

**SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION - COUNTY OF WESTCHESTER**

HON. ALAN D. SCHEINKMAN

RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

PREAMBLE

It is the policy of this Court to encourage the resolution of disputes and the early settlement of pending litigation through voluntary, consensual settlement procedures. The following Rules shall govern cases sent to [Alternative Dispute Resolution](#) (“ADR”) by the Justice Presiding in the Commercial Division or referred to ADR upon consent of the parties. As indicated hereinafter, parties whose cases are the subject of an Order of Reference are free to use the services of a private ADR provider of their choosing in lieu of taking part in this Court’s ADR Program. Further, after a case has been submitted to this Court’s program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. Program:

The Commercial Division of the Supreme Court of the State of New York, County of Westchester, operates an Alternative Dispute Resolution Program (“the Program”). Unless otherwise agreed by the parties, cases referred to the Program shall be mediated.

Rule 2. Roster of Mediators:

The Administrative Judge shall establish and maintain a Roster of Mediators (“the Roster”).

(i) In order to be eligible to serve as a Mediator and be listed on the Roster, a person shall possess the following qualifications and such others as may hereafter be promulgated. A mediator must (a) have a minimum of ten years of experience in the practice of commercial law or be an accountant or business professional with a comparable level of experience; (b) have completed at least the amount and type of training required by Part 146¹ of the Rules of the Chief Administrator; (c) have recent experience mediating commercial cases as mandated by Part 146; and (d) Comply with the Commercial Division’s [Standards of Conduct for Mediators](#)).

¹Part 146 requires prospective mediators to have successfully completed a minimum of forty (40) hours of training in an OCA-sponsored or OCA-recognized training program, which includes 24 hours of training in basic mediation skills and techniques and 16 hours of training in the specific mediation techniques pertaining to commercial litigation (see [Part 146](#) of the Rules of the Chief Administrator).

(ii) Continuing presence on the Roster is subject to review by the Administrative Judge. Mediators may be removed from the Roster at the discretion of the Administrative Judge in consultation with the Unified Court System Office of ADR Programs.

(iii) The Roster will be available through the Program Administrator, located in Westchester County Supreme Court, or on the [Commercial Division website](#).

Rule 3. Determination of Suitability; Order of Reference; Compensation:

At the outset of each case, the Commercial Division Justice shall determine the suitability of the action for mediation. Cases shall be referred to mediation as soon after they have been commenced as is practicable, consistent with the Uniform Rules for NYS Trial Courts, Rules of Practice for the Commercial Division, [Section 202.70\(g\)\(3\)](#). A case not deemed appropriate for referral at its outset may be referred later to the Program in the discretion of the Commercial Division Justice.

If the Commercial Division Justice orders the parties to mediation or if the parties consent to a referral to the Program, the Commercial Division Justice shall issue an Order of Reference requiring the parties to attend an initial mediation session. The Mediator shall not charge the parties for the first four hours of the initial mediation session. Thereafter, the parties may choose to terminate the mediation or to schedule additional sessions with the Mediator. If the parties choose to continue in mediation beyond the first four hours of the initial session, the parties shall pay the Mediator \$300.00 per hour unless the parties and the Mediator agree otherwise in writing.

Rule 4. Selection of Mediator; Private ADR Providers; Conflict of Interest:

(i) An action referred to the Program shall be assigned to a Mediator chosen from the Roster. The parties shall be given an opportunity to select the Mediator. If the parties do not submit in writing agreed-upon names of mediators within five business days from notification of the issuance of the Order of Reference, which deadline is not subject to adjournment, or if administrative necessity so requires, the Program Administrator shall select the Mediator.

(ii) Parties may designate as the Mediator a person who is not a member of the Roster or may proceed to ADR using the good offices of a private ADR provider; but in either instance the parties must complete the ADR process within the deadlines set forth in these Rules and comply with Rule 5.

(iii) Every member of the Roster, and any other person who serves as a Mediator pursuant to subdivision (ii) of this Rule, shall comply with the [Standards of Conduct for Mediators](#), promulgated by the Commercial Division of the State of New York.

(iv) To avoid conflicts of interest, any person tentatively designated to serve as a Mediator shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which he or she is a member or employee. The Mediator shall make disclosures to the parties who may object to the Mediator's ability to serve or the Mediator shall disqualify himself or herself if he or she would not be able to participate as Mediator fairly, objectively, impartially, and in accordance with the highest professional standards. The Mediator shall also avoid an appearance of a conflict of interest. If any potentially disqualifying facts are discovered, the Mediator shall either decline the appointment or shall fully inform the parties and the Commercial Division's Program Administrator of all relevant details. Unless all parties after full disclosure consent to the service of that Mediator, the Mediator shall decline the appointment and another Mediator shall be selected promptly by the Program Administrator. Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

Rule 5. Confidentiality:

(i) The mediation shall be confidential. All documents prepared by parties or their counsel, and communications made by the parties or their counsel, for, during, or in connection with mediation, and any notes or other writings prepared by the Mediator in connection with the proceeding shall be kept in confidence by the Mediator and the parties. They shall not be summarized, described, reported or submitted to the court by the Mediator or the parties. No party to the mediation shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation, or seek to compel the testimony of any other party or the Mediator concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for breach of the agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the mediation.

(ii) No party to an action referred to the Program shall subpoena or otherwise seek to compel the Mediator to testify in any legal proceeding concerning the content of the mediation. If a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the Mediator harmless against any resulting expenses, including reasonable legal fees incurred by the Mediator or reasonable sums lost by the Mediator in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 5 (i), a party or the Program Administrator may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Mediator, and the Mediator may do the same with respect to any such conduct engaged in by counsel to a party.

(iii) Notwithstanding the foregoing, to the extent necessary, (a) the parties may include

confidential information in a written settlement agreement; (b) the Mediator and the parties may communicate with the Program Administrator about administrative details of the proceeding; and (c) the Mediator may make general reference to the fact of the services rendered by him or her in any action required to collect an unpaid, authorized fee for services performed under these Rules.

Rule 6. Immunity of the Mediator:

Any person designated to serve as Mediator pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Rule 7. Procedure:

(i) Unless otherwise agreed by the parties, cases referred to the Program shall be mediated.

(ii) Unless otherwise directed by the Commercial Division Justice, all proceedings in this court other than the mediation, including all disclosure proceedings and motion practice, shall not be stayed from the date of the Order of Reference.

(iii) The first mediation session shall be conducted within 30 days from the Confirmation Date. Immediately after confirmation, all parties shall communicate with one another and the Mediator and take all steps necessary to comply with said deadline. The first four hours of the first mediation session shall be offered free of charge.

(iv) Unless otherwise directed by the Mediator, at least ten days before the first mediation session, each party shall deliver to the Mediator a copy of its pleadings. The Mediator may request from each party a memorandum of not more than ten pages (except as otherwise agreed) setting forth each party's opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved. Except as otherwise agreed, this memorandum shall not be served on the adversary or filed in court, shall be read only by the Mediator, and shall be destroyed by the Mediator immediately upon completion of the proceeding.

(v) Attendance is required at the first mediation session. The location of each mediation session shall be determined by the Mediator.

(vi) Unless exempted by the Mediator for good cause, every party must appear at each mediation session in person or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter. In addition, counsel for each represented party shall be present at each session. Any attorney who participates in the mediation shall be fully familiar with the action.

(vii) If the mediation results in a settlement of the case, the Mediator shall immediately advise the Program Administrator, and the parties shall forthwith submit a stipulation of discontinuance to the Commercial Division Justice.

(viii) At the end of the session(s) mandated by subdivision (v) of this Rule, any party or the Mediator may terminate the mediation. In such case the Mediator shall immediately inform the Program Administrator of the termination. If the mediation has been terminated by one party only, the identity of that party shall not be reported.

(ix) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for mediation in a timely manner, fails to appear at any scheduled session or otherwise fails to comply with these Rules, the Mediator shall advise the Program Administrator.

(x) Upon termination of the mediation by a party pursuant to subdivision (viii) of this Rule, neither the Mediator nor the parties shall inform the Program Administrator which party brought the mediation to an end. The Program Administrator shall report to the Commercial Division Justice at the conclusion of the mediation whether the mediation produced a resolution of the case in whole or in part. The Program Administrator shall also report to the Commercial Division Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as indicated by a Mediator pursuant to subdivision (ix) of this Rule. The Commercial Division Justice may impose sanctions or take such other action as is necessary to ensure compliance with and respect for the court's Order and these Rules.

Rule 8. Compensation of Mediators:

(i) Mediators shall be compensated at the rate of \$300.00 per hour unless the parties and the Mediator agree otherwise in writing, except that Mediators shall not be compensated for the first four (4) hours spent in required mediation sessions conducted pursuant to Rule 7 of these rules or for time spent on the selection and appointment process.

(ii) The Mediator's fees and expenses shall be borne equally by the parties unless the parties agree otherwise in writing.

Rule 9. Completion of Mediation; Report:

The mediation session or sessions shall be concluded within 45 days from the Confirmation Date. The Mediator shall report to the Program Administrator as to success or lack of success no later than seven days thereafter.

Rule 10. Continuation of Mediation after Expiration of the 45-Day Period:

If the matter has not been entirely resolved within the 45-day period as provided in Rule 9, but the parties and the Mediator believe that it would be beneficial if the mediation process were to continue, the process may go forward.

Rule 11. Further Mediation:

After completion of the mediation, upon request of a party or upon its own initiative, the Commercial Division Justice, in his or her discretion, may issue an order directing a second referral to the Program. Any such referral shall be entertained and ordered as early as practicable. Any case so referred shall proceed in accordance with these Rules.

Rule 12. Administration of Program:

The Program shall be supervised and coordinated by the Principal Law Clerk for the Commercial Division Justice, who shall act as the Program Administrator.

Rev. August 2011

THE COMMERCIAL DIVISION
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