JDRN
International
Judicial Dispute
Resolution Network

BEST PRACTICE GUIDE FOR JUDICIAL DISPUTE RESOLUTION IN COMMERCIAL CASES

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A. OVERVIEW

The Judicial Dispute Resolution (JDR) process refers to the proactive, judge-led management of cases coupled with the use of a range of alternative dispute resolution (ADR) modalities to achieve the resolution of court disputes in full or in part so that judicial time is saved. This Guide relates to ADR for commercial cases.

The purpose of this Best Practice Guide is to provide a set of guidelines on the objectives, process and practice in the use of mediation, early neutral evaluation, and Judge-facilitated negotiation programs in Commercial Cases. These guidelines should be implemented and adapted in each jurisdiction as appropriate, and each member and observer should take from the Guide as much as is helpful (and modify it if helpful) to address the particular needs in that jurisdiction. These guidelines are not intended to be exhaustive. The legal framework and court procedures of each jurisdiction are to be considered when applying these guidelines. Each jurisdiction should use this Guide to assist in providing the type(s) of ADR Program most helpful and efficient.

(I) EARLY CONSIDERATION OF ADR

In all civil cases involving commercial disputes, each party shall consider the use of ADR, in the form of mediation, judge-facilitated negotiations, or early neutral evaluation. Each party shall report to the assigned Judge at their initial conference, or as soon as possible thereafter, whether the party believes one of these forms of ADR may facilitate the resolution of the lawsuit. Judges are encouraged to note the availability of mediation, judge-facilitated negotiations, and/or early neutral evaluation before, at, or after any initial conference. Courts may wish to consider adopting modified ADR or case management practices for lower value claims, to ensure proportionality between costs and the sums in dispute.

(II) WHAT IS A COMMERCIAL DISPUTE

Commercial disputes are defined as those actions involving more than $_____ in damages and in which the principal claims involve or consist of the following:

1. Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (*e.g.*, unfair competition);

2. Breach or violation of statutory or common law that arises out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements);

3. Business dealings that involve technology transactions and/or commercial disputes involving or arising out of technology;

4. Trade secrets, patent, and copyright disputes;

5. Restrictive covenants and employment agreements, not including claims that principally involve alleged discriminatory practices;

6. Transactions involving commercial real property, excluding actions for the payment of rent only;

7. Shareholder derivative actions;

8. Commercial class actions;

9. Business transactions involving or arising out of dealings with commercial banks and other financial institutions;

10. Internal affairs of business organizations;

11. Malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters;

12. Environmental insurance coverage;

13. Commercial insurance coverage (e.g., directors and officers, errors and omissions, and business interruption coverage);

14. Dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures; and

15. Applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief involving any of the foregoing commercial issues.

16. Business dealings and/or commercial disputes involving State, public, or other governmental bodies.

(III) TYPES OF ADR INCLUDED IN ADR PROGRAM

1. Mediation

Mediation is a process by which the mediator facilitates discussions between parties and guides them towards a mutually acceptable settlement which addresses the interests and underlying concerns of disputing parties rather than focusing on the legal and evidential merits of each party's case. During the

mediation session, the mediator focuses on working with parties to propose and craft solutions rather than dwelling on the problem and assigning blame. It is a forward-looking process which helps parties to extricate themselves from the ongoing dispute and be able to move on after reaching a mutually amicable settlement.

2. Early Neutral Evaluation

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by an experienced neutral lawyer with subject matter expertise. The evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance. Some jurisdictions do not permit ENE in connection with their ADR Program.

3. Judge-Facilitated Negotiations

A Judge may facilitate and manage negotiations at judicial settlement conferences. In a settlement conference, a judicial officer facilitates the parties' efforts to negotiate a settlement. Some settlement Judges use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and assist in formulating resolutions. A settlement Judge might articulate views about the merits of the case or the relative strengths and weaknesses of the parties' legal positions. Some jurisdictions make Judge-facilitated negotiations an informal and non-mandatory process.

B. MEDIATION

There shall be flexibility in how a Mediation Program is administered and conducted, and in the mediation of each individual case. The following are the key features of a robust Mediation Program:

(I) CONFIDENTIALITY

1. All participants in any mediation shall execute a confidentiality agreement and provide copies to the mediator and to the other participants before mediation begins. Signed confidentiality agreements should be maintained by the participants themselves. In addition, these confidentiality provisions should incorporate the confidentiality protections afforded by any applicable statutory or common law rules of the Court, and the Standards of Conduct (attached as Appendix A).

2. The following basic provisions should be included in all confidentiality agreements:

    a) Any communications made exclusively during or for the mediation process shall be confidential except as expressly set forth herein. The mediator shall not disclose any information about the mediation process, communications, or participants to anyone except for ADR Program staff. ADR Program staff must also maintain confidentiality. Administrative aspects of the mediation process, including the assignment of a mediator, scheduling and holding of sessions, and a final report that the case has concluded or not concluded through mediation, or that parties failed to participate, are not confidential and will appear on the docket of the case.

    b) The participants may not disclose discussions or other communications with the mediator unless (i) all parties agree, (ii) disclosure is required by law or by the applicable rules of professional conduct, or (iii) otherwise confidential communications are relevant to a complaint against a mediator or the Mediation Program arising out of the mediation. The parties may agree to disclose information provided or obtained during mediation to the Court while engaged in further settlement negotiations. The parties may disclose to the Court the terms of settlement if either party seeks to enforce those terms.

    c) All mediation participants will inform the mediator, and each other, in advance of any mediation session of the names of all persons who will attend, participate, or observe any communications during or for

the mediation. No person may attend, participate, or be allowed to observe or listen to the mediation without the prior consent of all parties and the mediator.

d) Neither the mediator nor any participant may record or permit the recording of any part of a mediation session including audio, video, chat, closed-captions, or any other methods of communication whether the mediation session is conducted in person, or through telephone or video conference.

e) Understanding that the security of any electronic or telephonic platform cannot be guaranteed, the mediator and all participants in a mediation conducted by telephone or video conference shall take reasonable and appropriate security precautions, or disclose to the mediator and all participants that they are unable to do so in advance of any session. Such precautions must include taking steps so that only intended participants have access to the session, and may include using a secure WiFi/Ethernet connection for all communications related to the mediation session, using secure meeting access codes, enabling an electronic waiting room, or locking meetings once all participants have convened.

f) Documents and information otherwise discoverable under the applicable rules of the jurisdiction are not shielded from discovery merely because they are submitted or referred to in the mediation.

g) The parties may not call the mediator as a witness or deponent, or compel the mediator to produce documents that the mediator received or prepared for mediation.

(II) PROCEDURES REGARDING THE MEDIATION PROCESS

1. Referring and Removing Cases from the Mediation Program

a) Cases enter the Mediation Program either through a process of automatic referral established by the Court or by referral of a specific case from the presiding judge with or without the request of the parties.

b) Any party may request removal from mediation by submitting such a request in writing to the presiding judge. The ADR Program Office should be copied on any requests for removal. Mediation deadlines will be stayed pending a determination from the presiding judge.

c) With the permission of the presiding judge, parties who have not settled through mediation may return at any point and may request

the original mediator (if they are available) or that a new mediator be assigned.

2. Assignment of the Mediator

a) The mediators on the panel are divided into sub-groups based on areas of subject matter expertise. For most substantive areas of law, mediators identify to the program the areas in which they have the requisite experience or background.

b) In most instances, once the ADR Program Office receives a referral (either through a Mediation Referral Order from the presiding judge or an automatic process established by the Court), a mediator is selected for proposed assignment at random from the sub-group of mediators who have the subject matter expertise that is relevant to the case. If no such mediator is available, the ADR Program Office will select a proposed mediator at random from a sub-group of mediators with expertise in a related subject matter. On occasion, Mediation Referral Orders are entered in matters the subject of which is not included in the expertise coding for panel mediators. In such instances, the ADR Program Office may contact panel members to determine who might have the requisite expertise, and the ADR Program Office will select a mediator from amongst the responding mediators. Mediators or mediation participants with questions or concerns about expertise for a specific case should contact the ADR Program Office.

c) In all cases, the mediator selected must respond to the ADR Program Office as quickly as possible, but no later than three (3) business days from selection, to clear conflicts and accept the assignment, to request an extension of time to clear conflicts, or to decline. Upon notice that the selected mediator has declined, or after three (3) business days without notice of acceptance or a request for an extension of time, another mediator will be selected.

d) The assignment of a case to a mediator should take place within fourteen (14) business days of the receipt by the ADR Program Office of the mediation referral. Once a mediator has accepted the case, the ADR Program Office shall notify the mediator and the parties of the assignment. Once notified, the parties have seven (7) business days to object to the mediator's assignment.

3. Disqualification

Mediators shall comply with the Conflicts of Interest Standard (*i.e.*, Standard II) set forth in the Standards of Conduct (attached as Appendix A).

a) At any time after accepting an appointment, a mediator who becomes aware of any circumstance that could present a reasonable apprehension of a lack of impartiality shall promptly disclose that circumstance to the ADR Program Office, or may disqualify themselves from further service in the matter and shall promptly disclose such disqualification to the ADR Program Office.

b) Any mediator who makes such a disclosure and who is deemed qualified to serve by the ADR Program Office shall promptly make the same disclosure to the participants, in writing, and shall continue as the assigned mediator if, after disclosure, all parties to the dispute waive all objections to any actual or potential lack of impartiality or conflict of interest that arises as a consequence of the circumstance disclosed by the mediator.

c) Any party may submit a written request to the Director of the ADR Program for the mediator's disqualification. This request should be submitted within seven (7) business days from the date of the notification of the mediator's name, or from the date of the discovery of a ground for disqualification. A denial of such a request is subject to review by the presiding Judge upon motion filed within ten (10) days of the date of the denial.

4. Timing for Mediation Scheduling

a) Unless the date for the initial mediation session was set prior to the mediator's acceptance, the mediator shall promptly confer with counsel for the parties, or the parties themselves (if they are self-represented litigants), immediately after assignment of a case to determine an appropriate date, time, and format/location for the first mediation session. Unless the presiding judge imposes specific timelines or guidelines for the mediation process, the date, time, and location of the first session should be finalized within thirty (30) days of the assignment of the mediator.

b) If the parties require no discovery or information before mediation can take place, the mediator should hold the first session within forty-five (45) days of the assignment of the mediator. If the parties require discovery or information for the purpose of mediation, the parties must confer to establish a short reasonable timeline for the completion

of limited discovery and should hold the first session within thirty (30) days of the completion of limited discovery. The mediator shall promptly notify the ADR Program Office of the date, time, and format/location of the first mediation session or the reason the mediation cannot be scheduled within such 30-day period. The ADR Program Office will docket the date, time, and format/location of the mediation session.

c) In certain instances, mediation participants may wish to indefinitely adjourn mediation pending some specific action in the case (*e.g.*, a decision on a pending motion), or remove a case from mediation entirely. Such requests should be made directly to the presiding judge with copies to the assigned mediator and the ADR Program Office.

d) Any subsequent sessions shall be scheduled within thirty (30) days of the prior session, unless there is a specific reason a date certain cannot be established. The assigned mediator shall promptly notify the ADR Program Office of the date, time, and format/location of the next mediation session or the reason the mediation cannot be scheduled within the 30-day period. The ADR Program Office will docket the date, time, and format/location of the mediation session.

5. Pre-mediation Disclosures

Before the first mediation session, the parties and mediator should discuss and consider the exchange of limited, targeted discovery to frame issues for resolution and to assist the parties in planning for additional discovery if the case does not settle.

To facilitate such disclosures, the Protective Order attached as Appendix B should be deemed issued in all cases in which pre-mediation discovery is exchanged.

Other possible considerations may include the following:

a) Whether to focus on liability versus damages issues

b) Whether limited electronically stored information production may be necessary

c) Whether early dispositive motions could help facilitate settlement discussions

d) Whether a stay of discovery, coupled with limited pre-mediation disclosures, could help facilitate settlement discussions

Examples of targeted discovery tailored to specific types of cases are attached as Appendix C.

6. Attendance and Participation at Mediation

The benefits of mediation are best realized with preparation, attendance, and active participation of all parties and counsel at all stages of the process.

a) Unless specifically excused by the mediator in writing before the date scheduled for the mediation, each party must attend mediation, whether it is in person or held remotely. This requirement is critical to the effectiveness of the mediation process as it enables parties to articulate their positions and interests, to hear firsthand the positions and interests of the other parties, and to participate in discussions with the mediator both in joint session and individually. If a represented party is unable to attend a previously scheduled mediation because of a change in that party's availability, the party's attorney must notify the mediator immediately so that a decision can be made whether to go forward with the mediation session as scheduled or to reschedule it. Mediators are required to report to the Court if a party failed or refused to attend, or refused to participate in the mediation.

b) At any time, the mediator may contact counsel, or the parties themselves (if they are self-represented litigants), to schedule either a joint or individual preliminary case conference telephone or video call for the purpose of discussing the nature and posture of the case; the status of discovery; questions regarding mediation process; scheduling; or any other matter pertinent to the mediation.

c) A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a decision-maker who has full settlement authority and who is knowledgeable about the facts of the case. "Full settlement authority" means the authority to agree to the opposing side's settlement offer, if convinced to do so at the mediation.

d) The lawyer primarily responsible for handling the matter must be the lawyer who appears in mediation and at any pre-mediation process, unless the mediator approves otherwise in writing.

e) A fully authorized representative of the client's insurance company must attend when the decision to settle and/or the amount of settlement must be approved or agreed to by the insurance company.

f) A government unit or agency satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, full settlement authority, and who is knowledgeable about the facts of the

case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

g) Counsel, the parties (if they are self-represented litigants), or the mediator may invite individuals who are not part of the mediation process to observe the mediation. Observers may only attend if all parties, counsel for parties, and the mediator consent. As a condition to the attendance of an observer, each observer is required to sign the Mediation Confidentiality Agreement and will be bound by any confidentiality provisions that are relevant to the mediation as if they were a party to the mediation. Requests for observers to attend should be made in advance to the ADR Program Office, in writing, and should include a statement of the requester's relationship to the individual who wishes to observe, and a statement that all parties, counsel for parties, and the mediator have been consulted and that all consent to the individual(s) observing.

7. Mediation Location

Mediation sessions may take place at any location, or in any format, agreed to by the mediator and the parties. If the mediator is unable to accommodate the parties' preferred location or format, the mediator should promptly notify the ADR Program Office so that the matter can be reassigned to a mediator who can accommodate the parties. If the parties cannot agree on a location or format, they should arrange a call with the Director of the Mediation Program. As a last resort, the parties may be directed to raise this issue with the presiding judge.

8. Mediation Statements

Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall deliver either to the mediator alone, or between the parties if the parties so consent, a brief mediation statement not exceeding ten double-spaced pages including:

a) the party's contentions as to both liability and damages;

b) an assessment of strengths and weaknesses of each party's claims and/or defenses;

c) the status of any settlement negotiations, including prior demands and offers;

d) barriers to settlement, if any;

e) the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action;

f) any other facts or circumstances that may be material to the mediation or settlement possibilities; and

g) next steps in the litigation if settlement is not reached.

9. Finalizing Settlement Terms

a) When the terms and conditions of a settlement are agreed to as a result of a mediation, the parties are strongly encouraged to document the material terms of the parties' agreement in a writing signed by the parties and/or authorized representatives at the time of the mediation. The mediator may delay notifying the ADR Program Office of a settlement until the mediator receives notice that a binding term sheet, or settlement agreement, has been fully executed.

b) Any term sheet or stipulation developed through mediation must be read and signed by all parties and/or counsel for parties.

10. Final Mediator Reports

a) The mediation will conclude when the parties reach a resolution of some or all issues in the case or the mediator or parties conclude that resolution (or further resolution) is not possible.

b) Once mediation is concluded the mediation referral will be closed with the docketing of a Final Report of Mediator which will be viewable only by counsel of record and to the Court. The report will indicate that the mediation was:

i) Held and agreement was reached on all issues.

ii) Held and agreement was reached on some, but not all, issues.

iii) Held and agreement was reached as to some, but not all, parties.

iv) Held but was unsuccessful in resolving any issue in the case. The ADR Program Office will consider the referral to be completed and close its files at this time but the judge may re-refer parties to mediation at any point.

v) Not held as parties represent that they have reached settlement on all issues.

vi) Not held as a stipulation settling all of the issues of the case was entered into prior to mediation.

vii) Not held as one or both parties failed, refused to attend, or refused to participate in the mediation.

viii) Not held as the case was removed from mediation by the judge.

ix) Closed for other reasons.

c) The Final Report of Mediator shall be submitted by the mediator to the ADR Program Office within seven (7) days of the final mediation session or when the mediation process is otherwise over.

d) If the Final Report of Mediator indicates that the parties have settled, the parties should promptly submit a stipulation of discontinuance or other appropriate document to the presiding judge.

11. Post-mediation Survey

To assist in the continued development of the Mediation Program, counsel for parties, or parties (if they are self-represented litigants), are strongly encouraged to respond to a short survey about the mediator and the mediation process. Feedback can also be provided by sending an email directly to the Mediation Program.

12. Immunity

Any person designated to serve as a mediator pursuant to these procedures shall, to the extent provided by law, be immune from suit based upon actions engaged in or omission made while performing the duties of a mediator.

13. Compensation of Mediator

a) Mediators designated by the ADR Program Office. Designated Mediators shall serve in that role at no charge during preparation for the mediation (e.g., scheduling conference 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 $____ [insert average rate per hour of experienced lawyers in the jurisdiction].

b) Agreements among the Mediator and the Parties. Notwithstanding the rule above, the mediator and the parties may agree upon a rate in excess of the otherwise applicable rate 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.

(III) MEDIATION PANEL APPLICATION CRITERIA

An individual may apply to serve as a mediator if they satisfy the following criteria:

1. Is a member in good standing of the bar of the Court;
2. Has substantial exposure to mediation in the relevant court or has mediated cases in other settings;
3. Has successfully completed initial mediation trainings of at least 30 hours within the last three years or, if the initial mediation training was completed more than three years ago the applicant has:
    a) served as a mediator in more than 5 disputes during the last three years, or
    b) completed during the last three years at least 16 hours of mediation skills training, an apprenticeship program, or practicum;
4. Provides a letter of reference from a party, mediation training provider, colleague, judge, court administrator, or appropriate staff person with a public or private dispute resolution organization, that specifically addresses the applicant's mediation process skills including the ability to listen well, facilitate communication, and assist with settlement discussions; and
5. Is willing to participate in training, mentoring programs, and ongoing assessment.

(IV) MEDIATION PANEL APPLICATION PROCESS

1. Approximately twice a year the Mediation Program will review all pending applications. Applicants will be notified whether or not they have been selected for an interview. All mediators asked to continue on past the interview are required to observe at least three mediations and participate in at least one mentor mediation before undertaking to mediate cases on his or her own.
2. The purpose of the mentor mediation is for the incoming mediator to take the lead with a mentor mediator there to provide support and step in (as needed) to maintain the quality of the process. The mentor mediator will also provide a recommendation as to the incoming mediator's readiness to join the panel.

3. The process of observation and acceptance of a matter for mentor mediation should take no longer than six months.

(V) SERVICE AS A MEDIATOR

1. An individual may serve as a mediator once they have been certified by the Chief Judge or his/her designee to be competent to perform the duties of a mediator for this Court.

2. Each individual certified as a mediator shall take the oath or affirmation prescribed by applicable Court rules.

3. Mediators are provided with free access to pleadings and other relevant information that may be needed when considering whether to accept a case, or for relevant research while mediating. At the mediator's request, the ADR Program Office will forward documents and information to the mediator directly.

4. Unless the Director of the ADR Program approves otherwise, mediators who are invited to join the Court's panel will be expected to meet the following requirements to remain on the panel:

   a) Membership in good standing of the bar of the relevant jurisdiction;

   b) Attending at least one continuing education program in mediation each year;

   c) Participating in ongoing assessment as determined by the Director of the ADR Program; and

   d) Mediating at least two cases per year.

5. All mediators are assumed to be available to accept cases unless the ADR Program Office is notified otherwise. Mediators should notify the ADR Program Office if they cannot accept cases for a discrete period of time by sending an e-mail to the ADR Program Office with the start and end dates. The ADR Program Office will automatically resume sending cases to the mediator on the date indicated by the mediator. Mediators who request not to receive cases indefinitely, and who are inactive for a period exceeding one year, will be presumed to be retired from the panel. Mediators who wish to return to active status after being inactive for more than one year must write a letter of request to the Director of the ADR Program describing any mediation-related activities or training during the retirement period. In most instances, mediators wishing to be reinstated will participate in a mentor mediation to assess their current level of skill. Reinstatement to the panel is at the discretion of the Director of the ADR Program, taking into consideration the needs of the program.

(VI) COMPLAINTS ABOUT MEDIATORS : INVESTIGATION/ REMEDIATION

The following protocol is observed whenever the ADR Program Office receives a complaint about a mediator. The Director of the ADR Program will begin by gathering information from relevant parties, attorneys for parties, judges, and other relevant Court personnel or observers. The Director of the ADR Program will then contact the mediator in question to discuss the complaint or concern directly. This may be a phone or video call or an in-person meeting, depending on convenience and the nature of the complaint. In most cases, the issue will be considered sufficiently addressed after a discussion with the mediator.

1. If the complaint is serious, or if the particular complaint is part of a pattern, the Director of the ADR Program and the mediator may explore options for correction. A plan will be determined on a case-by-case basis, and might include being observed or observing cases, attending relevant training, co-mediating, or participating in simulated mediations. It is possible that a mediator will be suspended from mediating during the remedial period. The situation will be reassessed after the determined course of action is completed.
2. If a mediator chooses not to participate in the remedial process, they will be choosing to discontinue serving as a panel mediator.
3. If similar or other complaints persist after the remedial period, the mediator and the Director of the ADR Program may discuss options for additional remedial work or the mediator may be removed from the panel.

(VII) RESIGNATION OR REMOVAL FROM THE MEDIATION PANEL

Mediators may resign from the mediation panel at any time by notifying the ADR Program Office. The Director of the ADR Program may remove mediators from the mediation panel for:

1. Failing to meet the established requirements;
2. Violating the Standards of Conduct attached as Appendix A;
3. Violating any other procedures promulgated by the Mediation Program; or
4. Based on complaints, observations, or communications with counsel, parties, or the Mediation Program, that indicate that a mediator is no longer mediating in a way that is appropriate for the Mediation Program or that resources are not available to provide sufficient training or support to enhance the quality of a mediator's practice.

C. EARLY NEUTRAL EVALUATION (ENE)

(I) ENE EVALUATORS

1. Appointment

After entry of an order referring a case to ENE, an ENE Evaluator will be appointed by the ADR Program Office from the Court's panel who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest. The Court will notify the parties of the appointment.

2. Disqualification

ENE Evaluators shall comply with the Conflicts of Interest Standard (*i.e.*, Standard II) set forth in the Standards of Conduct (attached as Appendix A).

a) At any time after accepting an appointment, an Evaluator who becomes aware of any circumstance that could present a reasonable apprehension of a lack of impartiality shall promptly disclose that circumstance to the ADR Program Office, or may disqualify themselves from further service in the matter and shall promptly disclose such disqualification to the ADR Program Office.

b) Any Evaluator who makes such a disclosure and who is deemed qualified to serve by the ADR Program Office shall promptly make the same disclosure to the participants, in writing, and shall continue as the assigned mediator if, after disclosure, all parties to the dispute waive all objections to any actual or potential lack of impartiality or conflict of interest that arises as a consequence of the circumstance disclosed by the Evaluator.

c) Any party may submit a written request to the Director of the ADR Program for the Evaluator's disqualification. This request should be submitted within seven (7) business days from the date of the notification of the Evaluator's name, or from the date of the discovery of a ground for disqualification. A denial of such a request is subject to review by the presiding Judge upon motion filed within ten (10) days of the date of the denial.

3. Compensation

ENE Evaluators shall volunteer up to two hours of preparation time and the first four hours in an ENE session. After four hours in an ENE session,

the Evaluator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the Evaluator. The ENE proceeding will continue only if all parties and the Evaluator agree. If all parties agree to continue, the Evaluator may then charge his or her hourly rate or such other rate that all parties agree to pay. If more substantial preparation by the Evaluator is desired, the parties may discuss appropriate alternative payment arrangements with the Evaluator. Alternative arrangements must be approved by the ADR Program Office. No party may offer or give the Evaluator any gift.

4. Payment

All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties must pay the ENE Evaluator directly, or the Evaluator's law firm or employer, as directed by the Evaluator. On a questionnaire form provided by the Court, the Evaluator shall promptly report to the ADR Unit the amount of any payment received.

(II) TIMING AND SCHEDULING THE ENE SESSION

Promptly after being appointed to a case, after consultation with the parties, the ENE Evaluator must fix the date and place of the ENE session. Unless otherwise ordered, the ENE session must be held within 90 days after the entry of the order referring the case to ENE. Requests for extension of the deadline for conducting an ENE session must be made by the parties no later than 14 days before the session is to be held and must be directed to the assigned Judge, in a motion or stipulation, with a copy to the other parties, the Evaluator (if appointed) and the ADR Program Office.

(III) *EX PARTE* CONTACT PROHIBITED

Except with respect to scheduling matters, there shall be no *ex parte* communications between parties or counsel and the ENE Evaluator, including private caucuses to discuss settlement, until after the Evaluator has committed his or her evaluation to writing and all parties have agreed that *ex parte* communications with the Evaluator may occur.

(IV) WRITTEN ENE STATEMENTS

No later than 7 days before the first ENE session unless otherwise directed by the ENE Evaluator, each party must submit directly to the Evaluator, and must serve on all other parties, a written ENE Statement. The

statements must be concise, may include any information that may be useful to the Evaluator, and shall include the following:

1. The name and title or status of: (i) the person(s) with decision-making authority, who, in addition to counsel, will attend the ENE session as representative(s) of the party, and (2) any persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE session or the prospects for settlement.

2. A brief description of the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

3. An identification of legal or factual issues whose early resolution could significantly reduce the scope of the dispute or contribute to settlement negotiations;

4. An identification of the discovery that is necessary to equip the parties for meaningful settlement negotiations;

5. Copies of documents out of which the suit arose, or whose availability would materially advance the purposes of the ENE session; and

6. Any other documents or information as directed by the Evaluator.

(V) ATTENDANCE AT ENE SESSION

All named parties and their counsel are required to attend the ENE session in person unless excused by the ENE Evaluator. This requirement reflects the Court's view that the principal values of ENE include affording litigants opportunities to articulate directly to other parties and a neutral their positions and interests and to hear, first-hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case and the relative strengths of each party's legal positions. Unless the ENE Evaluator otherwise specifies, "attendance" at an ENE session is governed by the following:

1. Corporation or Other Non-Governmental Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies the attendance requirement if represented by a person (other than outside counsel) who has final authority to settle and who is knowledgeable about the facts of the case. If final authority to settle is vested only in a governing board, claims committee, or equivalent body and cannot be delegated to a representative, an entity must disclose (in writing or electronically) this fact to all other parties and the ENE Evaluator at least 14 days before the ENE session will occur. This required

disclosure must identify the board, body, or persons in whom final settlement authority is vested. In this instance the party must send the person (in addition to counsel of record) who has, to the greatest extent feasible, authority to recommend a settlement, and who is knowledgeable about the facts of the case, the entity's position, and the procedures and policies under which the entity decides whether to accept proposed settlements.

2. Government Entity. A unit or agency of government satisfies the attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Insurers. Unless excused by the ENE Evaluator, insurer representatives are required to attend in person if they have accepted coverage, or the duty to defend, even if subject to a reservation of rights.

4. Counsel. Each party must be accompanied at the ENE session by the lawyer who will be primarily responsible for handling the trial of the matter.

(VI) PROCEDURE AT ENE SESSION

1. Components of ENE Session

The Evaluator shall:

a. Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

b. Help the parties identify areas of agreement and, where feasible, enter stipulations;

c. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments;

d. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

e. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as

expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

f. Help the parties assess litigation costs realistically;

g. If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and

h. Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

2. Process Rules

The ENE session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion shall be made.

3. Evaluation and Settlement Discussions

If all parties agree, they may proceed to discuss settlement after the evaluation has been written but before it is presented. The evaluation must be presented orally on demand by any party. Copies of the written evaluation may be provided to the parties at the discretion of the Evaluator. The parties also may agree to discuss settlement after the evaluation has been presented.

(VII) CONFIDENTIALITY

Except as provided by a case-specific order entered in advance of the ENE session, by the Court, the Evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as "confidential information" the contents of the written ENE Statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any ENE session. "Confidential information" shall not be:

1. Disclosed to anyone not involved in the litigation;

2. Disclosed to the presiding Judge; or

3. Used for any purpose, including impeachment, in any pending or future proceeding in this Court.

Notwithstanding the foregoing, the following is not prohibited:

1. Disclosures as may be stipulated by all parties and the Evaluator;

2. Disclosure of the terms of a fully executed settlement agreement signed during or arising out of the ENE session;

3. Disclosures made in a subsequent confidential ADR or settlement proceeding under these Rules;

4. The Evaluator from discussing the ENE session with the Court's ADR staff, who must maintain the confidentiality of the ENE session;

5. Any participant or the Evaluator from responding to an appropriate request for information duly made by persons authorized by the Court to monitor or evaluate the Court's ADR program; or

6. Disclosures as are otherwise required by law.

(VIII) FOLLOW UP

At the close of the ENE session, the Evaluator and the parties shall discuss whether it would be beneficial to schedule any follow up to the session. The Evaluator may order these kinds of follow up without stipulation:

1. Responses to settlement offers or demands;

2. A focused phone conference;

3. Exchanges of letters between counsel addressing specified legal or factual issues; or

4. Written or telephonic reports to the Evaluator, *e.g.*, describing how discovery or other events occurring after the ENE session have affected a party's analysis of the case or position with respect to settlement.

With the consent of all parties, the Evaluator may schedule one or more follow up ENE sessions that may include additional evaluation, settlement discussions, or case development planning.

(IX) LIMITATIONS ON AUTHORITY OF EVALUATOR

ENE Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do Evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

(X) CERTIFICATION OF SESSION

Within 14 days of the close of each ENE session, the Evaluator must report to the ADR Program Office: the date of the session, whether any follow up

is scheduled, and whether the case settled in whole or in part. The ADR Program Office will enter this information on the docket.

D. JUDGE-FACILIATED NEGOTIATIONS (SETTLEMENT CONFERENCES)

(I) REFERRAL TO A SETTLEMENT CONFERENCE

Cases are referred to a settlement conference by order of the assigned Judge following a written stipulation by all parties, on motion by a party, or the Judge's initiative. Upon written stipulation of all parties, the assigned Judge, in the exercise of his or her discretion, may conduct a settlement conference. Otherwise, the settlement conference will be conducted by a different Judge.

(II) ATTENDANCE AT SETTLEMENT CONFERENCE

The settlement conference shall be attended by a person with knowledge of the case and authority to settle the case.

(III) DIRECTIVES FROM THE SETTLEMENT JUDGE

Within any constraints fixed by the referring Judge, the settlement Judge shall notify the parties of the time and date of the settlement conference. The settlement Judge also shall notify the parties of his or her requirements for pre-conference submissions and for attendance at the settlement conference. The settlement Judge may order parties to attend. Unless the settlement Judge otherwise specifies, "attendance" at a settlement conference is governed by the following:

1. Corporation or Other Non-Governmental Entity. A party other than a natural person (*e.g.*, a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has final authority to settle and who is knowledgeable about the facts of the case. If final authority to settle is vested only in a governing board, claims committee, or equivalent body and cannot be delegated to a representative, an entity must disclose (in writing or electronically) this fact to all other parties and the settlement Judge at least 14 days before the settlement conference will occur. This required disclosure must identify the board, body, or persons in whom final settlement authority is vested. In this instance the party must send the person (in addition to counsel of record) who has, to the greatest extent feasible, authority to recommend a settlement, and who is knowledgeable about the facts of the case, the entity's position, and the procedures and policies under which the entity decides whether to accept proposed settlements.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person (in addition to counsel of record) who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Insurers. Unless excused by the settlement Judge, insurer representatives are required to attend in person if they have accepted coverage, or the duty to defend, even if subject to a reservation of rights.

Ordinarily, a corporation or other entity, including a governmental entity or an insurer, satisfies the attendance requirement by sending a person or persons who can agree to a settlement without the necessity of gaining approval from anyone else. Exceptions to this general practice must be disclosed and addressed in advance of the settlement conference.

(IV) CONFIDENTIALITY

Except as provided by a case-specific order entered in advance of the settlement conference by the Court, the settlement Judge, all counsel and parties, and any other persons attending the settlement conference shall treat as "confidential information" the contents of any written settlement conference statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any settlement conference. "Confidential information" shall not be:

1. Disclosed to anyone not involved in the litigation;

2. Disclosed to the assigned Judge; or

3. Used for any purpose, including impeachment, in any pending or future proceeding in this Court.

Notwithstanding the foregoing, the following is not prohibited:

1. Disclosures as may be stipulated by all parties;

2. Disclosure of the terms of a fully executed or binding settlement agreement on the record arising out of the Settlement Conference;

3. Disclosures made in a subsequent confidential ADR or settlement proceeding;

4. The settlement Judge from discussing the settlement conference with the Court's ADR Program staff, who must maintain the confidentiality of the settlement conference;

5. Any participant or the settlement Judge from responding to an appropriate request for information duly made by persons authorized by the Court to monitor or evaluate the Court's ADR program;

6. Disclosures as are necessary to preserve the Court's capacity to enforce lawful orders or to discipline contumacious conduct; or

7. Disclosures as otherwise required by law.

(V) REPORT

Following the settlement conference, the parties will advise the presiding Judge whether a settlement was reached, and if a settlement was reached, a date by which the parties expect to complete documentation of the settlement. The parties shall not discuss any reasons why a settlement was not reached.

(VI) NON-EXCLUSIVE

Nothing contained herein shall preclude or replace any settlement practices used by the Court, by any individual judge, or as agreed to by the parties, and the presiding Judge shall retain ultimate authority with respect to each aspect of the settlement conference.

Appendix A

STANDARDS OF CONDUCT FOR MEDIATORS AND NEUTRAL EVALUATORS

The following Standards of Conduct shall govern all who serve as mediators or neutral evaluators in cases that undergo mediation or neutral evaluation pursuant to Court's Alternative Dispute Resolution Program (the "ADR Program"). The ADR Program aims to provide an alternative to the formal litigation process that is sound, fair, efficient, expeditious, and inexpensive. To achieve this objective, the ADR Program must have the confidence of the Bar and the public. Therefore, the ADR Program must be marked at all times by the highest possible standards of integrity, honesty, fairness, openness, intelligence, and diligence.

STANDARD I: IMPARTIALITY

A mediator or neutral evaluator should conduct the proceeding in an impartial manner.

A mediator or neutral evaluator should act at all times with the utmost of impartiality and evenhandedness, and should avoid all conduct that gives the appearance of partiality toward one of the parties. A mediator or neutral evaluator should handle only those matters in which they can remain impartial and evenhanded. The mediator or neutral evaluator should withdraw if unable to do so at any time.

STANDARD II: CONFLICTS OF INTEREST

A mediator or neutral evaluator should decline any appointment if acceptance would create a conflict of interest.

Before accepting an appointment, a mediator or neutral evaluator should disclose all potential conflicts of interest. After such disclosure, the mediator or neutral evaluator may accept the appointment if all parties so request. The mediator or neutral evaluator should avoid conflicts of interest during and even after the mediation.

A mediator or neutral evaluator should review his/her past or present professional and other relationships, including with attorneys for parties and parents, subsidiaries, and affiliates of corporate parties, and should decline the appointment if the review reveals the existence of a conflict of interest. A mediator or neutral evaluator who contemplates accepting an appointment should disclose to all parties

all potential conflicts of interest that could reasonably be seen as raising a question about impartiality. If in doubt, the mediator or neutral evaluator should err on the side of disclosure. If all parties agree to proceed after such disclosure, the mediator or neutral evaluator may proceed. If, however, the conflict of interest or potential conflict would cast serious doubt on the integrity of the process or the ADR Program, the mediator or neutral evaluator should decline the appointment.

STANDARD III: COMPETENCE

A mediator or neutral evaluator should mediate only when they have the qualifications necessary to satisfy the reasonable expectations of the parties.

In principle, any person may be selected as a mediator or neutral evaluator, provided that the parties are satisfied with the individual's qualifications. However, training and experience are necessary for an effective process. Any person who offers to serve as mediator or neutral evaluator in a case represents that they have the training and competency to perform effectively. If the mediator or neutral evaluator lacks that ability, due to the complexity or difficulty of the matter or other factors, they should decline the appointment.

STANDARD IV: CONFIDENTIALITY

A mediator or neutral evaluator should comply with the rules of the ADR Program regarding confidentiality and should respect the reasonable expectations of the parties on that subject.

The rules of the ADR Program provide for confidentiality, recognizing that confidentiality is essential to the process. Mediators and neutral evaluators should at all times comply with these rules. The parties' expectations of confidentiality generally depend on the rules and any other rules or law providing for confidentiality, the circumstances of the mediation, and agreements they may make. The parties may provide for additional levels of confidentiality beyond that guaranteed in the rules and such agreement should be respected. The mediator or neutral evaluator should not disclose any information that a party, in accordance with the foregoing, reasonably expects to be confidential unless given permission by the confiding party or required by law or authorized by the rules.

STANDARD V: QUALITY OF THE PROCESS

A mediator or neutral evaluator should conduct the ADR proceeding fairly, diligently, judiciously and in a manner respectful of all parties and the ADR Program.

A mediator or neutral evaluator should work to ensure a process of high quality. This requires a commitment by the arbitrator or neutral evaluator to fairness, high standards of due process, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator or neutral evaluator should provide an adequate and fair opportunity for counsel for each party to prepare for and to make presentations and to challenge those of adversaries. The mediator or neutral evaluator should observe deadlines and handle responsibilities with diligence and expedition.

STANDARD VI: SELF-DETERMINATION

A mediator or neutral evaluator should at all times recognize that settlement must be based on the principle of self-determination.

The parties have the right to communicate, assess facts, events, and issues, and make choices for themselves, and, if they wish, to reach an agreement, voluntarily and free of coercion.

Appendix B

PROTECTIVE ORDER

WHEREAS, the parties seek to exchange certain documents and information as part of an alternative dispute resolution process;

WHEREAS, the parties seek to ensure that the confidentiality of these documents and information remains protected; and

WHEREAS, good cause therefore exists for the entry of an order of protection, under the applicable rules of this Court, it is hereby

ORDERED that the following restrictions and procedures shall apply to the information and documents exchanged by the parties pursuant to their ADR process:

1. Counsel for any party may designate any document or information, in whole or in part, as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL."
2. The Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the action.
3. In the event a party challenges another party's designation of confidentiality, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party reserves the right to object to the use or admissibility of the Confidential Information.
4. The parties should meet and confer if any production requires a designation of "For Attorneys' or Experts' Eyes Only." All other documents designated as "CONFIDENTIAL" shall not be disclosed to any person, except:
    a. The requesting party and counsel, including in-house counsel;
    b. Employees of such counsel assigned to and necessary to assist in the litigation;
    c. Consultants or experts assisting in the prosecution or defense of this matter, to the extent deemed necessary by counsel; and
    d. The Court (including the mediator, or other person having access to any Confidential Information by virtue of his or her position with the Court).

5. Prior to disclosing or displaying the Confidential Information to any person, counsel must:

   a. Inform the person of the confidential nature of the information or documents;

   b. Inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of the information or documents to any other person; and

   c. Require each such person to sign an agreement to be bound by this Order in the form attached hereto.

6. The disclosure of a document or information without designating it as "confidential" shall not constitute a waiver of the right to designate such document or information as Confidential Information. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.

7. At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than 30 days after entry of final judgment no longer subject to further appeal) returned to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain protected.

Agreement

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled

_____

have been designated as confidential. I have been informed that any such documents or information labeled "CONFIDENTIAL" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

DATED:

_____
Signed in the presence of:

_____
(Attorney)

Appendix C

SAMPLE DISCOVERY PROTOCOLS

I. Breach of Contract Cases

A. Underlying contract

B. key documents/correspondence relating to alleged breach

C. Documents identified in complaint, if any

D. Key documents identified in initial disclosures, if any

E. Key documents related to potential defenses/counterclaims

F. Proof of insurance coverage, if any

II. Patent Cases

When a claim in a case alleges infringement of a patent, or when a party seeks a declaratory judgment that a patent is not infringed, is invalid, or is unenforceable, each party must exchange the following:

A. The patent and its prosecution history

B. Each party claiming patent infringement must serve on all parties a "Disclosure of Asserted Claims and Infringement Contentions," which identifies for each opposing party each claim of each patent-in-suit that is allegedly infringed and each product or process of each opposing party of which the party claiming infringement is aware that allegedly infringes each identified claim

C. Each party in a patent case who is accused of infringement shall set forth the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made.

III. Copyright Cases

To the extent then known or readily available and feasible, a party who bases a claim on copyright must exchange the following:

A. The copyright registration (or, if there is no relevant copyright registration yet, the relevant copyright application)

B. One or more demonstrative exemplars of the copying and infringement

C. Any direct or indirect evidence of copying

D. Plaintiff shall indicate whether it intends to elect statutory or actual damages

E. Each party in a copyright case who is accused of infringing shall set forth the dollar volume of sales of and profits from the allegedly infringing works that it and any entities for which it is legally responsible have made

IV. Trademark Cases

To the extent then known or readily available and feasible, a party who bases a claim on trademark or trade dress infringement, or on other unfair competition, must exchange the following:

A. Its registration, if any

B. Exemplars of both its use of its mark and use of the allegedly infringing mark, both including a description or representation of the goods or services on or in connection with which the marks are used

C. Any evidence it has of actual confusion

D. If "secondary meaning" is in issue, such a party must also describe the nature and extent of the advertising it has done with its mark and the volume of goods it has sold under its mark

E. Both parties must exchange documents sufficient to show how the consuming public is exposed to their respective marks and goods or services, including, if available, photographic or other demonstrative evidence

F. Each party who is accused of infringement must set forth the dollar volume of sales of and profits from goods or services bearing the allegedly infringing mark

V. Employment Cases

A. Documents that the plaintiff must produce to the defendant:

1. The plaintiff's employment contract

2. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiff's application for the position and any documents the plaintiff sent or received concerning the defendant's decision

3. If the claims in this lawsuit include the wrongful termination of employment, any documents the plaintiff sent or received concerning the defendant's decision

4. If the claims in this lawsuit include a failure to accommodate a disability, any requests for accommodation and responses to such requests

5. If the plaintiff's employment was terminated, any documents demonstrating the plaintiff's efforts to obtain other employment. The defendant shall not contact or subpoena a prospective or current employer absent agreement or leave of court

6. Any application for disability benefits or unemployment benefits after the alleged adverse action and documents sufficient to show any award

7. If the plaintiff is relying on any oral comments that the plaintiff alleges were discriminatory or on any instances of harassment, identify the speaker or actor, the comment or action, and any witnesses to the comments or harassment.

8. A description of the categories and amounts of damages for the plaintiff's claims.

B. Documents that the defendant must produce to the plaintiff:

1. The plaintiff's employment contract, job description, and documents sufficient to show plaintiffs compensation and benefits.

2. The plaintiff's personnel file

3. For the most recent 5 years of employment, plaintiff's performance reviews and the file created for any disciplinary actions taken against the plaintiff.

4. Any documents sent by the defendant to a government agency in response to government agency claims filed by the plaintiff in which the plaintiff relied on any of the same factual allegations as those in this lawsuit

5. If the claims in this lawsuit include a failure to hire or a failure to promote, the plaintiffs application and any documents the defendant created that record the reasons the defendant rejected the plaintiffs application.

6. If the claims in this lawsuit include the wrongful termination of employment, any documents the defendant sent to or received from the plaintiff regarding the termination, and any documents that record the reasons for the termination decision

7. If the claims in this lawsuit include a failure to accommodate a disability, any written requests for accommodation, written responses to such requests, and documents that record the reasons for rejection of a requested accommodation

8. Written workplace policies relevant to the alleged adverse action