

X. ALTERNATE DISPUTE RESOLUTION AND GENERAL PROVISIONS

[83.7](#) Mandatory Mediation Plan..... 66
[83.8](#) Assisted Mediation Program. 66
[83.9](#) Judicial Mediation in Prisoner Civil Rights Cases. 70
[83.10](#) Commission to Take Testimony. 70
[83.11](#) Student Practice. 70
[83.12](#) Production and Disclosure of Documents and Testimony of
Judicial Personnel in Legal Proceedings. 70
[83.13](#) Sealed Matters. 71
[83.14](#) Appearances of Former Judicial Officers. 72
[84.1](#) Forms. 72
[85.1](#) Title. 72
[86.1](#) Effective Date. 72

**SECTION X.
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83.7	Mandatory Mediation Plan.....	66
83.8	Assisted Mediation Program ..	66
83.9	Judicial Mediation in Prisoner Civil Rights Cases	70
83.10	Commission to Take Testimony	70
83.11	Student Practice	70
83.12	Production and Disclosure of Documents and Testimony of Judicial Personnel.	70
83.13	Sealed Matters ..	71
83.14	Appearances by Former Judicial Officers.	72
84.1	Forms.	72
85.1	Title.	72
86.1	Effective Date.	72

83.7 Mandatory Mediation Plan

Purpose. The United States District Court for the Northern District of New York has adopted this Mandatory Mediation Plan. The paid Mediation Program is designed to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation, without impairing the quality of justice or the right to trial. *(See General Order #47 available at www.nynd.uscourts.gov)*

83.8 Assisted Mediation Program

- (a) **Purpose.** The purpose of this Rule is to provide a supplementary procedure to the Court's existing alternative dispute resolution procedures that is specifically designed to assist civilian *pro se* litigants. This Rule provides for the possibility of an earlier resolution of civil disputes resulting in savings of time and cost to litigants and the Court without sacrificing the quality of justice rendered or the right of litigants to a full trial on all issues not resolved through assisted mediation.

- (b) **Definitions.** Mediation is a process by which an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation and settlement. The mediator is an advocate for settlement and uses the mediation process to help the parties fully explore any potential area of agreement. The mediator does not serve as a judge or arbitrator and has no authority to render any decision on any disputed issue or to force a settlement. The parties themselves are responsible for negotiating any resolution(s) to their dispute.

- (c) **Scope.** The Court may assign specially trained *pro bono* Special Mediation Counsel to assist *pro se* civilian litigants with preparing for and participating in assisted mediation. The Assisted Mediation Program is open to civilian *pro se* parties to actions in the Northern District of New York. The assigned district judge or magistrate judge

determines if the case would benefit from assisted mediation and would also benefit from the assignment of Special Mediation Counsel to assist the *pro se* party with the mediation process.

Appointment of Special Mediation Counsel is in no way guaranteed, even if the action is referred to the court-annexed assisted mediation program. Appointment is at the sole discretion of the presiding judge.

(d) Procedure. The procedure and limits of Assisted Mediation are governed by this Rule, including the filing requirements preceding and following the assisted mediation session.

1. If the court determines that referral to the Assisted Mediation Program is appropriate, the Court shall enter an order of reference to the Assisted Mediation Program.

2. Within ten (10) days of the entry of the order of reference, the *pro se* party shall complete and sign the Assisted Mediation Program declaration form provided by the Clerk's Office.

3. After receipt of the completed declaration, the Court shall issue an order appointing Special Mediation Counsel, appointing a mediator, and setting a date or time frame in which the assisted mediation session should be held. The court may appoint a member of the court's mediation panel, the assigned magistrate judge, or another magistrate judge as the mediator.

4. If the assisted mediation session does not result in settlement, at the conclusion of mediation procedures, the Court shall issue an order relieving the Special Mediation Counsel of further representation duties and termination of the attorney-client relationship.

(e) Duties of Special Mediation Counsel. Within five days of the filing of the order of reference, the Special Mediation Counsel shall contact the *pro se* party to help prepare for the assisted mediation session. On the agreed upon or set date, **the Special Mediation Counsel shall attend the assisted mediation session** and provide assistance to the *pro se* party. Thereafter, the Special Mediation Counsel shall help the *pro se* party complete any follow-up to the assisted mediation session, including the processing of a settlement agreement when necessary.

(1) Memorandum for Assisted Mediation. At least two days prior to the mediation session, each party shall provide to the mediator a "memorandum for assisted mediation." This memorandum shall

- a. State the name and role of each person expected to attend;
- b. Identify each person with full settlement authority;
- c. Include a concise summary of the party's claims or defenses;
- d. Discuss liability and damages; and

- e. State the relief sought by such party

The memorandum for assisted mediation shall not exceed five pages, and the parties shall not file these documents in the case or otherwise make them part of the court file.

- (f) **Service to the Bar and Court Provided by Special Mediation Counsel.** Special Mediation Counsel performs duties as a *pro bono* service to the Court, litigants, and the bar. Costs Special Mediation Counsel incurs during the course of representation of the *pro se* party, including costs associated with obtaining copies of materials filed prior to appointment and in attending mediation sessions, are recoverable under [L.R. 83.3\(g\)](#).
- (g) No person shall serve as a mediator in an action in which any of the circumstances specified in 28 U.S.C. § 455 exists, or may in good faith be believed to exist. Additionally, any mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144. Furthermore, the mediator has a continuing obligation to disclose any information that may cause a party or the court to believe, in good faith, that such mediator should be disqualified.
- (h) Assisted mediation sessions under this Rule may be held in any available court space or in any other suitable location agreeable to the mediator and the parties. Consideration shall be given to the convenience of the parties and to the cost and time of travel involved.
- (i) There shall be no continuance of an assisted mediation session beyond the time set in the referral order except by order of the Court upon a showing of good cause. If any rescheduling occurs within the prescribed time, the parties or the mediator must notify the ADR clerk and select the location of the rescheduled hearing.
- (j) The parties shall promptly report any settlement that occurs prior to the scheduled assisted mediation to the mediator and to the ADR clerk.
- (k) **Attendance Required.** The attorneys who are expected to try the case for any represented parties shall appear and shall be accompanied by an individual with authority to settle the lawsuit. Those latter individuals shall be the parties (if the parties are natural persons) or representatives of parties that are not natural persons. These latter individuals may not be counsel (except in-house counsel). Attorneys for the parties shall notify other interested parties such as insurers or indemnitors who shall attend and are subject to the provisions of this Rule. Only the assigned judge may excuse attendance of any attorney, party, or party's representative. Anyone who wants to be excused from attending the assisted mediation must make such request in writing to the presiding judge at least forty-eight (48) hours in advance of the assisted mediation session.
- (l) **Good Faith Participation in the Process.** Parties and counsel shall participate in good faith, without any time constraints, and put forth their best efforts toward settlement. Typically, the mediator will meet initially with all parties to the dispute and their counsel in a joint session and thereafter separately with each party and their representative. This

process permits the mediator and the parties to explore the needs and interests underlying their respective positions, generate and evaluate alternative settlement proposals or potential solutions, and consider interests that may be outside the scope of the stated controversy including matters that the Court may not address. The parties will participate in crafting a resolution of the dispute.

- (m) **Confidentiality.** Assisted mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during assisted mediation. There shall be no stenographic or electronic record, e.g., audio or video, of the assisted mediation process.
1. All written and oral communications made in connection with or during the assisted mediation session are confidential.
 2. No communication made in connection with or during any assisted mediation session may be disclosed or used for any purpose in any pending or future proceeding in the U.S. District Court for the Northern District of New York.
 3. Privileged and confidential status is afforded all communications made in connection with the assisted mediation session, including matters emanating from parties and counsel as well as mediators' comments, assessments, and recommendations concerning case development, discovery, and motions. Except for communication between the assigned judge and the mediator regarding noncompliance with program procedures (*as set forth in this Rule*), there will be no communications between the Court and the mediator regarding a case that has been designated for assisted mediation. The parties will be asked to sign an agreement of confidentiality at the beginning of the assisted mediation session.
 4. Parties, counsel and mediators may respond to inquiries from authorized court staff which are made for the purpose of program evaluation. Such responses will be kept in strict confidence.
 5. The mediator may not be required to testify in any proceeding relating to or arising out of the matter in dispute. Nor may the mediator be subject to process requiring disclosure of information or data relating to or arising out of the matter in dispute.
 6. **Immunity.** Mediators, as well as the Mediation Administrator (ADR clerk), shall be immune from claims arising out of acts or omissions incident to service as a court appointee in the mediation program. *See, e.g., Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994).
 7. **Default.** Subject to the mediator's approval, the assisted mediation session may proceed in the absence of a party, who, after due notice, fails to be present. The Court may impose sanctions on any party who, absent good cause shown, fails to attend or

participate in the assisted mediation session in good faith in accordance with this Rule.

- 8. Conclusion of the Mediation Session.** The assisted mediation shall be concluded
- a.** By the parties' resolution and settlement of the dispute;
 - b.** By adjournment for future assisted mediation by agreement of the parties and the mediator; or
 - c.** Upon the mediator's declaration of impasse that future efforts to resolve the dispute are no longer worthwhile.

Unless the Court authorizes otherwise, assisted mediation sessions shall be concluded at least fourteen (14) days prior to any final pretrial conference that the Court has scheduled.

If the assisted mediation is adjourned by agreement for further mediation, the additional session shall be concluded within the time the Court orders.

- (n)** Immediately upon conclusion of the assisted mediation, the mediator shall file a mediation report with the ADR clerk, indicating only whether the case settled, settled in part, or did not settle. This requirement does not apply if a magistrate judge serves as the mediator.
- (o)** In the event the parties reach an agreement to settle the case, the representatives for each party shall promptly notify the ADR clerk and promptly prepare and file the appropriate stipulation of dismissal.
- (p)** If the parties reach a partial agreement to narrow, withdraw or settle some but not all claims, they shall file a stipulation concisely setting forth the resolved claims with the ADR clerk within five (5) days of the assisted mediation. The stipulation shall bind the parties.
- (q)** If the assisted mediation session does not conclude in settlement of all the issues in the case, the case will proceed toward trial pursuant to the scheduling orders entered in the case.

83.9 Judicial Mediation in Prisoner Civil Rights Cases

The Court may from time to time select cases from its prisoner civil rights docket for judicial mediation on such terms as it deems appropriate.

83.10 Commission to Take Testimony

- (a)** Except as the law otherwise provides, in all actions or proceedings where the

taking of depositions of witnesses or of parties is authorized, the procedure for obtaining and using the depositions shall comply with the Federal Rules of Civil Procedure. The party seeking the deposition shall furnish the officer to whom the commission is issued with a copy of the Federal Rules of Civil Procedure pertaining to discovery.

(b) Upon receipt of a deposition, the Clerk, unless otherwise ordered, shall open and file it promptly.

83.11 Student Practice

[General Order #13](#) pertains to the rules regarding student practice in this District. Parties may obtain a copy of [General Order #13](#) from the Clerk's office or on the Court's webpage at "www.nynd.uscourts.gov."²²

83.12 Production and Disclosure of Documents and Testimony of Judicial Personnel in Legal Proceedings

(a) The purpose of the rule is to implement the policy of the Judicial Conference of the United States with regard

1. to the production or disclosure of official information or records by the federal judiciary, and
2. the testimony of present or former judicial personnel relating to any official information acquired by any such individual as part of the individual's performance of official duties, or by virtue of that individual's official status, in federal, state, or other legal proceedings. Implementation of this Rule is subject to the regulations that the Judicial Conference of the United States has established and which are incorporated herein. Parties can obtain a copy of such regulations from the Clerk's office.

(b) Requests that this Rule covers include an order, subpoena, or other demand of a court or administrative or other authority, of competent jurisdiction, under color of law, or any other request by whatever method, for the production, disclosure, or release of information or records by the federal judiciary, or for the appearance and testimony of federal judicial personnel as witnesses as to matters arising out of the performance of their official duties, in legal proceedings. This includes requests for voluntary production or testimony in the absence of any legal process.

(c) This Rule does not apply to requests that members of the public make, when properly made through the procedures that the Court has established for records or documents, such as court files or dockets, routinely made available to members of the public for inspection or copying.

(d) In any request for testimony or production of records, the party shall set forth a

written statement explaining the nature of the testimony or records the party seeks, the relevance of that testimony or those records to the legal proceedings, and the reasons why that testimony or those records, or the information contained therein, are not readily available from other sources or by other means. This explanation shall contain sufficient information for the determining officer to decide whether or not federal judicial personnel should be allowed to testify or the records should be produced. Where the request does not contain an explanation sufficient for this purpose, the determining officer may deny the request or may ask the requester to provide additional information. The request for testimony or production of records shall be provided to the federal judicial personnel from whom testimony or production of records is sought at least twenty-one (21) days in advance of the date on which the testimony or production of records is required. Failure to meet this requirement shall provide a sufficient basis for denial of the request.

(e) In the case of a request directed to a district judge or a magistrate judge, or directed to a current or former member of such a judge's personal staff, the determining officer shall be the district judge or the magistrate judge.

(f) Procedures to be followed.

1. In the case of a request directed to an employee or former employee of the Clerk's office, the determining officer shall be the Clerk. The Clerk shall consult with the Chief Judge for determination of the proper response to a request.

2. In the case of a request directed to an employee or former employee of the Probation Office, the determining officer will be the Chief Probation Officer or his or her designee. The determining officer shall consult with the Chief Judge or his or her designee regarding the proper response to a request. The Chief Probation Officer's designee(s) will be the officer to whom the request is directed and the officer's supervisor or manager. The Chief Judge's designee will be the judge who sentenced the offender who made the request or whose records are the subject of the request. Requests for disclosure, other than subpoenas, not otherwise covered by memorandum of understanding, statute, rule of procedure, regulation, case law, or court-approved local policy, will be presented to the sentencing judge, or in that judge's absence, the Chief Judge, for approval. All subpoenas will be presented to the Court.

83.13 Sealed Matters

(a) Cases may be sealed in their entirety, or only as to certain parties or documents, when they are initiated, or at various stages of the proceedings. The Court may on its own motion enter an order directing that a document, party or entire case be sealed. A party seeking to have a document, party or entire case sealed shall submit an application, under seal, setting forth the reason(s) why the document, party or entire case should be sealed, together with a proposed order for the assigned judge's approval. The proposed order shall include language in the "ORDERED" paragraph stating the referenced document(s) to be sealed and should include the phrase "including this sealing order." Upon the assigned judge's approval of the sealing

order, the Clerk shall seal the document(s) and the sealing order. A complaint presented for filing with a motion to seal and a proposed order shall be treated as a sealed case, pending approval of the proposed order. Once the Court seals a document or case, it shall remain under seal until a subsequent order, upon the Court's own motion (under [subsection \(b\)](#) of this Rule or otherwise) or in response to the motion of a party, is entered directing that the document or case be unsealed.

(b) Pleadings and other papers filed under seal in civil actions shall remain under seal for sixty (60) days following final disposition of the action, i.e., final disposition of the action includes any time allowed by the federal rules to file an appeal in a civil matter, and, if an appeal is filed, sixty (60) days from the date of the filing of the mandate if the action was not remanded for further proceedings. After that time, the Court will unseal all sealed documents and place them in the case record unless, upon motion of a party, the district judge or magistrate judge orders that the pleading or other document remain under seal or be returned to the filing party. If the case is fully electronic, documents that have been unsealed may be uploaded to CM/ECF where they would be available for public viewing.

83.14 Appearances of Former Judicial Officers

No former judicial officer of the Northern District of New York shall appear of record or in person in any case in this District, or use or permit the use of his or her name on any pleading, memorandum of law, or other document filed in any case in this court, within one year after having left such court. Nothing in this General Order shall prohibit a law firm with which said judge is associated from appearing in any case in this District and using the name of the firm on its papers consistent with that appearance. The prohibition against a former judicial officer in this General Order may be remitted in a case upon the informed consent of all other parties made in writing or on the record. This Order shall not prohibit appearances at any time by a former judicial officer in any case assigned to a visiting judge.

84.1 Forms

[Reserved]

85.1 Title

[Reserved]

86.1 Effective Date

See [L.R. 1.1\(b\)](#).

