

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING THE
RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

Pursuant to subsection 7A-38.3(e) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Farm Nuisance Disputes, which appear on the following pages. These rules supersede the Revised Rules of the North Carolina Supreme Court Implementing the Prelitigation Farm Nuisance Mediation Program, published at [367 N.C. 1099–108](#).

The Rules of Mediation for Farm Nuisance Disputes 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.



For the Court

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



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Farm Nuisance Disputes

Rule 1. Submission of Dispute to Prelitigation Farm Nuisance Mediation

(a) Mediation shall be initiated by filing a Request for Prelitigation Mediation of Farm Nuisance Dispute, [Form AOC-CV-820](#) (Request Form), with the clerk of superior court in a county in which the action may be brought. The party filing the Request Form shall mail a copy of the Request Form by Certified Mail, return receipt requested, to each party to the dispute.

(b) The clerk of superior court shall accept the Request Form and shall file it in a miscellaneous file under the name of the requesting party.

Rule 2. Exemption from N.C.G.S. § 7A-38.1

A dispute mediated under N.C.G.S. § 7A-38.3 shall be exempt from the provisions of N.C.G.S. § 7A-38.1.

Rule 3. Selection of the Mediator

(a) **Time Period for Selection.** The parties to the dispute shall have twenty-one days from the date of the filing of the Request Form to select a mediator to conduct their mediation and to file an Appointment of Mediator in Prelitigation Farm Nuisance Dispute, [Form AOC-CV-821](#) (Appointment Form).

(b) **Selection of the Certified Mediator by Agreement.** The clerk of superior court shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the Request Form was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, then the party who filed the Request Form shall notify the clerk of superior court by filing an Appointment Form. The Appointment Form shall state: (i) the name, address, and telephone number of the certified mediator selected; (ii) the rate of compensation to be paid to the mediator; and (iii) that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation.

(c) **Court Appointment of the Mediator.** If the parties to the dispute cannot agree on the selection of a certified superior court mediator, then the party who filed the Request Form shall file an Appointment Form with the clerk of superior court, moving the senior resident superior court judge to appoint a certified superior court mediator. The Appointment Form shall be filed with the clerk of superior court within twenty-one days of the date of the filing of the Request Form. The Appointment Form shall state whether any party prefers the mediator to be a certified attorney mediator or a certified nonattorney mediator. If the parties state a preference, then the senior resident superior court judge shall appoint a mediator in

accordance with that preference. If no preference is expressed, then the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts 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 district, 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 judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Dispute Resolution Commission (Commission), or by the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the senior resident superior court judge electronically through the Commission's website at <https://www.ncdrc.gov>.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(d) **Mediator Information Directory.** To assist parties in learning more about the qualifications and experience of certified mediators, the Commission shall post a list of certified superior court mediators on its website at <https://www.ncdrc.gov>, accompanied by each mediator's contact and biographical information, availability, and whether the mediator is willing to mediate farm nuisance disputes.

Rule 4. The Prelitigation Farm Nuisance Dispute Mediation

(a) **When the Mediation Is to Be Completed.** The mediation shall be completed within sixty days of either the filing of an Appointment Form that selects a mediator by agreement or the entry of an order that appoints a mediator to conduct the mediation.

(b) **Extending the Deadline for Completion.** The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(c) **Where the Mediation Is to Be Held.** The mediated settlement conference shall be held in any location agreeable to both the parties and the mediator. If the parties cannot agree to a location, then the mediator shall be responsible for reserving a neutral place in the county in which the Request Form

was filed, 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.

(d) **Recesses.** The mediator may recess the mediation at any time and may set a time for reconvening, except that the time for reconvening must fall within a thirty-day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

(e) **Duties of the Parties, Attorneys, and Other Participants.** Rule 4 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

(f) **Sanctions for Failure to Attend.** Rule 5 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. 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 prior to, and during, the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.
- (3) **Scheduling the Mediation.** The mediator shall make a good faith effort to schedule the mediation at a time that is convenient to the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for 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 differences between mediation and other forms of conflict resolution;
 - c. the costs of mediation;

- d. the fact that mediation is not a trial, that the mediator is not a judge, and that the parties may pursue their dispute in court if mediation is not successful;
 - e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;
 - f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;
 - g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*);
 - h. the duties and responsibilities of the mediator and the participants; and
 - i. the fact that any agreement reached will be reached by mutual consent.
- (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 timely when an impasse exists and when the mediation should end.
 - (4) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule and conduct the mediation within the time frame established by Rule 4. The mediator shall strictly observe Rule 4 unless an extension has been granted in writing by the senior resident superior court judge.
 - (5) **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 6. 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, except that no administrative fee or fees for services shall be assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation session.

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

fee of \$150, except that no administrative fee or fees for services shall be assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

(c) **Indigent Cases.** No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. Any mediator conducting a mediation under these rules shall waive the fee requirement for parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party'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 trial. In ruling upon such motion, the judge shall apply the criteria in N.C.G.S. § 1-110(a) but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request for a finding of indigency.

(d) **Postponement Fee.** As used in this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been agreed upon and scheduled by the parties and the mediator. After a mediation has been scheduled for a specific date, a party may not unilaterally postpone the mediation. A mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and after consent is given by the mediator and the opposing attorney. If the mediation is postponed within seven business days of the scheduled date, then a postponement fee shall be assessed. The postponement fee shall be \$300 if the mediation is postponed within three business days of the scheduled date, and \$150 if the mediation is postponed more than three business days, but less than seven business days, prior to the scheduled date. Postponement fees shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(e) **Payment of Compensation by Parties.** Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the mediator's fee shall pay the fee equally. Payment shall be due upon completion of the mediation.

(f) **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 senior resident superior court judge for a finding of indigency,

shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary sanctions by a resident or presiding superior court judge.

Comment

Comment to Rule 6(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses.

Comment to Rule 6(d). Though Rule 6(d) provides that mediators shall assess a postponement fee, it is understood that there may be rare situations in which the circumstances occasioning a request for a postponement are beyond the control of the parties (e.g., an illness, serious accident, or unexpected and unavoidable trial conflict). If a party takes steps to notify the mediator as soon as possible in such circumstances, then the mediator may, in his or her discretion, waive the postponement fee.

Nonessential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where,

in their judgment, the mediation could be held as scheduled.

Comment to Rule 6(e). If a party is found by a senior resident superior court judge to have failed to attend a mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6(f). If the Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6(f) is intended to give the court express authority to enforce payment of fees owed to both party-selected and court-appointed mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in Rule 6(b) (hourly fee and administrative fee) and Rule 6(d) (postponement fee and cancellation fee), or which provide for payment of services or expenses not provided for in Rule 6, but agreed to among the parties (e.g., payment for travel time or mileage).

Rule 7. Waiver of Mediation

The parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The party who requested mediation shall file a Waiver of Prelitigation Mediation in Farm Nuisance Dispute, [Form AOC-CV-822](#) (Waiver Form), with the clerk of superior court and shall mail a copy of the Waiver Form to the mediator and all parties named in the Request Form.

Rule 8. Mediator's Certification that the Mediation Has Concluded

(a) **Contents of Certification.** Following the conclusion of mediation or the receipt of a Waiver Form signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute, [Form AOC-CV-823](#) (Certification Form). If a mediation was held, then the Certification Form shall state the date on which the mediation was concluded and report the general results of the mediation. If a mediation was not held, then the Certification Form shall either: (i) state why a mediation was not held and identify

any parties named in the Request Form who failed, without good cause, to attend or participate in mediation; or (ii) state that all parties waived mediation in writing under Rule 7.

(b) **Deadline for Filing Mediator's Certification.** The mediator shall file the completed Certification Form with the clerk of superior court within seven days of either the completion of the mediation, the failure of the mediation to be held, or the receipt of a signed Waiver Form. The mediator shall serve a copy of the Certification Form on each of the parties named in the Request Form.

Rule 9. Certification of Mediation Training Programs

The Commission may specify a curriculum for a farm nuisance dispute mediation training program and may set qualifications for trainers.

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