

**SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION - COUNTY OF WESTCHESTER**

HON. LINDA S. JAMIESON

HON. GRETCHEN WALSH

**RULES OF THE COMMERCIAL DIVISION
ALTERNATIVE DISPUTE RESOLUTION PROGRAM**

PREAMBLE

It is the policy of the Courts of this State, as set forth in the State Chief Judge’s Excellence Initiative, to encourage the resolution of disputes and the early settlement of pending litigation through various settlement procedures. The following Rules shall govern cases which qualify for [Alternative Dispute Resolution](#) (“ADR”) through presumptive mediation. The Rules set forth herein are intended to apply in the Commercial Division of the Supreme Court of Westchester County. These Rules supplement and shall be applied in tandem with the Rules of the Alternative Dispute Resolution Program for the Ninth Judicial District (the “Ninth JD Rules”). Capitalized terms to the extent not defined herein are as defined in the Ninth JD Rules.

Rule 1. Program:

The Commercial Division of the Supreme Court of the State of New York, County of Westchester, employs the Alternative Dispute Resolution Program instituted by the Ninth Judicial District. Unless otherwise directed by the Court, cases referred to the Program shall be mediated. Cases which qualify for referral to the Program shall be those cases that have been designated by the Commercial Division as qualifying for presumptive mediation, as identified in Rule 2 herein, as well as any cases where all parties have elected to pursue mediation, and any cases where the Court has exercised its discretion to refer the cases to mediation.

Rule 2. Cases Qualifying for Presumptive Mediation and Determination of Suitability:

Listed below are those cases which have been designated as qualifying for presumptive mediation. All such cases shall be referred to mediation utilizing the procedures and forms established by the Ninth JD Rules. Those forms enable parties or their counsel to identify whether their case qualifies for mediation, following which the Commercial Division will review such forms to confirm that the case does qualify, in which event the mediation shall be initiated and an Order of Reference issued in accordance with the Ninth JD Rules. The following cases are deemed to qualify for presumptive mediation:

- (1) corporate dissolutions, internal governance disputes and shareholder derivative actions where the entity is closely held and non-public and there is an ongoing business or personal relationship among the parties;
- (2) employment agreements/restrictive covenants/unfair competition (whether or not employment-related);
- (3) commercial real estate not involving Yellowstone injunctions;
- (4) business transactions involving commercial banks or other financial institutions or lenders not involving an instrument for the payment of money only;
- (5) commercial insurance coverage or environmental insurance coverage;
- (6) construction litigation;
- (7) cases where the amount at issue is less than double the jurisdictional threshold for Commercial Division cases pending in Westchester County Supreme Court;
- (8) any case which does not fall into the list of cases above, but where all parties request mediation, or where the Court directs the case to go to mediation in the exercise of the Court's discretion.

Rule 3. Roster of Mediators and Compensation:

The Administrative Judge for the Ninth Judicial District, together with the Justices of the Commercial Division, shall establish and maintain a Roster of Mediators for the Commercial Division (“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 completed at least the amount and type of training required by Part 146 of the Rules of the Chief Administrator; (b) have recent experience mediating commercial cases as mandated by Part 146; and (c) comply with the Commercial Division's Standards of Conduct for Mediators.

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 24 hours of training in basic mediation skills and techniques and 16 hours of training in the specific mediation techniques pertaining to commercial litigation (see [Part 146](#) of the Rules of the Chief Administrator).

- (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.
- (iii) The Roster will be available through the [Commercial Division website](#).
- (iv) Unless otherwise directed by the Court, the Mediator shall be compensated in accordance with the Ninth JD Rules, including those provisions allowing for exemptions from parties having to pay for mediator compensation and those provisions allowing for portions of the Mediator's time to be non-compensable.

Rule 4. Procedure; Automatic Disclosures:

- (i) Unless otherwise directed by the Mediator, at least ten days before the first mediation session, each party shall deliver to the Mediator a copy of that party's marked pleadings (including responsive pleadings) together with a pre-mediation memorandum in the form set forth in the Ninth JD Rules. 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 mediation.
- (ii) Unless otherwise agreed by the parties and the Mediator or as directed by the Mediator, within ten days of the filing of the Order of Reference pursuant to the Ninth JD Rules, the parties shall exchange information as specified in the Mediation Disclosure Protocols annexed hereto as Schedule 1. Disclosure for mediation purposes shall be consistent with the efficient resolution of the case. Unless otherwise directed by the Court or Mediator or agreed to by the parties, the timeframe covering information to be produced pursuant to the Mediation Disclosure Protocols shall be from the earliest date by which the statute of limitations on any claim asserted in the action began to accrue.
- (iii) The Justices of the Commercial Division shall have the discretion to modify the deadlines for initiation and completion of the mediation process, including the discretion to limit required disclosure or to allow for additional disclosure beyond that which is exchanged pursuant to the Mediation Disclosure Protocols prior to the initiation of the mediation process.

Rule 5. Continuation of Mediation after Expiration of the 45-Day Period:

If the matter has not been entirely resolved within the 45-day period as provided in the Ninth JD Rules, but the parties and the Mediator believe that it would be beneficial if the mediation process were to continue, the process may go forward, but in such event, there shall be no extension or stay of the proceedings unless otherwise provided by the Ninth JD Rules or leave is granted by a Justice of the Commercial Division.

Rule 6. Further Mediation:

After completion of the mediation, upon request of a party or upon its own initiative, the Commercial Division Justice, in his or her discretion, may issue an order directing a second referral to the Program. Any such referral shall be entertained and ordered as early as practicable and shall be administered in accordance with these and the Ninth JD Rules.

Rule 7. Administration of Program:

The Program shall be supervised and coordinated by the Principal Court Attorney for the Commercial Division Justice assigned to the case, who shall act as the Administrator for the implementation of ADR for that case.

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THE COMMERCIAL DIVISION
SUPREME COURT-WESTCHESTER COUNTY
WESTCHESTER COUNTY COURTHOUSE
111 DR. MARTIN LUTHER KING, JR. BLVD.
WHITE PLAINS, NEW YORK 10601

Justice Linda S. Jamieson

Justice Gretchen Walsh

Schedule 1

Mediation Disclosure Protocols Commercial Division, Supreme Court, Westchester County

1. Documents sufficient to establish the subject contract, statutory cause of action (including the alleged violation), or the relationship between the parties
2. Preliminary calculation of damages, including for counterclaims, cross-claims and third party actions
3. Proof of any insurance (including excess) available to satisfy any cause of action as well as proof of any reservation of rights or disclaimer of coverage
4. Documents sufficient to show any dispositive affirmative defense
5. For construction disputes, only such documents as are necessary for the parties and Mediator to understand the nature and facilitate the resolution of the dispute, such as, for example, contracts, change orders, engineering reports, design documents, project minutes, mechanic's liens and if a subcontractor was replaced, the cost of the replacement subcontractor
6. To ensure that there is no gap in communication, parties should advise their adversary of any change in position regarding a previous settlement demand or offer
7. Any other documents that the parties, in consultation with the Mediator at the pre-mediation conference, agree to exchange
8. The names and titles of the people who will be attending the mediation
9. Counsel are, of course, encouraged to exchange any documents they believe would be helpful to the resolution of the dispute