

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20110376

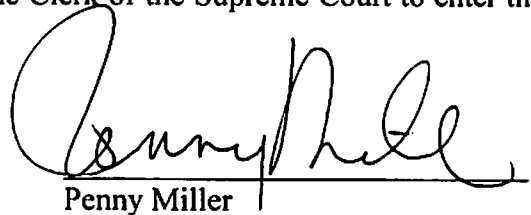
**Proposed Adoption or Amendment of North Dakota Rules of Appellate Procedure 5
and North Dakota Rules of Court 8.9**

[¶1] On October 27, 2011, the Joint Alternative Dispute Resolution Committee submitted a petition to approve adoption of North Dakota Rules of Appellate Procedure 5 and an Appellate Mediation Protocol, and to amend North Dakota Rules of Court 8.9. Following a comment period, on March 14, 2012, the Court returned the proposed rule and amendments to the Joint Alternative Dispute Resolution Committee for further consideration. On November 1, 2012, the Joint Alternative Dispute Resolution Committee submitted further amendments for the Court's consideration.

[¶2] The Court considered the Joint Alternative Dispute Resolution Committee's November 1, 2012, submission. On November 30, 2012, the Court referred the proposed rule and amendments to the Joint Procedure Committee, and on March 7, 2013, the committee submitted further amendments to proposed North Dakota Rules of Appellate Procedure 5 incorporating the Appellate Mediation Protocol, and to North Dakota Rules of Court 8.9. The Court further amended the proposal submitted by the Joint Procedure Committee. The proposed rule and amendments are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

[¶3] **ORDERED**, that the amendments to North Dakota Rules of Appellate Procedure 5 incorporating the Appellate Mediation Protocol, and to North Dakota Rules of Court 8.9, both with further amendments by the Court, are ADOPTED effective January 1, 2014.

[¶4] The Supreme Court of the State of North Dakota convened the 9th day of October, 2013, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, and the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order.

A handwritten signature in black ink, appearing to read "Penny Miller", written over a horizontal line.

Penny Miller
Clerk
North Dakota Supreme Court

RULE 5. POST-JUDGMENT MEDIATION

(a) Purpose.

(1) The purpose of post-judgment mediation is to improve the lives of families who appear before the courts by trying to resolve disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.

(2) The objectives of post-judgment mediation are to:

(A) support improved family decision-making and to promote agreement and compromise instead of further litigation and competition;

(B) improve access to mediation by providing funding;

(C) improve post-litigation family problem-solving and communication capacities by reestablishing communication through mediation;

(D) decrease litigation costs for litigants;

(E) create incentives to pursue mediation including flexibility to negotiate critical issues without judicial intervention;

(F) determine best practices for family mediation in North Dakota;

(G) improve rural access to post-litigation mediation services, as well as access by underprivileged and minority persons;

(H) work with the domestic violence services community in order to assess risk and provide services where appropriate; and to ensure proper protections are put in place and mediators are well-trained in signposts, risks, and exit planning strategies;

(I) reduce post-judgment litigation and conflict in family cases; and

(J) help the public, judiciary, and bar become more aware of the benefits and nature of the mediation process.

(b) Program Management. The family mediation program administrator will manage and oversee the operation of the program under the supervision of the Supreme Court.

(c) Research and Evaluation. The program will include evaluation components.

(d) Mediation Process.

(1) Request for Mediation. Any party contemplating an appeal may forward a request for post-judgment mediation to the program administrator no later than 60 days after the service of notice of entry of judgment or order, or seven days after service of the notice of appeal, in any eligible case. The request must be simultaneously served on every party under N.D. R. App. P. 25. The time for filing a notice of appeal under N.D. R. App. P. 4 is not affected by any request or assignment for mediation.

(2) Eligible Cases. Only final and appealable judgments and orders in the following types of cases are eligible for participation in appellate mediation:

(A) divorce cases involving property or spousal support;

(B) any case involving parenting rights, except for termination of parental rights cases;

(C) any case involving residential responsibilities or support of minor children;

(D) any case involving grandparent visitation; and

(E) any case under the Uniform Probate Code or the Uniform Trust Code.

(3) Exemption from Mediation. Any party may request referral of an eligible case to post-judgment mediation. Referral must be granted unless a party requests an order from the

45 court exempting the case from post-judgment mediation by filing a motion and an affidavit
46 with the supreme court clerk within seven days of service of the mediation request. The court
47 may exempt the case if:

48 (A) the issues raised are limited to a question of law; or

49 (B) prior post-judgment mediation has been attempted and the issues are substantially
50 similar; or

51 (C) other good cause is shown.

52 (4) Exclusion from Mediation. The program administrator may not refer proceedings
53 where a current domestic violence protection order or other order for protection between the
54 parties exists. In these cases, the court may not proceed with mediation except in unusual
55 cases where:

56 (A) mediation is requested by the victim of the domestic violence or sexual abuse, and
57 an exception to the order of protection is made by the court;

58 (B) the mediation is provided by a mediator trained to address the needs and safety
59 of victims where domestic violence is at issue;

60 (C) the victim of domestic violence is provided the opportunity for separate meetings
61 during the mediation, and to mediate using separate rooms;

62 (D) the mediation takes place in a courthouse or other building where security
63 measures are in place; and

64 (E) the victim has an attorney or other advocate or support person of their choice in
65 the mediation.

66 The Rule 5 (d)(4) exclusion and exceptions are intended to comply with the N.D.C.C.

§ 14-09.1-02 standards for family mediation.

(5) Screening and Assignment of Mediator. On receipt of a request for post-judgment mediation, the program administrator must determine whether a case meets the requirements for eligibility and appropriateness for mediation. Once a case has been approved for post-judgment mediation, the program administrator must assign a mediator eligible under Rule 5(e). The program administrator must send a notice of mediation to counsel, any unrepresented party, and the supreme court clerk. The notice of mediation must identify the mediator who has been assigned, and a deadline for completion of the mediation. The mediation must be completed within 45 days of the assignment of a post-judgment mediator.

(6) Ordering of Transcript and Filing of Briefs. To expedite the mediation process and spare the parties as much initial expense as possible, the ordering of the transcript in cases assigned for mediation is extended to 21 days after the filing of the notice of appeal. The time for filing briefs is not automatically tolled pending mediation. In cases in which mediation has been requested, any motions for enlargement of time for briefs must be filed with the supreme court clerk under Rule 26(b).

(7) Mediation Orientation. The post-judgment mediation program will provide up to six hours of combined pre-mediation orientations and mediation. Mediators will be compensated at a rate set annually by the state court administrator. The post-judgment mediation program requires the parties to individually attend a pre-mediation orientation and screening with a designated mediator, and at least one joint mediation session. The program will provide up to six hours of mediation without charge to the parties. Should the parties require additional sessions, they may purchase mediation from the mediator. Parties may also

89 apply to the program administrator for additional mediation sessions and may apply for a fee
90 waiver or sliding scale fee should they qualify based on economic factors. The program
91 administrator will determine whether a party is eligible for a fee waiver or fee reduction
92 based on party income according to a schedule adopted by the Supreme Court. If the parties
93 qualify for a fee reduction and have been approved for additional mediation, any "gap"
94 between the set rate and their ability to pay will be paid to the mediator by the court under
95 this program.

96 (8) Mediation Statement. On request of the mediator, the parties should each supply
97 to the mediator, at least two days before the scheduled conference, a mediation statement no
98 more than four pages in length. The statement should include:

99 (A) a brief history of the litigation;

100 (B) a brief statement of facts;

101 (C) the history of any efforts to settle the case, including any offers or demands;

102 (D) a summary of the parties' legal positions;

103 (E) the present posture of the case, including any related litigation; and

104 (F) any proposals for settlement.

105 The mediation statement may not be filed in the office of the supreme court clerk.
106 Mediation by telephone or other electronic means may be used if all parties and the mediator
107 agree.

108 (e) Selection of Mediators.

109 (1) Eligibility. Any lawyer qualified as a post-judgment mediator under N.D.R.Ct.
110 8.9 may apply to be added to the roster of post-judgment mediators and will be approved by

the program administrator. Mediators must carry malpractice insurance that covers their mediation practice.

(2) Mediation Assignment. Mediators will be assigned cases by the program administrator and will manage cases assigned to them from orientation and screening through conclusion of mediation.

(3) Conflicts of Interest and Bias. A mediator may not be removed unless the mediator and/or the parties' petition the program administrator based on bias or conflicts of interest. Parties and attorneys may not request a change of mediator unless they present clear evidence of bias or conflict of interest.

(f) Mediation Outcome. Within seven days after completion of the mediation decision summary in appeals settled in whole or in part under Rule 5, the parties must file a copy of the decision summary and a request for the Supreme Court to take appropriate action, such as dismissal of the appeal under Rule 43 or remand to the district court. If a matter is remanded, the parties must file the appropriate papers with the district court to obtain an amended judgment, which must incorporate all terms of the decision summary. On entry of an amended judgment, the parties must request the Supreme Court to enter an appropriate order. In appeals not settled and terminated from mediation, briefing and oral argument will proceed under the rules. In cases settled by post-judgment mediation prior to the filing of a notice of appeal, the requesting party is responsible for obtaining an amended judgment incorporating all terms of the decision summary from the district court.

(g) Closing.

(1) Mediation Decision Summary. At the close of every mediation case, the mediator

and parties must create a written decision summary for the parties that notes any and all agreements made and uses the parties' own language. The parties will have seven days to reconsider the decisions made in mediation. If neither party files a written request to reconsider within seven days, the mediator must immediately send a copy of the decision summary to the parties and their attorneys, along with the Mediation Case Closing Form. (N.D.R.Ct. Appendix I, Form G).

(2) Evaluation. At the close of every mediation case, the mediator and the parties must complete the required evaluation forms and the mediator must submit those to the program administrator along with closing form, and the mediator's invoice form. The mediator is responsible for collecting fees from the parties if appropriate.

(3) Case Closing/Notification: The mediator must notify program administrator when a mediation case has concluded for any reason, and offer the following reasons:

(A) agreement has been reached in whole or part; or

(B) the parties were unable to reach agreement.

(h) Confidentiality. Statements and comments made during mediation conferences and in related discussions, and any record of those statements, are confidential and may not be disclosed by anyone (including the program administrator, counsel, or the parties; and their agents or employees) to anyone not participating in the post-judgment mediation process. Mediators may not be called as witnesses, and the information and records of the program administrator may not be disclosed to judges, staff, or employees of any court.

EXPLANATORY NOTE

Rule 5 was adopted, effective January 1, 2014.

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013,
pages 5-10; Joint Alternative Dispute Resolution Committee Minutes of June 25, 2012;
October 25, 2012; September 7, 2011; June 29, 2011; June 10, 2011; December 9, 2010.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 14-09.1-02.

CROSS REFERENCE: N.D.R.App.P. 26 (Computing and Extending Time),
N.D.R.App.P. 43 (Substitution of Parties); N.D.R.Ct. 8.1 (Family Mediation Program),
N.D.R.Ct. 8.9 (Roster of Alternative Dispute Resolution Neutrals).

RULE 8.9. ROSTER OF ALTERNATIVE DISPUTE RESOLUTION NEUTRALS

(a) Roster of neutrals. The State Court Administrator shall maintain and monitor a roster of neutrals for civil arbitration, civil mediation, and domestic relations/contested child proceedings mediation. Each roster must include the neutral's name, address, and credentials. Each roster must be updated and published on an annual basis and be available for inspection in the clerk of the district court's office. The State Court Administrator may establish a reasonable fee for placement on the roster and a reasonable yearly renewal fee.

(b) Qualifications. To be listed on a roster, a neutral shall provide the State Court Administrator with written credentials indicating the neutral meets the following requirements:

(1) Civil arbitrator roster. An arbitrator shall complete 30 hours minimum of arbitration training. The training must include the following topics:

(A) Pre-hearing communications between parties and between parties and the neutral;

(B) Components of the hearing process including evidence, presentation of the case, witnesses, exhibits, objectives, awards, and dismissals;

(C) Settlement techniques;

(D) Rules, statutes, and practices covering arbitration, including these rules.

(E) An arbitrator must also complete nine hours of continued arbitration training during each three-year period.

(2) Civil mediator roster. A mediator shall complete 30 hours minimum of mediation training, including a minimum of 15 hours of role-playing. The training must include the

following topics:

(A) Conflict resolution and mediation theory, including causes of conflict and interest-based versus positional bargaining and models of conflict resolution;

(B) Mediation skills and techniques, including information gathering skills, communication skills, problem solving skills, interaction skills, conflict management skills, negotiation techniques, caucusing, cultural and gender issues, and power balancing;

(C) Components in the mediation process, including an introduction to the mediation process, fact gathering, interest identification, option building, problem solving, agreement building, decision making, closure, drafting agreements, and evaluation of the mediation process;

(D) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics, standards of practice, and mediator introduction;

(E) Rules, statutes, and practices governing mediation in the trial court system, including these rules.

(F) A mediator must also complete nine hours of continued mediation training during each three-year period.

(3) Domestic relations mediator/contested child proceedings mediator roster. A domestic relations mediator or a contested child proceedings mediator under N.D.C.C. ch. 14-09.1 shall complete 40 hours minimum of domestic relations mediation training, including two hours minimum of domestic abuse training, and nine hours of continued domestic relations mediation training during each three-year period; and

(A) have a Bachelor's Degree in Behavioral Science with two years of experience in

family/child intervention service; or

(B) have a Master's Degree in Behavioral Science with one year of experience in family/child intervention service; or

(C) have a license to practice law supplemented with two years of experience in domestic relations cases.

(4) Post-Judgment Domestic Relations Mediator Roster. A domestic relations proceedings mediator shall complete 40 hours minimum of domestic relations mediation training, including two hours minimum of domestic abuse training, and nine hours of continued domestic relations mediation training during each three-year period, and have a license to practice law supplemented with two years of experience in domestic relations.

(5) Post-Judgment Estate Mediator Roster. An estate proceedings mediator shall complete 40 hours minimum of domestic relations or civil mediation training, and nine hours of continued trust and estate law training during each three-year period, and have a license to practice law.

~~(4)~~(6) A qualified neutral may not provide services during a period of suspension of a professional license.

~~(5)~~(7) If a neutral is rostered in Minnesota within 60 days of the effective date of this rule, the neutral may be placed on the appropriate North Dakota roster within one year of the effective date of this rule as long as the neutral is still in good standing with the Minnesota rostering system.

(c) Selection of neutral. The parties may select a neutral who is not listed on the State Court Administrator's roster. A court-appointed contested child proceedings mediator under

N.D.C.C. § 14-09.1-03 must have the qualifications specified in subdivision (b)(3) of this rule.

(d) Continuing training. Training requirements may be attained through course work and attendance at state and national ADR conferences. The neutral is responsible for maintaining attendance records and shall disclose the information to program administrators and the parties to any dispute. The neutral shall submit continuing education credit information to the State Court Administrator's office every three years.

(e) Certification of training programs. Neutrals shall attend initial and continuing training programs that are approved by the Joint Committee on Alternative Dispute Resolution.

(f) Disclaimer. Each roster must include the following disclaimer:

The qualifications for listing a neutral on a roster are minimum standards, and the State Court Administrator's listing of a neutral does not imply the neutral has the requisite degree of skill or competency for a particular case. When choosing a neutral, the parties must make further inquiry about the qualifications and experience of the neutral. The rosters are intended to assist people in locating an appropriate neutral by serving as a starting point.

(g) Ethics Enforcement Procedure.

(1) Introduction. The purpose of the Code of Mediation Ethics, Appendix A, is to provide standards of ethical conduct to guide mediators who provide mediation services, to inform and protect consumers of mediation services, and to ensure the integrity of the mediation process. In order for mediation to be effective, there must be broad public confidence in the integrity of the process. Mediators have a responsibility not only to the

89 parties and the legal system, but also to the continuing improvement of the process. They
90 must observe high standards of ethical conduct. These provisions should be construed to
91 advance these objectives.

92 Failure to comply with any provision in the Code of Ethics may be the basis for
93 removal from the roster of mediators maintained by the State Court Administrator and for
94 such other action as may be taken by the North Dakota Supreme Court or the State Bar
95 Association of North Dakota, or other professional organizations. Violation of a provision
96 of the Code should not itself give rise to a cause of action nor should it create any
97 presumption that a legal duty has been breached. Nevertheless, since the rules do establish
98 standards of conduct for mediators, a mediator's violation of a rule may be evidence of
99 breach of the applicable standard of conduct.

100 (2) Scope. This procedure applies to complaints against any individual mediator or
101 mediation organization listed on the statewide mediation roster pursuant to this rule.

102 Advisory Comment

103 A mediator is subject to this complaint procedure when providing any mediation
104 services. The complaint procedure applies whether the services are court ordered or not, and
105 whether the services are or are not pursuant to North Dakota Rules of Court. The Alternative
106 Dispute Resolution Review Board will consider the full context of the alleged misconduct,
107 including whether the mediator was subject to other applicable codes of ethics, or was
108 representing a mediation organization at the time of the alleged misconduct.

109 (3) Board. The Alternative Dispute Resolution Review Board will consist of three (3)
110 experienced mediators appointed by the Chief Justice of the North Dakota Supreme Court

after consultation with the President of the State Bar Association of North Dakota. At least one member appointed must be a non-lawyer mediator. Each member will serve for a term not to exceed three years; however, at the time of the creation of the Board one member will serve one year before being eligible for reappointment, one member will serve two years before being eligible for reappointment and one member will serve three years before being eligible for reappointment. No member may serve more than two consecutive three year terms. The Chief Justice shall designate a Chair of the Board.

(4) Procedure.

(A) A complaint must be in writing, signed by the complainant, and mailed or delivered to the Alternative Dispute Resolution Review Board. The complaint must identify the mediator and make a short and plain statement of the conduct forming the basis of the complaint.

(B) The Board shall review the complaint to determine whether the allegations(s), if true, constitute a violation of the Code of Ethics.

(C) If the allegations(s) of the complaint do not constitute a violation of the Code of Ethics, the complaint must be dismissed and the complainant and the mediator must be notified in writing.

(D) If the Board concludes that the allegations of the complaint, if true, constitute a violation of the Code of Ethics, the Board will undertake such review, investigation, and action it deems appropriate. In all such cases, the Board shall send to the mediator, by certified mail, a copy of the complaint, a list identifying the ethical rules that may have been violated, and a request for a written response to the allegations and to any specific questions

posed by the Board. It may not be considered a violation of the Code of Ethics for the mediator to disclose notes, records, or recollections of the mediation process complained of as part of the complaint procedure. Confidentiality will be upheld by the Board and only the records and notes relevant to the complaint will be considered in order to protect the parties and the integrity of the mediation process. Except for good cause shown, if the mediator fails to respond to the complaint in writing within thirty (30) days, the allegations(s) shall will be considered admitted.

(E) The Board, at its discretion, may refer the complainant and mediator to mediation conducted by a neutral and qualified mediator to resolve the issues raised by the complainant. Mediation may proceed only if both the complainant and mediator consent. If the complaint is resolved through mediation, the Board shall dismiss the complaint, unless the resolution includes sanctions to be imposed by the Board. If no agreement is reached in mediation, the Board shall determine whether to proceed further.

(F) After review and investigation, the Board shall advise the complainant and mediator of the Board's action in writing by certified mail sent to their respective last known addresses. Upon request within 14 days from receipt of the Board's action on the complaint, the mediator and the complainant are entitled to a hearing before the Board to contest proposed sanctions or findings, and have the right to bring or defend against all charges, to be represented by an attorney, and to examine and cross-examine witnesses. The Board shall receive evidence that the Board considers necessary to understand and determine the dispute. Relevancy must be liberally construed in favor of admission. The Board shall make an electronic recording of the proceedings. The Board at its own initiative, or by request of the

complainant or mediator, may issue subpoenas for the attendance of witnesses and the production of documents and other evidentiary matter. The Board's decision is final.

(5) Sanctions.

(A) The Board may impose sanctions, including but not limited to:

(i) issuing a private reprimand;

(ii) designating the corrective action necessary for the mediator to remain on the statewide roster;

(iii) notifying the appointing court and any professional licensing authority with which the mediator is affiliated of the complaint and its disposition;

(iv) publishing the mediator's name, a summary of the violation, and any sanctions imposed;

(v) removing the mediator from the roster of qualified mediators and setting conditions for reinstatement; and

(vi) assessing costs and expenses of proceedings against the mediator, including without limitation, the costs of investigations, service of process, witness fees, and a court reporter's services.

(B) Sanctions may only be imposed if supported by clear and convincing evidence. Conduct considered in previous or concurrent ethical complaints against the mediator is admissible to show a pattern of related conduct, the cumulative effect of which constitutes an ethical violation, and in consideration of appropriate sanctions.

(6) Confidentiality.

(A) Unless and until sanctions are imposed, all files, records, and proceedings of the

Board that relate to or arise out of any complaint shall be confidential, except:

(i) as between Board members and staff;

(ii) on request of the mediator, the file maintained by the Board, excluding its work product, must be provided to the mediator;

(iii) as otherwise required or permitted by rule or statute; and

(iv) to the extent that the mediator and complainant both waive confidentiality.

(B) If sanctions are imposed against any mediator under Section III A (2)-(5), the sanction must be of public record, and the Board file must remain confidential.

(C) Nothing in this rule may be construed to require the disclosure of the mental processes or communications of the Board or staff.

(7) Privilege; Immunity.

(A) Privilege. A statement made in these proceedings is absolutely privileged and may not serve as a basis for liability in any civil lawsuit brought against the person who made the statement.

(B) Immunity. Board members and staff are immune from suit for any conduct in the course of their official duties.

EXPLANATORY NOTE

Rule 8.9 was adopted, effective March 1, 2001; amended effective August 1, 2009;_____.

A neutral is an individual or an organization offering an alternative dispute resolution process.

Arbitration is the process through which each party presents its case before a neutral

199 third party who renders a binding or non-binding decision.

200 Mediation is an informal, non-adversarial process through which a neutral third party
201 facilitates communication between the parties to promote settlement. Decision-making
202 authority remains with the parties; the mediator has no authority to render a judgment on any
203 issue of the dispute.

204 Subdivision (b) was amended, effective _____, to add new paragraphs
205 4 and 5 on post-judgment mediator qualifications.

206 Subdivision (g) was added, effective August 1, 2009, to provide an enforcement
207 procedure for the Code of Mediation Ethics attached to this rule as Appendix A.

208 Sources: Joint Procedure Committee Minutes of January 28-29, 1999, pages 7-12;
209 May 6-7, 1999, pages 7-11.

210 Statutes Affected:

211 Repealed: N.D. Sup. Ct. Admin. R. 28, effective March 1, 2001.

212 Cross Reference: N.D.R.App.P. 5 (Post-Judgment Mediation Program); N.D.R.Ct. 8.8
213 (Alternative Dispute Resolution).