



MEDIATION PROGRAM PROCEDURES (1/20/2021)

Mediation Program
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Table of Contents

1. Introduction and Scope.....	2
2. Confidentiality.....	2
3. Entering and Removing Cases from Mediation.....	3
4. Assignment of the Mediator.....	3
5. Disqualification.....	4
6. Mediation Scheduling.....	5
7. Electronic Devices in the Courthouses.....	6
8. Mediation Statements.....	6
9. Attendance at Mediation Sessions.....	6
10. Mediation Location.....	8
11. Mediation Forms.....	8
12. Reporting.....	8
13. Post-mediation Survey.....	9
14. Mediation Panel Application Criteria.....	9
15. Mediation Panel Application Process.....	10
16. Service as a Mediator.....	10
17. Code of Conduct.....	11
18. Complaints about Mediators: Investigation/Remediation.....	11
19. Complaints About the Mediation Program or Director.....	12
20. Resignation or Removal from the Mediation Panel.....	12
21. Immunity.....	13

1. Introduction and Scope

These procedures are promulgated for the management of the Mediation Program of the Southern District of New York. They shall not be deemed to vest any rights in litigants or their attorneys and shall be subject to such amendments from time to time as shall be approved by the Court. These procedures contemplate flexibility in the Mediation Program and in the mediation of each individual case. The Mediation Office may, if requested, offer guidance and assistance in any given matter.

2. Confidentiality¹

- a. Any communications made exclusively during or for the mediation process shall be confidential except as to the provisions indicated in this agreement. The mediator shall not disclose any information about the mediation process, communications, or participants to anyone except for Mediation Office staff. Mediation Office staff must also maintain confidentiality. Administrative aspects of the mediation process, including the assignment of a mediator, scheduling and holding of sessions, and a final report that the case has concluded or not concluded through mediation, or that parties failed to participate, are not confidential and will appear on the docket of the case.
- b. The participants may not disclose discussions or other communications with the mediator unless all parties agree, because disclosure is required by law, by the Rules of Professional Conduct, or because otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation. The parties may agree to disclose information provided or obtained during mediation to the Court while engaged in further settlement negotiations with a District or Magistrate Judge. The parties may disclose to the Court the terms of settlement if either party seeks to enforce those terms.
- c. All mediation participants will inform the mediator, and each other, in advance of any mediation session of the names of all persons who will attend, participate, or observe any communications during or for the mediation. No person may attend, participate, or be allowed to observe or listen to the mediation without the prior consent of all parties and the mediator.

¹ These confidentiality rules are intended to include the protections afforded by Rule 408 of the Federal Rules of Evidence, the New York State rules of evidence, and the Model Standards of Conduct for Mediators, promulgated by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution (September 2005), available as of 11/2/16 at: http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.

- d. Neither the mediator nor any participant may record or permit the recording of any part of a mediation session including audio, video, chat, closed-captions, or any other methods of communication whether the mediation session is conducted in person, or through telephone or video conference.
- e. Understanding that the security of any electronic or telephonic platform cannot be guaranteed, the mediator and all participants in a mediation conducted through telephone or video conference confirm that they will take appropriate security precautions, or disclose to the mediator and all participants that they are unable to do so in advance of any session. Such precautions shall include using a secure WiFi/Ethernet connection for all communications related to the mediation session, using secure meeting access codes, taking steps so that only intended participants have access to the session, and locking meetings once all participants have convened.
- f. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure shall not be shielded from discovery merely because they are submitted or referred to in the mediation.
- g. The parties may not call the mediator as a witness or deponent, or compel the mediator to produce documents that the mediator received or prepared for mediation, in any subsequent proceedings related to the dispute in which the mediator served.

3. Entering and Removing Cases from Mediation

- a. Cases enter the Mediation Program either through a process of automatic referral or by referral of a specific case from the presiding judge with or without the request of the parties.
- b. Any party may request removal from mediation by submitting such a request in writing to the presiding judge. The Mediation Office should be copied on any requests for removal. Mediation deadlines will be stayed pending a determination from the presiding judge.

4. Assignment of the Mediator

- a. The mediators on the panel for the Southern District of New York are divided into sub-groups based on areas of subject matter expertise. For most substantive areas of law, mediators identify to the program the areas in which they have the requisite experience or background. In consultation with members of the employment bar, the following criteria were developed for all mediators assigned to employment cases. Any mediator who wishes to mediate employment cases through the SDNY must: i) Have five years of experience practicing employment law in the past eight years; or ii) In the last three years have: taken an EEO/employment law CLE for at least 5

CLE credits, or been an instructor at an employment law CLE, or taught a course in employment law; or iii) Have greater than five years of demonstrated expertise as an employment law neutral.

- b. Once the Mediation Office receives a referral (either through a Mediation Referral Order or an automatic process), a mediator is selected for proposed assignment at random from the sub-group of mediators who have the subject matter expertise that is relevant to the case. If no such mediator is available, the Mediation Office will select a proposed mediator at random from a sub-group of mediators with expertise in a related subject matter. The mediator selected must respond to the Mediation Office as quickly as possible, but no later than three (3) business days, to accept the assignment, to request an extension of time to clear conflicts, or to decline. Upon notice that the selected mediator has declined, or after three (3) business days without notice of acceptance or a request for an extension of time, another mediator will be selected. Once a mediator has accepted the case, the Mediation Office shall notify the mediator and the parties of the assignment. The assignment of a case to a mediator should take place within ten (10) business days of the receipt by the Mediation Office of the mediation referral.
- c. Mediators are provided with a free PACER account to access pleadings and other relevant information that may be needed when considering whether to accept a case, or for relevant research while mediating. At the mediator's request, the Mediation Office will forward documents and information to the mediator directly. The free PACER account is only to be used for the purposes of service as a mediator on SDNY matters and mediators may not allow others to use the account.

5. Disqualification

- a. Before accepting an appointment as a mediator, and at all times after accepting such an appointment, a mediator shall disclose to the Mediation Office, in the first instance, any circumstance that could give rise to a reasonable apprehension of a lack of impartiality such as those circumstances enumerated under 28 U.S.C. § 455.
- b. Any mediator who makes a disclosure under (5)(a) and who is deemed qualified to serve by the Mediation Office shall continue as the assigned mediator if all parties to the dispute waive, in writing, all objections to any reasonable apprehension of a lack of impartiality or conflict of interest that arises as a consequence of the disclosure.
- c. Any party may submit a written request to the Director of the ADR Program for the mediator's disqualification based on the circumstances enumerated in 28 U.S.C. § 455 or 28 U.S.C. § 144. This request should be submitted within three (3) days from the date of the notification of the mediator's name, or from the date of the discovery of a new ground for disqualification. A denial of such a request by the Director of the ADR Program is subject to review by the presiding judge upon motion filed within ten (10) days of the date of the Director of the ADR Program's denial.

6. Mediation Scheduling

- a. The mediator shall confer with counsel for the parties, or parties themselves if proceeding *pro se*, immediately after assignment of a case to determine an appropriate date, time, and location for the first mediation session. Unless cases enter the Mediation Program through an order that imposes specific timelines or guidelines for the mediation process, the date, time, and location of the first session should be finalized within thirty (30) days of the assignment of the mediator unless there is a specific reason why a date certain cannot be established within thirty (30) days. If the parties require no discovery or information before mediation can take place, the mediator should hold the first session within thirty (30) days of the assignment of the mediator. If the parties require discovery or information for the purpose of mediation, the parties must confer to establish a short reasonable timeline for the completion of limited discovery and should hold the first session within thirty (30) days of the completion of limited discovery. The assigned mediator shall promptly notify the Mediation Office of the date, time, and location of the first mediation session or the reason for failing to schedule within the 30-day period. The Mediation Office will docket the date, time, and location of the mediation session.
- b. In certain instances, mediation participants may wish to indefinitely adjourn mediation pending some specific action in the case (e.g. a decision on a pending motion), or remove a case from mediation entirely. Such requests should be made directly to the presiding judge with copies to the assigned mediator and the Mediation Office.
- c. On or before receipt of each party's mediation statements (see section 8), the assigned mediator may contact counsel, or parties themselves if proceeding *pro se*, to schedule either a joint or individual preliminary case conference telephone call.
- d. Any subsequent sessions shall be scheduled within thirty (30) days of the prior session, unless there is a specific reason why a date certain cannot be established. The assigned mediator shall promptly notify the Mediation Office of the date, time, and location of the next mediation session or the reason for failing to schedule within the 30-day period. The Mediation Office will docket the date, time, and location of the mediation session.
- e. The mediation will conclude when the parties reach a resolution of some or all issues in the case or when the mediator or parties conclude that resolution (or further resolution) is not possible.
- f. With the permission of the presiding judge, parties who have not settled through mediation may return to mediation at any point and may request the original mediator (if he or she is available) or that a new mediator be assigned.

7. Electronic Devices in the Courthouses

- a. Attorneys with SDNY service passes may bring cell phones into the Courthouse. (Information on how to obtain a SDNY secure pass can be found at <http://www.nysd.uscourts.gov/file/forms/attorney-service-pass-application>.) To request permission to bring an additional or different electronic device into the Courthouse for a specific proceeding, an Electronic Device Order must be submitted to the mediation office at least two weeks before the scheduled mediation date.
- b. Attorneys coming to the Courthouse for the purpose of mediation without a secure pass, who wish to bring a cell phone or other approved electronic device, must submit an Electronic Device Order at least two weeks before the scheduled mediation date.
- c. The Electronic Device Order can be found on the Court's website: <https://www.nysd.uscourts.gov/programs/mediation-adr> under "Mediation Forms."

8. Mediation Statements

- a. Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall prepare and deliver to the mediator, either *ex parte* or as the mediator directs or the parties agree, a mediation statement not exceeding ten double-spaced pages including:
 - i. the party's contentions as to both liability and damages;
 - ii. the status of any settlement negotiations;
 - iii. the names of the persons, in addition to counsel, with full authority to resolve the matter who will attend the mediation; and
 - iv. the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action.
- b. The mediator may request the parties to provide different or additional information in the mediation statement including, for example, information about the parties or the dispute which might be useful in resolving the case.
- c. These mediation statements shall be subject to the confidentiality of the mediation process and treated as documents prepared "for settlement purposes only."

9. Attendance at Mediation Sessions

- a. Each party must attend mediation. This requirement is critical to the effectiveness of the mediation process as it enables parties to articulate their positions and interests, to hear firsthand the positions and interests of the other parties, and to participate in discussions with the mediator both in joint session and individually. If a represented

party is unable to attend a previously scheduled mediation because of a change in that party's availability, the party's attorney must notify the mediator immediately so that a decision can be made whether to go forward with the mediation session as scheduled or to reschedule it. Mediators are required to report to the Court if a party failed or refused to attend, or refused to participate in the mediation.

- b. A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a decision-maker who has full settlement authority and who is knowledgeable about the facts of the case. "Full settlement authority" means the authority to agree to the opposing side's settlement offer, if convinced to do so at the mediation.
- c. Each represented party must be accompanied at mediation by the lawyer who will be primarily responsible for handling the trial of the matter.
- d. A fully authorized representative of the client's insurance company must attend where the decision to settle and/or the amount of settlement must be approved by the insurance company.
- e. A government unit or agency satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. In addition, in cases where the Comptroller of the City of New York has authority over settlement, the Assistant Corporation Counsel must make arrangements in advance of the session for a representative of the Comptroller either to attend the session or to be available by telephone to approve any proposed settlement. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.
- f. Under some circumstances, if a party resides more than 100 miles from the Courthouse, and it would be a great hardship for the party to attend in person, he or she may request that the mediator allow for telephonic participation at the mediation; however, if such request is granted, that party must participate by telephone with full attention and for the duration of the mediation.
- g. Counsel for parties, parties if *pro se*, or the mediator may occasionally wish to invite individuals who are not part of the mediation process to observe the mediation. Observers may only attend if all parties, counsel for parties, and the mediator consent. As a condition of an observer attending, each observer is required to sign the Mediation Confidentiality Agreement (attached) and will be bound by any confidentiality provisions that are relevant to the mediation as if they were a party to the mediation.
- h. Requests for observers to attend should be made in advance to the Mediation Office, in writing, and should include the following:

- i. A statement of the requester's relationship to the individual who wishes to observe, and
- ii. A statement that all parties, counsel for parties, and the mediator have been consulted and that all consent to the individual(s) observing.

10. Mediation Location

Mediation sessions may take place at the mediator's office, at the Courthouse, or at any other location agreed to by the mediator and the parties.

11. Mediation Forms

- a. All participants in the mediation must read and sign the Mediation Confidentiality Agreement (attached) before or at the start of the mediation. Copies of this signed form should be retained by the Mediation Office.
- b. Any term sheet or stipulation developed through mediation must be read and signed by all parties and/or counsel for parties.

12. Reporting

- a. After referral of a case to the Mediation Program, such referral will be closed with the docketing of a Final Report of Mediator indicating that the mediation was:
 - i. Held and agreement was reached on all issues. The judge may wish to issue a "30 day order" under which the case is automatically closed in 30 days unless a party seeks to re-open the matter.
 - ii. Held and agreement was reached on some, but not all, issues.
 - iii. Held and agreement was reached as to some, but not all, parties.
 - iv. Held but was unsuccessful in resolving any issue in the case. The Mediation Unit will consider the referral to be completed and close its files at this time but the judge may re-refer parties to mediation at any point.
 - v. Not held as parties represent that they have reached settlement on all issues. The judge may wish to issue a "30 day order" under which the case is automatically closed in 30 days unless a party seeks to re-open the matter.
 - vi. Not held as a stipulation settling all of the issues of the case was entered into prior to mediation.
 - vii. Not held as one or both parties failed, refused to attend, or refused to participate in the mediation.

- viii. Not held as the case was removed from mediation by the judge.
- b. The Final Report of Mediator shall be submitted by the mediator to the Mediation Office within seven (7) days of the final mediation session or the results set forth in (a)(v), (vi), (vii) or (viii).
- c. If the Final Report of Mediator indicates the result set forth in (a)(i), (ii), (iii), or (v), the parties should promptly submit a stipulation of discontinuance or other appropriate document to the Clerk of Court.

13. Post-mediation Survey

To assist in the continued development of the Mediation Program, the Court requests that all counsel for parties, or parties if *pro se*, respond to a short survey after the close of the mediation process. When the Final Report of Mediator is docketed on CM/ECF attorneys of record will receive a Notice of Electronic Filing in which a hyperlink to the survey is embedded. The survey may also be sent from the Mediation Office as a fillable document and is accessible on the Court's mediation web site (<http://www.nysd.uscourts.gov/mediator>).

14. Mediation Panel Application Criteria

An individual may apply to serve as a mediator if he or she satisfies the following criteria:

- a. Is a member in good standing of the bar of any United States District Court;
- b. Has substantial exposure to mediation in federal court or has mediated cases in other settings;
- c. Has successfully completed an initial mediation training of at least 30 hours within the last three years or, if the initial mediation training was completed more than three years ago the applicant has:
 - i. served as a mediator in more than 5 disputes during the last three years, or
 - ii. successfully completed during the last three years at least one other mediation skills training, apprenticeship program, or practicum;
- d. Provides a letter of reference from a party, mediation training provider, colleague, judge, court administrator, or appropriate staff person with a public or private dispute resolution organization, that specifically addresses the applicant's mediation process skills including the ability to listen well, facilitate communication, and assist with settlement discussions; and
- e. Is willing to participate in training, mentoring programs, and ongoing assessment as detailed in section (17)(d).

15. Mediation Panel Application Process

- a. Approximately once a year the Mediation Program will review all pending applications. Applicants will be notified whether or not they have been selected for an interview. Consistent with Standard IV of the Model Standards of Conduct for Mediators, all mediators asked to continue on past the interview are required to observe at least three cases and participate in a mentor mediation before undertaking to mediate cases on his or her own.
- b. The purpose of the mentor mediation is for the incoming mediator to take the lead with a mentor mediator there to provide support and step in (as needed) to maintain the quality of the process. The mentor mediator will also provide a recommendation as to the incoming mediator's readiness to join the panel.
- c. The process of observation and acceptance of a matter for mentor mediation should take no longer than six months.

16. Service as a Mediator

- a. An individual may serve as a mediator once he or she has been certified by the Chief Judge or his/her designee to be competent to perform the duties of a mediator for this Court.
- b. Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. § 453.
- c. All mediators shall serve without compensation and shall not solicit or accept payment for any case undertaken as a panel mediator.
- d. Unless the Director of the ADR Program approves otherwise, mediators who are invited to join the Court's panel will be expected to meet the following requirements to remain on the panel:
 - i. Membership in good standing of the bar of any United States District Court;
 - ii. Attending at least one continuing education program in mediation each year;
 - iii. Participating in ongoing assessment as determined by the Director of the ADR Program; and
 - iv. Mediating at least two cases per year.
- e. All mediators are assumed available to accept cases unless the Mediation Office is notified otherwise. Mediators should notify the Mediation Office if they cannot accept cases for a discrete period of time by sending an e-mail to the Mediation Office with the start and end dates. The Mediation Office will automatically resume sending cases to the mediator on the date indicated by the mediator. Mediators who request not to receive cases indefinitely, and who are inactive for a period exceeding one

year, will be presumed retired from the panel. Mediators who wish to return to active status after being inactive for more than one year shall write a letter of request to the Director of the ADR Program. Reinstatement to the panel is at the discretion of the Director of the ADR Program and will be based on the needs of the program at the time the request is received.

17. Code of Conduct

The code of conduct set forth herein applies in its entirety to every mediator who is on the panel of the Southern District of New York. While mediators come from various professional backgrounds and may have been exposed to differing mediation theories, every mediator for the Southern District of New York must adhere to this code of conduct at a minimum.

- a. As representatives of the Southern District of New York, mediators should at all times be professional, respectful, and measured in their communication with attorneys for parties, *pro se* parties, and the Mediation Office.
- b. Mediators should understand and clearly convey that they are not decision-makers but facilitators of the decision-making of the parties. They may choose to meet with parties separate from their attorneys, or with attorneys separate from the parties. Mediators should ensure that participants in mediation understand that the role of the mediator is that of a neutral intermediary, not that of an advocate or representative for any party. A mediator should not offer legal advice to a party. If a mediator offers an evaluation of a party's position or of the likely outcome in court, or offers a recommendation with regard to settlement, the mediator should ensure that the parties understand that the mediator is not acting as an attorney for any party; is not providing legal advice; and is not speaking for the Court or any judge.
- c. Mediators should provide the same quality of service as they would for paying clients, or should request that the case be reassigned if they cannot do so.
- d. Unless all parties consent, mediators shall not work as consultants or attorneys in any matter related to a dispute in which they served as mediators.
- e. Mediators should be familiar with, and at all times uphold, the values of the Model Standards of Conduct for Mediators, particularly Standards III and VI.
- f. This code of conduct also applies to prospective panel mediators undertaking observation or co-mediation, to observers, and to anyone else who has access to a mediation under the auspices of the Program.

18. Complaints about Mediators: Investigation/Remediation

The following protocol is observed whenever the Mediation Office receives a complaint about a mediator.

- a. The Director of the ADR Program will begin by gathering information from relevant parties, attorneys for parties, and other relevant Court personnel or observers. The Director of the ADR Program will then contact the mediator in question to discuss the complaint or concern directly. This may be a phone call or an in-person meeting, depending on convenience and the nature of the complaint. In most cases, the issue will be considered sufficiently addressed after a discussion with the mediator.
- b. If the complaint is serious, or if the particular complaint is part of a pattern, the Director of the ADR Program and the mediator may explore options for correction. A plan will be determined on a case-by-case basis, and might include being observed or observing cases, attending relevant training, co-mediating, or participating in simulated mediations. It is possible that a mediator will be suspended from mediating during the remedial period. The situation will be reassessed after the determined course of action is completed.
- c. If a mediator chooses not to participate in the remedial process, he or she will be choosing to discontinue serving as a panel mediator.
- d. If similar or other complaints persist after the remedial period, the mediator and the Director of the ADR Program may discuss options for additional remedial work or the mediator may be removed from the panel (section 20(d)).

19. Complaints About the Mediation Program or Director

- a. Complaints by a mediator or mediation participant about Mediation Program staff or protocols should be made to the Director of the ADR Program. If the complaint is not satisfactorily resolved, the mediator or participants may contact the Chair of the Mediation Services Committee.
- b. Complaints about the Director of the ADR Program should be made to the Chair of the Mediation Services Committee.

20. Resignation or Removal from the Mediation Panel

Mediators may resign from the mediation panel at any time by notifying the Mediation Office. The Director of the ADR Program may remove mediators from the mediation panel for:

- a. Failing to meet the requirements of section (17)(d); or
- b. Violating the Code of Conduct set forth in section (18); or
- c. Violating any other Procedures promulgated by the Mediation Program; or
- d. Based on complaints, observations, or communications with counsel, parties, or the Mediation Program, that indicate that a mediator is no longer mediating in a way that is appropriate for the Mediation Program or that resources are not available to

provide sufficient training or support to enhance the quality of a mediator's practice.

21. Immunity

Any person designated to serve as a mediator pursuant to these Procedures shall be immune from suit based upon actions engaged in or omission made while performing the duties of a mediator.