United States District Court
Southern District Of New York

Procedures of the Mediation Program
(12/9/2013)

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.

1. **Confidentiality**
    a. Consistent with Standard V of the Model Standards of Conduct for Mediators[1], any communications made during the mediation process shall be confidential except as to the provisions indicated in this section. The mediator shall not disclose any information about the mediation to anyone except for Mediation Office staff. 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 parties may not disclose discussions with the mediator unless all parties agree, because it is required by law, 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 the terms of settlement if either party seeks to enforce those terms.
    c. The mediation process shall be treated as a compromise negotiation for purposes of Rule 408 of the Federal Rules of Evidence and state rules of evidence. Documents and information otherwise discoverable under the Federal Rules of Civil Procedure shall not

[1] Model Standards of Conduct for Mediators, promulgated by the American Bar Association, American Arbitration Association, and the Association for Conflict Resolution (August 2005).

be shielded from discovery merely because they are submitted or referred to in the mediation.

d. The mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation.

2. Assignment of the Mediator

a. Cases enter the Mediation Program either through a process of automatic referral or by referral of a specific case from the assigned judge. In both instances the Mediation Office is notified through a Mediation Referral Order. The mediators on the panel for the Southern District of New York are divided into sub-groups based on areas of subject matter expertise. Once the Mediation Office receives the Mediation Referral Order, a mediator is selected 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 mediator at random from a sub-group of mediators with expertise in a related subject matter. The mediator selected must respond 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 from the Mediation Supervisor, 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 Supervisor 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 Supervisor of the Mediation Referral Order.

b. 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. At the mediator's request, the Mediation Office will forward documents and information to the mediator directly.

3. 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 (3)(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, the right to object 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 Mediation Supervisor for the mediator's disqualification based on any grounds enumerated in 28 U.S.C. § 455 or 28 U.S.C. § 144. This request should be submitted within seven (7) 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 Mediation Supervisor is subject to review by the assigned judge upon motion filed within ten (10) days of the date of the Mediation Supervisor's denial.

4. 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 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 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, they must confer to establish a 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 Supervisor 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. On or before receipt of each party's written submissions (see section 5), the assigned mediator may contact counsel, or parties themselves if proceeding *pro se*, to schedule either a joint or individual preliminary case conference.

c. 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 Supervisor 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.

d. 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.

5. Written Submissions

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, a memorandum presenting in concise form, not exceeding ten double-spaced pages:

   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. These memoranda shall be subject to the confidentiality of the mediation process and treated as documents prepared "for settlement purposes only."

6. 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.

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 conference for a representative of the Comptroller either to attend the conference 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 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. Absent consent of all parties, counsel for parties, and the mediator, observers may not attend. 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.

h. Any observers are 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.

7. Mediation Location

a. 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.

8. 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 parties, counsel for parties, and the mediator.
b. Any term sheet or stipulation developed through mediation must be read and signed by all parties and/or counsel for parties.

9. 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 produced a stipulation settling all of the issues of the case.
   ii. Held and produced a stipulation settling less than all of the issues of the case. The parties by stipulation have agreed to submit the unresolved issues to binding arbitration.
   iii. Held and produced a stipulation submitting all issues to binding arbitration.
   iv. Held and produced a stipulation settling less than of the issues of the case. The unresolved issues should be treated as if they had not been sent to mediation.
   v. Held but was unsuccessful in resolving any issues in the case. The unresolved issues should be treated as if they had not been sent to mediation.
   vi. Not held as a stipulation settling all of the issues of the case was entered into prior to the mediation date.
   vii. Not held as one or both parties failed or refused to attend the mediation.

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)(vi) or (vii).
c. If the Final Report of Mediator indicates the result set forth in (a)(i), (ii), (iii), or (iv), the parties should promptly submit a stipulation of discontinuance or other appropriate document to the Clerk of Court.

10. Post-mediation Survey

a. 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. Surveys will be sent from the Mediation Office and are accessible through a hyperlink or a fillable document.

11. Mediation Panel Application Process

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

i. Is a member in good standing of the bar of this Court or, if not admitted to practice in a state within the Second Circuit, a member in good standing of the bar of any United States District Court;

ii. Has substantial exposure to mediation in federal court or has mediated cases in other settings;

iii. 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

iv. Is willing to participate in training, mentoring programs, and ongoing assessment as detailed in section (12)(e).

12. 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. Mediators shall be eligible for credit for pro bono service.

d. Consistent with Standard IV of the Model Standards of Conduct for Mediators, all mediators shall participate in an apprenticeship during their first year on the panel including:

i. Observing mediations;

ii. Co-mediating with other panel members; and

iii. Undergoing supervision and assessment before mediating independently.

e. Unless the Mediation Supervisor 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. Attending at least one continuing education program in mediation each year;

ii. Participating in ongoing assessment as determined by the Mediation Supervisor; and

iii. Mediating at least two cases per year.

f. Mediators may resign from the mediation panel at any time by notifying the Mediation Office in writing. The Mediation Supervisor may remove mediators from the mediation panel for:
    i. Failing to meet the requirements of section (12)(e); or
    ii. Violating the Code of Conduct set forth in section (13) or any other Procedures promulgated by the Mediation Program.

13. 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 and is not providing legal advice.
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. Mediators shall not work as consultants or attorneys in any pending or future action relating to any dispute in which they served as mediators, including actions between persons not parties to the mediation process.
e. Mediators shall not solicit payment for any aspect of any case undertaken as a panel mediator.
f. Mediators should be familiar with, and at all time uphold, the values of the Model Standards of Conduct for Mediators, particularly Standard VI.

14. Complaints

a. The following protocol is observed with every complaint about a mediator:

   i. The Mediation Supervisor will begin by gathering information from relevant parties, attorneys for parties, and other relevant Court personnel or observers. The Mediation Supervisor 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.

   ii. If the complaint is serious, or if the particular complaint is part of a pattern, the Mediation Supervisor and the mediator will explore options for redress. 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.

   iii. If a mediator chooses not to participate in the remedial process, he or she will be choosing to discontinue serving as a panel mediator.

   iv. If similar complaints persist after the remedial period, the mediator and the Mediation Supervisor may discuss options for additional remedial work or other remedies for rectifying the situation.

   v. Ultimately, the Mediation Supervisor may decide 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 additional training or support.

b. Complaints by a mediator about Mediation Program staff or protocols should be made to the Mediation Supervisor. The Chair of the Mediation Services Committee shall be contacted if the complaint is not resolved or if the complaint is about the Mediation Supervisor.

15. Immunity

a. 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.

United States District Court
Southern District Of New York

Mediation Confidentiality Agreement

Parties, counsel for the Parties, and the mediator agree as follows:

1. Any communications made during 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 to anyone except for Mediation Office staff. 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.

2. The parties may not disclose discussions with the mediator unless all parties agree, because it is required by law, 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 the terms of settlement if either party seeks to enforce those terms.

3. The mediation process shall be treated as a compromise negotiation for purposes of Rule 408 of the Federal Rules of Evidence and state rules of evidence. 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.

4. The mediator shall not be called as a witness or deponent in any proceeding related to the dispute in which the mediator served, or be compelled to produce documents that the mediator received or prepared for mediation.

The undersigned have read and agree to comply with this agreement.

Dated:

Plaintiff(s): _____ Defendant(s): _____

Attorney(s) for Plaintiff(s):_____ Attorney(s) for Defendant(s):_____

Mediator:_____ Observer(s):_____