

# PART 18. 00 FAMILY DIVISION MEDIATION PROGRAM RULES

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## 18.01 MISSION/PURPOSE STATEMENT

The mediation process described herein is established to assist the Court, counsel and parents as they resolve matters of child custody, child visitation and child removal. The primary purpose of the process is to recognize, foster and preserve the best interests of the children involved in divorce and family litigation. The secondary purpose of the process is to provide a reasonable, cost effective alternative dispute resolution forum for the parents in divorce and family litigation. The participants are encouraged to take advantage of this unique opportunity and to take a positive step for the benefit of their children.

## 18.02 DEFINITIONS

(a) **Mediation.** When the word "mediation" is used herein, it means a cooperative process for resolving conflict with the assistance of a trained court-appointed, neutral third party, whose role is to facilitate communication, to help define issues, and to assist the parties in identifying and negotiating fair solutions that are mutually agreeable. Fundamental to the mediation process described herein, are principles of safety, self determination, procedural informality, privacy, confidentiality, and full disclosure of relevant information between the parties. Mediation under this rule is a means for parties to maintain control of parenting decisions by resolving themselves the issues of custody, visitation, removal and other non-financial children's issues. Parties are encouraged to participate in the mediation process by attempting good faith negotiation and resolution of the issues brought to mediation.

Mediation under this rule is not to be considered a substitute for independent legal advice. Instead, it is to work in partnership with the attorneys and the legal process, by giving the parties the ability to be fully informed of options for resolution of their issues, which would include obtaining legal advice before, during and after the mediation process.

(b) **Impairment.** When the word "impairment" is used herein, it means any condition which hinders the ability of a party to negotiate safely, competently and in good faith, including but not limited to domestic violence or intimidation, substance abuse, or mental illness, or a cognitive impairment. Pursuant to these rules, the identification of impediments in a case is necessary to determine if mediation should be required, and to insure that only parties having a present, undiminished ability to negotiate are directed by the Court under this rule to mediate.

## 18.03 MEDIATION MANDATORY IN CERTAIN CASES

(a) **Matters Subject to Mediation.** The designated family judge shall order mediation of any contested issue of parental responsibility, custody, visitation, or access to children arising in any action not otherwise determined to be ineligible pursuant to this program. This shall apply to

dissolution of marriage and paternity cases involving the custody of a child or visitation issues (whether or not the parties have been married).

The parties may not proceed to a judicial hearing on contested issues including temporary relief arising in that case without leave of Court, or until the mediation process has been concluded and its outcome (with disclosures as to outcome being limited to what is set forth herein and as are consistent with the provisions of the Uniform Mediation Act) has been reported to the Court. Notwithstanding, the Court may enter an order for temporary child support or other appropriate financial relief for good cause shown.

(b) **Commencement of mediation.** The mediation process shall commence as soon as practicable after the action is filed, but in no event shall mediation occur before a case has been screened for eligibility. The designated family division judge shall make inquiries of counsel and the parties concerning:

1. prior or existing domestic violence proceedings between the parties;
2. prior adjudications of guilt or responsibility as a result of an independent criminal or civil proceeding based on domestic or family violence; and
3. pending criminal or civil proceedings based on domestic or family violence.

Mediation shall not be required if the Court determines an impairment exists.

The designated family judge shall further review information about the financial ability of each party to pay the cost of mediation services, and in cases of hardship the Court shall assign a mediator whose services shall be provided at a reduced fee. Financial hardship shall be determined in each case in accordance with local rule.

The parties referred to mediation by the Court shall commence the parent education program prior to starting mediation or as soon after starting mediation as the parent education program's schedule allows. However, mediation shall not be delayed due to the inability of either party to complete the parent education program.

(c) **Investigations.** Except when the Court finds good cause, no investigation or examination pertaining to issues pending in mediation shall be ordered by the Court.

(d) **Discovery.** Only written discovery shall be allowed until filing of the mediator termination report.

(e) **Mandated Sessions.** This mediation process contemplates at least three (3) sessions of approximately one (1) hour per session. The parties are required to attend the three mediation sessions. Following attendance at three mediation sessions, either party may terminate mediation even if mediation is not successful. The parties may agree to continue the mediation process beyond the three (3) sessions without permission of the Court. In that event, the mediator shall file the Mediator's Report on an interim basis, so informing the court.

#### **18.04 APPOINTMENT AND QUALIFICATION OF MEDIATOR**

(a) **List of Approved Persons.** For each eligible case, a person approved to provide mediation services shall be appointed by the Court from a list of court approved mediators. If the parties have agreed on an approved mediator, the Court may make an appointment pursuant to that request. All

appointments shall be made on the court-approved order form. The mediator's willingness to accept two such low income cases as identified by the court as is set forth herein (if appointed) shall be considered as a requirement for maintaining eligibility as to the list of court approved mediators.

(b) **Eligibility Requirement for Mediators.** The designated family judge shall maintain a list of persons approved to provide mediation services. Persons eligible for approval as a mediator shall provide evidence upon written application demonstrating that each of the following minimum requirements has been satisfied:

1. Satisfactory completion of 40 hour divorce mediation training program approved by the Association for Conflict Resolution or otherwise approved by the Court. In addition (or as part of such 40 hour program), the applicant must have completed at least three hours of training specific to domestic violence, child abuse, substance abuse and mental illness, which gives the applicant an understanding of the issues related to these impairments and one's ability to negotiate effectively when impacted by one or more of these impairments.
2. The applicant has been awarded a degree in law or a graduate degree in a field that includes the study of psychiatry, psychology, social work, human development, family counseling, or other behavioral science substantially related to marriage and family interpersonal relationships, or a related field otherwise approved by a Presiding Judge of the Family Court, or his or her designee.
3. Member in good standing in the professional organization of his/her respective disciplines.
4. Proof of professional liability insurance which covers the mediation process.
5. Minimum of two years of work experience in his/her discipline or profession, or otherwise supervised by a qualified mediator.

The parties may choose to use a mediator other than the court's list if the court finds that the mediator is an individual who meets substantially the same standards as is set forth above.

(c) **Continuing Education.** A mediator shall participate in six hours of continuing education every two years from programs approved by the 22<sup>nd</sup> Judicial Circuit's Family Mediation Advisory Council. A mediator shall report and verify his or her attendance at approved continuing education to the 22<sup>nd</sup> Judicial Circuit's Family Mediation Advisory Council.

A mediator is personally responsible for ongoing professional growth. A mediator is encouraged to join with other mediators and members of related professions to promote mutual professional development

(d) **Duty to Notify Court.** A mediator shall inform the court within 7 days if he or she has been disciplined by any licensing agency or professional organization to which he or she belongs.

(e) **Conflicts of Interest.**

1. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after 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 the mediator's impartiality.

2. 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.
3. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interests 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.
4. 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.
5. 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.
6. Subsequent to 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.

**(f) Impartiality.**

1. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.
2. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.
3. 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. 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. A mediator may accept or give de minimis gifts or incidental items or services that are provided to facilitate mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

**(g) Bar to Subsequent Representation of the Parties.** No mediator may engage in a lawyer/client, psychologist/patient, therapist/patient etc. relationship for a period of 2 years following final mediation report issue date.

**(h) Approval of persons Already Engaged as Mediators.** Prior to the passage of this rule, all persons approved to act as mediators under any existing Court mediation program in this Circuit shall continue to do so without further approval.

A mediator shall mediate two low income cases, as identified by the Court, per year, at a reduced fee assuming, as provided herein, that the court assigns to the mediator two such cases.

(i) Mediators shall be entitled to such immunity as may be provided by law.

## **18.05 DUTIES OF THE MEDIATOR**

(a) **Preliminary Responsibilities.** Before mediation may begin, the mediator shall:

1. confirm the parties' understanding regarding the fee for services and any reduced fee arrangements for eligible parties with financial hardship;
2. advise the parties that the mediator neither represents nor advocates for either party and will not provide therapy or counseling to either party;
3. advise the parties that either party could request that his or her attorney accompany that party to mediation and participate in the mediation process (consistent with the provisions of the Uniform Mediation Act, 710 ILCS 35/1, *et seq.*);
4. define and describe the process of mediation to the parties, including appropriate procedure when evidence of impairment surfaces after mediation is in progress;
5. explain the mandated reporting requirements of the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 *et seq.* and the application of rules of privilege and confidentiality in the mediation process and explain the applicability of those requirements to mediator-attorneys under this program;
6. disclose the nature and extent of any existing relationships with the parties or their attorneys and any personal, financial, or other interests that could result in bias or a conflict of interest on the part of the mediator; and
7. advise each party of the right to have an attorney available for consultation while mediation is in progress.

(c) **Application of Abused and Neglected Child Report Act Standards to Mediator-Attorneys.**

The mandated reporting requirements of the Abused and Neglected Child Reporting Act (ANCRA), 325 ILCS 5/1 *et seq.* as applied to mental health professionals shall also apply to all mediator attorneys acting in their capacity as mediators under this program.

(d) **Preparation of Agreements and Reports.** When agreements are reached in mediation, the mediator shall provide a written account of the decisions made by the parties to both of the parties and their attorneys, if any. The mediator shall not provide this written account to the Court. The mediator shall advise each party orally and in writing to obtain legal assistance in reviewing any draft memorandum of understanding as to decisions reached during mediation or in reviewing any proposed draft agreement. The mediator shall file a report with the Court in accordance with Article 18.08.

(e) **Termination without Agreement.** Upon termination without agreement, the mediator shall file with the Court a final mediator report stating that the mediation has concluded without disclosing any reasons for the parties' failure to reach agreement.

(f) **Completion of Mediation.** Unless for good cause shown, cases assigned for mediation shall be completed within sixty (60) days of notification of assignment. If the case cannot be completed within 60 days, the mediator shall file an interim report. The court may consider the length of time that mediation was pending until completion in making findings, if any, for any delay or extension of the time limitations imposed by Supreme Court Rule 922.

## 18.06 APPLICATION OF SAFEGUARDS IN CASE OF IMPAIRMENT

(a) **Duty to Assess.** While mediation is in progress, the mediator shall assess continuously whether the parties manifest any impairments affecting their ability to mediate safely, competently, and in good faith.

(b) **Safety.** If an impairment affecting safety arises during the course of mediation, the mediator shall adjourn the session to confer separately with the parties, shall implement appropriate personal safety protocols, shall advise the parties of their right to terminate, and either shall:

1. terminate mediation when circumstances indicate that protective measures are inadequate to maintain safety; or
2. proceed with shuttle mediation, after consulting separately with each party to ascertain whether mediation in any format should continue, unless both parties request joint sessions, and if the mediator believes that will be safe.

(c) **Competency or Good Faith.** If an impairment affecting competency or good faith, but not safety, arises during the course of mediation, the mediator shall either:

1. suspend mediation when there is a reasonable likelihood the impaired condition of an affected party is only temporary; or
2. terminate mediation when circumstances indicate an affected party's ability to negotiate cannot be adequately restored.

(d) **Effect of Termination.** No mediation terminated by the mediator shall proceed further unless ordered by the Court upon motion of a party.

## 18.07 CONFIDENTIALITY AND PRIVILEGE

(a) **Privacy of Sessions.** Privacy of mediation sessions shall be consistent with the provisions of the Uniform Mediation Act. Except as otherwise provided in this rule or as consistent with the provisions of the Uniform Mediation Act, the mediator shall have authority to recommend to the parties that good faith negotiations indicate that mediation be limited to only the parties (and to their counsel if either party or both parties which to have their lawyers present).

(b) **Confidentiality.** Except as otherwise provided by law or Article 18.05(d) and (e), all written and verbal communications made in a mediation session conducted pursuant to these rules are confidential and may not be disclosed by the mediator, any other participant, or observer of the mediation except by the parties to their attorneys.

(c) **Evidentiary Privilege.** Privilege and exceptions to privilege shall be as is set forth in the Uniform Mediation Act. Either party's lawyer has the right to be present during mediation or it is recognized that the mediator may discuss with the attorneys the progress and impediments to progress in mediation. However, in no way shall any such disclosure be deemed to waive the privileged nature of any of the discussions and communications made within the scope of the mediation process.

## 18.08 TERMINATION OF MEDIATION GENERALLY

(a) **Agreements to be Voluntary.** Parties shall not be compelled or pressured by a mediator to reach agreement on any issues arising in an action which is subject to mediation by rule or Court order.

(b) **Election of Party to Terminate.** In cases determined to be eligible after intake, any time after the first joint mediation session a party may elect to terminate the mediation. However, if the election is made prior to three mediation sessions, this election to terminate must be during a mediation session unless the court excuses the requirement of termination within a mediation session consistent with the provisions set forth herein as to proof regarding ineligibility.

Nevertheless, the mediator shall have the authority in exceptional cases to consider mediation terminated following the first mediation session as is outlined in paragraph (c) below.

(c) **Mediator's Authority to Terminate.** Termination by a mediator may be based upon reasonable belief that:

1. the parties have reached a final impasse;
2. the willingness or ability of any party to participate meaningfully in mediation is so lacking that an agreement on voluntary terms is unlikely to be reached by prolonging the negotiations; or
3. a disqualifying impairment exists and termination is required in accordance with Article 18.06.

(d) **Reports and Recommendations.** Upon termination of mediation for any reason, including election of a party, the mediator shall file with the Court a mediator report on a form prescribed by the Presiding Judge. Consistent with the provisions of the Uniform Mediation Act, the mediator may disclose in his or her report whether the mediation occurred, has terminated, or is suspended, whether a settlement was reached, and attendance.

## 18.09 TERMINATION OF MEDIATION ON MOTION OF A PARTY

(a) **Judicial Determination of Impairment.** Any party may move the Court for a ruling that a case is ineligible for mediation based upon evidence of impairment.

(b) **Filing a Motion.** The motion may be supported by affidavit setting forth facts demonstrating that, for one or more parties to the action, the ability to negotiate safely, competently, and in good faith is hindered by the presence in the relationship of family violence or intimidation, substance abuse, mental illness, or other impairment as defined in Article 18.02.

(c) **Presumption.** An existing plenary order of protection for or against any party issued under the Illinois Domestic Violence Act, or a comparable law of any other jurisdiction, creates a presumption of impairment. Unless the presumption is rebutted, the motion shall be granted.

(d) **Motion Denied.** If the motion is denied, the Court shall make a record of specific findings in support of the denial.

(e) **Motion Granted.** If the motion is granted, the Court may consider whether the best interest of a minor child requires the appointment of an attorney for the child in the balance of the litigation. The Court shall order the case returned to the docket for adjudication in the manner prescribed by law. a

guardian ad litem, attorney for the child or a child representative. The court may alternatively (or in addition) consider the appointment of a custody evaluation pursuant to Section 604(b).

(f) **Domestic Violence Order Entered While Mediation Pending.** Furthermore, if any order of protection is entered while a case is in the process of mediation, each party (or if he or she is represented by counsel, his or her respective attorney) shall immediately inform the mediator of the same and provide a copy of the order of protection to the mediator.

## **18.10 ENTRY OF JUDGEMENT OR ORDER**

(a) **Expedited Entry of Judgment.** The Circuit Court shall provide for an expedited process to insure prompt entry of an appropriate judgment or order in cases where agreement has been reached in mediation pursuant to these rules.

## **18.11 PERSONAL SAFETY PROTOCOLS**

(a) **Facility Requirements.** Two separate rooms should be available for each mediation in the event that shuttle mediation is pursued during the course of any given session or sessions. The rooms should not be connected by a common door, but each should have an independent access to a common hallway or exit. Each room should have a phone or intercom device to allow communication in case of emergency. A separate room should be provided to secure participants purses, brief cases, coats and other personal effects.

Mediators are encouraged to supply pens, pencils and other writing utensils in order to control objects that could be considered weapons.

(b) **Personnel Requirements.** It is strongly recommended that other staff or non-participating persons be available within the physical plant during all mediation sessions. This person or persons should be available to assist with emergency phone matters, to monitor parties' movements during shuttle mediation, and to assist the mediator in implementing appropriate exit procedures.

(c) **Exit Procedures.** Proper precaution should be taken to insure that participants actually leave the premises when the session is completed. If sessions are contemplated during evening hours, sufficient artificial lighting should be available in all parking areas. If shuttle mediation is in process or other special circumstances exist, parties should leave separately and be monitored by mediator or staff as the parties leave.

(d) **Notice to Participants.** Each mediator is responsible to notify each participant as such session commences that:

1. No physical confrontation shall be tolerated between the parties;
2. Such inappropriate conduct constitutes grounds to terminate session without refund;
3. Such conduct may cause police or official intervention immediately;
4. No form of weapon shall be allowed in the mediation room; and
5. All personal effects, including purses, briefcases and exterior coats shall be maintained and secured outside of the mediation area.
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## 18.12 COSTS AND FEES

(a) **Administrative Fee.** It is the goal that the mediation process established by this rule shall be accessible to all persons regardless of financial status or ability to pay. Provisions shall be made for a reduction or waiver of the fees for parties with financial hardship.

(b) **Referral Fees Prohibited.** No commissions, rebates, or other forms of remuneration shall be paid to any family service officer (if implemented) or mediator for referral of clients to support services. Mediators shall not charge contingent fees or fees based on the outcome of the mediation.

(c) **Hourly Rates.** All mediators under this article Part 18.00 shall be compensated by the parties at the rate agreed to by the parties and the mediator, or as set by the Court. The retainer ordered contemplates two (2) hours of administrative time to allow the mediator to prepare necessary reports, keep records required by this rule, and/or complete the agreement of the parties that is to be submitted to counsel and the Court.

## 18.13 REPORTS AND RECORDKEEPING

(a) **Data Collection Requirements.** The Court shall collect, compile and report such data as may be required by the Supreme Court or its administrative director to assist in measuring and monitoring the performance of mediation programs.

(b) **Time Standards and Case Management.** If required by Family Mediation Advisory Council, mediators shall report monthly on forms provided by the Court the names of all cases concluded, current status of cases pending, and time elapsed since referral for each case in which mediation is in progress.

(c) **Records Management.** Except as otherwise required by law, records of cases referred to mediation shall be maintained so as to prevent disclosure of confidential communications or privileged information.

## 18.14 CIRCUIT COURT ADVISORY COMMITTEE

(a) The Presiding Judge shall establish an advisory committee known as the 22<sup>nd</sup> Judicial Circuit's Family Mediation Advisory Council, whose membership shall consist of at least six (6) persons, including a family division judge, a non-mediator member of the local bar, a practicing attorney-mediator, a practicing mental health professional mediator, a representative of the domestic violence advocacy community, and a representative with the 22<sup>nd</sup> Judicial Circuit's Parenting Class program. The individual who as a representative of the 22<sup>nd</sup> Judicial Circuit's Parenting Class program may be also be appointed in one of the other capacities indicated above. Members of the committee shall be appointed by the Presiding Judge for terms not to exceed two years. In no event shall an individual be reappointed more than three consecutive times to such council. The appointments shall be staggered to provide for continuity of the committee.

(b) The Family Mediation Advisory Council shall advise the Presiding Judge in establishing and implementing administrative policy consistent with these rules for the fair and efficient delivery of mediation services including local rules of procedure, standards of conduct for mediators, and systematic review of program performance.

(c) Nothing contained in this rule shall be construed as a limitation on the authority of the Presiding Judge to exercise administrative authority conferred by law.