

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS COMMERCIAL DIVISION MEDIATION RULES

PREAMBLE

Queens Supreme Court encourages the use of alternative dispute resolution (“ADR”) methods to encourage the early resolution of matters and avoid protracted litigation. The Commercial Division has devised a program by which cases in the division may be referred by the assigned commercial judge, the Administrative Judge, or by consent of the parties to mediation. Mediation is a confidential and informal process where the parties meet with a Neutral third party to identify issues and explore options that may result in a mutually acceptable resolution. Unlike litigation, the Mediator does not make a determination, but instead assists the parties in creating their own resolution of the issues. While there is no obligation to settle the case through mediation, many cases often result in a written stipulation between the parties. However, if the parties are not able to resolve their dispute through mediation, the matter will proceed before the assigned Justice.

All parties whose cases are sent to the mediation program may choose to use the services of a private ADR of their own choosing as an alternative to the mediation program. If the parties consent to the use of the court’s mediation program, they may later terminate the process and choose to submit to an alternative ADR program.

The following Rules shall govern all cases sent to the ADR program of the Commercial Division by the Justices assigned to the Commercial Division, the Administrative Judge, or referred upon the consent of the parties.

Rule 1. The Program: The Commercial Division of the Supreme Court of the State of New York, County of Queens, operates the Alternative Dispute Resolution Program (“the Program”). The Program shall apply to cases referred by the Justices assigned to the Commercial Division, the Administrative Judge of Queens Supreme Court, Civil Term, and commercial cases referred by the consent of the parties to the extent that the Program can accommodate them. These Rules shall govern all cases so referred.

Rule 2. Administration of the Program: The Program shall be supervised by the Principal Law Clerk for the Administrative Judge of Queens Supreme Court, Civil Term, who shall act as the Program Administrator. The conduct of ADR proceedings shall be coordinated by the Program Administrator.

Rule 3. The Panel: The Administrative Judge shall establish and maintain a roster of Mediators (“the

Roster”) who shall serve and be compensated in accordance with the Rules unless the parties stipulate otherwise.

(1) In order to be eligible to serve as a Mediator and be included on the Roster, one must:

- (a) have been admitted to practice law as an attorney in New York State, and;
- (b) be in full compliance with the requirements of Part 146 of the Rules of the Chief Administrator. All training must be from an OCA-sponsored or OCA-recognized training program, and;
- (c) have any other mediation training or experience deemed appropriate by the Administrative Judge. Applicants to the panel lacking sufficient experience in mediating actual cases in commercial matters will be required to participate in at least one commercial mediation session with an experienced member of the Program’s Roster of Mediators.
- (d) Mediators shall provide the first three-hour mediation free of charge. Mediators shall not charge for time preparing for the first initial session.
- (e) At the conclusion of the first three hours, any party may bring the mediation session to an end. However, if the parties agree in writing to continue, the parties shall compensate the mediator for his or her time thereafter at a rate of \$300 per hour, unless the parties and the mediator otherwise agree in writing. The mediator’s fees and expenses shall be borne equally between the parties unless otherwise agreed to in writing.
- (f) Every member of the Roster, and any other person who serves as a Mediator pursuant to these Rules, shall comply with the Code of Ethical Standards for Mediators of the Commercial Division. Continuing presence on the Roster is subject to review by the Administrative Judge. Mediators may be removed from the Roster at the discretion of the Administrative Judge in consultation with the Unified Court System Office of the ADR Programs.
- (g) The Roster will be available through the Program Administrator, located in the Administrative Judge’s office in Queens Supreme Court or on the Commercial Division website (at <http://www.nycourts.gov>).

Rule 4. Procedure for Submission to the Program:

- (a) Cases shall be referred to ADR as soon after commencement as practicable. Cases may be sent to the Program by the Commercial Division Justices, the

Administrative Judge or by consent of the parties in writing. The assigned Justice shall issue an Order of Reference requiring that the case proceed to ADR in accordance with these Rules.

- (b) The Justice shall submit the Order of Reference to the Program Administrator. Upon receipt of the Order of Reference, the Program Administrator will randomly assign a Mediator chosen from the Roster.
- (c) Upon assigning a Mediator, the Program Administrator will forward the Order to the parties and advise the parties of the name and contact information of the Mediator. The Program Administrator will also send the ADR Initiation Form to the parties, which requires the names and contact information for all parties and/or their counsel, as well as that of the Mediator, and contains additional provisions for confidentiality and immunity for the Mediator.
- (d) Within five (5) business days of receiving the Order, the parties must sign the ADR Initiation Form and return it to the Program Administrator. The parties must also consent to the appointment of the assigned Mediator. If either party does not consent to the assigned Mediator, that party must submit in writing to the Program Administrator explaining the reason for the lack of consent. The Program Administrator will then randomly assign another Mediator to the mediation. If all parties stipulate to a private ADR proceeding, the parties must make arrangements for the proceeding. If a private ADR is chosen, the parties must report to the Program Administrator the name of the Mediator, contact information if not a member of the Roster and the date when the proceeding will be held.
- (e) It is the responsibility of the parties to contact the Mediator to make the necessary arrangements for the mediation within 5 days of the receipt of the ADR Initiation form. Unless otherwise agreed to by the parties and the mediator, the mediation shall take place at the mediator's office.
- (f) **The initial mediation session must be conducted within forty-five (45) days from the date the Order of Reference was signed.** If there is a conflict with the scheduled date of the mediation, the parties and the Mediator shall agree on a convenient date for the initial session without contacting or involving the Program Administration. However, the new date must be within the above time frame. The parties and Mediator may also contact each other to resolve any preliminary matters without the intervention of the Program Administrator. In the event of extraordinary circumstances, the Mediator shall contact the Program Administrator, who will intervene only if necessary to expedite the process.

- (g) At least ten (10) days before the initial ADR session, the Mediator may request the parties provide to the Mediator a copy of the pleadings and a memorandum of not more than ten pages (unless otherwise agreed by the parties and the Mediator) 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. Except as otherwise agreed, this memorandum shall not be served by the parties on their adversary or be filed in court, shall be read only by the Mediator, and shall be destroyed by the Mediator immediately upon completion of the ADR proceeding. At no time should the parties provide the memorandum to the Program Administrator or the assigned Commercial Division Justice.
- (h) Unless the Mediator permits otherwise, every party and counsel must attend the initial ADR session in person. In the case of a corporation, partnership or other business entity, the party may be represented by an official who possesses full knowledge of the facts and issues and authority to resolve the matter. In addition, any participating attorney must be present at every session and also have full knowledge and authority to settle the matter.
- (i) At the conclusion of the initial ADR session, any party or the Mediator may opt to terminate the ADR proceeding. In such an instance, the Mediator shall immediately inform the Program Administrator of the termination. If termination is by one party's request, the Mediator must notify the Program Administrator but shall not indicate the identity of that party who chose to terminate the proceeding.
- (j) Within ten (10) days after the mediation has concluded, the Mediator shall complete the Neutral's Report indicating resolution or lack thereof and submit the Report to the Program Administrator. If the parties entered into a written stipulation of settlement, the parties shall submit a stipulation of discontinuance to the assigned Commercial Division Justice and file the same with the County Clerk. The Mediator must complete the Neutral's Report regardless of the result of the mediation.
- (k) The Program Administrator shall report to the assigned Commercial Division Justice at the conclusion of the proceeding whether the proceeding resulted in a resolution of the case in whole or in part.
- (l) If a party or counsel to a party fails to appear at a mediation session or fails to otherwise comply with these Rules, the Mediator shall advise the Program Administrator in writing and specify the nature of the noncompliance. The Program Administrator shall then report to the assigned Justice any violation of these Rules as indicated by a Mediator and provide a copy to the parties.

The assigned Justice may hold a hearing to impose sanctions or take such other action as is necessary to ensure compliance with and respect for the court's Order and these Rules.

Rule 5. Confidentiality:

- (a) The mediation session(s) shall be confidential. All documents prepared by the parties or their counsel and any notes or other writing prepared by the Mediator in connection with the proceeding - as well as any communications made by the parties or their counsel for, during or in connection with the mediation shall be kept confidential by the Mediator and the parties and shall not be summarized, described, reported or submitted to the court by the Mediator or the parties. No party to the mediation shall, during the time the action is referred to mediation, or in any other legal proceeding, seek to compel production of documents, notes or the writings prepared for or generated in connection with the mediation, or seek to compel the testimony of any party concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation shall be effective only upon execution of a written stipulation signed by all parties affected 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 breach of this agreement. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the mediation.
- (b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the Mediator to testify in any legal proceeding concerning the content of the mediation. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the Mediator harmless against any resulting expenses, including reasonable legal fees incurred by the Mediator or reasonable sums lost by the Mediator in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 5(a), a party or the Program Administrator may report to an appropriate disciplinary body any unprofessional conduct engaged in by the Mediator and the Mediator may do the same with respect to any such conduct engaged in by counsel to a party.
- (c) Notwithstanding the foregoing and, to the extent necessary, (I) the parties may include confidential information in a written settlement agreement; (ii) the Mediator and the parties may communicate with the Program

Administrator about administrative details of the proceeding; and (iii) the Mediator may make general reference to the fact of the services rendered by him or her in any action required to collect an unpaid authorized fee for services performed under these Rules.

Rule 6. Immunity of the Mediator : Any person designated to serve as a Mediator shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity, to the extent permitted by applicable law.

Rule 7. Stay of Proceedings:

- (a) Unless otherwise directed by the assigned Justice, referral to Mediation will not stay the court proceedings in any respect.
- (b) Parties committed to the ADR process who conclude that additional time is required to fully explore the issues pertaining to their case may request a stay of proceedings. Regardless of whether a stay is granted by the assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the Mediator shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the court and in compliance with the deadlines set forth herein.
- (c) If the matter has not been entirely resolved within the 45-day period as provided in these rules but the parties and the Mediator believe that it would be beneficial if the mediation were to continue, the process may continue but shall be completed within 90 days from the date of the Order of Reference. If further time is needed, the parties must seek specific authorization from the assigned Justice to permit the process to continue beyond 90 days.

Rule 8. Conflicts of Interest: In order to avoid conflicts of interest, any person assigned to serve as a Mediator shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which he or she is a member or employee. The Mediator shall disqualify himself or herself if the Mediator would not be able to participate as a Mediator fairly, objectively, impartially and in accordance with the highest professional standards. The Mediator shall also avoid any appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the assigned Mediator shall fully inform the parties. If the parties object to the Mediator based on any perceived conflict, the Mediator shall then notify Program Administrator, who shall then randomly assign another mediator. Any such conflicts review shall include a check with regard to all parents, subsidiaries or affiliates of corporate parties. If all parties agree to mediate after the Mediator's disclosure, then the mediation shall proceed.

Rule 9. Further Mediation: After completion of the mediation, at the request of the parties upon a

showing of good cause, or upon the court's own initiative, the court may issue an order directing a second mediation with a new mediator to be randomly assigned. Any such mediation shall proceed in accordance with all Program Rules.

Dated: January 11, 2019

PROGRAM ADMINISTRATOR

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