

# STATE OF NEW HAMPSHIRE

## PROBATE COURT

### ADMINISTRATIVE ORDER 11

#### Probate Mediation Policies

**A. Purpose.** The Probate Court establishes these mediation policies to increase access to justice; to increase parties' participation in court processes and their satisfaction with the outcome; to allow cases to settle more quickly with less expense to the parties; to reduce future litigation by the same parties; and to expand dispute resolution resources available to the parties.

**B. Definitions.** For the purpose of this administrative order, the following definitions apply.

1. Mediation. Mediation is a process in which a mediator facilitates settlement discussions between parties.

(a) The mediator has no authority to make a decision or impose a settlement upon the parties.

(b) The mediator attempts to focus the attention of the parties upon their needs and interests rather than upon their rights and positions.

(c) Any settlement is entirely voluntary.

(d) In the absence of settlement, the parties lose none of their rights to a resolution of their dispute through litigation.

Mediation is based upon principles of communication, negotiation, facilitation and problem solving that emphasizes:

(a) The needs and interest of the parties

(b) Fairness

(c) Procedural flexibility

(d) Privacy and confidentiality

(e) Full disclosure

(f) Self determination

2. Mediator. An impartial person who facilitates discussion between the parties to mediation. The role of the mediator includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, and maximizing the exploration of alternatives in helping the parties reach voluntary agreement.

3. Party. Any person who is designated by the court as a party to the mediation. All such parties are required to attend the mediation session and to participate as specified in this administrative order.

**C. Mediator Qualifications.** Mediators shall satisfy the qualifications and criteria specified by the Office of Mediation & Arbitration. Minimum qualifications include: completion of a 40-hour mediation process training; five years experience as a mediator; knowledge of the probate court helpful; ability to travel regionally within New Hampshire.

**D. Referral of cases to mediation.** Cases may be referred to mediation in the probate court by any of the following methods:

1. When requested and agreed to by all parties.
2. When requested by a party with consent of all parties.
3. By the court's own motion.

Referral by the court may occur at the structuring conference if one is held, or at any other time in the proceedings deemed appropriate by the presiding judge.

**E. Good faith.** The parties, their counsel and their representatives, hereinafter called "participants", shall conduct themselves in good faith at all times while participating in mediation under this administrative order.

Good faith does not necessarily require that the participants change their positions during the course of mediation. However, good faith requires, but is not limited, to the following:

1. All participants must personally appear at the mediation session.

If, after agreeing to participate in the mediation session, any participant decides not to attend the mediation session, that participant must notify the court, the mediator and all other participants to the mediation in writing of the plan not to participate. The notification must be received by the court and all participants at least 48 hours prior to the scheduled mediation session, and may be delivered initially by FAX, followed by

filing the original signed document with the court. If the participant fails to notify all other participants at least 48 hours prior to the scheduled mediation session or fails to attend the mediation session, that participant may be responsible for paying any mediation fees and/or sanctions imposed by the court.

2. If a party is represented, that party's attorney must also appear.

3 Participants must be prepared for mediation, and be willing to listen and to take into account what is said by the other participants and by the mediator.

4. If a participant is unwilling to change position during the course of the mediation, that participant must be able to articulate the basis therefore.

5. Participants must follow the format outlined by the mediator, and within reason, must remain at the mediation until excused by the mediator.

6. Participants must follow the procedures set forth in this administrative order and court orders relating to mediation.

**F. Mediator Assignment.** Courts will assign a specific mediator to a case, but every effort will be made to accommodate parties if they prefer someone else from the probate mediator list.

**G. Party submissions.** The parties shall submit to the mediator and exchange with each other a summary of the significant aspects of their case not later than ten (10) days prior to the session. Parties shall attach to the summary copies of all documents on which they rely. Summaries shall not be more than four pages and shall not be filed with the court.

Upon receipt of a party's submission, any party may send additional information responding to that submission. All such responsive submissions shall be exchanged with opposing counsel, or parties if counsel not present, and the mediator, and shall contain a statement of compliance with the exchange requirement.

**H. Payment of mediator fees.** The probate court shall pay mediators a per case fee set by the Administrative Judge of the Probate Court. No additional fees or reimbursements shall be made by the probate court.

The per case fee paid by the probate court will cover up to 12 hours of mediation time. The mediator and the parties may enter into a private agreement to continue mediation beyond the 12 hours, with payment made directly to the mediator by the parties. Section K of this order is not intended to preclude the parties from retaining and paying the mediator directly for the current case being mediated.

**I. Disclosure of Conflict.** Upon receipt of a notice of appointment in a case, the mediator shall disclose any circumstances likely to create a conflict of interest, the

appearance of conflict of interest, a reasonable inference or bias or other matter that may prevent the process from proceeding as scheduled.

1. If the mediator withdraws, has a conflict of interest or is otherwise unavailable, another mediator shall be appointed by the court.
2. The burden of disclosure rests on the mediator. After appropriate disclosure, the mediator may serve if both parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

**J. Impartiality.** Impartiality shall be defined as freedom from favoritism or bias in word, action and appearance.

1. Impartiality implies a commitment to aid all parties, as opposed to an individual party, when moving toward an agreement. A mediator shall be impartial and shall advise all parties of any circumstances bearing on possible bias, prejudice or impartiality.
2. A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of the proposed options for settlement.
3. A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.
4. A mediator shall not give or accept a gift, request, favor, loan, or any other item of value to or from a party, attorney or any other person involved and arising from the mediation process.

**K. Prohibitions.** A mediator shall not provide counseling or therapy to any party during the mediation process nor shall a mediator who is an attorney represent either party, or give legal advice during or after the mediation.

The mediator shall not use the mediation process to solicit or encourage future professional services with either party.

**L. Self-determination.** A mediator shall assist the parties in reaching an informed and voluntary settlement. Decisions are to be made voluntarily by the parties.

1. A mediator shall not coerce or unfairly influence a party into a settlement agreement and shall not make a substantive decision for any party to a mediation process.
2. A mediator shall not intentionally or knowingly misrepresent material facts or circumstances in the course of conducting mediation.

3. A mediator shall promote consideration of the interest of persons affected by actual or potential agreements who are not present during mediation.

4. The mediator shall promote mutual respect amongst the parties throughout the process.

**M. Professional Advice.** A mediator shall only provide information the mediator is qualified by training or experience to provide.

1. When a mediator believes a non-represented party does not understand or appreciate how an agreement may adversely affect legal rights or obligations, the mediator may advise the participants to seek independent legal counsel.

2. While a mediator may point out a possible outcome of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case is filed will resolve the dispute.

**N. Confidentiality.** A mediator shall preserve and maintain the confidentiality of all mediation proceedings. Any communications made during the mediation, which relates to the controversy mediated, whether made to the mediator or a party, or to any other person present at the mediation is confidential.

1. A mediator shall keep confidential from the other parties any information obtained in an individual caucus unless the party to the caucus permits disclosure.

2. All memoranda, work products and other materials contained in the case file of a mediator are confidential. The mediator shall render anonymous all identifying information when materials are used for research, training or statistical compilations.

3. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceedings except for any of the following:

(a) Where the parties to the mediation agree in writing to waive the confidentiality.

(b) When a subsequent action for damages between the mediator and a party to the mediation arises out of the mediation.

(c) Where there are threats of imminent violence to self or others.

(d) Where reporting is required by state law.

**O. Inadmissibility of Mediation Proceeding.** Mediation proceedings under this administrative order are non-binding and shall not impair the right of the litigants to demand a trial. Information, evidence or the admission of any party shall not be disclosed or used in any subsequent proceeding.

1. Statements made and documents prepared by a party, attorney, or other participant in the aid of such proceedings shall be privileged and shall not be disclosed to any court or construed for any purpose as an admission against interest.

2. All mediation proceedings are deemed settlement conferences as prescribed by court rule and the Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceedings the fact that there has been a mediation proceeding.

3. Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in a mediation proceeding under this administrative order.

4. A mediator shall not be called as a witness in any subsequent proceeding relating to the parties' negotiation and participation except as set forth in Section N of this administrative order.

**P. Concluding Mediation.** If an agreement is reached during the mediation process, the parties shall reduce their agreement to a written memoranda on the points on which agreement has been reached, and the memoranda shall be reviewed and signed by all parties before the mediation ends.

If an agreement is not reached during the mediation process, the mediator shall notify the court that the mediation failed to resolve the issue in conflict.

**Q. Settlement of case prior to mediation session.** If the case is settled prior to the mediation session, the parties shall notify the court and the mediator immediately of the settlement, and file a written, signed settlement agreement with the court prior to the mediation date. The agreement must be received by the court and the mediator at least 48 hours prior to the scheduled mediation session, and may be delivered initially by FAX, followed by filing the original signed document with the court.

If the agreement is not filed by the mediation date, all parties must appear at the scheduled mediation time. If the parties fail to notify the court and the mediator at least 48 hours prior to the scheduled mediation session or fail to attend the mediation session as required, they may be responsible for paying any mediation fees and/or sanctions imposed by the court.

**R. Immunity.** No mediator shall be held liable for civil damages for any action, statement, admission or decision made in the course of mediation unless that statement, action, admission, or decision is grossly negligent and made with malice or is in willful disregard for the safety or rights of any party to the mediation.

**S. Term of service.** Mediators shall be appointed for five years with a reapplication process at the end of that term.

**T. Removal from list of approved probate mediators.** Approval to mediate in the Probate Court confers no vested rights to the mediator, but is a conditional privilege that is revocable for cause.

1. At any time during the period of the contract agreement, an approved probate mediator who has engaged in conduct that reflects adversely on his/her impartiality or in the performance of his/her duties as a mediator, or has persistently failed to carry out the duties of a mediator as specified in the contract, or has engaged in conduct prejudicial to the proper administration of justice, may be removed from the list of approved probate mediators at the sole discretion of the Administrative Judge of the Probate Court.

2. All approved probate mediators must inform the Office of Mediation & Arbitration within 30 days of a change in circumstances such as a conviction of a misdemeanor, felony or loss of professional license. Such conviction or loss of professional license may result in removal from the list of approved probate mediators.

David D. King  
Administrative Judge of Probate Court

History:

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