U.S. District Court
N.D.N.Y.
Filed
February 24, 2020
John M. Domurad, Clerk

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF NEW YORK

GENERAL ORDER #47

Mandatory Mediation Program

So Ordered: February 24, 2020

Hon. Glenn T. Suddaby, Chief Judge

MANDATORY MEDIATION PLAN
NORTHERN DISTRICT OF NEW YORK

SECTION 1 - INTRODUCTION AND AUTHORITY

1.1 TITLE

This Plan will serve as the Guidelines for the Court's paid Mandatory Mediation Program.

1.2 PURPOSE AND SCOPE

A. **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.

B. **Scope.** This Mandatory Mediation Plan applies to civil actions pending as well as newly filed actions, except as otherwise indicated herein. The Local Rules for voluntary mediation will apply only to *Pro Se* Cases that proceed through the Assisted Mediation Program.

C. **Magistrate Judge Consent Cases**. Consistent with Local Rule of Civil Procedure 72.1, in cases where the parties have consented to jurisdiction by a Magistrate Judge under 28 U.S.C. § 636, the Magistrate Judge shall have the same powers as the District Court Judge originally assigned to the case.

D. **Plan Administration**.

1. **Staffing.** The Clerk of Court will appoint an ADR administrator to assist with the management and oversight of the Court's ADR programs.

2. **ADR Information and Guidelines.** Information about the Court's Alternative Dispute Resolution Programs are available at *http://www.nynd.uscourts.gov* and also at the Court Clerk's office.

3. All inquiries about the Mandatory Mediation Program and the Court's other ADR Programs should be directed to:

   Case Numbers ending in 0 - 4:
   Nicole Eallonardo, ADR Program Administrator/Courtroom Deputy Clerk
   U.S. District Court
   U.S. Courthouse
   100 S. Clinton Street - PO Box 7367
   Syracuse, New York 13261-7367
   Telephone: (315) 234-8603
   e-mail: Nicole_Eallonardo@nynd.uscourts.gov

Case Numbers ending in 5 - 9:
Renata Hohl, ADR Program Administrator/Courtroom Deputy Clerk
U.S. District Court
U.S. Courthouse
100 S. Clinton Street - PO Box 7367
Syracuse, New York 13261-7367
Telephone: (315) 234-8593
e-mail: Renata_Hohl@nynd.uscourts.gov

SECTION 2 – OVERVIEW

2.1 REFERRAL INTO THE MANDATORY MEDIATION PROGRAM

A. **New Cases**. All non-exempt civil cases shall be referred automatically into the Mandatory Mediation Program. Notice of the Mandatory Mediation requirements will be provided to all parties immediately upon the filing of a complaint and answer or a notice of removal. Mandatory Mediation will be scheduled at the conference held pursuant to Local Rule of Civil Procedure 16.1. The following categories of actions are exempted from automatic referral:

1. *Habeas Corpus* and extraordinary writs;
2. Applications to vacate a sentence;
3. Social Security appeals;
4. Bankruptcy appeals;
5. Cases implicating issues of public policy, exclusively or predominantly;
6. IRS summons enforcement actions;
7. Government foreclosure actions;
8. Civil asset forfeiture actions;
9. Prisoner civil rights actions;
10. Civilian Pro Se actions (these actions may be referred to the Court's Assisted Mediation Program); and
11. Any action to enforce a government summons, subpoena or civil investigative demand.

B. **Pending Cases**. The assigned Judge or Magistrate Judge on any pending civil case may, *sua sponte* or with status conference, issue an order referring the case into the Mandatory Mediation Program. The order shall specify a date on which the mandatory mediation is to be completed.

C. **Stipulation**. A case may be referred into the Mandatory Mediation Program by stipulation of all parties. Stipulations shall be filed and shall designate the time frame within which the mandatory mediation will be completed. Stipulations are presumed acceptable unless the assigned Judge or Magistrate Judge determines that the interests of justice are not served.

2.2 RELIEF FROM ADR REFERRAL

A. **Opting Out Motions**. Motions to opt out of the mandatory mediation program will be addressed by the assigned Magistrate Judge at the Rule 16 conference.

B. **Criteria**. Opting Out Motions shall be granted only for "good cause" shown. Inconvenience, travel costs, attorney fees or other costs shall not constitute "good cause." A party seeking relief from the Mandatory Mediation Program must set forth the reasons why Mandatory Mediation has no reasonable chance of being productive.

C. **Judicial Initiative**. The assigned Magistrate Judge may, *sua sponte,* exempt any case from the Court's Mandatory Mediation Program.

2.3 VIOLATIONS OF THE MANDATORY MEDIATION PROGRAM

A. **Report of Violation**. A mediator or party may report to the assigned Magistrate Judge any failure to attend a mediation conference, to substantially comply with the mediation Referral Order, or to otherwise participate in the Mandatory Mediation Program process in good faith.

B. **Proceedings and Sanctions in Response to Report of Violation**. Upon receipt of such a report, the Court may take whatever actions it deems appropriate, including issuing an order to show cause why sanctions should not be imposed. Show cause hearings shall be conducted on the record, but under seal. If sanctions are imposed, objections thereto and any other comment thereon shall be filed with the Court within

fourteen (14) days from the date of the notice of sanctions and contemporaneously served on all other counsel, unrepresented parties and the mediator.

SECTION 3 – MANDATORY MEDIATION

3.1 DESCRIPTION OF MEDIATION AND ITS PROCESS

The Mandatory Mediation Program, as defined in this General Order and Plan, is intended to offer a flexible, non-binding, confidential process in which a qualified mediator facilitates resolution of the issues between the parties and assists with settlement discussions. Through various methods and techniques, the mediator seeks to improve communication between the participants (parties, counsel, experts or whoever is included in the mediation); helps participants articulate their interests; helps participants understand the interests of the other participants, including their "opponent"; probes the strengths and weaknesses of each party's legal positions; and helps generate and define options for a mutually agreeable resolution. The mediator may engage in "reality checking", but will not give an overall evaluation of the case unless requested by all the parties. The mediator has no fact-finding or decision-making authority. The central tenet of mediation is that the parties find their own solutions, with the assistance of the mediator. A hallmark of mediation is its capacity to go beyond traditional settlement discussions and explore creative outcomes responsive to the participants' needs and interests.

A. **Timing.** Timing will be decided by the assigned Magistrate Judge. It is the intent of the program to have cases proceed into the Mandatory Mediation Program as early as possible in the case. Prior to the Local Rule 16.1 scheduling conference, counsel shall confer about the Mandatory Mediation Program as part of their discussion of "the possibilities for a prompt settlement or resolution of the case" pursuant to Fed. R. Civ. P. 26(f). The parties shall attempt to agree upon a mediator and, at the scheduling conference, shall be prepared to report on the outcome of their discussion pursuant to Local Rule 16.1(d). The initial Scheduling Order shall include a deadline for the completion of the Mandatory Mediation session.

B. **Scheduling.** The referral of a case to the Mandatory Mediation Program does not delay or defer other dates established in the Scheduling Order and has no effect on the scheduled progress of the case toward trial. If the parties and mediator agree that extensions of the mediation process are appropriate, the parties, not the mediator, should notify the Court. However, any extensions of the mediation process should not impact the original Scheduling Order in the case.

3.2 SELECTION OF MEDIATOR

A. **Mandatory Mediation Panel List.** The Court shall maintain a list of Court approved mediators for this Program found on the our website at https://www.nynd.uscourts.gov/adr-program. Each mediator shall provide to the Court information on his or her area(s) of expertise and compensation rates.

B. **Private Mediators.** The parties may select a mediator other than from the Court's Mandatory Mediation list. Such selections are presumed acceptable and must be approved by the assigned Magistrate Judge. When a mediator is selected from other than the Court's Mandatory Mediation list, the parties will be responsible for filing the mediation report with the Court.

C. **Selection.**

1. Once the parties have stipulated or been referred to mediation, they shall have twenty-eight (28) days from the date of the Local Rule 16.1 conference or Order referring case to Mandatory Mediation Program in which to select a mediator, confirm the mediator's availability including a conflict check and electronically file a stipulation regarding their selection on CM/ECF using the event “Stipulation Selecting Mediator”. The ADR Administrator shall notify the mediator of their selection as mediator and the mediation deadline.

2. If the parties fail to agree upon a mediator within the twenty-eight (28) day period, the Court shall select a mediator for the case from the Court's Mediator list and shall issue an Order notifying the parties of the mediator's identity.

3. Should a mediator assigned by the Court require documents filed within their assigned case, they are directed to contact the Clerk's Office for assistance.

3.3 SCHEDULING AND LOCATION OF THE MANDATORY MEDIATION

A. **Scheduling.** Promptly upon being selected, the mediator shall conduct a telephone conference, jointly or separately, with counsel, to fix the date and place of the mediation.

B. **Timing.** Unless otherwise ordered, a first mediation session shall be conducted within twelve (12) weeks after the Local Rule 16.1 conference. In pending cases, mediation shall be conducted in accordance with the Mandatory Mediation Referral Order.

C. **Location.** The mediation session shall be held in the mediator's office, unless otherwise agreed. Space may be available at the U.S. Courthouse upon request through the Clerk's Office ADR Administrator.

3.4 MEDIATION MEMORANDUM

A. **Time for Submission.** No later than seven (7) days before the scheduled mediation session, each party shall submit to the Mediator a written "Mediation Memorandum."

B. **Prohibition Against Filing.** Mediation memoranda shall not be filed and the assigned Judge shall not have access to them. They shall be subject to the confidentiality of the mediation process and treated as a document prepared "for settlement purposes only."

C. **Content of Mediation Memoranda.** Mediation Memoranda must not exceed ten (10) double-spaced pages and shall:

1. Identify by name and title or status:

    a. All person(s) with factual knowledge and/or settlement authority, who, in addition to counsel, will attend the mediation as a representative(s) of the party; and

    b. Any other person(s) (including an insurer representative) whose presence might substantially improve the effectiveness of the mediation or the prospects of settlement;

2. Concisely describe the parties' claims and defenses, addressing the parties' views of the key liability issues and damages, and discussing the key evidence;

3. State the relief sought in the case and the basis for monetary calculations;

4. Describe the current status of the case, including the status of any motions made;

5. Describe the history and current status of settlement negotiations, including offers and counteroffers; and

6. Provide any other information that might be pertinent to resolution of the case, including possible settlement options and alternatives.

7. Parties should include, along with the Mediation Memorandum, copies of documents, including necessary pleadings, court decisions in the case, and discovery materials that are likely to make the mediation more productive or materially advance settlement prospects.

3.5 COMMUNICATIONS WITH THE MEDIATOR

After receiving Mediation Memoranda and submissions pursuant to Section 3.4, the mediator may request additional information from any party or participant. The mediator, at his or her discretion, may also discuss the case in confidence and *ex parte* with counsel, parties and/or representatives. The mediator shall not disclose any confidential communication, including the Mediation Memoranda and submissions, without permission.

3.6 ATTENDANCE AND PARTICIPATION

A. **Parties.** All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 3.6(E) below.

1. **Corporation or other entity.** A party other than a natural person *(e.g.* a corporation or some other entity or association) satisfies this attendance requirement if represented by one or more persons, other than outside counsel, who have authority to settle and who are knowledgeable about the facts and circumstances of the case and the claims being made.

2. **Government entity.** A unit or agency of government satisfies this attendance requirement if represented by one or more persons who have, to the greatest extent feasible, authority to settle, and who are knowledgeable about the facts

of the case, the agency's or unit's position, and the procedures and policies under which the agency or unit decides whether to enter into proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual shall also attend.

B. **Counsel.** Each party shall be accompanied at the mediation session by the attorney who will be primarily responsible for handling the trial of the matter and/or is most familiar with the matter at that stage of the proceeding.

C. **Insurers.** Insurer representatives are required to attend in person if their agreement is necessary to achieve a settlement, unless excused under 3.6(E) below.

D. **Other Attendees.** The mediator may require the attendance of any other individual who appears reasonably necessary for the advancement of communication and resolution between the parties.

E. **Request to be Excused.** Any person who is required to attend a mediation session in accordance with this Rule may request the assigned magistrate judge to excuse attendance for good cause shown. The good cause standard shall not be met by showing solely that the person is in a location other than where the mediation session will be conducted.

Any person required to be present at the mediation session must submit a request to be excused not less than fourteen (14) days before the date of the mediation stating: (1) all considerations that support the request; and (2) the position of the other party or parties regarding the request.

Any party opposing the request shall submit a written statement to the assigned magistrate judge no less than seven (7) days prior to the mediation session stating the reasons for its opposition.

The assigned magistrate judge shall promptly make a determination as to whether to excuse the person's attendance, permit participation by telephone or other means, or excuse the person's participation in total.

F. **Participation by Telephone.** A person excused from appearing in person at a mediation session shall be available by telephone or otherwise be available as the mediator may direct.

G. **Good Faith Participation in the Process.** All parties and counsel shall participate in mediation in good faith. Failure to do so shall be sanctionable by the Court.

3.7 THE MEDIATION SESSION

A. The first mediation session shall be a minimum of two (2) hours. The parties may, and are encouraged to, extend the length of the session.

B. The mediation session shall be conducted in accordance with the process described in detail by the mediator during the opening of the mediation. The process may include, as appropriate and necessary, the following:

1. Mediator "opening statement" and introduction to the process and session;
2. An opportunity to present each party's positions, claims and concerns;
3. Joint sessions with all parties participation; and/or
4. Various "caucus" sessions in which the mediator meets with one or more parties and/or their counsel, as the mediator deems appropriate

C. The mediator shall have discretion to structure the mediation so as to maximize the benefits of the process.

D. Any communications to the mediator during a "caucus" shall not be disclosed by the mediator to any other party without permission.

E. The mediation session shall be informal, and conducted with civility.

3.8 CONFIDENTIALITY IN MEDIATION

A. **Confidential Treatment.** Mediation is confidential and private. No participant in the mediation process or any portion thereof may communicate confidential information acquired during mediation without the consent of the disclosing party. There shall be no stenographic or electronic recording, *e.g.,* audio or visual, of the mediation process.

1. All written and oral communications made in connection with or during the mediation session, any positions taken and any views of the merits of the case formed by any participant, including parties, counsel and the mediator, are privileged and confidential.

2. There shall be no communication between the assigned Judge or designated Magistrate Judge and the mediator regarding a case referred for mediation.

3. No communication made in connection with or during any mediation session may be disclosed or used for any purpose including impeachment in any pending or future proceeding in the Court.

4. The confidentiality of information disclosed during mediation does not prohibit or limit:

    a. the Court from collecting information relative to evaluation of the Mandatory Mediation program;

    b. the mediator from reporting a failure to participate in the Mandatory Mediation process in good faith, except that the mediator shall not disclose the content of confidential communications;

    c. the mediator from filing "Mediation Certification" forms pursuant to 3.9;

d. a party from seeking to enforce a settlement agreement;

e. a party from disclosing the final resolution and settlement reached unless, in the interest of justice, the parties have agreed to the confidentiality of same; or

f. a participant from making such disclosures as are required by law.

3.9 CONTINUED MEDIATION AND REPORTS

A. At the close of the initial mediation session, the mediator and the parties shall jointly determine whether it would be appropriate and helpful to then schedule additional mediation. Follow-up could include, without limitation, written reports, telephonic discussions, negotiations between the parties with the Mediator available for assistance, or further mediation sessions.

B. Within seven (7) days after the close of each mediation session, the mediator shall report to the Court by electronically filing on CM/ECF using the text only event “Report of Mandatory Mediation,” the date the session was held, whether the case settled in whole or in part and whether any follow up is scheduled.

C. Congress has mandated that the Courts' ADR programs be evaluated. Within seven (7) days after the final mediation session has ended, the mediator and attorneys for the parties shall complete the online survey regarding the Mandatory Mediation Program emailed to them by the ADR Administrator. The information gathered during the survey period at the conclusion of each mediation will be used by the Board of Judges and ADR Committee to study the effectiveness of this program. The sources of specific information will not be disclosed to the assigned Judge or in any report.

3.10 MULTIPLE MANDATORY MEDIATION INTERVENTIONS

A. **Initial Intervention.** Generally, a first Mandatory Mediation Program session will be scheduled within twelve (12) weeks after the Local Rule 16.1 conference. The minimum duration for the first session is two (2) hours, but the parties are encouraged to spend additional time unless the Mediator agrees that additional time would not be productive.

B. **Additional Interventions.** If the initial mediation session is not successful in resolving the case, but the parties agree that an additional session(s) would be helpful, the process will be scheduled as set forth below:

1. **By the Mediator.** The Mediator will, in consultation with the parties, schedule subsequent sessions as needed to explore and evaluate the possibility of reaching a mutually acceptable resolution. Additional sessions must be conducted within the date for completion of Mandatory Mediation set forth in the Court's Scheduling or Referral Order.

SECTION 4 - MEDIATORS

4.1 MEDIATORS

A. **Mediator Panel for the Mandatory Mediation Program.** The Court shall select a panel of mediators to serve on the Mandatory Mediation Program. Applications will be accepted by the Court during the month of October 2021 and every other October thereafter. Applications for admission as a mediator will be referred to the Court's ADR committee for review and recommendation to the Board of Judges for final determination. Membership on the Court's Mediation panel is a privilege, not a right. The Court shall have the authority to establish qualifications for mediators, monitor their performance and withdraw any mediator from a panel. Beginning January 2020, and each January thereafter, the ADR Committee will review the mediator panel

composition and remove any mediator who has not received an appointment within the previous 24 months. Removed mediators may seek re-admission during the next open period. The acceptance of a pro bono mediation assignment qualifies as a mediation for panel removal purposes.

The mediators selected by the Court will be posted on the external website[1] for selection by the parties in cases from Albany, Binghamton, Utica, Syracuse and Plattsburgh.

4.2 QUALIFICATIONS OF MEDIATORS

A. Who May Qualify

Attorneys may apply to become a mediator if he or she:

1. has practiced law for at least 15 years;
2. is a member in good standing of the bar of this Court; and'
3. resides or maintains an office within the Northern District of New York.

Non-attorneys may apply provided they are professional mediators who would otherwise qualify as a special master or is a professional whom the Court has determined to be competent to perform the duties of the mediator and has completed appropriate training in the process of mediation as the Court may from time to time determine and direct.

To effectively assist ADR participants and the Court, mediators must:

- Be knowledgeable about civil litigation in federal Court;
- Have strong mediation process skills and the temperament to listen effectively and facilitate communication between all participants and across "party" lines;

[1] The Court's website will be updated on a daily basis to include the number of mediations conducted by each Panel member and their success rate.

- Exhibit strong problem-solving skills and the ability to generate meaningful options to assist parties and other participants with settlement negotiations.

B. <u>Mediators not Admitted in the Northern District of New York</u>

All mediators who are not admitted to practice in the Northern District of New York and/or who do not have the ability to file reports on the Court's electronic docketing system shall email the required mediation reports to the ADR Administrator whose email address is listed on page 2. If the mediator does not file the required report, then the parties will be responsible for filing the report as set forth in 3.2B.

C. <u>Training</u>. Although training is not required for admission on the panel, the Court may periodically direct that all panel members attend mediation training. The Court may also, on a case-by-case basis, require new panel members to attend training prior to their admission to the panel.

D. <u>Oath</u>. All persons serving as mediators shall take the oath or affirmation prescribed in 28 U.S.C. § 453.

E. <u>Disqualification and Unavailability of Mediators</u>.

1. **Disqualification.** A mediator serving on the Panel for the Mandatory Mediation Program may be disqualified for bias or prejudice, pursuant to 28 U.S.C. § 144. A mediator shall disqualify himself or herself in any case in which a justice, judge or magistrate judge would be disqualified pursuant to 28 U.S.C. § 455, subject to the waiver provision of 42 U.S.C. § 455(e).

2. **Notice of Recusal.** A meditator serving on the Panel for the Mandatory Mediation Program who discovers a circumstance requiring disqualification shall immediately notify all counsel, unrepresented parties and the Court. A new mediator serving on the Panel for the Mandatory Mediation Program shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

3. **Objections to Selected Mediator.** Prior to the issuance of an Order designating a mediator serving on the Panel for the Mandatory Mediation Program, the Court will contact the selected mediator who will review the case for possible conflicts. Following issuance of the Court's Order, a party who believes a disqualifying conflict exists should first confer with the mediator. If the matter is not resolved by, for example, waiver or recusal, a motion and supporting affidavit shall be filed with the Court with the assigned magistrate judge within fourteen (14) days from the Court's Order, stating the facts and the reasons for the belief that a disqualifying conflict, bias or prejudice exists. In the event a conflict or other objection does not become apparent until after the Mandatory Mediation process has commenced, a motion for disqualification must be made at the earliest opportunity or the objection is waived.

4. **Unavailability.** A selected mediator serving on the Panel for the Mandatory Mediation Program who later becomes unable to serve within the time period set forth in the Court's Scheduling or Referral Order shall notify all counsel, unrepresented parties and the Court. A new mediator serving on the Panel for the Mandatory Mediation Program shall be selected by agreement of the parties or, in the event the parties are unable to agree, by the Court.

4.3 IMMUNITIES

All persons serving as mediators in the Court's Mandatory Mediation Program are performing quasi-judicial functions and are entitled to all the immunities and protections that the law accords to the performance of tasks integrally related to the judicial process, including settlement and alternative dispute resolution. *See, e.g.,* ***Wagshal v. Foster,*** 28 F.3d 1249 (D.C. Cir. 1994).

4.4 COMPENSATION OF MEDIATORS

A. Mediators shall receive $150/hour for the first two hours of the initial mediation session. If necessary, the mediator may charge an additional $150/hour for up to two hours of preparation time for cases which require substantial preparation. Thereafter, mediators shall receive no more than their Court-approved hourly rates[2] for time spent in mediation and preparation. If the mediation is cancelled by the parties less than 48 hours prior to the mediation session, the parties will be responsible for one hour of mediation time each to compensate the mediator for his or her preparation time.

B. Mediators may require that counsel and/or parties sign an agreement confirming the terms of retention and compensation. Time spent in travel by mediators is not reimbursable under this program unless the parties consent to cover travel costs.

C. Mediator fees shall be divided equally among all separately represented parties, unless otherwise agreed or ordered by the Court. Mediator fees shall be paid by the parties within 14 days of the conclusion of mediation.

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[2] Hourly rates may not exceed $325.00 per hour. The rate caps will be reviewed by the Court every two years.

D. A party who has been granted *in forma* pauperis[3] status and is represented by counsel is automatically relieved of his or her *pro rata* share of the Mediator's fee. All other parties shall continue to bear their *pro rata* portions of the fee.

E. A party who has not sought *in forma pauperis* status and is represented, but is financially unable to pay all or part of the *pro rata* share of the mediator's fee, may move for a waiver of the fee requirement on a form provided by the Court.

F. All Mediation Panel members must provide *pro bona* services. The minimum service requirement is one *pro bono* case for every four (4) fully-compensated cases for which the mediator is selected. (For example, for every four fully compensated cases the mediator must perform one pro bono Assisted Mediation either as Assisted Mediation Counsel or as the mediator in an Assisted Mediation case.) The acceptance of a *pro bona* prisoner case assignment will fulfill a Mediation Panel member's minimum service requirement to provide *pro bona* services as described herein. The Court will track the number of mediation assignments and will notify the mediator when they are going to be placed in the pro bono assignment system.

G. In cases involving government entities, the mediator upon request, shall provide a W-9 Form to the government party making payment to them.

[3] Cases involving Pro Se Litigants are excluded from the Mandatory Mediation Program and may be referred by the Court into the Assisted Mediation Program.