

IN THE SUPREME COURT OF NORTH CAROLINA

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ORDER ADOPTING THE RULES OF MEDIATION  
FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Matters Before the Clerk of Superior Court, which appear on the following pages. These rules supersede the Rules Implementing Mediation in Matters Before the Clerk of Superior Court, published at [367 N.C. 1109–24](#), and waived in part at [369 N.C. 977–78](#).

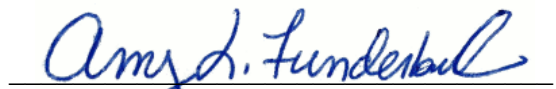
The Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

  
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For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

  
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AMY L. FUNDERBURK  
Clerk of the Supreme Court

# **Rules of Mediation for Matters Before the Clerk of Superior Court**

## **Rule 1. Mediation of Matters Before the Clerk of Superior Court**

(a) **Purposes of Mandatory Mediation.** These rules are promulgated under N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the jurisdiction of the clerk of superior court. The procedures set out in these rules are designed to focus the parties' attention on settlement and resolution, rather than on preparation for contested hearings, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily, either prior to, or after, the filing of a matter with the clerk.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures.** In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent a party to a matter before the clerk, counsel shall discuss the options available to the parties to resolve their dispute through mediation and other settlement procedures without resort to a contested hearing. Counsel shall also discuss which settlement procedure and third party neutral would best suit their clients and the matter in dispute.

(c) **Initiating the Mediation by Order of the Clerk.**

- (1) **Order of the Clerk.** The clerk of any county may, using an Order Regarding Mediation in Matters Before Clerk of Superior Court, [Form AOC-G-301](#), order all persons identified in Rule 4 to attend mediation in any matter in which the clerk has original or exclusive jurisdiction, except in matters under Chapter 45 and Chapter 48 of the General Statutes of North Carolina and matters in which the jurisdiction of the clerk is ancillary.
- (2) **Content of the Order.** The order shall:
  - a. require that a mediation be held in the case;
  - b. establish deadlines for the selection of a mediator and completion of the mediation;
  - c. state the names of the persons who shall attend the mediation;
  - d. state clearly that the persons ordered to attend the mediation have the right to select their own mediator, as provided by Rule 2;
  - e. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

f. state that the parties shall be required to pay the mediator's fee in shares determined by the clerk.

- (3) **Motion for Court-Ordered Mediation.** In matters not ordered to mediation, any party, interested person, or fiduciary may file a written motion with the clerk requesting that mediation be ordered. The motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the North Carolina Rules of Civil Procedure on the nonmovant, interested persons, and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of service of the motion. Thereafter, the clerk shall rule on the motion without a hearing and notify the parties or their attorneys of the ruling.
- (4) **Informational Brochure.** The clerk shall provide the parties with a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission, along with a copy of both the order under subsection (c)(1) of this rule and the motion under subsection (c)(3) of this rule.
- (5) **Motion to Dispense with Mediation.** A named party, interested person, or fiduciary may move the clerk to dispense with a mediation ordered by the clerk. The motion shall state the reasons that relief is sought and shall be served on all persons ordered to attend the mediation and the mediator. For good cause shown, the clerk may grant the motion.
- (6) **Dismissal of Petition for Adjudication of Incompetence.** The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after a mediation is ordered.

## **Rule 2. Designation of the Mediator**

(a) **Designation of a Mediator by Agreement of the Parties.** By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However, in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, [Form AOC-G-302](#) (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation.

The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk.** In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at <https://www.ncdrc.gov>. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory.** The Commission shall maintain for the consideration of the clerks, and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of mediators who are certified under these rules. The directory shall be provided to the clerks on the Commission's website at <https://www.ncdrc.gov>.

(d) **Disqualification of the Mediator.** Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order

disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.

### **Rule 3. The Mediation**

(a) **Where the Mediation Is to Be Held.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(b) **When the Mediation Is to Be Held.** The clerk's order issued under Rule 1(c)(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation under Rule 6(b)(5) and shall conduct the mediation before the deadline, unless the deadline is extended by the clerk.

(c) **Extending Deadline for Completion.** The clerk may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation by the parties, or upon the suggestion of the mediator.

(d) **Recesses.** The mediator may recess the mediation at any time and may set times for reconvening that are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, then no further notification is required for persons present at the mediation.

(e) **The Mediation Is Not to Delay Other Proceedings.** The mediation shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the clerk.

### **Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations**

(a) **Attendance.**

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall physically attend the mediation until either an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or an impasse has been declared. Any person required to attend the mediation may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference, by:

- a. agreement of all persons ordered to attend the mediation and the mediator; or

- b. order of the clerk, upon the motion of a person ordered to attend the mediation and notice to all other persons ordered to attend the mediation and the mediator.
- (2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.
  - (3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.
  - (4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.
  - (5) Other persons may participate in a mediation at the discretion of the mediator.
  - (6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.
- (b) **Finalizing Agreement.**
- (1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

- (2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent location in the document: “This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter.”

(c) **Payment of the Mediator’s Fee.** The persons ordered to attend the mediation shall pay the mediator’s fee as provided by Rule 7.

(d) **No Recording.** There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

#### **Rule 5. Sanctions for Failure to Attend Mediation or Pay the Mediator’s Fee**

Any person ordered to attend a mediation under these rules who fails to attend or to pay a portion of the mediator’s fee in compliance with N.C.G.S. § 7A-38.3B and these rules without good cause shall be subject to the contempt power of the clerk and any monetary sanctions imposed by the clerk. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys’ fees, the mediator’s fee, expenses, and loss of earnings incurred by persons attending the mediation.

Any person seeking sanctions against another 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 persons ordered to attend the mediation. The clerk may initiate proceedings for sanctions upon his or her own motion by the entry of a show cause order. If the clerk imposes sanctions, then the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court under N.C.G.S. §§ 1-301.2 to -301.3, and by the appellate courts under N.C.G.S. § 7A-38.1(g).

## **Rule 6. Authority and Duties of the Mediator**

### **(a) Authority of the Mediator.**

- (1) Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.
- (2) Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

### **(b) Duties of the Mediator.**

- (1) Informing the Parties.** At the beginning of the mediation, the mediator shall define and describe for the parties:
  - a. the process of mediation;
  - b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;
  - c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;
  - d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;
  - e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;
  - f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;
  - g. the duties and responsibilities of the mediator and the participants; and
  - h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule.
- (2) Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.



- (3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.
- (4) **Reporting Results of the Mediation.**
- a. The mediator shall report to the court in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.
  - b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.
  - c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.
- (5) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

## **Rule 7. Compensation of the Mediator**

(a) **By Agreement.** When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) **By Order of the Clerk.** When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of \$150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of \$150, due upon appointment.

(c) **Payment of Compensation.** In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties, unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or guardianship, or against a fiduciary or interested person upon the entry of a written order making specific findings of fact justifying the assessment of costs.

(d) **Change of Appointed Mediator.** Parties who fail to select a certified mediator within the time set out in the clerk's order, but desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee of the \$150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

(e) **Indigent Cases.** No person ordered to attend a mediation found to be indigent by the clerk for purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk to attend a mediation may move the clerk for a finding of indigency and ask to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation, or if the parties do not settle their dispute, subsequent to the conclusion of the dispute. In ruling upon the motion, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the dispute and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request for a finding of indigency. Any mediator conducting a mediation under these rules shall waive the fee requirement for persons found by the court to be indigent.

(f) **Postponements.**

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been scheduled by the mediator. After a mediation

has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

- (2) A mediation may be postponed by the mediator for good cause only after notice by the movant to all persons of the reason for the postponement and a finding of good cause by the mediator. Upon a finding of good cause, a postponement fee shall not be assessed.
- (3) Without a finding of good cause, a mediator may postpone a scheduled mediation session with the consent of all parties. If the mediation is postponed, a postponement fee of \$150 shall be paid to the mediator. However, if the mediation is postponed within two business days of the scheduled date, then the postponement fee shall be \$300. Postponement fees shall be paid by the party requesting the postponement. If it is not possible to determine who is responsible, then the clerk shall assess responsibility. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule. A postponement fee shall not be assessed when the mediator is responsible for the postponement.
- (4) If all persons ordered to attend the mediation select the mediator and they contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required by subsection (f) of this rule.

(g) **Sanctions for Failure to Pay the 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 clerk for a finding of indigency, shall constitute contempt of court and may result, after notice and a hearing, in the imposition of sanctions by the court under Rule 5.

## **Rule 8. Mediator Certification and Decertification**

(a) The Commission may receive and approve applications for the certification of persons to be appointed as mediators for matters before the clerk.

(b) To be appointed by the clerk as a mediator in all cases within the clerk's jurisdiction, except in guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs.

(c) To be appointed by the clerk as a mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by

the Commission for either superior or district court mediation programs and complete a course, at least ten hours in length and approved by the Commission under Rule 9, concerning estate and guardianship matters within the clerk's jurisdiction.

(d) To be approved as a mediator by the Commission under subsections (b) or (c) of this rule, a person shall also:

- (1) submit proof of all qualifications set out in this rule on a form provided by the Commission;
- (2) pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and
- (3) agree to accept the fee ordered by the clerk under Rule 7 as payment in full of a party's share of the mediator's fee.

(e) A mediator's certification may be revoked or not renewed whenever it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules, those of any county in which he or she has served as a mediator, or the Standards of Professional Conduct for Mediators. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification as a mediator under this rule.

## **Rule 9. Certification of Mediation Training Programs**

(a) Certified training programs for mediators who are seeking certification as a mediator under these rules for estate and guardianship matters within the jurisdiction of the clerk shall consist of a minimum of ten hours of instruction. The curriculum of such programs shall include the following topics:

- (1) Factors distinguishing estate and guardianship mediation from other types of mediation.
- (2) The aging process and societal attitudes toward the elderly, disabled, and persons with a mental illness.
- (3) How to ensure full participation of respondents and identifying interested persons and nonparty participants.
- (4) Medical concerns of the elderly, disabled, and persons with a mental illness.
- (5) Financial and accounting concerns in the administration of estates and financial accounting concerns of the elderly, disabled, and persons with a mental illness.
- (6) Family dynamics relative to the elderly, disabled, and persons with a mental illness, and relative to deceased persons.
- (7) How to assess physical and mental capacity.

- (8) The availability of community resources for the elderly, disabled, and persons with a mental illness.
- (9) Principles of guardianship law and procedure.
- (10) Principles of estate law and procedure.
- (11) Statutes, rules, and forms applicable to mediation conducted under these rules.
- (12) Ethical and conduct issues relevant to mediations conducted under these rules.

The Commission may adopt guidelines for trainers amplifying these topics and may set out minimum time frames and materials that trainers shall allocate to each topic. The guidelines shall be available at the Commission's office and posted on the Commission's website at <https://www.ncdrc.gov>.

(b) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(c). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(c) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

## **Rule 10. Procedural Details**

The clerk shall make all orders that are just and necessary to safeguard the interests of all persons, and may supplement all necessary procedural details in a manner that is not inconsistent with these rules.

## **Rule 11. Definitions**

(a) "Clerk," as used throughout these rules, refers to the clerk of superior court or, as appropriate, the clerk's assistant or designee.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

**Rule 12. Time Limits**

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

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