

**ADR PROGRAM RULES
SURROGATE’S COURT, WESTCHESTER COUNTY**

I. OVERVIEW

Proceedings in Westchester County, Surrogate’s Court, are eligible for mediation, and may, at the Surrogate’s discretion, be referred to mediation (the “Program”). The following 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 Westchester 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.

I. 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 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.

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

II. 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.
 - 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. **Order of Reference:**
 - i. Court staff shall refer matters to mediation by an Order of Reference informing parties and their counsel that the case shall undergo mediation.
 - ii. The Order of Reference shall specify:
 - 1. That it is up to the parties to schedule and participate in mediation within 45 days of receipt of the Order of Reference.
 - 2. A date thereafter upon which to return to Court.
 - iii. Upon receipt of the Order of Reference, parties and counsel shall contact the ADR Program Contact listed therein within three (3) days to:
 - 1. Confirm the initial mediation session, which shall take place at the courthouse, unless the parties agree otherwise, or
 - 2. Inform the ADR Program Contact of their choice to mediate with an outside mediation provider to be paid by the parties. If the parties wish to choose their own mediation provider, 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.
- c. **The Mediation Process**
 - i. **Pre-mediation Memoranda:** If requested by the Mediator, the parties shall provide a confidential memorandum, limited to three pages, 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.
 - 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:** The initial mediation session shall take

place in the courthouse, unless otherwise agreed by the Mediator and the parties. The location of any subsequent mediation sessions shall be held at the courthouse, unless otherwise agreed to by the parties and the Mediator.

- iv. **Informed Consent:** 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;
 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 keeps confidential the information discussed in caucus 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 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 Report (“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;
 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.

d. **Fees and Mediator Compensation**

i. **The Court itself does not charge or administer fees.**

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:** In the event that 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 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 \$400 per hour capped at \$1,200 for the three hours immediately following the non-compensable time, and no more than \$450 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 vii.

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.

III. 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 and Defaulted Party Participation:** If a non-party or a party who has defaulted before the Surrogate's Court 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 or defaulted party's written consent as to confidentiality and any other matters requested by the parties, as facilitated by the mediator. A party who has defaulted before the Surrogate's Court is not relieved of such default by such party's participation in the mediation.
 - 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 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.
 - f. **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.

IV. 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 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. 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.

V. **MEDIATORS**

a. **Qualifications**

i. Subject to the approval of the Administrative Judge, the Surrogate shall establish, and the ADR Program Contact shall maintain, a roster of trained mediators (“The Roster”) for the Program which shall be available on the Surrogate Court, Westchester County website. 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 Surrogate Court matters.

2. All Court Roster Mediators shall have experience mediating the types of cases that come before Surrogate’s Court. Mediation experience can be achieved by:

- a. Mediating at least three (3) Surrogate’s Court cases in a New York State Court, or
- b. Completing a Surrogate’s Court Mediation Apprenticeship.

3. A Surrogate’s Court Mediation Apprenticeship shall include:

- a. Observing at least one (1) mediation, regardless of case type;
- b. Co-mediating three (3) Surrogate’s Court cases;
- c. Debriefing all observations and mediations with a court roster mediator or ADR Program Contact;
- d. Evaluation by a court roster mediator or ADR Program Contact;

ii. All Court Roster Mediators must receive six hours of approved Continuing Education relevant to mediation and/or Surrogate’s Court matters every two years.

iii. Fulfillment of these requirements does not guarantee acceptance onto the Roster. Final placement on the Roster is in the discretion of the District Administrative Judge under Part 146 of the Rules of the Chief Administrator.

b. **Selection:**

i. The Court or its designee shall appoint a mediator or co-mediators from the Roster that meet the requirements of Part 146 of the Rules of the Chief Administrative Judge.

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 or mediation service providers who can provide free and reduced-fee mediation services to qualified participants.

iv. If parties reject an appointed Mediator, they must notify the ADR Program

Contact within three 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. Rejection will not extend the time permitted for the completion of mediation.

v. Upon receipt of the Order of Reference, and in compliance with Paragraph IV(b)(iii)(2), 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 Roster.
2. a mediator who is on the Roster. Mediators who are members of the 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 the rate of Mediator compensation identified in Paragraph IV(d)(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.

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.

e. **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 staff of the NYS Unified Court System's Statewide ADR Office, before appointment on the Roster or to remain on the Roster.

VI. 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 ADR Program.

Honorable Brandon R. Sall
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