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Commercial Division - NY Supreme Court

Nassau County

Rules of the Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than litigation that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation.

The Court will offer mediation as the default ADR option. Mediation is a confidential, informal procedure in which a neutral third party helps disputants negotiate. With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Although parties are not obligated to settle during mediation, the process frequently concludes with a written agreement.

Mediation is particularly appropriate for the resolution of complex commercial cases. Mediation offers the parties a confidential, structured forum in which to explore practical business concerns and develop tailor-made solutions beyond those that a Judge can often provide. Moreover, a mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The following Rules shall govern cases sent to mediation by Justices of the Commercial Division and other authorized Justices in Nassau County, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an order of reference are free at the outset to use the services of a private ADR provider of their choosing in lieu of taking part in this court's program. After a case has been submitted to the court's program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program ("the Program"). The Program shall be applicable to cases referred by Justices of the Commercial Division, the District Administrative Judge of the Supreme Court, Nassau County ("the Administrative Judge"), and the other Justices of the Supreme Court, Nassau County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties.

Rule 2. The Roster:

(a) The Administrative Judge shall establish and maintain a roster of mediators ("the Roster") who shall possess such qualifications and training as required by Part 146 of the Rules of the Chief Administrative Judge (see http://www.nycourts.gov/rules/chiefadmin/146.shtml).

(b) 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 upon its issuance. 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 ADR Programs.

(c) The Roster will be available through the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

Rule 3. Procedure:

(a) Cases shall be referred to mediation as early as is practicable. If the Justice or the Administrative Judge decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the Justice shall issue an Order of Reference requiring that the case proceed to mediation in accordance with these Rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the Justice.

(b) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon mediator from the court=s roster. During this time, the parties shall also complete and return to the court and selected mediator the Mediation Initiation Form. Copies of the Mediation Initiation Form can be obtained from the Nassau County Supreme Court or on the Commercial Division website (at http://www.nycourts.gov/courts/comdiv/nassau.shtml).

(c) If the parties are unable to agree on a mediator, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the Court the Mediation Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked which mediator). The Court will select a mediator from among the four (4) names submitted by the parties. Once a mediator is agreed upon or selected by the Court, the parties shall contact the mediator to schedule an initial session. Any mediator selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.

(d) The parties may agree on a mediator other than one listed on the Court=s roster, if they so desire. For a substitution to be made, the parties must contact the other mediator directly, make arrangements for that person to conduct the mediation, and submit a Mediation Initiation Form to both the Court and the selected mediator. Mediators selected from outside the Roster must comply with the deadlines set forth in these Rules and the confidentiality and immunity rules set forth herein as well.

(e) The initial mediation session must be conducted within 45 days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the mediator shall contact the Court and, if necessary, intervention will occur to expedite the process. The mediator may initially request a conference call with both parties regarding any preliminary matters.

(f) At least one week before the initial session, each party shall deliver to the mediator a memorandum of not more than three pages, (12 point font, doubled spaced) setting forth that party's views as to the

nature of the dispute, and suggestions as to how the matter might be resolved. This memorandum shall not be served on the adversary or filed in court, shall be read only by the mediator, and shall be destroyed by the mediator immediately upon completion of the proceeding.

(g) Unless exempted by the mediator for good cause, every party, including counsel must attend the initial mediation session either in person or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the mediation process shall be fully familiar with the action and authorized to settle.

(h) Parties and their counsel may be referred to mediation for a free four (4) hour initial session. Subject to the mediator=s discretion and full disclosure to the parties at the beginning of the initial session, the mediator may apply up to one (1) hour of preparation time toward the initial session, in which case the initial session shall last for no more than three (3) hours. At the conclusion of the initial session, the parties and mediator may (but are not required to) agree to continue the mediation. Mediator compensation for any additional mediation time beyond the initial session is governed by Rule 6, below.

(i) Within seven (7) days after the mediation process has concluded-whether by agreement, or the refusal of one or more parties to continue, the mediator shall complete the Mediation Disposition Form indicating settlement or lack thereof and transmit the Form, along with any written agreement, to the Court. If the mediation process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the Justice assigned.

(k) At the end of an initial session mandated by subdivision (h) of this Rule, any party or the mediator may terminate the mediation process. If the mediation process has been terminated by one party only, the identity of that party shall not be reported.

(l) Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for a mediation session in a timely manner, appear at any scheduled session or otherwise fail to comply with these Rules, the mediator may advise the Court and the Court may impose sanctions.

Rule 4. Confidentiality:

(a) The mediation process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the mediator in connection with the proceeding-as well as any communications made by the mediator, parties or their counsel, for, during, or in connection with the mediation process-shall be kept in confidence 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 process shall, during the action referred to mediation or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the mediation process, or seek to compel the testimony of any other party concerning the substance of the mediation process. Any settlement, in whole or in part, reached during the mediation process 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 process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7b herein).

(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 process. 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 4 (a), a party or the Court 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, 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 Court 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 5. Immunity of the Neutral:

Any person designated to serve as a mediator pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Rule 6. Compensation:

Parties shall not be required to compensate the mediator for services rendered during the initial session, or for time spent in preparation for the initial session. Should the parties choose to continue beyond the initial session, mediators shall be compensated at a maximum rate of $300/hour for time spent in mediation, and up to $150/hour for any additional preparation time needed beyond the initial session. All mediator fees and expenses shall be borne equally by the parties unless the court determines otherwise.

Rule 7. Stay of Proceedings:

(a) Unless otherwise directed by the Justice assigned, referral to mediation will not stay the court proceedings in any respect.

(b) Parties committed to the mediation 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 mediation 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 (See Rule 3 (e)) but the parties and the mediator believe that it would be beneficial if the mediation process

were to continue, the process may go forward. However, the mediation process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.

Rule 8. Conflicts of Interest:

In order to avoid conflicts of interest, any person tentatively designated 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 she is a member or employee. The mediator shall disqualify him or herself if the mediator would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. The mediator shall also avoid an appearance of a conflict of interest. In the event that any potentially disqualifying facts should be discovered, the mediator shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that mediator, the mediator shall decline the appointment and another mediator shall promptly be selected by the parties or the Court in a manner consistent with Rule 3 (b). Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate parties.

Rule 9. Communication with Assigned Justice:

The mediator may communicate with the assigned Justice or the assigned Justice=s staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination of the proceeding by a party pursuant these rules, the mediator shall not reveal to the Court which party brought the proceeding to an end. The mediator shall report to the Court at the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part.

Rule 10. Further ADR:

(a) While early attempts at mediation may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the Court may in its discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred shall proceed in accordance with these Rules. For example, the parties shall not compensate the mediator for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation or other ADR, without Order of the court, and at their own expense.

Rule 11. Administration of Program:

The Program shall be supervised by the Hon. Thomas A. Adams, Administrative Judge, Tenth Judicial District – Nassau County.

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THE COMMERCIAL DIVISION
SUPREME COURT, CIVIL BRANCH
NASSAU COUNTY

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