

SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY
COMMERCIAL DIVISION



GUIDE TO THE
ALTERNATIVE DISPUTE
RESOLUTION PROGRAM

HON. SHERRY KLEIN HEITLER
ADMINISTRATIVE JUDGE

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THE COMMERCIAL DIVISION ALTERNATIVE DISPUTE RESOLUTION PROGRAM

The Alternative Dispute Resolution Program of the New York County Commercial Division (“the Program”) is governed by rules issued by the Administrative Judge of the Civil Branch of the Supreme Court in the First Judicial District (“the Rules”). This Guide explains the Program’s operations. The Rules, the names of the mediators in the Program and biographical information about them, as well as other information, are available on the New York County pages of the Commercial Division’s website at www.nycourts.gov/comdiv.

I ADR IN THE DIVISION -- AN OVERVIEW

Alternative dispute resolution (“ADR”) refers to a variety of mechanisms for the resolution of legal disputes other than by litigation. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be possible in the normal course of litigation. The principal forms of ADR are the following:

- 1) **Mediation** - A process in which a Neutral attempts to facilitate a settlement of a dispute by conferring informally with the parties, jointly and in separate “caucuses,” - and focusing upon practical concerns and needs as well as the merits of each side’s position on the issues in the case.
- 2) **Neutral Evaluation** - A process in which an expert Neutral receives a presentation about the merits from each side and attempts to evaluate the presentations and predict how a court would decide the matter.
- 3) **Arbitration** - A process in which the parties present evidence to a Neutral or panel of Neutrals, who then issue a decision determining the merits of the case. An arbitration may be binding or advisory, depending upon the agreement of the parties. If binding, the decision of the arbitrator(s) ends the case, subject only to circumscribed review pursuant to Article 75 of the Civil Practice Law and Rules.

Commercial cases may be referred to the Program by a Justice of the Division, the Administrative Judge, or a non-Commercial Division Justice who is authorized by the Administrative Judge to make referrals. The Program is mandatory. Volume permitting, cases can also be referred on consent of the parties. Parties ordered into the court-annexed Program may use its resources or pursue ADR through a private service if they prefer. Parties who take part in the Program may choose the form of ADR they wish to pursue. Almost all cases in the Program, though, have been mediations, mediation being the default procedure; for that reason, the ADR process is hereafter referred to as mediation and the neutral assigned as the Mediator. The Program is overseen by the Clerk-in-Charge of the Commercial Division Support Office. Administration of the Program is coordinated by an ADR Coordinator. These and other features of the Program are explained hereafter.

II INITIATING THE ADR PROCESS

A. THE REFERRAL OF A CASE

Workload permitting, the Program will accept referrals on consent from parties in any eligible case as defined in the Rules. Parties should advise the assigned Justice of their desire to participate in the Program either at a conference or by presentation of a stipulation. After joinder of issue in other cases, any party anxious to proceed to ADR is encouraged to file a Request for Judicial Intervention and a request for a preliminary conference with the Commercial Division Support Office and to raise the ADR question at the conference. The Rules empower the Court, if it determines that ADR might be useful, to order the parties to proceed to ADR. The experience of those who have taken part in the Program confirms that cases that are perceived by the parties to be incapable of settlement and which might not be brought into ADR on a voluntary basis in fact often do settle, to the satisfaction of all concerned.

The Justices will direct ADR at the earliest practical point in a case; as a general rule, the earlier a case is referred, the better. Discovery, of course, is a source of considerable delay in litigation and can cause expense and frustration for litigants. The Court will attempt whenever practicable to promote resolution by ADR before the discovery wheels begin to turn. On the other hand, the Court recognizes that some cases may require focused discovery before they realistically can be resolved by ADR; it may often be possible, though, for that discovery to take place most efficiently and expeditiously under the guidance of the Mediator, on consent of the parties, subject, however, to any disclosure order previously issued by the Justice assigned. The Rules encourage Mediators and parties to pursue just such information exchange. Unless otherwise directed by the assigned Justice in a particular case, discovery will not be stayed during the ADR process.

Whenever a Justice decides to direct ADR, whether on consent of the parties or without it, he or she will sign an Order of Reference.

Litigants whose case is referred to the Program may pursue ADR through the good offices of an outside individual selected by the parties or a private ADR service. In all cases referred to the Program, all deadlines and confidentiality provisions in the Court's Rules will be binding on all parties who proceed to ADR, whether they do so inside or outside the Program. In order to avoid later controversy, other terms of a private retention should be put in writing before the process begins. If the parties elect to proceed to ADR outside the Court, they should so advise the Program Coordinator in the Commercial Division Support Office immediately after the signing of the Order of Reference. The Office will closely monitor the progress of the ADR proceeding to ensure compliance with the Order of Reference.

B. CONFIDENTIALITY AND ETHICAL STANDARDS FOR MEDIATORS

The Rules provide for confidentiality of the ADR process (binding arbitration apart). With narrow exceptions, no use may be made, whether in that case or any other case, of the information generated or communicated in the process by, between, or among the parties, counsel, or the Mediator

for any purpose other than resolution of the ADR proceeding. Nothing about the substance of the proceeding (e.g., the nature or the strengths of the parties' cases, statements made by parties, counsel, or the Mediator, whose "fault" it was that the parties could not agree to settle) will be revealed to the assigned Justice by the Mediator or the Program Coordinator. The Mediator will communicate only with the Program Coordinator. The Mediator will only discuss necessary administrative details with the Coordinator and at the end report to the Administration the outcome of the process (success in whole or in part, failure, non-compliance with the Rules). The Program Coordinator will convey that information to the assigned Justice (again, only success, failure, or non-compliance). Thus, if the case remains alive, the parties can be sure that there will be no risk of the Justice's receiving information revealed during the mediation.

The Rules provide that the prospective Mediator shall at the outset make a review for possible conflicts of interest and shall disqualify himself/herself if unable to function in a completely fair, impartial, objective, and disinterested manner. This review shall include a check with respect to subsidiaries of parties and other entities related thereto. The Mediator shall also avoid the appearance of a conflict. The Mediator is obliged to disclose all potentially disqualifying facts to the parties and, where such facts exist, shall not serve unless the parties consent. The Mediator shall adhere to ethical principles set out in the Division's Standards of Conduct for Mediators, which are posted on the website.

C. HOW THE MEDIATION BEGINS

1. First Steps

After the Justice signs an Order of Reference, it will usually be delivered to the Coordinator in the Commercial Division Support Office (Room 148) by counsel, who will have been directed to appear there by the Justice. The Coordinator will be able to answer at that time any questions counsel may have. The Coordinator will make available to counsel the Initiation Form (which is posted on the website). If the Justice does not refer counsel to Room 148 in person, the Coordinator will fax to counsel as soon as the Order of Reference reaches the Office a copy of the Order and the Initiation Form.

The Initiation Form requires the parties to provide a description of the case, identifying information about counsel, and a list of entities related to corporate parties so that the Mediator can conduct a conflicts check. If not completed in person in Room 148, the Form must be faxed to the Coordinator within 24 hours of its transmission. It is important that counsel adhere to this deadline, and all others, so that the mediation process can proceed efficiently and quickly.

2. Selection of the Mediator

In order to join the Division's Panel of Mediators, a person must have relevant professional experience and training in mediation. Specifically, mediators must be (i) attorneys who have had a minimum of ten years of experience in the practice of commercial law, transactional or in litigation; or (ii) accountants or business professionals with a comparable level of experience. In addition, all such persons must have had the training in mediation techniques and the mediation process required by Part

146 of the Rules of the Chief Administrator, as well as the recent experience required thereby.¹

Within five business days from completion and submission of the Initiation Form, the Program Coordinator will assign a Mediator to the case. The Coordinator will endeavor to assign Mediators to cases broadly from throughout the Panel. However, the Coordinator will not follow a strict alphabetical approach to assignment. Administrative requirements, including the need to designate a Mediator quickly, limitations on the availability of Mediators to handle a mediation within the relevant deadline under the ADR Rules (45 days), the occasional need to designate a Mediator with special expertise (e.g., in construction law), and similar factors preclude the Coordinator from following a rigid assignment process.

The Coordinator will send to counsel by e-mail within the five-day period the name of a Mediator who has been designated to handle the case. Counsel shall have five business days from such notification within which to choose another Mediator if they wish to do so. Counsel must contact the prospective substitute Mediator directly and make arrangements with that person. This person can be a member of the ADR Panel (biographical information on each Panel member is posted on the New York County Commercial Division webpages (www.nycourts.gov/comdiv)) or someone else, but in either event the mediation must be completed within the 45-day deadline as specified in the Rules. Counsel must notify the Coordinator within the five-day period if a substitute has been designated. Otherwise, the person designated by the Coordinator shall be the Mediator for that case and the 45-day period will have begun effective as of the confirmation date (the date of transmission of confirmation of the designation of a Mediator).

3. Initial Session; Compensation of Mediator

All parties are required to appear at the initial mediation session, which shall last for a total of four hours. (If the Mediator directs, the first four hours of the proceeding may be divided into more than one session.) There will be no charge to the parties by the Mediator for the first four hours of the mediation proceeding. Time spent arranging or preparing therefor will not be included in the calculation of the four hours. At the conclusion of the four hours, any party may bring the mediation to an end. If all parties agree to continue, the mediation shall proceed, in accordance with the deadlines set forth in the Rules. If the mediation continues, the parties shall compensate the Mediator for his or her time from that point forward at the rate of \$300 per hour. Unless otherwise agreed by the parties, the charge for compensation shall be divided equally among the parties.

III THE MEDIATION PROCESS

A. BEGINNING THE MEDIATION PROCESS: COMMUNICATING WITH THE MEDIATOR

As soon as a Mediator has been confirmed for a case, counsel shall contact the Mediator. Typically, the Mediator will wish to schedule a conference call with counsel to make all arrangements

¹ Neutral evaluators must have completed different training pursuant to Part 146.

necessary for the mediation. In order to ensure that the mediation proceeds in accordance with the deadlines set forth in the Rules, it is essential that counsel and the Mediator conduct any necessary preliminary discussions promptly and set an early date for the mediation that will be convenient for all.

The ADR Rules require that each party submit copies of its pleadings and a memorandum (ten pages maximum) directly to the Mediator at least ten days prior to the initial mediation session. This memorandum should include a statement as to the facts and issues that are not in dispute, the party's views about liability and damages, and any opinions the party may have about the terms on which the matter might be resolved. This memorandum shall not be served upon the other side (unless otherwise agreed) nor filed in court, shall be held in confidence by the Mediator, shall be read by no one else, and shall be destroyed by the Mediator upon completion of the process.

B. DEADLINES

The initial mediation session must take place within 30 days of the Confirmation Date (the date of notification by the Program Coordinator that a specific Mediator is available and willing to serve in the matter). Further ADR sessions may follow if needed and agreed upon. The entire ADR proceeding shall be completed within 45 days from the Confirmation Date, during which other proceedings in the case (discovery, motion practice, etc.) are usually not stayed. The Rules provide that the mediation may continue for an additional 30 days beyond the 45 days if the parties and the Mediator agree that that would be beneficial. The mediation may continue beyond the 75-day period only if specifically authorized by the Justice assigned.

As noted, the initial mediation session is mandatory. Failure of parties or counsel to respond to communications from the Mediator in a reasonably timely manner, to participate in arrangements for the conference call or the mediation sessions, to appear at a mandatory session, or otherwise to comply with the Rules, will require the Mediator to submit a report so stating to the Program Administration, which will advise the assigned Justice, and this may result in the imposition of sanctions. If at the conclusion of the mandatory four-hour session (or sessions) the ADR process is terminated, no report will be made to the court as to who ended the ADR process unless there has been non-compliance with the Rules.

If a party is represented by counsel, counsel must attend all mediation sessions and must be fully informed about all aspects of the case. In addition, unless exempted by the Mediator for good cause (e.g., residence of a defendant in a foreign country in a matter involving a modest sum), each party must attend all sessions in person or, in cases involving corporations or other entities, by a representative (or more than one if necessary) who is both in possession of all pertinent facts and empowered to settle the case without consultation. The Rules provide that the Mediator may require the presence of an insurance carrier for a party where that is needed for an effective mediation. Experience has demonstrated that the presence of the decision-makers with knowledge of the facts very greatly increases the likelihood of a successful outcome for mediation.

C. FOLLOW-UP ON ADR SESSIONS

The Program Coordinator will closely monitor the ADR process to ensure expedition and

compliance with the deadlines. The Mediator and counsel for the parties can expect to receive communications from the Coordinator regarding the status of the case. In all cases in which ADR continues beyond the 45-day period, the Program Administration will very closely monitor progress. Even in the absence of a stay, it is vital that the ADR proceeding, should it ultimately prove unsuccessful, not cause prejudice to any party. The Program Administration will do all it can to ensure that that does not occur.

D. REPORT OF THE NEUTRAL

The Mediator will report the outcome of the mediation to the Coordinator. This report is due as soon as possible after the completion of the mediation and in any event within seven days thereof.

The Program Coordinator will report the outcome to the assigned Justice upon receipt of the Mediator's report. If the mediation has succeeded in completely resolving the case, the case will be marked disposed. If the mediation has succeeded only in part or not at all, the parties shall contact the Part of the assigned Justice for a conference concerning further proceedings in the case or other instructions.

IV WHERE THE MEDIATION DOES NOT PRODUCE A SETTLEMENT

A. BINDING ARBITRATION AFTER MEDIATION

Where a dispute is not resolved in mediation, parties may conclude that it would be in their interests to submit the dispute to binding arbitration before a Program Neutral. The Division will accommodate such parties as follows. Upon the written stipulation of the parties to undergo this procedure, the Division will make a Neutral or panel of Neutrals (a maximum of three), as the parties agree, available to serve as arbitrators for a binding arbitration process. The parties must submit with the stipulation the names of three prospective Neutrals from the Panel for each arbitrator position. If the parties are unable to agree, the Program Coordinator will make the selection.² The arbitration shall be completed within 45 days after the selection of the arbitrator(s) is confirmed. An award must be rendered in writing within seven days after the completion of the proceeding. The Neutral shall inform the Program Coordinator of the issuance of the award. Parties who agree to binding arbitration after mediation will be required to pay each Neutral a fee for his/her services as arbitrator. The rate for each arbitrator in these circumstances will be \$ 350 per hour, which will cover and apply to time spent reviewing materials in preparation for arbitration hearings, in the hearings themselves, and rendering an award. Even with such a fee, the post-mediation arbitration may prove less expensive than a trial and have other advantages as well. The Program itself will

² The arbitration cannot proceed before the Mediator who conducted the mediation. The reason for this rule is that there otherwise might arise an appearance of unfairness even when parties consent because the Mediator may have received information in an *ex parte* caucus during the mediation process that might unintentionally affect the judgment in the arbitration. Such caucuses have a major role in mediation, but no place in binding arbitration. This limitation does not apply if no *ex parte* information has been received as of the time the choice for arbitration is made.

impose no charge upon the parties for this service.

Upon completion of a mediation process in the Program in accordance with the Rules, the parties are free to pursue an arbitration outside the Program if they wish.

B. SECOND MEDIATION

If a reference to the Program does not result in a complete resolution of all outstanding issues, then, as indicated, the case will be remanded to the assigned Justice. Later in the case the Justice may determine that the matter is now likely to settle if returned to mediation and may issue another mandatory Order of Reference, or the parties may consent to a second reference. The parties may choose the same Mediator, if he/she is available. Any such referral shall be directed at as early a point as is practicable. The procedures described above will apply to second referrals (although compensation of the Mediator shall be made from the outset and at a different rate as set forth in the rules).

CONCLUSION

Further information about the ADR Program may be obtained from the Program Coordinator in the Commercial Division Support Office. Comments and suggestions may be sent to the Clerk-in-Charge of the Commercial Division Support Office or the Coordinator.

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