

**THE EIGHTH JUDICIAL DISTRICT  
MARTIN P. VIOLANTE  
ADR PROGRAM  
COMMERCIAL DIVISION ADR  
PROGRAM PROTOCOLS**

June 1, 2015

DRAFT 6/2015 FINAL APPROVAL PENDING

**THE EIGHTH JUDICIAL DISTRICT - MARTIN P. VIOLANTE ADR PROGRAM PROTOCOLS  
COMMERCIAL DIVISION ADR PROGRAM PROTOCOLS  
TABLE OF CONTENTS**

**SECTION 1 INTRODUCTION**

- 1.1 TITLE
- 1.2 PURPOSE AND SCOPE OF PROGRAM

**SECTION 2 ADR PROCESS**

- 2.1 PROCESSES AVAILABLE
- 2.2 ADR PROCESSES: DEFINITIONS

**SECTION 3 ENGAGEMENT OF THE ADR PROCESS**

- 3.1 IN GENERAL: CHOOSING ADR
- 3.2 DISCOVERY; STAYS:
- 3.3 ORDER OF REFERENCE TO ADR

**SECTION 4 TIMELINE FOR ENGAGEMENT OF ADR; ATTENDANCE AND PRESENCE OF  
COUNSEL**

- 4.1 TIME LINE FOR REFERRALS TO ADR
- 4.2 PRESENCE OF COUNSEL AT ADR PROCEEDINGS

**SECTION 5 CONFIDENTIALITY DURING THE ADR PROCESS**

- 5.1 BASIC RULE: MEDIATION
- 5.2 BASIC RULE: ARBITRATION
- 5.2 EXCEPTIONS

**SECTION 6 RESOLUTION OR RESUMPTION OF LITIGATION**

- 6.1 NOTIFICATION TO COURT: STATUS REPORT
- 6.2 ENFORCEABLE SETTLEMENT AGREEMENT; ARBITRATOR'S AWARD

**SECTION 7 IMMUNITY OF NEUTRALS**

**SECTION 8 DESIGNATION OF ROSTERS**

- 8.1 COURT ROSTERS OF NEUTRALS

**SECTION 9 QUALIFICATIONS FOR COURT ROSTER NEUTRALS**

- 9.1 MEDIATOR
- 9.2 ARBITRATOR

**SECTION 10 COMPENSATION OF NEUTRALS**

- 10.1 IN GENERAL

10.2 DIVISION OF FEES AND EXPENSES

**SECTION 11 ONGOING REVIEW**

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## **SECTION 1 INTRODUCTION**

### **1.1 TITLE**

This program, the 8<sup>th</sup> Judicial District Commercial Division Alternative Dispute Resolution Program (“CD-ADR Program”), will run in concert with the Martin P. Violante ADR Program (MPV ADR). Should there be any inconsistency between the programs, these protocols shall govern in any matter assigned to the Commercial Division or its Judge(s).

### **1.2 PURPOSE AND SCOPE OF PROGRAM**

1. **PURPOSE** -These protocols should ensure a robust use of Alternative Dispute Resolution (ADR) for cases pending in the Commercial Division, 8th Judicial District (“Commercial Division”), and shall govern cases referred to the CD-ADR Program by the Court or upon consent of the parties. The CD-ADR Program is not intended to preclude or discourage private resolution of disputes, which is encouraged.
2. **COLLABORATION** - These protocols were developed in collaboration among the Bench, the practicing Bar, and ADR practitioners.
3. **SCOPE** -These Protocols are effective May 1, 2015 and shall apply to all matters assigned to the Commercial Division or its Judge(s) whether pending on or commenced on and after the effective date.
4. **PROGRAM ADMINISTRATION AND OVERSIGHT** - The Administrative Judge of the 8<sup>th</sup> Judicial District and his or her staff shall oversee and be responsible for the operation of the CD-ADR Program in consultation with the Office of Court Administration’s Office of ADR and the Presiding Justice of the local Commercial Division. The Program shall be monitored and periodically assessed and amended as needed to assure quality. The Administrative Judge encourages any feedback regarding the procedures and/or neutrals.

## SECTION 2            ADR PROCESS

### 2.1    **PROCESSES AVAILABLE**

Rosters shall include providers of mediation, arbitration and summary trials.

In addition, outside of the CD-ADR program, members of the court staff, including the justice(s) of the Commercial Division, his or her court attorney and the Court Staff ADR attorneys are available for settlement conferencing or pretrials.

### 2.2.   **ADR PROCESSES: DEFINITIONS**

1.   **ADR** means any process other than litigation that parties use to resolve disputes.
2.   **Neutral** means any individual selected by the parties to provide ADR services from the Court Rosters established pursuant to the MPV ADR program.
3.   **Mediation** is a confidential informal process in which a specially trained mediator assists the parties, together with their counsel, if any, to negotiate directly with each other. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. The mediator may request a confidential mediation submission from each party. Mediation shall require the presence of all parties and counsel, if any, at each session.
4.   **Arbitration** is a process in which a trained arbitrator (or an arbitration panel) hears arguments, weighs evidence and renders a final and binding award after an expedited hearing. In the CD-ADR Program arbitration may be conducted only pursuant to a stipulated agreement. The resulting award may be confirmed by a court and is subject to CPLR article 75.
5.   **Roster or Rosters** shall mean the MPV ADR Commercial Rosters
6.   **Settlement Conferencing** is a non-confidential process conducted by court attorneys with the parties present or available by telephone, to explore options for a mutually acceptable outcome. The parties may submit a settlement proposal to the Court Attorney in advance of the conference by parties' agreement or at the request of the Court Attorney.

7. **Summary Jury Trial** is a voluntary, adversarial process where a jury is asked to render a verdict on specified issues after an expedited trial. A six member jury is screened and selected by counsel or the trial Judge within strict time limits (usually one business day). Attorneys present their case within strict time limits. Testimony may be live or presented through deposition transcripts, affidavits or expert reports. In advance, the parties shall agree whether the summary jury verdict will be binding or non-binding.
8. **Summary Bench Trial** is the same process as a summary jury trial but with the Judge, or by agreement of the parties, a Judicial Hearing Officer (JHO) or a Court Attorney-Referee serving as finder of fact. In advance, the parties shall agree whether the summary jury verdict will be binding or non-binding.

### **SECTION 3            ENGAGEMENT OF THE ADR PROCESS**

#### **3.1 IN GENERAL; CHOOSING ADR**

1. Every action pending in the Commercial Division shall be assessed to determine its suitability for ADR. An initial assessment shall occur not later than the preliminary conference and thereafter as circumstances dictate. Further, at any time along with or after the filing of a Request for Judicial Intervention (RJI), the parties on consent may determine to engage in any of the ADR Processes.
2. The Commercial Division shall utilize the Rosters of qualified commercial Mediators and Arbitrators maintained by the MPV ADR to choose a neutral. (See *infra*, § 8). With the exception of Court staff, neutrals shall be paid their hourly rate as disclosed in the Roster, with the cost to be shared equally by the parties, unless otherwise agreed or directed by the Court (see § 10.2).
3. Should the parties be unable to agree on a Neutral, they shall each submit three names to the Court and an ADR Administrator or the Judge shall select one.
4. It shall be the obligation of parties to assure Neutrals are available to timely accept a referral and complete the necessary work.

5. Once the Neutral is identified, the Plaintiff's Counsel (or Plaintiff if he/she is self-represented) shall have the obligation to notify the Neutral within one week of the selection. Such notification shall be in writing (for these purposes writing may include email), copied to all parties and the Court and shall contain:

- a) the names and contact information for all parties and counsel;
- b) the Court's next Conference Date;
- c) the name and contact information for a member of the court staff able to answer Administrative/Procedural questions for the Neutral; and
- d) A copy of the pleadings in the matter.

Counsel may utilize the Initiation Form (attached) to provide the above information.

### **3.2 DISCOVERY; STAYS**

Upon a selection of or reference to the CD- ADR program, the parties may also request:

1. A "mini discovery order" prior to initial ADR session.
2. A stay of litigation, of between one and three months, pending the ADR process. The litigation time line shall be extended by an amount of time equivalent to that of the stay.

### **3.3 ORDER OF REFERENCE TO ADR**

In the discretion of, or at the request of one of the parties to, the Presiding Justice(s) of the Commercial Division, the Justice may direct the parties to proceed to an initial non-binding ADR session by issuance of an Order of Reference. After the initial session, the parties may agree to continue with ADR or return to the litigation path. The Court shall include in the Order of Reference a report back date to the Court which shall not exceed sixty (60) days from the date of issuance.

**SECTION 4**                    **TIMELINE FOR ENGAGEMENT OF ADR; ATTENDANCE AND PRESENCE OF COUNSEL**

**4.1**                    **TIME LINE FOR REFERRALS TO ADR**

The timeline for the ADR process shall be governed by a Commercial Division Scheduling Order on Consent or Order of Reference, issued in the matter. Although ADR may be elected at any time, parties and counsel are encouraged to consider the process as early as possible.

**4.2**                    **PRESENCE OF COUNSEL AT ADR PROCEEDINGS**

1. When parties have representation, the presence of counsel for each party at each ADR session is essential. Counsel and their clients shall not attend without one another unless presence of such counsel or party is specifically waived by the Neutral with full consent of all parties and counsel.
2. If, during the process, counsel for either party is discharged or withdraws, the case shall not proceed in ADR until a substitution of counsel occurs or a party acknowledges, in a writing, copied to the court, that he/she is moving forward as a self-represented party.

**SECTION 5**                    **CONFIDENTIALITY DURING THE ADR PROCESS**

**5.1**                    Should a party or counsel seek in any legal action or proceeding to compel the testimony of, or other evidence from a neutral concerning the substance of a confidential ADR process under the CD-ADR Program, the seeking party/counsel shall indemnify and hold the neutral harmless against any resulting costs and expenses, including but not limited to reasonable attorneys' fees, connected with such application and/or to the neutral's defending against it.

**5.2**                    **BASIC RULE: MEDIATION**

All written or oral communications made during the course of mediation are confidential and inadmissible in court. No party to an ADR proceeding shall seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR proceeding, or seek to compel the testimony of any other party or the Neutral concerning the substance of the ADR process. Nothing about the substance of the proceeding, such as the weaknesses or strengths of the parties' positions or the relative willingness of parties to discuss

settlement proposals shall be revealed to the Court or to any other person by the mediator, by any party or attorney, or by court personnel, except for an executed agreement or a stipulation of settlement pursuant to CPLR 2104.

## **5.2 BASIC RULE: ARBITRATION AND OTHER ADR PROCESSES**

In binding arbitration, confidentiality shall be governed by agreement.

In voluntary arbitration and other ADR Processes, all written or oral communications made during the course of ADR proceedings are confidential and inadmissible in court. No party to an ADR proceeding shall seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR proceeding, or seek to compel testimony of any other party or the Neutral concerning the substance of the ADR process.

## **5.3 EXCEPTIONS**

Notwithstanding section 5.1 and 5.2, ADR communications and information may be subject to disclosure proceedings in any of the following circumstances:

1. The fact of attendance or non-attendance by the parties and counsel at ADR session (s) shall be reported to the Court. Whether the matter has settled or not may be reported to the court.
2. Documents and information otherwise discoverable under the law shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding
3. Any threat of physical harm to the parties, counsel, oneself, any third party or the Court may be reported to the proper authorities by the Neutral or by the participants.
4. Disclosure of otherwise privileged communications may be made pursuant to a written waiver of confidentiality by all parties and the Neutral. 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.
5. Where the case has been resolved by a stipulation of settlement or discontinuance and execution of appropriate releases, the terms of such stipulation and release or any written settlement agreement are not confidential unless otherwise agreed between the parties. In any event, the settlement agreement and related documents shall be admissible in any proceeding to enforce the terms of that settlement.

6. Any paid Neutral may make reference to the services rendered by him or her in any action to collect an unpaid fee for services performed under these protocols, as set forth hereunder, agreed to by the parties or ordered by the Court.

## **SECTION 6            RESOLUTION OR RESUMPTION OF LITIGATION**

### **6.1            NOTIFICATION TO COURT: STATUS REPORT**

Prior to the Court's next Report Back date, the Neutral shall, and counsel may, inform the staff of the Presiding Justice that a settlement has been reached, without breaching confidentiality (see section 5, supra) and establish a time for filing of the Stipulation of Discontinuance.

If the matter is not resolved through ADR, that fact (without violation of confidentiality) shall be communicated to the Presiding Justice's staff.

### **6.2            ENFORCEABLE SETTLEMENT AGREEMENT; ARBITRATOR'S AWARD.**

After an Arbitration process, the Arbitrator's Award shall be issued in writing, signed and affirmed by the Arbitrator within the time fixed by agreement, or if the time is not fixed, within such time as ordered by the Presiding Justice (see CPLR 7507).

## **SECTION 7.            IMMUNITY OF NEUTRALS**

- 7.1            Any person designated or selected as a Neutral pursuant to these Protocols shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity. Such immunity shall commence from the date of the selection of the neutral and/or the Order of Reference, whichever is earlier.

## **SECTION 8            DESIGNATION OF ROSTERS**

### **8.1            ROSTER OF NEUTRALS**

1.            The Rosters consist of Neutrals who have complied with the requirements (as drawn from the MPV ADR Program) and 22 NYCRR Part 146 and have been accepted for Roster membership by the Administrative Judge of the 8<sup>th</sup> Judicial District. To be eligible for inclusion on any roster, an individual must submit an application and document successful completion of the specific criteria

outlined in section 9. In addition, Neutrals may be required to fulfill continuing education requirements prescribed by OCA ADR, or as requested by the District Administrative Judge.

2. Acceptance to each Roster of Neutrals is at the discretion of the District Administrative Judge, and Neutrals may be removed from the roster at the discretion of the Administrative Judge.
3. To avoid conflicts of interest, upon selection every Neutral shall, as a condition to confirmation in that role, conduct a conflict check of his or her prior association with any of the parties or counsel in the matter and those of any firm of which he or she is a member or employee in compliance with ethics and standards of conduct required for that category of Neutral. If appropriate, the conflicts review shall include a check with regard to all parties, subsidiaries, or affiliates of corporate parties.
4. In the event that any potentially disqualifying facts are discovered, the Neutral shall either decline the appointment or shall fully inform the parties of all relevant details. Unless all parties, after full disclosure, consent in writing to the service of that Neutral, the Neutral shall decline the appointment. The Neutral shall disqualify himself or herself if he or she would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. The Neutral shall always avoid an appearance of a conflict of interest.
5. Rosters shall be available in the chambers of the Presiding Justice of the Commercial Division and on the 8<sup>th</sup> Judicial District and Commercial Division websites. The Court Roster of Neutrals for each case type, including the name of the Neutral, area of expertise, resume and a schedule of fees will be maintained by the Program Administrator for review by parties and their attorneys.
6. All Roster members serving under the CD-ADR Program shall cooperate in requests for observation and shall meet with administrative staff about program protocols as needed. No such requests shall interfere with the Neutral's obligation to maintain the confidences of the ADR processes.

## **SECTION 9 QUALIFICATIONS FOR COURT ROSTER NEUTRALS**

### **9.1 MEDIATOR**

To be eligible for membership on the Court Roster of Mediators, an individual must have extensive, relevant experience in commercial practice and/or commercial litigation, or have served as in house counsel, AND must comply with any additional requirements imposed by 22 NYCRR part 146 (§§146.1-6).

Each candidate must submit an application with proof of successful completion of:

1. A minimum of forty (40) hours of mediation training sponsored or recognized by OCA ADR, or training that OCA ADR deems to comport substantively with its curriculum guidelines.
2. The forty (40) hour training must include at least twenty-four (24) hours of training in mediation skills and techniques AND at least sixteen (16) hours of additional training in the specific mediation techniques pertaining to the subject area of the types of cases to be referred to the applicant, AND
3. The applicant must also document substantial recent experience mediating actual cases.
4. An individual who has completed the minimum forty (40) hours of mediation training but has not completed the experiential requirements described herein, may be provisionally accepted on the Court Roster on the condition that he or she complete the experiential requirements within six (6) months of his or her acceptance on the Court Roster.

## 9.2 **ARBITRATOR**

The applicant must have the following qualifications:

1. Have successfully completed of at least six (6) hours of training in procedural and ethical matters related to arbitration AND
2. Be an attorney in good standing, admitted to the practice of law for at least five (5) years AND have at least five (5) years of substantial experience in the specific subject area of the cases that will be referred; OR have served as a Judge, JHO, Court Attorney-Referee or Confidential Law Clerk to a Judge AND have at least five (5) years of substantial experience in the specific subject area of the cases that will be referred; OR be a “Subject Matter Expert” defined as a professional with at least five (5) years of professional experience in the specific subject area of the cases that will be referred to Arbitration.

## **SECTION 10                    COMPENSATION OF NEUTRALS**

### **10.1                    IN GENERAL**

1. Roster Neutrals shall not be compensated for the first two (2) hours spent in ADR. Thereafter, all time spent, including up to ten (10) hours of preparation time spent by the Neutral in advance of the initial session, shall be compensable in accordance with these Protocols.
2. Roster Neutrals shall not be compensated for time spent in required ADR training sessions conducted pursuant to these rules or for time spent on the application, selection and/or appointment process.
3. The hourly rate a particular neutral may charge shall be published on the specific Roster. Neutrals are encouraged to use a sliding scale or to waive fees to ensure that no one is denied access to the CD-ADR program based on inability to pay.
4. Court staff Neutrals shall not receive any additional compensation for ADR services provided under the CD-ADR Program. Court staff Neutrals are prohibited from accepting any outside employment as a Neutral for a fee.

### **10.2                    DIVISION OF FEES AND EXPENSES:**

The Court Roster Neutral's fees and expenses shall be borne equally by the parties unless otherwise agreed in writing or ordered by the Court.

## **SECTION 11.                    ONGOING REVIEW**

1. These Protocols shall be subject to periodic review and adjustment.
2. In addition, litigants, counsel and the neutrals may be asked to complete an evaluation form seeking, non-confidential and non-identifying information about their experiences. Court staff will collect the forms, analyze the data, and continue to work on improving the CD-ADR Program. All Neutrals and those seeking inclusion on the Roster shall make themselves available to meet as requested so that they might obtain information about Program management, Protocols and best practices.