



The Basics of Part 146 Court-Annexed ADR

April 22, 2021 – NYCLA Civil Trial Practice Institute (Day 1)

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Part 146: What Is It?

“Part 146 is a rule of the Chief Administrative Judge that establishes qualifications and training for mediators and neutral evaluators who serve on court rosters throughout New York State.”

A Part 146 mediator who is on a court roster must have completed a minimum of 40 hours of mediation training, 24 hours of which must be in “basic training” and the other 16 in subject-specific mediation techniques, as well as recent experience mediating cases. Part 146 neutrals must have completed at least 6 hours of neutral evaluation, be lawyers admitted to practice law for 5 years, and have 5 years of case-specific experience in the cases they are assigned to evaluate.

Source: New York State Unified Court System, *Part 146 Frequently Asked Questions (FAQ's)* (http://ww2.nycourts.gov/ip/adr/Part146_FAQs.shtml) (last visited Apr. 16, 2021) and *PART 146. Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters* (<http://ww2.nycourts.gov/rules/chiefadmin/146.shtml>) (last visited Apr. 16, 2021)

Mediation Is the Primary Focus of NYS UCS Court-Annexed ADR

“A process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator’s role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties.”

Source: Nassau County Bar Association, *Mediation & Arbitration: Alternative Dispute Resolution Through the Nassau County Bar Association* (Brochure) (updated as of Feb. 3, 2017 and available at https://www.nassaubar.org/wp-content/uploads/2018/01/Mediation_Arbitration_Brochure_2_3_2017.pdf)

B.A.D.G.E.R.

A Mediation Process Summary

- ❖ **B – Begin the Mediation (Introductions, Rules)**
- ❖ **A – Accumulate Information (Case Statements)**
- ❖ **D – Discuss Needs & Interests and/or Develop Agenda**
- ❖ **G – Generate Movement / Options (Party-Driven)**
- ❖ **E – ESCAPE to Caucus (if necessary) –**
 - E – Explore settlement options; S – Signal warning signs; C – Confirm movement;
 - A – Attack recalcitrant party’s BATNA (“Agent of Reality”); P – Pause; E – Evaluate
- ❖ **R – Resolve the Dispute**

Source: Prof. Joseph B. Stulberg, *Taking Charge Managing Conflict* 58 (1987) (and Prof. Lela P. Love (informally))

Mediation vs. Arbitration

- | | |
|---------------------------------------|----------------------------------|
| ❖ No Final Decision | ❖ Final Decision |
| ❖ Lowest Cost vs. Litigation | ❖ Lower Cost vs. Litigation |
| ❖ No Set Procedure
(More Informal) | ❖ Set Procedure
(More Formal) |
| ❖ No Motion Practice | ❖ Motion Practice |
| ❖ Little to No Discovery | ❖ More Discovery |
| ❖ No Court Enforcement Role | ❖ Court Can Enforce Decision |
| ❖ Parties in Control | ❖ Arbitrator(s) in Control |
| ❖ Lawyers Optional | ❖ Lawyers Usually Required |

Litigation vs. Mediation

Litigation = Legal Fees + Damages + 18
(min.) Months of Depositions, Discovery,
Trial Prep + Trial

Mediation = 2 to 30 Days of Mediation
Sessions/Caucuses – Fees – Public
Relations Risk + Confidentiality

Source: Ricardo Granderson, E-mail dated Aug. 18, 2017 to NYC-DR Listserv (John Jay College)

Mediation is Much Broader in Scope Than Both Litigation and Arbitration

DISTRIBUTIVE VARIABLES

- ❖ Rights
- ❖ Obligations
- ❖ Remedies
- ❖ Issues
- ❖ Positions

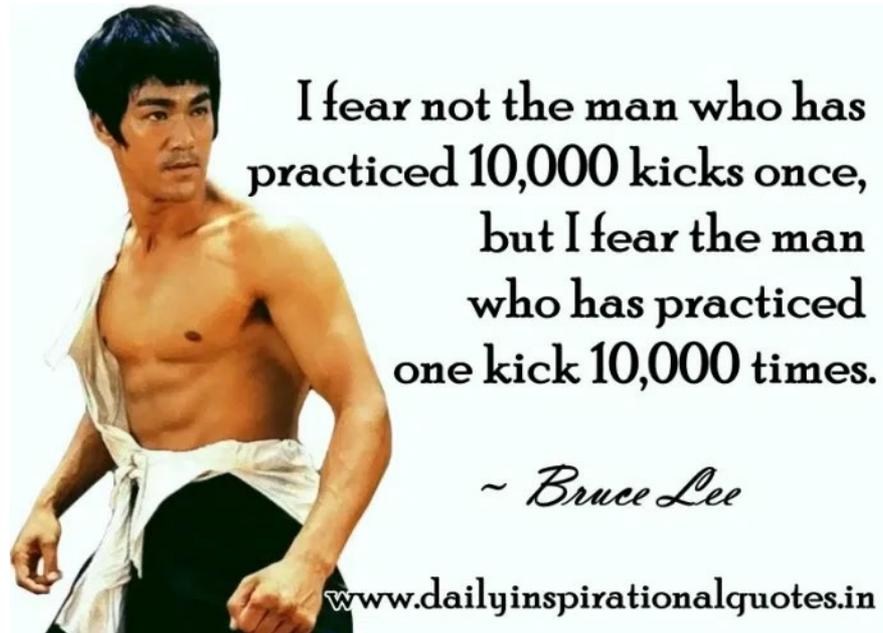
EXPANSIVE VARIABLES

- ❖ Interests
- ❖ Values
- ❖ Identities
- ❖ Power

“Rights – Entitlements granted by law, custom, and agreement; Obligations – Duties required by law, custom, and agreement; Remedies – Legal solutions available in adversarial proceedings; Issues – Questions or topics that give rise to disputes; Positions – Opinions regarding an issue; Interests – Needs, desires, fears, preferences, priorities, beliefs, and motivations for the positions that people take; Values – Beliefs and principles that govern a person’s behavior and choices; Identity – Characteristics that define a person, including groups the person feels she belongs to, such as Christian, Democrat, or baby boomer; Power – The need to win or at least feel that the outcome is fair.”

Source: Victoria Pynchon & Joseph Kraynak, *Success as a Mediator for Dummies* 208 (John Wiley & Sons, Inc. 2012)

All Types of Dispute Resolution REQUIRE Preparation!



Two Videos to Watch at Least TWICE to Prepare for Mediation Sessions

- I. **2020-05-07 - NYCLA ADR Committee Mock Mediation with Susan Guthrie**
(available at <https://www.youtube.com/WeinreblawPLLC/videos> and <https://vimeo.com/user27287947/review/420096804/5229c15407>)

- II. **2020-06-25 – Anatomy of a Virtual Mediation (Nassau County Bar Assoc.)**
(available at <https://vimeo.com/432986905>)

The New York County Rules (1)

IMPORTANT: Every county Supreme Court in the State of New York has its own ADR rules and procedures concerning civil disputes. I've included the rules for New York (discussed below) and Nassau County Supreme Courts (for comparison) as accompanying materials to this presentation. All rules—especially those concerning deadlines—should be studied closely.

- A. The Supreme Court, New York County Rules and Procedures of the Alternative Dispute Resolution Program (“Rules”) can be found at http://ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (which also includes a great overview of the Court’s ADR Program).

- B. Rule 2 – Panel of Neutrals: 10-year (double that of Part 146) experience requirement for neutrals in the practice of commercial law or comparable experience as an accountant or business professional.

- C. Two Paths to Case Assignment to ADR –
 - ❖ Rule 3 – Determination of Suitability; Order of Reference: The assigned Justice refers a case to ADR via an Order of Reference.

 - ❖ Rule 15(b) – Designation of Cases in Mandatory Mediation Pilot Project: Court staff will assign certain cases to ADR via NYSCEF.

The New York County Rules (2)

- D. Rule 4 – Form of ADR: “Cases referred to the Program shall be mediated unless otherwise agreed by the parties.”
- E. Rule 5 – Initiation Form: This form, which is signed by the parties (or by counsel on their behalf) officially involves the ADR Coordinator (currently Simone Abrams) in the process. A sample can be downloaded here: <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=vZDEASaipuBsxUyVNCODOQ==>. Note that in New York County, the identity of the assigned mediator is **NEVER** revealed to the Court or on NYSCEF.
- F. Rule 6 – Selection of Neutral; Private ADR Providers: This rule provides for four paths to neutral selection:
- ❖ The parties or their counsel select a neutral from the Court Panel of Neutrals by mutual agreement.
 - ❖ The ADR Coordinator presents the parties with a list of at least three names of neutrals from the Court Panel of Neutrals from which to select.
 - ❖ The ADR Coordinator assigns a neutral from the Court Panel of Neutrals.
 - ❖ The parties (via counsel) select a neutral from a private ADR provider such as AAA or CPR but also agree that deadlines provided for by the Rules shall apply.

The New York County Rules (3)

- G. Rule 7 – Compensation of Neutral: Part 146 mediators on the Court Panel of Neutrals are **NEVER** paid by the Court. It is the Office of Court Administration’s position that in the absence of enabling legislation like 28 U.S.C. § 658, parties cannot be compelled to compensate Part 146 mediators for preparation time and at least 90 minutes’ worth of initial mediation session time. (See <https://youtu.be/kKTuBmwHSgo>).

As such, if the ADR Coordinator assigns a mediator, in the absence of a mediation agreement providing otherwise (*see* Rule 7(c)), all mediator preparation time prior to the initial mediation session and the first 180 minutes of that session or sessions are to be provided free. Once 180 minutes have elapsed, the assigned mediator is to be compensated at a rate of \$400/hr. that the parties pay in equal shares. (*See* Rules 7(a) & 7(e)).

If the parties or their counsel select a mediator, then preparation time is still to be provided free of charge, but the mediator shall be compensated “at the rate of \$450 per hour commencing from the outset of the initial mediation session” that the parties pay in equal shares. (Rules 7(b) & 7(e)).

Where an arbitrator or neutral evaluator is selected instead of a mediator (not typical), he or she shall be compensated “at the rate of \$400 per hour from the commencement of the initial session” that the parties pay in equal shares. (Rules 7(d) & 7(e)).

The New York County Rules (4)

H. Rule 8 – Confidentiality of Mediation and Neutral Evaluation: Here are the major points to note (all taken from Rule 8(a)):

- ❖ **Strict Confidentiality of Proceedings** – “An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant.”
- ❖ **Motions to Compel or Other Attempted Compulsion of Documents or Testimony Prohibited** – “No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party or the Neutral concerning communications made during the proceeding.”
- ❖ **Settlements Must Be in Writing**
- ❖ **Indemnification of Neutral for Expenses (Including Reasonable Attorney’s Fees) Should a Party Attempt to Compel the Neutral’s Testimony**

The New York County Rules (5)

H. Rule 8 – Confidentiality of Mediation and Neutral Evaluation (cont.): And here are the **EXCEPTIONS** to confidentiality (all taken from Rule 8(b)):

- ❖ **Disclosure Required by Law or to Prevent Illegal Act** – “A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act.”
- ❖ **Unethical Conduct** – “A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority.”
- ❖ **Procedural Communications, ADR Communications of ADR Coordinator with Court, and Neutral’s Disclosure in Action to Recover Unpaid Fee** – “The Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding, including as provided in Rule 10; the ADR Coordinator may communicate with the assigned Justice in accordance with Rule 10(f) [sic - this should be Rule 10(h)]; and the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules.”

The New York County Rules (6)

- I. Rule 9 – Immunity of the Neutral: “Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving.”
- J. Rule 10 – Procedure: Rule 10 is extremely important in that it contains numerous procedural deadlines and requirements.

- ❖ **30 Days from Neutral Confirmation Date Deadline for First ADR Session** – This deadline is set forth in Rule 10(a) and effectively becomes a “hard” 45-day deadline based on Rule 10(d) concerning adjournments. The Confirmation Date is defined in Rule 6(b) essentially as the date where a Neutral accepts case assignment or appointment, and the ADR Coordinator confirms same.
- ❖ **Preliminary Submissions/Pre-Mediation Statements Due 10 Days Before Initial ADR Session** – Each side is required, pursuant to Rule 10(b), to submit to the Neutral copies of each side’s pleadings and “a [Neutral’s eyes only] memorandum of not more than ten pages . . . [covering] that party’s opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved.” A sample form pre-mediation statement that covers all these topics in “itemized form” appears on the next slide.

The Pre-Mediation Statement

I ask the parties/counsel to address these items, but there is no mandate to follow this form or order or any other form or order.

1. The name and title, if any, of the party who will be attending the conference with counsel.
2. A brief statement of the key factual and legal issues involved in the dispute.
3. The main “sticking points” preventing settlement.
4. A description of any important rulings made or pending motions in the case which may affect settlement.
5. The status of settlement negotiations, including the last settlement proposal made by you and to you.
6. A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of arbitration/litigation.
7. Key documents necessary for the mediator to understand the case.
8. Why should you prevail and by what amount?
9. Why should the other side prevail and by what amount?

The New York County Rules (7)

- ❖ **Attendance at Initial ADR Session(s) for 3 Hours Required by Parties Having Authority to Settle, Counsel of Record, and Potentially Insurance Carriers** – Rule 10(c) establishes a minimum three-hour mediation session attendance requirement by: (a) parties having knowledge of pertinent case facts and possessing authority to settle; (b) counsel of record for the parties familiar with the case facts; and (c) insurance carriers at a Neutral’s discretion.
- ❖ **Adjournments** – Rule 10(d) provides that adjournments of an initial ADR session at a Neutral’s discretion are permitted, but the initial session must take place within a deadline of 45 days from the Confirmation Date.
- ❖ **“Discovery in Aid of Mediation”** – Rule 10(f) empowers the Neutral to “provide such focused discovery as may assist in the ADR proceeding” but stops short of giving Neutrals the power to order discovery (except for arbitrators, who are granted such power by operation of law (*see* CPLR 7505)).
- ❖ **Sanctions: The Rules Have Teeth** – Rules 10(g) and 10(h)(2) provide for sanctions for violation of the Rules based on the recommendation(s) of the Neutral to the ADR Coordinator or the ADR Coordinator himself or herself.

The New York County Rules (8)

- ❖ **Communications with the Court** – Rule 10(h)(1) is the source for the “phantom Neutral” policy that is a hallmark of the Rules in New York County (but not in other counties like Nassau). In a nutshell, this rule provides that the ADR Coordinator—**NOT the Neutral**—shall be the only person who can communicate with an assigned Justice and then only concerning procedural matters. Neither the Neutral’s identity nor any substantive aspect of the ADR process is to be disclosed at any time to the Court.

K. Rule 11 – Completion of ADR; Report: This rule enables parties to “stop the clock” on the ADR process . . . but not for too long (essentially 30 days).

Rule 11(a) allows the Neutral with the agreement of the parties to extend the ADR process by up to another 30 days past the 45-days-from-Confirmation-Date deadline (for a total of 75 days). Any further extension of the ADR process requires Court approval.

Rule 11(b) provides that a Neutral shall report the outcome of any ADR proceeding to the ADR Coordinator no later than three business days after its conclusion. “If the ADR process is successful, the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and transmit a copy to the Part of the Justice assigned.”

The New York County Rules (9)

- L. Rule 12 – Arbitration: This rule sets forth an extremely short arbitration process largely left up to the parties (and here I note that the AAA’s Commercial and Consumer Rules are both each about 40 pages in length). In its entirety, Rule 12 provides:

“Parties who choose to arbitrate shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties are unable to so agree, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the ADR Coordinator. An award shall be issued within seven business days after conclusion of the arbitration proceeding.”

Practical Tip: Unless counsel for the parties are either experienced arbitration advocates or arbitrators themselves, they should agree upon selecting an arbitrator affiliated with a private ADR provider (e.g., AAA, CPR, JAMS, the Nassau County Bar Association, etc.) that offers in-house case administrators, who can in turn interact with the ADR Coordinator, rather than have their arbitrator directly interact with the ADR Coordinator.

This greatly minimizes the risk of the arbitrator, who holds a quasi-judicial office, from inadvertently reporting to the Court any information that is either or both confidential or potentially prejudicial to any party.

The New York County Rules (10)

- M. Rule 13 – Conversion of Mediation to Binding Arbitration: The three subsections of Rule 13 collectively provide for the conversion of a pending mediation to arbitration upon agreement of the parties at any stage of the mediation process as well as for post-mediation-process arbitration, provided that such arbitration is completed within 45 days of the Confirmation Date of the new arbitrator.

Importantly, the Rules do not permit “med-arb”—the practice of a mediator becoming an arbitrator after he or she has already commenced service as a mediator—unless the mediator-turned-arbitrator received no *ex parte* information (which can include oral communications) prior to the point of the mediation’s transformation into an arbitration. As a practical matter, even when permitted under the Rules, because med-arb presents a minefield of ethical issues that can encompass mediation, arbitration, and legal ethics, it rarely, if ever, is advisable.

- N. Rule 14. Further ADR: “After completion of a mediation, upon request of a party or upon its own initiative, the Court, in its discretion, may issue an order directing a second referral to mediation, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 7(b) with respect to alternate mediators.”

The Bottom Line: Mediation Works

“Mediation is highly successful, with more than 85% of mediated business cases resulting in settlement agreements.”

Source: David J. Abeshouse, Esq., *Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases* (June 18, 2013) (emphasis added) (available at <http://www.avvo.com/legal-guides/ugc/business-adr-arbitration-and-mediation-vs-court-litigation-for-commercial-cases>)

Questions or Comments?



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COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY



HON. DEBORAH A. KAPLAN
ADMINISTRATIVE JUDGE
SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY

JUSTICES OF THE COMMERCIAL DIVISION:
JUSTICE ANDREW BORROK JUSTICE JOEL M. COHEN
JUSTICE MARCY FRIEDMAN JUSTICE ANDREA MASLEY
JUSTICE BARRY OSTRAGER JUSTICE SALIANN SCARPULA
JUSTICE JENNIFER SCHECTER JUSTICE O. PETER SHERWOOD

RULES AND PROCEDURES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

A. GENERAL PROVISIONS

Rule 1. Program. The Alternative Dispute Resolution Program (“the Program”) of the Commercial Division of the Supreme Court of the State of New York, County of New York, shall be applicable to commercial cases referred by Justices of the Commercial Division and other Justices of the Supreme Court as permitted by order of the Administrative Judge.

Rule 2. Panel of Neutrals.

(a) Requirements to Join Panel. The Administrative Judge shall establish and maintain a panel of Neutrals (“the Panel”) for the Program. To be eligible to join the Panel as a Mediator, a person shall have a minimum of ten years of experience in the practice of commercial law or comparable experience as an accountant or business professional and shall satisfy the training and experience requirements of Part 146 of the Rules of the Chief Administrator. To become a Neutral Evaluator on the Panel, a person must be an attorney or former Judge who has the background and the training required by Part 146.

(b) Term of Membership. The Panel shall continue in existence for a term of two years from the date the Administrative Judge certifies the Panel as provided in Section 146.3 of Part 146. Further, each Neutral shall serve at the pleasure of the Administrative Judge, who may terminate membership at any time.

(c) Obligations of Membership. Each member of the Panel shall, in the event that the caseload of the Program requires it, serve as a Neutral in three matters annually in the Program. Members shall comply with these Rules and Procedures and with the continuing education requirement set forth in Section 146.5 of Part 146. Information on the members of the Panel is accessible on the New York County home page of the website of the Commercial Division, the address of which is www.nycourts.gov/comdiv.

Rule 3. Determination of Suitability; Order of Reference. Except as provided in Rule 15,

cases are referred to alternative dispute resolution (“ADR”) in the Program by the Justice assigned to the case. The assigned Justice may order parties to undergo ADR in the Program where the Justice finds that it would be in the interest of the just and efficient processing of the case to do so or upon consent of the parties. The suitability of an action for ADR shall be determined by the assigned Justice after considering the views of the parties insofar as practicable. If a case is referred to ADR, the Justice shall issue an Order of Reference. Such Order shall not stay court proceedings in the case unless otherwise specified therein.

Rule 4. Form of ADR. Cases referred to the Program shall be mediated unless otherwise agreed by the parties.

Rule 5. Initiation Form: In cases referred to ADR, the parties shall sign an ADR Initiation Form (accessible on the website of the Commercial Division at the following address: www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml), in counterparts if necessary, and, except as otherwise provided in Rule 15, shall, within four business days from the date of the Order of Reference, contact the ADR Coordinator and submit the Form to the Coordinator.

Rule 6. Selection of Neutral; Private ADR Providers.

(a) Designation of Neutral. An action referred to the Program shall be assigned to a Neutral from the Panel. As soon as practicable after referral, and after counsel submit a completed initiation form, the ADR Coordinator will explore with counsel options for selecting a Neutral. The Coordinator, in her discretion, may: (i) allow counsel to agree upon a Neutral; (ii) provide counsel with the names of not fewer than three Neutrals from the Panel from among whom counsel shall select; or (iii) assign a Neutral from the Panel. In following any of these three options, the Coordinator will endeavor to distribute assignments widely among all members of the Panel. The Coordinator may, however, select a particular Neutral if the nature of the matter in question calls for special expertise on the part of the Neutral, if difficulties are encountered in locating an available Neutral, or for other administrative reasons. Each Neutral contacted will advise the Coordinator as to his or her availability and, prior to serving, will conduct a conflicts check as required by subdivision (e) hereof.

(b) Time for Selection; Confirmation Date. If the Coordinator advised that Option (i) or (ii) shall govern the case, counsel shall have five business days from the date of the Coordinator’s communication to this effect within which to select a Neutral and notify the Coordinator of the Neutral’s identity. If counsel fail to do so in a timely manner, the Coordinator may designate the Neutral. In the case of Option (i), counsel shall contact the Neutral to determine his or her availability to serve. The Confirmation date shall be the date on which the Coordinator informs counsel of the identity of the Neutral selected or, in the cases of Options (i) and (ii), confirms the identity of the Neutral selected by counsel.

(c) Selection of Alternate Neutral from Panel. Once informed of the identity of the Neutral where the Neutral is selected by the Coordinator pursuant to Option (iii), the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral’s availability to handle the

matter and the absence of any conflict on the Neutral's part, and shall inform the Coordinator of the alternate selection within the five-day deadline. If the parties select an alternate Neutral pursuant to this subdivision, the Confirmation Date shall be the date on which they inform the Coordinator of that selection.

(d) Other Person as Neutral. Notwithstanding subdivision (a), the parties may designate as the Neutral a person who is not a member of the Panel or proceed to ADR through a private ADR provider and in accordance with the rules thereof, but the parties must nevertheless complete the ADR process within the deadlines set forth in these Rules.

(e) Ethical Standards. Prior to confirmation as the Neutral in any case, a prospective Neutral shall conduct a check for conflicts with regard to parties or related entities. The Neutral shall decline to serve if he or she would not be able to do so fairly, impartially, and in accordance with the highest professional standards. Neutrals on the Panel shall comply with the Standards of Conduct for Mediators of the Commercial Division or, if applicable, the Standards of Conduct for Arbitrators and Neutral Evaluators (accessible at the Internet address listed in Rule 5). Unless all parties consent to the Neutral's service after having been advised of all disqualifying facts, the Neutral shall decline the appointment and another Neutral shall promptly be selected.

Rule 7. Compensation of Neutral.

The Neutral designated pursuant to Rule 6 (a) or (c) shall be compensated by the parties as follows.

(a) Mediators Designated by the ADR Coordinator. The Neutral designated as a mediator by the ADR Coordinator under Options (ii) or (iii) of Rule 6(a) shall serve in that role at no charge during preparation for the mediation (e.g., scheduling conferences and review of documents in preparation) and for the first three hours of the actual mediation session or sessions. At the conclusion of the three hours, any party may bring the ADR proceeding to an end, but, if the parties agree to continue, they shall compensate the mediator for his or her time thereafter at the rate of \$ 400 per hour.

(b) Mediators Designated by the Parties. If the parties choose the mediator from the Panel under Option (i) of Rule 6(a) or if they designate an alternate mediator from the Panel pursuant to Rule 6(c) and that person is available and willing to handle the matter under the circumstances, the parties shall compensate the mediator at the rate of \$450 per hour commencing from the outset of the initial mediation session.

(c) Agreements of the Mediator and the Parties. Notwithstanding subdivisions (a) and (b) of this rule, the mediator and the parties may agree upon a rate in excess of the otherwise applicable rate specified in those subdivisions based upon factors such as the complexity of the case, the number of parties involved, and the experience of the mediator, and may also agree to compensate the mediator for preparation time. All such agreements shall be in writing.

(d) Arbitrators and Neutral Evaluators. If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the Neutral(s) shall be compensated at the rate of \$400 per hour from the commencement of the initial session. Preparation time will not be compensable.

(e) Party's Share of Compensation. Unless otherwise agreed, each party to the ADR proceeding shall pay an equal share of the Neutral's compensation.

Rule 8. Confidentiality of Mediation and Neutral Evaluation.

(a) Confidentiality. An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party or the Neutral concerning communications made during the proceeding. A settlement, in whole or in part, reached during the ADR proceeding shall be set forth in a writing signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding. Should a party attempt in any legal action to compel the testimony of the Neutral concerning the substance of an ADR proceeding in the Program, 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.

(b) Exceptions. Notwithstanding the foregoing:

(1) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act.

(2) A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority.

(3) The Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding, including as provided in Rule 10; the ADR Coordinator may communicate with the assigned Justice in accordance with Rule 10 (f); and the Neutral may make general reference to the fact of services rendered in any action to collect an unpaid fee for services performed under these Rules.

Rule 9. Immunity of the Neutral. Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving.

Rule 10. Procedure.

(a) Deadline for First Session; Scheduling. The first ADR session shall be conducted no later than 30 days from the Confirmation Date. Immediately after confirmation, the Neutral shall contact all counsel and parties to discuss the matter and schedule all proceedings, typically by conducting a conference call. All counsel and parties shall promptly communicate with one another and the Neutral and take all steps necessary to schedule the first proceeding in compliance with said deadline. Failure of any party or counsel to respond to communications in a timely manner or to participate in scheduling the mediation session may subject counsel to sanctions.

(b) Preliminary Submissions. At least ten days before the first session in cases being mediated or undergoing neutral evaluation, each party shall deliver to the Neutral a copy of its pleadings and a memorandum of not more than ten pages (except as otherwise agreed) setting forth that party's opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved. This memorandum shall not be filed in court nor, unless otherwise agreed by the parties, served on the adversary, and it shall be destroyed by the Neutral immediately upon completion of the proceeding.

(c) Attendance Required. Attendance of the parties is required at the first three hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, or where the Justice directs or the Neutral permits an appearance by video conference for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter. Where necessary to an effective mediation, the Neutral may require the insurance carrier of a party to attend. In addition, counsel of record for each represented party shall be present at each session. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to take all steps necessary to a meaningful mediation process.

(d) Adjournments. Once a session of the ADR proceeding has been scheduled, it may be adjourned only at the direction of the Neutral and not beyond 45 days from the Confirmation Date.

(e) Reporting of the Status to the Coordinator. On the 40th day from the Confirmation Date, the Neutral shall report to the ADR Coordinator the status of the proceeding.

(f) Discovery. Subject to any applicable disclosure order of the court, the Neutral may help the parties to provide such focused discovery as may assist in the ADR proceeding.

(g) Failure to Comply with Rules. If a party or counsel fails to cooperate in making arrangements for the mediation or to take steps preliminary thereto, as provided in subdivisions (a) and (b) of this rule, fails to appear at any scheduled session, or otherwise fails to comply with these Rules, the Neutral shall advise the ADR Coordinator, succinctly specifying the nature of the infraction. If the Neutral reports that an infraction has occurred, he or she may recommend the imposition of sanctions, or, where such a report is silent as to sanctions, the ADR Coordinator may recommend the imposition of sanctions based upon that report.

(h) Communications with Justice.

(1) Communications In General. The ADR Coordinator may communicate with the assigned Justice about administrative details of the processing of any case referred to the Program by that Justice, but shall not identify the Neutral designated or disclose any substantive aspect of the ADR proceeding. If a proceeding is terminated after four hours without a settlement, the Coordinator shall not reveal to the Justice which party brought the proceeding to an end. The Coordinator shall report to the Justice at the conclusion of the proceeding whether a resolution of the case in whole or in part was reached.

(2) Reporting Violations of the Rules; Sanctions. The Coordinator shall report to the Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as reported by a Neutral pursuant to subdivision (g) of this Rule and any recommendation for sanctions by the Neutral or by the Coordinator based upon the report of the Neutral. The Justice may impose sanctions or take such other action as the Justice may find to be necessary to ensure respect for the court's Order and these Rules.

Rule 11. Completion of ADR; Report.

(a) Conclusion; Continuation; Monitoring by Coordinator. The ADR process shall be concluded within 45 days from the Confirmation Date. If the matter has not been entirely resolved within that period, but the parties and the Neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward for an additional 30 days. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice, upon request presented by the ADR Coordinator, specifically authorizes the process to continue beyond that date. The ADR Coordinator will monitor progress of ADR proceedings to ensure that the deadlines set forth herein are complied with.

(b) Report of Outcome. Except as provided in Rule 12, the Neutral shall report the outcome of the proceeding to the ADR Coordinator no later than three business days after its conclusion. If the ADR process is successful, the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and transmit a copy to the Part of the Justice assigned.

Rule 12. Arbitration. Parties who choose to arbitrate shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties are unable to so agree, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the ADR Coordinator. An award shall be issued within seven business days after conclusion of the arbitration proceeding.

Rule 13. Conversion of Mediation to Binding Arbitration.

(a) Arbitration Permitted. Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process. Any such arbitration, however, must proceed before a Neutral different than the one who presided over the mediation session(s), unless the mediator did not receive any information from a party *ex parte* prior to the time an

agreement to proceed to arbitration was reached.

(b) Stipulation; Identification of Arbitrator(s); Fee. Within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the ADR Coordinator a written stipulation submitting the case to arbitration under this Rule. There shall be a single arbitrator unless the parties agree to have three. Together with the stipulation the parties shall transmit the name of the person or persons they have agreed upon to serve as arbitrator(s). If the parties are unable to agree upon the person or persons who shall serve, the Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 7 (d).

(c) Deadlines. The arbitration shall be completed within 45 days from the date on which the Coordinator advises the parties of the confirmation of the selection of the arbitrator(s)

Rule 14. Further ADR. After completion of a mediation, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to mediation, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 7 (b) with respect to alternate mediators.

B. MANDATORY MEDIATION PILOT PROJECT

Rule 15. Procedures in the Pilot Project.

(a) Cases Subject to Mandatory Mediation in the Pilot Project. By an Administrative Order of the Administrative Judge of this court, a pilot project (“the Pilot Project”) shall be established for the mandatory mediation of certain commercial cases filed outside the Commercial Division as defined in the Order. Excluded from the Project are cases in which a self-represented person is a party.

(b) Designation of Cases. As provided in the Administrative Order, the staff of the court shall identify all commercial cases that are subject to mandatory mediation in the Pilot Project upon the filing of the Request for Judicial Intervention (“RJI”). In each such case, the court will provide notice to the parties through the New York State Courts Electronic Filing System of the designation of the case as one subject to the Administrative Order. All parties and counsel shall proceed to mediation in accordance with that Order and these Rules and Procedures. Failure to comply with that Order and these Rules and Procedures may result in the imposition of sanctions.

(c) Preliminary Conference Part. The Administrative Order established a Preliminary Conference Part to handle such conferences in the kinds of cases that are subject to mandatory mediation in the Pilot Project. The preliminary conference in all such cases shall take place in this Part before the Justice or a staff attorney assigned to the Part. Other proceedings in such cases shall be handled by the Justice to whom the case has been assigned upon filing of the RJI. The Justice or staff attorney presiding in the Preliminary Conference Part shall address the provision of tailored discovery that may assist the parties to have a productive and successful mediation. Counsel may also enter into a stipulation at the conference governing all discovery on the merits.

(d) Exemption. A case otherwise subject to mandatory mediation in the Pilot Project may be exempted from such mediation upon a satisfactory showing that the applying party would be subjected to unreasonable hardship or burden by participation in the mediation. A party seeking an exemption shall apply therefor at the preliminary conference. Failure to seek an exemption as provided in this subdivision shall constitute a waiver of any objection to the mediation.

(e) Initiation Form. Within four business days after the preliminary conference, the parties shall submit an Initiation Form to the ADR Coordinator as provided in Rule 5.

(f) Designation of Neutral. An action designated for the Pilot Project shall [in the first instance] be assigned to a Neutral from the Panel by the ADR Coordinator. The Coordinator will take into account the discovery schedule arranged at the preliminary conference and shall assign the Neutral at a time consistent with the completion date of the mediation-related discovery and the date counsel are scheduled to appear before the assigned Justice.

(g) Selection of Alternate Neutral from Panel. Once informed of the identity of the Neutral, the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral's availability to handle the matter and the absence of any conflict on the Neutral's part, and shall inform the Coordinator of the alternate selection within the five-day deadline.

(h) Confirmation Date. The communication to the parties of the identity of the Neutral designated by the ADR Coordinator shall constitute the Confirmation Date, except that if the parties agree upon an alternate Neutral as provided in subdivision (g) of this rule, the Confirmation Date shall be the date on which the Coordinator confirms to the parties the identity of the Neutral so selected.

(g) Procedures. The parties shall comply with all subsequent procedures of the ADR process as set forth in these Rules, including the deadlines set forth in Rule 10.

(h) Compensation of Mediator. The Neutral shall be compensated as provided in Rule 7 (a) hereof if the Neutral has been designated by the ADR Coordinator or Rule 7(b) if the Neutral has been chosen by counsel.

C. ADMINISTRATION OF PROGRAM

Rule 16. Administration of Program. The Program shall be supervised by the Clerk-in-Charge of the Commercial Division Support Office. The conduct of ADR proceedings shall be coordinated by an Alternative Dispute Resolution Coordinator or Coordinators.

Effective Date: May 1, 2017
(Revised March 8, 2018)

**COMMERCIAL DIVISION ALTERNATIVE
DISPUTE RESOLUTION PROGRAM**

**Supreme Court, New York County
New York County Courthouse
60 Centre Street, Room 148
New York, New York 10007
Fax: 212-608-4873**

Clerk-in-Charge:
Doreen Gushue

ADR Coordinator:
Simone Abrams
Phone: 212-256-7986
Fax: 212-952-3772
E-mail: Sabrams@nycourts.gov

COMMERCIAL DIVISION – NASSAU COUNTY

Rules of the 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. 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 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. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

The Neutral Evaluators participating in the Commercial Division Alternative Dispute Resolution Program ("the Program") have significant experience in commercial law and specific training in neutral evaluation. Their assessments and opinions may help parties to analyze the case, facilitate discussion and generate a settlement.

The following Rules shall govern cases sent to mediation and neutral evaluation 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 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 Commercial Division of the Supreme Court of the State of New York, Nassau County, operates the Alternative Dispute Resolution Program. The Program shall be applicable to commercial cases referred by Justices of the Commercial Division and the other Justices of the Supreme Court, Nassau County; 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 and neutral evaluators ("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, in addition to the requirements set forth below. Applications to join the Roster will be accepted between January 1st and March 31st of the calendar year. Applications received outside this time period will be deferred for consideration to January 1st of the next calendar year.
- (b) In addition to the minimum qualifications and training criteria set forth in Part 146, a neutral evaluator seeking to qualify for appointment to the Roster must have at least seven (7) years of substantial experience in the area of Commercial Law or have served at least five years as a judge with substantial experience in the area of Commercial Law.
- (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.
- (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 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 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 to the District's ADR Coordinator a Statewide Mediator Application or a Nassau County

Commercial Division Application, available on the Nassau County Supreme Court's website, and a resume.

Rule 3. Procedure:

- (a) Cases shall be referred to mediation or neutral evaluation as early as is practicable. 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 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) Within five (5) business days from receipt of the Order of Reference, the parties shall confer and select an agreed-upon neutral from the Roster. During this time, the parties shall also complete and return to the Court and to the selected neutral the ADR Initiation Form. Copies of the ADR Initiation Form can be obtained from the Nassau County Supreme Court's website.
- (c) If the parties are unable to agree on a neutral, the parties shall within the same five (5) business days from receipt of the Order of Reference, submit to the referring Justice the ADR Initiation Form with four (4) names from the roster (two names from each party if necessary without indicating who picked each neutral). The Court will select a neutral from among the four (4) names submitted by the parties. Once a neutral is agreed upon or selected by the Court, the parties shall contact the neutral to schedule an initial session. Any neutral selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below.
- (d) The parties may agree on a neutral 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 neutral directly, make arrangements for that person to conduct the mediation or neutral evaluation, and submit a Neutral Initiation Form to both the Court and the selected neutral. A neutral selected from outside the Roster must nevertheless comply with the deadlines and confidentiality provisions set forth in these Rules.
- (e) The initial mediation or neutral evaluation 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 neutral shall contact the Court and, if necessary, intervention will occur to expedite the process. 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).

- (f) At least one week before the initial session, each party shall deliver to the neutral 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 neutral, and shall be destroyed by the neutral immediately upon completion of the proceeding.
- (g) Unless exempted by the neutral for good cause, every party, including counsel must attend 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.
- (h) Parties and their counsel may be referred to mediation or neutral evaluation for a free four (4) hour initial session. Subject to the neutral's discretion and full disclosure to the parties at the beginning of the initial session, the neutral 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 neutral may (but are not required to) agree to continue the ADR process. Neutral compensation for any additional time beyond the initial ADR session is governed by Rule 6, below.
- (i) 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 ADR Disposition Form indicating settlement or lack thereof and transmit the same, along with any written agreement, to the Court. If the ADR process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the assigned Justice.
- (j) At the end of an initial session mandated by subdivision (h) 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.
- (k) 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 fail to comply with these Rules, the neutral may advise the Court and the Court may impose sanctions.

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. 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 ADR process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 7 [b] 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 the foregoing, to the extent necessary,
 - 1) the parties may include confidential information in a written settlement agreement;
 - 2) the neutral and the parties may communicate with the Court about administrative details of the ADR process; and
 - 3) the neutral 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 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.

Rule 6. Compensation:

Parties shall not be required to compensate the neutral, selected from this Program's Roster, 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, a neutral shall be compensated at a maximum rate of \$500 per hour for time spent in mediation or neutral evaluation and for any additional preparation time needed beyond the initial session. All neutral fees and expenses shall be borne equally by the parties unless the Court determines otherwise and should be agreed upon in writing prior to the commencement

of the initial 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 request a stay of proceedings. Regardless of whether a stay is granted by the Assigned Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the 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 [e]) 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:

In order to avoid conflicts of interest, any person tentatively designated 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. 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. The neutral shall also avoid an appearance of a conflict of interest. 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, the neutral shall decline the appointment and another neutral 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 Referring Justice:

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. The neutral shall report to the referring Justice 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 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, or another ADR process, without Order of the Court, and at their own expense.

Rule 11. Administration and Assessment of Program:

The Program shall be supervised by the Administrative Judge of the Tenth Judicial District – Nassau County.

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 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.

Effective date: November 23, 2020
THE COMMERCIAL DIVISION
SUPREME COURT, CIVIL BRANCH
NASSAU COUNTY

Nassau Lawyer



THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

March 2016

www.nassaubar.org

Vol. 65, No. 7

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Breaking Bread with the Bench

OF NOTE

NCBA Member Benefit - I.D. Card Photo

Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center

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PLEASE NOTE: Existing Secure Pass holders do not need new photos and can now renew online at the OCA website www.nycourts.gov/attorneys/registration/secure-pass.shtml

NCBA COMMITTEE MEETING CALENDAR

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EVENTS

WE CARE

Dressed to a Tea

Wednesday, March 16, 2016
5:00 p.m. at Domus

SOLD OUT!

NASSAU ACADEMY OF LAW

Hon. Elaine Jackson Stack MOOT COURT COMPETITION

Tuesday & Wednesday
March 22 & 23, 2016 at Domus
Details pg 14

LAW DAY

Tuesday, May 3, 2016
5:30 p.m.
Details pg. 6

117TH ANNUAL DINNER DANCE

Saturday, May 14, 2016
Long Island Marriott, Uniondale
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UPCOMING PUBLICATIONS

COMMITTEE MEETINGS

Thursday, March 10, 2016 12:45 at Domus

Thursday, April 14, 2016 12:45 at Domus



During the first luncheon between new lawyers and members of the Judiciary, NCBA President Martha Krisel asked District Court Judge, Hon. Andrew M. Engel, and all invited Judges, to speak to the lawyers on a variety of topics including practicing law, exploring other practice areas and becoming involved in the Bar Association. (Photo by Hector Herrera)

By Andrea M. Brodie
and Jennifer L. Koo

One of the initiatives promulgated by President Steven J. Eisman was the creation of a task force to help foster connections between new lawyers (admitted less than 10 years) and the more active members of the Nassau County Bar Association, particularly the judiciary. This task force, now known as the Steven J. Eisman New Lawyer/Judiciary Relations Task Force, is co-chaired by the Hon. Jeffrey S. Goodstein of the Nassau County Supreme Court and Andrea M. Brodie, Esq. of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

One of the programs created by the Task Force is a monthly lunch between new lawyers and members of the judiciary. The Task Force and the New Lawyers Committee held its first lunch at Domus with Justices of the Nassau County District and Supreme Courts on

See BENCH, Page 9

Canvas and Wine

Channel Your Creativity at the Bar

By Adam D'Antonio

Discover your inner Rembrandt on the evening of Thursday, April 14, 2016 at 6:30p.m. when a professional artist guides us in creating masterpieces on canvas. **NO ARTISTIC EXPERIENCE REQUIRED!**

Adult paint nights are the new craze and we've managed to line up one of the best artists in town. Even the least artistic will be amazed at what can be created with a paintbrush in one hand and a wine glass in the other. All you need to bring is your enthusiasm! We'll supply the rest including a 16" x 20" canvas, easel, apron and supplies to create a moonlit skyline suitable for hanging in your home or office. Refreshments, including wraps, music and other surprises will round out this casual and fun-filled evening.

Tickets are only \$35 per person, but seating is limited, so reserve your easel now. A portion of each ticket will support the Steven J. Eisman Memorial



Moonlit Skyline

Building Fund. Canvas and Wine follows on the heels of NCBA's wildly successful Oktoberfest and is sure to be another hit with members and their guests. Don't miss out on having your firm featured as an event sponsor, too. Contact Valerie Zurblis for sponsorship details at (516)747-4070 x204.

For more information and to purchase tickets for Canvas and Wine, please contact Special Events (516)747-4070 x226, events@nassaubar.org or register on-line at www.nassaubar.org.

For NCBA Members
Notice of
Nassau County Bar Association
Annual Meeting
May 10, 2016 • 7 p.m.
Domus

Proxy statement can be found on the insert in this issue of the Nassau Lawyer. In addition to the election of Nassau County Bar Association officers, directors, Nominating Committee members and Nassau Academy of Law officers, amendments to the Nassau County Bar Association By-Laws will be voted upon.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org. Copies are available at the reception desk at the home of the Association or by mail upon request.

Richard D. Collins
Secretary

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One Size Does Not Fit All – Ten Reasons Why Commercial Litigators Should Consider Commercial Mediation

Most commercial litigators love to litigate. Their fondness for the art of advocacy, competitive instinct, keen interest in pre-trial and trial strategizing, drive for personal satisfaction, and—let's be honest—love of lucre all drive these warriors' dreams of "scorched earth" legal victory. In some cases, their pugilistic desires are fine, even commendable. However, in other cases, these desires can lead to an endless descent into needlessly protracted proceedings. The negative consequences of such trench warfare include, but are not limited to inefficiency, waste, reputational damage, and public distrust of litigators.



Elan E. Weinreb

There are just some situations where litigation is not an appropriate form of dispute resolution (and exactly what those situations are is a topic well beyond the scope of this article). In such circumstances, mediation—"an informal and confidential process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences"¹—can present itself as an optimal (at least initially) dispute resolution method for one or more of the following ten reasons.

10: Scheduling Flexibility

In any commercial litigation involving judicial intervention, the parties and their attorneys are at the mercy of at least one judicial schedule. In contrast, in commercial mediation, the parties and their attorneys generally remain in control of their respective schedules, rendering it a more attractive dispute resolution option.

9: Recognition for Problem Solving

According to one founder of a firm which specializes in representing entrepreneurs, the top reason why entrepreneurs generally hate to deal with lawyers is the perception that the latter cause problems instead of solving them: "Good lawyers are able to identify significant potential legal problems; great lawyers provide solutions to those problems."²

Commercial mediation defies this stereotype by its essence as an alternative dispute resolution modality controlled by the disputants, not their attorneys. As such, commercial litigators who support commercial mediation stand in support of "doing something"—problem solving—and not just "saying something"—problem identification.

8: Judicial Support

Judges abhor (at least) two administrative nightmares: (a) an out-of-control docket; and (b) reversal or significant modification of their decisions.

Successfully mediated cases resulting in settlement prevent these nightmares from becoming reality. It follows that judges throughout the world ardently support mediation,³ and commercial litigators who ignore this trend do so at their peril.

7: Speed

Mediation is simply faster. Business mediations "usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings)."⁴

6: Increased Law Practice Efficiency

The odds of a civil case ultimately proceeding to trial are not exactly high. "According to the National Center for State Courts, only about 7.6 percent of civil cases go to trial in the United States, and only 0.6 percent receives a jury trial."⁵ In contrast, commercial mediation offers practically mirror-opposite odds: "more than 85% of mediated business cases result[] in settlement agreements."⁶

Considering these odds, allocating resources to mediation initiatives that can resolve more cases in less time is worthwhile and will likely increase law practice efficiency.

5: Confidentiality

In the Information Age, any case can be tried twice: once in the courtroom, and once in the court of public opinion. Blasting a 160-character text or tweet of trial testimony to cyberspace that "goes viral" can easily cost any client—regardless of mainstream media presence—thousands of dollars in reputational damage in less than 160 seconds. Such damage can even occur when a client prevails.⁷

However, unlike a public trial environment, with narrow exceptions,⁸ commercial mediation is "entirely confidential."⁹ While this designation of confidentiality is no guarantee against a wrongful disclosure of confidential information, it is certainly better than no protection at all. Furthermore, while the remedies for breach of mediation confidentiality are not particularly punitive,¹⁰ courts do not take such breaches lightly.¹¹

4: Neutral Assessment of Case Strengths and Weaknesses

The best commercial litigators recognize that an assessment of case strengths and weaknesses is an essential component of trial preparation.¹² A type of evaluative mediation known as "information centered mediation" is particularly useful in testing case strength.¹³ This process involves the appointment of a mediator having practical or technical expertise who receives written submissions and significant documents from the parties in advance of meeting with them.¹⁴ After reviewing these materials and hearing from the parties or their attorneys, the appointed mediator renders an opinion on "the likely outcome and value of the dispute," which he or she proceeds to

defend.¹⁵

It is in the defense of the mediator's opinion that an astute commercial litigator can strike gold by exposure to the mediator's opposing perspectives on the case.¹⁶ And even where a case returns to a litigation track, analysis of case strengths and weaknesses will have occurred as part of the mediation process.

3: Reduced Discovery Expenses

Clients often discover early that the discovery process "can be lengthy, expensive, intrusive, and frustrating."¹⁷ While in commercial mediation, it is practically impossible to entirely eliminate discovery in advance of mediation sessions, "[e]ssential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred."¹⁸

2: "Win-Win" Potential

When judges, court attorneys, or even the parties' attorneys settle a matter without mediator assistance, it is often done in the limited framework of compromise—what is also known as a "win-lose" framework because the parties sacrifice items to gain others or avoid liability exposure.¹⁹ This is largely because the restrictive structure of litigation limits available remedies and options. Courts, for example, are rarely able to compel parties to interact with each other outside of the scope of contractual arrangements that they have established or award remedies to them beyond those available at law.²⁰

However, commercial mediators are not so limited and are often able to propose extra-legal, "out of the box" creative options that open the proverbial door to collaborative "win-win" conflict resolution.²¹

1: Client Retention Driven by Cost Savings

Finally, commercial mediation is often superior to commercial litigation because it offers a greater probability of client retention driven by cost savings.²² In the United States, "parties spend \$50,700 on average on each litigated case, [but] only \$7,500 (\$3,500 per party [in a two-party case]) for resolving their case by mediation, a cost-savings of approximately 85%.²³ Outside of the United States, the savings are similarly significant.²⁴

Moreover, it is not only clients who stand in support of commercial mediation in light of these savings, but the transactional attorneys counseling them, who in turn affect the future retention of commercial litigators. Recently, Loretta Gastwirth, Chair of the NCBA's ADR Committee and a commercial litigator herself, advised that "inserting a mediation clause in a contract . . . is a no-brainer" in light of its potential to "save clients tons of money in the long run . . ."²⁵ The proverbial stage for commercial mediation is thus now being set by clients' transactional attorneys prophylactically, well before any submission of pleadings.

Towards the Future

It bears emphasis that commercial mediation—or any dispute resolution process, for that matter—is no talismanic panacea. "One size does not fit all" applies equally to commercial litigation and commercial mediation such that either is optimal only in appropriate cases, not every case. It is for this reason that some practitioners refer to ADR as "Appropriate Dispute Resolution"²⁶ instead of "Alternative Dispute Resolution."

However, as ADR continues to grow in popularity, it is not a question of "if" but "when" commercial mediation replaces it as a "first-line" option for dispute resolution. And at the end of the day, even those commercial litigators who stubbornly cling to the gladiatorial mindset of days gone by may come to welcome the turning of the tide. After all, it was no less than the great Chinese general Sun Tzu who declared, "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."²⁷

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5. Philip B. Ytterberg, *A Baker's Dozen of ADR Practice Pointers to Boost Your Bottom Line*, 3 GP|Solo Law Trends & News (No. 2) 44, 44, American Bar Association (General Practice, Solo & Small Firm Division), Sept. 2007 (available at http://www.americanbar.org/content/dam/aba/publishing/law_trends_news_practice_area_eneletter/lawtrends0709.pdf).
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7. See Joshua E. Bienstock, *Students' Lawsuits Proliferate: Is Mediation the Cure?*, 65 Nassau Lawyer (No. 3) 7, 10 (Nov. 2015).
8. See generally Max Factor III & Alice M. Graham, *Better Practice Tip: Recognized Exceptions to Mediation Confidentiality and Remedies That Every Litigator Should Know*, Mediate.com, July 2005, <http://www.mediate.com/articles/factor4.cfm> (last visited Nov. 16, 2015).
9. Ytterberg, *supra* n.5 at 45; see also Abeshouse, *supra* n.4 at 21; Bienstock, *supra* n.7 at 7.
10. See Factor III & Graham, *supra* n.8.
11. See *id.*
12. See John Stuart Mill, *On Liberty* § II ¶ 23

INSPECTIONS ...

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istration of taxes, can regulate businesses and individuals that engage in various commercial activities; it also has exclusive regulatory authority over businesses and individuals dealing in the wholesale and retail distribution of cigarettes and tobacco products, and regulatory oversight over the importation, transportation and sale of petroleum products, i.e., motor fuel (gasoline) diesel motor fuel,⁶ and alcoholic beverages.⁷

In regards to cigarettes and tobacco products, Investigators have authority

... to examine the books, papers, invoices and ... records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale ... as well as the stock of cigarettes or tobacco products in any such premises... (And), (t)o verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations.⁸

The Tax Department also has criminal enforcement authority with respect to certain taxes that it administers. In fact, Department Investigators are also police officers as defined under the New York State Criminal Procedure Law, regarding enforcement of such taxes.⁹ Possession of unstamped, counterfeit-stamped or out-of-state stamped cigarettes 'for purposes of sale' is a crime and such cigarettes are seized whenever or wherever they are discovered¹⁰ and vehicles if any, that were used to transport such cigarettes may also be seized for forfeiture.¹¹ The crimes of *Possession for Purposes of Sale or Sale of Unstamped or Illegally Stamped Cigarettes* range from Class D felony to Class A misdemeanor.¹²

In regard to sentencing, periods of incarceration or probation that may be imposed are based upon Penal Law criteria. However, under the Tax Law courts may impose fines substantially higher than those provided for in the Penal Law : for a felony, a fine not to exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or \$50,000, or, in the case of a corporation the fine may not exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or \$250,000 and for a misdemeanor the court may impose a fine not to exceed \$10,000, except that in the case of a corporation the fine may not exceed \$20,000.¹³

In addition to the criminal fines, it should also be noted that the Department has the authority to levy civil fines varying in severity, depend-

ing upon quantities of unstamped or counterfeit stamped cigarettes or counterfeit stamps found in possession of the defendant,¹⁴ (even if the defendant is not convicted of the above mentioned crimes.)

Case Law

The lead case in New York addressing the Department's authority to do administrative inspections involving cigarettes and tobacco products, and which had Fourth Amendment ramifications, was *People v. Rizzo*.¹⁵

There, the Tax Department received a complaint that a Ronald Rizzo had been arrested in New Jersey in possession of approximately 400 cartons of untaxed cigarettes, indicating two New York addresses connected with him. During surveillance at one of the addresses, an investigator observed the defendant in the garage in possession of 30 cartons of various brands of cigarettes. The investigator entered the garage without Rizzo's consent, seized about 90 cartons of cigarettes in the garage and about 54 cartons from the trunk of his car and arrested the defendant for the crime of Possession of Untaxed Cigarettes.¹⁶

The trial court suppressed the evidence of the cigarettes as an unconstitutional search and seizure. The Second Department upheld the trial court's decision and the Court of Appeals followed suit. The Court confirmed that the investigator lacked probable cause to believe that the storage or sale of cigarettes was taking place on the defendant's property prior to entering the premises. It also outlined three situations¹⁷ that could be considered guidelines for Tax Investigators while conducting administrative inspections involving cigarettes and tobacco products, as follows:

- Where the dealer is open and notorious either by license or holding himself out to the public, Tax Department Investigators are authorized to inspect records and inventory of that dealer.
- Where a party is engaging in regulated activity out of premises which are not publicly recognized as those of a dealer in that commodity and investigators have probable cause to believe that regulated activity is taking place, they may lawfully enter the premises and inspect records and inventory pursuant to their statutory power.
- However, where the regulated activity is in fact occurring but the investigators have nothing more than a suspicion (as opposed to probable cause) to believe that such activity is taking place, statutory authority will not suffice as the basis upon which to enter the premises under investigation.

The Impact of Inspections

Notwithstanding inspections of unlicensed individuals and businesses, such as the Rizzo case, the majority of the Department's regulatory inspections

involve businesses to which it has issued licenses and permits: cigarette stamping agents, wholesale and retail distributors. The Department is very proactive in its efforts to enforce the law. For example, for calendar year 2014 the Department had seized 2,017 cartons of cigarettes, 254,723 cigars, 2,059 pounds of loose tobacco, 14,738 counterfeit cigarette tax stamps and \$35,658 cash.¹⁸

Consider the following example of a store that was found in violation of the law during an inspection: On June 25, 2015... Tax Department Cigarette Strike Force Investigators conducted a cigarette inspection at Stop & Go Friend Corp. located at 730 South St., in Peekskill. In total, the investigators seized 159 packages of cigarettes with counterfeit tax stamps. Sultan Ahmed Mosleh Ali, 28 was charged with criminal tax fraud and felony possession of counterfeit tax stamps. The defendant was processed at the Peekskill Police Department and remanded to the Westchester County Jail.¹⁹

As in the above case generally,

- The store owner is either arrested or issued summonses,
- untaxed cigarettes are seized, and
- the store's permit (license) to do business (its Certificate of Registration²⁰) is also seized.

Confiscation of the Certificate of Registration translates into dire consequences for the business owner. Since Investigators have seized the store's Certificate of Registration, the store is prohibited from purchasing cigarettes from wholesale distributors or continuing to sell any such product (including existing inventory) to its customers. *Business is suspended!*

- loss of customers!
- loss of income!
- financial loss in money spent for inventory of legally-stamped cigarettes that the proprietor cannot sell!

And, in some cases finality; the shut down and discontinuance of business.

Options After Suspension

A defendant whose Certificate of Registration has been suspended because of unstamped or counterfeit-stamped cigarettes discovered on its premises has recourse. The Tax Law offers the business owner a procedure to apply for return of the store's Certificate of Registration and reinstatement of the store's authority to continue in business, i.e., the purchase and sale of cigarettes.

By filing a petition with the Department, the store owner has the right to have the seizure and suspension of the store's Registration reviewed. The Commissioner designates a Review Officer to hear the case. A hearing is conducted, during which the Petitioner may present evidence and witnesses in an effort to prove to the Review Officer's satisfaction a basis for lifting the suspension.²¹

Petitioner has the burden of proof, to prove by a preponderance of the

evidence that the cigarettes were not unstamped or unlawfully stamped. However, based upon this writer's experience as a Department Review Officer, the Petitioner usually is unable to sustain this burden and the alternative is to present evidence of mitigating circumstances concerning the incident. Counsel's presentation of the case should include information such as:

- Period during which the petitioner operated 'in good' standing with the Department
- information identifying the distributors from whom the client regularly purchases product, with copies of invoices and receipts reflecting such purchases
- explanation as to how the untaxed product came to be on the premises
- and, if available, information the client may have concerning incidents of illegal trafficking in cigarettes.

The Review Officer will decide the period of suspension or revocation of the Petitioner's Registration and will submit findings to the Department's Commissioner. Thereafter, the Commissioner will issue a decision regarding the Petitioner's suspension. If the decision is to continue the suspension or revoke the Certificate of Registration, the Petitioner may appeal the Commissioner's decision by commencing an Article 78 against the Tax Department Commissioner, in Supreme Court in Albany, NY.²²

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¹ United States Constitution, Fourth Amendment.

² New York State Constitution, Article One, § Twelve.

³ New Criminal Procedure Law, Article 690, §§ 690.05 et. seq.

⁴ *Colonade Catering Corp. v. United States*, 397 U.S. 722 (1970). The Supreme Court approved the statutory authorization of Internal Revenue Agents to conduct warrantless inspections of federally licensed dealers in alcoholic beverages.

⁵ *United States v. Biswell*, 406 U.S. 311 (1972). Dealer engaged in the pervasively regulated business of firearms sales accepts a license to do so with knowledge that his business records and inventory will be subject to effective inspection.

⁶ Tax Law Art. 12-A, §§ 281 et. seq.

⁷ Tax Law Art. 18, §§ 420-445.

⁸ Tax Law § 474(4).

⁹ New York Criminal Procedure Law § 1.20(34)

(g).

¹⁰ Tax Law Art. 37, § 1846 et. seq.

¹¹ Tax Law Art. 37, § 1847 et. seq.

¹² Tax Law Art. 37, § 1814(a) et. seq.

¹³ Tax Law Art. 37, § 1800.

¹⁴ Tax Law § 481(1)(b)(i) et. seq.

¹⁵ *People v. Rizzo*, 40 N.Y.2d 425 (1976).

¹⁶ *Rizzo*, 47 A.D.2d at 470 (1975).

¹⁷ *Rizzo*, 40 N.Y.2d at 428 and 429 (1976).

¹⁸ Press Release, NYS Dept. Taxation & Finance

(Apr. 7, 2014)(on file with author).

¹⁹ Press Release, NYS Dept. Taxation & Finance

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²⁰ Tax Law § 480-a(1)(a).

²¹ Tax Law § 480-a(4)(b).

²² Tax Law § 480-a(4)(c).

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17. *Fact-Finding and Discovery*, FindLaw, 2015, <http://litigation.findlaw.com/filing-a-lawsuit/fact-finding-and-discovery.html> (last visited Nov. 17, 2015).

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19. See Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy - For A Time*, 67 U. Colo. L. Rev. 259, 309 (1996); Gastwirth, *supra* n.16 at 16.

20. See *Am. Express Bank, Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dept. 1990) ("Rather

than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement."); *Caruso v. HSBC Private Bank*, No. 650347/2010, 2015 N.Y. Slip Op 30736(U), ¶¶ 12-15 (Sup. Ct. N.Y. Co. Apr. 29, 2015) (Singh, J.) (denying cross-motion to amend complaint where relevant contract proscribed recovery for consequential and punitive damages); Gastwirth, *supra* n.16 at 16.

21. See Harriette M. Steinberg & Elizabeth P. Donlon, *Using Mediation to Resolve a Will Contest (Maybe Even Before It Happens)*, 65 Nassau Lawyer (No. 3) 8, 22 (Nov. 2015).

22. Brand, *supra* n.13 (section entitled "Building

a Practice").

23. Ytterberg, *supra* n.5, at 45.

24. See Arran Dowling-Hussey, *A Cheaper Way to Solve Disputes*, Retail News, May 2014, at 62, 63 (*available at* http://issuu.com/retailnews/docs/rn_may_2014).

25. Gastwirth, *supra* n.16, at 16.

26. See Eugene S. Ginsberg, Eugene S. Ginsberg - Mediator Arbitration Long Island Attorney Nassau County Lawyer, 2015, <http://www.eugeneginsberg.com> (last visited Nov. 18, 2015).

27. Sun Tzu, *The Art of War* 77 (Samuel B. Griffith trans., Oxford Univ. Press 1971).