

LOCAL RULE 9019-2

Title: MEDIATED SETTLEMENT CONFERENCE

(a) Order for Mediated Settlement Conference

(1) Order By Court: The court may, by written order, require parties and their representatives to attend a pre-trial mediated settlement conference in any adversary proceeding or contested matter pending in the Bankruptcy Court.

(2) Timing of the Order: The court may issue the order at any time after the time for filing answers has expired in an adversary proceeding or after a response is filed in a contested matter.

(3) Content of Order: The court's order shall:

(A) Require that a mediated settlement conference be held in the case;

(B) Establish a deadline for the completion of the conference;

(C) State clearly that the parties have the right to select their own mediator as provided by section (b);

(D) State the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to section (b); and

(E) State that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) Motion to Dispense with Mediated Settlement Conference: A party may move the court, within 14 days after the court's order, to dispense with the conference. The motion shall state the reasons the relief is sought, and shall be filed with the clerk of court and served on all opposing parties. Any party may file a written objection specifically stating his or her reasons for opposing the motion. The judge will rule upon such motion without a hearing.

(5) Motion for Court Ordered Mediated Settlement Conference: In cases not ordered to mediated settlement conference, any party may move the court to order such a conference. The motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections may be filed in writing with the court within 14 days after the date of the service of the motion. Thereafter, the judge shall rule upon the motion without a hearing.

(6) Motion to Authorize the Use of Other Settlement Procedures: Within 14 days of the court's mediation order, any party may move the court to authorize the use of some other settlement procedure in lieu of a mediated settlement conference. The motion shall state the reasons the authorization is requested and that all parties consent to the motion. The deadline for completion of the authorized settlement procedure shall be as provided by the rules authorizing the procedure or, if none, the deadline shall be as ordered for the mediated settlement conference.

(b) Selection of Mediator

(1) Selection of Certified Mediator by Agreement of Parties: The parties appearing of record may select a mediator certified pursuant to the rules of the Supreme Court of North Carolina. The plaintiff shall file with the court an approved Designation for Mediator notice form indicating Selection of Certified Mediator by Agreement within 21 days of the court's order. The notice shall state the name, address, and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and the parties have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to the rules of the Supreme Court.

(2) **Nomination and Court Approval of Noncertified Mediator:** The parties may select a mediator who does not meet the certification requirements of the Supreme Court but who, in the opinion of the parties and the judge, is otherwise qualified by training or experience to mediate the action. If the parties select a noncertified mediator, the plaintiff or plaintiff's attorney shall file with the court an approved Designation of Mediator notice form indicating Nomination for Noncertified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; 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 have agreed upon the selection and rate of compensation. The judge shall rule on the nomination without a hearing.

(3) **Appointment of Mediator by the Court:** If the parties cannot agree upon the selection of a mediator, the plaintiff shall submit a Designation of Mediator form indicating a Motion for Court Appointment of Mediator to the court on behalf of the parties. The motion must be filed within 21 days after the court's order and shall state that the parties and their attorneys have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall state whether any party prefers a certified attorney mediator, and if so, the judge shall appoint a certified attorney mediator. The motion shall state that all parties prefer a certified, nonattorney mediator, and if so, the judge shall appoint a certified, nonattorney mediator if one is on the list of certified mediators desiring to mediate cases in the district. If no preference is expressed, the judge may appoint a certified attorney mediator or a certified nonattorney mediator. Upon receipt of a Motion for Court Appointment of Mediator, or in the event the plaintiff has not filed a Notice of Selection of Certified Mediator or Nomination of Noncertified Mediator with the court within 21 days of the court's order, the judge shall appoint a mediator certified pursuant to these Local Rules. Only mediators that have indicated their desire to mediate cases in the Middle District shall be appointed.

(4) **Mediator Information Directory:** To assist the parties in the selection of a mediator by agreement, a central directory of information on all certified mediators who wish to mediate cases in the Middle District will be collected and maintained by the clerk's office.

(5) **Disqualification of Mediator:** Any party may move for an order disqualifying the mediator. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to this rule. Nothing in this provision shall preclude mediators from disqualifying themselves upon written notice to the judges and the parties.

(c) The Mediated Settlement Conference

(1) **Where Conference Is to Be Held:** Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the United States Bankruptcy Courthouse or other public or community building in the Middle District. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

(2) **When Conference Is to Be Held:** The court's order issued pursuant to section (a)(2) shall state a date of completion for the conference. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

(3) **Request to Extend Date of Completion:** A party, or the mediator, may request the judge to extend the deadline for completion of the conference. The request shall state the reasons the

continuance is sought and shall be served by the movant upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the judge. The judge may grant the request and enter an order setting a new date for the completion of the conference, which date may be set at any time prior to trial. The order shall be served on all parties and on the mediator by the person who sought the extension.

(4) Recesses: The mediator may recess the conference at any time and may set times for reconvening. No further notification is required for persons present at the recessed conference.

(5) Mediated Settlement Conference is not to delay other proceedings: The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the judge.

(d) Duties of Parties, Representatives, and Attorneys

(1) Attendance: The following persons shall physically attend the entire mediated settlement conference until an agreement is reduced to writing and signed as provided by section (d)(3) or an impasse has been declared, unless excused by the judge or by the mediator with approval of all parties and attorneys:

(A) Parties:

(i) All individual parties;

(ii) Any party that is not a natural person or a government entity shall be represented at the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle this action; and

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

(B) Insurance Company Representatives: A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have decision making authority.

(C) Attorneys: At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) Notifying Lien Holders: Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify the lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request the lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

(3) Finalizing Agreement: Upon reaching agreement during the conference but before the conference concludes, a draft of the settlement terms shall be written by the mediator and signed by the parties and others with settlement authority. Upon reaching agreement, either before or during the conference, the parties and others with settlement authority, shall provide a copy of a formal executed written agreement to the mediator within 7 days of the settlement. The mediator shall attach a copy of the formal written agreement to the Report of Mediator filed pursuant to section (f)(2)(D) of these Local Rules. Failure of the parties to provide a copy of the formal written agreement to the mediator on a timely basis may result in sanctions.

(e) **Sanctions and Failure to Attend:** If any person required to attend the conference pursuant to section (d) of these rules fails to attend without good cause, the judge may impose an appropriate monetary sanction, including but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and losses of earnings incurred by persons attending the conference. A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing, and in a written order making findings of fact and conclusions of law.

(f) Authority and Duties of a Mediator

(1) Authority of a Mediator:

(A) Control of Conference: The mediator shall at all times be in control of the conference and the procedures to be followed.

(B) Private Consultation: The mediator may meet and consult privately with any participant or counsel during the conference.

(C) Scheduling of the Conference: The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

(2) Duties of Mediator

(A) Generally: The mediator shall define and describe the following to the parties at the beginning of the conference:

(i) The process of mediation;

(ii) The difference between mediation and other forms of conflict resolution;

(iii) The costs of the mediated settlement conference;

(iv) 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 a settlement;

(v) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(vi) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(vii) The inadmissibility of conduct and settlements as provided by applicable Rules of Evidence;

(viii) The duties and responsibilities of the mediator and the participants; and

(ix) The fact that any agreement reached will be reached by mutual consent.

(B) Disclosure: The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(C) Declaring Impasse: It is the duty of the mediator to timely determine that an impasse exists and that the conference should end.

(D) Reporting Results of Conference: The mediator shall submit a Report of Mediator to the judge which indicates the results of the conference. This report shall be filed within 14 days of the conclusion of the conference or upon the receipt of a copy of a written settlement agreement, whichever comes first. If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the persons designated to file the consent judgment or dismissal. The mediator's report shall inform the court of the absence of any party, attorney, or insurance representative who was absent without permission from the conference. The mediator shall attach the written settlement agreement prepared by the parties to the Report of Mediator.

(E) Scheduling and Holding the Conference: It is the duty of the mediator to schedule the conference and to conduct and conclude the conference prior to the conference completion deadline set out in the court's order. Deadlines for completion of the conference shall be strictly observed by the mediator unless the time limit is changed by a written order of the judge.

(3) Failure of mediator to comply with section (f): The judge may withhold future appointments of any mediator who does not fully comply with the requirement of section (f).

(g) Compensation of the Mediator

(1) By Agreement: when the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(2) By Court Order: When the mediator is appointed by the court, the mediator shall be compensated by the parties at an hourly rate set by the judge.

(3) Payment of Compensation by Parties: Unless otherwise agreed to by the parties or ordered by the court, costs of the mediated settlement conference shall be paid in equal shares by the parties. Multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the costs shall pay them equally unless the court otherwise orders.

(4) Sanctions for Failure to Pay mediator's Fee: Except when excused by these rules or by order of the court, failure of a party to make a timely payment of the party's share of a mediator's fee at the conclusion of the conference may result in the imposition of sanctions.

(h) Communications with the Court: All communications concerning mediated settlement conferences should be addressed to the bankruptcy administrator.