

Surrogate's  
Court ADR  
Referral Roster  
Rules

# NASSAU COUNTY SURROGATE'S COURT RULES

## I. OVERVIEW

- a. Proceedings in Nassau 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. 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

- a. The Surrogate's Court of Nassau 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 referral to mediation.

## III. DEFINITIONS

- a. **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 their 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.
  - i. 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, or without counsel after consultation with their attorneys. Although the mediation process can result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves.
- b. **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. 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.
- c. **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).

## IV. PROCEDURES

- a. **Timing of Referral to Mediation**

- i. The Court shall refer parties to mediation 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 unless a demand for a SCPA 1404 or 2211 examination has been filed.
- 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. The Court shall refer matters to mediation by an Order of Reference informing parties and their counsel that the case shall undergo mediation.
- ii. The Court shall designate on the Order of Reference the mediator, as chosen by the parties from the program roster.

**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 mediation sessions shall take place in-person at an agreed upon location with the selected 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;
- 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.



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. Default includes, but is not limited to, non-appearance or failure to file a pleading (answer, objection or demand).

- d. Screening: Cases shall be screened for appropriateness for mediation by the ADR Program Contact and the Mediator.

## VI. 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 shall be notified.

## **VII. 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 Nassau County ADR 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; and
    - 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.
- 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. 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.

### **c. 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.

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