

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20200231

**Proposed Amendment to North Dakota Rule of Court 8.1
Regarding the Family Mediation Program**

[¶1] On August 19, 2020, the Joint Alternative Dispute Resolution Committee filed a petition to amend North Dakota Rule of Court 8.1 Regarding the Family Mediation Program. The proposal is available at <https://www.ndcourts.gov/supreme-court/dockets/20200231>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court allowed comment on the proposal. The Court considered the matter, and

[¶2] IT IS HEREBY ORDERED, that the amendments to North Dakota Rule of Court 8.1 are ADOPTED effective September 1, 2020.

[¶3] The Supreme Court of the State of North Dakota with the Honorable Jon J. Jensen, Chief Justice, and The Honorable Gerald W. VandeWalle, the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, Justices, directed the Clerk of the Supreme Court to enter the above order.

[¶4] Dated: August 26, 2020.

/s/ Petra H. Mandigo Hulm
Clerk
North Dakota Supreme Court

RULE 8.1 FAMILY MEDIATION PROGRAM

(a) Purpose.

(1) *Mission Statement.* The mission of the Family Mediation Program is to provide a high quality, impartial, and efficient forum for resolving disputed parental rights and responsibilities matters through mediation.

(2) *Goal.* The goal of the program is to improve the lives of families and children who appear before the court by trying to resolve parental rights and responsibilities disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.

(3) *The objectives of the program are:*

- (A) to support improved parental decision-making and to promote agreement and compromise in place of litigation over parenting rights and responsibilities and to conserve limited family resources in family cases;
- (B) to improve access to mediation by providing funding for the limited time frame of the program;
- (C) to improve parental problem-solving and communication capacities;
- (D) to create incentives to pursue mediation including flexibility to negotiate critical issues without judicial intervention;
- (E) to determine best practices for family mediation in North Dakota;
- (F) to improve rural access to mediation services, as well as access by underprivileged and minority persons;
- (G) to work with the domestic violence services community in order to assess risk and provide services where appropriate; and to ensure proper protections are put in place and mediators are well trained in signposts, risks, and exit planning strategies;
- (H) to reduce post-decree litigation and conflict in family cases;
- (I) to provide ethical standards for mediators in order to encourage high quality family mediation practice; and
- (J) to help the public, judiciary, and bar become more aware of the benefits and nature of the mediation process;

(4) *Scope and Definition.* Rule 8.1 governs mediation in parental rights and responsibilities disputes in the district courts. "Mediation" is a process by which a non-judicial neutral mediator facilitates communication between parties to assist the parties in reaching voluntary decisions related to their dispute. A case evaluation or settlement conference under [N.D.R.Civ.P. 16](#) is not "mediation" under Rule 8.1. To the extent the requirements of [N.D.R.Civ.P. 16\(b\)](#) and [N.D.R.Ct. 8.3\(b\)](#) conflict with Rule 8.1, Rule 8.1's provisions control. The [N.D.R.Ct. 8.8](#) alternative dispute resolution statement requirement is satisfied by compliance with Rule 8.1.

(b) Program Management.

- (1) A full-time administrator will manage and oversee the operation of the program under the auspices of the Supreme Court.
- (2) The program administrator will directly report to the state court administrator and will act as a liaison to the district courts, the Joint Committee on Alternative Dispute Resolution, and the Subcommittee on Family Mediation.
- (3) The program administrator will be a state employee and compensated at a rate commensurate with market value and state policies.
- (4) Research and Evaluation. The program will include a research and evaluation component.

(c) Mediation Process.

(1) *Clerk Referral to Family Mediation.* Within 10 days of filing, the following new cases will be referred by the district court clerk to the program administrator:

- (A) any civil proceeding in which there is a dispute or an unresolved issue regarding parental rights and responsibilities, relocation of a child, or grandparent visitation, including an original proceeding for a divorce, separation, or paternity; ~~or guardianship~~ in which the issue may appear.
- (B) a post-judgment proceeding to modify parental rights and responsibilities, requesting to remove a child from the state, or seeking grandparent visitation, but if the proceeding is to modify parental rights and responsibilities, a referral to mediation will be made only after a court order has determined that a prima facie case under N.D.C.C. § 14-09-06.6 has been established, and if the court believes mediation may be useful to the parties and the children.

(2) *Referral of Guardianship Proceedings.*

(A) any party to a guardianship proceeding may request a referral to family mediation as provided in (C), except as prohibited by this or any other rule or statute. Such requests shall be made during the initial appearance phase of the juvenile guardianship proceeding. When such a request is made, the district judge or referee shall direct the program administrator to assign a mediator to the case, and prepare an order and schedule for mediation.

(23) *Court Referral.* A district judge or referee assigned to a parental rights and responsibilities or guardianship proceeding may at any time refer the case to family mediation, except as prohibited by this or any other rule or statute.

(34) *Exclusions from Referral.* A proceeding may not be referred to family mediation if:

(A) the proceeding involves termination of parental rights;
(B) the parties have already started mediating prior to filing the proceeding;
(C) parental rights and responsibilities are stipulated by the parties at the time of filing; or
(D) a current domestic violence protection order or other order for protection between the parties exists, unless:

- (i) mediation is requested by the victim of the domestic violence or sexual abuse, and an exception to the order of protection is made by the court;
- (ii) the mediation is provided by a mediator trained to address the needs and safety of victims where domestic violence is at issue;
- (iii) the victim of domestic violence is provided the opportunity for separate meetings during the mediation, and to mediate using separate rooms;
- (iv) the mediation takes place in a courthouse or other building where security measures are in place; and
- (v) the victim has an advocate or support person of their choice in the mediation.

The Rule 8.1(c)(3)(D) exclusion and exceptions are intended to comply with the N.D.C.C. § 14-09.1-02 standards for family mediation.

(4) Mediation in General.

- (A) The program will automatically provide up to six hours of combined pre-mediation orientation and mediation. Mediators will be compensated at a rate to be set annually by the state court administrator.
- (B) Under the program, the parties will individually attend a pre-mediation orientation and screening with a designated mediator, and at least one joint mediation session. Counsel for represented parties may participate in mediation proceedings.
- (C) If the parties require more than six hours of sessions, they may purchase additional mediation sessions from the mediator, who will offer mediation at the hourly rate set annually by the state court administrator.
- (D) Parties may also apply to the program administrator for additional mediation sessions using Form B and may apply for a fee waiver or sliding scale fee using Form C. The program administrator will determine whether a party is eligible for a fee waiver or fee reduction based on party income according to a schedule adopted by the Supreme Court. If the parties qualify for a fee reduction and have been approved for additional mediation, any gap between the hourly rate set annually by the state court administrator and the parties' ability to pay will be paid to the mediator under this program.

(d) Mediation Procedure.

(1) Order and Schedule. ~~On receipt of a case from the clerk, the program administrator will assign a mediator to the case and prepare an order and schedule for mediation (Form A) under the authority of the assigned judge.~~ The order and a copy of Form D, Guide to Participants in Mediation, must be sent to the parties, attorneys, and the mediator, setting the following time frame for the mediation to take place:

(A) the parties must contact the mediator and attend a pre-mediation orientation separately within 10 days of the date of the mediation scheduling order for guardianship proceedings and 20 days of the date of the mediation scheduling order for all other proceedings;

(B) the mediation sessions must take place within 50 days of the date of the mediation scheduling order for guardianship proceedings and 120 days of the date of the mediation scheduling order for all other proceedings;

(C) any requests to deviate from this time frame must be submitted to the judge presiding over the case in writing by the mediator and the parties, and the judge may allow a time extension for good cause.

(2) Case Management. Once a case is assigned, the mediator will manage the case and report to the court as required by Rule 8.1. If any party fails to appear for orientation or mediation sessions, the mediator must promptly notify the court, which may order the party to show cause for failure to appear. The mediation process is not a stay on any interim process.

(3) Pre-Mediation Orientation. The program will provide a mediation orientation session for all parties in cases assigned for mediation. The orientation sessions must be provided to the parties separately by the assigned mediator in a way that best meets the needs of the parties. The parties will receive a copy of Form E, How to Prepare for Mediation, as part of the orientation. Prior to the orientation, the mediator should study Supplement 1, Components of Mediation Orientation. Form F, the Mediator Domestic Violence Screening Tool and Safety Planning, is also intended to assist the mediator during orientation. The orientation session should be designed to make the parties aware of important mediation factors including:

- (A) what mediation is and is not;
- (B) what to expect from the mediators;
- (C) what the parties' goals are for mediation;
- (D) any guidelines necessary to have constructive conversations;
- (E) how to prepare for the mediation process;
- (F) the role of the court, lawyers, and other experts;
- (G) how fee payment works;
- (H) the time line for mediation;
- (I) any relevant requirements of the program.

(e) Selection of Mediators.

(1) *Qualifications.* In order to mediate within the program, mediators must meet the criteria set forth in [Rule 8.9](#) or have a minimum of 40 hours of mediation training and four years of experience in family mediation, with an average of six cases per year. Mediators must carry malpractice insurance that covers their mediation practice. Mediators may apply to be placed on the roster of family mediators in the manner indicated in [Rule 8.9](#). The program administrator has discretion to approve mediators for placement on the roster.

(2) *Mediation Assignment.* Mediators will be assigned cases by the program administrator and will manage cases assigned to them from orientation and screening through conclusion of mediation.

(3) *Conflicts of Interest and Bias.* A mediator may not be removed unless the mediator or the parties' petition the program administrator based upon bias or conflicts of interest. Parties and attorneys may not request a change of mediator unless they present clear evidence of bias or conflict of interest as described in Supplement 2, the ABA Model Standards of Practice for Family and Divorce Mediation.

(4) *Standards.* All mediators must agree to follow the standards in Supplement 2. Any violation of standards may be reported to the program administrator.

(5) *Confidentiality.* The program requires the highest ethical standards, including confidentiality. Mediators may not discuss or reveal the details of any mediation proceeding or any information provided by a party in a mediation proceeding to any judge, magistrate, or third party. See [Rule 8.8\(b\)](#) (Alternative Dispute Resolution Procedure); N.D.C.C. § 14-09.1-06 (Confidentiality); N.D.C.C. § 31-04-11 (Mediation Inadmissibility of evidence Exception).

(f) Program Evaluation. All mediators and parties must cooperate with the research and evaluation protocol to help measure the impact and success of the program. This may include providing written comments, participating in a personal interview, and allowing occasional observation during mediation if the parties approve.

(g) Concluding Mediation.

(1) The mediator must notify the program administrator when the mediation has concluded for any reason, and advise the judge presiding over the case of one of the following outcomes:

- (A) agreement has been reached in whole or part; or
- (B) the parties were unable to reach agreement.

(2) If the parties reach agreement, the mediator and parties must prepare a written summary for the parties to sign noting all agreements made and using the parties' own words. A copy of the signed summary must be given to each party.

(3) The parties have seven days from receiving the summary to reconsider the decisions made in mediation. If neither party sends a written request to reconsider to the mediator within seven days, the mediator must send a final copy of the written summary to the parties and their attorneys, and file the mediation closing form (Form G) with the clerk of court with a copy to the judge presiding over the case.

(4) At the close of the case the mediator and the parties must complete the required evaluation forms. The mediator must submit the forms to the program administrator along with a copy of the closing form, mediator's log and the mediator's invoice. The mediator is responsible for collecting fees from the parties for additional mediation sessions not paid by the court.

EXPLANATORY NOTE

Rule 8.1 was adopted, effective [January 1, 2014](#), and amended effective [March 1, 2016](#). Subdivision (b) was amended, effective [March 1, 2016](#), to remove language no longer relevant to the mediation program.

Subdivision (b) was amended, effective [March 1, 2016](#), to remove language no longer relevant to the mediation program.

Subdivisions (c) and (d) were amended, effective September 1, 2020, to conform this rule to the Juvenile Court Rules.

Paragraph (d)(1) was amended, effective [March 1, 2016](#), to permit the program administrator to prepare an order and schedule for mediation under the authority of the assigned judge; and subparagraph (d)(1)(B) increased the length of time allowed for completion of the mediation from 90 to 120 days to allow parties to gather necessary information to prepare for the mediation.

Paragraph (d)(2) was amended, effective [March 1, 2016](#), to provide for notice to the assigned judge of a party failing to appear for orientation or mediation sessions.

Rule 8.1 contains the former content of [N.D.Sup.Ct.Admin.O. 17](#), which was adopted effective March 1, 2008, and amended, effective September 1, 2010 and March 1, 2011. The order was converted to a rule to reflect the program's transition from pilot status.

Sources: [Joint Procedure Committee Minutes](#) of April 29-30, 2010, page 21.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 14-09-06.6, 14-09.1-02, 14-09.1-06, 31-04-11.

CROSS REFERENCE: [N.D.R.Civ.P. 16](#) (Pretrial Conferences; Scheduling; Management); [N.D.R.App.P. 5](#) (Post-Judgment Mediation); [N.D.R.Ct. 8.3](#) (Case Management), [N.D.R.Ct. 8.8](#)(Alternative Dispute Resolution), [N.D.R.Ct. 8.9](#) (Roster of Alternative Dispute Resolution Neutrals).