

SUPREME COURT – NASSAU COUNTY

Rules of the Civil Case Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than a trial 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, however parties are encouraged to determine the most appropriate form of dispute resolution for their case.

Mediation is a confidential dispute resolution process in which a neutral third party – the Mediator - helps parties identify and narrow issues, clarify perceptions and explore options for a mutually acceptable outcome as to some or all issues. In this process, parties have an opportunity to communicate with each other, focus on what is important to them, and to come up with individually tailored solutions. During mediation, each party relates his or her understanding of the dispute. The Mediator may ask the parties clarifying questions. The Mediator will not give legal advice or force solutions on the parties.

Mediation often involves non-legal as well as legal issues. Represented parties are strongly encouraged to discuss the proposed mediation process with their attorneys. Parties may choose to attend sessions without counsel, if all participants agree. Although the mediation process can, and often does, result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves. 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 Court will also offer neutral evaluation as an ADR option. Neutral evaluation is a confidential, non-binding process in which a neutral third party with expertise in the subject matter relating to the dispute hears abbreviated case presentations by the parties and counsel, provides an informal assessment of the strengths and weaknesses of the arguments and may offer an evaluation of likely court outcomes in an effort to promote settlement. Their assessments and opinions may help parties to analyze the case, facilitate discussion and generate a settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

The following Rules shall govern cases sent to mediation and neutral evaluation by Justices of the Nassau County Supreme Court, 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, at their own expense, in lieu of taking part in this Program. After a case has been submitted to the Program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Supreme Court of the State of New York, Nassau County, operates the Civil Case Alternative Dispute Resolution Program ("the Program"). Cases qualifying for referral to the Program include all civil cases that are not already included in a separate ADR program within this District (i.e. commercial and matrimonial). Personal injuries matters are particularly suitable for the Program.

Rule 2. The Roster:

- (a) The Administrative Judge shall establish and maintain a Civil Case ADR Program Roster of neutral evaluators and mediators ("the Roster") who shall possess the qualifications and training required by Part 146 of the Rules of the Chief Administrative Judge (see <http://www.nycourts.gov/rules/chiefadmin/146.shtml>) as either a mediator or neutral evaluator.
- (b) In order to be eligible to serve on the Program's Roster, a person shall possess the following qualifications as either a Neutral Evaluator or Mediator, and such other requirements as may hereafter be promulgated:
 - 1) Neutral evaluator. Neutral evaluators must have successfully completed at least six hours of approved training in procedural and ethical matters related to neutral evaluation and be: (i) a lawyer admitted to practice law who has at least seven (7) years of substantial experience in the area of Civil Practice; or (ii) an individual who has served at least five years as a judge with substantial experience in the specific subject area of the cases that will be referred to them.
 - 2) Mediator. Mediators must have successfully completed at least 40 hours of mediation in a training program sponsored or recognized by the New York State Office of Court Administration ("OCA"), as follows: at least 24 hours of training in basic mediation skills and techniques; and at least 16 hours of additional training in advance mediation techniques. Mediators must also have recent experience mediating Civil cases.
- (c) Every member of the Roster, and any other person, who serves as a mediator pursuant to these Rules, shall comply with the Model Standards of Conduct for Mediators (adopted and approved by the AAA; ABA; and ACR).
- (d) Every member of the Roster shall complete at least six hours of additional approved training relevant to their respective practice areas every two years in compliance with the Continuing Education requirement of Part 146 of the Rules of the Chief Administrative Judge.
- (e) Continuing presence on the Roster is subject to review by the District Administrative Judge. Every member of the Roster serves at the pleasure of the District Administrative Judge, who may terminate a designation to the Roster at any time.

- (f) The Roster will be available through the Nassau County Supreme Court’s ADR website.
 - (g) The 10th Judicial District—Nassau County serves a wide variety of litigants, including persons of varying age, race, ethnicity, national origin, gender, sexual orientation, physical or mental ability, religion, socioeconomic and family status. Neutrals with a wide variety of cultural and life experiences enrich the alternate dispute resolution process by bringing diverse perspectives to resolving disputes. To better serve our District’s population and instill confidence in participants in the ADR process, Nassau County is committed to attracting and retaining court-approved neutrals who represent a range of personal and professional backgrounds. Qualified applicants of diverse backgrounds and experiences are encouraged to apply for admission to the Roster by submitting a NYS UCS Office of ADR Application to Mediate for the NYS Trial Courts available on the NYS UCS ADR website (<https://ww2.nycourts.gov/ip/adr/Application.shtml>), and a resume.
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Rule 3. Procedure:

- (a) **Referrals.** Cases shall be referred to mediation or neutral evaluation as early as is practicable and appropriate. If the assigned Justice 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 assigned Justice shall issue an Order of Reference requiring that the case proceed to mediation or neutral evaluation in accordance with these Program rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the assigned Justice.
- (b) **Order of Reference.** The Order of References shall direct that within five (5) business days from receipt of the Order of Reference, the parties shall confer and determine whether they choose to mediate with either an outside ADR provider or a party-selected neutral from the Roster to be paid by the parties, or a court-assigned neutral from the Program’s Roster. During this time, the parties shall also execute and submit to the Court the “Civil Case ADR Program Assignment Form” (hereinafter “Assignment Form”), which can be obtained from the Nassau County Supreme Court’s ADR website <https://ww2.nycourts.gov/courts/10jd/nassau/ADR.shtml>. The Order of Reference shall establish a date upon which the parties are to return to Court.
- (c) **Assignment of Neutral.** If the parties do not elect to use their own neutral as set forth in Subdivision (d) of this Rule, then within three (3) days of receipt of the parties’ executed Assignment Form the Court or its designee shall assign a neutral or Co-Mediators from the Roster and provide the parties with a Court Assignment of Neutral form. Within five (5) business day of the time a neutral is either agreed upon by the parties or assigned by the Court, the parties shall jointly contact the neutral to schedule an initial session. Counsel shall provide the neutral with copies of the Order of Reference and Assignment Form.
- (d) **Party-Selected Neutrals.** Parties may select their own mediator, whether they are on the Court’s Roster or not. If the parties elect to use a party-selected neutral they shall include on the Assignment Form the name and contact information of the neutral selected and the date of the first session, which date shall be no more than forty-five (45) calendar days from the date of the

Order of Reference. A Party-Selected Neutral shall not be required to, but may agree to, provide the initial ADR session without compensation.

- (e) **Substitution of Neutral.** Any neutral selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below. Should the assigned neutral be unable to serve as the neutral, due to a conflict of interest or other circumstances, the parties shall promptly request a substitute neutral. The substitute neutral shall be assigned by the Court or the Court's designee and shall be bound by all the provisions of the Order of Reference, including providing the first ninety (90) minutes of the initial ADR session without compensation.
- (f) **Initial ADR Session.** A referral to mediation or neutral evaluation under the Program consists of, but is not limited to, a free ninety (90) minute initial mediation session. The initial ADR session must be conducted within forty-five (45) calendar 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 neutral shall contact the Court and, if necessary, intervention will occur to expedite the process. If the case is not resolved at the conclusion of the initial session, the parties and neutral may agree to continue the ADR process. Neutral compensation for any additional time beyond the initial ADR session is governed by Rule 6, below.
- (g) **Pre-ADR Conference Call.** The neutral may initially request a conference call with both parties regarding any preliminary matters. If the neutral and the parties have agreed to proceed by a remote virtual online platform, the neutral shall, prior to the initial session, discuss the following with the parties: privacy expectations; confidentiality; prohibition on recording; participants' ability to access and use virtual technology, including the availability of a secure internet connection; whether the participant needs an interpreter or other accommodation; safety concerns; any other requests by participants, including a participants' request to have a support person present for the session (to be discussed and agreed to by the other participant).
- (h) **Party Participation.** Unless exempted by the neutral for good cause, every party, including counsel must attend and participate in good faith in the initial ADR session either in person or remotely if agreed upon in advance, 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 ADR process shall be fully familiar with the action and authorized to settle. If an insurance carrier is involved, a representative with full authority to negotiate a settlement must appear or be available by phone at the time of any ADR session. Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for an ADR session in a timely manner, appear at any scheduled session or otherwise unreasonably fails to comply with these Rules, the neutral may advise the Court and the Court may impose sanctions.
- (i) **Pre-ADR Statement.** Unless otherwise directed by the neutral, at least seven (7) business days before the initial session, counsel for each party shall deliver directly to the neutral a concise confidential statement of not more than three pages (12 point font, doubled spaced) setting forth: the essential issues presented; relevant facts, including injuries; assessment of value and

applicable law, if any; the status of settlement negotiations; why the parties are at an impasse; suggestions as to how the matter might be resolved; and any other information concerning the litigation necessary for the effective negotiation and resolution of the issues. Unless otherwise specified by the party, the pre-ADR Statement shall not be served on the adversary or filed in court, shall be read only by the neutral, and shall be destroyed by the neutral immediately upon completion of the proceeding. *Pro se* litigants shall not be required to provide a pre-ADR Statement. Instead, they shall speak directly to the neutral to answer any pre-ADR questions the neutral might have. Such information shall be given to the neutral and treated with the same confidentiality as a pre-ADR Statement.

- (j) **Pre-ADR Disclosure.** If requested, counsel must be prepared to provide to the assigned neutral any materials directly relevant to the issues of liability and damages. Counsel are encouraged to provide to the neutral and exchange with opposing Counsel, if not previously exchanged, any documents they believe would be helpful in resolving the dispute. Such documents may include:
1. Documents sufficient to establish the subject contract, statutory cause of action (including the alleged violation), or the relationship between the parties;
 2. Preliminary evaluation of damages, including for counterclaims, crossclaims, and third-party actions;
 3. Proof of any insurance (including excess) available to satisfy any cause of action, as well as proof of any reservation of rights or disclaimer of coverage;
 4. Documents sufficient to show any dispositive affirmative defense;
 5. Plaintiff's medical records and examination reports;
 6. Bills of Particulars;
 7. Relevant photographs, video recordings or accident reports;
- (k) **Conclusion of ADR.** Within seven (7) business days after the ADR process has concluded – whether by agreement, or the refusal of one or more parties to continue – the neutral shall complete the Confidential Report of ADR Neutral indicating settlement or lack thereof and transmit the same, along with any written agreement, to the Court and ADR Coordinator. If the ADR process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the assigned Justice.

At the end of an ADR initial session mandated by Subdivision (f) of this Rule, any party or the neutral may terminate the ADR process. If the ADR process has been terminated by one party only, the identity of that party shall not be reported.

Rule 4. Confidentiality:

- (a) The ADR process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the neutral in connection with the proceeding - as well as any communications made by the neutral, parties or their counsel, for, during, or in connection with the ADR process - shall be kept in confidence by the neutral, the parties and any individual present

during the ADR process, and shall not be summarized, described, reported or submitted to the Court by the neutral or any individual present during the ADR process. No party to the ADR process shall, during the action referred to the ADR process or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR process, or seek to compel the testimony of any other party concerning the substance of the ADR process. Any settlement, in whole or in part, reached during the ADR process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the New York Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the ADR process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 3 [j] herein).

- (b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the neutral or any individual present during the ADR process to testify in any legal proceeding concerning the content of the ADR 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 neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or reasonable sums lost by the neutral 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 neutral and the neutral may do the same with respect to any such conduct engaged in by counsel to a party.
- (c) Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following circumstances:
 - 1) Attendance: Whether the parties and their counsel attended the initial ADR session will be reported to the Program Coordinator who may notify the Court.
 - 2) Session Information: The neutral may report to the Court whether the parties are requesting additional ADR sessions as well as the date of any ADR session and whether the parties reached partial, complete, or no agreement on the issues.
 - 3) Waiver: Parties to the ADR session and the neutral agree in writing to waive confidentiality. The waiver must specify the individual communication(s) and writing that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure. All waivers shall be in writing or on the record. Nothing herein shall be construed to require a neutral to appear in any court.
 - 4) Written Agreement: A writing signed by all parties embodying a negotiated agreement submitted to the court for review. Only those agreements that have become court orders

or decrees may be admissible in any present or future judicial or administrative proceeding.

- 5) Threats of Imminent, Serious Harm: If communications or information constitute a credible threat of serious and imminent harm to any person or entity, the appropriate authorities and/or the potential endangered person shall be notified.
- 6) Allegations of Child Abuse or Neglect: 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 required pursuant to Social Services Law § 413, appropriate authorities may be notified.
- 7) Mediation Survey: Mediation surveys that elicit participant satisfaction with the mediation process may be shared with the local ADR Coordinator or Administrative Judge. These surveys may be shared to evaluate the program, to determine whether to approve a neutral to join or remain on a roster, to counsel a neutral, if necessary, or to remove a neutral from a roster.
- 8) Unprofessional Conduct: A party, counsel to a party, or a neutral, may report unprofessional conduct to an appropriate disciplinary body or to the local ADR coordinator.
- 9) Collection of Fees: The neutral may make general references to the fact of ADR services rendered in any action to collect an unpaid authorized fee for services performed under local court rules.

Rule 5. Immunity of the Neutral:

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 that capacity to the extent permitted by law.

Should a party attempt in any legal action to compel the testimony of the neutral concerning the substance of an ADR session, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or the reasonable value of time spent by the neutral in representing himself or herself in connection therewith.

Rule 6. Compensation:

- (a) **Initial Session.** Parties shall not be required to compensate the Neutral assigned by the Court from the Program Roster for services rendered during the ninety (90) minute initial session, or for time spent in preparation for the initial session. Either prior to or at the beginning of the initial ADR session, the assigned neutral shall disclose to the parties either in writing or verbally the

specific time at which the non-compensable ninety (90) minutes of the initial ADR session will conclude and advise that continuation beyond that time will be billed by the neutral at the agreed upon rate against those parties who continue ADR beyond the initial ninety (90) minute session.

- (b) **Amount of Compensation.** Should the parties agree to continue beyond the Initial Session or to schedule additional sessions with the court-assigned Neutral, the court-assigned Neutral shall be entitled to compensation for time spent conducting any mediation session that follows the initial session and time spent reviewing materials submitted by the parties for purpose of subsequent ADR sessions. Should the parties choose to continue beyond the initial session, a neutral shall be compensated at a rate agreed upon between the neutral and parties, which shall not exceed a rate of \$450 per hour. A written agreement setting forth the neutral's rate to be charge for compensable time beyond the initial session shall be executed by the parties prior to the start of the initial session and a copy shall be provided to the parties. Neutrals on the Program's Roster are strongly encouraged to work on a sliding fee scale taking into account a party's financial circumstances.
- (c) **Continuing or Terminating ADR.** At the expiration of the first ninety (90) minutes of the initial session as previously defined, any party may elect not to continue with ADR, which decision must be immediately communicated orally or in writing to the neutral and all parties. In such situation, despite the fact that one or more parties have opted out of ADR, ADR can continue as to those parties desiring to continue, to the extent that the ADR can be meaningful without participation by the party or parties that opted out. The parties shall promptly advise the referring Justice of the date of any continuing ADR session that is scheduled beyond the next scheduled Court date.
- (d) **Allocation of Compensation.** All neutral fees and expenses beyond the initial session shall be split evenly among the parties who continue ADR beyond the initial ninety (90) minute session, unless otherwise agreed upon in writing.
- (e) **Agreement of the Neutral and Parties.** Notwithstanding the foregoing, the neutral and the parties may agree upon a rate in excess of the rate for services set forth herein, based upon factors such as the complexity of the case, the number of parties involved, and the experience of the neutral, and may also agree to compensate the neutral for preparation time. All such agreements shall be in writing prior to the initial session.
- (f) **Co-Mediation.** The presence of more than one appointed neutral shall not increase the cost of the mediation to the parties. When a case is co-mediated by two appointed Roster Neutrals, the neutrals shall share the agreed hourly rate for services beyond the initial ADR session.

Rule 7. Stay of Proceedings:

- (a) Unless otherwise directed by the Justice assigned, referral to an ADR process 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 make a request for a stay of any proceedings to the referring Justice. Regardless of whether a stay is granted by the referring Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the neutral 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 [f]) but the parties and the neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward. However, the ADR 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:

- (a) **Conflict Check.** In order to avoid conflicts of interest, any person tentatively assigned to serve as a neutral 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. Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate. The neutral shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the neutral, including a financial or personal interest in the outcome, and an existing or past relationship with a party or their attorney or foreseeable participant in the ADR session. The neutral shall also avoid an appearance of a conflict of interest.
- (b) **Disclosure.** The neutral shall disqualify him or herself if the neutral would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. In the event that any potentially disqualifying facts should be discovered, the neutral shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that neutral in writing, the neutral shall decline the assignment and another neutral shall be assigned in a manner consistent with Rule 3.

Rule 9. Neutral Communication with Referring Justice:

The neutral shall submit a Confidential Report of ADR Neutral, located at <https://nycourts.gov/legacypdfs/courts/10jd/nassau/pdf/ADR/General/Confidential-Reportof-ADR-Neutral-Nassau.pdf> , to the referring Justice and ADR Coordinator within five (5) business days of the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. If the parties have utilized a party-selected neutral, within 24-hours of completion of the ADR session(s), the parties shall advise the referring Justice and ADR Coordinator of any settlement reached during ADR. The neutral may communicate with the referring Justice or the referring 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 neutral shall not reveal to the Court which party brought the proceeding to an end.

Rule 10. Further ADR:

- (a) While early attempts at alternative dispute resolution 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 assigned Justice may in his or her discretion issue an order directing subsequent referrals to the Program.
 - (b) Any case subsequently referred to the Program shall proceed in accordance with these Rules. For example, the parties shall not compensate the neutral for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order of Reference to the Program.
 - (c) Nothing in this Rule shall prohibit the parties from proceeding to mediation, neutral evaluation, arbitration, or another ADR process, without Order of the Court, and at their own expense.
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Rule 11. Administration and Assessment of Program:

The Program shall be supervised by the Administrative Judge of the Tenth Judicial District – Nassau County. The Program contact is Daniel Merker, Esq., ADR Coordinator for the 10th Judicial District, Nassau County, dmerker@nycourts.gov.

To assist in the continued development of the Program, we ask the parties and counsel, if applicable, complete a Post-Mediation Survey within fifteen (15) business days after the final ADR session. The Post-Mediation Survey may be easily completed and submitted online at:

<https://mediationsurvey.questionpro.com/?custom1=20>

Once submitted, the online survey is automatically routed to the Nassau County ADR Coordinator. Neutrals are encouraged to share the survey link with the parties via email or by inserting it into the chat feature at the end of a virtual ADR session.

**NEW YORK STATE SUPREME COURT, CIVIL BRANCH
10TH JUDICIAL DISTRICT, NASSAU COUNTY
Effective date: March 1, 2024**