

In the Supreme Court of North Carolina

Order Adopting Amendments to the Rules Implementing Mediation in Matters Pending in District Criminal Court


WHEREAS, section 7A-38.3D of the North Carolina General Statutes establishes a statewide system of mediations to be implemented in participating district court judicial districts in order to facilitate the settlement of criminal matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.3D(d) enables this Court to implement section 7A-38.3D by adopting rules and amendments to rules concerning said mediations.

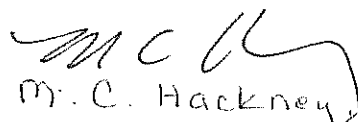
NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3D(d), the Rules Implementing Mediation In Matters Pending in District Criminal Court are hereby amended to read as in the following pages. These amended Rules shall be effective on the 1st of April, 2014.

Adopted by the Court in conference the 23rd day of January, 2014. The Appellate Division Reporter shall promulgate by publication as soon as practicable the portions of the Rules Implementing Mediation in Matters Pending in District Criminal Court amended through this action in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J.,
Recused.


For the Court

Witness my hand and seal of the Supreme Court of North Carolina, this the 5th day of February, 2014.


M. C. Hackney, Assistant Clerk
Christie Speir Cameron Roeder
Clerk of the Supreme Court

RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

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RULE 1. INITIATING VOLUNTARY MEDIATION IN DISTRICT CRIMINAL COURT.

A. PURPOSE OF MEDIATION. Pursuant to N.C.G.S. § 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with N.C.G.S. § 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. DEFINITIONS.

- (1) **Court.** The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee, or personnel affiliated with a community mediation center.

- (2) **Mediation Process.** The term “mediation process” as used throughout these rules, shall encompass intake, screening and mediation through impasse or until the case is dismissed.
- (3) **District Attorney.** The term “district attorney” as used throughout these rules, shall refer to the district attorney, assistant district attorneys and any staff or designee of the district attorney.

C. INITIATING THE MEDIATION.

- (1) **Suggestion by the Court.** In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:
 - (a) whether the parties are willing to participate;
 - (b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;
 - (c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;
 - (d) whether cross-warrants have been filed in the case; and
 - (e) whether the case might otherwise be subject to voluntary dismissal.
- (2) **Multiple Charges.** Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.
- (3) **Timing of Suggestion.** The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.
- (4) **Notice to Parties.** The court shall provide to parties who have agreed to attend mediation notice of the following either orally or in

writing on a North Carolina Administrative Office of the Courts (NCAOC) approved form: (1) the deadline for completion of the mediation process; (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator; and (3) and that the defendant may be required to pay the dismissal fee set forth in Rule 5.B(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

- (5) **Motion for Mediation.** Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on a NCAOC form.
- (6) **Screening.** A mediator as defined by Rule 7 below or a community mediation center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

RULE 2. PROGRAM ADMINISTRATION.

Pursuant to N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission) or the (NCAOC), including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

RULE 3. APPOINTMENT OF MEDIATOR

- A. AUTHORITY TO APPOINT.** When the parties have agreed to attend mediation, the court shall appoint a community mediation center mediator by name or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be certified pursuant to Rule 7 of these rules or shall be working toward certification under the supervision of the center to whom the dispute is referred for mediation.

- B. DISQUALIFICATION OF MEDIATOR.** For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

RULE 4. THE MEDIATION.

- A. SCHEDULING MEDIATION.** The mediator appointed to conduct the mediation or the community mediation center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules and the maintenance of any files pertaining to the mediation.
- B. WHERE MEDIATION IS TO BE HELD.** Mediation shall be held in the courthouse or if suitable space is available, in the offices of a community mediation center or at any other place as agreed upon between the mediator and parties.
- C. EXTENDING DEADLINE FOR COMPLETION.** The court may extend the deadline for completion of the mediation process upon its own motion or upon suggestion of community mediation center staff.
- D. RECESSES.** The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.
- E. 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.

RULES 5. DUTIES OF THE PARTIES.

A. ATTENDANCE.

- (1)** Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

- (2) The following may attend and participate in mediation:
- (a) **Parents or guardians of a minor party.** Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.
 - (b) **Attorneys.** Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.
 - (c) **Others.** In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counter-productive.
- (3) **Exceptions to Physical Attendance.** A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:
- (a) by agreement of the complainant(s) and defendant(s) and the mediator, or
 - (b) by order of the court.
- (4) **Scheduling.** The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:
- (a) Make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at a time that is convenient for all participants;
 - (b) Promptly notify the mediator or community mediation center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation; and

- (c) Notify the mediator or the center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. FINALIZING AGREEMENT.

- (1) **Written Agreement.** If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.
- (2) **Dismissal Fee.** To be dismissed by the district attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m) to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be an approved NCAOC form. In his or her discretion, a judge or his/her designee may waive the dismissal fee pursuant to N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

RULE 6. AUTHORITY AND DUTIES OF THE MEDIATOR

A. AUTHORITY OF THE MEDIATOR.

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

- (3) **Inclusion and Exclusion of Participants at Mediation.** In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other than the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.
- (4) **Scheduling the Mediation.** The mediator or community mediation center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or community mediation center staff shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A(4).

B. DUTIES OF THE MEDIATOR.

- (1) The mediator shall define and describe the following at the beginning of the mediation:
 - (a) The process of mediation;
 - (b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;
 - (c) That the mediator is present only to assist the parties in reaching their own agreement;
 - (d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
 - (e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;
 - (f) The inadmissibility of conduct and statements as provided in N.C.G.S. §7A-38.3D(i);
 - (g) The duties and responsibilities of the mediator and the participants;

- (h) That any agreement reached will be by mutual consent;
 - (i) That if the parties are unable to agree and the mediator declares an impasse, that the parties and the case will return to court;
and
 - (j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.
- (2) **Disclosure.** Consistent with the Standards of Professional Conduct for Mediators (Standards), 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.** Consistent with the Standards, it is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.
- (4) **Reporting Results of Mediation.** The mediator or community mediation center shall report the outcome of mediation to the court or its designee in writing on a NCAOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending district attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the district attorney.
- (5) **Scheduling and Holding the Mediation.** It is the duty of the mediator and community mediation center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator and center staff unless the deadline is extended orally or in writing by a judge or his/her designee.

RULE 7. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

- A.** At the time of application, be affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator and have received the center's endorsement that he or she possesses the training, experience, and skills necessary to conduct district court criminal mediations.
- B.** Have the following training and experience:
 - (1)** Have both:
 - (a)** Attended at least 24 hours of training in a district criminal court mediation training program certified by the Commission; and
 - (b)** Have a four-year degree from an accredited college or university or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a community mediation center; or
 - (2)** Be a mediated settlement conference or family financial settlement mediator certified by the Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.
- C.** Observations and Mediation Experience:
 - (1)** Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or for a one-year period following the initial adoption of these rules, observe any mediator who is affiliated with a community mediation center established pursuant to N.C.G.S. § 7A-38.5 and who has mediated at least 10 criminal district court cases.
 - (2)** Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a community mediation center whose criminal district court mediation training program has been certified by the Commission pursuant to Rule 9 of these Rules.
- D.** Demonstrate familiarity with the statutes, rules, and practice governing district criminal court mediations in North Carolina.

- E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification under these Rules and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court of North Carolina. Applicants for certification and re-certification and all certified district criminal court mediators shall report to the Commission any pending criminal matters or any criminal convictions, disbarments or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.
- F. Commit to serving the district court as a mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.
- G. Comply with the requirements of the Commission for continuing mediator education or training.
- H. Submit proof of qualifications set out in this Section on a form provided by the Commission.

Community mediation centers participating in the program shall assist the Commission in implementing the certification process established by this Rule by:

- (1) Documenting Sections A-F for the mediator and Commission;
- (2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;
- (3) Making a written recommendation on the applicant's certification to the Commission; and
- (4) Forwarding the documentation for Sections A-F and its recommendation to the Commission along with the mediator's completed certification application form.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule. Certification renewal shall be required every two years.

A community mediation center may withdraw its affiliation with a mediator certified pursuant to these Rules. Such disaffiliation does not revoke said mediator's certification. A mediator's certification is portable and a mediator may agree to be affiliated with a different center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the community mediation center providing services in that court. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

RULE 8. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

- A. Certified training programs for mediators seeking certification as district criminal court mediators shall consist of a minimum of 24 hours instruction. The curriculum of such programs shall include:
- (1) Conflict resolution and mediation theory;
 - (2) Mediation process and techniques, including the process and techniques of district court criminal mediation;
 - (3) Agreement writing;
 - (4) Communication and information gathering;
 - (5) Standards of conduct for mediators including, but not limited to the Standards adopted by the Supreme Court;
 - (6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;
 - (7) Demonstrations of district criminal court mediations;
 - (8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;
 - (9) Courtroom protocol;
 - (10) Domestic violence awareness; and
 - (11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district court mediations in North Carolina.

- B. A training program must be certified by the Commission before attendance at such program may be deemed as satisfying Rule 8.
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. Renewal of certification shall be required every two years.

RULE 9. LOCAL RULE MAKING. The chief district court judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these Rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.