

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF WESTCHESTER

HON. ALAN D. SCHEINKMAN

RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

FOR CIVIL CASES

PREAMBLE

It is the policy of this Court to encourage the voluntary resolution of disputes through the use of Alternative Dispute Resolution (“ADR”). The following Rules shall govern cases referred to the ADR Program for Civil Cases (“the Program”) upon consent of the parties either at a conference or in a written stipulation (“Consent Mediation”). Parties are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in the Program. Further, parties can terminate the process after the initial session.

Rule 1. Eligibility:

Cases eligible for the Program consist of personal injury matters, real estate cases, and other cases not assigned to a specialized part in the Court (*e.g.*, Matrimonial, Commercial, Tax Certiorari, Medical Malpractice) (collectively “Civil Cases”).

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 specific subject area of the cases referred to them; (b) have completed at least the amount and type of training required by Part 146 of the Rules of the Chief Administrator; (c) have recent experience mediating actual cases as mandated by Part 146; and (d) comply with the Court’s Standards of Conduct for Mediators.¹
- (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 on the Supreme Court, Westchester County website (<http://www.nycourts.gov>).

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Part 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 twenty-four (24) hours of training in basic mediation skills and techniques and sixteen (16) hours of training in the specific mediation techniques pertaining to the subject area of the types of cases referred to them (see Part 146 of the Rules of the Chief Administrator).

Rule 3. ADR Order:

At the outset of each case, the Assigned Justice or CAR shall inform the parties of the availability of the Program. In the event a matter is referred to the Program, upon the written consent of the parties, the Assigned Justice or CAR shall issue an ADR Order for an initial mediation session in accordance with these Rules.

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

- (i) Within five (5) business days from receipt of the ADR Order, the parties shall confer and select a Mediator from the Roster. During this time, the parties shall also complete and return to the Court and the selected Mediator, the Mediation Initiation Form. Copies of the Mediation Initiation Form can be obtained from the Westchester County Supreme Court website (at <http://www.nycourts.gov/courts/9jd/Westchester/index.shtml>.)
- (ii) If the parties are unable to agree on a Mediator, the parties shall within the same five (5) business days from receipt of the ADR Order, submit to the Court, the Mediation Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked which mediator.) The Court will select a mediator from among the four (4) names submitted by the parties.
- (iii) If either party does not consent to the Mediator selected by the Court under this Rule 4 on the belief that there is a conflict of interest, a party may submit a written request to the Court within five (5) days from the date of notification of the selected Mediator seeking the disqualification of the Mediator including the basis for disqualification. The Court may randomly select an alternative mediator or deny the request.
- (iv) 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.
- (v) 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 Administrative Judge.
- (vi) 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 the Mediator fairly, objectively, impartially, and in accordance with the highest professional standards. The Mediator shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the Mediator shall either decline the appointment or shall fully inform the parties and the Court 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 promptly be selected by the Court. 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 proceeding 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 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 and shall not be summarized, described, reported or submitted to the court by the Mediator or the parties. No party to the mediation proceeding shall, during the action referred to in the 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. 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, (a) disclose the settlement to the Court as required pursuant to Rule 7(vii), or (b) 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. 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 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, counsel to a party, or the Mediator, may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Mediator or 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 Court 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 any claim or suit based upon any actions engaged in or omissions made while serving in that capacity, to the extent permissible 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 Administrative Judge, 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 ADR Order.
- (iii) The first mediation session shall be conducted within 30 days from the date on which a particular Mediator has been designated to conduct the mediation (“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.

- (iv) If directed by the Mediator, at least ten days before that session, each party shall deliver to the Mediator a copy of its pleadings and a memorandum of not more than five 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 ("Mediation Memorandum"). 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. In addition, in all cases where a party has claimed physical and/or emotional injury, the parties shall exchange as well as provide a copy to the Mediator, a written statement of liens identifying the source and amounts of all the medical and/or other liens related to the claim(s) that will be discussed at the mediation. The Mediation Memorandum and statement of liens shall be used for mediation purposes only and are otherwise confidential pursuant to Rule 5.
- (v) The location of each mediation session shall be determined by the Mediator and the parties.
- (vi) Unless excepted 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. Where liability insurance is involved, claims adjusters or other persons on behalf of the insurance carrier with full authority to settle the matter on behalf of the defendant must attend in addition to the insured, unless specifically excused by the Mediator at least one week before the first mediation session. If excused, that claim adjuster or other authorized person on behalf of the carrier shall be available by telephone during each mediation session. Experience has demonstrated, however, that the presence at the mediation session of the carrier's representative who has decision-making authority can greatly assist the productivity of the mediation process. 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 Court, and the parties shall forthwith submit a stipulation of discontinuance to the Court. In the event the plaintiff is an infant, judicially declared incompetent or conservatee, approval of the settlement and the filing of a stipulation of discontinuance shall remain subject to N.Y. C.P.L.R. §1207.
- (viii) At the end of an initial Mediation session(s), any party or the Mediator may terminate the mediation. In such case the Mediator shall immediately inform the Court of the termination. If the mediation has been terminated by one party only, the identity of that party shall not be reported. Further, at the end of an initial Mediation session, the parties may elect to continue with mediation and the mediator shall be compensated at the hourly rate set forth in Rule 8(i).
- (ix) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for a mediation session in a timely manner, fails to appear at any scheduled session or otherwise fails to comply with these Rules, the Mediator shall advise the Court.

- (x) Upon termination of the proceeding by a party pursuant to subdivision (viii) of this Rule, neither the Mediator nor the parties shall inform the Court which party brought the proceeding to an end. The Court shall report to the Assigned Justice at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. The Court shall also report to the Assigned 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 Assigned 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:

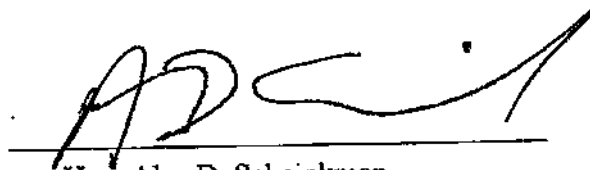
- (i) **Mediators shall not be compensated for the first ninety (90) minutes in any case referred to a mediation session under this Program.** Parties shall compensate the Mediator at the rate of \$300.00 per hour (unless the parties and the Mediator agree otherwise in writing), for any mediation session beyond the first ninety (90) minutes with the same Mediator. Mediators shall not be compensated for time spent on the selection and appointment process.
- (ii) The Mediator's fees and expenses shall be borne equally by the parties unless otherwise agreed in writing.

Rule 9. Completion of ADR; Report: The mediation session or sessions shall be concluded within 45 days from the Confirmation Date. The Mediator shall report to the Court as to success or lack of success no later than seven days thereafter.

Rule 10. Continuation of ADR: 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. Administration of Program: Contact James Garfein, Esq., Program Administrator by telephone (914) 824-5492 or e-mail GeneralCivilMediationWestchester@NYCourts.gov

Dated: October 11, 2013
White Plains, NY



Hon. Alan D. Scheinkman
Administrative Judge
Ninth Judicial District
