

**Suffolk County Surrogate's Court  
Alternative Dispute Resolution  
Procedures**

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**Temporary COVID-19 ADR Procedures**

**Effective June 2020 and until further notice, mandatory personal appearance is suspended. In light of COVID-19 and concerns for the safety of court employees and the public, mediation will be conducted remotely via videoconferencing, unless other in-person arrangements are made with the ADR Coordinator and mediator. Therefore, any reference in the Surrogate's Court ADR Procedures to in-person appearances or participation shall mean remote or virtual unless otherwise ordered by the court.**

SURROGATE’S COURT OF THE STATE OF NEW YORK  
SUFFOLK COUNTY  
HON. THERESA WHELAN  
ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

It is the objective of this court to encourage the resolution of disputes and the early settlement of pending litigation through Alternative Dispute Resolution (“ADR”), a non-judicial process designed to assist parties in resolving their disputes economically and efficiently. In order to achieve its objective, the court shall refer eligible cases to an early settlement conference, followed by mediation. In certain cases, mediation can be more convenient, less expensive, less acrimonious, and can often result in a more mutually acceptable and durable resolution than the normal course of litigation.

Contested proceedings heard in the Surrogate’s Court shall be presumptively eligible for early referral to a mediation process unless otherwise excluded pursuant to these procedures. These procedures are promulgated for the management of the Program of Alternative Dispute Resolution for the Surrogate’s Court, County of Suffolk. They shall not be deemed to vest any additional rights in litigants or their attorney and shall be subject to such amendments from time to time as shall be approved by the court.

**1. The Program**

- A. The Surrogate’s Court of the State of New York, County of Suffolk, shall oversee a Program of Alternative Dispute Resolution for contested matters (the “Program”). Once issue has joined in any proceeding, an early settlement conference shall be held with a court attorney. If the matter is not resolved at the early settlement conference, the matter shall proceed to mediation. Unless deemed by the court to be ineligible, all contested matters referred to mediation shall proceed to one of the three mediation options, set forth below. If the parties cannot reach an agreement, the case shall be returned to the court.
- B. The court shall designate a Program Coordinator. The Coordinator shall oversee the administrative requirements of the Program, which include but are not limited to:
  - a. Monitoring all proceedings referred to the program;

- b. Scheduling mediation sessions for the parties who take part in mediating with a court employee;
  - c. Monitoring the status of all cases referred to ADR, including the scheduling of a control date;
  - d. Maintaining statistical data on the Program.
- C. Cases shall be screened for appropriateness. Cases involving the Public Administrator shall be exempted from referral to mediation. In addition, the court may, for good cause, deem any matter ineligible for mediation.

## **2. Process**

### **A. Early Settlement Conference**

Once issue has joined in any proceeding, an early settlement conference shall be held with a member of the Surrogate's Court's Law Department. This conference shall last up to one hour, and shall be attended by counsel for the parties, or, if a party is unrepresented, then by the *pro se* party. In the event the parties are represented by counsel, the parties and attorney shall be available to participate in this conference. In the event that the matter is not resolved, then the parties shall proceed to one of the following ADR options:

- 1) Mediation with a court employee;
- 2) Mediation by a mediator assigned from the Roster;
- 3) Mediation by a mutually agreed upon mediator.

### **B. Mediation with a court employee**

The court shall offer a mediation session of up to one and a half hours with a court employee who is a trained mediator. The mediator shall not be the same member of the Surrogate's Court Law Department with whom an early settlement conference was held. These sessions shall take place at the Surrogate's Court of Suffolk County, 320 Center Drive, Riverhead, New York.

### **C. Mediation by a Mediator assigned from the Roster**

The Administrative Judge of the 10<sup>th</sup> Judicial District (Suffolk County) shall establish and maintain a panel of Mediators (the "Roster") who shall be certified as required by Part 146 of the Rules of the Chief Administrative Judge.

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 Mediators. Continuing presence on the Roster is subject to review by the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

Mediators from the Roster shall be compensated at the rate of \$300 per hour, except that Mediators shall not be compensated for the first 1 ½ hours spent in the Mediation session or for the time spent in preparation for such Mediation session. The Mediator's fees and expenses shall be borne equally by the parties unless otherwise agreed in writing.

D. Mediation by a mutually agreed upon mediator

If the parties choose to select their own mediator, they shall inform the Program Coordinator, within ten days of the Order of Reference, of the name of the mediator.

**3. Determination of Suitability; Order of Reference**

- A. At the conclusion of the early settlement conference, the court shall determine the suitability of the action for the three mediation options and issue an Order of Reference. Cases shall be referred to mediation as soon as is practicable. A case not deemed appropriate for referral at its outset may be subsequently referred in the discretion of the court.
- B. Upon the completion of the early settlement conference, the parties and counsel shall meet with the Program Coordinator:
  - a. If the parties choose to mediate with a court-provided Mediator, the parties/counsel shall schedule a mediation session at the courthouse; or
  - b. If the parties choose to mediate with a Roster Mediator, the parties/counsel shall receive the assignment of the Mediator from the Program Coordinator; or
  - c. If the parties choose to mediate at their own expense, the parties/counsel shall inform the Program Coordinator within ten business days from the date of the Order of Reference, of the name and contact information of the mediator selected and the date of the first session. If the parties do not submit in writing an agreed upon name of a mediator within ten (10) business days from the date of the Order of Reference,

the court shall select the mediator from the Roster. Privately paid mediators must comply with the deadlines set forth in these procedures and the confidentiality rules set forth herein as well.

- C. The Order of Reference shall specify applicable control dates. For those matters using an in-court mediator, the Order of Reference shall specify the date of the scheduled mediation, which is to take place within approximately two (2) weeks of the early settlement conference. For those matters using a mediator from the Roster or a mutually agreed upon mediator, the Order of Reference shall specify a control date of approximately 45 (forty-five) days to return to court, within which time the parties are expected to have scheduled and completed a mediation session. An appearance by parties and counsel, if represented, on the control date shall be required unless the court has received a fully executed stipulation of settlement with all documentation necessary to completely resolve the matter. If additional time is necessary, parties must submit a stipulation with a statement of necessity to continue with the mediation process to the court to be so ordered.

#### **4. Participation in Mediation**

- A. 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. 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. In addition, at any time, the court may, upon its own review, determine that a matter should be exempted.
- B. Parties are required to attend all mediation sessions and participate in good faith. The mediator has the discretion to allow remote participation in mediation upon showing of hardship. Parties are encouraged to participate in mediation with counsel.
- C. Pre-mediation Memoranda: If requested by the mediator, the parties shall provide a confidential memorandum of not more than 2 pages (12 point font, doubled spaced) setting forth their view as to the facts, the issues that are in dispute, suggestions as to how the matter might be resolved, as well as such other information concerning the litigation as the mediator deems necessary for the effective negotiation and resolution of the issues. No

portion of the confidential memorandum shall be disclosed to the court nor to any other party to the proceeding, unless otherwise agreed by the parties.

- D. 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. 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.
- E. At the beginning of the initial session, the mediator shall:
  - i. Explain to all parties that all communications are confidential with narrow exceptions pursuant to these procedures;
  - ii. Explain that any party may, during the initial session or at any time thereafter, end the mediation process and return to court;
  - iii. Inform all parties that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot determine how the court would apply the law or rule in the parties' case or what the outcome of the case would be if the dispute were to go before the court;
  - iv. Request that all parties acknowledge in writing that they were informed of and understand the confidential nature of the mediation process.
- F. With the exception of privileged communications, the rules of evidence do not apply in mediation.
- G. Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process.
- H. The mediator may terminate the mediation at any time when a participant becomes disruptive to the mediation process.
- I. 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 in writing. For all cases mediated outside of the court, upon the conclusion of the mediation, the mediator shall email within 24 hours all parties, attorneys and the Program Coordinator that the mediation process has ended. Within five

(5) business days after the conclusion of the mediation sessions, the mediator 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.
- J. Agreements resolving some or all the legal matters in dispute shall be signed by all parties and submitted to the court within 15 days from the date the mediation concludes.

## **5. Mediators**

- A. A mediator's role is to assist in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement as well as legitimate points of disagreement.
- B. Any person who serves as a mediator pursuant to these Rules shall comply with the Model Standards of Conduct for Mediators (2005) promulgated by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, in such form as may be adopted by the ADR Office with the approval of the Chief Administrative Judge.
- C. Qualification of a mediator: Mediators who appear on the Roster shall comply with the requirements of Part 146 of the Rules of the Chief Administrative Judge of New York
- D. Quality Assurance: The ADR Program Coordinator shall from time to time develop and promulgate consistent practices for ensuring mediator quality and fitness. Such practices may include, but are not limited to: periodic observation of mediation sessions and use, collection and evaluation of post-mediation surveys.
- E. Immunity of the Mediator: Any person designated to serve as a mediator pursuant to this Program shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law, including Public Officers Law Section 17.
- F. Conflict of Interest: To avoid conflicts of interest, any person tentatively designated to serve as a mediator shall, as a condition to confirmation in that role, conduct a review of

his or her prior activities and those of any firm of which he or she is a member or employee. The mediator shall make disclosures to the parties who may object to the mediator's ability to serve or the mediator shall disqualify himself or herself if he or she would not be able to participate as mediator fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. If any potentially disqualifying facts are discovered, the mediator shall do the following: decline the appointment or fully inform the parties and the Coordinator of all relevant details. Unless all parties, after full disclosure, consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall be selected promptly by the court.

## **6. Confidentiality**

- A. The mediation shall be confidential. All documents prepared by parties or their counsel, and communications made by the parties or their counsel, for, during, or in connection with mediation, and any notes or other writings prepared by the mediator in connection with the proceeding shall be kept in confidence by the mediator, the parties and counsel. They shall not be summarized, described, reported or submitted to the court by the mediator or the parties. No party to the mediation shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation, or seek to compel the testimony of any other party or the mediator concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the Civil Practice Law and Rules or the New York Surrogate's Court Procedure Act shall not be shielded from disclosure merely because they are submitted or referred to in the mediation.
- B. No party to an action referred to mediation shall subpoena or otherwise seek to compel the mediator to testify in any legal proceeding concerning the content of the mediation. If a party to an action that had or has been referred to mediation attempts to compel such testimony, that party shall hold the mediator harmless against any resulting expenses,



including reasonable legal fees incurred by the mediator or reasonable sums lost by the mediator in representing himself or herself in connection therewith.

C. 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 circumstances:

- i. Whether the parties and their counsel attended the initial session will be reported to the court.
- ii. Mediator may report to the court whether the parties are requesting additional mediation sessions as well as the date of any mediation session.
- iii. 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. A writing signed by all the parties embodying a negotiated agreement submitted to the court for review. Only those signed agreements that have become court orders or decrees may be admissible in any present or future judicial or administrative proceeding.
- v. 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. 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 will be notified.

## **7. Stay of Proceedings**

Unless otherwise directed by the Court, referral to mediation will not stay the court proceedings in any respect.

## **8. Communication with the Court**

The mediator may communicate with the court or its staff about administrative details of the

processing of any case referred to the Program but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant to these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end unless consented to by all parties.

#### **9. Sanctions**

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.

#### **10. Mediation Survey**

Parties and counsel shall complete a Mediation Participant Survey and return it promptly to the Coordinator after conclusion of mediation. The survey is meant to track participant satisfaction and shall not include any details of the substance of the case or mediation.