

# **SUPREME COURT, CIVIL BRANCH WESTCHESTER COUNTY**

## **STATEMENT OF PROCEDURES**

### **MATRIMONIAL MEDIATION PROGRAM**

#### **I. OVERVIEW**

The Westchester County Supreme Court's Matrimonial Mediation Program offers parties access to qualified Mediators who meet the criteria set out in Section VII. The Court will in the near future offer parties access to qualified Neutral Evaluators, but for now the program offers mediation.

Mediation is a confidential ADR process that may result in faster, more convenient, less expensive, and less acrimonious settlement than might be the case in the normal course of litigation. In Mediation, a neutral third party — the Mediator — helps disputing parties to identify issues, clarify perceptions, and explore options for a mutually acceptable outcome. Mediators have significant training and experience in family mediation and in opening paths of communication that emphasize common ground and encourage cooperation. Mediators help parties to resolve key issues that affect their relationships with their children and the financial well-being of all family members.

Although parties are not obligated to settle in mediation, parties often emerge with a written agreement. If the parties cannot reach agreement, they return to court. Parties are strongly encouraged, but are not required, to attend the Mediation session with their own attorneys. Referral to the Program is not appropriate where only one party is represented by counsel, or in cases of domestic violence, child abuse, or severe power imbalance.

#### **II. DEFINITIONS<sup>1</sup>**

(a) "Neutral" shall refer to mediators.

(b) "Mediation" shall refer to 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.

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<sup>1</sup> The definitions for this Program are established in Part 146 of the Rules of the Chief Administrative Judge. See <http://nycourts.gov/rules/chiefadmin/146.shtml>

### III. PROCEDURES

The assigned Matrimonial Part Justice or the assigned court attorney-referee may refer parties to the Program or parties on their own may request referral to the Program. Cases involving child abuse or neglect (as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412), domestic violence, or a severe power imbalance between the parties are not appropriate for referral to the Program. Cases will be screened to avoid inappropriate referrals.

To begin the process, the Court issues an Order of Reference. The Order of Reference specifies the topics (e.g., child custody, visitation and/or financial issues) to be submitted to the Program for resolution. The Order shall direct parties to attend an initial, free, 90-minute session with a Mediator from the Program's Roster of Neutrals. Counsel for the parties are encouraged but not required to attend. If parties wish to continue mediation beyond the initial ninety (90) minute session, they may continue that session or schedule additional sessions. Mediators shall be entitled to compensation from the parties at a rate that shall not exceed \$300 per hour, following the initial session. Payment shall be made in advance of scheduled sessions. See Section VIII.

The Order of Reference shall contain the control date set by the referring justice or court-attorney referee for the parties to appear in Court for a conference following the initial Mediation session. All pre-trial proceedings scheduled in the Preliminary Conference order shall continue, and shall not be stayed, pending additional mediation sessions, except that, if all parties request, the referring justice or court-attorney referee may extend the dates for the taking of examinations before trial, provided that, in no event, may such dates be extended beyond twenty (20) days from the date set in the Preliminary Conference Order for the completion of discovery. In no event shall the date for completion of discovery set in the Preliminary Conference Order or the date for the Compliance Conference be extended or adjourned by reason of the pendency of mediation.

The Court shall deliver the Order of Reference to the Program Coordinator ("Coordinator"), Katherine Mueller in the Westchester County Courthouse. The Coordinator shall select the next available Mediator from the Court's Roster of Neutrals, proceeding in alphabetical order.<sup>2</sup> The parties are free to select a different mediator, but if they do so, they must notify the Coordinator of the substitution within 5 business days. Next, the Coordinator shall send to the parties and to the selected Mediator a Notice of Confirmation. The parties are required to appear at the initial session within ten (10) days of receiving a Notice of Confirmation. At least three (3) business days prior to the initial session, the parties' counsel shall send the Mediator a copy of the pleadings, the Statements of Net Worth, and any other information necessary for the effective negotiation and resolution of the issues involved. The Mediator may request a conference call with both counsel regarding any preliminary matters.

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<sup>2</sup> The Coordinator has discretion to designate another Neutral in appropriate cases.

The Mediator may give to the parties any agreements or memorandum of understanding generated at the sessions.

Within five (5) business days after the conclusion of the Mediation sessions — which shall occur whenever after the initial session one party, both parties, or the Mediator decides that the process has ended — the Mediator shall send a Report (“Report of the Neutral”) to the Coordinator and to counsel for the parties stating:

- (1) the date of the initial session and whether each party and counsel appeared at the initial session;
- (2) the dates of any subsequent scheduled sessions, but not whether parties appeared; and
- (3) whether the parties reached partial, complete, or no agreement on the issues.

The Mediator shall not disclose other information discussed during the Mediation, except as described in Section X.

The Coordinator shall forward the Report of the Neutral to the referring Justice or court-attorney referee.

#### **IV. ROLE OF THE NEUTRAL**

The Mediator serves as a neutral facilitator of communication and helps the parties reach future-oriented solutions that meet their families’ individualized needs. The Mediator can probe the parties’ feelings, values, and preferences underlying their stated positions. The Mediator does not give legal advice, predict likely court outcomes, or force solutions on the parties.

At the initial session, the Mediator explains that all communications are confidential (with narrow exceptions outlined below) and will not be disclosed to the Justice hearing their case or in any other judicial or administrative proceeding. The Mediator also explains that either party is free at the close of the initial session or at any time thereafter to end the Mediation and return to court.

During the Mediation, each party relates the facts of the dispute and raises particular issues of concern. The Mediator may ask the parties clarifying questions related to the care of their children, parenting time, and allocation of property and income. The Mediator then helps the parties work collaboratively to develop and choose options that meet the parties’ needs.

At some point in the process, either party, the party’s counsel, or the Mediator may suggest a caucus. Caucuses are meetings that Mediators hold separately with each side in a dispute. During the caucus, the Mediator may explore how each spouse views the dispute and the impact of any proposed solutions. The Mediator keeps confidential the information discussed in caucus unless the party permits disclosure.

If the parties reach a written agreement during Mediation, the parties are strongly encouraged to submit the agreement to their respective attorneys for review.

## **V. THE ROLE OF PARTIES, COUNSEL, ATTORNEYS FOR THE CHILD and GUARDIANS AD LITEM**

Experience has demonstrated that party participation — as opposed to exclusive participation by counsel — not only increases the likelihood of settlement, but also improves compliance with any agreed-upon terms and enhances the parties' satisfaction. Accordingly, unless exempted by the Neutral for good cause shown, the parties must be present during the Mediation session.

The presence of separate counsel for each party at all mediation sessions is encouraged. Whether appearing alongside their clients or advising clients outside of the mediation process, attorneys play a crucial role in informing parties of their legal rights and responsibilities and the consequences of proposed solutions. Without representation by counsel, parties risk entering into agreements with insufficient knowledge about financial, legal, or other issues. If counsel for either party is discharged or withdraws for any reason, the case will not proceed in Mediation.

For those cases in which an Attorney for the Child or guardian ad litem has been assigned, Mediation may not commence without the appropriate Attorney or guardian's presence, unless the parties agree otherwise.

## **VI. THE ROLE OF THE COURT**

The Program is conducted under Court auspices and pursuant to these rules. Judicial and non-judicial staff are encouraged to inform the parties of the Program's existence. If the parties wish to go to Mediation but cannot afford it, the Coordinator can assist qualifying parties to find a Mediator who may take their case for a reduced fee.

The Court welcomes the feedback of parties, counsel, and Mediators after the conclusion of the proceedings.

## **VII. THE ROSTER OF NEUTRALS**

The Court has assembled a Roster of Neutrals. Mediators who wish to join the Roster must comply with the following prerequisites:<sup>3</sup>

- Training: Completion of at least 60 hours of family mediation training in a training program recognized by the New York State Office of Court Administration ("OCA").

- Experience: At least four years of family mediation experience, including 250 hours of face-to-face mediation with clients and a minimum of 25 custody and visitation cases, and any other mediation training or experience deemed appropriate by the Court.

- NOTE: Cases involving financial issues will be referred only to those Mediators with knowledge of, training in and experience with financial aspects of divorce. Cases involving issues relating to decision-making for a child or parenting time with a child shall be referred only those Mediators with knowledge of, training in and experience with such issues.

- Continuing Education: Pursuant to Part 146 of the Rules of the Chief Administrative Judge, all mediators must attend at least six hours of additional approved training relevant to their respective practice areas every two years. See [www.nycourts.gov/rules/chiefadmin/146.shtml](http://www.nycourts.gov/rules/chiefadmin/146.shtml)

The District Administrative Judge shall determine whether a person qualifies for inclusion on the Roster of Neutrals and whether a person seeking inclusion on the Roster of Neutrals has the requisite temperament, character, and discretion. Continuing presence on the Court's Roster of Neutrals is subject to review by the District Administrative Judge. Neutrals may be removed from the Roster at the discretion of the District Administrative Judge.

## VIII. FEES

The Program itself does not charge or administer fees. Parties referred to Mediation pursuant to this Statement of Procedures shall be required to compensate the Mediator for services rendered following the initial 90-minute session and for time spent reviewing materials submitted by the parties for purposes of any subsequent sessions at a rate not to exceed \$300.00 per hour. The fee arrangement with the Mediator must be agreed to in writing, and must include the ratio at which the fee will be divided between the parties. The parties must sign this fee agreement before commencing any sessions for which compensation is required. Sessions shall be paid for in advance. Mediators are encouraged to work on a sliding scale to take into account the parties' financial circumstances.

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<sup>3</sup>The training and qualifications guidelines for the Program exceed the minimum requirements established in Part 146 of the Rules of the Chief Administrative Judge. See [www.nycourts.gov/rules/chiefadmin/146.shtml](http://www.nycourts.gov/rules/chiefadmin/146.shtml)

## **IX. IMMUNITY**

Neutrals serving in this program shall be immune from suit as a result of any conduct or omission during the performance of duties in that capacity to the extent permissible by law.

## **X. CONFIDENTIALITY**

Except as set forth below, all oral, written, or other communications made during the course of the Mediation by any party, Mediator or any other person present shall be immune from disclosure in any present or future judicial or administrative proceeding. Similarly, all information generated in or in connection with the Mediation –including memoranda, work products or case files of a Mediator–shall remain confidential and not be subject to disclosure in any present or future judicial or administrative proceeding. However, Mediation will not be used as a shield with respect to otherwise discoverable documents or information produced or occurring prior to or outside the mediation process.

Moreover, except as set forth below, nothing about the substance of the Mediation, such as the weaknesses or strengths of the parties' cases or the relative willingness of parties to discuss settlement proposals, will be revealed to the referring Justice, Court-attorney referee or any other person by the Mediator or any party or attorney. Nor will any party or attorney for a party reveal the outcome of the mediation process to the referring Justice or a member of the Justice's staff or to any Court personnel, including Court attorney-referees unless both sides agree to the disclosure.

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 five circumstances:

1. *Attendance*

Whether the parties and their counsel attended the initial session will be reported to the referring Justice or Court attorney-referee.

2. *Waiver*

Parties to the Mediation and the Mediator agree in writing 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.

3. ***Written Agreement***

A writing signed by all the parties embodying a negotiated agreement submitted to the Court for review. Additionally, a limited report of the outcome, as explained in **Section III**, will be sent to the referring Justice or Court attorney-referee. Only those signed agreements that have become Court orders may be admissible in any present or future judicial or administrative proceeding.

4. ***Threats of Imminent, Serious Harm***

If communications or information constitute 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.

5. ***Allegations of Child Abuse or Neglect***

The 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.

**XI. CHILD ABUSE AND NEGLECT**

If an allegation of child abuse or neglect is made by any party during the Mediation, the Mediator will safely stop the mediation process. Mediators shall report to the referring Justice or Court attorney-referee allegations of child abuse or neglect for which disclosure is required pursuant to Social Services Law § 413.

**XII. DOMESTIC VIOLENCE/SEVERE POWER IMBALANCE**

When an allegation of domestic violence or severe power imbalance is made by any party during the Mediation, the Mediator shall safely stop the mediation process, meet with each party individually where appropriate to learn as much as possible about the circumstances, and consult with the Coordinator (but not the assigned Justice or members of that Justice's staff or Court attorney-referee) as to whether to resume the process. Allegations of domestic violence shall not be disclosed to the referring Justice or court attorney-referee; instead, the Coordinator will give victims information regarding their rights in the form prescribed in Family Court Act § 812 (5), and they will receive additional information.

**XII. REFERRAL TO THE PROGRAM AND ONGOING LITIGATION**

Cases may be referred to Mediation at anytime including the preliminary conference (which is typically when referrals are made). A party who attends the initial session complies with the Order of Reference, even if that party ultimately chooses not to proceed with mediation.

Referral to the Program will not stay the court proceedings in any respect. The “no stay” policy recognizes the special need for prompt action in matrimonial and family proceedings. Full discovery, emergency and *pendente lite* relief, family dynamics, and the needs of children require ongoing access to the Court.

### **XIII. AVOIDING CONFLICTS OF INTEREST**

Before accepting a Mediation, 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. The Mediator shall disclose any such known conflict to the parties and counsel as soon as possible before accepting a referral. If the Mediator wishes to accept a referral after discovering a potentially disqualifying fact, the Mediator is obliged to disclose the disqualifying facts to the parties and, where such facts exist, shall not serve unless the parties consent in writing. If a Mediator later learns of any disqualifying fact after accepting a case, the Mediator shall disclose it as soon as practicable. If unable to function in a fair and impartial manner, the Mediator shall seek disqualification and notify the Coordinator.

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