

SUPREME COURT, CIVIL BRANCH NEW YORK COUNTY

STATEMENT OF PROCEDURES MATRIMONIAL MEDIATION PROGRAM

I. OVERVIEW

Mediation is a confidential, problem-solving process in which a neutral third party - - the mediator - - helps disputing parties to identify issues, clarify perceptions, and explore options for a mutually acceptable outcome. Mediation often results in faster, less expensive, more durable, and less acrimonious settlement than might be the case in the normal course of litigation.

The Matrimonial Mediation Program of this Court (“the Program”) provides parties a free, 90-minute initial session with a Program mediator. Program mediators have significant training and experience in family mediation and in opening paths of communication that emphasize common ground and encourage cooperation. They help divorcing parties to resolve key issues that affect their relationships with their children and the financial well-being of all family members.

Although parties are not obligated to reach agreement in mediation, the process often concludes with a written agreement, as well as improved communication between the parties. If the parties reach an agreement during mediation, the mediator may assist the parties and their counsel in drafting a written 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.

II. PROCEDURES

Supreme Court Justices may refer parties to the Program 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) and Social Services Law § 412), domestic violence, or a severe power imbalance between the parties are not appropriate for mediation and shall be excluded from the Program.

To begin the process, the Justice will sign an Order of Reference directing parties and their counsel to appear at an initial, free, 90-minute mediation session with a mediator from the Program’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 the mediation.

The Matrimonial Mediation Program Coordinator (“the Coordinator”), who is located in Room 148 in the New York County Courthouse at 60 Centre Street, New York, New York 10013, will receive the referring Justice’s Order of Reference. The Coordinator will select from the Court’s Roster of Mediators the next available mediator, proceeding in alphabetical order.¹

Within five business days from receipt of the Order of Reference, the Coordinator will provide the parties with a mediator’s name and contact information 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 the Form. The parties are free to select a different mediator, but if they do so, they must still return the completed Initiation Form within five business days.

Next, within five business days from receipt of the Initiation Form, the Coordinator will send to the parties and to the selected mediator a Notice of Confirmation. The parties are required to appear at the initial mediation session within 20 days after receiving a Notice of Confirmation.

At least one week before the initial mediation session, the mediator may require the parties’ counsel to send the mediator a copy of the pleadings and any other information necessary for the effective negotiation of the issues involved. The mediator may also request a conference call with the parties’ counsel regarding any preliminary matters.

If parties wish to extend the mediation process beyond the initial 90-minute session, they may continue that session or schedule additional sessions with the mediator, who shall be entitled from that point forward to compensation at a rate that shall not exceed \$250 per hour. Parties shall complete all scheduled mediation sessions within 75 days of receiving the Notice of Confirmation.

Within five business days after the mediation’s conclusion, which shall occur whenever after the initial 90-minute session one party, both parties, or the mediator decides that the mediation has ended, the mediator shall send a Mediator’s Report to counsel and to the Coordinator, but not to the referring Justice. The Report 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 Report any original, signed agreement and return it to the Coordinator.

Once counsel receives a copy of the Mediator’s Report, counsel shall promptly contact the Part of the assigned Justice to schedule a conference concerning further proceedings in the case. The Coordinator shall report to the referring Justice whether the case settled (in whole or in part), but shall not reveal to the referring Justice the selected mediator’s identity or disclose other information discussed during the mediation, except as described in Section IX.

¹ The Coordinator, however, has discretion to designate another mediator in appropriate cases.

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 that all communications are confidential (with narrow exceptions outlined below) and will not be disclosed to the Justice hearing the 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.

During the mediation process, all parties are free to discuss the case as they see it and to raise particular issues of concern that they would like to address. The mediator may ask the parties clarifying questions related to the care of their children, parenting time, and allocation of property and income. The mediator will then help the parties to develop and choose options that meet the parties' needs.

At some point in the process, either party, the party's counsel, or the mediator may suggest a caucus. Caucuses are meetings that mediators hold separately with each side in a dispute. During the caucus, the mediator may explore how each party views the dispute and the impact of any proposed solutions. The mediator will keep confidential the information discussed in caucus unless the party permits disclosure.

If the parties reach a written agreement during mediation, the parties are strongly encouraged to submit the agreement to their respective attorneys for review.

IV. THE ROLES OF PARTIES, COUNSEL, ATTORNEYS FOR THE CHILD, AND GUARDIANS AD LITEM

Experience has demonstrated that party participation - - as opposed to participation exclusively by counsel - - not only increases the likelihood of settlement, but also improves compliance with any agreed-upon terms and enhances the parties' overall satisfaction with the process and outcome. 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 during mediation sessions is encouraged. Without representation by counsel, parties may risk entering into agreements with insufficient knowledge about financial, legal or other issues. If counsel for either party is discharged or withdraws for any reason during the mediation process, the case will not proceed in mediation until a substitution occurs.

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 solutions.

For those cases in which an attorney for the child has been assigned, mediation may not commence without the appropriate attorney's or guardian's presence. If the parties and the attorney or guardian agree to proceed in mediation without the attorney or guardian present, they may do so, unless otherwise ordered by the Court.

V. THE ROLE OF THE COURT

The Program is conducted under Court auspices and pursuant to these rules. Judicial and non-judicial staff are encouraged to inform the parties of the Program'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 Court welcomes the feedback of 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/suptctmanh) and is also available in Room 148 in the Courthouse at 60 Centre Street. The prerequisites to joining the Roster are as follows:

- Completion of at least 60 hours of family mediation training in a training program sponsored or recognized by the New York State Office of Court Administration ("OCA").²
- At least four years of family mediation experience, including 250 hours of face-to-face mediation with clients and a minimum of 25 custody and visitation cases, and any other mediation training or experience deemed appropriate by the Court.

Cases involving financial disputes will be referred only to those Program mediators with knowledge of, training in and experience with the financial aspects of divorce.

² The training and qualifications guidelines for the Program exceed the minimum requirements established in Part 146 of the Rules of the Chief Administrative Judge. See www.nycourts.gov/rules/chiefadmin/146.shtml.

Continuing presence on the Court's Roster of Mediators is subject to review by the Administrative Judge of this Court. Mediators may be removed from the Roster at the discretion of the Administrative Judge.

VII. FEES

The Program itself does not impose a fee, nor does it administer fees payable to mediators. As indicated above, parties referred to mediation pursuant to this Statement of Procedures shall not be required to compensate the mediator for services rendered before or during the initial 90-minute mediation session. Should the parties agree to continue mediation beyond the 90-minute period or schedule additional sessions with the mediator, the mediator shall be entitled to compensation for services rendered as follows: compensable services shall consist of time spent conducting any mediation that follows the initial 90-minute session, and time spent reviewing materials submitted by the parties for purposes of such subsequent mediation. The mediator's fee for such services shall not exceed \$250.00 per hour. The fee arrangement must be agreed to in writing, and must include the ratio at which the fee will be divided between the parties. The parties must sign this fee agreement before commencing any additional mediation beyond the initial mediation session. Parties through their counsel are required to notify the Coordinator in the event that a total of \$1000.00 or more in billable fees is paid or becomes owing to the mediator.

Mediators are encouraged to use a sliding scale to take into account the parties' financial circumstances, and may consult with the Coordinator to ensure that no one is denied access to the Program based on inability to pay.

VIII. IMMUNITY

The mediator shall be immune from suit as a result of any conduct or omission during the performance of duties in that capacity to the extent permissible under the law. The execution of the Initiation Form constitutes a waiver of any right to sue the mediator because of his or her actions in that role. Persons who, as a matter of public service, volunteer their time to assist parties in resolving their matrimonial differences should not run the risk of some sort of blame, especially when that service does not bind the parties to a particular result but instead offers them the opportunity to reach a consensual resolution to their dispute.

IX. CONFIDENTIALITY

Except as set forth below, all oral, written, or other communications made during the course of mediation by any party, mediator or any other person present shall be immune from disclosure in any present or future judicial or administrative proceeding. Similarly, all information generated in or in connection with the mediation - - including memoranda, work products or case files of a

mediator - - shall remain confidential and not be subject to disclosure in any present or future judicial or administrative proceeding. However, mediation will not be used as a shield with respect to otherwise discoverable documents or information produced or occurring prior to or outside the mediation.

Moreover, except as set forth below, nothing about the substance of the mediation, such as the weaknesses or strengths of the parties' cases or the relative willingness of 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/Compliance with Rules***

Whether the parties and their counsel attended the initial mediation session will be reported to the referring Justice. The Coordinator will report any failure to comply with the rules that may be reported to the Coordinator by the mediator.

2. ***Waiver***

Parties to the mediation and the mediator agree in writing to waive confidentiality. 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***

A writing signed by all the parties embodying a mediated agreement submitted to the court for review. Additionally, a limited report of the outcome will be sent to the referring Justice by the Coordinator. 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 communications or information constitute a credible threat of serious and imminent harm, either to the speaker or another person or entity, the appropriate authorities and/or the potential victim may be notified.

5. ***Allegations of Child Abuse or Neglect***

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 required pursuant to Social Services Law § 413.

X. CHILD ABUSE AND NEGLECT

If an allegation of child abuse or neglect is made by any party during the mediation, the mediator will stop the mediation process and consult with each party individually for the purpose of obtaining as much information about the circumstances as possible. Mediators shall report to the referring Justice allegations of child abuse or neglect for which disclosure is required pursuant to Social Services Law § 413.

XI. DOMESTIC VIOLENCE/SEVERE POWER IMBALANCE

When an allegation of domestic violence or severe power imbalance is made by any party during the mediation, the mediator shall stop the mediation process, meet with each party individually where appropriate to learn as much as possible about the circumstances, and consult with the Coordinator (but not the assigned Justice or members of that Justice's staff) as to whether to resume the mediation process. Allegations of domestic violence will not be disclosed to the referring Justice; instead, 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.

XII. REFERRAL TO THE PROGRAM AND ONGOING LITIGATION

Cases may be referred to mediation, typically at the preliminary conference, on consent of the parties or at any time deemed appropriate by the Justice. A party who attends the initial 90-minute session complies with the Order of Reference, even if that party ultimately chooses not to proceed with mediation. Parties may move to opt out of the Program for good cause.

Referral to mediation will not ordinarily stay the court proceedings in any respect. The "no stay" policy recognizes the special need for prompt action in matrimonial and family proceedings. Full discovery, emergency and *pendente lite* relief, family dynamics, and the needs of children require ongoing access to the court, as a general rule. However, parties committed to the mediation process who conclude that additional time is required to explore fully the issues pertaining to their case may request an adjournment.

XIII. AVOIDING CONFLICTS OF INTEREST

Before accepting a mediation, a mediator shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome, and an existing or past relationship with a mediation party or foreseeable participant in the mediation. The mediator shall disclose any such known fact to the mediation parties and counsel as soon as possible before accepting a mediation. The mediator is obliged to disclose all

potentially disqualifying facts to the parties and, where such facts exist, shall not serve unless the parties consent in writing. If a mediator learns of any disqualifying fact after accepting a mediation, the mediator shall disclose it as soon as practicable. If unable to function in a fair, impartial and objective manner, the mediator shall seek disqualification.

XIV. FAILURE TO COMPLY WITH 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 or to appear at an initial scheduled session, or otherwise fails to 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.

Dated: January 22, 2009

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Documents may be emailed to the email address above as Word, WordPerfect, or PDF attachments.