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**STATEMENT OF PROCEDURES
FOR NEUTRAL EVALUATION PROGRAM**

NEW YORK COUNTY SUPREME COURT CIVIL BRANCH

I. OVERVIEW

Neutral Evaluation is a confidential alternative dispute resolution process that may result in faster, more convenient, less expensive, and less acrimonious settlement than might be the case in the normal course of litigation. In Neutral Evaluation, a neutral third party — the Neutral Evaluator — hears abbreviated case presentations by the parties and counsel, provides an informal assessment of the strengths and weaknesses of the arguments and may offer a non-binding opinion. Neutral Evaluators have significant experience in their specified area of 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 Early Neutral Evaluation Program (the “ENEP” or the “Program”) offers parties access, free of charge, to qualified Neutral Evaluators who meet the criteria set out in Section VI. The goal of the ENEP is to assist the parties and their counsel in reaching a resolution or to decide a discrete issue or issues. Although parties are not obligated to settle in Neutral Evaluation, parties often resolve the discrete issue or issues referred to the Neutral.

The presence of counsel for each party at all Neutral Evaluation sessions is required, and parties shall attend the Neutral Evaluation session with their attorneys. Referral to the Program is not appropriate where only one party is represented by counsel, or in cases of domestic violence, child abuse, or a severe power imbalance.¹

All Neutral Evaluation sessions may be conducted remotely.

For further information about Alternative Dispute Resolution Programs in New York County Supreme Court Civil Branch, visit <http://ww2.nycourts.gov/ip/adr/NYCSupreme.shtml>

¹ Matrimonial cases should be referred to the New York County Supreme Court Matrimonial Neutral Evaluation Program (MNEP) by contacting Loren Schwartz, Program Manager, at lschwartz@nycourts.gov. All cases referred to the MNEP are screened prior to assignment for domestic violence, child abuse and serious imbalance of power.

II. DEFINITIONS²

- (a) "Neutral" shall refer to Neutral Evaluators.
- (b) "Neutral Evaluation" refers to a confidential, non-binding process in which a neutral third party (the Neutral Evaluator) with expertise in the subject matter relating to the dispute provides an assessment of likely court outcomes to help parties reach a settlement.

III. PROCEDURES

The assigned Part Justice may, at any point in the litigation, refer parties to the Program on consent by emailing Jean Norton, Alternative Dispute Resolution Coordinator for the Supreme Court, New York County Civil Branch at jnorton@nycourts.gov. Cases involving child abuse or neglect (as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412), domestic violence, or a severe power imbalance between the parties are not appropriate for referral to the Program. Cases will be screened to avoid inappropriate referrals.

To begin the process, the Court issues an Order of Reference on consent of the parties. The Order of Reference may specify any discrete issues to be submitted to the Program or simply refer the case for resolution. The Order shall direct parties and counsel to attend a free session with a Neutral Evaluator from the Program's Roster of Neutrals.

The Order of Reference shall contain the control date set by the referring Justice for the parties to appear in Court for a conference following the Neutral Evaluation session. All pre-trial proceedings scheduled in the Preliminary Conference order shall continue and shall not be stayed pending the Neutral Evaluation. If all parties request, the referring Justice may agree to extend dates given the particular circumstances presented.

The Court shall transmit the Order of Reference to the Program Coordinator ("Coordinator"), who will administer this program. The Coordinator shall randomly select the names of three Neutral Evaluators. Next, the Coordinator shall send to the parties a Notice of Confirmation with the three names. Within five (5) business days of receiving the Notice of Confirmation, counsel shall select one of the three proposed Neutral Evaluators, and inform the Coordinator of their selection. If counsel for the parties cannot agree, each side shall have the right within the said five (5) business days to object to one of the selected Neutral Evaluators. The remaining Neutral Evaluator shall serve as the Neutral Evaluator, provided there is no conflict of interest (as identified in Section XI herein). If there is a conflict with the remaining Neutral Evaluator, counsel shall promptly send an email to the Coordinator at email address of coordinator within ten (10) business days of receipt of the Notice of Confirmation with a copy to the other side. The Coordinator shall randomly select names of three additional Neutral Evaluators, and the process described above shall be repeated.

² The definitions for this Program are established in Part 146 of the Rules of the Chief Administrative Judge. See <http://nycourts.gov/rules/chiefadmin/146.shtml>

Once counsel select the Neutral, counsel will jointly contact the Neutral within 72 hours by conference call or email to schedule the first session, which may take place remotely.

Parties and counsel are required to appear at the Neutral Evaluation session within forty-five (45) days of receiving a Notice of Confirmation. The Neutral Evaluation shall be completed within sixty (60) days of the initial meeting absent stipulation of the parties and the Neutral Evaluator, approved by the Court.

The parties' counsel shall simultaneously exchange and submit to the Neutral Evaluator a concise, two-page summary of the issue(s) presented, relevant facts, and applicable law, if any. This exchange and submission shall be made so that the Neutral Evaluator receives such submissions at least five (5) business days before the scheduled Neutral Evaluation. The Neutral Evaluator may request limited, additional information mindful of the additional cost this may cause the respective parties to incur. The Neutral Evaluator may further request a conference call with both attorneys regarding any preliminary matters.

Within five (5) business days after the conclusion of the Neutral Evaluation session, the Neutral Evaluator shall send a Report ("Report of the Neutral") to the Coordinator and to counsel for the parties stating only that the Neutral Evaluation has been completed. The Coordinator shall forward the Report to the Referring Justice. The Neutral Evaluator shall not disclose any substantive information discussed during the Neutral Evaluation, except as described in Section IX.

The parties shall report to the Court whether the case or any discrete issue or issues have been "resolved" or "not resolved." If "resolved" the parties shall prepare and execute a stipulation for submission to the Court.

IV. ROLE OF THE NEUTRAL

The Neutral Evaluator is an expert in the subject matter of the issues referred, who hears abbreviated case presentations and provides a non-binding assessment of the merits of the respective claims in an effort to facilitate settlement. The Neutral Evaluator is not an advocate, and may give an opinion as to likely court outcomes. At the parties' request, the Neutral Evaluator may also provide settlement assistance. The Neutral Evaluator is not a certified mediator but can recommend that the Court direct the case to a court connected mediation program if the Neutral Evaluator believes this would be beneficial.

All communications are confidential (with narrow exceptions outlined below) and will not be disclosed to the Justice hearing the case or in any other judicial or administrative proceeding. The Neutral Evaluator shall also explain that either party is free at any time to end the Neutral Evaluation and return to Court.

During the Neutral Evaluation, each side relates the facts of the dispute and raises particular issues of concern. The Neutral Evaluator may ask clarifying questions related to the issues submitted.

At some point in the process, the parties can opt to explore settlement. If this occurs, either party or the party's counsel may request a caucus. Caucuses are meetings that each side

may have alone with the Neutral Evaluator to explore the possibility of settlement. During the caucus, the Neutral Evaluator may explore how the parties view the dispute and the impact of any proposed solutions. The Neutral Evaluator keeps confidential the information discussed in caucus unless the party permits disclosure. In discussing whether to caucus, the Neutral Evaluator shall explain to the parties the risks of separate meetings in the context of an evaluative process where one party is unaware of what the other is saying to the Neutral, is unable to respond to what is said, and is unable to determine how that might influence the Neutral Evaluator's assessments. To guard against this risk, Neutral Evaluators sometimes place "in their pocket" their handwritten assessment of a likely court outcome, before they agree to caucus or attempt to settle the case.³ By committing to paper their assessment and placing it out of view, Neutral Evaluators avoid being influenced by what they learn during a caucus, and can retrieve their initial assessment if the parties cannot settle and request the Neutral Evaluator's evaluation.

V. THE ROLE OF PARTIES and COUNSEL

Experience has demonstrated that party participation — as opposed to exclusive participation by counsel — not only increases the likelihood of settlement, but also improves compliance with any agreed-upon terms and enhances the parties' satisfaction. Accordingly, unless exempted by the Neutral for good cause shown, the parties shall be present during the Neutral Evaluation session.

VI. THE ROSTER OF NEUTRALS

The Program has assembled a Roster of approved neutrals who have completed Neutral Evaluation training and possess significant and substantive legal experience in civil matters. Attorneys who wish to join the Roster must comply with the following prerequisites:⁴

Application to join the Roster shall be made to the Coordinator and shall include a letter of interest with a description of the applicant's credentials in the format prescribed by the Program. The Coordinator shall confer with the Administrative Judge as to any applicant's admission to the roster.

VII. FEES

The Program does not charge or administer fees.

³ See Proposed Model Rule of Professional Conduct for the Neutral Lawyer at: https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/meadow/

⁴The training and qualifications guidelines for the Program are derived from and in certain aspects exceed the minimum requirements established in Part 146 of the Rules of the Chief Administrative Judge. See www.nycourts.gov/rules/chiefadmin/146.shtml

VIII. IMMUNITY

Neutrals serving in this program shall be immune from suit as a result of any conduct or omission during the performance of duties in that capacity to the extent permissible by law.

IX. CONFIDENTIALITY

Except as set forth below, all oral, written, or other communications made during the course of the Neutral Evaluation shall be confidential and shall not be disclosed in any present or future judicial or administrative proceeding. Similarly, all information generated in or in connection with the Neutral Evaluation – including memoranda, work product or case files of a Neutral Evaluator – shall remain confidential and not be subject to disclosure in any present or future judicial or administrative proceeding. However, Neutral Evaluation shall not be used as a shield with respect to otherwise discoverable documents or information produced or occurring prior to or outside of the Neutral Evaluation process.

Moreover, except as set forth below, nothing about the substance of the Neutral Evaluation, such as the weaknesses or strengths of the parties' case or the relative willingness of parties to discuss settlement proposals, shall be revealed to the referring Justice, or to any other person by the Neutral Evaluator or any party or attorney. The parties shall report to the Court whether the case or any discrete issue or issues have been "resolved" or "not resolved." If "resolved" the parties shall prepare and execute a stipulation for submission to the Court.

Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following five circumstances:

1. *Attendance*

Whether the parties and their counsel attended the initial session will be reported to the referring Justice.

2. *Waiver*

Parties to the Neutral Evaluation and the Neutral Evaluator agree in writing to waive confidentiality. The waiver must specify the individual communication(s) or information that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure.

3. *Written Agreement*

Any agreements reached during the Neutral Evaluation, shall be memorialized by counsel in a stipulation and submitted to the Court for review. Only those signed agreements that have become Court orders may be admissible in any present or future judicial or administrative proceeding. Additionally, a limited report of the outcome, as explained in Section III, will be sent to the referring Justice.

4. *Threats of Imminent, Serious Harm*

If communications or information constitutes a credible threat of serious and imminent harm, either to the speaker or another person or entity, the appropriate authorities and/or the potential victim may be notified.

5. *Allegations of Child Abuse or Neglect*

If communications or information relates to an allegation of child abuse or neglect as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412, disclosure may be required pursuant to Social Services Law § 413.

X. REFERRAL TO THE PROGRAM AND ONGOING LITIGATION

Cases may be referred to Neutral Evaluation on consent of the parties at any time during the litigation, including at the preliminary conference.

Referral to the Program will not stay the court proceedings. The “no stay” policy recognizes the special need for prompt action in all proceedings and the directive by the Chief Judge regarding Standards and Goals.

XI. AVOIDING CONFLICTS OF INTEREST

Before accepting a Neutral Evaluation, a Neutral Evaluator shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the Neutral Evaluator, including a financial or personal interest in the outcome, or an existing or past relationship with a party or their attorneys or foreseeable participant in the Neutral Evaluation. The Neutral Evaluator shall disclose any such known conflict to the parties and counsel as soon as possible before accepting a referral. If unable to function in a fair and impartial manner, the Neutral Evaluator shall notify counsel for the parties and the Coordinator. The Coordinator shall thereafter promptly provide counsel for the parties with a Notice of Confirmation containing three different Neutral Evaluators.

Dated: December 7, 2020