

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Prelitigation Farm Nuisance Mediation Program

WHEREAS, section 7A-38.3 of the North Carolina General Statutes codifies and establishes a statewide program to provide for prelitigation mediation of farm nuisance disputes prior to bringing of civil actions involving such disputes, and

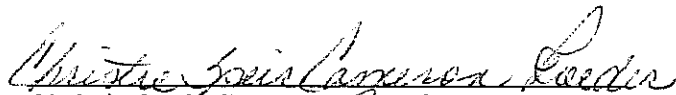
WHEREAS, N.C.G.S. § 7A-38.3(e) enables this Court to implement section 7A-38.3 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3(e), the Rules Implementing the Prelitigation Farm Nuisance Mediated Program are adopted to read as the following pages. These amended Rules shall be effective on the 1st day of JANUARY, 2012.

Adopted by the Court in conference the 10th day of October, 2011. The Appellate Division Reporter promulgate by publication as soon as practicable the portions of the the Rules Implementing the Prelitigation Farm Nuisance Program amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.


For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 17th day of September, 2011.


Christie Speir Cameron *For the Clerk*
Clerk of the Supreme Court

**REVISED RULES OF THE NORTH CAROLINA
SUPREME COURT IMPLEMENTING THE
PRELITIGATION FARM NUISANCE MEDIATION PROGRAM**

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**RULE 1. SUBMISSION OF DISPUTE TO PRELITIGATION FARM NUISANCE
MEDIATION**

- A.** Mediation shall be initiated by the filing of a Request for Prelitigation Mediation of Farm Nuisance Dispute (Request) (Form AOC-CV-820) with the clerk of superior court in a county in which the action may be brought. The Request shall be on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC) and posted on the NCAOC's website at www.nccourts.org. The party filing the Request shall mail a copy of the Request by certified U.S. mail, return receipt requested, to each party to the dispute.
- B.** The clerk of superior court shall accept the Request 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 pursuant to N.C.G.S. § 7A-38.3, shall be exempt from an order referring the dispute to a mediated settlement conference entered pursuant to N.C.G.S. § 7A-38.1.

RULE 3. SELECTION OF MEDIATOR

- A. TIME PERIOD FOR SELECTION.** The parties to the dispute shall have 21 days from the date of the filing of the Request to select a mediator to conduct their mediation and to file Notice of Selection of Certified Mediator by Agreement.
- B. SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT.** The clerk 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 was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, the party who filed the Request shall notify the clerk by filing with the clerk a Notice of Selection of Certified Mediator by Agreement (Notice) (Form AOC-CV-821). Such Notice shall state the name, address and telephone number of the certified mediator selected; state the rate of compensation to be paid the mediator; and state that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation. The Notice shall be on a form prepared and distributed by the NCAOC and available on the court's website.
- C. COURT APPOINTMENT OF MEDIATOR.** If the parties to the dispute cannot agree on selection of a certified superior court mediator, the party who filed the Request shall file with the clerk a Motion for Court Appointment of Mediator (Motion) and the senior resident superior court judge shall appoint a certified superior court mediator. The Motion shall be filed with the clerk within 21 days of the date of the filing of the Request. The Motion shall be on a form prepared and distributed by the NCAOC (Form AOC-CV-821). The Motion shall state whether any party prefers a certified attorney mediator, and if so, the senior resident superior court judge shall appoint a certified attorney mediator. The Motion may state that all parties prefer a certified non-attorney mediator, and if so, the senior resident judge shall appoint a certified non-attorney mediator. If no preference is expressed, the senior resident superior court judge may appoint any certified superior court mediator.
- D. MEDIATOR INFORMATION DIRECTORY.** To assist parties in learning more about the qualifications and experience of certified mediators, the Dispute Resolution Commission (Commission) shall post a list of certified superior court mediators on its website at www.ncdrc.org accompanied by contact, availability and biographical information, including information identifying mediators who wish to mediate farm nuisance matters.

RULE 4. THE PRELITIGATION FARM MEDIATION

- A. WHEN MEDIATION IS TO BE COMPLETED.** The mediation shall be completed within 60 days of the Notice or the date of the order appointing a mediator to conduct the mediation.
- B. EXTENDING 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 suggestion of the mediator.
- C. WHERE THE MEDIATION IS TO BE HELD.** Unless all parties and the mediator agree otherwise, the mediation shall be held in the courthouse or other public or community building in the county where the Request was filed. The mediator shall be responsible for reserving a place and making arrangements for the mediation and for giving timely notice of the date, time and location of the mediation to all parties named in the Request or their attorneys.
- D. RECESSES.** The mediator may recess the mediation at any time and may set a time for reconvening, except that such time shall fall within a 30 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 Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.
- F. SANCTIONS FOR FAILURE TO ATTEND.** Rule 5 of the Rules Implementing Mediated Settlement Conferences in Superior Court Civil Actions is hereby incorporated by reference.

RULE 5. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF MEDIATOR.

- (1) Control of Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed.
- (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 for the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

B. DUTIES OF MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the mediation:
- (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 the mediation is not a trial, the mediator is not a judge and that the parties may pursue their dispute in court if mediation is not successful and they so choose;
 - (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 circumstance bearing on possible bias, prejudice or partiality.
- (3) **Declaring Impasse.** It is the duty of the mediator to determine timely that an impasse exists and that the mediation should end.

- (4) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule the mediation and to conduct it within the time frame established by Rule 4 above. Rule 4 shall be strictly observed by the mediator 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 precludes 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 fees or fees for services shall be assessed any party if all parties waive mediation prior to the occurrence of an initial mediation meeting.
- 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 fees or fees for services shall be assessed any 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 fee. Any mediator conducting a mediation pursuant to these rules shall waive the payment of fees from 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.

Said motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their cases, subsequent to the trial of the action. In ruling upon such motions, the judge shall apply the criteria enumerated 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.

- D. **POSTPONEMENT FEE.** As used herein, the term "postponement" shall mean 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 consent of the mediator and the opposing attorney. If a mediation is postponed within seven business days of the scheduled date, the fee shall be \$150. If the mediation is postponed within three business days of the scheduled date, the fee shall be \$300. Postponement fees shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 6.B.

E. PAYMENT OF COMPENSATION OF 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 fees shall pay them equally. Payment shall be due upon completion of the mediation.

F. SANCTIONS FOR FAILURE TO PAY 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.

COMMENTS TO RULE 6

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 the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.

Non-essential 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 both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 6.B (hourly fee and administrative fee) and 6.D postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 6 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 7. WAIVER OF MEDIATION

All parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The Waiver of Prelitigation Mediation in Farm Nuisance Dispute (Waiver) shall be on a form prescribed by the NCAOC (Form AOC-CV-822). The party who requested mediation shall file the Waiver with the clerk and mail a copy to the mediator and all parties named in the Request.

RULE 8. MEDIATOR'S CERTIFICATION THAT MEDIATION CONCLUDED

A. CONTENTS OF CERTIFICATION. Following the conclusion of mediation or the receipt of a Waiver signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute (Certification) on a form prescribed by the NCAOC (Form AOC-CV-823). If a mediation was held, the Certification shall state the date on which the mediation was concluded and report the general results. If a mediation was not held, the Certification shall state why the mediation was not

held and identify any parties named in the Request who failed, without good cause, to attend or participate in mediation or shall state that all parties waived mediation in writing pursuant to Rule 7 above.

B. DEADLINE FOR FILING MEDIATOR'S CERTIFICATION. The mediator shall file the completed Certification with the clerk within seven days of the completion of the mediation, the failure of the mediation to be held or the receipt of a signed waiver of mediation. The mediator shall serve a copy of the Certification on each of the parties named in the Request.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

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