



MEDIATION PROGRAM PROCEDURES
(8/7/2023)

Mediation Program
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Southern District of New York
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1. Introduction and Scope

The Mediation Program of the Southern District of New York operates under the auspices of the Court. These procedures are promulgated for the management of the program and shall not be deemed to vest any rights in litigants or their attorneys. They 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.

The Court's [Local Civil Rules 89.9 and 83.10](#) contain provisions that apply to mediation proceedings. Mediators and mediation participants shall review and comply with those rules when applicable.

2. Confidentiality

All mediations conducted through the SDNY Mediation Program are subject to the following confidentiality provisions. All participants in any mediation shall execute a confidentiality agreement containing the following provisions and provide copies to the mediator and to the other participants before mediation begins. Signed confidentiality agreements should be maintained by the participants themselves, not the Mediation Office. In addition, these confidentiality provisions incorporate the confidentiality protections afforded by [Rule 408](#) of the Federal Rules of Evidence, New York law, 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).

- a. Any communications made exclusively during or for the mediation process shall be confidential except as expressly set forth herein. The mediator¹ 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 (i) all parties agree, (ii) disclosure is required by law or by the [Rules of Professional Conduct](#), or (iii) 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

¹ As required by the context, 'mediator' includes co-mediator, mentor mediators, authorized observers, or on-boarding mediators.

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.

- 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 by telephone or video conference shall take reasonable and 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 must include taking steps so that only intended participants have access to the session, and may include using a secure WiFi/Ethernet connection for all communications related to the mediation session, using secure meeting access codes, enabling an electronic waiting room, or locking meetings once all participants have convened.
- f. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure are not 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.

PROCEDURES REGARDING THE MEDIATION PROCESS

3. Referring and Removing Cases from the Mediation Program

- 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.
- c. With the permission of the presiding judge, parties who have not settled through mediation may return at any point and may request the original mediator (if he or she is available) or that a new mediator be assigned.

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.²
- b. In most instances, 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. On occasion, Mediation Referral Orders are entered in matters the subject of which is not included in the expertise coding for panel mediators. In such instances, the Mediation Office may contact panel members to determine who might have the requisite expertise, and the Mediation Office will select a mediator from amongst the responding mediators. Mediators or mediation participants with questions or concerns about expertise for a specific case should contact the Mediation Office.
- c. In all cases, the mediator selected must respond to the Mediation Office as quickly as possible, but no later than three (3) business days from selection, to clear conflicts and accept the assignment (see Section 5), 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.
- d. The assignment of a case to a mediator should take place within fourteen (14) business days of the receipt by the Mediation Office of the mediation referral. Once a mediator has accepted the case, the Mediation Office shall notify the mediator and the parties of the assignment. Under Section 5(d), once notified, the parties have seven (7) business days to object to the mediator's assignment.

5. Disqualification

- a. Before accepting an appointment, a mediator should make a reasonable effort to learn of, and disclose to the Mediation Office, any circumstance that could present a reasonable apprehension of a lack of impartiality such as those circumstances enumerated under

² In consultation with members of the employment bar, the following criteria were developed for all mediators assigned to employment discrimination 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.

[28 U.S.C. § 455](#). Mediators should consider, for example, clients of the mediator or the mediator's law firm, previous or current social or professional relationships; membership on committees, organizations or boards of directors; prior service as a neutral or advocate in matters with the same participants; direct or indirect financial or personal interest in the outcome of the case; relationships involving members of the mediator's family or the mediator's current or prior employers, partners, or business associates; publicly expressed opinions regarding the subject matter of the dispute that suggest, or could be perceived as suggesting, partiality or bias; or any other circumstance that could raise a reasonable question of the mediator's impartiality. A mediator who is aware of any such circumstance may elect not to accept the appointment.

- b. At any time after accepting an appointment, a mediator who becomes aware of any circumstance that could present a reasonable apprehension of a lack of impartiality shall promptly disclose that circumstance to the Mediation Office, or may disqualify themselves from further service in the matter and shall promptly disclose such disqualification to the Mediation Office.
- c. Any mediator who makes a disclosure under 5(a) or (b) and who is deemed qualified to serve by the Mediation Office shall promptly make the same disclosure to the participants, in writing, and shall continue as the assigned mediator if, after disclosure, all parties to the dispute waive all objections to any actual or potential lack of impartiality or conflict of interest that arises as a consequence of the circumstance disclosed by the mediator.
- d. 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 seven (7) business days from the date of the notification of the mediator's name, or from the date of the discovery of a 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. Timing for Mediation Scheduling

- a. Unless the date for the initial mediation session was set prior to the mediator's acceptance, the mediator shall promptly confer with counsel for the parties, or the parties themselves if proceeding *pro se*, immediately after assignment of a case to determine an appropriate date, time, and format/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. If the parties require no discovery or information before mediation can take place, the mediator should hold the first session within forty-five (45) 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 mediator shall promptly notify the Mediation Office of the date, time, and format/location of the first mediation session or the reason the mediation cannot be scheduled within such 30-day period. The Mediation Office will docket the date, time, and format/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. Any subsequent sessions shall be scheduled within thirty (30) days of the prior session, unless there is a specific reason a date certain cannot be established. The assigned mediator shall promptly notify the Mediation Office of the date, time, and format/location of the next mediation session or the reason the mediation cannot be scheduled within the 30-day period. The Mediation Office will docket the date, time, and format/location of the mediation session.

7. Attendance and Participation at Mediation Sessions

The benefits of mediation are best realized with preparation, attendance, and active participation of all parties and counsel at all stages of the process.

- a. Unless specifically excused by the mediator in writing before the date scheduled for the mediation, each party must attend mediation, whether it is in person or held remotely. 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. At any time, the mediator may contact counsel, or the parties themselves if proceeding *pro se*, to schedule either a joint or individual preliminary case conference telephone or video call for the purpose of discussing the nature and posture of the case; the status of discovery; questions regarding mediation process; scheduling; or any other matter pertinent to the mediation.
- c. 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.

- d. The lawyer primarily responsible for handling the matter must be the lawyer who appears in mediation and at any pre-mediation process, unless the mediator approves otherwise in writing.
- e. A fully authorized representative of the client's insurance company must attend when the decision to settle and/or the amount of settlement must be approved or agreed to by the insurance company.
- f. 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 that day.
- g. Counsel, the parties if *pro se*, or the mediator may 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 to the attendance of an observer, each observer is required to sign the Mediation Confidentiality Agreement and will be bound by any confidentiality provisions that are relevant to the mediation as if they were a party to the mediation. Requests for observers to attend should be made in advance to the Mediation Office, in writing, and should include a statement of the requester's relationship to the individual who wishes to observe, and a statement that all parties, counsel for parties, and the mediator have been consulted and that all consent to the individual(s) observing.

8. Mediation Location

Mediation sessions may take place at any location, or in any format, agreed to by the mediator and the parties. If the mediator is unable to accommodate the parties' preferred location or format, the mediator should promptly notify the Mediation Office so that the matter can be reassigned to a mediator who can accommodate the parties. If the parties cannot agree on a location or format, they should arrange a call with the Director of the Mediation Program. As a last resort, the parties may be directed to raise this issue with the presiding judge.

9. Mediation Statements

- a. Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall deliver either to the mediator alone, or

between the parties if the parties so consent, a brief mediation statement not exceeding ten double-spaced pages including:

- i. the party's contentions as to both liability and damages;
 - ii. an assessment of strengths and weaknesses of each party's claims and/or defenses;
 - iii. the status of any settlement negotiations, including prior demands and offers;
 - iv. barriers to settlement, if any;
 - v. the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action;
 - vi. any other facts or circumstances that may be material to the mediation or settlement possibilities; and
 - vii. next steps in the litigation if settlement is not reached.
- b. Mediation statements are confidential, as provided in section 2 of these procedures for communications made exclusively during or for the mediation process.

10. Finalizing Settlement Terms

- a. When the terms and conditions of a settlement are agreed to as a result of a mediation, the parties are strongly encouraged to document the material terms of the parties' agreement in a writing signed by the parties and/or authorized representatives at the time of the mediation. The mediator may delay notifying the Mediation Office of a settlement until the mediator receives notice that a binding term sheet, or settlement agreement, has been fully executed.
- b. Any term sheet or stipulation developed through mediation must be read and signed by all parties and/or counsel for parties.

11. Final Mediator Reports

- a. The mediation will conclude when the parties reach a resolution of some or all issues in the case or the mediator or parties conclude that resolution (or further resolution) is not possible.
- b. Once mediation is concluded the mediation referral will be closed with the docketing of a Final Report of Mediator which will be viewable on PACER only to counsel of record and to the Court. The report will indicate 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.
 - ix. Closed for other reasons.
- c. 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 (b)(v), (vi), (vii), (viii).
- d. If the Final Report of Mediator indicates the result set forth in (b)(i), (ii), (iii), or (v), the parties should promptly submit a stipulation of discontinuance or other appropriate document to the Clerk of Court.

12. Post-mediation Survey

To assist in the continued development of the Mediation Program, counsel for parties, or parties if *pro se*, are strongly encouraged to respond to a short survey about the mediator and the mediation process. Feedback can also be provided by sending an email directly to the Mediation Program.

REQUESTS FOR INTERPRETERS OR ELECTRONIC DEVICES

13. Electronic Devices in the Courthouses

Any attorney can present appropriate verification of membership of the bar of any state or federal court to bring in one cell phone. Attorneys/mediators who wish to bring in additional devices must email a device order to the Mediation Office at least 72 hours before the date

of the mediation session to request permission. (Electronic Device Orders can be found [here](#).)

14. Interpreters

Interpreters are only provided by the Southern District of New York for parties who are deaf or hard of hearing or in cases in which the United States is the plaintiff. In all other circumstances, parties must provide their own interpreters for mediation. Parties who need to retain interpreters for mediation can contact the Court's Interpreters' Office for the contact information for qualified interpreters.

PROCEDURES REGARDING PANEL MEDIATORS

15. 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 initial mediation trainings 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. completed during the last three years at least 16 hours of mediation skills training, an 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)(e).

16. Mediation Panel Application Process

- a. Approximately twice 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 mediations and participate in at least one 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.

17. 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 mediation undertaken as a panel mediator.
- d. 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.
- e. 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.
- f. All mediators are assumed to be 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 to be retired from the panel. Mediators who wish to return to active status after being inactive for more than one year must write a letter of request to the Director of the ADR Program describing any mediation-related activities or training during the retirement period. In most instances, mediators wishing to be reinstated will participate in a mentor mediation to assess their current level of skill. Reinstatement to the panel is at the discretion of the Director of the ADR Program, taking into consideration the needs of the program.

18. 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 or processes, 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 all of their communications related to the mediation.
- 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.
- c. 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.
- d. 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.
- e. 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.
- f. 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.
- g. 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 Mediation Program.

19. Complaints about Mediators: Investigation/Remediation

The following protocol is observed whenever the Mediation Office receives a complaint about a mediator. The Director of the ADR Program will begin by gathering information from relevant parties, attorneys for parties, judges, 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 or video 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.

- a. 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.
- b. If a mediator chooses not to participate in the remedial process, he or she will be choosing to discontinue serving as a panel mediator.
- c. 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 21(d)).

20. 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.

21. 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)(e); 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.

22. Immunity

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