

MEDIATION PROGRAM RULES
SURROGATE’S COURT, BRONX COUNTY

I. OVERVIEW

Proceedings in Bronx County, Surrogate’s Court, are eligible for mediation, and may, at the Surrogate’s discretion, be referred to mediation (the “Program”). The following rules (the “Program Rules” or the “Rules”) shall govern cases referred to this Program. Cases involving the Public Administrator shall be exempted from referral to this Program. This Program does not preclude the Court from directing or referring parties to other forms of dispute resolution, including *settlement conferences with Court staff*.

II. STATEMENT OF PURPOSE

The Surrogate’s Court of Bronx County is dedicated to fulfilling its statutory and constitutional mandate to ensure the just and efficient resolution of all matters that come before it. The Program has been developed to achieve these ends through early referral to mediation. Mediation is often faster, more convenient, less expensive and less acrimonious, and often results in a more mutually acceptable and durable resolution than the normal course of litigation.

III. DEFINITIONS

Mediation. A confidential dispute resolution process in which a neutral third party (the “Mediator”) helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. In this process, parties have an opportunity to communicate with each other, focus on what is important to them, and to come up with individually-tailored solutions. During mediation, each party relates his or her understanding of the dispute. The Mediator may ask the parties clarifying questions. The Mediator will not give legal advice or force solutions on the parties.

Mediation often involves non-legal as well as legal issues. Parties are strongly encouraged to participate in mediation with their own attorneys. Parties may also choose to attend sessions *without counsel, if all participants agree*. Although the mediation process can, and often does, result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves.

Role of the Mediator. A trained third party neutral, the Mediator is not a decision-maker. The Mediator serves as a neutral facilitator of communication and helps the parties reach resolution of the issue(s) being mediated. In this document, Mediator may also refer to a co-mediation team where two such neutrals are working together to mediate a case. For the purposes of these Rules, a Mediator is a (i) a neutral who has been appointed to the Court’s Roster (as that term is defined below) and is mediating a given case pursuant to these Program Rules or (ii) a trained neutral who is a member of the Court staff. This is distinct from private mediators who mediate cases outside these Program Rules.

ADR Program Contact. A person or entity designated by the court to facilitate the assignment of court proceedings to mediation in accordance with the Mediation Program Rules. (see §VIII below)

IV. PROCEDURES

a. Timing of Referral to Mediation

- i. The Court shall refer parties to mediation as early as practicable.
- ii. The need for discovery shall not prevent parties from attending an initial mediation session unless the Court determines otherwise. Where appropriate, the Court may allow limited discovery to be exchanged between the parties prior to the mediation.
- iii. All parties and counsel shall be prepared to be referred to a scheduled mediation session upon completion of jurisdiction.
- iv. Counsel shall prepare for their case to be referred to mediation by:
 1. Informing their clients about the Court's mediation program and its expectations and requirements:
 2. Identifying the information and material that may be useful to exchange with other parties in advance of mediation.

b. Preliminary Mediation Conference.

- i. Parties and/or their respective counsel shall participate in a Preliminary Mediation Conference with the ADR Program Contact. The date and time of the Preliminary Mediation Conference shall be designated by the Surrogate.
- ii. At the Preliminary Mediation Conference, the parties and/or their respective counsel shall provide the ADR Program Contact with intake information and discuss how the mediation process will proceed, *e.g.*, who will be attending the mediation and whether there is a need for limited exchanges of information.
- iii. The parties shall have three (3) business days from the date of the Preliminary Mediation Conference to discuss and agree upon three (3) dates and times for the mediation. Within this three (3) business day period, the parties shall advise the Court of their mutually agreeable dates/times by sending a joint email to the ADR Coordinator. The ADR Coordinator will try to schedule the mediation for one of the suggested dates and times, but the ultimate selection of the date for the mediation session shall always be in the Surrogate's sole discretion. If a joint email from the parties identifying mutually satisfactory dates for the mediation is not received by the ADR Coordinator within three (3) business days of the Preliminary Mediation Conference, the Court, in its sole discretion, may proceed without the parties' input and assign a date and time for the Mediation in its Order of Reference, which scheduling may not be changed except in the case of extraordinary circumstances.

The initial mediation session must occur no more than forty-five (45) calendar days from the date that the Order of Reference is issued, except in cases where the parties can establish to the Surrogate's satisfaction that extraordinary circumstances require an extension of such deadline.

c. **Order of Reference:**

- i. The Court shall refer matters to mediation by an Order of Reference informing parties and their counsel that the case shall undergo mediation. The Order of Reference shall, *inter alia*:
 1. Direct the parties to schedule and participate in mediation.
 2. Identify the issues that are being referred to mediation.
 3. Establish the deadline for the parties to opt to use a private mediator.
 4. Establish a date upon which the parties are to return to Court.
 5. Address any other preliminary matters pertaining to the mediation.
- ii. Within three (3) business days of the Order of Reference being issued, parties and counsel shall advise the ADR Program Contact of their choice to mediate with an outside mediation provider to be paid by the parties. If the parties elect to use their own mediator, they shall inform the ADR Program Contact of (a) the name and contact information of the mediator selected; and (b) date of the first session (which date shall be no more than forty-five [45] calendar days from the date that the Order of Reference is issued).

d. **The Mediation Process**

- i. **Pre-Mediation Memoranda:** At least five (5) calendar days prior to the initial mediation session, each of the parties' counsel shall provide the Mediator with a confidential memorandum, limited to three (3) pages, setting forth to the extent possible: the names of the parties and their relationships to each other; essential facts and client's contentions about liability; the procedural background of the case; the issues that are in dispute; what the adversary is expected to claim and the basis for such position; why the parties are at an impasse; the status of settlement negotiations; suggestions as to how the matter might be resolved, as well as such other information concerning the litigation necessary for the effective negotiation and resolution of the issues. No portion of the confidential memorandum shall be disclosed to the Court, nor, unless otherwise agreed by the parties, to any other party to the proceeding. *Pro se* litigants shall not be required to provide a pre-mediation memorandum. Instead, they shall provide intake information to the ADR Program Contact. Such intake information shall be given to the Mediator and treated with the same confidentiality as a pre-mediation memorandum.
- ii. **Pre-mediation Conference Calls:** The Mediator may request a conference call regarding any preliminary matters and may thereafter meet privately with any party and their respective counsel prior to or during a mediation session.
- iii. **Location of Mediation Sessions:** If the Mediator and the parties cannot agree upon the location of a Mediation session, the Court shall determine where the Mediation session will occur. The Court, in its sole discretion, may direct the Mediator and the parties to conduct their mediation session(s) by videoconference, telephone or any

other virtual method accessible to the parties which allows a mediation session to proceed without the parties and the Mediator all being physically present in the same location.

- iv. **Informed Consent:** At the beginning of the initial mediation session, the Mediator shall:
 1. Explain to all parties that all communications are confidential with narrow exceptions summarized in Section VI;
 2. Explain that any party may, during the initial session or at any time thereafter, end the mediation process and return to Court;
 3. Request that all parties and attorneys acknowledge in writing that they were informed of and understand the voluntary and confidential nature of the mediation process.
- v. **Caucus:** At any point in the process either party, their counsel, or the Mediator may suggest meeting separately with the Mediator in caucus. During the caucus, the Mediator may explore how that party views the dispute and the impact of any proposed solutions. The Mediator shall keep the information discussed in caucus confidential unless the caucusing party permits disclosure.
- vi. **Time to Complete Mediation:** Unless otherwise permitted by the Court, the parties shall complete the mediation process within forty-five (45) days of receiving the Order of Reference. If additional time is necessary, parties must submit a stipulation to the Court to be so-ordered.
- vii. **Conclusion of Mediation:** The mediation concludes upon all parties signing a written agreement resolving all or some of the matters in dispute, or whenever any party or the Mediator decides that the process has ended and notifies the others orally or in writing. Upon the conclusion of the mediation, the Mediator shall email within twenty-four (24) hours all parties, attorneys and the ADR Program Contact that the mediation process has ended.
- viii. **Agreements:** Agreements resolving some or all of the legal matters in dispute shall be signed by all parties and submitted to the Court.
- ix. **Mediation Report to the Court:** Within five (5) business days after the conclusion of the mediation sessions, the ADR Program Contact shall send a “Mediation Report” to the Court, copying counsel, that states:
 1. The date of the initial session and whether each party and counsel appeared at the initial session; and
 2. The dates of any subsequent sessions that were held, but not whether parties appeared; and
 3. Whether the parties reached partial, complete, or no agreement on the issues.

- x. **Mediation Survey:** Parties and counsel shall complete a Mediation Participant Survey and return it promptly to the ADR Program Contact after the final mediation session. The survey is meant to track participant satisfaction and shall not include any details of the substance of the case or mediation.
- e. **Fees and Mediator Compensation**
- i. The Court itself does not charge or administer fees. Mediators who are Court staff do not charge fees for providing mediation services. Mediators who are appointed to the Court's Roster may charge fees for their services, as set forth below.
 - ii. **Initial Session:** Court Roster Mediators shall not be compensated for the first ninety (90) minutes of the initial mediation session under the Program. Mediators shall not be compensated under the Program for preparation time or administrative tasks. Unless otherwise provided in these rules or agreed upon by the parties in writing, no fee, retainer or other payment may be charged or paid prior to the conclusion of the first ninety (90) minutes of the initial mediation session.
 - iii. **Substitute Mediators:** If the appointed Mediator has a conflict of interest or is otherwise unable to serve, a substitute Mediator shall be appointed who is bound by all of the provisions of the court order, including providing the first ninety (90) *minutes of the initial mediation session without compensation.*
 - iv. **Party-selected Mediators:** If the parties wish to select their own mediator, whether or not they are on the Court's Roster, that Mediator may negotiate a fee with the parties and need not provide the first ninety (90) minutes of the initial mediation session without compensation.
 - v. **Payment Disclosure:** At the beginning of the initial in-person mediation session, the appointed Mediator shall disclose to the parties in writing the specific time at which the non-compensable ninety (90) minute of the initial mediation session will conclude. That written disclosure shall advise the parties that any mediation continued beyond that time will be billed by the mediator at a rate of \$350 per hour capped at \$1,050 for the three hours immediately following the non-compensable time, and no more than \$425 for each hour thereafter. Additionally, the written disclosure shall be signed by all parties participating in the mediation and state how the Mediator fees shall be allocated among them. At the expiration of the first ninety minutes of the initial session as previously defined, any party may elect not to continue with the mediation, which decision must be immediately communicated orally or in writing to the Mediator and all parties. In such situation, despite the fact that one or more parties have opted out of mediation, mediation can continue as to those parties desiring to continue, to the extent that the mediation can be meaningful without participation by the party or parties that opted out. Only those parties who continue with the mediation beyond the first non-compensable ninety (90) minutes shall be responsible for payment of the Mediator's fee and expenses, as set forth below in subparagraph viii.

- vi. Notwithstanding anything to the contrary in these Program Rules, the Surrogate reserves the right, under appropriate circumstances, to allow or require Mediators to deviate from the fee schedule set forth in subparagraph v above. In such an event, the Mediator shall provide the mediating parties advance written disclosure of the fee structure permitted or required by the Surrogate, in the manner prescribed under subparagraph v for disclosing billing rates.
- vii. **Newly Added Parties:** The first ninety (90) minutes in any case referred to this program is not extended by reason of the addition of a new party to the case. If a new party enters the case after the expiration of the first ninety (90) minutes of the *initial mediation session*, that party may agree to participate in the mediation subject to the same terms as the rest of the parties on a fee-sharing basis.
- viii. **Allocation of Mediation Fees and Expenses:** The parties in interest who participate in mediation beyond the first ninety (90) minutes of the initial mediation session shall share the costs and fees of the mediator (a) equally, or (b) as agreed in writing. All fees must be set forth in writing. Appointed Mediators shall waive the share of the fee allocable to any party who has been granted permission to proceed in their case as a poor person pursuant to New York Civil Practice Law and Rules (CPLR) § 1101.
- ix. **Co-Mediation:** The presence of more than one appointed Mediator shall not increase the cost of mediation to the parties. When a case is co-mediated by two appointed Court Roster Mediators, the Mediators shall split the set hourly rate.

V. PARTICIPATING IN MEDIATION

- a. **Party Participation:** Parties are required to attend all mediation sessions. The Mediator has the discretion to allow remote participation in mediation.
- b. **Attorney participation:** Parties are strongly encouraged to participate in mediation with counsel.
- c. **Non-Party Participation:** If a non-party is invited to participate in the mediation, which participation must be agreed to by the parties and the Mediator, the Mediator shall obtain the participating non-party's written consent as to confidentiality and any other matters requested by the parties, as facilitated by the Mediator. If a mediation is conducted virtually, a non-party shall not be permitted to record, view or listen to any part of the mediation session without (i) the knowledge and consent of all parties and (ii) the non-party's written agreement to abide by all of the Rules' confidentiality provisions that are binding upon the parties and the Mediator.
- d. **Screening:** Cases shall be screened for appropriateness for mediation by the ADR Program Contact and the Mediator.
- e. **Opting Out:** A case otherwise subject to mediation may be exempted from mediation upon a showing of good cause. A party seeking an exemption shall apply for leave of court to be exempted within three (3) business days of the Court's issuance of the Order of

Reference. Failure to seek an exemption in this manner shall constitute a waiver of any objection to the mediation referral. If the court grants leave to “opt out” from referral to mediation, then the case shall not proceed to mediation at that time.

- f. **Good faith participation.** The parties and their counsel shall participate in the mediation process in good faith and cooperate with all reasonable requests made by the Mediator and/or the ADR Program Contact. The parties shall attend at least one mediation session and as many sessions thereafter as may be helpful in resolving the dispute.
- g. **Compliance:** Failure to comply with these rules may subject the offending party or attorney to sanctions, including but not limited to sanctions under CPLR 3126 and 22 NYCRR 130.

VI. CONFIDENTIALITY

- a. What happens during a mediation session with a Mediator shall be confidential and, except as otherwise provided, any document prepared, or communications made, by parties, their counsel or a mediator for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to mediation or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with mediation, or the testimony of any other party or the mediator concerning communications made during the proceeding. No stenographic or other record/recording shall be made of a mediation session, or any part thereof, except to memorialize a settlement agreement. A settlement, in whole or in part, reached during mediation shall be set forth in a writing signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the CPLR or the New York Surrogate's Court Procedure Act shall not be shielded from disclosure merely because they are submitted or referred to in mediation.
- b. 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 six circumstances*:
 - i. **Attendance:** Whether the parties and their counsel attended the initial session will be reported to the court.
 - ii. **Session Information:** The Mediator may report to the Court whether the parties are requesting additional mediation sessions as well as the date of any mediation session.
 - iii. **Waiver:** Parties to the mediation and the Mediator may agree 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. All waivers shall be in writing.
 - iv. **Written Agreement:** A writing signed by all the parties embodying a negotiated agreement submitted to the Court for review.

- v. **Threats of Imminent, Serious Harm:** If a communication or information constitutes 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.
- vi. **Allegations of Child Abuse or Neglect:** If a 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, appropriate authorities may be notified.

VII. MEDIATORS

a. Qualifications

- i. The Surrogate shall establish, and the ADR Program Contact shall maintain, a roster of trained mediators (“The Roster”) for the Program. To be eligible to join the Roster as a Mediator, an applicant must demonstrate temperament, training and experience that are satisfactory to the Surrogate. Such competence can be demonstrated by the applicant’s compliance with Part 146 of the Rules of the Chief Administrative Judge, which requires that:
 - 1. All Court Roster Mediators shall have received at least:
 - a. *24 hours of basic mediation training,*
 - b. 16 hours of additional training in the specific mediation techniques applicable to Surrogate Court matters.
 - 2. All Court Roster Mediators shall have experience mediating the types of cases that come before Surrogate’s Court.
 - 3. All Court Roster Mediators must receive six hours of approved Continuing Education relevant to mediation and/or Surrogate’s Court matters every two years.
- ii. Notwithstanding the foregoing, fulfillment of the Part 146 requirements does not guarantee acceptance onto the Roster. Final placement on the Roster is in the sole discretion of the Surrogate. The Surrogate reserves the right, under appropriate circumstances, to deviate from the Part 146 guidelines for Roster selection stated above.

b. Selection:

- i. The Court or its designee shall appoint a Mediator or Co-Mediators from the Roster.
- ii. Co-mediation may occur as part of an apprentice program when one mediator is mentoring another. Co-mediation may also occur when two Court Roster Mediators are appointed to the case.
- iii. The Roster shall include Mediators who can provide free and reduced-fee mediation services to qualified participants.

- iv. If a party objects to an appointed Mediator, the party must notify the ADR Program Contact of the objection and its basis within three (3) business days of the Order of Reference being issued. If the Court determines there is a good-faith, valid basis for the objection (e.g., a conflict of interest between the Mediator and one of the parties or their attorneys), the Court will appoint a different Mediator from the Roster. Rejection of a Mediator will not extend the time permitted for the completion of mediation.
- v. Upon receipt of the Order of Reference, and in compliance with the Program Rules, parties may opt out of the Court's mediator appointment process and hire at *their own expense a private mediator who is not on the Roster*. Such private mediator will not be obligated to provide the first ninety minutes of the initial mediation session without compensation or adhere to the rate of Mediator compensation identified in Paragraph IV(e)(v).

c. Immunity

- i. The Mediator shall be immune from suit as a result of any conduct or omission during performance of duties in that capacity to the extent permissible by law. Any person designated by the Court to serve as an ADR neutral pursuant to an ADR Plan shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity, and shall be indemnified against the costs of defending any claim based on such actions or omissions, to the extent permitted by applicable law, including but not limited to Public Officers Law §17.
- ii. Should a party attempt in any legal action to compel the testimony of the Mediator concerning the substance of a mediation, that party shall hold the mediator harmless against any resulting expenses, including reasonable legal fees incurred by the Mediator or the reasonable value of time spent by the Mediator in representing himself or herself in connection therewith.

d. Avoiding Conflicts of Interest

- i. *Before accepting an appointment as a Mediator, 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 party or their attorneys or foreseeable participant in the mediation. If the Mediator wishes to accept an appointment after discovering a potentially disqualifying fact, the Mediator shall disclose the disqualifying fact to the parties and shall not serve unless the parties consent thereto in writing. If, after accepting a case, a Mediator learns of any disqualifying fact, the Mediator shall disclose it to the parties as soon as practicable. If such conflict is not waived by the parties, or if, such conflict might reasonably be viewed as undermining the integrity of the mediation, the Mediator shall withdraw and notify the parties and the Court. In such an event, the Court shall appoint a new Mediator for the case.*


c. Quality Assurance

- i. The ADR Program Contact shall develop and promulgate consistent practices for ensuring mediator quality and fitness. Such practices may include, but are not limited to:
 1. Observing Mediators periodically;
 2. Providing and/or requiring continuing education relevant to mediating Surrogate Court cases;
 3. Debriefing cases with Mediators.
- ii. Any Roster Mediator or prospective Mediator may be observed at any time by the ADR Program Contact, or by staff of the NYS Unified Court System's Statewide ADR Office, before appointment on the Roster or to remain on the Roster.

VIII. ADR PROGRAM CONTACT

- a. The Court shall designate an ADR Program Contact.
- b. The ADR Program Contact shall oversee the administrative requirements of the ADR Program, which includes but is not limited to:
 - i. Monitoring all proceedings referred to mediation;
 - ii. Scheduling the first sessions for proceedings that opt for Mediators on the Roster ;
 - iii. Providing information to the court on the status of cases referred to mediation;
 - iv. Maintaining statistical data on the Program.
 - v. Observing the performance of Mediators during mediation sessions.

So Ordered,


HONORABLE Nelida Malavé-Gonzalez
Surrogate, Bronx County

EFFECTIVE DATE: April 27, 2020