

COMMERCIAL DIVISION



SUPREME COURT, NEW YORK COUNTY

HON. DEBORAH A. KAPLAN
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:
JUSTICE ANDREW BORROK JUSTICE ANDREA MASLEY
JUSTICE MARGARET CHAN JUSTICE BARRY R. OSTRAGER
JUSTICE JOEL M. COHEN JUSTICE ROBERT REED
JUSTICE MELISSA CRANE JUSTICE JENNIFER SCHECTER

RULES AND PROCEDURES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

A. GENERAL PROVISIONS

Rule 1. Program. The Alternative Dispute Resolution Program (“the Program”) of the Commercial Division of the Supreme Court of the State of New York, County of New York, shall be applicable to commercial cases referred by Justices of the Commercial Division and other Justices of the Supreme Court as permitted by order of the Administrative Judge.

Rule 2. Panel of Neutrals.

(a) Requirements to Join Panel. The Administrative Judge shall establish and maintain a panel of Neutrals (“the Panel”) for the Program. To be eligible to join the Panel as a Mediator, a person shall have a minimum of ten years of experience in the practice of commercial law or comparable experience as an accountant or business professional and shall satisfy the training and experience requirements of Part 146 of the Rules of the Chief Administrator. To become a Neutral Evaluator on the Panel, a person must be an attorney or former Judge who has the background and the training required by Part 146.

(b) Term of Membership. The Panel shall continue in existence for a term of two years from the date the Administrative Judge certifies the Panel as provided in Section 146.3 of Part 146. Further, each Neutral shall serve at the pleasure of the Administrative Judge, who may

terminate membership at any time.

(c) **Obligations of Membership:** Each member of the Panel shall, in the event that the caseload of the Program requires it, serve as a Neutral in three matters annually in the Program. Members shall comply with these Rules and Procedures and with the continuing education requirement set forth in Section 146.5 of Part 146. Information on the members of the Panel is accessible on the New York County home page of the website of the Commercial Division, the address of which is www.nycourts.gov/comdiv.

Rule 3. Determination of Suitability; Order of Reference. Except as provided in Rule 15, cases are referred to alternative dispute resolution (“ADR”) in the Program by the Justice assigned to the case. The assigned Justice may order parties to undergo ADR in the Program where the Justice finds that it would be in the interest of the just and efficient processing of the case to do so or upon consent of the parties. The suitability of an action for ADR shall be determined by the assigned Justice after considering the views of the parties insofar as practicable. If a case is referred to ADR, the Justice shall issue an Order of Reference. Such Order shall not stay court proceedings in the case unless otherwise specified therein.

Rule 4. Form of ADR. Cases referred to the Program shall be mediated unless otherwise agreed by the parties.

Rule 5. Initiation Form. In cases referred to ADR, the parties shall sign an ADR Initiation Form (accessible on the website of the Commercial Division at the following address: www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml), in counterparts if necessary, and, except as otherwise provided in Rule 15, shall, within four business days from the date of the Order of Reference, contact the ADR Coordinator and submit the Form to the Coordinator.

Rule 6. Selection of Neutral; Private ADR Providers.

(a) Designation of Neutral. An action referred to the Program shall be assigned to a Neutral from the Panel who shall in the first instance be designated by the ADR Coordinator. The Coordinator will endeavor to distribute assignments widely among all members of the Panel. The Coordinator may, however, select a particular Neutral if the nature of the matter in question calls for special expertise on the part of the Neutral, if difficulties are encountered in locating an available Neutral, or for other administrative reasons. Each Neutral contacted will advise the Coordinator as to his or her availability and, prior to serving, will conduct a conflicts check as required by subdivision (d) hereof. Within ten business days from receipt of the Order of Reference, or, in cases governed by Rule 15, within five business days after the filing of the Initiation Form, the Coordinator shall inform the parties of the identity of the designated Neutral. The date of this communication shall constitute the Confirmation Date (subject to subdivision (b)).

(b) Selection of Alternate Neutral from Panel. Once informed of the identity of the

Neutral, the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral's availability to handle the matter and the absence of any conflict on the Neutral's part, and shall inform the Coordinator of the alternate selection within the five-day deadline. If the parties select an alternate Neutral pursuant hereto, the Confirmation Date shall be the date on which they inform the Coordinator of that selection.

(c) Other Person as Neutral. Notwithstanding subdivision (a), the parties may designate as the Neutral a person who is not a member of the Panel or proceed to ADR through a private ADR provider and in accordance with the rules thereof, but the parties must nevertheless complete the ADR process within the deadlines set forth in these Rules.

(d) Ethical Standards. Prior to confirmation as the Neutral in any case, a prospective Neutral shall conduct a check for conflicts with regard to parties or related entities. The Neutral shall decline to serve if he or she would not be able to do so fairly, impartially, and in accordance with the highest professional standards. Neutrals on the Panel shall comply with the Standards of Conduct for Mediators of the Commercial Division or, if applicable, the Standards of Conduct for Arbitrators and Neutral Evaluators (accessible at the Internet address listed in Rule 5). Unless all parties consent to the Neutral's service after having been advised of all disqualifying facts, the Neutral shall decline the appointment and another Neutral shall promptly be selected.

Rule 7. Compensation of Neutral.

The Neutral designated pursuant to Rule 6 (a) or (b) shall be compensated by the parties as follows.

(a) Mediators Designated by the ADR Coordinator. The Neutral designated as a mediator by the ADR Coordinator under Rule 6(a) shall serve in that role at no charge during preparation for the mediation (e.g., scheduling conference and review of documents in preparation) and for the first three hours of the actual mediation session or sessions. At the conclusion of the three hours, any party may bring the ADR proceeding to an end, but, if the parties agree to continue, they shall compensate the mediator for his or her time thereafter at the rate of \$ 400 per hour.

(b) Mediators Designated by the Parties. If the parties designate an alternate mediator from the Panel pursuant to Rule 6(b) and that person is available and willing to handle the matter under the circumstances, the parties shall compensate the mediator at the rate of \$ 450 per hour commencing from the outset of the initial mediation session.

(c) Agreements of the Mediator and the Parties. Notwithstanding subdivisions (a) and (b) of this rule, the mediator and the parties may agree upon a rate in excess of the otherwise applicable rate specified in those subdivisions based upon factors such as the complexity of the

case, the number of parties involved, and the experience of the mediator, and may also agree to compensate the mediator for preparation time. All such agreements shall be in writing.

(d) Arbitrators and Neutral Evaluators. If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the Neutral(s) shall be compensated at the rate of \$ 400 per hour from the commencement of the initial session. Preparation time will not be compensable.

(e) Party's Share of Compensation. Unless otherwise agreed, each party to the ADR proceeding shall pay an equal share of the Neutral's compensation.

Rule 8. Confidentiality of Mediation and Neutral Evaluation.

(a) Confidentiality. An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program 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 proceeding, 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 the ADR proceeding shall be set forth in a writing signed by all parties affected or their duly authorized agents. 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 ADR proceeding. Should a party attempt in any legal action to compel the testimony of the Neutral concerning the substance of an ADR proceeding in the Program, that party shall hold the Neutral harmless against any resulting expenses, including reasonable legal fees incurred by the Neutral or the reasonable value of time spent by the Neutral in representing himself or herself in connection therewith.

(b) Exceptions. Notwithstanding the foregoing:

(1) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act.

(2) A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority.

(3) The Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding, including as provided in Rule 10; the ADR Coordinator may communicate with the assigned Justice in accordance with Rule 10 (h); and the Neutral may make general reference to the fact of services rendered in any action

to collect an unpaid fee for services performed under these Rules.

Rule 9. Immunity of the Neutral. Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving.

Rule 10. Procedure.

(a) Deadline for First Session; Scheduling. The first ADR session shall be conducted no later than 30 days from the Confirmation Date. Immediately after confirmation, the Neutral shall contact all counsel and parties to discuss the matter and schedule all proceedings, typically by conducting a conference call. All counsel and parties shall promptly communicate with one another and the Neutral and take all steps necessary to schedule the first proceeding in compliance with said deadline. Failure of any party or counsel to respond to communications in a timely manner or to participate in scheduling the mediation session may subject counsel to sanctions.

(b) Preliminary Submissions. At least ten days before the first session in cases being mediated or undergoing neutral evaluation, each party shall deliver to the Neutral a copy of its pleadings and a memorandum of not more than ten 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. This memorandum shall not be filed in court nor, unless otherwise agreed by the parties, served on the adversary, and it shall be destroyed by the Neutral immediately upon completion of the proceeding.

(c) Attendance Required. Attendance of the parties is required at the first three hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, every party must appear at each ADR session in person or, in the case of a corporation 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 necessary to an effective mediation, the Neutral may require the insurance carrier of a party to attend. In addition, counsel of record for each represented party shall be present at each session. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to take all steps necessary to a meaningful mediation process.

(d) Adjournments. Once a session of the ADR proceeding has been scheduled, it may be adjourned only at the direction of the Neutral and not beyond 45 days from the Confirmation Date.

(e) Reporting of the Status to the Coordinator. On the 40th day from the Confirmation Date, the Neutral shall report to the ADR Coordinator the status of the proceeding.

(f) Discovery. Subject to any applicable disclosure order of the court, the Neutral may help the parties to provide such focused discovery as may assist in the ADR proceeding.

(g) Failure to Comply with Rules. If a party or counsel fails to cooperate in making arrangements for the mediation or to take steps preliminary thereto, as provided in subdivisions (a) and (b) of this rule, fails to appear at any scheduled session, or otherwise fails to comply with these Rules, the Neutral shall advise the ADR Coordinator, succinctly specifying the nature of the infraction. If the Neutral reports that an infraction has occurred, he or she may recommend the imposition of sanctions, or, where such a report of the Neutral is silent as to sanctions, the ADR Coordinator may recommend the imposition of sanctions based upon that report.

(h) Communications with Justice.

(1) Communications In General. The ADR Coordinator may communicate with the assigned Justice about administrative details of the processing of any case referred to the Program by that Justice, but shall not identify the Neutral designated or disclose any substantive aspect of the ADR proceeding. If a proceeding is terminated after three hours without a settlement, the Coordinator shall not reveal to the Justice which party brought the proceeding to an end. The Coordinator shall report to the Justice at the conclusion of the proceeding whether a resolution of the case in whole or in part was reached.

(2) Reporting Violations of the Rules; Sanctions. The Coordinator shall report to the Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as reported by a Neutral pursuant to subdivision (g) of this Rule and any recommendation for sanctions by the Neutral or by the Coordinator based upon the report of the Neutral. The Justice may impose sanctions or take such other action as the Justice may find to be necessary to ensure respect for the court's Order and these Rules.

Rule 11. Completion of ADR; Report.

(a) Conclusion; Continuation; Monitoring by Coordinator. The ADR process shall be concluded within 45 days from the Confirmation Date. If the matter has not been entirely resolved within that period, but the parties and the Neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward for an additional 30 days. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice, upon request presented by the ADR Coordinator, specifically authorizes the process to continue beyond that date. The ADR Coordinator will monitor progress of ADR proceedings to ensure that the deadlines set forth herein are complied with.

(b) Report of Outcome. Except as provided in Rule 12, the Neutral shall report the outcome of the proceeding to the ADR Coordinator no later than three business days after its conclusion. If the ADR process is successful, the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and transmit a copy to the Part of the Justice assigned.

Rule 12. Arbitration. Parties who choose to arbitrate shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties are unable to so agree, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the ADR Coordinator. An award shall be issued within seven business days after conclusion of the arbitration proceeding.

Rule 13. Conversion of Mediation to Binding Arbitration.

(a) Arbitration Permitted. Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process. Any such arbitration, however, must proceed before a Neutral different than the one who presided over the mediation session(s), unless the mediator did not receive any information from a party *ex parte* prior to the time an agreement to proceed to arbitration was reached.

(b) Stipulation; Identification of Arbitrator(s); Fee. Within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the ADR Coordinator a written stipulation submitting the case to arbitration under this Rule. There shall be a single arbitrator unless the parties agree to have three. Together with the stipulation the parties shall transmit the name of the person or persons they have agreed upon to serve as arbitrator(s). If the parties are unable to agree upon the person or persons who shall serve, the Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 7 (d).

(c) Deadlines. The arbitration shall be completed within 45 days from the date on which the Coordinator advises the parties of the confirmation of the selection of the arbitrator(s).

Rule 14. Further ADR. After completion of a mediation, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to mediation, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 7 (b) with respect to alternate mediators.

B. MANDATORY MEDIATION PILOT PROJECT

Rule 15. Procedures in the Pilot Project.

(a) Cases Subject to Mandatory Mediation in the Pilot Project. By an Administrative Order or Orders of the Administrative Judge of this court, a pilot project (“the Pilot Project”) shall be established for the mandatory mediation of certain commercial cases filed outside the Commercial Division as defined in the Order or Orders.

(b) Designation of Cases. As provided in any applicable Administrative Order of the Administrative Judge, the staff of the court shall identify all commercial cases that are subject to mandatory mediation in the Pilot Project upon the filing of the Request for Judicial Intervention (“RJI”). In each such case, the court will provide notice to the parties through the New York State Courts Electronic Filing System of the designation of the case as one subject to the Administrative Order. All parties and counsel shall proceed to mediation in accordance with that Order and these Rules and Procedures. Failure to comply with that Order and these Rules and Procedures may result in the imposition of sanctions.

(c) Preliminary Conference Part. The initial Administrative Order shall establish a Preliminary Conference Part to handle such conferences in the kinds of cases that are subject to mandatory mediation in the Pilot Project. The preliminary conference in all such cases shall take place in this Part before the Justice assigned to the Part. Other proceedings in such cases shall be handled by the Justice to whom the case has been assigned upon filing of the RJI. The Justice presiding in the Preliminary Conference Part shall address all discovery issues in each case that are pending as of the time of the conference and shall also make any directives with regard to discovery that may assist the parties to have a productive and successful mediation.

(d) Exemption. A case otherwise subject to mandatory mediation in the Pilot Project may be exempted from such mediation upon a satisfactory showing that the applying party would be subjected to unreasonable hardship or burden by participation in the mediation. A party seeking an exemption shall apply therefor at the preliminary conference. Failure to seek an exemption as provided in this subdivision shall constitute a waiver of any objection to the mediation.

(e) Initiation Form and Other Procedures. Within four business days after the preliminary conference, the parties shall submit an Initiation Form to the ADR Coordinator as provided in Rule 5 hereof. The parties shall comply with all subsequent procedures of the ADR process as set forth in these Rules, including the deadlines set forth in Rule 10.

(f) Compensation of Mediator. The mediator shall be compensated as provided in Rule 7 hereof.

C. ADMINISTRATION OF PROGRAM

Rule 16. Administration of Program. The Program shall be supervised by the Clerk-in-Charge of the Commercial Division Support Office. The conduct of ADR proceedings shall be coordinated by an Alternative Dispute Resolution Coordinator or Coordinators.

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