



SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
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SILENT ADVOCATOR

Effective Representation of Your Client in Mediation

FACULTY

Hon. Theresa Whelan, Suffolk County Surrogate
Hon. Glenn A. Murphy, Court of Claims, Acting Supreme Court Justice
Robin S. Abramowitz, Esq., Partner, Lazer, Aptheker, Rosella & Yedid
Matthew Deedy, Esq., Court Attorney Referee: ADR Program Coordinator, Suffolk County
Lynn Poster-Zimmerman, Esq., Principal of Lynn Poster-Zimmerman, PC

April 7, 2022
Suffolk County Bar Association, New York

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HON. THERESA WHELAN – SURROGATE AND ACTING SUPREME COURT JUSTICE

Theresa Whelan is the Suffolk County Surrogate's Court Judge and presides over proceedings involving wills, trusts and estates, as well as guardianship matters. Judge Whelan is also the Supervising Judge of the Suffolk County Family Court. She was first elected to the Family Court in 2007 and was re-elected to another ten year term in 2017. As a Family Court Judge, Judge Whelan heard primarily child abuse and neglect cases and presided over Family Treatment Court. She was elected Surrogate's Court Judge in 2018.

Judge Whelan was appointed Supervising Judge of the Suffolk County Family Court in February 2016. In that role, Judge Whelan supervises a court consisting of eight to ten judges, five referees and numerous support magistrates. During her tenure, she has reformed court practice to better accommodate the needs of parties and litigants.

In 2009, the Office of Court Administration appointed Judge Whelan as Lead Judge of the Suffolk County Child Welfare Court Improvement Project. This local child welfare collaborative is part of state-wide initiative to address court practices in cases where the court has removed children from their parents' care.

Judge Whelan is the Chair of the Suffolk County Attorneys for Children Advisory Committee which is responsible for considering the qualifications of new applicants to the Attorneys for Children panel, as well as reviewing the recertification applications for existing lawyers. The Advisory Committee also addresses issues that may arise with lawyers, conducts the annual training and ensures a fair and efficient rotation of lawyers available to take assignments from the Family Court

In 2017, Chief Administrative Judge Larry Marks appointed Judge Whelan to the Family Court Advisory and Rules Committee, a statewide committee which meets monthly. That committee reviews proposed legislation and drafts its own proposals in the area of family law. More recently, Chief Judge Janet DiFiore appointed Judge Whelan to the New York State Commission on Parental Representation, which is tasked with holding public hearings throughout the state and reporting on the status and quality of lawyers representing parents in child welfare cases.

Judge Whelan began her law career in 1988 as a Suffolk County Assistant County Attorney. In 1990 she began her career in the judicial system, serving as a law clerk to three Supreme Court Justices: the Honorable Eli Wager (Nassau County), the Honorable Mary M. Werner, and the Honorable William B. Rebolini. As law clerk, she conferenced thousands of cases with attorneys and self-represented litigants, conducted legal research and drafted hundreds of decisions and orders. During her seventeen years in the Supreme Court, she worked in nearly every part of that court, including civil litigation, guardianship, tax certiorari and condemnation cases as well as matrimonial matters.

Judge Whelan is an active member of the Suffolk County Bar Association, where she was co-chair of the Family Court Committee from 2013 - 2016. She has lectured for the Law Academy and other law organizations. As a member of the Attorney for Child Task Force, she and the other members received the Suffolk County Bar Association's President's Award in 2016 for their work. Judge Whelan is also a member of and past president of the Suffolk County Women's Bar Association.

Judge Whelan received a Bachelor of Arts degree in English and a Master of Science degree in Policy Analysis and Public Management from the State University of New York at Stony Brook. She holds a Juris Doctor from Albany Law School.



HON. GLENN A. MURPHY, AJSC, of Matrimonial Part 25, NYS Court of Claims Judge, Acting Justice of the Supreme Court

Judge Glenn A. Murphy was appointed to the New York State Court of Claims in June of 2015 and has been serving as an acting Justice of the Supreme Court in a Suffolk County Matrimonial part since January of 2016. Judge Murphy recently completed two separate OCA approved Mediation programs. Judge Murphy's courtroom was selected as one of two parts to participate in the pilot project which referred cases for presumptive mediation in our Matrimonial Mediation program. Prior to his appointment Judge Murphy had served on the District Court Bench for 13 years in various capacities. Judge Murphy was Supervising Judge of the District Court, Supervising Judge of the Town and Village Courts and presided over one of two Domestic Violence Parts and the Felony Exam Part for several years. He was selected as the Criminal Bar Association's Judge of the Year in 2015.

Prior to joining the bench Judge Murphy served as an official in the Town of Brookhaven in various capacities including Deputy Town Attorney, Chief of Staff to the Supervisor, Town Councilman and Deputy Supervisor. Judge Murphy served 14 years as an Assistant District Attorney in Suffolk County. His duties included; Deputy Chief of the Rackets Bureau, and White Collar Crime Bureaus as well as serving as Supervisor in the Case Advisory Bureau. Judge Murphy also served as a Special Assistant United States Attorney prosecuting Civil Rights and Organized Crimes cases in the Eastern District of New York. He graduated from SUNY at Binghamton and Nova Southeastern Law School. He is married and has three children.



LYNN POSTER-ZIMMERMAN, ESQ.

Lynn Poster-Zimmerman, Esq. is a past President of the Suffolk County Bar Association. She is a solo practitioner whose practice focuses on matrimonial and family law, divorce mediation, neglect proceedings, elder law, guardianship proceedings, trusts and estates, real estate law, Suffolk County Attorney for Children Panel, Suffolk County 18B Family Court Panel, arbitrator, Suffolk County District Court – Commercial Small Claims Part.

Lynn received the Suffolk County Bar Association President's Award for her work on the 18B Task Force, the SCBA President's Award for Attorney for Children Taskforce Chair and the SCBA's Award of Recognition for the Suffolk Academy of Law Program Development.

She is admitted into practice in the State of New York, Second Department, United States District Court, Eastern District, and United States District Court, Southern District.



ROBIN S. ABRAMOWITZ

Robin S. Abramowitz is a senior partner in the firm of Lazer, Aptheker, Rosella & Yedid, P.C. and co-chairs the firm's Litigation practice group. Her areas of practice include arbitration, mediation, commercial litigation, and construction litigation. She is an Arbitrator on the Long Island General Commercial and the Construction Panels for the American Arbitration Association. She is also on the panel of mediators for both the Suffolk County Supreme Court Commercial Division and the Suffolk County Surrogate's Court, she is an AV Preeminent peer review rated attorney. Robin was appointed by the presiding justice of the Appellate Division, Second Department to serve on the Board of Governors for the Attorney Fee Dispute Program for the term 2016-2019 and reappointed to serve through 2022.

Robin received her J.D. *with distinction* in 1989 from Hofstra University School of Law. She was admitted to practice in New York and the United States District Courts for the Eastern and Southern Districts in 1990, the United States Court of Appeals for the Second Circuit in 1998, United States Supreme Court in 2005, Florida in 2009 and the United States District Court for the Southern and Middle Districts of Florida in 2010.

Robin is the Secretary of the Suffolk County Bar Association. Among other committee positions she served as the Co-Chair of the ADR Committee in 2011-2012 and as a member of the Professional Ethics & Civility Committee from 2014 to the present. She served as an Officer of the Suffolk Academy of Law from 2009-2013 and as a Director of the Suffolk County Bar Association from 2015-2018.

Robin was a co-presenter for numerous CLE programs for the Suffolk County Bar Association, the Suffolk County Women's Bar Association, and the Women's Bar Association of the State of New York. Those programs include, *Attention to Ethics of Transactional Law; A Practitioner's Guide to the Interplay of Matrimonial & Bankruptcy Law; The Intersection of Matrimonial & Bankruptcy Law; State Court Issues and Bankruptcy Court-What Every State Practitioner Should Know; How to Save Your Client's House From Foreclosure; Practice Management from Solo, Mid-Sized and Large Firms; Representing a Client in Arbitration; Matrimonial Bootcamp; Game Night Ethics-The Feud; Retainer Agreements & the Attorney Fee Dispute Resolution Program; Evidence Series-Admissions and Notice to Admit.*



Matthew M. Deedy, Esq., Districtwide ADR Coordinator

Matthew M. Deedy is the ADR Coordinator for the 10th Judicial District, Suffolk County as well as the Coordinator of the Suffolk County Matrimonial Mediation Center, in addition to serving as one of the mediators in that program. Since 2015, he also has worked as one of three Special Referees assigned to the Dedicated Matrimonial Parts of Suffolk County. He has presided over both the Non-Complex Matrimonial Part and one of the Matrimonial Referral Parts, maintaining a balance of newly commenced matrimonial cases as well as trial ready matrimonial and family law related matters. Additionally, Matthew has also been selected to handle a variety of special projects for the District Administrative Judge and Supervising Judge of the Matrimonial Parts. Among other things, he was integral in helping to establish and develop Suffolk County's very successful Matrimonial Mediation Program, and more recently has worked with other stakeholders in and outside the Court system to add other ADR alternatives to the Courts of Suffolk County.

Matthew began his career within the Court system as a Court Attorney in the Suffolk County Family Court from 1994 - 2000. During that time, he was appointed to serve as the Acting Family Court Hearing Examiner (currently referred to as "Support Magistrate") in the Central Islip and Riverhead Courts. From 2000 through 2013, Matthew served as the Principal Law Clerk to the Honorable William J. Kent III, responsible for helping manage a significant caseload of matrimonial, foreclosure, tax and election law matters. In 2014, he was appointed as Court Attorney-Referee in the Suffolk County Family Court where he presided over Custody and Family Offense cases. During that time, he was also assigned to special projects by the Administrative Judge of Suffolk County.

Prior to his career within the Suffolk County Court System, Matthew represented the County in Juvenile Delinquent, Support, PINS and Neglect and Abuse cases as an Assistant County Attorney in the Family Court/Social Services Bureau of the Suffolk County Department of Law.

Matthew received a Bachelor of Science degree in Industrial and Labor Relations from Cornell University and a Juris Doctor degree from the City University of New York School of Law. He lives on Long Island with his wife and four children.

**SUFFOLK COUNTY, SUPREME COURT
10th JUDICIAL DISTRICT
MATRIMONIAL MEDIATION PROGRAM**

STATEMENT OF PROCEDURES

I. OVERVIEW

The Suffolk County Supreme Court's Matrimonial Mediation Program (hereinafter "the Program") offers parties access to qualified Mediators who meet the criteria set out in Section VII.

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

Although the parties are not compelled to reach an agreement during the mediation process, the process frequently concludes with a written agreement. The process also often improves the parties' ability to communicate with each other in the future. Even in instances where no agreement is reached during the mediation process, often the prospective gained during mediation helps the parties reach a final agreement after the case returns to the traditional litigation process.

If the parties cannot reach agreement, they return to court. Parties are strongly encouraged, but are not required, to attend all mediation sessions with their attorneys. Referral to the Program may not be appropriate where only one party is represented by counsel, or in cases involving domestic violence, child abuse or neglect, or in cases where there is a severe power imbalance.

II. DEFINITIONS¹

- (a) "Neutral" refers to the In-House Mediator.
- (b) "Mediation" refers to a confidential, dispute resolution process in which a neutral third party — the Mediator — helps parties to communicate, identify issues, clarify perceptions, and explore options for a mutually acceptable outcome.
- (c) "ADR Session" refers to a Mediation session.
- (d) "The Program" refers to the Suffolk County Matrimonial Mediation Program.
- (e) "Neutral Evaluation" refers to a voluntary, confidential dispute resolution process in which a neutral person with subject matter expertise hears abbreviated arguments, reviews the strengths and weaknesses of each side's case, and offers an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

III. PROCEDURES

The assigned Matrimonial Part Justice or the assigned Court Attorney Referee may refer parties to the Program or parties on their own may request referral to the Program. However, cases involving child abuse or neglect (as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412), domestic violence, or a severe power imbalance between the parties are not appropriate for referral to the Program. Cases shall be initially screened by the Court and again screened by the Mediator to prevent inappropriate referrals.

To initiate the process, the Court issues an Order of Reference. The Order of Reference specifies the topics (e.g., child custody, visitation and/or financial issues) to be submitted to the Program for resolution. The Order shall direct parties to attend an initial session with an In-House Mediator from the Program. Counsel for the parties are strongly encouraged, but not required, to attend. If parties wish to continue with the mediation process beyond the initial session, the Mediator will schedule additional sessions with the parties. All sessions with the In-House Mediator shall take place in designated mediation facilities in the courthouse and are provided at no cost to the parties. The In-House Mediator may limit the number of sessions to conserve resources.

The Order of Reference shall include a control date set by the referring Justice or Court Attorney Referee for the parties to appear in Court for a conference

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

following the initial mediation session. All pre-trial proceedings scheduled in the Preliminary Conference order shall continue, and shall not be stayed, pending additional mediation sessions, except that, if all parties request, the referring Justice or Court Attorney Referee may extend the dates for the taking of examinations before trial, and such other discovery dates as deemed appropriate by the Court. Unless otherwise directed by the Court, the date for completion of discovery set in the Preliminary Conference Order and the date for the Compliance Conference shall not be extended or adjourned by reason of the pendency of the mediation process.

The Court shall endeavor to refer each matter it deems to be appropriate for mediation to the Program and issue an Order of Reference at the Preliminary Conference or as soon thereafter as is reasonably practical after consideration of the individual facts and circumstances of the matter before the Court. Referral to the Program shall not delay the prompt resolution of any emergency relief requested by any party, nor shall it prevent any party from requesting *pendente lite* relief from the Court at anytime. The issuance of an Order of Reference does not constitute a stay of the proceedings.

The Order of Reference shall require the parties to appear at the initial session, and unless otherwise waived by the Mediator, prior to the initial session, the parties' counsel shall send the Mediator a copy of:

1. any pleadings previously filed with Court; and,
2. any pending Court orders in effect relating to the parties; and,
3. each parties' Statements of Net Worth; and,
4. any other information the Mediator deems necessary for the effective negotiation and resolution of the issues involved.

The Mediator may request a conference call with both counsel regarding any preliminary matters.

The Mediator may give to the parties any agreements or memorandum of understanding generated at the sessions. The Mediator, with the consent of the parties may send any agreement, partial or complete, to the referring court. The Mediator may periodically inform the referring court that the mediation is ongoing, the amount of time that has been spent mediating, and may give the court an approximation as how long the mediation is likely to continue. However in doing so the Mediator shall not disclose information discussed during the mediation sessions, except as described in Section X hereof.

The mediation process shall end whenever one party, both parties, or the Mediator decides that the process has ended. At the conclusion of the mediation the Mediator shall send a report ("Report of the Mediator") to the referring Court and to

counsel for the parties stating: (1) the date of the initial session and whether each party and counsel appeared at the initial session; (2) the dates of any subsequent scheduled sessions, but not whether parties appeared; and, (3) whether the parties reached partial, complete, or no agreement on the issues: and, (4) the total time spent in the mediation sessions.

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

IV. ROLE OF THE MEDIATOR

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

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

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

During the mediation process all parties will be afforded an opportunity to raise issues of concern and to explain the facts of the dispute as each party sees them. Once the Mediator and the parties are satisfied that they have identified all the issues for discussion, the Mediator will assist the parties to work collaboratively to develop and choose options that satisfactorily address these issues.

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

will keep all information discussed in caucus confidential and will not divulge same to the other side unless the party permits disclosure.

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

There may be a request made by the parties, during the course of the mediation, for an opinion from the Mediator as to the merits of their positions. Only a qualified Neutral Evaluator can offer such opinion (*see Section VII.b*). If the Mediator is also a qualified Neutral Evaluator in the subject area, and upon full consent of the parties, the mediation may expand to include neutral evaluation concerning these issues. However, if the Mediator is not a qualified Neutral Evaluator in the specific subject area, the Mediator should not offer an opinion regarding likely court outcomes or the merits of the case.

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

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

The presence of separate counsel for each party at all mediation sessions is strongly encouraged. Whether appearing alongside their clients or advising clients outside of the mediation process, attorneys play a crucial role in informing parties of their legal rights and responsibilities and the consequences of proposed solutions. Without representation by counsel, parties risk entering into agreements with insufficient knowledge about financial, legal, or other issues.

For those cases in which an Attorney for the Child or Guardian Ad Litem has been assigned, mediation sessions may not commence without the appropriate attorney or guardian's presence, unless all parties, and the mediator agree otherwise.

VI. THE ROLE OF THE COURT

The Program is conducted under Court auspices and pursuant to these rules. Judicial and non-judicial staff are encouraged to inform the parties of the Program's existence. The program shall be managed by the Suffolk County ADR Coordinator and overseen by the Supervising Judge of the Matrimonial Parts and under the direction and authority of the District Administrative Judge.

VII. THE APPOINTMENT OF MEDIATORS

The District Administrative Judge, in consultation with the Supervising Judge of the Matrimonial Parts, shall appoint all Mediators to be used in the Program.

(a) Mediators appointed to be used for the Program must comply with the following prerequisites:²

- Training: Completion of at least 40 hours of family mediation training in a training program recognized by the New York State Office of Court Administration ("OCA"), broken down as follows: at least, 24 hours of training in basic mediation skills; and techniques and 16 hours of additional training in matrimonial and family mediation.
- Experience: At least two years of family mediation experience, including 100 hours of face-to-face mediation with clients and a minimum of 10 custody and visitation cases, or any other equivalent training or experience deemed appropriate by the Court.

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

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

The District Administrative Judge, shall determine whether a person qualifies for appointment as a mediator for the Program and whether such person has the requisite temperament, character, and discretion. The continued eligibility of any mediator appointed to the program is subject to periodic review by the District Administrative Judge. Mediators may be disqualified from participating in the Program at the discretion of the District Administrative Judge.

²The training and qualifications guidelines for the Program meet or exceed the minimum requirements established in Part 146 of the Rules of the Chief Administrative Judge. See www.nycourts.gov/rules/chiefadmin/146.shtml

VIII. FEES

The Program does not charge or administer fees.

IX. IMMUNITY

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

X. CONFIDENTIALITY

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

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

Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following five circumstances:

1. Attendance

Information regarding whether the parties and their counsel attended the initial session will be reported to the referring Justice or Court Attorney Referee.

2. *Waiver*

All parties to the mediation process, their attorneys and the Mediator may agree in writing to waive confidentiality with respect to any or all the issues. However, the waiver must specify the individual communication(s) or information that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure.

3. *Written Agreement*

Writings, signed by all the parties, embodying a negotiated agreement will be submitted to the Court for review. Additionally, a limited report of the outcome and time spent mediating, as explained in Section III, will be sent to the referring Justice or Court Attorney Referee. Only those signed agreements may be admissible in any present or future judicial or administrative proceeding.

4. *Threats of Imminent, Serious Harm*

If during the mediation process, actions, communications or information constitute a credible threat of serious and imminent harm, either to the speaker or another person or entity, the Court and any other appropriate authorities and/or the potential victim may be notified.

5. *Allegations of Child Abuse or Neglect*

If the communication or information relates to an allegation of child abuse or neglect as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412 and for which disclosure is or may be required pursuant to Social Services Law § 413, confidentiality will not apply as to those disclosures.

XI. CHILD ABUSE AND NEGLECT

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

XII. DOMESTIC VIOLENCE/SEVERE POWER IMBALANCE

When an allegation of domestic violence or severe power imbalance is made by any party during the mediation process, the Mediator shall safely stop the process, meet with each party individually where appropriate to learn as much as possible about the circumstances so as to determine whether it is appropriate to resume the mediation process. Allegations of domestic violence shall not be disclosed to the referring Justice or Court Attorney Referee; instead, the Mediator will give victims information regarding their rights in the form prescribed in Family Court Act § 812 (5), and they will receive additional referrals.

XII. REFERRAL TO THE PROGRAM AND ONGOING LITIGATION

Cases may be referred to the Program by the Court at the Preliminary Conference, or any time thereafter during the pendency of the litigation. A party who attends the initial session complies with the Order of Reference, even if that party ultimately chooses not to proceed with mediation.

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

XIII. AVOIDING CONFLICTS OF INTEREST

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

Revised 9/7/18

Suffolk County Matrimonial Mediation Program

For more information contact the Suffolk County ADR Coordinator at 631-740-3777

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART SUFFOLK COUNTY

PRESENT:

HON.

Acting Justice of the Supreme Court

X-----X

Order

INDEX NO.: 1158-2019

PLAINTIFF'S ATTY:

Plaintiff,

-against-

DEFENDANT'S ATTY:

Defendant.

X-----X

The above referenced matter having come before the Court on _____, and the Court having determined that it is appropriate to refer the parties to the Matrimonial Mediation Program, it is;

ORDERED, that this case is referred to the Mediation Program:

All issues; or

On the following issue(s):

_____; it is further;

ORDERED, that the parties are directed to appear at Suffolk County Supreme Court Mediation Center located on the fourth (4th) floor, in the Supreme Court Building for the initial mediation session scheduled on _____. Counsel for the parties and the attorney for the child(ren) are encouraged to appear. Further, unless otherwise waived by the Mediator, prior to the initial mediation session, the parties' attorney shall provide the Mediator with copies of the following:

1. Any and all pleadings filed with the Court;
2. Any Court Orders in effect related to the parties;

3. Each party's Statement of Net Worth; and

4. Any other information that the Mediator deems necessary for the effective negotiation and resolution of the issues involved in the matter

All the statements made by the parties in the context of the mediation shall be confidential and shall not be disclosed, except for the following:

- a. The parties to the mediation and their respective attorneys may specifically agree in writing to waive confidentially with respect to any or all issues;
- b. Partial or comprehensive settlement agreements signed by the parties and submitted to the Court for review;
- c. A crime, a family offense as defined by Family Court Act § 812, and/or any credible threat of serious and imminent harm; or
- d. An allegation of child abuse or neglect as defined by the Family Court Act or the Social Services Law.

The Trial Court will not ask the mediator to issue either a written or oral report regarding the mediation other than the Disposition Report. Further, neither the ADR Coordinator nor the mediator shall be called as a witness by either party or the Court except as noted above; it is further,

ORDERED, that the mediation sessions shall be conducted in accordance with and subject to the Program's Rules; it is further,

ORDERED, that the parties shall complete the initial mediation session; it is further,

ORDERED, that the parties shall comply with all the requirements set for in the Statement of Procedures. Failure to comply may lead to the termination of the mediation process; it is further,

ORDERED, that next scheduled conference date with the Court shall be held before the undersigned on _____, or sooner at the request of either party.

The foregoing constitutes the Order of this Court.

Dated:

Central Islip, New York

**Suffolk County Surrogate's Court
Alternative Dispute Resolution
Procedures**

Surrogate: Hon. Theresa Whelan

320 Centre Drive, Riverhead, New York 11901

Surrogate's Court ADR Coordinator: Amy Campbell

Email: aecampbe@nycourts.gov

Phone: 631-852-1729

Temporary COVID-19 ADR Procedures

Effective June 2020 and until further notice, mandatory personal appearance is suspended. In light of COVID-19 and concerns for the safety of court employees and the public, mediation will be conducted remotely via videoconferencing, unless other in-person arrangements are made with the ADR Coordinator and mediator. Therefore, any reference in the Surrogate's Court ADR Procedures to in-person appearances or participation shall mean remote or virtual unless otherwise ordered by the court.

SURROGATE’S COURT OF THE STATE OF NEW YORK
SUFFOLK COUNTY
HON. THERESA WHELAN
ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

It is the objective of this court to encourage the resolution of disputes and the early settlement of pending litigation through Alternative Dispute Resolution (“ADR”), a non-judicial process designed to assist parties in resolving their disputes economically and efficiently. In order to achieve its objective, the court shall refer eligible cases to an early settlement conference, followed by mediation. In certain cases, mediation can be more convenient, less expensive, less acrimonious, and can often result in a more mutually acceptable and durable resolution than the normal course of litigation.

Contested proceedings heard in the Surrogate’s Court shall be presumptively eligible for early referral to a mediation process unless otherwise excluded pursuant to these procedures. These procedures are promulgated for the management of the Program of Alternative Dispute Resolution for the Surrogate’s Court, County of Suffolk. They shall not be deemed to vest any additional rights in litigants or their attorney and shall be subject to such amendments from time to time as shall be approved by the court.

1. The Program

- A. The Surrogate’s Court of the State of New York, County of Suffolk, shall oversee a Program of Alternative Dispute Resolution for contested matters (the “Program”). Once issue has joined in any proceeding, an early settlement conference shall be held with a court attorney. If the matter is not resolved at the early settlement conference, the matter shall proceed to mediation. Unless deemed by the court to be ineligible, all contested matters referred to mediation shall proceed to one of the three mediation options, set forth below. If the parties cannot reach an agreement, the case shall be returned to the court.
- B. The court shall designate a Program Coordinator. The Coordinator shall oversee the administrative requirements of the Program, which include but are not limited to:
 - a. Monitoring all proceedings referred to the program;

- b. Scheduling mediation sessions for the parties who take part in mediating with a court employee;
 - c. Monitoring the status of all cases referred to ADR, including the scheduling of a control date;
 - d. Maintaining statistical data on the Program.
- C. Cases shall be screened for appropriateness. Cases involving the Public Administrator shall be exempted from referral to mediation. In addition, the court may, for good cause, deem any matter ineligible for mediation.

2. Process

A. Early Settlement Conference

Once issue has joined in any proceeding, an early settlement conference shall be held with a member of the Surrogate's Court's Law Department. This conference shall last up to one hour, and shall be attended by counsel for the parties, or, if a party is unrepresented, then by the *pro se* party. In the event the parties are represented by counsel, the parties and attorney shall be available to participate in this conference. In the event that the matter is not resolved, then the parties shall proceed to one of the following ADR options:

- 1) Mediation with a court employee;
- 2) Mediation by a mediator assigned from the Roster;
- 3) Mediation by a mutually agreed upon mediator.

B. Mediation with a court employee

The court shall offer a mediation session of up to one and a half hours with a court employee who is a trained mediator. The mediator shall not be the same member of the Surrogate's Court Law Department with whom an early settlement conference was held. These sessions shall take place at the Surrogate's Court of Suffolk County, 320 Center Drive, Riverhead, New York.

C. Mediation by a Mediator assigned from the Roster

The Administrative Judge of the 10th Judicial District (Suffolk County) shall establish and maintain a panel of Mediators (the "Roster") who shall be certified as required by Part 146 of the Rules of the Chief Administrative Judge.

Every member of the Roster, and any other person who serves as a Mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Mediators. Continuing presence on the Roster is subject to review by the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

Mediators from the Roster shall be compensated at the rate of \$300 per hour, except that Mediators shall not be compensated for the first 1 ½ hours spent in the Mediation session or for the time spent in preparation for such Mediation session. The Mediator's fees and expenses shall be borne equally by the parties unless otherwise agreed in writing.

D. Mediation by a mutually agreed upon mediator

If the parties choose to select their own mediator, they shall inform the Program Coordinator, within ten days of the Order of Reference, of the name of the mediator.

3. Determination of Suitability; Order of Reference

- A. At the conclusion of the early settlement conference, the court shall determine the suitability of the action for the three mediation options and issue an Order of Reference. Cases shall be referred to mediation as soon as is practicable. A case not deemed appropriate for referral at its outset may be subsequently referred in the discretion of the court.
- B. Upon the completion of the early settlement conference, the parties and counsel shall meet with the Program Coordinator:
 - a. If the parties choose to mediate with a court-provided Mediator, the parties/counsel shall schedule a mediation session at the courthouse; or
 - b. If the parties choose to mediate with a Roster Mediator, the parties/counsel shall receive the assignment of the Mediator from the Program Coordinator; or
 - c. If the parties choose to mediate at their own expense, the parties/counsel shall inform the Program Coordinator within ten business days from the date of the Order of Reference, of the name and contact information of the mediator selected and the date of the first session. If the parties do not submit in writing an agreed upon name of a mediator within ten (10) business days from the date of the Order of Reference,

the court shall select the mediator from the Roster. Privately paid mediators must comply with the deadlines set forth in these procedures and the confidentiality rules set forth herein as well.

- C. The Order of Reference shall specify applicable control dates. For those matters using an in-court mediator, the Order of Reference shall specify the date of the scheduled mediation, which is to take place within approximately two (2) weeks of the early settlement conference. For those matters using a mediator from the Roster or a mutually agreed upon mediator, the Order of Reference shall specify a control date of approximately 45 (forty-five) days to return to court, within which time the parties are expected to have scheduled and completed a mediation session. An appearance by parties and counsel, if represented, on the control date shall be required unless the court has received a fully executed stipulation of settlement with all documentation necessary to completely resolve the matter. If additional time is necessary, parties must submit a stipulation with a statement of necessity to continue with the mediation process to the court to be so ordered.

4. Participation in Mediation

- A. A case otherwise subject to mediation may be exempted from such mediation upon a showing of good cause. A party seeking an exemption shall apply for leave of court to be exempted. Failure to seek an exemption in this manner shall constitute a waiver of any objection to the mediation referral. If the court grants leave to “opt out” from referral to mediation, then the case shall not proceed to mediation at that time. In addition, at any time, the court may, upon its own review, determine that a matter should be exempted.
- B. Parties are required to attend all mediation sessions and participate in good faith. The mediator has the discretion to allow remote participation in mediation upon showing of hardship. Parties are encouraged to participate in mediation with counsel.
- C. Pre-mediation Memoranda: If requested by the mediator, the parties shall provide a confidential memorandum of not more than 2 pages (12 point font, doubled spaced) 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 to any other party to the proceeding, unless otherwise agreed by the parties.

- D. 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. If a non-party is invited to participate in the mediation, which participation must be agreed to by the parties and the mediator, the mediator shall obtain the participating non-party's written consent as to confidentiality and any other matters requested by the parties, as facilitated by the mediator.
- E. At the beginning of the initial session, the mediator shall:
 - i. Explain to all parties that all communications are confidential with narrow exceptions pursuant to these procedures;
 - ii. Explain that any party may, during the initial session or at any time thereafter, end the mediation process and return to court;
 - iii. Inform all parties that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot determine how the court would apply the law or rule in the parties' case or what the outcome of the case would be if the dispute were to go before the court;
 - iv. Request that all parties acknowledge in writing that they were informed of and understand the confidential nature of the mediation process.
- F. With the exception of privileged communications, the rules of evidence do not apply in mediation.
- G. Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process.
- H. The mediator may terminate the mediation at any time when a participant becomes disruptive to the mediation process.
- I. Mediation concludes upon all parties signing a written agreement resolving all or some of the matters in dispute, or whenever any party or the mediator decides that the process has ended and notifies the others in writing. For all cases mediated outside of the court, upon the conclusion of the mediation, the mediator shall email within 24 hours all parties, attorneys and the Program Coordinator that the mediation process has ended. Within five

(5) business days after the conclusion of the mediation sessions, the mediator shall send a Mediation Report to the Court, copying counsel, that states:

- i. The date of the initial session and whether each party and counsel appeared at the initial session;
 - ii. The dates of any subsequent sessions that were held, but not whether parties appeared; and
 - iii. Whether the parties reached partial, complete, or no agreement on the issues.
- J. Agreements resolving some or all the legal matters in dispute shall be signed by all parties and submitted to the court within 15 days from the date the mediation concludes.

5. Mediators

- A. A mediator's role is to assist in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise and finding points of agreement as well as legitimate points of disagreement.
- B. Any person who serves as a mediator pursuant to these Rules shall comply with the Model Standards of Conduct for Mediators (2005) promulgated by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, in such form as may be adopted by the ADR Office with the approval of the Chief Administrative Judge.
- C. Qualification of a mediator: Mediators who appear on the Roster shall comply with the requirements of Part 146 of the Rules of the Chief Administrative Judge of New York
- D. Quality Assurance: The ADR Program Coordinator shall from time to time develop and promulgate consistent practices for ensuring mediator quality and fitness. Such practices may include, but are not limited to: periodic observation of mediation sessions and use, collection and evaluation of post-mediation surveys.
- E. Immunity of the Mediator: Any person designated to serve as a mediator pursuant to this Program shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law, including Public Officers Law Section 17.
- F. Conflict of Interest: To avoid conflicts of interest, any person tentatively designated to serve as a mediator shall, as a condition to confirmation in that role, conduct a review of

his or her prior activities and those of any firm of which he or she is a member or employee. The mediator shall make disclosures to the parties who may object to the mediator's ability to serve or the mediator shall disqualify himself or herself if he or she would not be able to participate as mediator fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. If any potentially disqualifying facts are discovered, the mediator shall do the following: decline the appointment or fully inform the parties and the Coordinator of all relevant details. Unless all parties, after full disclosure, consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall be selected promptly by the court.

6. Confidentiality

- A. The mediation shall be confidential. All documents prepared by parties or their counsel, and communications made by the parties or their counsel, for, during, or in connection with mediation, and any notes or other writings prepared by the mediator in connection with the proceeding shall be kept in confidence by the mediator, the parties and counsel. They shall not be summarized, described, reported or submitted to the court by the mediator or the parties. No party to the mediation shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation, or seek to compel the testimony of any other party or the mediator concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the Civil Practice Law and Rules or the New York Surrogate's Court Procedure Act shall not be shielded from disclosure merely because they are submitted or referred to in the mediation.
- B. No party to an action referred to mediation shall subpoena or otherwise seek to compel the mediator to testify in any legal proceeding concerning the content of the mediation. If a party to an action that had or has been referred to mediation attempts to compel such testimony, that party shall hold the mediator harmless against any resulting expenses,

including reasonable legal fees incurred by the mediator or reasonable sums lost by the mediator in representing himself or herself in connection therewith.

C. 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 circumstances:

- i. Whether the parties and their counsel attended the initial session will be reported to the court.
- ii. Mediator may report to the court whether the parties are requesting additional mediation sessions as well as the date of any mediation session.
- iii. 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. 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. 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. 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 will be notified.

7. Stay of Proceedings

Unless otherwise directed by the Court, referral to mediation will not stay the court proceedings in any respect.

8. Communication with the Court

The mediator may communicate with the court or its staff about administrative details of the

processing of any case referred to the Program but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant to these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end unless consented to by all parties.

9. Sanctions

Failure to comply with these rules may subject the offending party or attorney to sanctions, including but not limited to sanctions under CPLR 3126 and 22 NYCRR 130.

10. Mediation Survey

Parties and counsel shall complete a Mediation Participant Survey and return it promptly to the Coordinator after conclusion of mediation. The survey is meant to track participant satisfaction and shall not include any details of the substance of the case or mediation.

SURROGATE'S COURT: SUFFOLK COUNTY
PRESENT: HON. THERESA WHELAN

In the Matter of

FRANK APUZZO,

Deceased.

ORDER OF REFERENCE
MEDIATION

File #: 2019-3414/A

The above referenced matter having come before the court, and the court having determined that it is appropriate to refer the parties to mediation, it is

ORDERED that this case is referred to the Mediation Program of the Suffolk County Surrogate's Court, and that the mediation sessions shall be conducted in accordance with and subject to the procedures of the Mediation Program, with the following requirements:

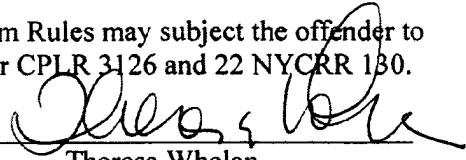
- ☐ [For in-house mediators]: The initial mediation session shall take place with an in-court mediator, _____ at _____ AM/PM on ____/____/____ by Microsoft Teams, or other platform, as determined by the court.

☒ [For roster mediators]: Counsel and parties have agreed to mediation with **John M. Czygier, Jr.** from the Court Roster. Counsel and parties shall contact the mediator as soon as practicable.

☐ [For private mediator]: Counsel and parties have determined to proceed with a mutually agreed upon mediator, to be compensated at their own expense. They shall inform the Program Coordinator the name and contact information of the mediator selected and the date of first session within ten (10) business days of the date of this order.
- If the parties have not reached a full settlement disposing of the matter, the parties and counsel, if represented shall again appear before the Surrogate's Court for a conference at 10 AM on **March 8, 2021** and shall contact the Court Attorney assigned to the matter 3 business days prior to the conference date to obtain the manner of such conference. No appearance is necessary if the parties have reached a full settlement disposing of the matter and a fully executed stipulation is filed with and approved by the court prior to this conference date.
- In the event of any scheduling issues, the parties and/or counsel shall immediately contact Amy E. Campbell, Surrogate's Court ADR Program Coordinator, at (631) 852-1729 or by email aecampbe@nycourts.gov at the Suffolk Mediation Center.
- The parties must complete and return the intake questionnaire to the Program Coordinator at least seven days prior to the initial mediation session, by email aecampbe@nycourts.gov.
- Failure to comply with this Order or the ADR Program Rules may subject the offender to sanctions, including but not limited to sanctions under CPLR 3126 and 22 NYCRR 130.

Suffolk, New York

Dated: 1/15, 2021


Theresa Whelan
Surrogate

**MODEL STANDARDS OF CONDUCT
FOR MEDIATORS**

AMERICAN ARBITRATION ASSOCIATION
(ADOPTED SEPTEMBER 8, 2005)

AMERICAN BAR ASSOCIATION
(APPROVED BY THE ABA HOUSE OF DELEGATES AUGUST 9, 2005)

ASSOCIATION FOR CONFLICT RESOLUTION
(ADOPTED AUGUST 22, 2005)

SEPTEMBER 2005

The Model Standards of Conduct for Mediators 2005

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution¹. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

¹ The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

² Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³ The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

The use of the term “shall” in a Standard indicates that the mediator must follow the practice described. The use of the term “should” indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term “mediator” is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.
 - 1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.
 - 2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where

appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

- B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

- A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
- B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
 - 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.
 - 2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality.
 - 3. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.
- C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

- A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.
- E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.
- F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

- A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.
 - 1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator

competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.
 3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.
- B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.
- C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so.
 2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.
 3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.
- B. A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

- C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.
- D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

- A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
 - 1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
 - 2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.
 - 3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.
 - 4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
 - 5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.
 7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.
 8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.
 9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
 10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
- B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

- A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.
 2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.
- B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.
- C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

- A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.
1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.
 2. A mediator's fee arrangement should be in writing unless the parties request otherwise.
- B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.
1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
 2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

- A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
 - 1. Fostering diversity within the field of mediation.
 - 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
 - 3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
 - 4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
 - 5. Assisting newer mediators through training, mentoring and networking.
- B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

**NEW YORK STATE UNIFIED COURT SYSTEM
DIVISION OF PROFESSIONAL AND COURT SERVICES**

OFFICE OF ADR PROGRAMS



**STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY
DISPUTE RESOLUTION CENTER MEDIATORS**

Revised 2009

STANDARDS OF CONDUCT FOR NEW YORK STATE COMMUNITY DISPUTE RESOLUTION CENTER MEDIATORS

INTRODUCTION

The New York State Office of Alternative Dispute Resolution Programs has developed these Standards of Conduct (“Standards”) for New York State mediators in community dispute resolution centers¹ located throughout New York State. These Standards have been adapted from The Revised Model Standards of Conduct created by the American Arbitration Association, the American Bar Association (Section of Dispute Resolution) and the Association of Conflict Resolution.²

The Standards are intended to serve as a general framework for the practice of mediation and aim to:

- 1.) educate mediators regarding current standards of practice;
- 2.) guide mediators in their practice;
- 3.) promote public confidence in mediation as a dispute resolution process;
and
- 4.) inform the mediating parties about the process.

The Standards include different levels of guidance³:

- ▶ Use of the term “may” is the lowest strength of guidance and indicates a practice that the mediator should consider adopting but which can be deviated from in the exercise of good professional judgment.
- ▶ Use of the term “should” indicates that the practice described in the Standard is strongly suggested and should be departed from only with very strong reason.
- ▶ Use of the term “shall” is the highest level of guidance to the mediator, indicating that the mediator must follow the practice described.

These Standards of Conduct are applicable to those practicing mediators who mediate under the auspices of a New York State Community Resolution Center Program.

The Standards are listed and followed by Comments, where appropriate. The order of the Comments is not intended to reflect any priority in their importance. The Standards are meant to be read and interpreted in their entirety.

¹A Community Dispute Resolution Center is a community-based, private, not-for-profit program that contracts with the Chief Administrative Judge of the Unified Court System of the State of New York to provide conciliation, mediation, arbitration, or other types of dispute resolution services.

²Joint Committee Draft, January 1, 2004 (approved by the American Bar Association 2005).

³This language is adopted in large part from the *Model Standards of Practice for Family and Divorce Mediation*, developed by the Symposium on Standards of Practice (August 2000).

The Standards are to be used as a guide for ethical mediation practice. The Standards are not intended to be used as a substitute for other professional rules, applicable law, court rules, or regulations.

To the extent that a mediator cannot resolve an ethical dilemma after reading these Standards as a whole, or that the mediator finds that a certain Standard may conflict with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Mediator Ethics Advisory Committee of the New York State Office of ADR Programs.⁴ The Mediator Ethics Advisory Committee recognizes that a mediator may need to resolve a conflict in a shorter time period than the Committee may have to respond. In such a case, the mediator should exercise good professional judgment for guidance in reaching a resolution of the conflict.⁵ Nonetheless, the mediator should consult the Mediator Ethics Advisory Committee.

The Standards are followed by “Committee Notes” that clarify, define, and expand on the statements made in the Standards and Comments, as well as a “Definitions” section and an “Appendix.”

⁴The Mediator Ethics Advisory Committee (“*Committee*”) serves as an ethics advisory board, to interpret and clarify the Standards as they are raised by practicing CDRCP mediators in conjunction with an ethical dilemma. The committee is appointed and serves under the rules created by the New York State Office of ADR Programs. The Committee will consider any ethical dilemma that a mediator raises in accordance with its rules, requiring that the mediator state the dilemma in writing and send the request to: The Mediator Ethics Advisory Committee, New York State Office of ADR Programs, 25 Beaver Street, Room 859-A, New York, NY, 10004, or by e-mail to: cdrcp@courts.state.ny.us.

⁵This may include looking to other applicable professional standards within the mediation field. See *Committee Notes*.

STANDARD I. SELF-DETERMINATION

- A. A mediator shall conduct a mediation in a manner that supports the principle of party self-determination as to both process and outcome. Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree.

COMMENTS:

1. Parties can exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in the process, and outcomes. The mediator is responsible for supporting party self-determination in each area, tempered by a mediator's duty to conduct a quality mediation process.
2. Although party self-determination is a fundamental principle of mediation practice, a mediator may need to balance party self-determination with a duty to conduct a quality mediation process. When resolving these potentially conflicting duties, a mediator should be cautious of conflict of interest issues and avoid influencing party decisions for reasons such as higher settlement rates, egos, increased fees and outside pressures from individuals or organizations.
3. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but the mediator can make the parties aware that they may consult other professionals to help them make informed choices at any point during the mediation process.⁶
4. Where a power imbalance exists between the parties such that one or both parties cannot exercise self-determination, the mediator should postpone the session, withdraw from the mediation, terminate the mediation, or consult with center staff.⁷ (see *Committee Notes*)

⁶A party is unable to make a fully informed choice where, for example, the party is unable to articulate his or her concerns or lacks substantial information regarding the dispute such that the party is unable to make procedural and substantive decisions or an informed decision to agree or not to agree.

⁷Indicators of a "power imbalance" that may impede a party's ability to make a decision freely and willingly include where one party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

STANDARD II: IMPARTIALITY

- A. A mediator shall conduct a mediation in an impartial manner and shall avoid conduct that gives the appearance of partiality toward or prejudice against a party. Impartiality means freedom from favoritism or prejudice in word, action or appearance.
- B. A mediator shall accept for mediation only those matters in which the mediator can remain impartial.
- C. If at any time a mediator is unable to conduct the process in an impartial manner, the mediator shall withdraw.
- D. In any mediation, a mediator shall neither give nor accept a gift, favor, loan or other item of value that would raise a question as to the mediator's actual or perceived impartiality.

COMMENTS:

- 1. A mediator should not act with partiality based on any participant's race, ethnicity, sex, religion, national origin, or sexual orientation or to any other factors that may create bias on the mediator's part.(see *Committee Notes*)
- 2. During the mediation, a mediator shall maintain impartiality even while raising questions regarding the reality, fairness, equity, durability and feasibility of proposed options for resolution. In the event circumstances arise during a mediation that would reasonably be construed to impair or compromise a mediator's impartiality, the mediator is obligated to withdraw.⁸
- 3. The mediator's commitment is to remain impartial towards the parties and their choices in the process, in both joint and private sessions with the parties.⁹

⁸FLA Rule 10.330, *Committee Notes*, Florida Rules for Certified and Court Appointed Mediators (2000 Revision).

⁹A party may request, or a mediator may offer to the parties as an option, the opportunity to meet individually with the mediator. This private session is often referred to as a "separate session" or "caucus". During such separate sessions between a party and the mediator, the mediator continues to be bound by the Standard of Impartiality and the Standard of Confidentiality (Standard V.).

STANDARD III. CONFLICTS OF INTEREST

- A.** A mediator shall avoid the appearance of a conflict of interest before, during and after a mediation either by disclosing the conflict or withdrawing from the process.
- B.** Before accepting a mediation, a mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. Thereafter, and as soon as practical, a mediator shall disclose all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's ability to fairly discharge his or her responsibilities. If a mediator learns any fact described above after accepting a mediation, she or he shall disclose it to the parties as soon as is practical. If all parties agree to retain the mediator after disclosure, the mediator may proceed or continue with the mediation. However, if a conflict of interest casts serious doubt on the integrity of the process, the mediator shall withdraw or decline to proceed regardless of the express agreement of the parties.
- C.** During a mediation, a mediator shall not solicit or otherwise attempt to procure any future professional services, including future mediations, beyond the sessions necessary, to obtain an outcome.
- D.** Subsequent to mediation, a mediator shall not establish another relationship with one of the parties in any matter that would raise questions about the integrity of the mediation process.

COMMENTS:

- 1.** The mediator's duty to make a reasonable inquiry may be shaped by the sponsoring organization for which she or he mediates. A mediator should make an inquiry of the parties and participants prior to the time of the mediation regarding potential conflicts of interest. Given the central role that a mediator's impartiality assumes to promote the integrity and effectiveness of the mediation process, a mediator should avoid conduct that undermines the public's or party's perception of her or his impartiality. This duty to avoid conflicts of interest exists at the pre-mediation stage, during the mediation conference, and following the mediation session.
- 2.** Disclosure of relationships or circumstances that would create the potential for a conflict of interest rests on the mediator and should be made at the earliest possible opportunity and under circumstances that will allow the parties to freely exercise their right of self-determination as to both the selection of the mediator and participation in the mediation process.
- 3.** Development of relationships by the mediator following the mediation with persons, organizations or agencies that might create a perceived or actual conflict of interest depend upon considerations such as time elapsed following the mediation and the nature of the relationship established and services offered.

STANDARD IV: COMPETENCE

- A.** A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties and the sponsoring organization for which she or he mediates.
- B.** If a mediator cannot satisfy this Standard, the mediator shall immediately notify the parties and take steps reasonably appropriate under the circumstances, including declining or withdrawing from the mediation or, where appropriate, obtaining assistance from others.
- C.** A mediator shall not conduct any aspect of a mediation while impaired by drugs, alcohol, medication or otherwise.

COMMENTS:

- 1.** A mediator should obtain the training, skills, experience in mediation, cultural understanding, and other qualities that are necessary for effective mediation, consistent with the sponsoring organization for which he or she mediates.
- 2.** A mediator should inform the parties, where necessary or when asked, of information relevant to the mediator's training, education and experience.¹⁰
- 3.** A mediator should attend educational programs and related activities to enhance and strengthen his or her personal knowledge of and skills in the mediation process, consistent with the sponsoring organization for which she or he mediates.

¹⁰Under the CDRC Program Manual and as required by Article 21-A of the New York State Judiciary Law governing all New York State community dispute resolution center programs, community mediators are required to complete a minimum of 30 hours of initial training, followed by a supervised apprenticeship at the center where they volunteer prior to becoming a community mediator for that center (CDRCP Program Manual, Ch. 7, Section I. A.(1) (revised January 1, 2007)). Additional training is required for community mediators who mediate disputes in family cases, youth cases, and civil, city, and district court cases (CDRCP Program Manual, Ch. 7, Section I. A.(5)).

STANDARD V: CONFIDENTIALITY

- A. A mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, including information obtained from the parties, non-party participants or documents shown to the mediator, with the exception of any allegation of child abuse.¹¹

COMMENTS:

1. All mediations that are conducted by mediators on behalf of a New York State community resolution center are protected by a confidentiality statute, Article 21-A of the New York State Judiciary Law.¹²
2. If an allegation of child abuse is made during the mediation, the mediator is required to stop the mediation process, consult with each party individually for the purpose of obtaining as much information about the circumstances as possible, and consult with center program staff to determine whether to resume the mediation process.¹³
3. A mediator who meets with a party in private session during a mediation should not convey directly or indirectly to any other party, group or institution any information that was obtained during that private session without the consent of the disclosing party.
4. A mediator may report, pursuant to the policies of the local center, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.¹⁴
5. Nothing in this Standard should be construed to prohibit monitoring, research, and evaluation of mediation activities or the continuing education of mediators.
6. Nothing in this Standard should be construed to prohibit a mediator from disclosing necessary information to staff of the sponsoring organization for which she or he mediates.

¹¹All centers deem allegations or evidence of child abuse inappropriate for mediation; accordingly, this information is not deemed confidential pursuant to Formal Opinion No. 83-F17 of the New York State Attorney General (1983).

¹²This statute protects all memoranda, work product and case files from disclosure in judicial or administrative proceedings and deems confidential all communications that relate to the subject matter of the dispute resolution proceeding. Mediators at community dispute resolution center programs may request participants to sign a written consent form agreeing to mediate in order to ensure full protection under Article 21-A (1981).

¹³CDRCP Program Manual, Ch. 5, Section II. A., Guideline IV. New York State CDRCP mediators are required to be aware of these Guidelines (revised May 10, 2012).

¹⁴*See generally* CDRC Program Manual.

STANDARD VI: QUALITY OF THE PROCESS

- A. A mediator shall conduct a quality mediation process that is consistent with these Standards of Conduct.
- B. A mediator shall terminate the mediation, withdraw from service, or take other appropriate steps if she or he believes that participant conduct, including that of the mediator, jeopardizes sustaining a quality mediation process.
- C. A mediator shall not exclude a party's attorney from a mediation session, including an attorney for the child.

COMMENTS:

- 1. A mediator should agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.
- 2. A mediator should only accept cases when she or he can satisfy the reasonable expectation of the parties concerning the timing of the process.
- 3. A mediator should only accept cases when he or she can satisfy the reasonable expectation of the parties concerning his or her experience and training based on the guidelines of the sponsoring organization for which the mediator mediates.
- 4. The mediator should respect the decision of a party who chooses not to participate in the presence of another party's attorney or another third party (see *Committee Notes*)
- 5. The primary purpose of a mediator is to help the parties communicate, negotiate, and/or make decisions. This role differs substantially from other professional client relationships. Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators should strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice or services, or consider resolving their dispute through arbitration, neutral evaluation, or another dispute resolution process.
- 6. A mediator should not conduct a dispute resolution procedure other than mediation but attempt to characterize it as mediation in an effort to gain the protection of rules, statutes or other governing authorities pertaining to mediation.
- 7. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.
- 8. If a party appears to have difficulty comprehending the process, issues or settlement options, or difficulty participating in the mediation process, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination. If no such option can be reasonably provided, the mediator should take other appropriate steps, including

postponing the session, withdrawing from the mediation or terminating the mediation.

9. A mediator should postpone the session or take other appropriate steps if he or she becomes aware that a party is unable to participate due to drug or alcohol use.
10. If a mediation is being used to further illegal conduct, a mediator should take appropriate steps to insure a quality process including, if necessary, postponing the session, withdrawing from the mediation or terminating the mediation.
11. A mediator has an ongoing obligation to be sensitive to power imbalances between the parties and to ensure that the mediation process is conducted in a manner consistent with these Standards. If the mediator cannot ensure a quality process, the mediator should take appropriate steps to postpone the session, withdraw from the mediation or terminate the mediation.¹⁵ (see *Committee Notes*)
12. A mediator is responsible for confirming with the parties that mediation is an appropriate dispute resolution process under the circumstances of each case.¹⁶
13. A mediator should consult with center staff if a party reveals or the mediator is otherwise made aware of a credible threat of serious and imminent physical harm to the speaker or to center staff.

¹⁵Such power imbalances include where a party threatens, intimidates, or otherwise coerces the other party into participating in or reaching a desired result in the mediation.

¹⁶ FLA Rule 10.400. Mediator's Responsibility to the Mediation Process.

STANDARD VII: ADVERTISING AND SOLICITATION

- A.** A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating his or her qualifications, experience, and range of available professional services.

COMMENTS:

- 1.** Communications, including business cards, letter heads, or computer based communications, should not include any statistical settlement data or any promises as to outcome.
- 2.** Communications may include references to a mediator's fulfilling state, national or private organization qualifications only if the entity referred to has a procedure for qualifying mediators, and the mediator has been duly granted the requisite status.¹⁷
- 3.** A mediator should not solicit in a manner that could give an appearance of partiality for or against a party.
- 4.** A mediator should not list names of clients or persons served in promotional materials and communications without their permission.

¹⁷The New York State Office of ADR Programs does not certify mediators. Under the CDRC Program Manual, however, mediators may obtain certification by a local center by completing an initial community training that is at least 30 hours in duration and conducted by a trainer who has been certified by the New York State Office of ADR Programs, followed by an apprenticeship at the center, a performance evaluation under the supervision of the center's Program Director, and an assessment by the Director that the mediator is prepared to mediate pursuant to the center's performance standards (Ch. 7, Section 1.A.(1)).

STANDARD VIII: RESPONSIBILITIES TO THE MEDIATION PROFESSION

- A.** A mediator shall act in a manner that enhances the growth and quality of the mediation profession.

COMMENTS: Any person offering mediation services under the auspices of a New York State Community Dispute Resolution Program is considered to be a member of the mediation profession. Among other activities, a mediation professional should:

- 1.** Foster diversity in the mediation field, reaching out to individuals with differing backgrounds and perspectives.
- 2.** Strive to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
- 3.** Participate in research in the field when given the opportunity, including obtaining participant feedback when appropriate.
- 4.** Participate in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
- 5.** Assist newer mediators through training, mentoring and networking.
- 6.** Exhibit tolerance of differing points of view within the field, seeking to learn from one another and work together to improve the profession and better serve people in conflict.

COMMITTEE NOTES

These Committee Notes contain annotations to the Introduction and “Comments” listed under each Standard. The Committee Notes include both “General Notes” and “Comment Notes.” The General Notes contain introductory comments by the Committee and the Comment Notes clarify, define, and expand upon the specific Comment to which they refer. This section may be updated as necessary by the Mediator Ethics Advisory Committee (“Committee”).

Introduction to Committee Notes

Where a mediator is unable to resolve an ethical dilemma after reading these Standards as a whole, or finds that a certain Standard conflicts with another Standard contained therein, the mediator is encouraged to address this concern in writing to the Committee. In the interim, a mediator may look to other applicable professional rules or standards within the mediation field. Specific reference should be made to the Community Dispute Resolution Program Manual as a general rule, but particularly in circumstances that require immediate and decisive action by a mediator. Such instances may include where a party is in danger by the other party due to domestic violence, or the particular protocol a mediator should employ if a party reveals or the mediator is otherwise made aware of an allegation of child abuse. A mediator might also look to the Model Standards of Practice for Family and Divorce Mediation, that specifically addresses ethical practice for mediators of family cases (Symposium on Standards of Practice August 2001).

STANDARD I. SELF-DETERMINATION

General Notes

Practitioners and scholars cite self-determination as the fundamental principle of mediation. Comments for Standard I, however, identify how this principle might conflict with other Standards and suggest that a mediator’s duty, in limited circumstances, may override this principle.

Comment Notes

Comment 4.

The Committee recognizes that power imbalances are an inherent part of mediation between any two parties, based on many factors including informational, emotional, or verbal differences, or even due to the disparity between the numbers of parties at the table. However, since the issue of power at the mediation table concerns the fundamental principle of self-determination, the mediator should be sensitive to any significant challenge to a party’s ability to freely and willingly make decisions regarding his or her own future. Such circumstances include where one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In those cases the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

Comment 3.

General Notes

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator’s roles is to

make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

Comment Notes

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

STANDARD II: IMPARTIALITY

Comment Notes

Comment 1.

The Committee's intention in this Comment is to reflect all possible bases of bias that may cause a mediator to act with partiality. The classes of persons listed under this Comment are provided as examples, and are not intended to serve as an exhaustive or exclusive list.

The Committee's emphasis is on the mediator's action with regard to any bias he or she may hold. A mediator who may have a particular bias towards a party for any reason must not act with partiality due to her or his views. A mediator who is unable to act in an impartial, neutral way towards all parties in the dispute must decline to mediate or withdraw from the mediation.

STANDARD V. CONFIDENTIALITY

Comment 6.

General Notes

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

Comment Notes

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

STANDARD VI: QUALITY OF THE PROCESS

Comment Notes

Comment 4.

A center must permit all parties to appear with representatives, including counsel, and to present all relevant evidence relating to the dispute, including calling and examining witnesses (22 New York Code of Rules and Regulations Part 116.3(I); see also and CDRC Program Manual, Ch. 5, Section IV. B.(3)). Parties who speak another language are afforded the assistance of a court interpreter, who must be present in the mediation (although no direct authority addresses this, this practice is recognized by centers as an "equal access to justice" issue; indirectly, this practice is covered under CDRC Program Manual Ch. 5, Section IV. B.(4), centers shall not discriminate on the basis of age, sex, religion, creed, ethnic origin, sexual orientation or disability) (emphasis added). Parties may also request the presence of other third parties, such as friends and/or family for support. Prior to the mediation, both parties should determine together if these third parties will participate in the session.

Comment 5.

General Notes

Party self-determination means that parties are free to make voluntary and uncoerced procedural and substantive decisions, including whether to make an informed choice to agree or not agree. In order to make an informed choice, one of the mediator's roles is to make the parties aware that they may consult other professionals at any point in the mediation process. In addition, to ensure a quality mediation process, the mediator should not mix the role of mediator with that of any other professional role. While a

mediator may hold specialized knowledge, due to the mediator's profession or area of expertise, a mediator should only be acting as a mediator when mediating and not in any other professional role.

Comment Notes

The Committee recognizes that the mediator may have specialized knowledge, due to the mediator's professional role or area of expertise, as stated in Standard VI. Quality of the Process, Comment 5. Sometimes this knowledge can impact what the mediator believes to be the potential outcome of the parties' decisions (for example, the mediator is an attorney and is aware of a particular law that impacts the parties' agreement). However, even if the mediator were correct and this knowledge would impact the parties' agreement, the mediator must be careful to assist the parties in making informed choices without providing direct (professional) advice, legal, therapeutic or otherwise. Since, as Standard I. Self-Determination, Comment 3. states, the mediator's role is solely to help the parties make informed choices at any point during the mediation process, the mediator must find a balance between making the parties aware that they may consult other professionals to help them make informed choices with providing specific advice based on the mediator's specialized knowledge.

When faced with this dilemma, the mediator can assist the parties by questioning their understanding of the implications of their decisions and making them aware that they may consult with other professionals regarding any decisions they make or would like to make. The mediator should take care to question the parties in a balanced way, so that both parties are receiving the same consideration.

Committee Opinions for reference: 2008-02, 2009-01.

Comment 10.

General Notes

While a mediator shall maintain the confidentiality of all information obtained by the mediator during a mediation, except any allegation of child abuse, that does not prohibit a mediator from disclosing necessary information to staff. If a mediator becomes aware of or suspects that a crime may be or may have been committed, then the mediator should consult with staff regarding next steps without delay.

Comment Notes

The Committee does not want to put the mediator in the position of making determinations as to what is legal, since it is beyond the scope of the mediator's role. When the mediator is faced with a situation where there is a concern about the legality of a certain action or a fear of something illegal taking place, the mediator should disclose this information to center staff, as indicated in Standard V. Confidentiality, Comment 6. The mediator must also consider Standard VI. Quality of the Process, Comment 10. at this time, and, if a mediation is being used to further illegal conduct, the mediator should take appropriate steps to insure a quality process, including, if necessary, postponing the session, or withdrawing from or terminating the mediation.

Committee Opinions for reference: 2006-02, 2006-03, 2008-01.

Comment 11.

Comment Notes

A mediator has a duty to conduct a quality mediation process. The quality of the process, consistent with the Standards, requires the mediator to conduct a process that supports party self-determination, with impartiality, no conflicts of interest, competence, and by upholding the confidentiality of the parties (with the exception of child abuse). Specifically, this Comment refers to the Standard of Self-Determination (Standard I.). As the Committee states in Committee Notes to Standard I. Self-Determination, Comment 4., any significant challenge to a party's ability to self-determine or freely and willingly make decisions regarding his or her own future should be a concern to the mediator, such as when one party is threatening, intimidating, or otherwise manipulating the other party through either words or actions. In such circumstances, the mediator should take immediate action to either postpone the session, withdraw from the mediation or terminate the mediation.

Revision to Standard VI. Quality of the Process, C.

This new language has been added in order to ensure that a necessary party to a mediation is not excluded from the session.

While the Committee requires the mediator to not exclude the attorney for the child, the Committee also recognizes that the CDRCs play an active role in ensuring that the stakeholders in the mediation process in cases where an attorney for the child would be appointed -- generally Family Court personnel and other professionals who are integrally involved in a system based case such as a caseworker/ supervisor, in addition to the parties -- are routinely notified of scheduled mediation sessions and have an equal chance of participation

The CDRC Program Manual recognizes the importance of including all necessary parties in the mediation process (Chapter 5, Operational Policies, IV.B.1.3.) and this is reinforced through mediator's initial training as well (Chapter 7, Standards and Guidelines for Mediators and Mediation Trainers, III., 8.).

DEFINITIONS

Conflict of Interest: A person has a conflict of interest when a person is in a position that requires him or her to exercise judgment on behalf of others and also has interests or obligations that might interfere with the exercise of his or her judgment.¹⁸

Impartiality: Impartiality means freedom from favoritism or prejudice in word, action or appearance.

Mediation: For the purpose of these Standards, mediation is defined as a confidential, informal procedure in which a neutral third party helps disputants communicate, negotiate, and/or make decisions. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome.

¹⁸www.unmc.edu/ethics/words.html.

APPENDIX

ARTICLE 21-A COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM

Section	849-a. Definitions.
	849-b. Establishment and administration of centers.
	849-c. Application procedures.
	849-d. Payment procedures.
	849-e. Funding.
	849-f. Rules and regulations.
	849-g. Reports.

S 849-a. Definitions. For the purposes of this article:

1. "Center" means a community dispute center which provides conciliation, mediation, arbitration or other forms and techniques of dispute resolution.
2. "Mediator" means an impartial person who assists in the resolution of a dispute.
3. "Grant recipient" means any nonprofit organization that administers a community dispute resolution center pursuant to this article, and is organized for the resolution of disputes or for religious, charitable or educational purposes.

S 849-b. Establishment and administration of centers.

1. There is hereby established the community dispute resolution center program, to be administered and supervised under the direction of the chief administrator of the courts, to provide funds pursuant to this article for the establishment and continuance of dispute resolution centers on the basis of need in neighborhoods.
2. Every center shall be operated by a grant recipient.
3. All centers shall be operated pursuant to contract with the chief administrator and shall comply with all provisions of this article. The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article, including provisions for periodic monitoring and evaluation of the program.
4. A center shall not be eligible for funds under this article unless:
 - (a) it complies with the provisions of this article and the applicable rules and regulations of the chief administrator;
 - (b) it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques;
 - (c) it provides dispute resolution without cost to indigents and at nominal or no cost to other participants;
 - (d) it provides that during or at the conclusion of the dispute resolution process there shall be a written agreement or decision setting forth the settlement of the issues and future responsibilities of each party and that such agreement or decision shall be available to a court which has adjourned a pending action pursuant to section 170.55 of the criminal procedure law;
 - (e) it does not make monetary awards except upon consent of the parties and such awards do not exceed the monetary jurisdiction of the small claims part of the justice court, except that where an action has been adjourned in contemplation of dismissal pursuant to section 215.10 of the criminal procedure law, a monetary award not in excess of five thousand dollars may be made; and
 - (f) it does not accept for dispute resolution any defendant who is named in a filed felony complaint, superior court information, or indictment, charging: (i) a class A felony, or (ii) a violent felony offense as defined in section 70.02 of the penal law, or (iii) any drug offense as defined in article two hundred twenty of the penal law, or (iv) a felony upon the conviction of which defendant must be sentenced as a second felony offender, a second violent felony offender, or a persistent violent felony offender pursuant to sections 70.06, 70.04 and 70.08 of the penal law, or a

- felony upon the conviction of which defendant may be sentenced as a persistent felony offender pursuant to section 70.10 of such law.
5. Parties must be provided in advance of the dispute resolution process with a written statement relating:
- (a) their rights and obligations;
 - (b) the nature of the dispute;
 - (c) their right to call and examine witnesses;
 - (d) that a written decision with the reasons therefor will be rendered; and
 - (e) that the dispute resolution process will be final and binding upon the parties.
6. Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

S 849-c. Application procedures.

1. Funds appropriated or available for the purposes of this article may be allocated for programs proposed by eligible centers. Nothing in this article shall preclude existing resolution centers from applying for funds made available under this article provided that they are otherwise in compliance with this article.
2. Centers shall be selected by the chief administrator from applications submitted.
3. The chief administrator shall require that applications submitted for funding include, but need not be limited to the following:
 - (a) The cost of each of the proposed centers components including the proposed compensation of employees.
 - (b) A description of the proposed area of service and number of participants who may be served.
 - (c) A description of available dispute resolution services and facilities within the proposed geographical area.
 - (d) A description of the applicant's proposed program, including support of civic groups, social services agencies and criminal justice agencies to accept and make referrals; the present availability of resources; and the applicant's administrative capacity.
 - (e) Such additional information as is determined to be needed pursuant to rules of the chief administrator.

S 849-d. Payment procedures.

1. Upon the approval of the chief administrator, funds appropriated or available for the purposes of this article shall be used for the costs of operation of approved programs. The methods of payment or reimbursement for dispute resolution costs shall be specified by the chief administrator and may vary among centers. All such arrangements shall conform to the eligibility criteria of this article and the rules and regulations of the chief administrator.
2. The state share of the cost of any center approved under this section shall include a basic grant of up to twenty thousand dollars for each county served by the center and may include an additional amount not exceeding fifty per centum of the difference between the approved estimated cost of the program and the basic grant.

S 849-e. Funding.

1. The chief administrator may accept and disburse from any public or private agency or person, any money for the purposes of this article.
2. The chief administrator may also receive and disburse federal funds for purposes of this article, and perform services and acts as may be necessary for the receipt and disbursement of such federal funds.

- (a) A grant recipient may accept funds from any public or private agency or person for the purposes of this article.
- (b) The state comptroller, the chief administrator and their authorized representatives, shall have the power to inspect, examine and audit the fiscal affairs of the program.
- (c) Centers shall, whenever reasonably possible, make use of public facilities at free or nominal cost.

S 849-f. Rules and regulations.

The chief administrator shall promulgate rules and regulations to effectuate the purposes of this article.

S 849-g. Reports.

Each resolution center funded pursuant to this article shall annually provide the chief administrator with statistical data regarding the operating budget, the number of referrals, categories or types of cases referred, number of parties serviced, number of disputes resolved, nature of resolution, amount and type of awards, rate of compliance, returnees to the resolution process, duration and estimated costs of hearings and such other information the chief administrator may require and the cost of hearings as the chief administrator requires. The chief administrator shall thereafter report annually to the governor and the and the temporary president of the senate, speaker of the assembly, and chairpersons of the judiciary and children and families committees regarding the operation and success of the centers funded pursuant to this article. The chief administrator shall include in such report all the information for each center that is required to be in the report from each center to the chief administrator.



SCBA Lawyers Helping Lawyers Committee

The SCBA Lawyers Helping Lawyers Committee provides free and confidential assistance to those in the legal community who are concerned about their alcohol or drug use and/or mental health or wellbeing or that of a colleague or family member.

Assistance is available to the legal community including attorneys, members of the judiciary, law students, and family members dealing with alcohol or substance abuse disorder, other addictive disorders, anxiety, depression, vicarious trauma, age related cognitive decline and other mental health concerns that affect one's well-being and professional conduct.

**Please call the
Lawyers Helping Lawyers Helpline at (631) 697-2499
to speak with an attorney who will provide support and recommend
resources. All calls are private and confidentiality is protected under
Judiciary Law Section 499. (Lawyer Assistance Committee)**

Feel Free to Join Us at Our Weekly Recovery Meeting