



SUFFOLK COUNTY SUPREME COURT 10TH JUDICIAL DISTRICT

STATEMENT OF PROCEDURES MATRIMONIAL MEDIATION PROJECT PILOT PROGRAM

I. OVERVIEW

Alternative Dispute Resolution (“ADR”) refers to a variety of processes other than litigation that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation, and mediation.

As a pilot program, the Suffolk County Civil Alternatives to Litigating in Matrimonials Project (CALM) will focus on mediation. Mediation is a confidential, informal procedure in which a neutral third person helps parties in disagreement to negotiate with each other. With the assistance of a mediator, parties identify issues, clarify perceptions, and explore options for mutually acceptable outcomes. Although parties are not obligated to reach an agreement during mediation, the process frequently concludes with a written agreement and often improves the parties’ ability to communicate with each other in the future. If the parties reach an agreement during mediation, the mediator may assist the parties and their counsel in drafting the agreement. The written agreement is then returned to the referring Justice for review. Subject to the referring Justice’s approval, the agreement will be incorporated in the Court’s Order or Judgment of Divorce.

All unresolved issues in a contested matrimonial or post-judgment case may be referred to individuals qualified in mediation, however, cases involving financial disputes will be referred only to those Project mediators with knowledge of, training in and experience with the financial aspects of divorce. A mediator will not impose a solution on the parties, attempt to tell them what to do or offer their own opinions regarding likely court outcomes or the merits of the case; if the parties cannot reach an agreement, the case will be returned to the referring Justice.

The Project will be administered by a Project Coordinator who shall be appointed by the Supervising Justice of the Suffolk County Matrimonial Part in consultation with and approval of the District Administrative Judge.

II. PROCEDURES

Supreme Court Justices may refer parties to the Project or parties on their own may request referral to it at any time. Cases involving child abuse or neglect (as defined in Family Court Act §1012(e) and (f) Social Services Law §412), domestic violence, serious mental health issues, or a severe power imbalance between the parties are excluded from the Project.

Initially, the Justice will sign an Order of Reference directing parties and their counsel to appear at an initial, free, 45 minute mediation session with a mediator from the Project's Roster of Mediators. The Order of Reference will specify the topics (e.g. child custody and visitation and/or financial issues) to be submitted to mediation. The Order of Reference will further direct the parties to select a mediator from the Roster within five (5) days of receiving the Order of Reference and inform the Project Coordinator of same within that same five (5) days of receiving the initial Order. If the Coordinator does not hear from either party, the Coordinator will select from the Court's Roster of Mediators the next available mediator, proceeding in alphabetical order.¹

Within seven (7) business days from receipt of the Order of Reference, the Coordinator will provide the parties with a mediator's name and contact information, if a mediator was not mutually agreed upon, and send the parties an Initiation Form. The Initiation Form must be completed by the parties and returned to the Coordinator within five business days from receipt of said Form.

The parties are required to appear at the initial mediation session within twenty (20) days after receiving the Initiation Form.

At least one week before the initial mediation session, the parties' counsel shall send to the mediator a copy of the pleadings and any other documentation deemed relevant to the issue(s) being mediated. The mediator may also request a conference call with the parties' counsel regarding any preliminary matters.

Initially, the parties will attend a 45 minute mediation session. After that session they may choose to schedule additional sessions as they work toward a final agreement. If the parties wish to extend the mediation process, the mediator shall be entitled from that point forward to compensation at a rate that shall not exceed \$225.00 per hour. Parties shall complete all scheduled mediation sessions within sixty (60) days of receiving the Initiation Form.

Within five (5) business days after the mediation's conclusion, which shall occur either after the initial 45 minute session or when one party, both parties, or the mediator decide that the mediation has ended, the mediator shall send a Mediation Disposition

¹The Coordinator, however, has discretion to designate another mediator as she/he deems appropriate.

Form to the referring Justice, counsel and to the Coordinator. The Disposition Form shall state: (1) the date of the initial session and whether each party and counsel appeared at the initial session; (2) the dates of any subsequent scheduled sessions, but not whether parties appeared; and (3) whether the parties reached partial, complete, or no agreement on the issues. The mediator may attach to the Disposition Form any original, signed agreement and return it to the referring Justice and a copy of same to the Coordinator.

Upon receipt of the Disposition Form, counsel shall contact the chambers of the referring Justice within seven (7) days to request a conference concerning further proceedings in the case.

III. ROLE OF THE MEDIATOR

The mediator's primary role is to help the parties communicate and negotiate. The mediator will not give legal advice, predict likely court outcomes, or force solutions on the parties.

At the initial mediation session, the mediator will explain the mediation process. Parties will be assured that they are under no obligation to reach an agreement and that each party is free at any time to end the mediation process and return to court. Parties will also be assured that all communications (with narrow exceptions defined below) will be confidential and will not be disclosed to the Justice hearing their case or in any other judicial or administrative proceeding. The mediator will also explain that either party is free at the close of the initial session or at any time thereafter to end the mediation process and return to court.

All parties will have the opportunity to raise issues of concern and to explain the facts of the dispute as each sees them. The mediator will ask questions in an effort to identify those issues that each of the parties wants to discuss. The mediator will not offer an opinion as to the likely court outcome of any particular issue. Once the Mediator and parties have identified the issues for discussion, the mediator will assist the parties to work collaboratively to develop and choose options which address these issues.

The mediator may initiate a caucus. During the caucus, the mediator will meet separately with each party. The mediator will not divulge any information discussed in caucus without first obtaining each party's permission to do so.

IV. THE ROLE OF COUNSEL, ATTORNEY FOR THE CHILD(REN) AND GUARDIANS AD LITEM

Experience has demonstrated that party participation-as opposed to exclusive participation by counsel-not only increases the likelihood of settlement, but also enhances the parties' satisfaction with any agreement that is ultimately reached.

Accordingly, unless exempted by the Mediator for good cause shown, the parties must

be present during the mediation.

The presence of separate counsel for each party at all mediation sessions is favored in matrimonial and family proceedings. Serious concerns exist regarding potential inequalities between the parties, *e.g.* unequal financial strength, lack of knowledge about financial issues, general inequality of business skill or knowledge, strong personalities, etc. Therefore, presence of counsel at mediation for each party is strongly encouraged. However, by agreement of the parties, mediation may proceed in the absence of both counsel.

If, during the process, counsel for either party is discharged or withdraws for any reason, the case will not proceed in mediation unless a substitution of counsel occurs within twenty one days.

If parties decide to participate in mediation without their attorneys present, they are strongly advised to consult counsel before finalizing any written agreement. Whether appearing in the mediation alongside their clients or advising clients outside of the mediation process, attorneys play a crucial role in informing parties of their legal rights and responsibilities and the consequences of proposed resolutions.

For those cases in which an Attorney for the Child(ren) or Guardian Ad Litem has been appointed, mediation will not commence without the presence of the Attorney for the Child(ren) and/or the Guardian Ad Litem. However, by agreement of the parties, the appropriate Guardian Ad Litem and/or the Attorney for the Child(ren), mediation may proceed in the absence of the Guardian Ad Litem and /or Attorney for the Child(ren), unless otherwise ordered by the Court.

V. THE ROLE OF THE COURT

The Project is conducted under the auspices of the Court and pursuant to the rules of procedure set forth in this document. Judicial and non-judicial staff are encouraged to inform the parties of the Project's existence. If the parties wish to go to mediation but cannot afford it, the Coordinator will endeavor to assist qualifying parties to find a mediator who will take their case.

The referring Justice is not a party to the mediation and the Justice will never be advised of the positions taken by any party in the process. This will ensure in fact and appearance that the Justice deciding the case is not influenced by any party's willingness or lack thereof to participate in mediation. Except as set forth in Section IX below, the Justice will never be informed of any communication made by either party during mediation sessions.

The Court welcomes the feedback of the parties, counsel, and mediators after the conclusion of the proceedings. Comments should be sent to the Coordinator.

VI. THE ROSTER OF MEDIATORS

The Court has assembled a Roster of Mediators. The Roster appears on the website of this Court (www.nycourts.gov/courts/10jd/suffolk/supreme) and is also available in Room (clerk's office) and shall be updated at least quarterly. To be eligible to be included on the Roster of Mediators for the CALM Project, one must submit an application to the District Administrative Judge. Pursuant to the Rules of the Chief Administrator of the Courts, 22 NYCRR §146(b) each applicant must document successful completion of a minimum of forty (40) hours of mediation training sponsored or recognized by the New York State Unified Court System's Office of Alternative Dispute Resolution Programs or training that the Office of ADR Programs deems to comport substantively with its curriculum guidelines.

In the discretion of the District Administrative Judge or his designee, an applicant may also be required to document:

1. Substantial recent experience mediating actual cases, including family matters. Substantial recent experience is defined as a minimum of 150 hours of actual face-to-face mediation practice including at least 25 family matters conducted as either a solo or co-mediator within the last five years, **OR**
2. The applicant must document successful completion of a structured family mediation apprenticeship. Such apprenticeship must, at a minimum, include the following components:
 - A. Mediation or co-mediation of at least two structured role-plays. The role-plays may be conducted as part of the aforementioned training requirement provided that the apprentice is given a sufficient opportunity to: deliver an opening statement; help parties exchange information, identify negotiable issues and explore options for resolution; and draft a written agreement that incorporates the terms of the parties' resolution; **AND**
 - B. Observation of at least one mediation session involving an actual controversy between actual parties; **AND**
 - C. Mediation or co-mediation of at least 20 family matters involving actual controversies between actual parties under the direct supervision of a coach or mentor that has previously been admitted to the Project roster; **AND**
 - D. Mediation or co-mediation of at least one case as the primary mediator followed by either a debriefing session with the coach or mentor or completion of a self-evaluation instrument.

Roster Mediators may be required to fulfill continuing education requirements prescribed by the Court. Every member of the Roster, and any other person who serves as a mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Family Mediators of the Tenth Judicial District Alternative Dispute Resolution Project upon its issuance.

Acceptance to the Roster is at the discretion of the District Administrative Judge in consultation with the Office of Court Administration's Office of Alternative Dispute Resolution Program. Continuing presence on the Mediation Roster is subject to review by the District Administrative Judge. Mediators may be removed from the roster at the discretion of the District Administrative Judge in consultation with the OCA Office of Alternative Dispute Resolution Programs.

VII. FEES

The Project itself will impose no fee for this service upon either mediators or parties. Parties who are referred to mediation shall not be required to compensate the Mediator(s) for services rendered prior to and during the **initial** mediation session.

Should the parties agree to schedule additional mediation sessions with the assigned Mediator, or to extend the initial mediation session past the 45 minute period, the Mediator shall be entitled to compensation for services rendered.

The mediator's fee for such services shall be set at no more than \$225.00 per hour and be agreed upon in writing including the ratio at which the fee will be divided between the parties. This agreement must be signed prior to the commencement of any additional session. The mediator's hourly rates, availability, reputation, responsiveness to time constraints, etc. will be considered when the parties and/or the Coordinator make a selection.

Mediators are encouraged to use a sliding scale when appropriate or to waive fees to ensure that no one is denied access to the Mediation Project based on inability to pay. Furthermore, in an effort to evaluate the cost effectiveness of mediation during the pilot period, the parties through their counsel are required to notify the Coordinator in the event that a total of fifteen hundred dollars (\$1,500.00) or more in billable fees is paid or becomes owing to the Mediator.

VIII. IMMUNITY

Individuals who, as a matter of public service, volunteer their time to assist parties in resolving their matrimonial differences should not run the risk of blame when a consensual resolution is not reached or is not possible. Since the CALM Project does not bind the parties to a particular result but instead offers them the opportunity to reach

a consensual resolution, the volunteer Mediator shall be immune from suit as a result of any conduct or omission during the performance of duties in that capacity. The execution of an Initiation Form constitutes a waiver of any right to sue the Mediator because of his or her actions in that role.

IX. CONFIDENTIALITY

All communications made - whether in writing, orally, or by other means - during the course of mediation by any party, Mediator, or any other person present shall not be disclosed, except as noted below. Similarly, information generated in or around the mediation --including memoranda, work products or case files of a Mediator--is confidential and shall not be disclosed, except as noted below. However, mediation may not be used as a shield with respect to otherwise discoverable documents or information produced or occurring prior to or outside the confines of mediation.

Except as set forth below, nothing about the substance of the mediation, such as the weaknesses or strengths of the parties' case or the relative willingness of the parties to discuss settlement proposals, will be revealed to the referring Justice or any other person by the mediator or any party or attorney. Nor will any party or lawyer for a party reveal the outcome of the mediation process to the referring Justice or a member of the Justice's staff unless both sides agree to the disclosure.

Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following five circumstances:

1. Attendance

Information pertaining to whether the parties and their counsel attended the initial mediation session will be reported to the referring Justice. No information regarding attendance at subsequent sessions will be revealed. The Coordinator will report any failure to comply with the rules as is reported to the Coordinator by the mediator.

2. Waiver

All parties to the mediation and their attorneys may specifically agree in writing to waive confidentiality with respect to any or all issues. The waiver must specify the individual communication(s) or information that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure.

3. Written Agreement

Agreements signed by all the parties will be submitted to the Court for review. Only those signed, mediated agreements that have become court orders may be admissible in any present or future judicial or administrative proceeding.

4. Threats of Imminent, Serious Harm

If the action, communication or information recited during a mediation session constitutes a crime, a family offense as defined in section 812 of the Family Court Act and/or a credible threat of serious and/or imminent harm, the appropriate authorities and the potential victim may be notified.

5. Allegations of Child Abuse or Neglect

If the communication or information relates to an allegation of child abuse or neglect as defined in Family Court Act §1012(e) and (f) and Social Services Law §412 and for which disclosure is or may be required pursuant to the Family Court Act or Social Services Law §413, confidentiality will not apply as to those disclosures.

X. DOMESTIC VIOLENCE/SEVERE POWER IMBALANCE

All mediators accepted to the Mediation Roster must be alert to any evidence of domestic violence or severe power imbalances.

Upon a credible allegation of domestic violence or severe power imbalance, the Mediator shall suspend the mediation process, and shall advise the assigned Justice that the mediation process is no longer appropriate. Allegations of domestic violence and/or severe power imbalance will not be disclosed to the referring Justice. The alleged victims will be given information regarding their rights in the form prescribed in Family Court Act §812(5), and they will receive safety planning information.

XI. REFERRAL TO CALM AND ONGOING LITIGATION

Cases may be referred to mediation, typically at the preliminary conference, upon joint request of the parties or counsel or mandated in the discretion of the Court. The parties may opt out of the Project after the initial mediation session.

Mediation does not stay the Court proceedings. However parties committed to the mediation process who conclude that additional time is necessary to fully explore the issues pertaining to their case, may request an adjournment from the assigned Justice. Such adjournment may be granted only by permission of the assigned Justice. In no event shall the adjournment be in excess of ninety (90) days.

XII. CONFLICTS OF INTEREST

The Mediator shall disqualify himself or herself in the event that there is an actual conflict of interest or the appearance of a conflict of interest, unless the parties and counsel agree, in writing, after full disclosure, to waive the conflict of interest or the appearance of the conflict of interest.

XIII. FAILURE TO COMPLY WITH THE ORDER OF REFERENCE AND THESE RULES

If a party or counsel fails to schedule an appearance for an initial mediation session in a timely manner, appear at an initial session, or otherwise comply with these rules, the Mediator shall advise the Coordinator and may, if appropriate, recommend the imposition of sanctions. The Coordinator shall report any such failure and recommendation to the referring Justice.