

# 9th JUDICIAL DISTRICT DISTRICT-WIDE PRESUMPTIVE MEDIATION PROGRAM RULES

## I. OVERVIEW

Proceedings in the civil parts of the Ninth Judicial District are eligible for presumptive mediation (the "Program"). The following Rules shall govern all cases referred to this Program in conjunction with specific approved Rules for individual Courts and Parts of court in the counties of the District. This Program does not preclude the Court from directing or referring parties to other forms of Alternative Dispute Resolution ("ADR"), including settlement conferences with court staff.

## II. STATEMENT OF PURPOSE

The Ninth Judicial District 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.

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 (or more) such neutrals are working together to mediate a case. For the purposes of these rules,

a Mediator is a neutral who has fulfilled the requirements of Part 146 of the Rules of the Chief Administrative Judge and is mediating a given case pursuant to these program rules. This is distinct from private mediators who mediate cases outside these program rules.

Community Dispute Resolution Center (hereinafter, "CDRC"). The New York State Unified Court System partners with local non-profit organizations known as CDRCs to provide mediation, arbitration and other dispute resolution options as an alternative to court. CDRCs help litigants resolve a wide range of family court disputes involving parents and children as well as child custody and visitation issues.

Part. A Part shall mean any branch of court so designated by Administrative Rule or any Supreme Court IAS Justice, Acting Justice, Family Court Judge, Surrogate Judge or Judicial Hearing Officer presiding over the matter assigned.

County ADR Coordinator. A person or entity designated to facilitate the assignment of Court proceedings to mediation and to track results of the mediation program in accordance with the Program Rules. Each County shall have at least one County ADR Coordinator to be designated by the Administrative Judge for the Ninth Judicial District. A County ADR Coordinator may include any assigned Supreme Court IAS Justice, Acting Justice, Family Court Judge, Surrogate, chambers staff, Judicial Hearing Officer, clerk, office staff or other court staff designated to review matters for ADR.

District ADR Coordinator. A person or entity designated by the Administrative Judge for the Ninth Judicial District to have general program oversight.

#### **IV. PROCEDURES**

##### **a. Mediation Initiation Process**

i. The referral to mediation shall take place at the preliminary conference unless a different time frame is provided for by the specific court or part of court in the County where the action or proceeding is brought.

ii. If any Party seeks an exemption from mediation, the Part shall determine in its discretion whether good cause exists to grant same.

iii. If any Party seeks an exemption from the fee component of the mediation based on indigent status pursuant to New York Civil Practice Law and Rules § 1101, the Part shall make a determination on such request, with the understanding that the non-indigent party shall still be responsible for their portion of the Mediator's fee.

iv. If all Parties request mediation in the Mediation Initiation Form, the case shall be referred to Mediation.

v. Once the Part determines that the case qualifies for presumptive mediation, the Part shall issue an Order of Reference or referral to a CDRC.

b. Order of Reference/Referral to CDRC:

i. The Part staff shall:

1. refer matters to mediation by an Order of Reference or Referral to CDRC informing parties and their counsel that the case shall undergo mediation, which shall be completed within 45 days of issuance of the Order of Reference or referral; and

2. establish a date thereafter upon which to return to Court.

**V. SELECTION OF MEDIATOR**

a. If a matter is not referred to a CDRC, then within ten (10) business days from receipt of the Order of Reference, the parties shall confer and select a Mediator from the Roster or retain a private mediator, following which, the Parties shall, before the expiration of such ten (10) business day period file with the Court the Mediator Selection Form indicating the identity of the Mediator. Parties should proceed with Mediator selection as expeditiously as possible so that if the first choice of Mediator has a conflict of interest or otherwise is unable to serve, the Parties then have sufficient time to choose an alternative Mediator within the time frame set herein.

b. If the Parties are unable to agree on a Mediator, the Parties shall within the same ten (10) business days from receipt of the Order of Reference submit to the Court the Mediator Selection Form with two Mediator names per party listed, and the Court will select the Mediator from that list.

c. If either party does not consent to the Mediator selected by the Court under this Rule on the belief that there is a conflict of interest, the objecting party must submit a written request to the Court within five (5) days from the date of notification of the selected Mediator that includes the basis for disqualification of the Mediator. The Court may randomly select an alternative mediator or deny the request.

d. If the Parties are unable to agree on a Mediator, and the Parties fail to submit the Mediator Selection Form in the time period prescribed above, the Court, after confirming no conflict of interest with the Mediator and that the Mediator can conduct a mediation within the required time frame under these Rules, shall then complete the Mediator Selection Form designating a Mediator from the Roster, and the Parties shall be bound by the Court's election.

e. Parties may designate as the Mediator a person who is not a member of the Roster (i.e., a private mediation provider), but in such instance the Parties must complete the mediation process within the deadlines set forth in these Rules. Where the Parties elect to mediate with a Mediator who is not on the Roster, the fee structure shall be as agreed to by the Parties and such Mediator

is not obligated to provide the first ninety minutes of the initial mediation session without compensation.

f. If the Parties wish to choose their own Mediator who is not on the Roster, they shall inform the Part of (a) the name and contact information of the Mediator selected; and (b) date of the first session within the time frame set herein.

g. Co-mediation may occur as part of an apprentice program when one Mediator is mentoring another. Co-mediation may also occur when two Mediators are appointed to the case. Apprentice mediators' time is non-compensable, whereas a Co-mediator's time is compensable, but with the understanding that Co-mediators will split the fee that would otherwise be payable to a single Mediator under these Rules.

h. The Roster shall include Mediators or mediation service providers who can provide free and reduced-fee mediation services to qualified participants.

i. Mediators on court rosters shall list their relevant biographical information, experience, areas of expertise and any language fluency they possess.

## **VI. THE MEDIATION PROCESS**

a. Client Preparation: Counsel shall prepare for their case to be referred to mediation by:

i) Informing their clients about the Court's mediation program and its expectations and requirements.

ii) Identifying the information and material that may be useful to exchange with other parties in advance of mediation, including any information required to be exchanged by any discovery protocol prescribed by the Part.

b. Pre-mediation Memoranda: The parties shall provide a five page-limited confidential memorandum 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, unless otherwise agreed by the parties, to any other party to the proceeding. Any departure from the requirements set forth herein may be authorized by the Part or the Mediator.

c. Pre-mediation Conference Calls: The Mediator may request a conference call regarding any preliminary matters and may thereafter meet or speak privately with any party and their respective counsel prior to or during a mediation session.

d. Location of Mediation Sessions: The initial mediation and any subsequent session shall take place at the mediator's office, unless a different location is identified in another specific

court sponsored mediation program or otherwise agreed to by the Mediator and the parties that permits the effective conduct of the mediation and preserves confidentiality and safety.

- e. Informed Consent: At the beginning of the initial session, the Mediator shall:
  - i. Explain to all parties that all communications are governed by the Confidentiality provisions of these Rules
  - ii Explain that any party may, during the initial session or at any time thereafter, end the mediation process and return to Court
  - iii. Request that all parties acknowledge in writing that they were informed of and understand the voluntary and confidential nature of the mediation process. A Mediation Participation Statement of Understanding shall be sent to the Mediator and the parties by the Part after the Mediator selection has been confirmed.
  
- f. 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 keeps confidential the information discussed in caucus unless the party permits disclosure.
  
- g. Time to Complete Mediation: Unless otherwise permitted by the Part, the parties shall complete the mediation process within forty-five (45) days of issuance of the Order of Reference.
  
- h. Mediator Report: Within five (5) business days after the conclusion of the mediation sessions, the Mediator shall send a Report ("Mediator Report") to the Court 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.
  
- i. Mediation Survey: Following the conclusion of the mediation, Parties and counsel shall complete a Mediation Survey and return it promptly to the Part. The Part shall in turn send the Mediation Survey to the County ADR Coordinator, and the County ADR Coordinator shall furnish a copy to the District ADR Coordinator. The survey is meant to track participant satisfaction and shall not include any details of the substance of the case or mediation.

## **VII. FEES AND MEDIATOR COMPENSATION**

- a. The Court itself does not charge or administer fees for mediation.
  
- b. CDRC services are offered for a nominal administrative fee or the non-profit's sliding

scale depending on the type of case and services provided.

c. **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 also 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, the Mediator's fee structure shall as set forth in the Program's Mediation Fee Agreement.

d. **Mediation Fee Agreement:** At or any time prior to the beginning of the initial in-person mediation session, the Parties, counsel and the Mediator shall enter into a Mediation Fee Agreement, which shall be in the form accompanying these Rules, except as otherwise agreed to in writing by the Parties, counsel, and the Mediator.

e. Unless otherwise agreed to by the Parties, counsel and the Mediator in a signed writing, mediation continued beyond the first ninety (90) minutes of the initial mediation session will be billed by the Mediator at a rate of \$400/hour, (unless a different amount is identified in another specific court sponsored mediation program) to be split evenly among the Parties who continue the mediation beyond the first ninety (90) minutes of the initial mediation session, subject to any indigency exception set forth herein.

f. 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.

g. **Co-Mediation:** When a case is co-mediated by two appointed Court Roster Mediators, the Mediators shall split the set hourly rate.

## **VIII. 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.

d. **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. 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.

e. **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.

## **IX. CONFIDENTIALITY**

a. Mediation with a Court Roster 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 New York Law 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 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. 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 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. Mediation Survey: The mediation survey may be disclosed to the Administrative Judge or applicable ADR Coordinator as set forth above, including for purposes of determining whether to re-certify a Mediator to a Roster or whether to remove a Mediator from a Roster.

vii. Unprofessional Conduct: A party, counsel to a party, or the Mediator, may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Mediator or counsel to a party.

viii. Collection of Fees: The Mediator may make general references to the fact of the mediation services rendered in any action to collect an unpaid, authorized fee for services performed under these Rules.

## **X. MEDIATORS**

### **a. Qualifications**

i. The Administrative Judge shall establish, and the District ADR Coordinator shall maintain, a roster of trained mediators ("The Roster") for the Program which shall be available on the applicable Court or Part website within the District. To be eligible to join the Roster as a Mediator, a person shall satisfy the training and experience requirements of Part 146 of the Rules of the Chief Administrative Judge as follows:

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 specific subject areas of the types of cases referred to them.
  - c. Any additional training or experience required in another specific court sponsored mediation program.
2. All Court Roster Mediators shall have recent experience mediating actual cases in the subject area of the types of cases to be referred to them. Mediation experience can be achieved by:
  - a. Mediating at least three (3) Court cases which were filed within a State or Federal Court in New York, or
  - b. Completing a Court Mediation Apprenticeship, which shall include:



- i. Observing at least one (1) mediation, regardless of case type;
    - ii. Co-mediating three (3) Court cases in the subject area of the types of cases to be referred to them;
    - iii. Debriefing all observations and mediations with a court roster mediator or ADR Program Contact; and
    - iv. Evaluation by a court roster mediator or ADR Program Contact;
  - c. All Court Roster Mediators must receive six hours of approved Continuing Legal Education either in relevant substantive law or the mediation of disputes relevant to their practice areas.
  - d. Fulfillment of these requirements does not guarantee acceptance onto the Roster. Final placement on a Roster or continuation on a Roster is in the discretion of the District Administrative Judge under Part 146 of the Rules of the Chief Administrator.
- b. Immunity
  - i. The Mediator shall be immune from suit as a result of any conduct or omission made during performance of duties in that official capacity to the extent permissible by law and shall be held harmless and indemnified against any costs incurred by the Mediator in connection with any claim based on such actions or omissions to the extent permitted by applicable law, including Public Officer's Law Section 17.
- c. Avoiding Conflicts of Interest:
  - i. Before accepting an appointment as a Mediator, and within 72 hours of being contacted for possible retention for Mediation to mediate a case under these Rules, 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.
- d. Quality Assurance
  - i. The District 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 cases;
  3. Debriefing cases with mediators
- ii. Any Roster Mediator or prospective Mediator may be observed at any time by the District ADR Coordinator, the County ADR Coordinator, or staff of the NYS Unified Court System's Statewide ADR Office, before appointment on the Roster or to remain on the Roster.
- e. Mediator Standards of Conduct
- i. Mediators on court approved rosters must adhere to Standards of Conduct to be established or adopted by the Office of Court Administration in conducting their mediations.

## **XI. DISTRICT ADR COORDINATOR**

- a. The District ADR Coordinator shall oversee the administrative requirements of the Program, which includes but is not limited to:
- i. Monitoring all proceedings referred to mediation;
  - ii. Providing information to the Court on the status of cases referred to mediation;
  - iii. Maintaining statistical data on the Program.

Honorable Kathie E. Davidson  
Administrative Judge, Ninth Judicial District