

KINGS COUNTY SUPREME COURT, CIVIL TERM
PRESUMPTIVE MEDIATION PROGRAM RULES

I. OVERVIEW

Proceedings in Kings County Supreme Court, Civil Term are eligible for mediation, and may, at the Court’s discretion, be referred to mediation (the “Program”). The following rules (the “Program Rules”) shall govern cases referred to this Program. This Program does not preclude the Court from directing or referring parties to other forms of dispute resolution, including settlement conferences.

II. STATEMENT OF PURPOSE

Kings County Supreme Court, Civil Term 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. Mediators do not decide cases but help the parties come to a voluntary, mutually agreeable decision. 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 both litigants 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. As 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 (i) a neutral who has been appointed to the Court’s Roster (as that term is defined below) and (ii) is mediating a given case pursuant to these Program Rules and / or the ADR Coordinator. This is distinct from private mediators who mediate cases outside of these Program Rules.

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

IV. PROCEDURES

a. All proceedings are eligible for the Program except for the following:

- i. Matrimonial Proceedings (see Matrimonial Mediation Program rules)
- ii. Guardianship Proceedings
- iii. Special Proceedings
- iv. Tax Certiorari Proceedings
- v. Condemnation Proceedings
- vi. Foreclosures (see statutory mediation procedure)
- vii. Mental Hygiene Proceedings

b. 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; and
 2. Identifying the information and material that may be useful to exchange with other parties in advance of mediation. Parties should exchange documents at least ten (10) days before the scheduled mediation.

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 with a designated mediator;
 2. Establish the deadline for the parties to complete their mediation session;
 3. Establish a date upon which the parties are to return to Court; and

4. Address any other preliminary matters pertaining to the mediation.
- ii. Within five (5) business days of the Order of Reference being issued, parties and counsel shall advise the ADR Coordinator if they choose 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 Coordinator of (a) the name and contact information of the mediator selected; and (b) the 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 ten (10) calendar days prior to the initial mediation session, each of the parties' counsel shall provide the Mediator with a confidential memorandum, limited to three pages, setting forth: essential facts and client's contentions about liability; 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 to any other party to the proceeding, unless otherwise agreed by the parties. *Pro se* litigants shall not be required to provide a pre-mediation memorandum. Instead, they shall speak directly to the Mediator to answer any pre-mediation questions the Mediator might have. Such 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:** Mediation sessions will be conducted virtually at this time, subject to a change in circumstances regarding social distancing and courthouse availability.
- iv. **Informed Consent:** Either before the first session or at the beginning of the initial 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; and
 3. Request that all parties and attorneys sign the Agreement to Mediate form which will be returned to the Court.
- 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 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 Coordinator 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 Coordinator shall send a “Mediation Report” to the Court, copying counsel, that states 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 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.
- e. **Fees and Mediator Compensation**
- i. The Court itself does not charge or administer fees. The ADR Coordinator does 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. **Private Mediation:** If the parties elect to seek private mediation, the parties shall notify the ADR Coordinator in writing. Such election must be endorsed by all parties and shall identify the name and contact information of the private mediator and the expected date of mediation. Whether or not the private mediator is 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.

- iv. **Payment Disclosure:** Either prior to or at the beginning of the initial mediation session, the appointed Mediator shall disclose to the parties in writing the specific time at which the non-compensable ninety (90) minutes 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 agreed upon by all parties but not more than \$400 per hour. Additionally, the written disclosure shall be signed by all parties participating in the mediation and Mediator fees shall be shared by the parties. 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, 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 vii.
- v. Notwithstanding anything to the contrary in these Program Rules, the Court reserves the right, under appropriate circumstances, to allow or require Mediators to deviate from the fee schedule set forth in subparagraph iv above. In such an event, the Mediator shall provide the parties advance written disclosure of the fee structure permitted or required by the Court, in the manner prescribed under subparagraph iv for disclosing billing rates.
- vi. **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.
- vii. **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 spelled out 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.
- viii. **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, whether remotely or in-person.
- b. **Attorney participation:** Parties may participate in mediation with counsel, if they choose.
- 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.
- d. **Screening:** Cases shall be screened for appropriateness for mediation by the Court and the ADR Coordinator.
- e. **Opting-Out:** A case otherwise subject to mediation may be exempted from such mediation upon a showing of good cause. Applications to opt out of mediation may only be by order to show cause or motion on papers returnable prior to the assigned date of mediation, or by oral application to the Mediator under circumstances wherein further mediation would likely prove unsuccessful.
- 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 Coordinator.
- g. **Compliance:** Failure to comply with these Program Rules may subject the offending party or attorney to sanctions, including but not limited to sanctions under 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. 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 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 dates of any mediation sessions.
- 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 may be 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. **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 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 Court shall establish, and the ADR Coordinator shall maintain, a roster of trained mediators (“The Court Roster”) for the Program. To be eligible to join the Court Roster as a Mediator, an applicant must demonstrate temperament, training and experience that are satisfactory to the Court. 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 that Court’s matters.
 - 2. All Court Roster Mediators shall have experience mediating the types of cases that come before the particular Court. Mediation experience can be achieved by:
 - a. Mediating or co-mediating at least three (3) Supreme Court cases in a New York State Court.
 - 3. All Court Roster Mediators must receive six hours of approved Continuing Legal Education relevant to mediation and/or Supreme Court matters every two years.

- ii. Notwithstanding the foregoing, fulfillment of the Part 146 requirements does not guarantee acceptance onto the Court Roster. Final placement on the Roster is in the sole discretion of the Administrative Judge. The Administrative Judge reserves the right, under appropriate circumstances, to deviate from the Part 146 guidelines for Court Roster selection stated above.

b. Selection:

- i. The Court or its designee shall appoint a Mediator or Co-Mediators from the Court Roster.
- ii. Co-mediation may occur as part of an apprenticeship program when one mediator is mentoring another. Co-mediation may also occur when two Court Roster Mediators are appointed to the case.
- iii. The Court Roster shall include Mediators who can provide free and reduced-fee mediation services to qualified participants.
- iv. If parties reject an appointed Mediator, they must notify the ADR Coordinator 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 Court Roster. Rejection 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:
 - 1. a private mediator who is not on the Court Roster.
 - 2. a mediator who is on the Court Roster. Mediators who are members of the Court Roster but are selected independently of the court's selection process are not 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)(iv).

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 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.
- 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.

e. Quality Assurance

- i. The ADR Coordinator 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 Supreme Court cases;
 3. Debriefing cases with mediators.
- ii. Any Court Roster Mediator or prospective Mediator may be observed at any time by the ADR Coordinator, or by staff of the NYS Unified Court System's Statewide ADR Office, before appointment on the Court Roster or to remain on the Court Roster.

VIII. ADR PROGRAM CONTACT

- a. The ADR Coordinator for Kings County Supreme Court, Civil Term, is:
Kelechi Acholonu, Esq.
Kacholon@nycourts.gov
- b. The ADR Coordinator shall oversee the administrative requirements of the ADR Program, which includes but is not limited to:
 - i. Monitoring all proceedings referred to mediation;
 - ii. Assigning Mediators from the Court Roster;

- iii. Providing information to the court on the status of cases referred to mediation;
- iv. Maintaining statistical data on the Program.