

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
PROBATE MEDIATION PROGRAM GUIDELINES**

1. Description.

The Superior Court of California, County of Orange (Court), offers a voluntary Probate Mediation Program for probate cases.

2. Eligible Cases.

The mediation program is available for probate cases including, but not limited to:

- a. Decedents Estates,
- b. Trusts,
- c. Conservatorships (General and Limited), and
- d. Guardianships

3. Initiation of Mediation Process.

Mediation is available on a voluntary basis only. The parties may, at any time, file an Alternate Dispute Resolution (ADR) Stipulation form. The parties may choose from the Court's probate mediation panel an available mediator with no apparent conflict of interest and an alternate mediator. The mediator will set a date and time for mediation. The mediator will provide the place. If you settle your case, the mediator will handle the paper work.

4. Authority of Mediator.

All parties, their counsel, and persons with full authority to settle the case must personally attend the mediation, unless excused by the mediator for good cause. If any consent to settle is required for any reason, the party with the consent authority must be personally present at the mediation.

- a. The mediator may excuse participants for good cause. The mediator may determine whether persons with settlement authority can attend the mediation telephonically.

All parties are required to attend the mediation session and every effort should be made to encourage attendance.

- b. The mediator may require mediation briefs, statements, or other mediation materials. If the mediator requires that materials be sent, he or she should notify the parties directly in writing and include a time deadline for the service of the materials to all other parties. Mediators and parties may not submit copies of pre-mediation materials to the Court.

5. Timelines to Schedule the Mediation Session.

All mediation activity must be completed ninety (90) days from the date of filing of the Stipulation to ADR. Participation in mediation does not extend any dates or timelines for discovery, filing of motions, or trial dates.

6. Extensions.

Under the Probate Mediation Program, the mediator does not have any authority to grant an extension of time to mediate. If the parties need more time, they must file a stipulation with the Probate Clerk's Office to extend the mediation period. The stipulation must include a statement of the facts establishing good cause for the extension, a specific date for the mediation, the signature of the mediator, and a signature line for the judge who originally referred the case to mediation.

7. Notice of Mediation.

- a. The mediator will serve a Notice of ADR Session on all parties. The Notice of ADR Session must include the date, time and location of the hearing, and the date by which the mediation must be completed.
- b. The mediator must include with the Notice of ADR Session:
 1. The mediator's procedures for handling mediation briefs.
 2. The fees for the session, including both the reduced rate of \$300.00 for up to the first two hours, and the mediator's hourly market rate (even if the mediation is only scheduled for two hours or less).
 3. Any other fee requirements, including:
 - a. deposit fees (if the fee is refundable and under what circumstances), and
 - b. any administrative/case management fees (applicable to hour three (3) and beyond only).

8. Ethics and Standards of Practice.

As a condition of probate mediation panel membership, mediators must comply with the California Rules of Court rule 3.850 et. seq. Pursuant to these rules, there are several issues that must be raised with parties and participants. In addition, each mediator must read the ethical provisions for conduct and be able to independently assess his or her ability to handle each case. Any disclosures required by California Code of Civil Procedure section 170.1 and California Rules of Court rule 3.855 must be in writing.

As a minimum, the rules require that eight issues be raised with the parties at or before the commencement of the mediation session. The mediator must:

- a. Check his or her records to ensure that there are no conflicts of interest. If a potential conflict does not require immediate recusal, it must be disclosed in writing to the parties before the mediation begins to give them an opportunity to object. (CRC 3.855, CCP §170.1)
- b. Inform the parties at the outset of the first session that any resolution requires the voluntary agreement of the parties. (CRC 3.853)
- c. Provide the participants with a general explanation of the confidentiality of the mediation proceedings. (CRC 3.854(b))
- d. Discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants before speaking separately with one or more participants. (CRC 3.854(c))
- e. Provide all participants with a general explanation of the nature of the process, the procedures to be used, and the roles of the mediator, the parties and other participants. (CRC 3.857(c)) The mediator should also discuss his or her style.

- f. Inform all participants that during the mediation, he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. (CRC 3.857(d))
- g. Disclose any personal or financial interest if recommending other services. (CRC 3.857(e))
- h. Inform all participants of the mediator's lack of competency to testify in any subsequent probate proceeding pursuant to Evidence Code section 703.5, and the rules governing the confidentiality of mediation proceedings pursuant to Evidence Code section 1115 et. seq.
- i. Disclose in writing to the parties any fees, costs, or charges to be paid to the mediator by the parties before commencing mediation. (CRC 3.859(b))

9. Conducting the Mediation Session.

A mediation is defined as a dispute resolution process in which a trained third party neutral (known as a "mediator") facilitates communication between disputants and assists parties in reaching a mutually acceptable resolution of all or part of their dispute. In this process, the mediator carefully explores not only the relevant evidence and law, but also the parties' underlying interests, needs, and priorities. The mediator is not the decision maker and does not resolve the dispute; the parties do. Mediation is a flexible, informal, and confidential process that can be less stressful than a formalized trial.

A mediator may employ a variety of techniques, styles, and models of mediation during the mediation process in an attempt to reach an informed, voluntary agreement. Appropriate mediator behavior may include, but is not limited to:

- a. Providing information about the process,
- b. Addressing obstacles to communication,
- c. Assisting the participants in defining the issues,
- d. Exploring alternatives for resolution, and
- e. Building the capacity of the parties to make an informed decision.

Under the Court's Probate Mediation Program, mediators may offer a personal evaluation or opinion, but only at the parties' request, and as a tool used during the mediation. The court strongly discourages mediators from offering opinions about the case early on in the process.

The California Rules of Court, rules 3.856 – 3.858 provide the following for the conduct of a mediation session:

- a. **Competence.** A mediator must decline to serve or withdraw if the mediator determines that he or she does not have the requisite skill, knowledge, and ability to conduct the mediation effectively.
- b. Mediation may not be combined with any other ADR process.
- c. **Settlement Agreements.** A mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so, the mediator confines the assistance to stating the settlement as determined by the parties.

- d. Termination. A mediator may suspend or terminate the mediation, or withdraw as mediator when he or she reasonably believes the circumstances require it, including whether he or she suspects that:
 - 1. The mediation is being used to further illegal conduct.
 - 2. A participant is unable to participate meaningfully in negotiations, or
 - 3. Continuation of the process would cause significant harm to any participant or third party.
- e. Marketing. A mediator may indicate in his or her marketing materials that he or she is a member of the Court's panel but may not make any representation that he or she is approved, endorsed, certified, or licensed by the Court.

10. Mediator Requirements for Providing Information to the Court.

A Statement of Agreement or Non-agreement must be returned to the Superior Court in every case. The Statement of Agreement or Non-agreement is due 10 days after the mediation is completed.

11. Qualifications and Requirements for Probate Mediation Panel Members.

To qualify for appointment to the probate mediation panel, an applicant must satisfy the following requirements:

- a. **California Bar Membership.** The applicant must be a member in good standing of the California Bar for a minimum of ten (10) years.
- b. **Training.** The applicant should have successfully completed at least thirty (30) hours of mediator training from a recognized provider. The thirty (30) hours should include:
 - 1. At least one basic/introductory mediator training course consisting of ten (10) hours of classroom training and ten (10) hours of experiential training (e.g., role playing), and
 - 2. At least five (5) hours of advanced training or specialized training.
 - 3. Applicants with extensive experience in handling estates, trusts, guardianships and conservatorships may seek a waiver of some or all of the training requirements. Waiver requests will be considered and decided by the judges assigned to the Probate and Mental Health Panel.
- c. **Experience.** The applicant must have conducted at least eight (8) mediations of two (2) hours or more in duration during the past three (3) years. Specifically:
 - 1. Those mediations should fall within five (5) general categories which include:
 - a. Decedent's Estates,
 - b. Trusts,
 - c. Conservatorships (General or Limited),
 - d. Guardianships, and

e. Settlement Conferences conducted as mediations after completion of training.

It is preferred, but not required, that the applicant have conducted at least two (2) mediations in each of the five categories.

2. Only “co-mediations” conducted through a recognized community-based mediation center that utilizes a “co-mediation model” may be applied toward the experience requirement.
3. Arbitrations that become mediations or “med-arb” may not be included.
4. “Mediations” refers to the number of cases mediated, not the number of mediation sessions.

d. **Disclosure, Disqualifications and Record Keeping Requirements.**

1. Applicants must agree to comply at all times with California Code of Civil Procedure section 170.1 and California Rules of Court rule 10.781(c)(1).
2. All disclosures and disqualifications must be in writing and the writing must be maintained for four (4) years following completion of the mediation.
3. Mediators must have the disclosures and disqualifications documents available to the Court upon request.
4. Failure to fulfill these requirements is grounds for the mediator’s termination from the program.

e. **Place of Business.** Mediators must maintain a mediation practice or place of business within Orange County (including an Orange County business address and phone number) and conduct all sessions in facilities that are considered professional and appropriate for mediation by the court (i.e. mediation offices, law firms, or other appropriate conference room facilities).

f. **References.** Applicants must provide three references. Two references must be from a person who appeared before the applicant in a mediation (as a party or attorney). The third reference may be from a person who is familiar with the applicant’s mediation skills.

g. **Criminal/Disciplinary Actions.** Applicants must notify the Court and provide a written explanation if the applicant has ever been:

1. charged with, pleaded guilty or no contest to, or convicted of, a felony or a misdemeanor, or
2. suspended or subject to disciplinary action as a result of an investigation from any professional organization, public entity, or mediation program.

The Court will take the explanation and circumstances under consideration as it reviews the applications.

h. **Vexatious Litigant.** The applicant must not have been declared a vexatious litigant.

i. **Insurance.** The applicant must have or agree to obtain professional liability insurance covering services as a mediator. Mediators must file their Certificate of Insurance by January 15th of each year, or within thirty (30) days of acquiring insurance.

j. **Pro Bono Services.** Mediators must agree to serve as a mediator on a pro bono or modest-means basis in at least one case per year, not to exceed eight (8) hours, if requested by the Court (CRC 10.781(c)(2)).

- k. **Web Site.** Mediators must permit the court to place mediator information on the Court's web site, and in the Court's mediator directories and listings.
- l. **Advertisement.** A mediator may indicate in his or her marketing materials that he or she is a member of the Court's panel but may not indicate that he or she is approved, endorsed, certified or licensed by the Court.

12. Maintaining Panel Status.

To maintain status as a probate mediation panel member, mediators must:

- a. Provide the Court with a current and updated Orange County address and biographical information, including the Orange County address of the ADR firm or agency that handles administration for the mediator and direct contact information for the mediator, including phone number and email address.
- b. Have mediated at least one case referred under the Probate Mediation Program within the past twenty four (24) months. The operative date to determine mediation will be the date of referral and not the date the case was actually mediated.
- c. Complete four (4) hours of approved continuing education annually focused on mediation skills, process and standards. At least one hour of continuing education should focus on disclosure and disqualification issues.
- d. Comply with the Court's procedures regarding mediation timelines, case administration, party notification, post mediation paperwork, and program evaluation.
- e. Promptly notify the Court in writing if declared a vexatious litigant, the subject of any criminal proceedings (except infractions), or of any proposed or pending disciplinary action by any professional organization, public entity, or mediation program.

13. Compensation.

- a. All mediators on the probate mediation panel must abide by the following payment schedule:
 - 1. \$300.00 for up to the first two (2) hours of the mediation session (the "initial period"), and
 - 2. the mediator's individual hourly rate for mediation services beyond the initial period.
- b. The \$300.00 fee for the initial period applies to actual mediation session hours, including any supplemental discussions between the mediator and one or more of the parties during this period. Mediators may not charge any additional fees for intake, scheduling, administration, preparation, case evaluation, or brief review time or for the securing of mediation facilities associated with the initial period. Violation of this provision may result in the immediate removal of the mediator from the probate mediation panel.
- c. Mediators may not require more than the \$300.00 fee for the initial period as a deposit prior to beginning the mediation session. Mediators may retain this deposit if the cancellation was made less than two (2) court days prior to the scheduled date for the initial period.
- d. Mediators will be compensated directly by the parties. The fees and expenses of the mediator must be shared equally by the parties, unless otherwise agreed by the parties. Mediators will be responsible for the collection of fees. The Court will not assist with collection or other fee dispute issues pertaining to mediation under the Probate Mediation Program.

- e. Mediators must declare their individual hourly rates and any deposit or cancellation policies in their mediator profile. In addition, parties must be notified in writing upon receiving a referral from the Court and prior to the beginning of the first mediation session of the mediator's hourly rate and any deposit, cancellation, or other policies.

14. Case Limits.

The Court may impose case limits under the Probate Mediation Program depending on the mediator's caseload. In no instance will a mediator be assigned more than one hundred (100) active cases at any one time.

15. Panel Descriptions and Lists.

In accordance with California Rules of Court rule 10.781(a), the mediator panel listing, subject area experience listing, and mediator profiles are maintained on the Court's ADR web pages.

Although the Court will make the mediator profiles and the subject area experience listing available to the parties to assist in their selection, the Court does not independently examine or guarantee the designation of "subject area experience" on the subject area experience listing. Mediators are expected to be entirely candid and accurate in the representation of their background and areas of experience.

16. Mediation Facilities.

- a. It is the expectation of the Court that each mediator on the probate mediation panel will maintain a mediation practice or primary place of business in Orange County. It is also expected that all sessions will be conducted in facilities that are professional and considered appropriate for mediation (i.e., mediation offices, law firms, or other appropriate conference room facilities).
- b. Mediators are expected to arrange their own mediation facilities.
- c. Mediators must ensure that the mediation location can accommodate persons with disabilities. Written guidance concerning the responsibility of mediators to provide disability accommodation can be found at:

<https://www.eeoc.gov/eeoc/mediation/ada-mediators.cfm>

<https://www.eeoc.gov/eeoc/mediation/ada-parties.cfm>

17. Resignation.

Any probate mediation panel member may resign at any time by communicating in writing with the ADR Administrator, with the understanding that all cases referred to the mediator will be completed and all forms and program-related materials will be submitted to the Court.

18. Removal.

- a. It is a goal of the Court to encourage excellence in mediation practice by setting guidelines that promote honesty, impartiality, and integrity in mediation. The California Rules of Court outline the Court's expectation that mediators will conduct themselves in accordance with the highest ethical standards. Mediators on the probate mediation panel will be expected to comply with all requirements outlined by the Guidelines, and the California Rules of Court.
- b. Mediators serve at the pleasure of the Court and may be removed from the probate mediation panel at any time at the sole discretion of the Court without cause.

- c. The Court may use informal or formal means to deal with complaints and/or issues relating to panelist and maintaining excellence in the practice of mediation under the Probate Mediation Program. If a complaint against a mediator is made, the Court will determine whether the mediator will be removed from the active list pending investigation of the complaint. Please refer to Orange County Superior Court's local rules concerning disciplinary/grievance proceedings.

- d. In the event a mediator does not comply with the provisions of these guidelines in order to maintain panel status, the Court may remove the mediator for noncompliance. Once removed, the mediator will be required to submit a new application when the Court is accepting such applications and must be approved by the judges assigned to the Probate and Mental Health Panel in order to again be placed on the Probate Mediation Panel.