

August 2020 Changes to Appellate Mediation Rules and Procedures Due to COVID-19

The Court of Appeals previously adopted changes to its mediation program in March 2020 in response to Governor Cooper's stay-at-home order. Since restrictions on travel and in-person gathering are still in effect, as of 1 August 2020, the following modifications to the usual mediation rules and scheduling procedures will apply. This directive on appellate mediation replaces the March 2020 directive and will remain in effect until further notice from this Court.

1. General framework for continuing the Appellate Mediation Program during COVID-19

The Court of Appeals mediation program will continue to accept mediation requests and to schedule mediations (either by remote conference or in person) if the mediations can be held in accordance with the most recent applicable order by the Supreme Court to address COVID-19, any guidelines from the Administrative Office of Courts regarding COVID-19 safety, and any applicable State or local restrictions on travel and gatherings. The most recent Supreme Court orders regarding COVID-19 are available on the North Carolina Judicial Branch website, under COVID-19 (Coronavirus) Updates: <https://www.nccourts.gov/covid-19>.

2. Possibility that mediation deadlines may be extended by future Supreme Court orders.

The Supreme Court's emergency order of 27 March 2020 extended deadlines for filings due in the appellate courts between March 27 and April 30 by 60 days. Because the dates covered by that Supreme Court order have now passed, no automatic extensions of deadlines for filings in the appellate courts are currently in effect.

However, if the Supreme Court issues another emergency order in response to COVID-19 extending deadlines for filings due in the appellate courts, the deadline for filing the "Consent to Appellate Mediation Form and Motion for 60-day Extension of Time" ("Consent Form") and appellate briefs might be impacted. Parties should consult the Supreme Court's website to locate and determine the impact of any future orders.

3. E-filing or emailing the Consent Form

Counsel may electronically file the completed Consent Form at <https://www.ncappellatecourts.org/>. Alternatively, counsel may file the completed Consent Form by emailing it to mediate@coa.nccourts.org or by mailing it to the Court of Appeals. Nevertheless, e-filing is preferred and strongly encouraged.

The Consent Form now requests each party's preference, if any, on mediation by teleconference or videoconference ("remote conference").

4. Mediation by current Court of Appeals Judges by remote conference or in-person mediation

In-person mediation at the Court of Appeals building

No in-person mediation sessions will be conducted at the Court of Appeals building in Raleigh by a current Court of Appeals judge until 1 September 2020 at the earliest. The Court of Appeals will determine when to resume in-person mediation sessions at the Court of Appeals building based upon guidance from the Administrative Office of Courts, any applicable State and local restrictions, and orders and directives from the Chief Justice and the Supreme Court regarding COVID-19.

In-person mediation at a location provided by the parties

A current Court of Appeals judge *may* be willing and available to conduct a mediation in person at a location other than the Court, but this will depend upon the circumstances of the particular case and the distance of travel involved. The Court cannot guarantee that a current Court of Appeals judge will be available to conduct an in-person mediation but will attempt to accommodate the parties' request if possible. Parties who prefer to have an in-person mediation session with a current Court of Appeals judge may do so under the following conditions:

- a. All parties to a mediation agree to an in-person mediation session at a location other than the Court of Appeal building;
- b. The parties agree to secure the location for the mediation and ensure that the mediation is held in accordance with all applicable federal, state, and local restrictions regarding social distancing, travel, or gatherings; and
- c. The assigned judge agrees to conduct the mediation in person at the location selected by the parties. The assigned judge has

absolute discretion not to conduct an in-person mediation. Such judge can elect to conduct the mediation by remote conference or to cancel the mediation if any party does not wish to participate by remote conference.

Mediation by remote conference.

If all parties to a mediation agree for the mediation to be conducted by remote conference, a current Court of Appeals judge will be assigned to do so. If all parties agree to mediation by a current Court of Appeals judge but do not all agree to mediation by remote conference, the mediation shall be canceled unless all parties and the assigned judge agree to hold an in-person mediation under the conditions prescribed above at a location provided by the parties.

5. Extensions of time for filing briefs

When a Consent Form shows that all parties have agreed to appellate mediation, the Court routinely enters a 60-day extension order for filing the appellant's opening brief ("appellate mediation extension"). In the event that the Supreme Court issues another order in response to COVID-19 extending deadlines for filings due in the appellate courts, any briefing deadline falling within the time period of the order ("extension window") will be automatically extended an additional 60 days. This automatic extension will apply even when the briefing deadline falls within the extension window based on a routine appellate mediation briefing extension.

The Court also recognizes that additional briefing extensions of time may be needed, including those necessitated by delays in scheduling a mediation session due to applicable State or local restrictions regarding COVID-19. Any reasonable additional extension of time will be granted upon a party's request.

6. Private mediation by in-person session or remote conference permitted

If the parties select a private mediator to conduct the mediation, all parties and the mediator may agree to hold a mediation session in person. For the mediation to go forward all parties and the mediator must agree on the location and format of the mediation session. Private mediators may also hold mediations by remote conference with the consent of all parties and the private mediator.

7. Canceling mediation a possibility

Calendaring of cases for argument will necessarily be delayed by the extensions of time for filing documents in the Court of Appeals. At this time, the Court does not know the exact effect of these delays on the calendaring of cases. However, if a case has been scheduled for mediation and the mediation session cannot be held soon enough for the case to proceed as the Court deems necessary, the mediation may be canceled in the Court's discretion. If the mediation is canceled by the Court, counsel may file a motion for an extension of time to file the appellant's brief, and the Court will freely grant such an extension.

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