

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

Revised February 2, 2009

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

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

## **SECTION 1                    INTRODUCTION**

### **1.1 TITLE**

This program is titled the 8<sup>th</sup> Judicial District Martin P. Violante Alternative Dispute Resolution (“ADR”) Program. It is named in honor of Court Attorney Referee Martin P. Violante, who implemented the highly successful pilot ADR program for civil cases in the 8<sup>th</sup> Judicial District. His exceptional case settlement skills are legendary and well-respected on a statewide basis, as he generously shared his expertise with members of the Bench and Bar over the years. Marty’s standard of excellence and dedication to alternative dispute resolution has inspired these protocols for ADR in civil, commercial and matrimonial cases and for parenting issues in Family Court cases .

To our knowledge, this is the first comprehensive protocol developed in the New York State courts to standardize alternative dispute resolution in civil, commercial and matrimonial cases and parenting issues in Family Court actions.

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

- A.     **PURPOSE** -These protocols for the 8<sup>th</sup> Judicial District Martin P. Violante ADR Program will encourage the use of ADR in civil, commercial and matrimonial cases and for parenting issues in Family Court cases, and will standardize services provided by ADR Neutrals. ADR Neutrals in this Program include ADR Court staff Neutrals, individuals on the Court’s Rosters of ADR Neutrals, and non-profit agency ADR providers under contract with the Unified Court System. These protocols shall govern

cases referred to the 8<sup>th</sup> Judicial District ADR Program by the Court or upon consent of the parties. This program is not intended to preclude private resolution of disputes.

These rules were developed in collaboration among the Bench, the practicing Bar and ADR practitioners.

- B. SCOPE -These ADR Protocols are effective immediately and shall apply to all civil, commercial and matrimonial actions, and to parenting issues in Family Courts within the 8<sup>th</sup> Judicial District pending or commenced on and after the effective date.
- C. PROGRAM OVERSIGHT - Hon Sharon S. Townsend, the Administrative Judge of the 8<sup>th</sup> Judicial District shall have oversight and be responsible for operation of the ADR Program . She will consult with Daniel M. Weitz, Esq, Coordinator of the Office of Court Administration’s Office of Alternative Dispute Resolution Programs and Court Improvement Programs ( “OCA ADR,” ) Hon. Donna M. Siwek, Supervising Judge of Civil Matters, Hon. Janice M. Rosa, Supervising Judge of Matrimonial Matters, Hon. Michael F. Griffith, Supervising Judge of the Family Courts for the 8<sup>th</sup> Judicial District, and Hon. John M. Curran, the Justice assigned to the Commercial Division in Erie County.
- D. PROGRAM ADMINISTRATION- The Administrative Judge of the 8<sup>th</sup> Judicial District has assigned Mary Louise Hayden, Esq. as ADR Program Administrator to supervise and manage the program. William E. Gersten, Esq. is the Civil ADR Program Administrator. Anne S. Rutland, Esq. is the Commercial ADR Program Administrator , Tracey A. Kassman, Esq. is the Matrimonial ADR Program Administrator for Matrimonial Matters and Sheila Weir Schwanekamp, Esq. Is the Family Court ADR Program Administrator for parenting issues.

ADR proceedings , but not their content, will be tracked and supervised by the ADR Program Administrator, as directed by the District Administrative Judge, with the assistance of clerical support personnel. Tracking will ensure efficient case management and monitor the performance of the program with respect to: litigant satisfaction; number of cases referred; number of cases reaching full or partial

agreement; the Neutrals who receive assignments and any purpose requested by OCA ADR. Information or assistance required by Neutrals or counsel may be obtained from the Program Administrators. The program will be continually monitored and periodically assessed. Suggestions and comments from Neutrals, counsel and parties are welcome and may be made to the ADR Program Administrators.

## **SECTION 2                      ADR PROCESS**

### 2.1                      DEFINITIONS

- A. Alternative Dispute Resolution is a process, other than litigation, that parties use to resolve disputes. ADR offers the possibility of a settlement or resolution that is achieved sooner, at less expense, and with less inconvenience and acrimony than can occur in the normal course of litigation.
  
- B. Neutral means an individual assigned by the Court or selected by the parties to provide ADR services. Neutrals may include Judicial Hearing Officers, Court staff and members of Court Rosters established pursuant to this protocol, as well as staff and/or volunteers assigned by agencies under contract with the Unified Court System to provide ADR services.
  
- C. Arbitration
  - 1. Voluntary Arbitration is an adversarial dispute resolution process in which one or more trained Arbitrators hears arguments, weighs evidence and renders a final and binding award after an expedited hearing. Voluntary arbitration is often conducted pursuant to a stipulated agreement. The award may be confirmed by a court and is subject to CPLR Article 75.
  
  - 2. Compulsory Arbitration is a non-binding, adversarial dispute resolution process in which one or more trained Arbitrators hears arguments, weighs evidence and renders a non-binding award after an expedited hearing. Either party may reject

the arbitrator's award and pursue litigation options. Compulsory arbitration in New York is governed in Part 28 of the Rules of the Chief Administrator (22 NYCRR §§ 28.1- 28.16 ) which is incorporated herein by reference.

D. Summary Jury Trial is an adversarial, voluntary, dispute resolution 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. Attorneys present their case within strict time limits. Testimony may be live or presented through deposition transcripts, affidavits or expert reports. The summary jury verdict may be binding or non-binding as agreed by the parties.

E. Summary Bench Trial is the same process as a summary jury trial but the Judge, or by agreement of the parties, a Judicial Hearing Officer (JHO) or a Court Attorney-Referee serves as the fact-finder.

F. Neutral Evaluation is a non-binding, confidential process in which a Neutral Evaluator who is a subject matter expert on the issues in controversy, advises parties of the strengths and weaknesses of their case and offers an opinion as to likely court outcomes. The Neutral Evaluator hears abbreviated informal presentations by the attorneys for the parties or by self-represented litigants. The Neutral Evaluator's opinions may assist parties in their analysis of the merits of their cases, help to facilitate discussion between the parties and aid in reaching a settlement. The neutral evaluator may endeavor to facilitate a settlement between the parties.

G. Mediation is a confidential, informal procedure in which a specially trained Neutral helps parties negotiate with each other. With the assistance of a Mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. The process often improves the parties' ability to communicate with each other. The process may conclude with a written agreement. Mediation has the following elements:

1. Mediators offer the opportunity to expand the settlement discussion beyond the legal issues in dispute and to focus on developing creative solutions that emphasize the parties' practical concerns.
2. Mediation places importance on self-determination by the parties. Disputants are encouraged to speak for themselves, as well as through counsel.
3. Mediation may be conducted in several multi-hour sessions and is generally less time limited than other facilitated settlement conferences.
4. Mediators do not offer their own opinions regarding likely court outcomes or the merits of the case.

There may be a request made by the parties, during the course of the mediation, for an opinion from the Mediator as to the merits of their positions. Only a qualified Neutral Evaluator can offer such opinion (*see Section 12.2*). If the Mediator is also a qualified Neutral Evaluator in the subject area, and upon full consent of the parties, the mediation may expand to include neutral evaluation concerning these issues.

However, if the Mediator is not a qualified Neutral Evaluator in the specific subject area, the Mediator should not offer an opinion regarding likely court outcomes or the merits of the case.

- H. Parenting Coordination is used in child custody matters. The parenting coordinator is a specially trained Neutral assigned by the Court to manage chronic, recurring parenting disputes under the direction of and on behalf of the Court. He or she helps parents comply with court orders by acting as an educator, mediator and counselor. The parenting coordinator assists parents in developing conflict management skills and may resolve day-to-day parenting disputes in emergency circumstances if and when parents cannot do so themselves.
- I. Case Conferencing-Settlement Conferencing is a non-confidential process that provides effective ways of narrowing issues and resolving disputes. Cases are either

Judge- referred or party- initiated for this process which is conducted by the Court's legal staff and Court staff Neutrals.

## 2.2 ADR PROCESS IN SPECIFIC ACTIONS

### A. CIVIL AND COMMERCIAL ACTIONS

ADR processes in civil and commercial actions include arbitration, summary trials, neutral evaluation, mediation and case conferencing -settlement conferencing.

### B. MATRIMONIAL ACTIONS

ADR processes for matrimonial actions include summary trials, neutral evaluation, mediation (parenting issues only) and parenting coordination.

Rules pertaining to parenting coordination are addressed in separate guidelines developed at the direction of the Administrative Judge of the 8<sup>th</sup> Judicial District.

The Court may also employ Family Services Coordinators to conduct initial case assessments for the purpose of identifying family dynamics. This assessment will include analysis of the level of family conflict and complexity of issues involving the family in order to assist the judge in tailoring an appropriate service plan. Family Services Coordinators have knowledge of court-based and community services available to assist parents and children experiencing difficulties and may link parents and children with such services.<sup>1</sup>

### C. FAMILY COURT CASES

ADR processes for parenting issues in Family Court cases include mediation, parenting coordination, and the use of Family Service Coordinators, if available.

These procedures will apply to existing ADR programs to address parenting issues in Erie County Family Court but do not replace any other existing ADR program in any

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<sup>1</sup>Family Service Coordinators are part of the Children Come First Initiative, piloted in Erie County.

other Family Courts, including, but not limited to, the Permanency Mediation Project in the 8<sup>th</sup> Judicial District.

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

#### **3.1.      IN GENERAL**

Every action filed in the Eighth Judicial District shall be assessed to determine its suitability for ADR. This can occur when the RJI is filed, after referral to a Judge , or at the time a petition is filed in Family Court. Subject to the approval of the Court, a case deemed not appropriate for referral at its outset may be referred to the Program later at the request of the parties.

Parties shall attend a 2 hour initial ADR session. Counsel's attendance at the ADR sessions will be presumed unless specifically waived by counsel and parties. At the initial ADR session, the Neutral will explain the selected ADR process and will begin to outline and address issues of concern. After that session, the parties may choose to schedule additional sessions with the Neutral as they work toward resolution.. If the parties, counsel, and the Neutral agree, the parties may schedule the initial session to exceed the two hour requirement.

However, the Neutral will be entitled to compensation for services beyond the initial two hour period as well as compensation for the Neutral's preparation time when the session(s) exceed the initial two hour period.

#### **3.2      REFERRAL BY PARTIES' REQUEST AT TIME OF FILING AN RJI OR PETITION**

Parties may agree to request referral to ADR by filing a Request for ADR- ADR Initiation Form when a Request for Judicial Intervention (RJI) or Petition in Family Court is filed. The request will be docketed by the Chief Clerk who will forward it to the ADR Program Administrator.

A. Civil and Commercial matters

In civil or commercial matters, the parties shall indicate on the Request for ADR-ADR Initiation Form whether they are seeking the services of a Court staff Neutral or a Court Roster Neutral to conduct the ADR session. If the parties have selected a Court Roster Neutral, they will indicate on this form the name of a mutually agreed upon Court Roster Neutral who the parties have confirmed is available to hear the matter within thirty (30) days of the filing of the RJI. The ADR Program Administrator will coordinate the assignment of the case to the Court Roster Neutral.

If the parties have requested that the ADR session be conducted by a Court staff Neutral, the ADR Program Administrator will send the request to the Civil ADR Program Administrator or the Commercial ADR Program Administrator. The Administrator will schedule an ADR session before a Court staff Neutral to be held within thirty (30) days of the filing of the RJI.

B. Matrimonial or Family Court (parenting issue) matters

In matrimonial and Family Court cases, the parties should indicate on the Request for ADR- ADR Initiation Form the name of the mutually agreed upon Court Roster Neutral. In matrimonial matters, the request will be reviewed at the initial preliminary conference with the Court. In Family Court cases, the request will be referred by the Chief Clerk to the Family Court ADR Program Administrator.

3.3 REFERRAL TO ADR BY COURT AT REQUEST OF PARTIES:

The ADR Program will also accept requests for referrals to ADR on consent from parties in any eligible case after the filing of an RJI or Petition in Family Court with approval of and on referral from the Assigned Judge.

A. Civil and Commercial Matters

Parties should advise the Assigned Judge, at a conference or by agreement, of their desire to participate in the ADR Program and any preference with regard to the appointment of a Court staff Neutral or a Court Roster Neutral. The Court will determine whether the matter will be referred to ADR and will assign a return date for

a report back to the Court after the ADR session, not to exceed sixty (60) days from the date of the referral to ADR by the Court .

The parties shall complete either the ADR Initiation Form for Court staff Neutrals or the ADR Initiation Form for Court Roster Neutrals and forward the completed form to the ADR Program Administrator within ten (10) business days from the date of the referral to ADR. There will be no adjournment for the return of this form.

If the matter is to be heard by a Court Roster Neutral, the ADR Program Administrator will forward the ADR Initiation Form to the selected Court Roster Neutral who will hear the matter within the time line provided herein.

If the matter is to be heard by a Court staff Neutral, the ADR Program Administrator will forward the ADR Initiation Form to the Civil or Commercial ADR Program Administrator who will oversee the assignment of the matter to a Court Staff Neutral.

The same procedures in 3.2 (A) for assignment of the Neutral shall also apply to post-RJI assignments in civil and commercial matters except where there is no agreement on the neutral. In that event, the parties will submit three ranked names from the applicable Court Roster on their ADR Initiation form and the Assigned Judge will select the Court Roster Neutral.

**B. Matrimonial and Family Court matters**

The parties shall complete the ADR Initiation Form for Court Roster Neutrals and will return the form to the Court and to the respective Matrimonial or Family Court ADR Program Administrator within ten (10) business days from the date of the referral to ADR. There will be no adjournment for the return of this form. The respective ADR Program Administrator will coordinate the dissemination of the ADR Initiation Form to the assigned Neutral who will hear the matter within the time line provided herein.

The parties should indicate on the ADR Initiation Form the name of the mutually agreed upon Court Roster Neutral or submit three ranked names from the Court Roster of Neutrals.

In matrimonial matters, the Assigned Judge will oversee the selection of the Court Roster Neutral if there is no agreement.

In Family Court matters, the Family Court ADR Program Administrator will coordinate the assignment of the Court Roster Neutral. If there is no agreement, the Family Court ADR Program Administrator will select the Neutral.

#### 3.4 ORDER OF REFERENCE TO ADR

The Court may direct the parties to proceed to an initial ADR session by issuance of an Order of Reference to ADR. After the initial session, the parties may agree to continue with ADR or return to the Court. The Court will include in the Order of Reference to ADR a return date for a report back to the Court which will not exceed sixty (60) days from the date of issuance of said Order. The Order of Reference to ADR shall indicate time frames in which the ADR session shall be conducted. The issuance of the Order of Reference to ADR may be directed by the Court at a conference or in response to a request from any party made on notice to all other parties.

An Order of Reference to ADR will be issued by the Court and sent to the parties through their counsel and to the Civil or Commercial or Matrimonial or Family Court ADR Program Administrator. The parties must thereafter submit to the Court and to the respective Civil, Commercial, Matrimonial or Family Court ADR Program Administrator the appropriate ADR Initiation Form within ten (10) business days from the issuance of the Order of Reference to ADR.

#### 3.5. DISCOVERY ISSUES

At the discretion of the Assigned Judge or by request of the parties, a “mini discovery” order may issue prior to the issuance of an Order of Reference to ADR.

Additionally at the discretion of the Judge, the ADR option may be scheduled so as to identify the nature of the discovery required by each party. The exchange of information may be completed in the context of the ADR option.

### 3.6. SPECIAL CONSIDERATIONS

If the parties do not submit the ADR Initiation Form within ten (10) business days from the notification of the issuance of the Order of Reference to ADR, or if administrative necessity so requires, the Court shall select the Neutral. The ten (10) business day deadline is not subject to adjournment or extension.

Notwithstanding the foregoing, the parties may, by written stipulation, at the outset designate as the Neutral a person from the Court's roster or may proceed to ADR using the offices of a private ADR provider; in either instance, the parties must complete the ADR process within the deadlines set forth in these Rules

## **SECTION 4 TIME FOR ENGAGEMENT OF ADR**

### 4.1 TIME LINE WHEN REQUEST FOR ADR FILED WITH RJJ

Upon receipt of the Request for ADR- ADR Initiation Form, the ADR Program Administrator will immediately send a confirmation of the assignment along with the Request for ADR-ADR Initiation Form to the Neutral. If the parties have selected a Court staff Neutral, the Civil or Commercial ADR Program Administrator will schedule the ADR session. Where a Court Roster Neutral is selected, the Neutral shall then contact the parties' counsel or, if the parties are self-represented, the parties themselves to schedule the initial ADR session.

At least five (5) business days before the initial session, the parties or their attorneys shall send to the Neutral the ADR Summary Form of the case (not to exceed 2 pages) and any other information necessary to the effective negotiation of the outstanding issues. The Neutral may initiate a conference call with counsel regarding any preliminary matters. All ADR sessions shall be conducted within thirty (30) days from the filing of the Request for ADR-ADR Initiation Form.

#### 4.2 TIME LINE FOR POST-RJI REFERRALS TO ADD OR ISSUANCE OF ORDER OF REFERENCE TO ADD

Upon receipt of the completed ADR Initiation Form from the parties or the Order of Reference to ADR along with the ADR Initiation Form from the Court, the Civil, Commercial, Matrimonial or Family Court ADR Program Administrator will immediately forward the form and, if one has been issued, the Order, to the Court Roster Neutral, if that is the parties' choice. If the parties have selected a Court staff Neutral, the Civil or Commercial ADR Program Administrator will schedule the ADR session. Where a Court Roster Neutral is selected, the Neutral shall contact the parties' counsel or, if the parties are self-represented, the parties directly, to schedule the initial ADR session. The initial ADR session with the Court Roster Neutral shall be conducted within 20 days from the date the Program Administrator sends the form or order to the Neutral. This deadline is to be met by parties, counsel and the Neutrals.

At least five (5) business days before the initial session, the parties or their attorneys shall send the ADR Summary Form of the case (not to exceed 2 pages) and any other information necessary to the effective negotiation of the outstanding issues to the Neutral. The Neutral may initiate a conference call with counsel regarding any preliminary matters. All ADR sessions shall be conducted within 60 days from the issuance of the Order of Reference to ADR or within sixty (60) days from the date of the Court's referral to ADR. Those deadlines and the Court report back date will be stated on the ADR Initiation Form..

##### A. Family Court parenting issues

The parties in these cases will send to the Neutral a copy of the Family Court petition and any responding papers filed by the respondent prior to the initial mediation session in lieu of the ADR Summary Form.

#### 4.3 PRESENCE OF COUNSEL AT ADR PROCEEDINGS

Issues regarding potential inequalities between the parties, e.g. unequal financial strength, lack of knowledge about financial issues, general inequality of business skill or knowledge, strong personalities, etc., favor the presence of counsel for each party at

each ADR session. However, by agreement of the parties, ADR may proceed in the absence of counsel, unless otherwise ordered by the Court.

If, during the process, counsel for either party is discharged or withdraws for any reason, the case will not proceed in ADR until a substitution of counsel occurs or the party indicates in writing a decision to be self-represented.

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

5.1      All written or oral communications made during the course of ADR proceedings are confidential and inadmissible in court with the exception of neutral case conferencing-settlement conferencing conducted by Court staff Neutrals. 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. 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.

5.2      ADR communications and information may be subject to disclosure in judicial or administrative proceedings in any of the following six circumstances:

1.      Attendance by the parties and counsel at the initial ADR session will be reported to the Assigned Judge. No information regarding attendance at subsequent sessions will be revealed.
2.      Disclosure of otherwise privileged communications may be made pursuant to a written waiver of confidentiality by parties and 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.
3.      In civil actions, where the case has been resolved by a stipulation of settlement or a stipulation of discontinuance and execution of appropriate releases pursuant to the

law, the terms of such stipulation and release are not confidential unless otherwise agreed between the parties.

4. In matrimonial and Family Court matters, where signed agreements have been incorporated into Court orders or judgments, such agreements may be admissible in any judicial or administrative proceeding.

5. If a communication is made or information is disclosed during an ADR session, which presents a credible threat of serious and imminent harm to a party or to another person or entity, the appropriate authorities, the potential victim and the referring Court may be notified.

6. If the 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 or may be required pursuant to Social Services Law § 413, confidentiality will not apply as to those disclosures. If an allegation of child abuse or neglect is made by any party during the ADR session, the Neutral will stop the ADR process and consult with each party individually to obtain as much information about the allegation as possible. Neutrals will report to the Assigned Judge allegations of child abuse or neglect for which disclosure is required pursuant to Social Services Law § 413, and if under a professional duty as a mandated reporter, may take independent action as required by statute.

### 5.3 MEDIATION

Nothing about the substance of the mediation proceeding, such as the weaknesses or strengths of the parties' positions or the relative willingness of parties to discuss settlement proposals will be revealed to the referring Judge or any other person by the mediator, or any party or attorney, or court personnel. No party or counsel for a party may reveal the details of the mediation process to the referring Judge or a member of his/her staff, except for an executed agreement or a stipulation of settlement pursuant to CPLR § 2104.

Notwithstanding the foregoing: the parties may include confidential information in a written settlement agreement ; the Neutral and the parties may communicate with the

Program Administrator about administrative details of the proceeding; and the Neutral may make reference to the services rendered by him or her in any action to collect an unpaid, authorized fee for services performed under these Rules.

## **SECTION 6      STAYS**

### **6.1            CIVIL AND COMMERCIAL ACTIONS**

The Assigned Judge may, in his or her discretion, issue a stay of proceedings while the case is pending in ADR and shall so indicate in the Order of Reference to ADR. Upon the issuance of an Order of Reference with a stay, all proceedings over which the Court has jurisdiction other than the ADR process shall be stayed for not more than sixty (60) days.

If the matter has not been entirely resolved within the 60-day period and the parties and the Neutral believes that it would be beneficial if the ADR process were to continue, the process may go forward with approval of the Court. However, absent extraordinary circumstances, no additional stay shall be ordered .

### **6.2            MATRIMONIAL AND FAMILY COURT CASES**

Referral to ADR in contested matrimonial and Family Court cases will not stay the Court proceeding. OCA policy in these cases recognizes the special need for prompt action in matrimonial and Family Court proceedings. As a general rule, full discovery, emergency and *pendente lite* relief, family dynamics, and the needs of children require ongoing access to the Court. However, if the parties agree that additional time is required to fully explore resolution through ADR, they may request an adjournment of a court date from the Assigned Judge, which may be granted sparingly.

**SECTION 7      COMPLETION OF ADR REPORT OF DISPOSITION**

**7.1            REPORT OF DISPOSITION**

The ADR session or sessions shall be concluded within thirty (30) days if initiated by a Request for ADR- ADR Initiation Form filed with an RJI or a Petition in Family Court or within sixty (60) days from the issuance of the Order of Reference to ADR or date of referral to ADR by the Court.

The Neutral shall report, by ADR Disposition Form, to the ADR Program Administrator for Civil or Commercial Matters or the Matrimonial or Family Court ADR Program Administrator as to whether the parties reached an agreement or whether the parties require judicial intervention no later than two (2) business days after the final ADR session. The “final ADR session” is the session in which the parties have either resolved the case or the parties have not reached an agreement by the end of the respective completion period.

If the ADR session had been initiated by the Request for ADR filed with the RJI or a Petition in Family Court, the Neutral shall the ADR Disposition Form to the Chief Clerk and to the ADR Program Administrator as well as to all counsel and self-represented litigants . If the matter has not been resolved after completion of the ADR Process, the Chief Clerk shall assign the matter to a Judge.

If the ADR session had been initiated by referral of the Court or by Order of Reference to ADR, the Neutral must complete and send the ADR Disposition Form to the Assigned Justice and to the Civil or Commercial or Matrimonial or Family Court ADR Program Administrator and to all counsel and self-represented litigants

**7.2            CONTENT OF ADR DISPOSITION FORM**

The ADR Disposition Form shall set forth the date of the initial ADR session, whether each party and counsel appeared at the first session, and the date of any subsequently scheduled sessions. The form shall indicate whether the parties reached agreement on

some, all, or any of the issues referred to the ADR proceeding. The Neutral shall attach any stipulations or agreements executed by the parties.

### 7.3 COURT CONFERENCE SCHEDULING

If the case has not resolved, or if otherwise directed by the Court, the parties and counsel shall appear before the Court on the scheduled report back conference date, designated on the ADR Initiation Form.

### 7.4 SPECIAL CONSIDERATIONS

#### A. CIVIL AND COMMERCIAL ACTIONS

Any settlement, in whole or in part, reached during the ADR proceeding shall be enforceable upon compliance with the applicable requirements enunciated in the CPLR.

If the case has been referred to Arbitration, the Arbitrator's Award shall be in writing, signed and affirmed by the Arbitrator within the time fixed by the agreement, or if the time is not fixed, within such time as the court orders. (See CPLR § 7507 and CPLR § 7508 regarding an award by confession)

If the case has been referred to Mediation by the Assigned Judge after Neutral Evaluation has been unsuccessful, the Mediator will follow the process outlined in 7.1-7.3 above and comply with any time limits set by the Assigned Judge.

#### B. MATRIMONIAL AND FAMILY COURT CASES

The Mediator or Neutral Evaluator shall complete the ADR Disposition Form, attach to the form any original signed agreement, and return it to the Judge, JHO or Court Attorney Referee assigned to the case. The Mediator or Neutral Evaluator shall send copies to the Matrimonial or Family Court ADR Program Administrator, counsel, and to any self-represented litigants.

If the parties voluntarily reach an agreement, the Mediator or Neutral Evaluator may assist the parties and their counsel in drafting a written agreement. Subject to review and approval of the referring Judge, the Stipulated Agreement will be incorporated in the Court's Order.

Any settlement, in whole or in part, reached during the ADR proceeding shall be effective only upon execution of a written agreement signed by all parties or their duly authorized agents. Such an agreement shall be kept confidential unless the parties agree otherwise, except that any party thereto may thereafter commence an action for violation of the agreement.

C. ALL CASES

If the case is not resolved after completion of the ADR proceeding, the Assigned Justice may determine, or the parties may stipulate, to resolve the matter by another ADR process.

**SECTION 8            IMMUNITY OF NEUTRALS**

8.1            Any person designated to serve as a Neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in a *pro bono* capacity. The execution of an ADR Initiation Form constitutes a waiver of any right to sue the Court Roster Neutral because of his or her actions in that *pro bono* role.

**SECTION 9            SPECIAL CONSIDERATIONS REGARDING REFERRALS TO  
MEDIATION IN ALL CASES**

9.1            The following cases shall not be referred to Court mediation:

- A.            Child abuse or neglect (as defined in Family Court Act §§ 1012(e) and (f) and Social Services Law § 412) except that these protocols do not preclude the continuation of the Permanency Mediation Project in the Eighth Judicial District; OR
- B.            A pending family offense proceeding (Family Court Act Art. 8) between the parties; OR
- C.            A pending criminal action between the parties except for those cases covered by Judiciary Law Article 21 A; OR

- D. An existing temporary or permanent stay away Order of Protection between the parties;  
OR
- E. A severe power imbalance between the parties that precludes an individual's capacity to exercise self-determination.

**SECTION 10     DOMESTIC VIOLENCE**

If, during the course of the ADR process, an allegation of domestic violence or severe power imbalance is made by any party, the Neutral will stop the ADR process, consult with each party individually for the purpose of obtaining as much information as possible, and determine whether the process should continue. Allegations of domestic violence which are not a matter of public record will not be disclosed to the referring Judge; instead individuals will be given information regarding their rights in the form statement prescribed in Family Court Act § 812 (5) and they will also receive safety planning information.

**SECTION 11     NEUTRALS**

**11.1       COURT ROSTER OF NEUTRALS**

- A. The Court's Roster of Neutrals includes Neutrals who have complied with the training and experience requirements set forth below and have been accepted for Court Roster membership.

Any other individual seeking to be included on the Court's Roster of Neutrals, including, but not limited to, those who are affiliated with an organization providing ADR services pursuant to a contract with the Unified Court System, must also meet the training and experience requirements of OCA ADR and adhere to standards of conduct that may be adopted by OCA ADR. These standards of conduct for all Neutrals incorporate, but are not limited to, ethical standards adopted by recognized professional organizations.

The Court may assemble Rosters of Neutrals for specific roles and case types. 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 12. In addition, Court Roster Neutrals may be required to fulfill continuing education requirements prescribed by OCA ADR.

Pursuant to The Rules of the Chief administrator of the Courts, 22 NYCRR § 146.3 (b), Neutrals shall be redesignated to the Court Roster every two years. In determining whether to redesignate any Neutral, the Neutral must show proof of compliance with the requirement that he or she attend at least six hours of additional approved training relevant to his or her respective practice areas every two years pursuant to 22 NYCRR § 146.5.

- B. Acceptance to each Court Roster of Neutrals is at the discretion of the District Administrative Judge in consultation with the OCA ADR. Continuing presence on a Court Roster is subject to review by the District Administrative Judge. Court Roster Neutrals may be removed from the Court Rosters at the discretion of the District Administrative Judge in consultation with the OCA ADR.
- C. 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 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, any such conflicts review shall include a check with regard to all parties, subsidiaries, or affiliates of corporate parties.

In the event that any potentially disqualifying facts are discovered, the Neutral shall either decline the appointment or shall fully inform the parties and the Program Administrator 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 and another Neutral shall promptly be selected by the Program Administrator.

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

- D. Court Rosters of Neutrals will be available in the 8<sup>th</sup> Judicial District ADR Office and shall be updated periodically as necessary. 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.

## **SECTION 12     QUALIFICATIONS OF NEUTRALS FOR COURT ROSTER**

### **12.1     ARBITRATOR:**

To be eligible to receive a Court referral and be included on the Court's Roster of Arbitrators, an individual must submit an application and have successfully completed at least six (6) hours of training in procedural and ethical matters related to arbitration and :

1.     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
2.     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
3.     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.

### **12.2     NEUTRAL EVALUATOR:**

To be eligible to receive a court referral and be included on the Court's Roster of Neutral Evaluators, an individual must submit an application and have successfully completed at

least six (6) hours of training in procedural and ethical matters related to neutral evaluation and must:

1. 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
2. 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 referred cases; OR

#### 12.3. MEDIATOR IN CIVIL CASES:

To be eligible to receive a Court referral and be included on the Court's Roster of Mediators- Civil Matters, other than commercial and matrimonial actions, an individual must have extensive, relevant civil litigation experience, civil matter experience or serve or have recently served as in house counsel. In addition, each candidate must submit an application with proof of successful completion of 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. 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. The applicant must also document substantial recent experience mediating actual cases. Substantial recent experience is defined by the applicable Court.

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 their acceptance on the Court Roster.

#### 12.4. MEDIATOR IN COMMERCIAL CASES

To be eligible to receive a Court referral and be included on the Court's Roster of Mediators- Commercial Matters, an individual must submit an application and proof of

completion of all of the requirements outlined in 12.3 above AND have extensive commercial litigation experience, commercial matter experience or serve or have recently served as in-house counsel.

12.5 MEDIATOR IN MATRIMONIAL AND FAMILY COURT MATTERS (Parenting issues only)

To be eligible to receive a Court referral and be included on the Court's Roster of Mediators- Parenting Issues in Matrimonial and/or Family Court Matters, an individual must have extensive, relevant legal expertise in parenting issues or extensive professional training and expertise regarding parenting issues and must submit an application and proof of successful completion of 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. 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. The applicant must also document substantial recent experience mediating actual cases. Substantial recent experience is defined as a minimum of one hundred fifty (150) hours of actual face-to-face mediation practice as either a solo or co-mediator within the last five years OR successful completion of a structured apprenticeship. Such apprenticeship must, at a minimum, include the following components:

1. Mediation or co-mediation of at least two structured role-plays. The role-plays may be conducted as part of the aforementioned training requirement provided that the apprentice is given a sufficient opportunity to: deliver an opening statement; help parties exchange information, identify negotiable issues and explore options for resolution; and draft a written agreement that incorporates the terms of the parties' resolution; AND
2. Observation by apprentice of at least one mediation session involving an actual controversy between actual parties; AND

3. Mediation or co-mediation of at least ten (10) matters involving actual controversies between parties under the direct supervision of a coach or mentor who has previously been admitted to the ADR Program Roster; AND

4. Mediation or co-mediation of at least one case as the primary mediator followed by either a debriefing session with the coach or mentor or completion of a self-evaluation instrument.

An individual who has completed the minimum twenty-four (24) hours of mediation training described above, as well as the additional twelve (16) hours of training on mediation of parenting issues, may be provisionally accepted on the Court Roster on the condition that they complete the substantial experience requirement within six (6) months of his or her acceptance on the Court Roster of Mediators.

## **SECTION 13            COMPENSATION OF NEUTRALS**

### **13.1    GENERAL INFORMATION REGARDING COMPENSATION OF NEUTRALS**

- A.    Court staff Neutrals and individuals providing ADR services pursuant to a contract with the Unified Court System shall not receive any additional compensation for ADR services provided under this program. However, individuals affiliated with a program providing ADR services pursuant to a contract with the Unified Court System shall not be precluded from receiving reimbursement when the services provided are outside the scope of the contract.
- B.    Court staff Neutrals are prohibited from accepting any outside employment as a Neutral for a fee.
- C.    Court 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.
- D.    Court Roster Neutrals shall not be compensated for the first two (2) hours spent in

ADR. Thereafter, all time spent following the first two (2) hours by the Neutral shall be compensable in accordance with these rules.

- E. After the initial ADR two hour session, the Court Roster Neutral shall be permitted to charge the fee schedule published in the list of Court Roster Neutrals.
- F. If the parties continue the ADR process after the initial session, the Neutral may also charge for the preparation time expended in the case.
- G. Neutrals are encouraged to use a sliding scale when appropriate or to waive fees to ensure that no one is denied access to the ADR program based on inability to pay.
- H. In the event that the Neutral's fees exceed fifteen hundred dollars (\$1500.00) or more, the parties through their counsel are required to notify the Civil or Commercial or Matrimonial or Family Court ADR Program Administrator who will advise the Assigned Judge or Chief Clerk where no Judge is assigned. At that point, the Court will determine whether the ADR process should continue or advise the parties and counsel to appear for a court conference to discuss the status of the matter. The respective ADR Program Administrator will coordinate the notice to parties, counsel and the Neutral.

### 13.2 SPECIAL CONSIDERATIONS:

#### A. CIVIL AND COMMERCIAL MATTERS

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

#### B. MATRIMONIAL AND FAMILY COURT MATTERS

The Neutral's fees shall be as agreed in a written Retainer Agreement executed by the parties and the Neutral before the commencement of the ADR session. The retainer agreement shall include the ratio at which the fee will be divided between the parties.

Some Family Courts in the 8<sup>th</sup> District may have access to Neutrals who provide mediation services to court litigants pursuant to a contract with the Unified Court System. These Neutrals may also be included on the Court Roster but they shall not receive any additional compensation for ADR services provided under this program.

The Court may employ Family Services Coordinators who are court employees, they shall not receive any additional compensation for ADR services provided under this program.

Fees for parenting coordinators are addressed in specific guidelines being developed for parenting coordination in the 8<sup>th</sup> Judicial District.

## **SECTION 14            ONGOING REVIEW**

The 8<sup>th</sup> Judicial District ADR Protocols will be subject to periodic review and adjustment as the program matures and develops, including statewide oversight and application of administrative rules.

In addition, litigants will be asked to complete an evaluation form, which will seek information about their experience with the process and the Court Roster Neutral. Court staff will collect the forms, analyze the data, and continue to work on improving the program.

## **ACKNOWLEDGMENTS**

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