

# **COMMERCIAL DIVISION – NASSAU COUNTY**

## ***Rules of the Alternative Dispute Resolution Program***

### **INTRODUCTION**

Alternative dispute resolution ("ADR") refers to a variety of processes other than a trial that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation.

The Court will offer mediation as the default ADR option. Mediation is a confidential, informal procedure in which a neutral third party helps disputants negotiate. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Although parties are not obligated to settle during mediation, the process frequently concludes with a written agreement.

Mediation is particularly appropriate for the resolution of complex commercial cases. Mediation offers the parties a confidential, structured forum in which to explore practical business concerns and develop tailor-made solutions beyond those that a Judge can often provide. Moreover, a mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The Court will also offer neutral evaluation as an ADR option. Neutral evaluation is a confidential, non-binding process in which a neutral third party with expertise in the subject matter relating to the dispute hears abbreviated case presentations by the parties and counsel, provides an informal assessment of the strengths and weaknesses of the arguments and may offer an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

The Neutral Evaluators participating in the Commercial Division Alternative Dispute Resolution Program ("the Program") have significant experience in commercial law and specific training in neutral evaluation. Their assessments and opinions may help parties to analyze the case, facilitate discussion and generate a settlement.

The following Rules shall govern cases sent to mediation and neutral evaluation by Justices of the Commercial Division and other authorized Justices in Nassau County, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an Order of Reference are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in this Program. After a case has been submitted to the Program, parties can terminate the process and proceed to ADR elsewhere.

**Rule 1. The Program:**

The Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program. The Program shall be applicable to commercial cases referred by Justices of the Commercial Division and the other Justices of the Supreme Court, Nassau County; and commercial cases referred by consent of the parties.

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**Rule 2. The Roster:**

- (a) The Administrative Judge shall establish and maintain a roster of mediators and neutral evaluators ("the Roster") who shall possess the qualifications and training required by Part 146 of the Rules of the Chief Administrative Judge (see <http://www.nycourts.gov/rules/chiefadmin/146.shtml>) as either a mediator or neutral evaluator, in addition to the requirements set forth below. Applications to join the Roster will be accepted between January 1<sup>st</sup> and March 31<sup>st</sup> of the calendar year. Applications received outside this time period will be deferred for consideration to January 1<sup>st</sup> of the next calendar year.
- (b) In addition to the minimum qualifications and training criteria set forth in Part 146, a neutral evaluator seeking to qualify for appointment to the Roster must have at least seven (7) years of substantial experience in the area of Commercial Law or have served at least five years as a judge with substantial experience in the area of Commercial Law.
- (c) Every member of the Roster, and any other person, who serves as a mediator pursuant to these Rules, shall comply with the Model Standards of Conduct for Mediators.
- (d) Every member of the Roster shall complete at least six hours of additional approved training relevant to their respective practice areas every two years in compliance with the Continuing Education requirement of Part 146 of the Rules of the Chief Administrative Judge.
- (e) Continuing presence on the Roster is subject to review by the Administrative Judge. Every member of the Roster serves at the pleasure of the District Administrative Judge, who may terminate a designation to the Roster at any time.
- (f) The Roster will be available through the Nassau County Supreme Court's website.
- (g) The 10th Judicial District—Nassau County serves a wide variety of litigants, including persons of varying age, race, ethnicity, national origin, gender, sexual orientation, physical or mental ability, religion, socioeconomic and family status. Neutrals with a wide variety of cultural and life experiences enrich the alternate dispute resolution process by bringing diverse perspectives to resolving disputes. To better serve our District's population and instill confidence in participants in the ADR process, Nassau County is committed to attracting and retaining court-approved neutrals who represent a range of personal and professional backgrounds. Qualified applicants of diverse backgrounds and experiences are encouraged to apply for admission to the Roster by submitting to the District's ADR Coordinator a Statewide Mediator Application or a Nassau County

Commercial Division Application, available on the Nassau County Supreme Court's website, and a resume.

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**Rule 3. Procedure:**

- (a) Cases shall be referred to mediation or neutral evaluation as early as is practicable. If the assigned Justice 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 assigned Justice shall issue an Order of Reference requiring that the case proceed to mediation or neutral evaluation 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 assigned Justice.
- (b) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon neutral from the Roster. During this time, the parties shall also complete and return to the Court and to the selected neutral the ADR Initiation Form. Copies of the ADR Initiation Form can be obtained from the Nassau County Supreme Court's website.
- (c) If the parties are unable to agree on a neutral, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the referring Justice the ADR Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked each neutral). The Court will select a neutral from among the four (4) names submitted by the parties. Once a neutral is agreed upon or selected by the Court, the parties shall contact the neutral to schedule an initial session. Any neutral selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.
- (d) The parties may agree on a neutral other than one listed on the Court's roster, if they so desire. For a substitution to be made, the parties must contact the other neutral directly, make arrangements for that person to conduct the mediation or neutral evaluation, and submit a Neutral Initiation Form to both the Court and the selected neutral. A neutral selected from outside the Roster must nevertheless comply with the deadlines and confidentiality provisions set forth in these Rules.
- (e) The initial mediation or neutral evaluation session must be conducted within 45 days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the neutral shall contact the Court and, if necessary, intervention will occur to expedite the process. The neutral may initially request a conference call with both parties regarding any preliminary matters. If the neutral and the parties have agreed to proceed by a remote virtual online platform, the neutral shall, prior to the initial session, discuss the following with the parties: privacy expectations; confidentiality; prohibition on recording; participants' ability to access and use virtual technology, including the availability of a secure internet connection; whether the participant needs an interpreter or other accommodation; safety concerns; any other requests by participants, including a participants' request to have a support person present for the session (to be discussed and agreed to by the other participant).

- (f) At least one week before the initial session, each party shall deliver to the neutral a memorandum of not more than three pages, (12 point font, doubled spaced) setting forth that party's views as to the nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum shall not be served on the adversary or filed in court, shall be read only by the neutral, and shall be destroyed by the neutral immediately upon completion of the proceeding.
- (g) Unless exempted by the neutral for good cause, every party, including counsel must attend the initial ADR session either in person or remotely if agreed upon in advance, 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 authorized to settle the matter. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to settle.
- (h) Parties and their counsel may be referred to mediation or neutral evaluation for a free four (4) hour initial session. Subject to the neutral's discretion and full disclosure to the parties at the beginning of the initial session, the neutral may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. At the conclusion of the initial session, the parties and neutral may (but are not required to) agree to continue the ADR process. Neutral compensation for any additional time beyond the initial ADR session is governed by Rule 6, below.
- (i) Within seven (7) business days after the ADR process has concluded – whether by agreement, or the refusal of one or more parties to continue – the neutral shall complete the ADR Disposition Form indicating settlement or lack thereof and transmit the same, along with any written agreement, to the Court. If the ADR process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the assigned Justice.
- (j) At the end of an initial session mandated by subdivision (h) of this Rule, any party or the neutral may terminate the ADR process. If the ADR process has been terminated by one party only, the identity of that party shall not be reported.
- (k) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for an ADR session in a timely manner, appear at any scheduled session or otherwise fail to comply with these Rules, the neutral may advise the Court and the Court may impose sanctions.

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**Rule 4. Confidentiality:**

- (a) The ADR process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the neutral in connection with the proceeding - as well as any communications made by the neutral, parties or their counsel, for, during, or in connection with the ADR process - shall be kept in confidence by the neutral, the parties and any individual present during the ADR process, and shall not be summarized, described, reported or submitted to the Court by the neutral or any individual present during the ADR process. No party to the ADR process shall, during the action referred to the ADR process 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 process, or seek to compel the testimony of any other party concerning the substance of the ADR process. Any settlement, in whole or in part, reached during the ADR process 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 this agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the ADR process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7 [b] herein).

- (b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the neutral or any individual present during the ADR process to testify in any legal proceeding concerning the content of the ADR process. 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 reasonable sums lost by the neutral in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the neutral and the neutral may do the same with respect to any such conduct engaged in by counsel to a party.
- (c) Notwithstanding the foregoing, to the extent necessary,
  - 1) the parties may include confidential information in a written settlement agreement;
  - 2) the neutral and the parties may communicate with the Court about administrative details of the ADR process; and
  - 3) the neutral 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.

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**Rule 5. Immunity of the Neutral:**

Any person designated to serve as a neutral 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.

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**Rule 6. Compensation:**

Parties shall not be required to compensate the neutral, selected from this Program's Roster, for services rendered during the initial session, or for time spent in preparation for the initial session. Should the parties choose to continue beyond the initial session, a neutral shall be compensated at a maximum rate of \$500 per hour for time spent in mediation or neutral evaluation and for any additional preparation time needed beyond the initial session. All neutral fees and expenses shall be borne equally by the parties unless the Court determines otherwise and should be agreed upon in writing prior to the commencement

of the initial session.

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**Rule 7. Stay of Proceedings:**

- (a) Unless otherwise directed by the Justice assigned, referral to an ADR process will not stay the court proceedings in any respect.
  - (b) Parties committed to the ADR process who conclude that additional time is required to fully explore the issues pertaining to their case may request a stay of proceedings. Regardless of whether a stay is granted by the Assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the neutral shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the Court and in compliance with the deadlines set forth herein.
  - (c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (See Rule 3 [e]) but the parties and the neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward. However, the ADR process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.
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**Rule 8. Conflicts of Interest:**

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 disqualify him or herself if the neutral would not be able to participate 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 should be discovered, the neutral shall fully inform the parties and the Court 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 parties or the Court in a manner consistent with Rule 3 (b). Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

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**Rule 9. Communication with Referring Justice:**

The neutral may communicate with the referring Justice or the referring Justice's staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant these rules, the neutral shall not reveal to the Court which party brought the proceeding to an end. The neutral shall report to the referring Justice at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part.

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**Rule 10. Further ADR:**

- (a) While early attempts at alternative dispute resolution may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the assigned Justice may in his or her discretion issue an order directing subsequent referrals to the Program.
- (b) Any case subsequently referred to the Program shall proceed in accordance with these Rules. For example, the parties shall not compensate the neutral for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order of Reference to the Program.
- (c) Nothing in this Rule shall prohibit the parties from proceeding to mediation, neutral evaluation, or another ADR process, without Order of the Court, and at their own expense.

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**Rule 11. Administration and Assessment of Program:**

The Program shall be supervised by the Administrative Judge of the Tenth Judicial District – Nassau County.

To assist in the continued development of the Program, we ask the parties and counsel, if applicable, complete a Post-Mediation Survey within fifteen (15) business days after the final ADR session. The Post-Mediation Survey may be easily completed and submitted online at: <https://mediationsurvey.questionpro.com/?custom1=20>

Once submitted, the online survey is automatically routed to the Nassau County ADR Coordinator. Neutrals are encouraged share the survey link with the parties via email or by inserting it into the chat feature at the end of a virtual ADR session.

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**Effective date: November 23, 2020**  
**THE COMMERCIAL DIVISION**  
**SUPREME COURT, CIVIL BRANCH**  
**NASSAU COUNTY**