

# FELONY MEDIATION PROGRAM

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## HANDBOOK

Prepared For:

**The Administrative Office of the Courts (AOC)**

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## Introduction

This document is an informational how-to guide for judges, mediators, and attorneys participating in Kentucky's Felony Mediation Program (FMP).

## Mission Statement

To develop a progressive statewide Court of Justice FMP that encourages the Commonwealth to support the peaceable resolution of disputes, advance the efficiencies of its court system, and become a national model in alternative dispute resolution.

## Program Goals

The FMP has four goals that benefit the Commonwealth:

1. Reduce docket congestion for Circuit Courts in Kentucky.
2. Provide significant savings in court resources.
3. Utilize the unique knowledge and experience of retired judges to mediate felony cases.
4. Provide element of restorative justice to parties involved in felony mediation.

## Program Objectives

In addition to these goals, there are five main objectives of the FMP:

1. Collect data on case dispositions.
2. Analyze court-reported statistics to determine what impact mediation services have on criminal cases.
3. Gather data from judges, attorneys, and parties that participate in the FMP. This data will evaluate goals, expectations, and satisfaction of mediation services.
4. Train judges, prosecutors, and defense attorneys to recognize cases appropriate for mediation.
5. Gather and analyze data for various court sites across the state to determine mediation resources and how to best meet their needs.

## Mediation Nature and Purpose

Pursuant to Rules of Civil Procedure (CR) 99.02, mediation is an informal process where a neutral third party, called a mediator, facilitates the resolution of all or part of a case. Decision-making authority remains with the parties, and not the mediator. Instead, the mediator's role is to assist parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.

Defendants and their counsel meet with a prosecuting attorney at the local courthouse, or virtually (via Zoom), for a private settlement conference with a trained mediator who is well-versed in Kentucky criminal law and procedure. The mediator will act as a diplomat to help parties and counsel achieve a voluntary plea agreement. The process is risk-free to the negotiating parties, who can say “no deal” if they are dissatisfied with the offer on the table from the opposing party.

## Mediation Philosophy

Because presiding judges have the authority to order parties to mediation, it's necessary for the Felony Mediation Program to:

1. Provide mediators and a program that: is of high quality; easily accessible; permits party and [victim participation](#); allows lawyer participation; and provides clear and complete information about the process and procedures that are utilized.
2. Monitor inappropriate pressure to settle.
3. Conduct mediation according to applicable rules and statutes.
4. Explain voluntary nature of participation and agreement.
  - a. While there are many mediation styles, the two primary models are facilitative and evaluative. This program relies primarily on the facilitative model, which is governed by principles of party control over the outcome, and non-authoritative neutrals. The facilitative mediator does not give solutions, and believes disputing parties are in the best position to find their own appropriate solutions given their particular circumstances. At the same time, however, if a participant requests the mediator's evaluation, consistent with standards of impartiality and preserving party self-determination, a mediator may provide information that he/she is qualified to provide by virtue of training and experience.
  - b. The mediator controls the process by facilitating communication between the participants and enforcing ground rules. They encourage parties to generate and evaluate options and clarify agreements. The mediator keeps the parties focused. Mediators do not make decisions for the parties.

## Authority for Felony Mediation Program

Pursuant to Section 116 of the Kentucky Constitution and Supreme Court Rule 1.010, the Supreme Court has power to develop rules to promote efficient operation of the court's business, including rules that establish and maintain a mediation program.

1. KRS 454.011. “It is the policy of this commonwealth to encourage the peaceable resolution of disputes and the early voluntary settlement of litigation through negotiation and mediation. To the extent it is consistent with other laws, the

courts and state governmental agencies are authorized and encouraged to refer disputing parties to mediation before trial or hearing.”

2. According to the Guidelines for the Retired Judges Program, all requests for a retired judge mediator must originate with the presiding judge by contacting the FMP Coordinator at the AOC.

## Mediator Qualifications

For the purposes of the FMP, a retired judge mediator must meet the following two qualifications in order to serve as a mediator:

1. Have extensive experience as a prosecutor or criminal defense attorney, and/or familiarity with Kentucky criminal law; and
2. Have completed, at a minimum, 40 hours of mediation training and felony mediation training.

A roster of qualified retired judges/mediators is available [here](#) or by contacting the FMP Coordinator.

## Benefits of Felony Mediation

The FMP has benefits that are felt by more than just the two opposing parties:

- a. Court: Felony mediation helps reduce high-volume criminal dockets and backlogged cases.
- b. Commonwealth Attorney: Helps manage caseload, provide speedier disposition of cases, attorney hears the defendant’s perspective of the case from a defendant and his/her lawyer, instead of just his/her lawyer.
- c. Defendant: Receives speedier access to justice in an informal setting; opportunity for a second opinion in a safe environment; and a tailored agreement.
- d. Public Advocate: Helps manage caseload and create fairer and more creative agreements for clients.
- e. Taxpayer: Most jail expenses are borne by the local tax base. Felony mediation helps reduce jail population and resulting expenses.
- f. Jailer: Overcrowded jails increase the risk of liability. Felony mediation helps reduce the risk.
- g. Victim: Provides an opportunity for the victim to participate in the process and be heard.

The high rate of settlement achieved through mediation is directly related to the process and the unique experience of the mediator. Mediation does not replace plea

bargaining but improves the concept by balancing power between the opposing sides. The mediator helps the attorneys focus on the individual case by defining the issues and reviewing the strengths and weaknesses of each side. Parties are encouraged to be realistic about the merits of their cases.

Mediation is most successful when each participant has their real interest addressed. The mediator's role is to attempt to find and satisfy each participant's interests.

Felony mediators are unique. Many were prosecutors or criminal defense attorneys before becoming judges. They have experienced a wide variety of criminal cases and different personalities among prosecutors, victims, defendants, and lawyers. Their experience allows them to view situations from a different perspective. They often offer solutions that the parties and lawyers have never considered. They are trained in civil and criminal mediations and have received mentoring. They have the opportunity to meet with other felony mediators to discuss techniques on a quarterly basis.

Because they were all previously judges, participants see felony mediators as neutral and their judicial experience gains them trust and credibility with defendants.

The opportunity to speak openly with a judge without being judged is appreciated by defendants. Participants also appreciate the fact that there are no limitations or penalties as to what they can say to a felony mediator.

## Restorative Justice

The FMP was formerly known as the Felony Mediation Docket Program, and it was initially designed to reduce caseloads in jurisdictions with overburdened dockets. It is still primarily a device to help judges control their dockets and to expedite the resolution of criminal cases. But the FMP also plays an important role in restorative justice for all participants in the criminal justice system, including [victims](#).

The criminal justice system traditionally has been a retributive system. It is viewed as a contest between the government and the defendant. The government makes the rules, and if someone breaks them, the government is the party who goes to court to seek justice. The party seeking retribution is not the victim, but society in the abstract. There may be some monetary restitution awarded to the victim, but the victim does not have the final decision in the amount awarded to him or her. The prosecutor is focusing on the guilt of the defendant and whether these facts support guilt or innocence as defined under a specific set of conditions put forth by the legislature as a crime. The process is truly adversarial. The prosecutor attempts to prove facts to show the defendant is guilty of violating the law. If that is proven, the prosecutor attempts to exact a punishment he or she believes is just to pay as the defendant's debt to society. A prosecutor may speak to the victim but in reality, the victim is on the periphery. It is society versus the defendant.

In recent years, there has been a movement towards improving outcomes in the criminal justice system by adopting a restorative justice model. Restorative justice focuses on repairing harm and holding the defendant accountable by understanding

and responding to the needs of each party involved and those of the broader community. Principles of restorative justice are already being used in Kentucky’s courts through programs such as drug court, veterans’ treatment court, mental health court and teen court. The FMP is another adaptation of restorative justice.

The dichotomy between the current system of retributive justice compared to the restorative system of justice is illustrated by the following:

<u>Retributive</u>	v.	<u>Restorative</u>
Crime is violation of rules		Crime harms people and relationships
State is victim		Victim is a person
Parties are state and defendant		Parties are victim and defendant
Debt owed to society in the abstract		Debt owed to the victim
Debt paid by punishment		Debt paid by working to repair harm
Victim on periphery to process		Victim active/central participant
Adversarial Process		Dialogue - related process

## Confidentiality of Process and Records

The confidentiality rules set forth under CR 99.11 apply to all cases referred to felony mediation along with the following provisions :

1. All participants in a felony mediation must sign the Agreement to Mediate for Criminal Cases (AOC-MED-ADR-13) (Appendix, Exhibit 7), which explains the mediation process and binds the parties to confidentiality.
2. Mediation sessions shall be closed to all persons other than the parties, their representatives, and other persons invited by the mediator with the consent of the parties.
3. Mediation shall be regarded as confidential settlement negotiations for purpose of KRE 408.
4. Negotiations and behavior during a mediation session shall not be divulged in a subsequent court proceeding.
5. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the court for good cause shown CR 99.11. This privilege and immunity reside in the mediator and may not be waived by the parties.



6. Confidentiality shall not be construed to prohibit or limit the presence of professionals necessary to effectively present a party's position during mediation, or to prohibit or limit effective mentoring, research, or program evaluation.
7. No part of the mediation may be recorded without the express agreement of the parties and the mediator.
8. For purposes of this rule, all mediation communications, including documents introduced during the mediation process, are privileged and confidential. The mediation process includes any communications with the mediator in advance of, during, and after the mediation conference. Mediation communications are not subject to disclosure through discovery or any other process and are not admissible into evidence in any judicial or administrative proceeding. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during the mediation.
9. Each party and/or counsel is responsible for explicitly advising the mediator precisely what information communicated to them is done so in confidence. Information shall not be divulged to other mediation participants without express authority to do so.
10. A mediator shall not disclose, directly or indirectly, to any participant in the mediation any information communicated to the mediator in confidence unless the mediator is given permission by the communicating participant to do so. A mediator may encourage a participant to permit disclosure, but absent such permission, the mediator shall not disclose.
11. Unless otherwise allowed under CR 99 or this handbook, a mediator shall not disclose to, nor discuss with, court officials or staff any information communicated to the mediator by any participant within the mediation process, including correspondence or communications regarding scheduling or attendance, nor may the mediator comment about the mediation negotiations in any respect.
12. Nothing in this rule prohibits a mediator from reporting abuse according to KRS 209.030, KRS 620.030, or other applicable law.
13. Any executed settlement document shall not be deemed privileged and confidential as provided in this rule unless the parties explicitly stipulate that the terms of settlement are to remain confidential. In any event, however, should the settlement agreement be required as proof in a proceeding to enforce the terms of settlement, such settlement agreement shall no longer have the privilege of confidentiality and may be introduced into evidence.

14. Notwithstanding any other provision of this CR 99.11, a mediator will not be bound by the confidentiality requirements of mediation to the extent allowed by a court in considering a claim against the mediator.

## Case Referral and Scheduling

Most criminal cases can be mediated, including murder, manslaughter, robbery, theft, burglary, assault, and sex and drug related crimes. When referring or scheduling a case, the following considerations should be taken into account:

- Priority should be given to cases in which the defendant is incarcerated.
- Cases with multiple defendants and/or multiple charges may require additional time and accommodations and should be brought to the attention of the coordinator.
- Due to the voluntary nature of the mediation process, all parties must agree to mediate before a request is made. The Commonwealth Attorney is responsible for communicating and establishing [victim participation](#). All referrals are subject to approval by the presiding judge.
- A Request For Assignment of Retired Judge To Conduct Felony Mediation form, AOC-MED-ADR-14, may be found [here](#).
- Any party, judge or mediator may withdraw from mediation at any time.

## Mediating Virtually or In Person

The request for assignment of a retired judge to conduct felony mediation should indicate if the mediation is to be held virtually or in person. The FMP Coordinator will assist in scheduling virtual Zoom meetings.

For in-person mediations, preference is given to the local courthouse for easy access to court records, security, and the presiding judge who can take a plea immediately upon completion of the mediation session.

The security and safety of the participants is of utmost importance. If at any point the mediator and/or participants feel that their safety is compromised, they may immediately terminate the mediation. In addition, local law enforcement or court security should be made available to ensure a safe environment for in-person sessions.

## Mediation Request

A circuit judge can request the Chief Justice to assign a retired judge felony mediator to mediate in his or her circuit.

1. Mediation of a criminal case constitutionally requires the consent of the Commonwealth's Attorney and the defendant.

2. Before making the request, the circuit judge should enter an Agreed Order for Mediation executed by the defendant, defense attorney and the Commonwealth's Attorney. See Appendix, Exhibit 2.
3. A request to the Chief Justice for appointment of a felony mediator is made on form [AOC-MED-ADR-14](#). This form is submitted via email to [felonymediation@kycourts.net](mailto:felonymediation@kycourts.net). The form provides two types of distinct mediations: felony docket mediation or specific case mediation.
4. Mediation requests should include information per Paragraph 3 "Reason(s) for Request."
  - a. A request must be made at least ten (10) days prior to a scheduled mediation date.

### **Docket-Style Mediation**

Paragraph 4A of form [AOC-MED-ADR-14](#) is for approval and assignment of retired judge felony mediator(s) for a felony docket-style mediation. A key factor for a felony mediation docket to be successful is the active support and participation of the local judiciary, prosecution, defense bar, circuit clerk, and the sheriff. The presiding judge and their staff must be willing to provide the leadership and support necessary to all parties.

- a. This type of program is intended to settle many cases in a single day.
- b. Previous examples have shown that three experienced felony mediators who have worked together in the past can effectively resolve 18 cases in a day.
- c. If this type of mediation is being requested, the date should be set far enough in advance to allow for adequate preparation time. If the jurisdiction has never conducted a felony mediation docket, it should be scheduled a minimum of eight (8) weeks in advance. If the jurisdiction is experienced with conducting a felony mediation docket, scheduling five (5) weeks in advance should be sufficient. The FMP Administrator will consult with the circuit judge to assess the number and type of cases to be mediated so a proper assignment of mediator(s) can be made. An assessment will also need to be made on the amount of training necessary for support staff in the requesting jurisdiction. When a jurisdiction is conducting its first felony mediation docket, staff from the mediation division at the AOC will schedule an orientation. Sitting judge(s), the Commonwealth's Attorney, public defenders, defense attorneys, the circuit clerk, bailiffs, jailer, and other local officials are invited. The purpose of the meeting is to explain the felony mediation process, its purpose, expectations, and to discuss planning for the docket.

- d. The judge who orders a felony mediation docket is required to appoint a liaison from their office to work directly with the AOC mediation division. Generally, the liaison is the judge's law clerk/staff attorney. The on-site liaison has the following duties:
1. Facilitate referrals through use of form [AOC-MED-ADR-14](#), Request For Assignment of Retired Judge to Conduct Felony Mediation.
  2. Locate and makes available courthouse conference space for mediation.
  3. Locate and provide a private space for mediators to convene outside the mediation.
  4. Keep AOC informed of the number of referrals submitted by the sitting judge(s).
  5. Create the felony mediation docket at least one week before the event.
  6. Send the docket to the AOC mediation division.
  7. Ensure an order setting mediation and ordering participants to appear is entered into the record at least 10 days prior to mediation day.
  8. Have case files and sufficient copies of the Agreement to Mediate, Plea Colloquy, Report to Court and Confidential Report to AOC forms available on the date set for the felony mediation docket.
  9. Prepare the calendar for the felony mediation docket. This is one of the most important documents needed to ensure the success of the day. It provides the names of the cases, case numbers, names of the mediator originally assigned to the cases, names of the prosecutors, names of the defense attorneys, room assignments, and bailiffs assigned to rooms.
  10. Arrange for a judge to accept pleas on mediation day and for a courtroom to be available to take pleas.
  11. Review referral to ensure there is enough time for each case. Cases are generally set 1.5 hours apart.
  12. Make sure court security is aware that a felony mediation is scheduled and is able to ensure a safe environment.
  13. Make sure the judge(s) calendars are available to set sentencing dates. When the date for mediation is selected, there are different methods for considering cases for mediation. A judge may consider providing notice during criminal dockets that he or she is accepting recommendations for cases to be placed on the felony mediation docket.
- e. A judge can also review pending cases and ask the parties to consider mediation. Pretrial conferences are a good time to consider this option.

The judge should also review the jail list for possible cases for mediation. Defendants who are currently in jail should be given priority on the mediation docket.

- f. The judge should clarify that mediation requires the voluntary agreement of both the defendant and the Commonwealth's Attorney, who has obtained the agreement of the victim, along with the approval of the presiding judge. Form= [AOC-MED-ADR-14](#), Request For Assignment of Retired Judge to Conduct Felony Mediation, must be completed and signed by the presiding judge and submitted to the FMP Coordinator .

### **Specific Case Mediation Request**

Some cases are too complex to be placed on a felony mediation docket. Paragraph 4B of form [AOC-MED-ADR-14](#) should be selected and completed for those type of cases.

- a. Typical cases that fall into this category are capital murder, sex crimes, [victim participation](#), multiple defendants being mediated together, or a defendant who has multiple charges in different jurisdictions.
- b. In this type of request, the circuit judge does not designate a day for mediation, but instead requests approval of mediation for a specific case.
- c. The circuit judge may request a specific retired judge for the mediation or request the FMP Administrator to select a mediator. If the circuit judge is requesting a specific mediator, they should make sure the mediator has consented to serve before the request is submitted.
- d. It's the responsibility of the FMP Administrator to make sure the mediator is trained and has the requisite experience to handle the specific case.

### **Order Appointing Mediator**

If the request for a mediator is approved, the Chief Justice enters an order appointing a felony mediator(s). Mediators are unable to schedule and/or mediate cases until they have an order of appointment from the Chief Justice.

Once the mediation is scheduled, the circuit judge should follow up with an order in the record requiring the parties to appear at a certain time and place. See Appendix, Exhibits 5 and 6.

### **Jurisdictional Order Appointing Mediator**

Some circuit judges have encountered unique situations in their jurisdictions and have received approval for the use of felony mediation to meet their specific needs. The Chief Justice may enter a blanket order appointing a felony mediator to a circuit with authority to perform mediations for a specific term. These types of appointments are reviewed by the FMP administrator.

- a. These assignments can never exceed thirty (30) days without a review and an order extending the length of time.
- b. A circuit judge may set specific days on the court's calendar as mediation days. On those days, a felony mediator will be assigned to appear and mediate the cases placed on the court's docket.
- c. If a circuit judge wants to pursue the use of the Felony Mediation Program in a manner that does not fit within Paragraphs 4A or 4B of form [AOC-MED-ADR-14](#), he or she should contact the FMP Administrator.

## Choosing Cases for Mediation

Any type of crime can be mediated, but not every case should be. Although every type of crime has, at some point over the years, successfully been mediated, many cases have been found to be unsuitable for mediation.

Mediation is not a substitute for plea bargaining. It's a process where plea bargaining has been tried and shown to be ineffective in a particular case. It's the responsibility of the presiding judge as the gatekeeper to make the initial determination whether a particular case is appropriate for mediation.

### Case Appropriate Mediation Indicators

Typical questions the presiding Judge should ask the attorneys requesting mediation include:

1. Is discovery complete?
2. Has the prosecution made an offer to defendant?
3. Has defendant made a counteroffer to the prosecution?
4. Have there been rulings on all evidentiary issues?
5. Are there victims who want to be heard on plea bargaining?
6. What are the issues that are the obstacles to the plea-bargaining process?

Over the years, cases have been found to be inappropriate for mediation. The following are a few scenarios that indicate mediation would be unsuitable.

### The Defendant Who is Only Seeking Delay of the Inevitable

This type of case is more often a result of a defendant who is out on bond. Also, a defendant who has a long criminal history and is facing charges that would result in a life sentence has little to no incentive to plea bargain.

One such case that of retired Judge Frohlich was assigned to mediate involved a defendant who was a PFO 1 facing two new serious felony charges. When Judge Anthony Frohlich spoke to the defendant, his first response was “They got the wrong guy.”

Judge Frohlich’s response was “Let me guess? You are out on bond, and you agreed to mediation to delay the trial as long as possible.”

Taken aback, the defendant responded, “... I hope you are not mad at me. I like your program, but I would rather die out here than in jail.”

### **The Defendant Who Claims Innocence**

When the program was first being developed in Boone County, there were two cases that came before retired Judges Raymond Lape, William Wehr, and Leonard Kopowsky where the defendants claimed innocence. One resulted in a dismissal. The other went to trial and the defendant was acquitted. One of the problems in mediating a case where a defendant claims innocence is the possibility the case is open to inappropriate pressure to settle. Accordingly, a decision was made early on to avoid cases in which a defendant claims innocence.

Occasionally, however, a case comes along where a defendant claims innocence and the case is appropriate for mediation. In these circumstances, the assessment of the presiding judge is critically important. There are many sex-crime cases where the victim’s and defendant’s versions of the facts are viewed differently. This is to be differentiated from the case where the defendant claims the sex act never occurred and the victim is lying.

Presiding judges must retain discretion with respect to the selection of cases appropriate for mediation. Their discretionary judgment is a key component to the success of the program. One such example: Judge Frohlich received a telephone call from one of Kentucky’s longest-tenured judges. A capital murder trial was slated to begin in less than two weeks. The defendant had been held without bond for two-and-a-half years awaiting trial and had repeatedly claimed his innocence. The jurisdiction had never used felony mediation.

The mediation resulted in an agreement whereby the defendant would sit in the courtroom and be interviewed by the Commonwealth’s Attorney and the investigator while on the record. The interview could not be used against the defendant unless he took the stand to testify. In return, the Commonwealth agreed to restart the investigation and while it was ongoing, the defendant would be out on bond. Several months later the charges were dismissed. Justice was swiftly delivered because the presiding judge took the initiative to move the case into mediation.

### **Multiple Co-Defendants**

If a case has multiple co-defendants and only one defendant has agreed to mediation, the first question that needs to be asked is whether the defendant will testify against the co-defendants. If they are refusing to testify against the other co-defendants as part of a plea agreement and the position of the Commonwealth Attorney requires testifying, then mediation is not appropriate. In this type of case, all co-defendants need to be mediated simultaneously or the whole case should go to trial.

Conversely, there are many case types that have been found to be both appropriate for mediation and helpful for managing a court's docket:

### **Mediating Co-Defendants**

Felony mediation has proven to be a helpful tool in situations where there are multiple co-defendants, particularly when all defendants refuse to testify against each other. In one jurisdiction, Judge Frohlich successfully mediated four co-defendants, with four separate defense attorneys, at one time.

### **Victim Participation**

There are cases where victims indicate their strong desire to be heard in the decision-making process. Felony mediation provides a safe and skilled environment for this to happen.

### **Capital Murder Cases**

These types of cases consume a great deal of time and resources. Felony mediation in a capital murder case generally involves 15-16 participants. The Commonwealth's Attorney usually has an assistant, investigator, family members and victim advocate. The defendant usually has three attorneys, family members, investigator, special investigator, social worker, and experts. Felony mediation time and time again has resolved capital cases, saved time on the court's calendar, and lowered expenses to taxpayers.

### **Multiple Charges in Different Divisions**

There are multiple divisions in larger circuits, which means a defendant with multiple cases may end up with cases in different divisions. Depending on how cases are assigned, there may be multiple assistant Commonwealth's Attorneys or multiple public advocates involved. Felony mediation provides the opportunity to discuss all the cases at one time to have a universal resolution.

### **Charges Not Closely Connected Across Multiple Jurisdictions**

In some situations, the defendant may have pending criminal charges in several different counties. It's important to all parties for the cases to be resolved at the same time. With the use of Zoom to conduct a felony mediation, resolution of all cases can be accomplished at one time.



### **Crimes in Multiple Jurisdictions Closely Connected**

Retired Judge Stephen Hayden successfully mediated multiple cases where a defendant stole an automobile in one jurisdiction, committed an assault in another, robbed a bank in a third, and committed a murder in the fourth. He convened the mediation in the jurisdiction where the murder took place and the other jurisdictions participated in person or by conference call. The mediation resolved the charges in all four jurisdictions. The defendant entered a plea that day and was subsequently transported to the other jurisdictions to enter his guilty pleas.

### **Financial Crimes**

Financial crimes involving cases of fraud, embezzlement, and exploitation of adults, are often appropriate cases for felony mediation. With these cases, finding a method for restitution is a key component to settlement.

The above discussion is not intended to limit the types of cases which should or shouldn't be mediated. It's meant to illustrate the decision to mediate is an evaluative process. It takes the consent of the defendant, Commonwealth's Attorney, and presiding judge before felony mediation can be considered. The presiding judge makes a recommendation to the Chief Justice of the Supreme Court that a case is appropriate for mediation by filing the form [AOC-MED-ADR-14](#).

## **Felony Mediation Preparation**

The purpose of any felony mediation is to resolve the case. How the parties prepare can greatly increase the likelihood of a successful resolution. What follows should help guide your preparation.

### **Communication of Mediation Process**

Once an order of appointment has been entered, the most effective way to move forward in mediation is by group email. This email should include the Commonwealth's Attorney, defense counsel, felony mediator, and someone from the circuit judge's office (typically, a judicial support specialist). This communication is used to select the date, time, location, or other specifics for the mediation. See Appendix, Exhibit 6.

This email will allow all parties to discuss logistics of the mediation, including the date, time, and location. Felony mediation should take place at a judicial facility. The prosecution and the defense will need separate rooms. If there are multiple defendants, each defendant and their attorney will need a separate room.

Once these decisions have been made, the presiding judge should enter an order setting forth the details of the mediation. This order is typically prepared by the prosecutor. The felony mediator should be included on the distribution list for the order. See Appendix, Exhibit 7.

If the defendant is in jail, arrangements must be made to transport them to the mediation. If possible, a defendant incarcerated in another county should be transported the day prior to the mediation date. This ensures the defendant will be available for the mediation and allows the defendant and defense counsel time together to adequately prepare their case.

### **Before the Mediation**

Prior to the start of mediation, discovery should be complete (or near completion) and the prosecution must have formally made an offer to the defendant. Defense counsel should have pointed out to the prosecution, or tested by motion before the court, defects in the prosecution's case requiring dismissal or reduction of any charge as a matter of law.

Both the prosecution and defense must prepare for the mediation in much the same way they would prepare for a trial. This allows for both sides to be able to present the defendant and the victim(s) with a clear-eyed assessment of the most likely outcome if the matter goes to trial.

### **The Prosecution**

The prosecutor should determine who will participate in mediation with them, including offering the victims the opportunity to participate. The prosecutor should consult with these participants and make a formal offer to defense counsel for their client to consider.

If the prosecution plans to give considerable weight to the wishes of the victim(s), they should meet with them a few days before mediation is to be conducted and lay out their assessment of the case, including each side's strengths and weaknesses and the most likely outcomes if the case goes to trial. During the consult, the prosecutor should get a sense of what resolution is acceptable to the victim(s) in exchange for avoiding the uncertainty of their desired trial outcome.

Even if the victim doesn't want to be an active participant at mediation, the prosecutor should always consult with them before it begins. This is especially true in sex-related crimes. Defendants in these crimes frequently rely on the belief that the victim will refuse to testify at trial. Accordingly, having the victim present or at least available by phone during the felony mediation is usually beneficial for getting the case successfully mediated.

### **Defense Counsel and the Defendant**

Once defense counsel's preparation is complete, including a complete review of discovery with the defendant, meeting(s) should be conducted with the defendant a few days before mediation is scheduled. Defense counsel should lay out their assessment of the case in detail, including each side's strengths and weaknesses, what they believe the prosecution wants as an outcome, and the most likely outcome if the case goes to trial. During the meeting(s), defense counsel and the defendant

should agree on the maximum offer they would accept to avoid the ordeal and uncertainty of trial.

The defendant and defense counsel should also discuss the first offer made by the prosecution, decide on their opening counteroffer, and a strategy to get the prosecution to the offer they would be willing to accept. This may include a discussion of facts or arguments unknown to the prosecution that defense may be willing to disclose prior to trial to move the prosecution's position.

The defense should also discuss ahead of time what facts or arguments must be saved for trial if the mediation is unsuccessful. It's imperative the defendant be made to understand that if there is no realistic offer the prosecution could make that the defendant is willing to accept, then the case is not a good candidate for mediation. Even if the prosecution recognizes there are weaknesses in proving their case, it's highly unlikely they will concede during mediation to an outright dismissal of the case. Therefore, after a clear-eyed assessment of their case, the defendant, upon the advice of their defense counsel, should be prepared to accept some offer of a plea or a diversion.

Finally, defense counsel and their client should discuss if there's anyone they'd like to participate in the mediation with them. Often, the defendant relies upon a spouse, parent, family member or friend for counsel in making major decisions in their life. In those instances, having that person available at mediation may be crucial to resolving the case.

### **The Mediator**

The most common result of a successful mediation is a plea agreement. The mediated plea agreement has the same legal effect as any other plea agreement. It is still subject to the approval of the presiding judge. This is set forth in the written agreement to mediate which all parties must sign before moving forward. Because judges have different philosophies regarding sentencing, it's important that a felony mediator is familiar with the philosophy of the presiding judge with respect to the appropriate sentence on the type of crime being mediated.

Other issues that may need to be addressed before a felony mediation include:

1. Do any parties have disabilities that need to be accommodated?
2. Does a court interpreter need to be provided for the defendant?
3. How many bailiffs/court security officers will be needed to secure the mediation?
4. If the defendant is incarcerated, will he or she be in a holding cell?
5. Will the mediator sit at a table with the defendant or will he speak with the defendant through the glass in a holding cell?

### **Disclosures to the Mediator**

All oral or written disclosures made to the mediator either prior to or during the mediation are protected by confidentiality and shall not be disclosed to the other side without express permission to do so.

The mediator should be informed exactly who will be participating on each side. Both the prosecutor and defense counsel must make the mediator and court security aware of any concerns they have for the safety of anyone attending the mediation. They should also make the mediator aware of whom they expect will participate in the mediation and of any special needs they may have.

Beyond that, both the prosecution and defense counsel should consider providing the mediator with a confidential statement. This statement should set out their candid assessment of the strengths and weaknesses of each case and without revealing any bottom-line position, a general statement of what they are most hoping to accomplish through the mediation.

Both parties may also wish to include in their statement any impediments to a successful mediation that they anticipate.

The more information the felony mediator is provided with before mediation, the more prepared the mediator will be and more likely the mediator will have a successful outcome. A mediator should not conduct a felony mediation unless they have received the following information:

1. Copy of the indictment;
2. Investigative report;
3. Commonwealth's offer to defendant; and
4. Defendant's counteroffer to Commonwealth.

The amount and type of evidence that is provided to the mediator is within the prosecutor's discretion. Many prosecutors will provide the mediator with most of the evidence they plan to present at trial. Others will provide a summary of the evidence and copies of key evidence, such as videos. Some prepare a memorandum of the case, including their analysis of the strengths and weaknesses of their case as well as the defendant's case. Sometimes the prosecutor will advise the mediator that the memorandum is confidential while others are comfortable sharing it with the defense. Some prosecutors provide copies directly to defense counsel.

Defense attorneys also differ on the materials they are willing to share with the mediator. Some provide a short outline, while others provide a memorandum listing the strengths and weaknesses of the defendant's case, defenses which the Commonwealth may not be aware of, and the range of penalty their client will accept. Defense counsel rarely provides the prosecutor with a copy of their mediation statement.

## Victim Participation

The passage of Marsy's Law, Section 26A of the Kentucky Constitution, gives crime victims the right to participate in certain aspects of the criminal justice system. Because of this, it is important that victims wishing to be notified are informed by the prosecutor that the case is being mediated. The prosecutor should meet with the victim prior to the mediation and offer them the opportunity to participate.

### **Victim participation can add a layer of complexity to a felony mediation, especially when there are multiple victims.**

For example, if a murder victim is a husband and father, the wife and adult children may have different interests and perspectives. The wife may not feel that she can speak openly and honestly to the mediator in front of the children, or the adult children in front of their siblings. This complexity increases if the defendant is a member of the family. There are other cases such as multiple victims in human trafficking who may have different views on punishment. Because of this, it is important for the felony mediator to establish ground rules for the mediation, such as whether there will be a primary spokesperson on behalf of the victims or if it would be beneficial for victims to be separated during the discussions.

### **A victim's advocate should always be present at the mediation.**

The victim usually has a support system at the mediation. This may be a parent, a social worker, or a lawyer from the Children's Law Center. The victim should be entitled to the same team of support as the defendant. It is not unusual in a capital murder case for there to be 15 plus participants between the two sides. It is important that the mediation process treats victims and survivors with respect and dignity.

### **If there is victim participation in the mediation the following issues should be addressed:**

1. Has the Prosecutor and his or her office (particularly the victim advocate) adequately addressed the expectations and needs of the victim?
2. Is the victim fully aware that they may withdraw from mediation at any time?
3. Has the victim had the opportunity to read the Felony Mediation Handbook and to have any questions answered?
4. Does the victim understand they have the right to have a support person there?
5. Does the victim understand they can participate by Zoom or telephone and not be physically present if they so choose?
6. Does the victim understand they will be in a different room and never have to see or interact with the Defendant?
7. Does the victim understand the Bailiff will arrange their movement in and out of the building so as not to interact with the Defendant or his/her family?

8. Does the victim fully understand confidentiality rules?
9. Does the victim understand they will have down time (e.g., when the mediator is speaking to the other side) during the process and may have things to occupy their time (e.g., book, music, laptop, etc.) and snacks?
10. Does the victim understand they can choose how much or how little to participate in the felony mediation?
11. Does the victim understand that by participating in the felony mediation, they are not giving up their right to speak for or against the resolution at sentencing?
12. Has the mediator been assured that the victim has voluntarily requested to participate in mediation and the decision is not the result of coercion?
13. Does the victim understand the mediator will terminate the mediation if the mediator believes anyone's safety is compromised?
14. Does the victim understand that if a Plea Agreement is reached it may still be rejected by the presiding Judge?
15. Has the victim been told that if they want to participate, they must sign the "Agreement to Mediate" and comply with its terms?

## The Mediation

The mediator should arrive at the mediation early and check-in with the judge's staff to pick-up the case file and discuss logistics, (e.g., whether any last-minute issues have arisen), and which rooms are being used for the mediators. Staff should also introduce the mediator to the bailiff(s).

In civil mediations, the parties normally meet at the beginning of the mediation and share their perspectives on the case with the mediator. This procedure should not be used in case-specific mediations with [victim participation](#). Prior to commencing, the mediator should discuss with the prosecutor and defense whether they intend to start the mediation with a joint conference.

Deciding to have the first discussion with either the prosecutor or the defense is a tactical decision that should be made after consultation with all parties. If neither side has a preference, the decision is usually determined by whether a victim is an active participant in the mediation. If a victim is participating, the first discussion usually occurs with the prosecutor and victim. If a victim is not participating, the mediator generally speaks first with the defense.

The first order of business is execution of form [AOC-MED-ADR-13](#) "Agreement to Mediate for Criminal Cases." The Agreement must be read by the mediator verbatim out loud to the participants. The mediator is trained to be thoroughly knowledgeable with the terms of the Agreement and the reason for their inclusion.

### **Preamble**

The preamble to the Agreement states as follows:

“This agreement reflects the commitment of each party to negotiate fairly and honestly throughout the mediation process.”

The mediator should spend sufficient time explaining to the participants that the success of mediation depends on the fact that under the law what is said during mediation is confidential; that the mediator will engage with a participant in an honest discussion; and that although the mediator will take detailed notes, nothing will be disclosed to the other party without the express authority of the party divulging the information.

The mediator may consider using different colored pens to identify the categories of information he or she is receiving. For example, the mediator may use one color to identify information that may be fully divulged at any time, and a different color to identify information that has been confidentially disclosed to the mediator so he or she may understand a defense or tactic but that may never be divulged. The use of different colored pens can help to keep the information straight and to assure participants the mediator considers confidentiality and honest dialogue crucial to a successful mediation.

### **Paragraph 1**

Paragraph 1 of the Mediation Agreement states:

“The mediator will direct the mediation process in an impartial and neutral manner. The mediator has no authority to force a settlement on the participants and does not provide legal, financial, therapeutic or other professional advice.”

There are many mediation styles. The two primary models are facilitative and evaluative. The Felony Mediation Program relies primarily on the facilitative model. It is governed by principles of party control over the outcome and use of non-authoritative neutrals. The facilitative mediator does not give solutions. The philosophy of the facilitative model is that the parties are in the best position to find their own appropriate solution given their particular circumstances. The facilitative model does recognize that if a party requests the mediator’s opinion, consistent with standards of impartiality and preserving the party’s self-determination, a mediator may provide information that he/she is qualified to provide by virtue of training or experience.

During the mediation the mediator controls the process by facilitating communication among the participants. The mediator encourages the parties to generate and evaluate facts and opinions. The mediator strives to keep the parties focused on the issues and clarifying positions. The mediator never makes decisions for the parties.

## Paragraph 2

Paragraph 2 of the Mediation Agreement states:

“All information disclosed during mediation, either written or verbal, shall be confidential. The privilege resides in the mediator and may not be waived by the parties. However, nothing prohibits a mediator from reporting abuse according to KRS 209.030, KRS 209A.100 or KRS 209A.110 (if mediator is a professional as defined by KRS 209A.020), KRS 620.030, or other applicable law.”

It has long been the rule in Kentucky that evidence of conduct or statements made in compromise negotiations is not admissible. This rule of law is set forth in KRE 408. It is also set forth in CR 99.11.

Anyone sitting in the mediation sessions must sign the Agreement. This includes bailiffs, prison guards and persons who have been allowed admittance to observe or for training. It is important for the mediator to explain the confidentiality requirements to all persons who are in the sessions and the penalties for contempt for violation.

The mediator and the parties must be aware of the statutes set forth in this paragraph. The mediator should discuss the statutes with the parties and have a copy of these statutes available for review. The defendant must be made aware of the mediator’s responsibilities under the law.

## Paragraph 3

Paragraph 3 of the Mediation Agreement states as follows:

“Participants agree to not video or voice record any part of the mediation session or allow anyone else to record any part of it. This includes, but is not limited to, the use of desktop or mobile phone recording apps.”

This paragraph is intended to emphasize to the participants the law regarding confidentiality and differs from the rule followed in civil mediations. CR 99.11 allows the mediation to be recorded if there is an express agreement between the parties, their attorneys, and the mediator. There is no such provision in criminal mediation. To that end, it is recommended that the participants not have their cell phones or any other recording device present during the mediation session with the mediator.

This is to be distinguished from the situation where the settlement requires the recording of a statement. In some cases, the defendant agrees to give a statement to the prosecutor as part of the plea agreement. For example, in one of the mediation examples discussed earlier in the handbook, a defendant had been in jail for several years awaiting trial on a capital murder charge. He had always maintained his innocence. During the mediation, the defendant agreed to be interrogated in the courtroom on the record by a new investigator and prosecutor. In return the prosecution agreed to restart the investigation and the defendant was released on bond while the investigation was taking place. This agreement was reduced to a mediated agreement before the recording of the statement took place.



#### Paragraph 4

Paragraph 4 of the Mediation Agreement states as follows:

“Participants may choose another means to resolve their conflict at any time before mediation is completed, including, but not limited to, normal court proceedings.”

The defendant, Commonwealth’s Attorney and the presiding judge cannot be compelled to participate in felony mediation and a felony mediation cannot occur unless all three freely agree. Likewise, the consent to participate in mediation can be withdrawn at any time without consequence.

#### Paragraph 5

Paragraph 5 of the Mediation Agreement states as follows:

“Any agreement signed as a result of the mediation will be presented to the circuit judge for final approval.”

The Mediator must make the parties aware that mediation does not provide any influence on plea agreements. Mediation does not restrict the discretion of the presiding judge. Any plea agreement negotiated during mediation is still subject to the approval of the sentencing judge.

The Mediation Agreement provides a line for each participant to sign and a spot to print their names. Sometimes there are other participants at the mediation other than the parties. Those participants should also sign the agreement and add their titles for future reference, i.e., victim, victim’s advocate, bailiff, investigator, etc.

After the Mediation Agreement is signed the original is filed in the record and copies given to the counsel and the mediator for their files. The mediator then proceeds to mediate the case.

#### Mediation Report to the Court

At the conclusion of the mediation, the mediator fills out a form [AOC-MED-ADR-11](#) "Mediation Report to Court. The original is filed in the record and copies are provided to the parties and the presiding judge. If the case is settled, the parties execute a written plea agreement. Prior to the plea agreement being signed, the felony mediator should engage the defendant in a plea colloquy as contained in the appendix (Exhibit 9) to ensure he or she is satisfied with the mediation process and the decision to enter into a plea agreement.

### Mediation Outcome & Plea Agreements

The Mediator may provide a form [AOC-MED ADR 11](#) to the court indicating the mediation outcome. Following a successful plea agreement, the presiding circuit judge receives and reviews the following:

1. Commonwealth’s Offer on a Plea of Guilty ([AOC-491.1](#)).

2. Defendant's Motion to Enter Guilty Plea ([AOC-491](#)),
3. Defendant's Motion to Enter Guilty Plea Pursuant to North Carolina vs. Alford ([AOC-491.2](#)).

The presiding judge then takes the defendant's plea and ensures the defendant's agreement is not compromised in any way by the mediation process. It is recommended the presiding judge review the colloquy questions asked of the defendant during mediation on the record in addition to the standard questions they use in the taking of a plea. The presiding judge will then set a sentencing date. If no agreement is reached, the presiding judge sets trial date.

## Felony Mediation Plea Colloquy

Felony mediators are trained to monitor inappropriate pressure to settle. The goal of all participants should be to reach an agreement that is voluntarily, intelligently, and knowingly made. When the parties reach an agreement, the mediator asks the defendant the following questions:

1. Did you understand your participation was voluntary?
2. Were you willing to participate?
3. Were you forced, threatened, or coerced into participating?
4. Did you participate of your own free will?
5. Did you think the process was fair?
6. Did you feel you were treated fairly, by everyone, including the mediator?
7. Were you given a fair opportunity to think about the consequences of the agreement which was ultimately reached?
8. Were you pressured, forced, threatened, or coerced into reaching a settlement?

A copy of these questions is given to the presiding judge. It is recommended to the presiding judge that these questions be asked on the record in addition to the standard questions they use in the taking of a plea.

## Mediation Reports and Data to AOC

Since the inception of the FMP in 2004, information has been collected for the purposes of improving the program. For both felony docket mediations and case-specific mediations, mediators collect and report all data to the Mediation Office at the AOC using form [AOC-MED-ADR-15](#).

Minimum data to be collected and reported by mediator:

1. Name of mediator

2. County
3. Case Name and Number
4. Mediation date, time, and duration
5. Case type and charges
6. Outcome
7. Whether or not victim participated.

Because the program will continue to evolve, the data reporting requirements are subject to change in order to adequately evaluate program effectiveness.

### **Confidential Report to AOC (For Data Purposes Only)**

The reporting objectives for the Felony Mediation Program are:

1. Collect data on case dispositions;
2. Analyze court-reported statistics to determine what impact mediation services have on the quantity of cases in which mediation was unsuccessful;
3. Gather data from judges, attorneys and parties that participate in the FMP to evaluate goals, expectations and satisfaction with the mediation services provided;
4. Train judges, prosecutors, and defense counsel to recognize cases appropriate for mediation; and
5. Gather and analyze data for various court sites across the state to determine mediation resources and how to best meet their needs.

## **Program Evaluation**

There are several steps to evaluating how successful a mediation was:

1. Statistical tracking using SharePoint Reports
2. Goal Verification
3. Satisfaction surveys
  - a. Effectiveness of mediator
  - b. Parties felt heard
  - c. Fairness of mediation
  - d. Effectiveness and efficiency of program

The FMP is constantly undergoing evaluation and improvement. At the conclusion of

the mediations, participants are asked to fill out satisfaction surveys. The participants are asked their opinions on such things as:

1. The effectiveness of mediation;
2. Whether the parties felt heard;
3. The fairness of the mediation;
4. The effectiveness and efficiency of program; and
5. Any recommendations for improvement.

### Additional Information

For additional information about the program or how to become a felony mediator, please visit the [KCOJ Mediation web page](#), or email [felonymediation@kycourts.net](mailto:felonymediation@kycourts.net).

### Exhibits

1. Mediator Application Felony Mediation Program ([AOC-MED-ADR-16](#)).
2. Agreed Order Referring to Mediation.
3. Request for Assignment of Retired Judge to Conduct Felony Mediation ([AOC-MED-ADR-14](#)).
4. [Order](#) from Chief Justice Approving Mediation.
5. Email from Mediator to Referring Judge, Prosecutor, Defense Attorney (Group Email Template).
6. Order Setting Mediation.
7. Agreement to Mediate for Criminal Cases ([AOC-MED-ADR-13](#)).
8. Mediation Report to Court ([AOC-MED-ADR-11](#)).
9. [Felony Mediation Colloquy](#) for Taking of a Guilty Plea.
10. Felony Mediation Confidential Report to AOC for Data Purposes Only ([AOC-MED-ADR-15](#)).
11. Felony Mediation Case Referral (Criminal Docket Day Form).
12. Criminal Mediation Docket Day Checklist (Criminal Docket Day Form).

Exhibit 1

**AOC-MED-ADR-16**

<p>AOC-MED-ADR-16 Rev. 9-21 Page 1 of 2 Commonwealth of Kentucky Court of Justice <i>www.kycourts.gov</i></p>	 <b>MEDIATOR APPLICATION FELONY MEDIATION PROGRAM</b>	<p><b>Submit to:</b> Felony Mediation Program Administrative Office of the Courts 1001 Vandalay Drive, Frankfort, Kentucky 40601 Email: <a href="mailto:felonymediation@kycourts.net">felonymediation@kycourts.net</a></p>
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Name: \_\_\_\_\_

Retirement Date: \_\_\_\_\_ Years of Judicial Service: \_\_\_\_\_

Home Address: \_\_\_\_\_ **Basic Mediation Training Completion Date:** \_\_\_\_\_

\_\_\_\_\_ **Training Provider:** \_\_\_\_\_

\_\_\_\_\_ **Felony Mediation Training Completion Date:** \_\_\_\_\_

Home Phone: \_\_\_\_\_ Cell Phone: \_\_\_\_\_

Email Address: \_\_\_\_\_

**EXPERIENCE:**

1. Court and District or Circuit in which you served, and the number of years served: *(check all that apply)*
    - a. Supreme Court: District # \_\_\_\_\_, years served \_\_\_\_\_
    - b. Court of Appeals: District # \_\_\_\_\_, years served \_\_\_\_\_
    - c. Circuit Court: Circuit # \_\_\_\_\_, years served \_\_\_\_\_
    - d. Family Court: Circuit # \_\_\_\_\_, years served \_\_\_\_\_
    - e. District Court: District # \_\_\_\_\_, years served \_\_\_\_\_
  2. KBA Active Status?  Yes  No (Must be in Active Status)
  3. Willing to do In-Person Mediations?  Yes  No
  4. Willing to do Remote Mediations?  Yes  No  
If yes, do you need assistance or additional training to provide Remote Mediations?  Yes  No
  5. a. Have formal proceedings under SCR 4.180 ever been initiated against you by the Judicial Conduct Commission (JCC) or its predecessor, the Judicial Retirement and Removal Commission (JR&R)?  Yes  No
  - b. Have you ever received one of the sanctions listed under SCR 4.020, including an admonition, private reprimand, public reprimand, censure, suspension or removal, prior to the filing of a formal charge or proceedings by the JCC or JR&R?  Yes  No
  - c. Are you aware of any disciplinary actions against you that are currently pending before the JCC?  Yes  No
- If you answered yes to any part of #5, please identify the nature of the charge or proceeding, when it was filed, and how it was ultimately resolved. \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

Initials \_\_\_\_\_

Exhibit 2

**Agreed Order to Felony Mediation**

Commonwealth of Kentucky

\_\_\_\_\_ Circuit Court

Division \_\_\_\_\_

Case No. \_\_\_\_\_

Commonwealth of Kentucky

Plaintiff

v. Agreed Order Referring to Felony Mediation

\_\_\_\_\_

Defendant

All parties having agreed, and the Court being sufficiently advised,

This matter is referred to Felony Mediation. A “Request for Assignment of Retired Judge to Conduct Felony Mediation (AOC-MED-ADR-14)” will be submitted to the Felony Mediation Coordinator ([felonymediation@kycourts.net](mailto:felonymediation@kycourts.net)) for appointment of a Felony Mediator by the Chief Justice.

Date: \_\_\_\_\_

\_\_\_\_\_  
Judge

Agreed:

\_\_\_\_\_  
Commonwealth’s Attorney (with agreement by the victim to participate)

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Counsel for Defendant

Exhibit 3

**AOC-MED-ADR-14**

AOC-MED-ADR-14 Doc Code: RFMP Rev. 2-24 Page 1 of 1  Commonwealth of Kentucky Court of Justice <a href="http://www.kycourts.gov">www.kycourts.gov</a>	 <b>REQUEST FOR ASSIGNMENT OF                  RETIRED JUDGE TO CONDUCT                  FELONY MEDIATION</b>	<b>Submit to:</b>  FelonyMediation@kycourts.net
--	---	---

Requesting Judge: \_\_\_\_\_  
 (Name)  
 \_\_\_\_\_  
 (Title)  
 \_\_\_\_\_  
 (Telephone No.)

1. (Check one):  I am requesting the Felony Mediation Program secure a mediator **OR**  
 I am requesting Retired Judge \_\_\_\_\_ to conduct this mediation.  
 (Note: There is no guarantee that a requested mediator will be assigned. Mediators are assigned based on availability, location, and program guidelines.)
2. I am requesting the mediation be held: (check one)  in person **OR**  remote.
3. I am requesting the mediation to be held by this date: \_\_\_\_\_.
4. Reason(s) for Request: \_\_\_\_\_

5. Complete paragraph A if multiple cases are requested to be mediated on a specific date **OR** complete paragraph B if one case is requested to be mediated.

A. Mediation requested in \_\_\_\_\_ County on \_\_\_\_\_ (Date).  
 Judicial Circuit Number/District Number: \_\_\_\_\_

**OR**

B. Mediation requested in case \_\_\_\_\_ in \_\_\_\_\_ County;  
 (Case Number)  
 \_\_\_\_\_  
 (Case Name/Style)

Commonwealth Attorney: \_\_\_\_\_  
 (Name) (Phone) (Email)

Defense Attorney: \_\_\_\_\_  
 (Name) (Phone) (Email)

Type of Charge(s) to be mediated: \_\_\_\_\_

Is the Defendant currently incarcerated?  Yes  No If Yes, what facility: \_\_\_\_\_

Victim Participation (check one):  Yes  No

Are interpreting services needed for this mediation?  Yes  No

6. Additional information which may assist in the selection of a Retired Judge: (attach additional pages if needed)

Date: \_\_\_\_\_, 2\_\_\_\_\_  
 Judge, \_\_\_\_\_ Judicial  Circuit  District

**INTERNAL USE ONLY**

GRANTED: Retired Judge assigned: \_\_\_\_\_

DENIED: Request denied as follows: \_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_, 2\_\_\_\_\_

Distribution: Court File; Felony Mediation Coordinator

**Print Form**

**Reset Form**

Exhibit 4

**Order to Mediate**

AOC-MED-ADR-14 Doc Code: RFMP Rev. 2-24 Page 1 of 1  Commonwealth of Kentucky Court of Justice <a href="http://www.kycourts.gov">www.kycourts.gov</a>	  <b>REQUEST FOR ASSIGNMENT OF                  RETIRED JUDGE TO CONDUCT                  FELONY MEDIATION</b>	<b>Submit to:</b>  FelonyMediation@kycourts.net
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Requesting Judge: \_\_\_\_\_  
 (Name)

\_\_\_\_\_   
 (Title)

\_\_\_\_\_   
 (Telephone No.)

1. (Check one):  I am requesting the Felony Mediation Program secure a mediator **OR**  
 I am requesting Retired Judge \_\_\_\_\_ to conduct this mediation.  
 (Note: There is no guarantee that a requested mediator will be assigned. Mediators are assigned based on availability, location, and program guidelines.)
2. I am requesting the mediation be held: (check one)  in person **OR**  remote.
3. I am requesting the mediation to be held by this date: \_\_\_\_\_.
4. Reason(s) for Request: \_\_\_\_\_

5. Complete paragraph A if multiple cases are requested to be mediated on a specific date **OR** complete paragraph B if one case is requested to be mediated.

A. Mediation requested in \_\_\_\_\_ County on \_\_\_\_\_ (Date).  
 Judicial Circuit Number/District Number: \_\_\_\_\_

**OR**

B. Mediation requested in case \_\_\_\_\_ in \_\_\_\_\_ County;  
 (Case Number) \_\_\_\_\_  
 (Case Name/Style) \_\_\_\_\_

Commonwealth Attorney: \_\_\_\_\_  
 (Name) (Phone) (Email)

Defense Attorney: \_\_\_\_\_  
 (Name) (Phone) (Email)

Type of Charge(s) to be mediated: \_\_\_\_\_

Is the Defendant currently incarcerated?  Yes  No If Yes, what facility: \_\_\_\_\_

Victim Participation (check one):  Yes  No

Are interpreting services needed for this mediation?  Yes  No

6. Additional information which may assist in the selection of a Retired Judge: (attach additional pages if needed)

\_\_\_\_\_

Date: \_\_\_\_\_, 2\_\_\_\_\_  
 Judge, \_\_\_\_\_ Judicial  Circuit  District

**INTERNAL USE ONLY**

GRANTED: Retired Judge assigned: \_\_\_\_\_

DENIED: Request denied as follows: \_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_, 2\_\_\_\_\_  
 \_\_\_\_\_

Distribution: Court File; Felony Mediation Coordinator

**Print Form**      **Reset Form**



Exhibit 5

**Group Email**

To: Judge \_\_\_\_\_

Cc: Prosecutor \_\_\_\_\_

Cc: Defense Attorney \_\_\_\_\_

By Order of the Chief Justice of the Kentucky Supreme Court I have been appointed to mediate Case Number \_\_\_\_\_. The parties have selected \_\_\_\_\_ at \_\_\_\_\_ o'clock as the date and time for the mediation. The following logistical matters need to be addressed:

1. It is preferable that the mediation take place in the Courthouse for easy access to Court records, security and availability of a Judge should any issues arise or for the taking of a guilty plea.
2. If the Defendant is in jail or prison, arrangements need to be made for transportation to the mediation.
3. We will need \_\_\_\_\_ rooms for the mediation.
4. Bailiffs will be needed to provide security during the mediation.
5. I would like to pick up the Court file from your office about an hour before the mediation.

I am asking the Prosecutor to be responsible for seeing that Order setting the mediation placed in the record. I attach a proposed form Order.

I am asking that the prosecutor forward a copy of the indictment and police investigative report to me prior to mediation. The prosecutor and defense attorney may forward to me any materials or brief that they wish me to review prior to mediation. Any materials forwarded to me for review shall be considered confidential and need not be provided to the other party.

I sincerely appreciate the opportunity to mediate this case. I am hopeful we can reach an acceptable resolution. A report will be filed by me after the mediation. Please feel free to contact me if you have any questions.

Respectfully,

\_\_\_\_\_

Exhibit 6

**Order Setting Mediation**

Commonwealth of Kentucky

\_\_\_\_\_ Circuit Court

Division \_\_\_\_\_

Case No. \_\_\_\_\_

Commonwealth of Kentucky

Plaintiff

v. Order Setting Mediation

\_\_\_\_\_  
Defendant

The Court previously entered an Agreed Order Referring to Mediation and the Chief Justice of the Supreme Court has approved the assignment of a retired judge to serve as a felony mediator for this case. Accordingly,

It is Ordered that mediation in this case shall take place as follows:

Date: \_\_\_\_\_

Time: \_\_\_\_\_

Place: \_\_\_\_\_

It is further ordered that a party may withdraw at any time. The withdrawing party shall give timely notice of withdrawal to the court, felony mediator and the opposing party. A written notice of withdrawal shall be filed in the record. Failure of a party to comply with this order may subject the offending party to sanctions.

It is further ordered that, upon its conclusion, the results of the mediation shall be reported to the court.

\_\_\_\_\_  
Judge

Copies to:


Felony Mediator

Commonwealth's Attorney

Defense Counsel

Exhibit 7

Agreement to Mediate for Criminal Cases

AOC-MED-ADR-13 Doc. Code: FMP Rev. 3-21 Page 1 of 1  Commonwealth of Kentucky Court of Justice <a href="http://www.kycourts.gov">www.kycourts.gov</a>	  <b>AGREEMENT TO MEDIATE FOR CRIMINAL CASES</b>	Case No. _____ Court _____ County _____ Division _____ Mediation Date _____
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This agreement reflects the commitment of each party to negotiate fairly and honestly throughout the mediation process.

1. The mediator will direct the mediation process in an impartial and neutral manner. The mediator has no authority to force a settlement on the participants and does not provide legal, financial, therapeutic or other professional advice.
2. All information disclosed during the mediation, either written or verbal, shall be confidential. The privilege resides in the mediator and may not be waived by the parties. However, nothing prohibits a mediator from reporting abuse according to KRS 209.030, KRS 209A.100 or 209A.110 (if mediator is a professional as defined by KRS 209A.020), KRS 620.030, or other applicable law.
3. Participants agree to not video or voice record any part of the mediation session or allow anyone else to record any part of it. This includes, but is not limited to, the use of desktop or mobile phone recording apps.
4. Participants may choose another means to resolve their conflict at any time before mediation is completed, including, but not limited to, the court system.
5. Any agreement signed as a result of the mediation will be presented to the Circuit Judge for final approval.

I understand and agree to abide by the terms of this agreement.

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

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Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Participant \_\_\_\_\_ Printed Name

Mediator \_\_\_\_\_ Printed Name

Mediator \_\_\_\_\_ Printed Name

Exhibit 8

**Mediation Report to Court**

AOC-MED-ADR-11 Doc. Code: MO  
Rev. 4-21  
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Commonwealth of Kentucky  
Court of Justice [www.kycourts.gov](http://www.kycourts.gov)



**MEDIATION  
REPORT TO COURT**

Case No. \_\_\_\_\_

Court \_\_\_\_\_

County \_\_\_\_\_

Mediation Date \_\_\_\_\_

Judge: \_\_\_\_\_

RE: \_\_\_\_\_

- Case is settled.
- Case is not settled.
- Case is partially settled. (civil only)
  - Case was not mediated for the following reason(s):
  - Case was deemed not suitable for mediation.
  - A mediation session could not be scheduled because of scheduling difficulties.
  - One or more parties did not attend the mediation session  
(specify):
  
- The matter was settled prior to mediation.
- Other reason(s) (specify):

Mediator: \_\_\_\_\_  
(Name)

Date: \_\_\_\_\_

Exhibit 9

**Felony Plea Colloquy**

Felony Judge Mediators are trained to monitor inappropriate pressure to settle. The goal of all participants should be to reach a mediation result where the agreement reached was voluntarily, intelligently and knowingly made. When the parties reach an agreement, the Mediator asks the Defendant the following questions:

1. Did you understand your participation was voluntary?
2. Were you willing to participate?
3. Were you forced, threatened or coerced into participating?
4. Did you participate of your own free will?
5. Did you think the process was fair?
6. Did you feel you were treated fairly, by everyone, including the Mediator?
7. Were you given a fair opportunity to think about the consequences of the agreement which was ultimately reached?
8. Were you pressured, forced, threatened or coerced into reaching a settlement?

A copy of these questions is given to the presiding Judge. It is recommended to the presiding Judge that in addition to the standard questions they use in the taking of a Plea, that these questions be additionally asked on the record.

Exhibit 10

**Felony Mediation Confidential Report to AOC for Data Purposes Only**

AOC-MED-ADR-15 Rev. 9-22 Page 1 of 1  Commonwealth of Kentucky Court of Justice <i>www.kycourts.gov</i>	  <b>FELONY MEDIATION          CONFIDENTIAL REPORT TO AOC FOR          DATA PURPOSES ONLY</b>	Case No. _____ Court _____ County _____ Division _____
--	--	---

**DO NOT FILE IN THE RECORD**

Requesting Judge: \_\_\_\_\_  
Name

Assigned Mediator: \_\_\_\_\_  
Name

Case Name: \_\_\_\_\_

Date of Mediation: \_\_\_\_\_  
mm/dd/yyyy

The participants were:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

Charges: \_\_\_\_\_

Mediation Result (*check one*)  settled  not settled  not suitable for mediation  withdrawal by a party.

Interpreting Services were necessary and/or requested for this mediation?  Yes  No

Agreement Terms: \_\_\_\_\_

Time Elapsed for Mediation: \_\_\_\_\_

Did victim(s) participate?:  Yes  No

If yes, what effect did the victim's participation have on the process and/or on any of the other participants?

\_\_\_\_\_  
\_\_\_\_\_

Other: \_\_\_\_\_

\_\_\_\_\_, 2 \_\_\_\_\_

Date

Mediator

**DO NOT FILE IN THE RECORD**

**SUBMIT TO:** AOC, Mediation Coordinator, 1001 Vandalay Drive, Frankfort, KY 40601; or felonymediation@kycourts.net.

Exhibit 11

**Felony Mediation Request Referral**

Date: \_\_\_\_\_

1. Case number:
2. Case name:
3. Charges:
4. Mediator assigned:
5. Commonwealth's Attorney:
6. Defense counsel:
7. Time assigned:
8. Rooms assigned to each party:
9. Settled/Not Settled:
10. Sentencing date:
11. Mediation Report filed:
12. Confidential AOC Data Report completed and forwarded:

Exhibit 12

**Criminal Mediation Docket Day Checklist**

Date: \_\_\_\_\_

1. Case number:
2. Case name:
3. Charges:
4. Mediator assigned:
5. Commonwealth's Attorney:
6. Defense counsel:
7. Time assigned:
8. Rooms assigned to each party:
9. Settled/Not Settled:
10. Sentencing date:
11. Mediation Report filed:
12. Confidential AOC Data Report completed and forwarded:



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