

# 3RD JUDICIAL DISTRICT DISTRICT-WIDE PRESUMPTIVE ADR PROGRAM RULES

## I. OVERVIEW

Proceedings in the civil parts of the Third Judicial District are eligible for presumptive Alternative Dispute Resolution (“ADR”). The following Rules shall govern all cases referred to this Program. This Program does not preclude the Court from directing or referring parties to ADR, including settlement conferences or early neutral evaluations without fee with Court Attorney-Referees at the 3<sup>rd</sup> Judicial District Office or through a retained Neutral of the Parties choice.

## II. STATEMENT OF PURPOSE

The Third Judicial District is dedicated to fulfilling its statutory and constitutional mandate to ensure the just and efficient resolution of all matters that come before it. This plan has been developed to achieve these ends through early referral to ADR which is often faster, more convenient, less expensive, and less acrimonious. An ADR resolution often results in a more mutually acceptable and durable resolution than that obtained through litigation.

## III. DEFINITIONS

Alternative Dispute Resolution (ADR): A variety of processes that help parties resolve their claim, conflict or dispute without a trial. Types of ADR include, but is not limited to, Mediation, Neutral Evaluation and Arbitration.

Neutral: A third party, usually an attorney, who works with the parties in the ADR process in a neutral capacity to help resolve their dispute.

Mediation: A confidential dispute resolution process in which a neutral third party - the Mediator - helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. In this process, parties have an opportunity to communicate with each other, focus on what is important to them, and to come up with individually tailored solutions. During mediation, each party relates his or her understanding of the dispute. The Mediator may ask the parties clarifying questions. The Mediator will not give legal advice or force solutions on the parties.

Mediation often involves non-legal as well as legal issues. Parties are strongly encouraged to participate in mediation with their own attorneys. Parties may also choose to attend sessions without counsel, if all participants agree. Although the mediation process can, and often does, result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves.

Mediator: A trained third party neutral. The Mediator is not a decision-maker. The Mediator serves as a neutral facilitator of communication and helps the parties reach resolution of the issue(s) being mediated. In this document, Mediator may also refer to a co-mediation team where two (or more) such neutrals are working together to mediate a case. For the purpose of these rules, a Mediator is a neutral who has fulfilled the requirements of Part 146 of the Rules of the Chief Administrative Judge and is mediating a given case pursuant to these program rules. This is distinct from private mediators who mediate cases outside these program rules.

Neutral Evaluation: Neutral evaluation is an ADR process where the case is referred to an expert, usually an attorney, who is asked to provide a balanced and unbiased evaluation of the dispute. Early Neutral Evaluation (ENE) may take place soon after a case has been filed in court. If this process occurs early, it may be referred to as Early Neutral Evaluation. Regardless, a court may refer the case to ENE or the parties may mutually agree to this process. The parties either submit written comments or meet in person with the expert. The expert identifies each side's strengths and weaknesses and provides an evaluation of the likely outcome of a trial. This evaluation can assist the parties in assessing their case and may propel them towards a settlement. Often, the expert's opinion may be of great significance to one or more parties as it may serve to confirm the evaluation of the case by that party's attorney.

Arbitration: Arbitration is a process where disputing parties agree that one or several individuals, the arbitrator(s), can make a decision about the dispute after receiving evidence and hearing arguments. Arbitration is different from mediation because the arbitrator has the authority to make a decision about the dispute. The process may be similar to a trial in that the parties make opening statements and present evidence to the arbitrator; however, it is usually less formal and is often faster. Arbitration may be binding or non-binding, which depends on either an agreement between the parties or any applicable law in this area, depending on the jurisdiction involved. In binding arbitration, parties agree to accept the arbitrator's decision as final. In non-binding arbitration, the parties may request a trial if they don't accept the arbitrator's decision.

Community Dispute Resolution Center (hereinafter, "CDRC"): The New York State Unified Court System partners with local non-profit organizations known as CDRC's to provide mediation and other dispute resolution options as an alternative to court. CDRC's help litigants resolve a wide range of family court disputes involving parents and children as well as child custody and visitation issues. CDRC's can also be utilized in mediating Surrogate's Court disputes such as Accountings, Administration and Probate disputes that are largely driven by family dynamics. A list of the 3<sup>rd</sup> Judicial Districts CDRC's, and the counties they serve, can be found at <http://ww2.nycourts.gov/ip/adr/MedDirectory.shtml>

District ADR Coordinator: A person or entity designated by the Administrative Judge for the Third Judicial District to have general program oversight.

## **IV. PROCEDURES**

### **A. ADR Initiation Process**

1. The referral to ADR should take place at the Preliminary Conference unless a different time frame is provided for by the specific court in the County where the action or proceeding is brought.
2. If any Party seeks an exemption from ADR, the Court shall determine in its discretion whether good cause exists to grant same.
3. If any Party seeks an exemption from the fee component of ADR based on indigent status pursuant to New York Civil Practice Law and Rules § 1101, the Court shall make a determination on such request, with the understanding that the non-indigent party shall still be responsible for their own portion of the Mediator's fee.
4. Once the Court determines that the case qualifies for ADR, the Court shall issue an Order of Reference either selecting a Roster Neutral or the applicable CDRC.

B. Order of Reference:

1. The Court shall:
  - a. refer matters to a Roster Neutral or a CDRC by issuing an Order of Reference informing parties and their counsel that the case shall undergo Mediation, which shall be completed within 60 days of issuance of the Order of Reference, or at the discretion of the Court, set a different time frame; and
  - b. establish a date thereafter upon which to return to Court.

**V. SELECTION OF NEUTRAL/CDRC**

- A. The list of Neutrals and CDRC's serving the 3<sup>rd</sup> Judicial District can be found at <http://ww2.nycourts.gov/ip/adr/MedDirectory.shtml> The Court shall list the Neutral in the Order of Reference, provide a copy to the parties, and send the Order of Reference to the ADR Coordinator at [claquida@nycourts.gov](mailto:claquida@nycourts.gov).
- B. The ADR Coordinator will then contact the Neutral, confirm there is no conflict, and provide the Neutral with a copy of the Order of Reference.

- C. If either party believes that there is a conflict of interest with the Neutral selected by the Court, the objecting party must submit a written request to the Court within five (5) days from the date of notification of the selected Neutral that includes the basis for disqualification of the Neutral. The Court may select an alternative Neutral or deny the request. If the Court finds a basis for disqualification, it will issue a new Order of Reference, notify the parties of the alternate Neutral and provide a copy of the new Order of Reference to the ADR Coordinator.
- D. Co-mediation may occur as part of an apprentice program when one Mediator is mentoring another. Co-mediation may also occur when two Mediators are appointed to the case. Apprentice mediators' time is non-compensable, whereas a Co-mediator's time is compensable, but with the understanding that Co-mediators will split the fee that would otherwise be payable to a single Mediator under these Rules.
- E. The Roster shall include Neutrals or mediation service providers who agree to provide reduced-fee neutral services to qualified participants.
- F. Neutrals on court rosters shall list, among other information, their relevant biographical information, experience, areas of expertise, any language fluency they possess and whether they have the capability to conduct ADR remotely.

## **VI. THE ADR PROCESS**

- A. Client Preparation: Counsel shall prepare for their case to be referred to ADR by:
  - 1. Informing their clients about the ADR program and its expectations and requirements.
  - 2. Identifying the information and material that may be useful to exchange with other parties in advance of ADR, including any information required to be exchanged by any discovery protocol prescribed by the Court.
- B. Pre-ADR Memoranda: Within three (3) business days of the scheduled mediation the parties should provide to the Neutral a three page-limited confidential memorandum setting forth their view as to the facts, the issues that are in dispute, suggestions as to how the matter might be resolved, as well as such other information concerning the litigation as the Neutral deems necessary for the effective negotiation and resolution of the issues. If a party feels that a memorandum to the Neutral needs to be longer than three pages based on the complexity of the case (i.e., commercial claims) they should make a request to the Neutral to provide a longer memorandum. No portion of the confidential memorandum shall be disclosed to the Court, nor, unless otherwise agreed by the parties, to any other party to the proceeding. Any departure from the requirements set forth herein may be authorized by the Court or the Neutral.
- C. Pre-ADR Conference Calls: The Neutral may request a conference call regarding any

preliminary matters and may thereafter meet or speak privately with any party and their respective counsel prior to or during an ADR session.

- D. Location of ADR Sessions: The initial ADR session and any subsequent sessions should take place at the Neutral's office, unless a different location is agreed to by the Neutral and the parties. Any alternate location must permit the effective conduct of the ADR process and preserve confidentiality and safety. The Neutral can provide ADR services remotely at their discretion.
- E. Informed Consent: At the beginning of the initial session, the Neutral shall:
  - 1. Explain to all parties that all communications are governed by the confidentiality provisions of these Rules.
  - 2. Explain that any party may, during the initial session or at any time thereafter, end the ADR process and return to Court.
  - 3. Request that all parties acknowledge in writing that they were informed of and understand the voluntary and confidential nature of the ADR process. An ADR Participation Statement of Understanding shall be sent by the Neutral to the Parties after the Neutral selection has been confirmed.
- F. Caucus: At any point in the process either party, their counsel, or the Neutral may suggest meeting separately with the Neutral in caucus. During the caucus, the Neutral may explore how that party views the dispute and the impact of any proposed solutions. The Neutral shall keep confidential the information discussed in caucus unless the party permits disclosure.
- G. Time to Complete ADR: Unless otherwise permitted by the Court, the parties shall complete the ADR process within sixty (60) days of issuance of the Order of Reference.
- H. Neutral Report: Within five (5) business days after the conclusion of the ADR session(s), the Neutral shall send a Report ("ADR Report") to the ADR Coordinator that states:
  - 1. The date of the initial session and whether each party and counsel appeared at the initial session;
  - 2. The dates of any subsequent session(s) that were held, and whether each party and counsel appeared at the subsequent session(s); and
  - 3. Whether the parties settled, did not settle, or settled a portion of the issues in dispute (describing the issues that were resolved).
  - 4. The ADR Coordinator will then forward the "ADR Report" to the assigning Court.

- I. ADR Survey: Following the conclusion of ADR, Parties and counsel are strongly encouraged to complete an ADR Survey and return it promptly to the ADR Coordinator. The survey is meant to track participant satisfaction and shall not include any details of the substance of the case or mediation.

## **VII. FEES AND NEUTRAL COMPENSATION**

- A. The Court itself does not charge or administer fees for ADR.
- B. CDRC services are offered for a nominal administrative fee or the non-profit's sliding scale depending on the type of case and services provided.
- C. ADR Sessions: Court Roster Neutrals shall not be compensated for the first ninety (90) minutes of the initial ADR session under the Plan. Neutrals shall also not be compensated under the Plan for preparation time or administrative tasks leading up to the first 90-minute ADR session. Should the parties agree to continue ADR beyond the initial 90-minute free period, the Neutral shall be entitled to compensation as follows: compensable services shall consist of time spent conducting any ADR session that follows the initial free 90-minute session and the time spent reviewing materials submitted by the parties for purposes of subsequent ADR sessions. The Neutral's fees for such service shall not exceed \$350.00/hour and be split evenly between the parties unless otherwise agreed to. Unless otherwise provided in these rules or agreed upon by the parties in writing, the Neutral's fee structure shall be as set forth in the Plan's Neutral Fee Agreement.
- D. Neutral Fee Agreement: At or any time prior to the beginning of the initial ADR session, the parties, counsel and the Neutral shall enter into a Neutral Fee Agreement, which shall be in the form accompanying these Rules, except as otherwise agreed to in writing by the parties, counsel, and the Neutral.
- E. Neutrals are encouraged to use a sliding scale where appropriate.
- F. Any party may elect not to continue with ADR, which decision must be immediately communicated orally or in writing to the Neutral and all parties. In such situation, despite the fact that one or more parties have opted out, ADR can continue as to those parties desiring to continue to the extent that ADR can be meaningful without participation by the party or parties that opted out.
- G. Co-Mediation: When a case is co-mediated by two appointed Court Roster Neutrals, the Neutrals shall split the set hourly rate.

## **VIII. PARTICIPATING IN ADR**

- A. Party Participation: Parties are strongly encouraged to attend all ADR sessions. The

Neutral has the discretion to allow remote participation in the ADR process.

- B. **Attorney Participation:** Parties are strongly encouraged to participate in the ADR process with counsel.
- C. **Non-Party Participation:** If a non-party is invited to participate in the ADR process, which participation must be agreed to by the parties and the Neutral, the Neutral shall obtain the participating non-party's written consent as to confidentiality and any other matters requested by the parties, as facilitated by the Neutral.
- D. **Opting-Out:** A case otherwise subject to ADR may be exempted from such process upon a showing of good cause. A party seeking an exemption shall apply for leave of Court to be exempted. Failure to seek an exemption in this manner shall constitute a waiver of any objection to the ADR referral. If the court grants leave to "opt out" from referral to ADR, then the case shall not proceed to ADR at that time.
- E. **Compliance:** Failure to comply with these rules may subject the offending party or attorney to sanctions, including but not limited to sanctions under CPLR 3126 and 22 NYCRR 130.

## **IX. CONFIDENTIALITY**

- A. ADR with a Court Roster Neutral shall be confidential and, except as otherwise provided, any document prepared, or communications made, by parties, their counsel or a Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR process, or the testimony of any other party or the Neutral concerning communications made during the proceeding. A settlement, in whole or in part, reached during ADR shall be set forth in a writing signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under New York Law shall not be shielded from disclosure merely because they are submitted or referred to in ADR.
- B. 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 circumstances:
  - 1. **Attendance:** Whether the parties and their counsel attended the initial session will be reported to the Court.
  - 2. **Session Information:** The Neutral may report to the Court whether the parties are requesting additional ADR sessions as well as the date of any ADR session.

3. Waiver: Parties to ADR and the Neutral may agree 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. All waivers shall be in writing.
4. Written Agreement: A writing signed by all the parties embodying a negotiated agreement submitted to the Court for review. Only those signed agreements that have become court orders or decrees may be admissible in any present or future judicial or administrative proceeding.
5. Threats of Imminent, Serious Harm: If a communication 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.
6. Allegations of Child Abuse or Neglect: If a communication 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, and for which disclosure is required pursuant to Social Services Law § 413, appropriate authorities may be notified.
7. Neutral Survey: The Neutral survey may be disclosed to the presiding Judge, Administrative Judge or applicable ADR Coordinator as set forth above, including for purposes of determining whether to re-certify a Neutral to a Roster or whether to remove a Neutral from a Roster.
8. Unprofessional Conduct: A party, counsel to a party, or the Neutral, may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Neutral or counsel to a party.
9. Collection of Fees: The Neutral may make general references to the fact of the ADR services rendered in any action to collect an unpaid, authorized fee for services performed under these Rules.

## **X. NEUTRAL EVALUATORS/MEDIATORS**

### **A. Qualifications**

1. The Administrative Judge shall establish, and the District ADR Coordinator shall maintain, a roster of trained Neutrals ("The Roster") for the Program which shall be available on the applicable Court website within the District. To be eligible to join the Roster as a Neutral Evaluator and/or a Mediator, a person shall satisfy the training and experience requirements of Part 146 of the Rules of the Chief Administrative Judge as follows:

1. Neutral Evaluation: Neutral evaluators who wish to qualify for appointment to the 3<sup>rd</sup> Judicial District court roster must have successfully completed at least six (6) hours of approved training in procedural and ethical matters related to neutral evaluation and be:
  - i. Admitted to practice law for at least five (5) years who also have at least five (5) years of substantial experience in the subject area of the cases that will be referred to them; or
  - ii. Individuals who have served at least five (5) years as a judge with substantial experience in the specific subject area of the cases that will be referred to them.
  - iii. All neutral evaluators must attend at least six (6) hours of additional approved training relevant to their respective practice areas every two (2) years.
  - iv. Effective January 1, 2023, all neutral evaluators must complete at least two (2) hours of qualifying anti-bias training every two years. Note: neutral evaluators may apply two (2) hours of their anti-bias training towards the six (6) hours of continuing education requirements listed in para iii above.
  
2. Mediators: Mediators must have successfully completed at least forty (40) hours of approved training as follows:
  - i. At least twenty-four (24) hours of training in basic mediation skills and techniques; and
  - ii. At least sixteen (16) hours of additional training in the specific mediation techniques pertaining to the subject area of the types of cases referred to them.
  - iii. Mediators must also have recent experience mediating actual cases in the subject area of the types of cases referred to them.
  - iv. All mediators must attend at least six (6) hours of additional approved training relevant to their respective practice areas every two (2) years.
  - v. Effective January 1, 2023, all mediators must complete at least two (2) hours of qualifying anti-bias training every two years. Note: mediators may apply two (2) hours of their anti-bias training towards the six (6) hours of continuing education requirements listed in para iv above.
  - vi. Effective January 1, 2023, mediators who mediate matrimonial or

family matters must take an additional four (4) hours of approved training on how to screen for Intimate Partner Violence. After completing this one-time four (4) hour training, mediators must take at least two (2) hours of continuing education on Intimate Partner Violence every two years. Note: These continuing education hours may be applied towards the six (6) hours of continuing education requirements listed in para iv above.

3. Persons who serve as both mediators and neutral evaluators in the same matter must meet the qualifications and training specified above.
4. Fulfillment of these requirements does not guarantee acceptance onto the Roster. Final placement on a Roster or continuation on a Roster is in the discretion of the District Administrative Judge under Part 146 of the Rules of the Chief Administrator.

B. Immunity

1. The Neutral shall be immune from suit as a result of any conduct or omission made during performance of duties in that official capacity to the extent permissible by law and shall be held harmless and indemnified against any costs incurred by the Neutral in connection with any claim based on such actions or omissions to the extent permitted by applicable law, including Public Officer's Law Section 17.

C. Avoiding Conflicts of Interest:

1. Before accepting an appointment as a Neutral, and within 72 hours of being contacted for possible retention to serve as a Neutral under these Rules, the Neutral 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, 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 ADR process. If the Neutral wishes to accept an appointment after discovering a potentially disqualifying fact, the Neutral shall disclose the disqualifying fact to the parties and shall not serve unless the parties consent thereto in writing. If, after accepting a case, a Neutral learns of any disqualifying fact, the Neutral shall disclose it to the parties as soon as practicable. If such conflict is not waived by the parties, or if such conflict might reasonably be viewed as undermining the integrity of the ADR process, the Neutral shall withdraw and notify the parties, the Court and the ADR Coordinator.

D. Quality Assurance

1. The District ADR Coordinator shall develop and promulgate consistent practices for ensuring Neutral quality and fitness. Such practices may include, but are not limited to:
    1. Observing Neutrals periodically;
    2. Providing and/or requiring continuing education relevant to serving as a Neutral in a case;
    3. Debriefing cases with Neutrals.
  2. Any Roster Neutral or prospective Neutral may be observed at any time by the District ADR Coordinator or staff of the NYS Unified Court System's Statewide ADR Office, before appointment on the Roster or to remain on the Roster.
- E. Neutral Standards of Conduct
1. Neutrals on court approved rosters must adhere to Standards of Conduct to be established or adopted by the Office of Court Administration in conducting their ADR session(s).
- F. Forms referenced in these rules can be found on the 3<sup>rd</sup> JD ADR webpage.

## **XI. DISTRICT ADR COORDINATOR**

- A. The District ADR Coordinator shall oversee the administrative requirements of the Program, which includes but is not limited to:
1. Monitoring all proceedings referred to ADR;
  2. Providing information to the Court on the status of cases referred to ADR;
  3. Maintaining statistical data on the Program.
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Honorable Gerald W. Connolly  
Administrative Judge, Third Judicial District

