

# The art of mediation in mass tort or complex cases: Know your enemy and help your neutral

By Hon. Jennifer Togliatti (Ret.)

**S**un Tzu said, “Every battle is won before it is fought.” While preparation is important in every mediation, it is paramount to the successful resolution of complex litigation or a mass tort case. When you represent a client in a case of this magnitude you can help your mediator, and at the same time your client, by communicating to your neutral your insights into the three most important elements of the case: the players, the politics and the payment.

## Define the Players

Every complex case has different dynamics on either side or sides of the aisle. Any mediator you choose in a complex or mass tort case should schedule a pre-meeting with the attorneys for the aligned parties. If for some reason your mediator does not schedule a pre-meeting, then you should request to schedule one. In each of my complex or mass tort cases, I have gained invaluable information on the dynamics of a case by meeting with the different sides

to discuss the roles of the participants, the relationships between them, and the identification of decision-makers.

In the event of a mass tort or class action case, a meeting with the plaintiffs’ counsel leadership group or class counsel is key to the mediator’s understanding of the structure or make-up of the attorney leadership group and which attorneys speak to particular issues. For example, there may be divisions of labor by the attorneys, by client groups or particularly important legal, factual or expert issues in the case. Because a complex mediation will ordinarily involve many sessions, phone calls and emails, it is often not practical to expect to speak to all attorneys about each of the issues in the case when the mediator needs answers or communication is necessary. For example, while you may have lead counsel for a particular group, that attorney may not be the coverage counsel that you need to speak to discuss a finer point on coverage. Before your pre-mediation meeting, think about the divisions of labor among attorneys, and what if any client groupings by liability, injury or any other quantifier that you have in your case and be prepared to share all of that information with your neutral.

Regardless of who you represent, you will also likely have information your mediator wants to know about the participants for the other aligned parties. Whether it is what you know about the dynamics of the other parties’ carriers and counsel, or the other parties themselves, sharing what you know about the relationships and personalities can be very helpful. Also, do

not hesitate to tell your neutral speculations you may have into the dynamics of the opposing parties, their carriers and their counsel. No detail is too small! Your neutral is bound by confidentiality and will never share your speculation. Sensitizing your mediator to these dynamics will assist them in adjusting their approach to the case as needed. This includes your assessments of any particularly difficult personalities in the case or significant prior litigation interaction that may explain the posturing or intense emotions of other parties or their counsel. I have mediated several cases where very sophisticated parties express bewilderment to me at the lack of meaningful dialogue regarding settlement between their counsel with the opposing side, only for me to find out during the process that their counsel’s intractable posture with the other lawyer has limited any meaningful conversations regarding a pathway to resolution. In my experience, the attorneys working the case day to day are, more often than not, spot-on in assessment of the dynamics of the opposing players, so do not hesitate to share all of your insights with your neutral.

## Detail the Politics

It is very important for your neutral to consider the interests driving the parties. Oftentimes the interest of a party or parties is not necessarily a significant consideration for that party’s carrier, and if that is the case, that is very important for your mediator to know. Whether the considerations of a party are adverse publicity and potential negative effect



Hon. Jennifer Togliatti (Ret.) is a neutral with Advanced Resolution Management in Las Vegas, Nevada. She is one of the most-sought after mediators for complex, high-stakes litigation in the country, having facilitated massive settlements in her first year as a private mediator. <https://armadr.com>



on business reputation, concerns about setting precedent with a settlement, the potential exposure of an excess verdict, adverse effects on long-term business relationships between parties or between parties and carriers, or a myriad of different interests, your mediator should know all of this before the mediation begins. You may think that opposing counsel will fill in your mediator on these salient details about the conflicting interests on their side of the fence, but in my experience that is not necessarily the case. There may be ethical or client authority considerations that limit opposing counsel sharing those types of details with your mediator.

To the extent you are authorized to share any specific political or practical concerns regarding your own client's political interests in the outcome of the case, beside the monetary result, this is also important information. While experienced neutrals will likely have a sense of political hot-buttons your client may have, knowing the sensitivity will help your neutral ensure an approach to the issue in a tactful way that will not result in loss of your client's trust in the neutral you likely agreed to or recommended. I can speak to this based upon my experience in handling the One October, Mass Shooting case in Las Vegas as trust was an essential component to its resolution. The politics involved in a case

of this magnitude could have been insurmountable, however, the parties and counsel had trust: both in the process and in the mediators. Sharing vital information about the politics and driving interests of the parties at the outset of the case, in combination with keeping those lines of communication open throughout months of mediation truly assisted with facilitating a successful resolution.

### **Determine the Payment**

The bottom line and getting to an actual number for settlement is often the most simple and straightforward aspect to a mass tort or complex mediation. Regardless of whether it is a mass tort or a construction defect case with hundreds of millions of dollars in dispute, my experience has been that coverage issues will be the crux of whether the mediation succeeds or fails. Pre-mediation there should be a presentation of the towers and layers of insurance coverage, along with a general description of the terms of coverage. A full briefing of the terms of particular policies may be quite helpful to your mediator, however, depending on your mediator it may be sufficient to detail the type of coverage, e.g. builder's risk, general liability, inland marine, etc. Waiting until the actual start of the mediation to get this

information to your neutral is a mistake guaranteed to result in significant frustration of the process and, rightly or wrongly, potentially lead to distrust by the opposing party. Also be prepared to brief your neutral on any declaratory relief actions related to coverage and the status of those actions prior to the mediation.

If you know that the coverage issues in your case are so significant that you have hired coverage lawyers for your team, talk to your client about their willingness to have the neutral to retain a consulting neutral who is highly knowledgeable and experienced in the particular types of coverage in play in the case. I was lucky enough in the City Center Litigation over the now imploded Harmon Hotel in Las Vegas, to have parties that retained a neutral with decades of specific coverage litigation experience to assist me in working through the coverage issues with the parties and the carriers, which was crucial to the successful resolution of that case.

Attorneys who mediate successfully understand that it is not all about their case and their case alone. Share everything you know about all the players, all the politics and the payment. After all, Tzu tells us, "if you know your enemy and yourself you need not fear the results of 100 battles." So give your neutral the weapons to succeed. ■

# Nassau County 10<sup>th</sup> JD Alternative Dispute Resolution Programs

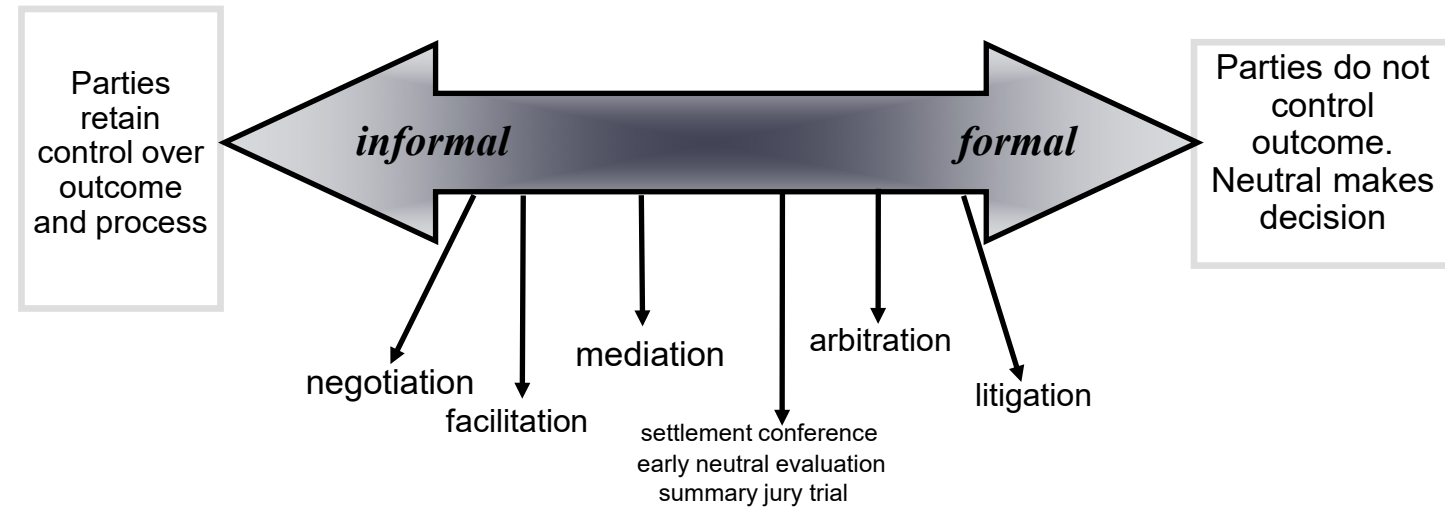
October 29, 2020 ; Theodore Roosevelt Inn of Court

Yvonne Marin, Esq. [ymarin@nycourts.gov](mailto:ymarin@nycourts.gov)

ADR Coordinator, 10<sup>th</sup> Judicial District Nassau County

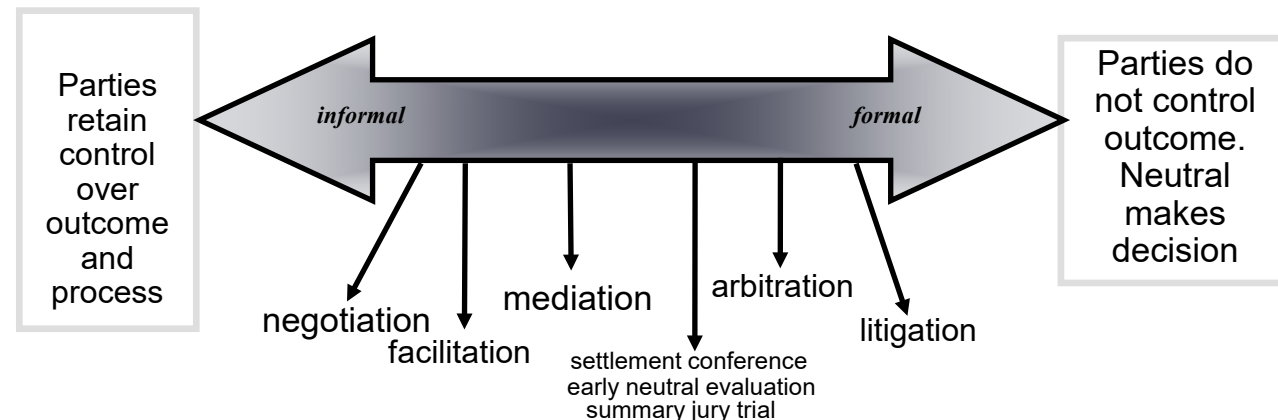


# ADR Continuum



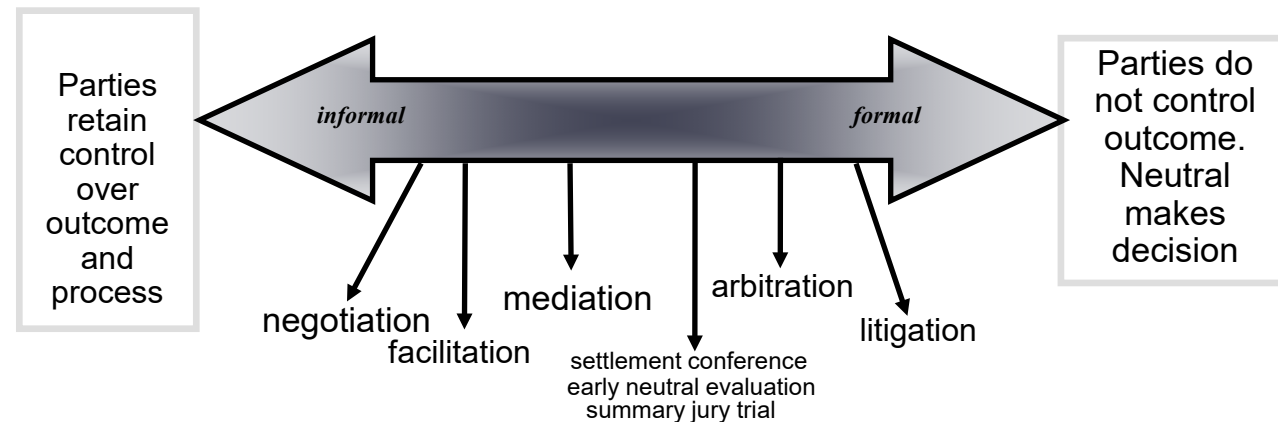
# ADR Benefits

- ❖ Saves Time: ADR is faster than going to trial.
- ❖ Saves Money: Parties can save on court costs, attorney's fees, and witness fees.
- ❖ Control with the parties: Parties choose their ADR process and provider for voluntary ADR.
- ❖ Reduces Stress/Protects Privacy: ADR is done outside the courtroom, in private offices, by phone or remotely. The proceedings remain confidential.
- ❖ It can produce more lasting agreements.
- ❖ It may preserve or improve relationships. This is especially important in conflict involving families in which it is critical to preserve the relationship and foster ongoing communication.



# ADR Disadvantages

- ❖ If the parties do not resolve their dispute through ADR, they may have to pay for ADR, litigation and trial.
- ❖ ADR does not provide a public trial or a decision by a judge or jury.



What are the  
different ADR  
processes?

**Unified Court  
System**

**The Office of  
Alternative  
Dispute  
Resolution**



# Nassau County ADR Programs

Nassau County Family Court  
Mediation Center

Nassau County Surrogate's Court  
Neutral Evaluation Program

Nassau County Blockbuster Settlement Conference Days

Participating Carriers
USAA
IAT
Geico
Starr
State Farm
Travelers
USAA



# Nassau County ADR Programs

Nassau County Family Court  
Mediation Center

Nassau County Surrogate's Court  
Neutral Evaluation Program

Nassau County Blockbuster Settlement Conference Days

Nassau County Commercial  
Division ADR Program

Nassau County Matrimonial Special Master/  
Neutral Evaluation Program

# Nassau County Commercial Division ADR Program

## Qualified cases and referrals

Judicial Referrals and Party Requests; any commercial case.

Cases shall be referred to the ADR Program as early as is practicable.

## Cost and Timing

Free four (4) hour initial ADR session. Subject to full disclosure 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.

If the parties choose to continue the ADR process beyond the initial session, compensation for the mediator shall not exceed \$300 per 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. [under review]

## Mediator Assignment

The parties select an agreed-upon mediator from the Court's Roster within five (5) business days from receipt of the Order of Reference. Within such time, the parties complete and return to the Court and to the selected mediator the Mediation Initiation Form.

If the parties cannot agree on a mediator, they submit two (2) names from each side to the Court for the Court to select from.

# Commercial Division ADR Program

## Order of Reference

### SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

PRESENT: Hon. \_\_\_\_\_  
Justice  
-----X

Index No. \_\_\_\_\_

Plaintiff(s),  
-against-

#### ORDER OF REFERENCE TO COMMERCIAL DIVISION ADR PROGRAM

Defendant(s).  
-----X

- 1) On ☐ CONSENT OF THE PARTIES or by ☐ ORDER OF THE COURT (*check one*) this case is referred to mediation or early neutral evaluation through the ADR Program of the Commercial Division;
- 2) The parties shall select a neutral and jointly execute an ADR Initiation Form, located at <http://www.nycourts.gov/courts/comdiv/nassau.shtml> within five business days of receipt of this Order.
- 3) The parties shall schedule an initial ADR session within 45 days of the date of this Order pursuant to the ADR Program's Rules available at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>.
- 4) All proceedings in this action, including motion practice, shall continue during the ADR process. The following proceedings shall be stayed during the ADR process:  
☐ depositions, ☐ e-discovery, and/or ☐ \_\_\_\_\_  
(*check applicable portions, if any. Strike inapplicable portions.*)
- 5) The parties shall appear for a status conference with the Court on \_\_\_\_\_ at \_\_\_\_\_.

Dated: \_\_\_\_\_

# Commercial Division ADR Program

## ADR Initiation Form

### SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NASSAU

-----X

Index No. \_\_\_\_\_

Plaintiff(s),

**COMMERCIAL DIVISION  
ADR INITIATION FORM**

- against -

Defendant(s).

-----X

1) This case was referred to ADR through the Nassau County Commercial Division's ADR Program (order of Justice \_\_\_\_\_ dated \_\_\_\_\_).

2) Pursuant to Rule 3 of the Nassau County Commercial Division ADR Program's Rules, located at <http://www.nycourts.gov/courts/comdiv/nassau.shtml>, the parties have conferred and have (CHECK APPROPRIATE BOX BELOW):

☐ Selected the following to serve as neutral.

Name \_\_\_\_\_

Address \_\_\_\_\_

Phone \_\_\_\_\_

Email \_\_\_\_\_

☐ Are unable to agree on a neutral and submit the following four (4) names from which the Court may assign a neutral.

Name

Phone

Email

Name

Phone

Email

Name

Phone

Email

Name

Phone

Email

3) For the neutral to run the required conflicts check, counsel for any corporate party must list here or on an attached sheet the names of all corporate parents, subsidiaries or affiliates:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

# Commercial Division ADR Program

## ADR Initiation Form

- 4) Please indicate whether there are  
Motions *sub judice*: ☐ Yes ☐ No      Appeals: ☐ Yes ☐ No

If you indicated yes to either of the foregoing, please contact the Court immediately.

- 5) The attorneys for the parties herein are as follows:

Plaintiff Name		Defendant Name	
Attorney		Attorney	
Phone		Phone	
E-Mail		E-Mail	
Defendant Name		Defendant Name	
Attorney		Attorney	
Phone		Phone	
E-Mail		E-Mail	

- 6) This form shall be completed and returned to the Court and the selected neutral **within 5 business days** from receipt of the Order of Reference. This deadline will not be extended. **The initial ADR session must be conducted within 45 days** from the date of the Order of Reference (see Rule 3 [e]). At least one week before the initial session, each party shall deliver to the neutral a memorandum of not more than three pages (see Rule 3[f]).
- 7) By signing below, the parties and their Counsel, certify that they have read and will comply with the ADR Program Rules of the Nassau County Commercial Division. The parties and their Counsel further understand and agree that the ADR process is confidential and that the neutral shall be immune from suit by any of the parties or other participants in this case because of or based upon the neutral's activities as such in this matter to the extent permitted by law. Parties agree that no attorney-client relationship exists between the neutral and the parties, and the neutral shall not provide legal services to the parties during the process.

\_\_\_\_\_  
Counsel for Plaintiff

\_\_\_\_\_  
Counsel for Defendant

\_\_\_\_\_  
Counsel for Defendant

Date: \_\_\_\_\_

\_\_\_\_\_  
Counsel for Defendant

# Nassau County Matrimonial Special Master / Neutral Evaluation Program

## Qualified cases and referrals

Judicial Referrals of appropriate matrimonial cases. Cases involving domestic violence and where safety is a concern are exempt.

Judge may refer ongoing cases at any time when deemed appropriate for ADR.

## Cost and Timing

Free initial session of up to three (3) hours.

If parties choose to continue beyond the initial session, the Special Master may be compensated as agreed upon in writing, but shall not exceed a rate of \$300 per hour.

## Mediator Assignment

The Program Coordinator randomly selects the names of three Special Master's from the Court's Roster. Within five (5) business days of receiving the Notice of Confirmation from the Program Coordinator listing the three names, the parties shall select one of the three proposed Special Masters, and inform the Program Coordinator of their selection.

If the parties cannot agree, each side shall have the right, within said five (5) business days, to object to one of the selected names. The remaining named Special Master shall serve as the neutral, provided there is no conflict of interest.

# Nassau County Matrimonial Special Master/ Neutral Evaluation Program

## Order of Reference

## Notice of Confirmation

SUPREME COURT: THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: HON. \_\_\_\_\_  
Justice

Plaintiff,

-against-

Defendant.

Index No.:

ORDER OF REFERENCE -  
MATRIMONIAL SPECIAL MASTER/  
NEUTRAL EVALUATION PROGRAM

1. By Order of this Court and/or on consent of the parties, all financial issues are hereby referred to the Matrimonial Special Master/Neutral Evaluation Program (the "Program") for a neutral evaluation to be conducted in accordance with the Program's Procedures.

2. Counsel for the parties shall complete this form and, once it has been so-ordered, the court shall send it to Cathy Reidy, (the "Program Coordinator"), who can be reached at (516) 493-3424 or via e-mail at cshrenke@courts.state.ny.us.

3. The Program Coordinator shall forward to counsel for the parties a Notice of Confirmation with a list of three randomly selected Special Masters/Neutral Evaluators, from which counsel shall jointly select one in accordance with the Program's Procedures. Counsel shall notify the Program Coordinator of the name of the Special Master/Neutral Evaluator selected as provided in the Procedures, and, within 72 hours thereafter, shall together contact the Special Master/Neutral Evaluator listed to schedule the first session. If counsel for the parties cannot agree, each side shall have the right within five (5) business days to object to one of the selected Special Masters/Neutral Evaluators. The remaining Special Master/Neutral Evaluator shall serve as the Special Master/Neutral Evaluator. The Program Coordinator shall provide the Special Master/Neutral Evaluator with a copy of this Order of Reference.

## NOTICE OF CONFIRMATION

\_\_\_\_\_, v. \_\_\_\_\_  
Index No.: \_\_\_\_\_  
Justice Assigned: \_\_\_\_\_

Pursuant to the Order of Reference dated \_\_\_\_\_, wherein Justice \_\_\_\_\_ ordered the parties to attend the Matrimonial Special Master/Neutral Evaluation Program, below are the three (3) randomly selected Special Masters/Neutral Evaluators.

1. Name: \_\_\_\_\_  
Firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_
2. Name: \_\_\_\_\_  
Firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_
3. Name: \_\_\_\_\_  
Firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

Counsel shall jointly select one Special Master/Neutral Evaluator and shall notify the Program Coordinator of the name selected. If counsel for the parties cannot agree, each side shall have the right within five (5) business days to object to one of the selected Special Masters/Neutral Evaluators. The remaining Special Master/Neutral Evaluator shall serve as the Special Master/Neutral Evaluator.

Within seventy two (72) hours after notifying the Program Coordinator, or after counsel have each objected to a Special Master/Neutral Evaluator and the remaining Special Master/Neutral Evaluator has been selected by default, counsel shall, together, contact the

# Nassau County Matrimonial Special Master/ Neutral Evaluation Program

## SFO Selection of Special Master

SUPREME COURT STATE OF NEW YORK  
COUNTY OF NASSAU  
PRESENT: HON.

_____	TRIAL/IAS PART 33
	INDEX NO. :
Plaintiff,	DATE: 1/9/17
-against -	SHORT FORM ORDER
	SELECTION OF
SPECIAL MASTER	
_____	
Defendant.	

WHEREAS, pursuant to the So-Ordered Stipulation dated ....., the parties consented to participate in the Special Masters/Neutral Evaluation Program; and

WHEREAS, the parties were provided an opportunity to jointly choose a Special Master/Neutral Evaluator of the three (3) random Special Masters/Neutral Evaluators provided to them in the Notice of Confirmation dated ..... or to each reject one of the Special Masters/Neutral Evaluators listed in said Notice of Confirmation; it is hereby

ORDERED, that ....., Esq. is hereby appointed as the Special Master/Neutral Evaluator for this matter; and it is further

ORDERED, that counsel shall, together, within five (5) business days of the date of this Order, contact the above named Special Master/Neutral Evaluator to schedule the first session, which shall take place within forty-five (45) days of receiving the Notice of Confirmation.

Dated: January 9, 2017  
Mineola, New York

E N T E R:

\_\_\_\_\_  
HON.,  
J.S.C.



# Nassau County Matrimonial Special Master/ Neutral Evaluation Program

## Report of ADR Neutral

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Plaintiff

Index No. \_\_\_\_\_

- against -

REPORT OF  
ADR NEUTRAL

Defendant

This case was referred to the Special Master Program by order of

Justice \_\_\_\_\_, dated \_\_\_\_\_. In an effort to resolve or narrow  
the dispute, a session was held on \_\_\_\_\_ (and further sessions were held on  
\_\_\_\_\_.)

The result was as follows (please check one):

- ☐ One or more of the parties opted out of the Program.
- ☐ The following party(ies) and/or attorney(s) failed to appear at the initial session:  
\_\_\_\_\_
- ☐ The matter remains unresolved and is ready to proceed in court.
- ☐ The matter remains unresolved in part and is ready to proceed in court.
- ☐ The matter was resolved and a stipulation of settlement and/or stipulation of discontinuance  
is/are submitted herewith.
- ☐ Other (Specify) \_\_\_\_\_

Dated: \_\_\_\_\_

ADR NEUTRAL

NOTE:

No comment should be made hereon as to any substantive aspect of the case, or if  
applicable, the reason why the proceeding failed to resolve the case.

# Court Programs in Progress

## Matrimonial

- Matrimonial Mediation Program
- Court Approved Roster of Matrimonial Mediators
- 90-minutes free initial session; capped fee thereafter

## Surrogate's

- Surrogate's ADR Program (Mediation/ NE)
- Court Approved Roster Highly Experienced
- 90-minutes free initial session

## Torts/ Civil

- Court approved roster of mediators or neutral evaluators
- Free initial session
- Apply if interested through Statewide Universal Mediator Application



# Upcoming Part 147 Trainings

<http://ww2.nycourts.gov/ip/adr/Training.shtml>

The Office of ADR  
webpage

## November Online Basic Mediation Training

- \*Part 146 Approved for 24 hours of Initial Mediation
- Location: Zoom platform
- Dates: November 7, 8, 14, 15, 21, and 22, 2020
- Three consecutive Saturdays and Sundays: option for a morning or an afternoon group
- Morning Group: 8:30am-1:00 pm each day; Afternoon Group: 2:30-7:00 pm each day
- Trainer: Elena Sabora To register please go to Elena Sabora's training registration page

## Elder / Adult Family Mediation Training

- \*Part 146 Approved for 16 hours of Additional Mediation Training
- Location: Online (MA)
- Dates: December 2-19, 2020 (Wednesday and Saturday afternoons)
- Elder Decisions®, a division of Agreement Resources, LLC with Arline Kardasis and Crystal Thorpe
- For more information or to register for this program, please visit our website or call (617) 621-7009 x29.

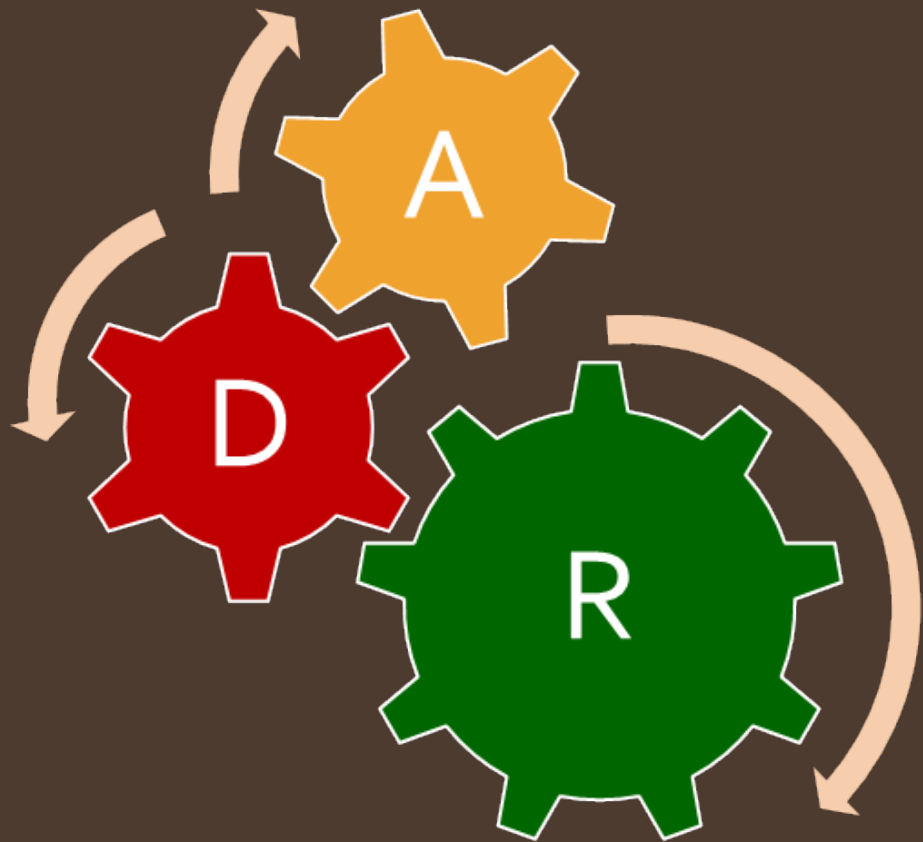
2021

## Online Basic Mediation Training

- \*Part 146 Approved for 24 hours of Initial Mediation Training
- With Elena Sabora
- Location: Zoom
- Dates: Three consecutive Tuesdays and Wednesdays (Tuesday, January 5; Wednesday, January 6; Tuesday, January 12; Wednesday, January 13; Tuesday, January 19; Wednesday, January 20); 8:30am-1:00 pm each day
- To register, please use this link: <https://www.elenasabora.com/january-2021-basic-mediation-training>

## 24-Hour Basic Mediation Training

- \*Part 146 Approved for 24 hours of Initial Mediation Training
- Organization: Stalder Mediation
- Location: (Zoom platform)
- Dates: January 25, 26, 27 and 28, 2021
- Trainer: Sequoia Stalder
- Contact: [julia@staldermediation.com](mailto:julia@staldermediation.com) or (917) 580-2253



Yvonne R. Marin, Esq.  
Alternative Dispute Resolution  
Coordinator, 10th JD – Nassau County

Phone: 516-493-3330

E~mail: [ymarin@courts.gov](mailto:ymarin@courts.gov)

**Rachel Harris: St. John's Law School**

[Highlighting Key New York Settlements](#) - A list and brief summary of notable New York settlements can be found on this website (categorized here by year), reflect how tort issues overlap with other areas of law (such as employment).