

COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY



HON. JACQUELINE W. SILBERMANN
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH,
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:
JUSTICE EILEEN BRANSTEN JUSTICE HERMAN CAHN
JUSTICE HELEN E. FREEDMAN JUSTICE BERNARD J. FRIED
HON. IRA GAMMERMANN (JHO) JUSTICE RICHARD B. LOWE III
JUSTICE CHARLES E. RAMOS

RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

Rule 1. Program. The Alternative Dispute Resolution Program (“the Program”) of the Commercial Division of the Supreme Court of the State of New York, County of New York, shall be applicable, as hereinafter set forth, to commercial cases referred by Justices of the Commercial Division, the Administrative Judge of the Supreme Court, Civil Branch, New York County (“the Administrative Judge”), and the other Justices of the Supreme Court, New York County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties to the extent the Program can accommodate them. These Rules shall govern all cases so referred.

Rule 2. Panel. The Administrative Judge shall establish and maintain a panel of Neutrals (“the Panel”) the members of which shall possess such qualifications as shall be promulgated. Persons may be added to or removed from the Panel as the Administrative Judge may determine.

Rule 3. Determination of Suitability; Order of Reference. Cases shall be referred to alternative dispute resolution (“ADR”) as soon after filing of a Request for Judicial Intervention as is practicable. The suitability of the action for ADR shall be determined by the assigned Justice or the Administrative Judge, after considering the views of the parties insofar as practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to ADR in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

Rule 4. Selection of Neutral; Private ADR Providers.

(a) An action referred to the Program shall be assigned to a Neutral chosen from the Panel. The Program Coordinator shall designate the Neutral in the first instance. The Coordinator will endeavor to distribute assignments widely among all active members of the Panel. The Coordinator may, however, depart from this procedure if the nature of the matter in question calls for special expertise on the part of the Neutral, if difficulties are encountered in locating an available Neutral, or for other administrative reasons. Each Neutral contacted will immediately conduct a conflicts check as required by subdivision (d) hereof and advise the Coordinator as to his or her availability. The Coordinator shall inform the parties of the identity of the designated Neutral within five business days from the date on which the Order of Reference reaches the Coordinator. The date of this

communication shall constitute the Confirmation Date (except as provided otherwise in subdivision (b)).

(b) Once informed of the identity of the Neutral, the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral's availability and willingness to handle the matter and that he or she has no conflict. The parties shall inform the Coordinator of the alternate selection within the five-day deadline. The Coordinator may, for good cause, allow the parties an additional five business days within which to make such selection. If the parties designate an alternate Neutral pursuant hereto, the Confirmation Date shall be the date they inform the Coordinator of that selection.

(c) Notwithstanding subdivision (a), the parties may designate as the Neutral a person who is not a member of the Panel or may proceed to ADR through a private ADR provider and in accordance with the rules thereof, but the parties must nevertheless complete the ADR process within the deadlines set forth in these Rules and comply with Rule 6.

(d) Every member of the Panel, and any other person who serves as a Neutral pursuant to this Rule, shall comply with the Standards of Conduct for Mediators of the Commercial Division or, if applicable, the Standards of Conduct for Arbitrators and Neutral Evaluators. In order to avoid conflicts of interest, any person tentatively designated to serve as a Neutral 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 Neutral shall decline to serve if he or she would not be able to do so fairly, objectively, impartially, and in accordance with the highest professional standards. The Neutral shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts are discovered, the Neutral shall fully inform the parties and the Commercial Division's Program Administration of all relevant details. Unless all parties after full disclosure consent to the service of that Neutral, the Neutral shall decline the appointment and another Neutral shall promptly be selected by the Administration. Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

Rule 5. Compensation of Neutral.

(a) The Neutral selected by the Administrator pursuant to Rule 4 (a) shall be compensated by the parties as follows. The Neutral designated as a mediator shall serve in that role at no charge for one mediation session or sessions totaling four hours duration. Time spent in arranging for the initial session(s) and review of papers in preparation therefor shall not be counted in calculating the four hours. At the conclusion of the four hours, any party may bring the ADR proceeding to an end. If, however, the parties agree to continue, the mediation shall proceed, but the parties shall compensate the mediator for his or her time thereafter at the rate of \$ 300 per hour.

(b) If the parties designate an alternate mediator from the Panel pursuant to Rule 4 (b) and that person is available and willing to handle the matter under the circumstances, including at the rate of compensation herein specified, the parties shall compensate the mediator at the rate of \$350 per hour commencing from the outset of the initial mediation session.

(c) If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the neutral shall be compensated at the rate of \$300 per hour from the commencement of the initial session.

(d) If the parties and the Neutral agree, the parties may compensate the Neutral at a rate in excess of those specified in this Rule. Any such agreement shall be set forth in writing.

(e) Each party to the ADR proceeding shall pay an equal share of the Neutral's compensation unless otherwise agreed by the parties.

Rule 6. Confidentiality of Mediation and Neutral Evaluation.

(a) The ADR proceeding, other than a binding arbitration, 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, the ADR proceeding, and any notes or other writings prepared by the Neutral in connection with the proceeding shall be kept in confidence by the Neutral and the parties and shall not be summarized, described, reported or submitted to the court by the Neutral or the parties. No party to the ADR proceeding shall, during the action referred to ADR or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party concerning the substance of the ADR process. Any settlement, in whole or in part, reached during the ADR proceeding shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. The terms of 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 and may refer to the terms to the extent necessary to do so. 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 ADR proceeding.

(b) No party to an action referred to mediation or neutral evaluation in the Program shall subpoena the Neutral to testify in any legal proceeding concerning the substance of the ADR proceeding. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the Neutral harmless against any resulting expenses, including reasonable legal fees incurred by the Neutral or the reasonable value of time spent by the Neutral in representing himself or herself in connection therewith.

(c) Notwithstanding the foregoing:

(i) A Neutral shall disclose to a proper authority information obtained in mediation if required by law or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act likely to inflict death or serious physical injury.

(ii) A party or the Program Coordinator may report to a proper authority any unprofessional conduct engaged in by the Neutral and the Neutral may make such a report with respect to any such conduct engaged in by counsel to a party.

(iii) The parties may include confidential information in a written

settlement agreement; the Neutral and the parties may communicate with the Program Coordinator about administrative details of the proceeding, including as provided in Rule 8(h); and the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules.

Rule 7. Immunity of the Neutral. Any person designated to serve as Neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity.

Rule 8. Procedure.

(a) Parties referred to the Program are free to choose the form of ADR they wish to undergo. Unless otherwise agreed by the parties, cases shall be mediated.

(b) The issuance of an Order of Reference shall not stay court proceedings in the case unless otherwise directed by the Justice assigned.

(c) The first ADR session shall be conducted no later than 30 days from the Confirmation Date. Immediately after confirmation, all parties shall communicate with one another and the Neutral and take all steps necessary to comply with said deadline. At least ten days before that session, each party shall deliver to the Neutral a copy of its pleadings and a memorandum of not more than ten pages (except as otherwise agreed) setting forth that 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. In cases being mediated or undergoing neutral evaluation, this memorandum shall not be filed in court nor, unless otherwise agreed by the parties, served on the adversary, and it shall be destroyed by the Neutral immediately upon completion of the proceeding.

(d) Attendance is required at the first four hours of the mediation process, whether at a single session or more than one.

(e) Unless exempted by the Neutral for good cause, every party must appear at each ADR 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. Where necessary to an effective mediation, the Neutral may require the insurance carrier of a party to attend. In addition, counsel for each represented party shall be present at each session. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to take all steps necessary to a meaningful mediation process.

(f) If the ADR process is successful, the Neutral shall immediately advise the Program Coordinator, and the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and transmit a copy to the Part of the Justice assigned.

(g) If after four hours the mediation is terminated without a settlement, the Neutral shall immediately inform the Program Coordinator.

(h) Notwithstanding the foregoing, if a party or counsel fails to cooperate in making arrangements for the mediation, appear at any scheduled session or otherwise comply with these Rules, the Neutral shall advise the Program Coordinator, succinctly specifying the nature of the infraction, and may recommend the imposition of sanctions.

(i) The Program Coordinator may communicate with the assigned Justice about administrative details of the processing of any case referred to the Program by that Justice, but shall not identify the Neutral designated or disclose any substantive aspect of the ADR proceeding. If a proceeding is terminated after four hours without a settlement, the Administration shall not reveal to the Justice which party brought the proceeding to an end. The Administration shall report to the Justice at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. The Administration shall also report to the Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as indicated by a Neutral pursuant to subdivision (h) of this Rule and any recommendation for sanctions. The Justice may impose sanctions or take such other action as is necessary to ensure respect for the court's Order and these Rules.

Rule 9. Completion of ADR; Report.

(a) The ADR process shall be concluded within 45 days from the Confirmation Date. The Neutral shall report the outcome to the Program Administration no later than seven days thereafter.

(b) If the matter has not been entirely resolved within the 45-day period, but the parties and the Neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward for an additional 30 days. However, absent extraordinary circumstances, there shall be no stay of other proceedings in the case. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice specifically authorizes the process to continue beyond that date.

Rule 10. Arbitration. Parties who choose to proceed to arbitration pursuant to Rule 8 (a) hereof and the Order of Reference shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties agree to arbitration but are unable to agree upon the procedures, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the Program Coordinator. An award shall be issued within the time for a report of the Neutral fixed by Rule 9.

Rule 11. Conversion of Mediation to Binding Arbitration.

(a) Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process.

(b) Any such arbitration must proceed before a different Neutral than the one who presided over the mediation session(s). However, this subdivision shall not apply if the mediator had not received any material or information from a party *ex parte* by the time an agreement to proceed to arbitration was reached.

(c) As soon as practicable and in any event within five days from conclusion of the mediation

proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the Program Administration a written stipulation submitting the case to arbitration under this Rule and identifying the number of arbitrators agreed upon. There shall be a single arbitrator unless otherwise agreed, in which event there may be a maximum of three. Together with the stipulation the parties shall submit a list identifying the person(s) to serve as arbitrator(s) whom they have chosen or the names of at least three prospective arbitrators from the Panel whom they have agreed upon for each position. If the parties are unable to provide either listing, the Program Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 5 (c).

(d) Any person tentatively selected as an arbitrator shall comply with Rule 4 (d) hereof.

(e) The arbitration shall be completed within 45 days from the date on which the Program Coordinator advises the parties of the confirmation of the selection of the arbitrator(s). The arbitrator(s) shall issue a written award within seven days after completion of the proceeding. This award shall be binding upon the parties.

(f) The parties shall stipulate in advance to all other necessary procedures to govern the arbitration.

Rule 12. Further ADR. After completion of the ADR proceeding, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to the Program, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 5(b).

Rule 13. Administration of Program. The Program shall be supervised by the Clerk-in-Charge of the Commercial Division Support Office. The conduct of ADR proceedings shall be coordinated by an Alternative Dispute Resolution Coordinator or Coordinators.

Effective Date: June 15, 2008

**THE COMMERCIAL DIVISION
SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY**

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