvenile or elder abuse.

(2) No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a mediated settlement conference.

(3) No mediator or neutral observer present at a mediated settlement conference shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and except proceedings for sanctions under these rules, and disciplinary proceedings before this Court, the State Bar, or an agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

LR 83.9f COMPLETION OF THE MEDIATED SETTLEMENT CONFERENCE

When the mediated settlement conference is completed, the mediator shall immediately submit to the clerk a report of the status of the case, on a form supplied by the clerk. If the case is resolved, it is the duty of the parties to file a stipulation of

dismissal or consent judgment. If the case is not resolved, it proceeds without further order of the Court in accordance with the local rules of the Court.

~~LR 83.9g~~ — EVALUATION OF THE MEDIATION PROGRAM

~~—— The mediation program established by these rules is experimental in nature and will be periodically reviewed by the Court. For purposes of evaluation of the program, the mediator, the attorneys, and the litigants may be requested to complete confidential evaluation reports at the completion of the mediation. These reports shall be kept confidential by the clerk and shall be maintained in a file separate and apart from the case file. The clerk shall compile information from the evaluation reports to assist the Court in determining the effectiveness of the mediation program.~~