

SURROGATE MONTALBANO'S MEDIATION PROGRAM RULES

I. OVERVIEW

Proceedings pending before Surrogate Rosemarie Montalbano in Kings County Surrogate's Court are eligible for mediation, and may, at the Surrogate or her staff's discretion, be referred to Kings County's Mediation Program (the "Program"). The following rules (the "Program Rules") shall only 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

Surrogate Montalbano is dedicated to fulfilling the statutory and constitutional mandate to ensure the just and efficient resolution of all matters that come before her. 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 an individual who has

been appointed to Surrogate Montalbano's Roster (as that term is defined below) and is mediating a given case pursuant to these Program Rules. This is distinct from mediations or even settlement conferences that occur outside this Program.

ADR Program Coordinator. A person or entity designated by the court to facilitate the assignment of court proceedings to mediation in accordance with the Mediation Program Rules.

IV. MEDIATION PROCEDURES

1. Timing of Referral to Mediation

- a. The Court shall refer parties to mediation as early as practicable.¹
 - i. Counsel shall prepare for their case to be referred to mediation by:
 - a. Informing their clients about Surrogate Montalbano's mediation program and his expectations and requirements.
 - b. Identifying the information and material that may be useful to exchange with other parties in advance of mediation.

2. Order of Reference:

- a. Surrogate Montalbano 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*:
 - i. Direct the parties to schedule and participate in mediation within a certain timeframe.
 1. The initial mediation session must occur no more than thirty-five (35) calendar days from the date the Order of Reference is issued, except in cases where the parties can establish to Surrogate Montalbano's satisfaction that extraordinary circumstances require an extension of such deadline.
 2. The final mediation session be completed within sixty (60) days from the initial mediation session (or ninety-five [95] days from the issuance of the ADR Reference Order). If additional time is needed, however, an extension request should be made to the Court.
 - ii. Establish the deadline for the parties to opt to use a private, non-rostered mediator.

¹ 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.

1. Within five (5) business days of the Order of Reference being issued, parties and counsel shall advise the Court and ADR Program Coordinator of their choice to mediate with a private mediation service to be paid by the parties.
2. If the parties elect to use a private mediation service (as opposed to the Roster or a court annexed program), the parties shall inform the Court and the ADR Program Coordinator 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 thirty-five [35] calendar days from the date that the Order of Reference is issued).

3. The Court Rostered Mediation Process

- a. After receiving a Referral Order, the parties shall directly contact the selected/appointed mediator after which the mediator will assume all communication with the parties.
- b. Mediations should be held in a setting mutually agreed upon by all parties to the mediation. Mediations may take place in person, virtually or telephonically.
- c. At the beginning of the initial mediation session, the Mediator shall:
 - i. Explain to all parties that all communications are confidential with narrow exceptions summarized in Section VI below; and
 - ii. Explain that any party may, during the initial session or at any time thereafter, end the mediation process and return to Court;
- d. Unless otherwise permitted by Surrogate Montalbano, the parties shall complete the mediation process within ninety-five (95) days of receiving the Order of Reference. If additional time is necessary, parties must submit a stipulation to the Court to be so-ordered.
- e. 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 Coordinator that the mediation process has ended.
- f. Agreements resolving some or all the legal matters in dispute shall be signed by all parties and submitted to the Court.
- g. Within five (5) business days after the conclusion of the mediation sessions, the ADR Program Coordinator shall send a "Mediation Report"

to the Court, copying counsel, that states:

- i. The date of the initial session and whether each party and counsel appeared at the initial session;
 - ii. The dates of any subsequent sessions that were held, but not whether parties appeared; and
 - iii. Whether the parties reached partial, complete, or no agreement on the issues.
- h. Parties and counsel are encouraged to complete a Mediation Participant Survey and return it promptly to the ADR Program Coordinator 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.

4. Fees and Compensation for Court Rostered Mediators

- a. The Court itself does not charge or administer fees.
- b. Mediators who are appointed to Surrogate Montalbano's Roster may charge fees for their services, as set forth below.
 - i. **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.
 - ii. **Subsequent time:** Unless otherwise agreed to by the parties and mediator, any time spent in a mediation session (beyond the initial ninety 90) minutes shall be compensable.
- c. Prior to beginning a mediation, the Mediator shall disclose to the parties in writing that the first ninety (90) minutes of the initial mediation session are non-compensable and any mediation time beyond that shall be charged at an hourly rate set by the Mediator. 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 (90) 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, even though one or more parties may 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 for in section f below.

- d. Notwithstanding anything to the contrary in these Program Rules, Surrogate Montalbano reserves the right, under appropriate circumstances, to allow or require Mediators to deviate from the fee schedule set forth in subparagraph 3 above. In such an event, the Mediator shall provide the mediating parties advance written disclosure of the fee structure permitted or required by Surrogate Montalbano, in the manner prescribed under subparagraph c for disclosing billing rates.
- e. The first ninety (90) minutes in any case referred to this program shall not be 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.
- f. 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. The appointed mediator may waive the share of the fee allocable to any party who has been granted permission to in case as a poor person pursuant to New York Civil Practice Law and Rules (CPLR) 1101.
- g. 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

1. **Party Participation:** Parties are required to attend all mediation sessions. The Mediator has the discretion to allow telephonic participation in mediation.
2. **Attorney participation:** Parties are strongly encouraged to participate in mediation with counsel.
3. **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.
4. **Screening:** Cases shall be screened for appropriateness for mediation by the Court and, if needed, also by the ADR Program Coordinator and the Mediator.
5. **Opting-Out:** A case otherwise subject to mediation may be exempted from such

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.

6. **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.
7. **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

1. 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. 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.
2. 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:
 - a. **Attendance:** Whether the parties and their counsel attended the initial session will be reported to the court.
 - b. **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.
 - c. **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.

- d. **Written Agreement:** A writing signed by all the parties embodying a negotiated agreement submitted to the Court for review.
- e. **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.
- f. **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. COURT ROSTER MEDIATORS

1. Qualifications

- a. Surrogate Montalbano shall establish, and the ADR Program Coordinator 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 Surrogate Montalbano. Such competence can be demonstrated by the applicant's compliance with Part 146 of the Rules of the Chief Administrative Judge, which requires that:
 - i. All Court Roster Mediators shall have received at least:
 - 1. 24 hours of basic mediation training,
 - 2. 16 hours of additional training in the specific mediation techniques applicable to Surrogate Court matters.
 - ii. All Court Roster Mediators shall have recent experience mediating the types of cases that come before Surrogate's Court. Such mediation experience can be achieved by:
 - 1. Mediating at least three (3) Surrogate's Court cases in a New York State Court, one of which has been observed (in whole or in part) by the ADR Program Coordinator; or
 - 2. Co-Mediating at least twenty (20) hours in Surrogate's Court cases in a New York State Court.
 - iii. All Court Roster Mediators must receive six hours of approved Continuing Education relevant to mediation and/or Surrogate's Court

matters every two years. Proof of such attendance shall be provided to the ADR Program Coordinator upon completion.

- b. 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 Surrogate Montalbano. Surrogate Montalbano reserves the right, under appropriate circumstances, to deviate from the Part 146 guidelines for Roster selection stated above.
- c. All mediators who wish to be considered for addition on Surrogate Montalbano's Roster must complete an application and provide it to the ADR Coordinator.

2. Selection/Mediation Appointment:

- a. The parties may select their preferred Mediator or Co-Mediators from the Roster and can advise the ADR Coordinator within 5 days of the issuance of the Mediation Referral Order. If the parties are unable to agree on a selection within the allotted time, the Court will appoint one to the matter.
- b. 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 selected and/or appointed to the case.
- c. If parties reject an appointed Mediator, they must notify the ADR Program Contact within three (3) business days. If the basis for the rejection is a conflict of interest between the Mediator and one of the parties or their attorneys, the parties may request a different mediator from the Roster. Absent a conflict of interest, rejection will not extend the time permitted for the completion of mediation.
- d. 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 a private mediation service at their own expense. (See form)

3. Immunity

- a. 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 a court to serve as a volunteer ADR neutral pursuant to an ADR Plan, and serving without compensation, 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 Public Officers Law §17.
- b. 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.

4. Avoiding Conflicts of Interest

- a. 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.

5. Quality Assurance

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

*Hon. Rosemarie Montalbano
Kings County Surrogate*