for his/her services as arbitrator. The maximum rate for each arbitrator in these circumstances will be $ 200 per hour (unless a higher rate is agreed upon), which will cover and apply to time spent reviewing materials in preparation for arbitration hearings, in the hearings themselves, and rendering an award. Even with such a fee, the post-mediation arbitration will often prove very much less expensive than a trial and have other advantages as well. The Program itself will impose no charge upon the parties for this service.

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

M. Later ADR

If a reference to the Program does not result in a complete resolution of all outstanding issues, then, as indicated, the case will be remanded to the assigned Justice. Later in the case the Justice may determine that the matter is now likely to settle if returned to ADR and may issue another mandatory Order of Reference, or the parties may consent to a second reference. If the original reference was a mediation, the parties may choose the same mediator, if he/she is available. Any such referral shall be considered and directed at as early a point as is practicable. The procedures described above will apply to second referrals. However, since the Program and its Neutrals will have already devoted time and energy to the case, the parties to all second referrals will be obliged to compensate the Neutral in accordance with the fee standards set forth in Section L.

N. Further Information; Comments and Suggestions

Further information about the ADR Program may be obtained from the Program

Administration in the Commercial Division Support Office. The Commercial Division is extremely interested in comments from parties and Neutrals about the Program, especially suggestions for improving it. Please send comments and suggestions to the Clerk-in-Charge of the Commercial Division Support Office.

February 15, 1999

THE COMMERCIAL DIVISION ALTERNATIVE DISPUTE RESOLUTION PROGRAM

Commercial Division Support Office
Supreme Court, New York County
60 Centre Street, Room 148
New York, New York 10007
Phone: (212) 748-5303
Fax: (212) 748-5312

PABLO RIVERA
CLERK-IN-CHARGE

Barbara Reaves
Associate Court Clerk

Doug Henderson
ADR Coordinator

COMMERCIAL DIVISION

RULES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM COMMERCIAL DIVISION SUPREME COURT, NEW YORK COUNTY

PREAMBLE

The following Rules shall govern cases sent to alternative dispute resolution by Justices of the Commercial Division and other authorized Justices or referred upon consent of the parties. As indicated hereafter, 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 court's program. Further, after a case has been submitted to the court's program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. Program: The Commercial Division of the Supreme Court of the State of New York, County of New York, operates the Alternative Dispute Resolution Program ("the Program"). The Program shall be applicable, as hereinafter set forth, to cases referred by Justices of the Commercial Division, the Administrative Judge of the Supreme Court, Civil Branch, New York County ("the Administrative Judge"), and the other Justices of the Supreme Court, New York County upon authorization of the Administrative Judge; and commercial cases referred by consent of the parties to the extent the Program can accommodate them. These Rules shall govern all cases so referred.

Rule 2. Panel: The Administrative Judge shall establish and maintain a panel of Neutrals ("the Panel") who shall possess such qualifications as shall be promulgated. Neutrals shall serve without charge to the parties unless the parties otherwise agree or these Rules otherwise permit. Persons may be added to or removed from the Panel as the Administrative Judge may determine. Members of the Panel serve as volunteers in a state-sponsored program.

Rule 3. Determination of Suitability; Order of Reference: Cases shall be referred to alternative dispute resolution ("ADR") as early in their lives as is practicable. At the outset of each case described in Rule 1, the suitability of the action for ADR shall be determined by the assigned Justice or the Administrative Judge, after considering the views of the parties insofar as practicable. If the Justice or the Administrative Judge 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 Justice shall issue an Order of Reference requiring that the case proceed to ADR 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 Justice.

proceeding. 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 5 (a), a party or the Program Administration 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, (i) the parties may include confidential information in a written settlement agreement; (ii) the Neutral and the parties may communicate with the Program Administration about administrative details of the proceeding; and (iii) 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. Furthermore, this Rule shall not apply to binding arbitration.

Rule 6. Immunity of the Neutral: Any person designated to serve as Neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity.

Rule 7. Procedure:

(a) Parties referred to the Program are free to choose the form of ADR they wish to undergo. Unless otherwise agreed by the parties, cases shall be mediated.

(b) Unless otherwise directed by the Justice assigned, all proceedings in this court other than the ADR process, including all disclosure proceedings and motion practice, shall be stayed from the date of the Order of Reference until 45 days from the date on which the Program Administration confirms to the parties that a particular Neutral has been designated to conduct the proceeding ("the Confirmation Date"). Notwithstanding the stay, 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 herein set forth.

(c) The first ADR session shall be conducted within 30 days from the Confirmation Date. Immediately after confirmation, all parties shall communicate with one another and the Neutral and take all steps necessary to comply with said deadline. At least ten days before that session, 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 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.

(d) Attendance is required at the first ADR session and at a second session if the Neutral directs that one shall take place.

appropriate procedures to govern the process in lieu of the requirements for settlement memoranda of Rule 7 (c), for appearance of the parties in person or by corporate official of Rule 7 (e), and of Rule 7 (f) and (g). An award shall be issued within the time for a report of the Neutral fixed by Rule 8. If the parties agree to arbitration but are unable to agree upon the procedures to be followed in the process, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the Program Administration.

Rule 11. Conversion of Mediation to Binding Arbitration.

(a) Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in or at the end of the mediation process.

(b) Any such arbitration must proceed before a different Neutral than the one who presided over the mediation session(s). However, this subdivision shall not apply if the mediator had not received any material or information from a party *ex parte* by the time an agreement to proceed to arbitration was reached.

(c) As soon as practicable and in any event within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the Program Administration a written stipulation submitting the case to arbitration under this Rule and identifying the number of arbitrators agreed upon. There shall be a single arbitrator unless otherwise agreed, in which event there may be a maximum of three. Together with the stipulation the parties shall submit a list identifying the person(s) to serve as arbitrator(s) whom they have chosen or the names of at least three prospective arbitrators from the roster of Panel members whom they have agreed upon for each position. If the parties are unable to provide either listing, the Program Administration shall select the arbitrator(s).

(d) Any person tentatively selected as an arbitrator shall comply with Rule 4 (c) hereof.

(e) The arbitration shall be completed within 45 days from the date on which the Program Administration advises the parties of the confirmation of the selection of the arbitrator(s). The arbitrator(s) shall issue a written award within seven days after completion of the proceeding. This award shall be binding upon the parties.

(f) The parties shall stipulate in advance to all other necessary procedures to govern the arbitration.

(g) Each arbitrator designated from the roster of Panel members pursuant to subdivision (c) of this Rule shall be entitled to compensation for services rendered as follows. Compensable services shall consist of time spent reviewing materials submitted by the parties in advance of the arbitration session(s), in the arbitration hearing(s), and rendering an award. The maximum rate for such services shall be $ 200 per hour unless the parties agree upon a higher rate. The Program itself will impose no fee for this service.

Rule 12. Further ADR:

(a) After completion of the ADR proceeding, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to the

STATE OF NEW YORK
UNIFIED COURT SYSTEM
FIRST JUDICIAL DISTRICT
SUPREME COURT, CIVIL BRANCH
60 CENTRE STREET
NEW YORK, NEW YORK 10007-1474
(212) 374-4726
FAX (212) 374-3326

JONATHAN LIPPMAN
Chief Administrative Judge

JOAN B. CAREY
Deputy Chief Administrative Judge
New York City Courts

STEPHEN G. CRANE
Administrative Judge
First Judicial District
Supreme Court, Civil Branch

March 22, 2001

Re: Commercial Division ADR Program

Dear Neutral:

We are making some changes on an experimental basis to the procedures for the Commercial Division Alternative Dispute Resolution Program.

As you know, our ADR Rules have provided that the parties are given an opportunity to select the neutral of their choice. For some time we have been concerned that this aspect of the process builds in delay. We fear that, as a result, Justices do not refer as many cases as they otherwise would. Accordingly, last spring we instituted an experimental procedure in which the Program Administrator selects the neutral. The experiment has significantly reduced delay.

In light of this experience and after consultation with our ADR Advisory Group, we will continue our experiment with some modifications. Henceforth, the neutral will be selected by the Program Administrator within five business days from receipt of an order referring a case to ADR. In order to ensure that as many neutrals as possible can receive referrals, we will generally proceed in alphabetical order in making the selections from our Roster of Neutrals. The Administrator may deviate from this procedure occasionally, when the special needs of a case so require, such as where a case calls for unusual expertise on the neutral's part.

Using this procedure, the Program Administrator will contact a neutral to inquire about the neutral's ability and willingness to handle a case. If you are the recipient of such a contact and you cannot handle the case, please advise the ADR Coordinator when in the near future you will be free to do so.[1] We will try to call back at that time with another case. In you are unable to take the case or to handle another in the near future, some time may pass before the Administration contacts you again in view of the alphabetical process being followed. If you can take the case, we will need to

[1] Once you accept a case, it is imperative that you continue to handle it unless an unanticipated

more than one session is required to complete the proceeding, the interval between sessions be kept brief.

We shall be monitoring how long cases have been pending. We do not want the ADR process to be curtailed arbitrarily if the case is active and progress is being made. On the other hand, we do not want cases to remain open that are not truly active. Even if there is no stay of disclosure in place, and there rarely is, it is important that the ADR process be completed as quickly as possible. The Justices who refer matters want them concluded promptly. Promptness is required by the Chief Judge's Comprehensive Civil Justice Program. The longer ADR takes, the more its benefits will be dissipated as parties spend money on litigating. Also, it is better for the Justice's inventory that ADR be completed sooner rather than later. Some cases have continued in ADR for too long in the past. If Justices start to believe that the process takes too long, they will be disinclined to use it as much as they otherwise might. This has to some extent occurred in the past.

During this experiment, the initial ADR session shall be conducted within 30 days from designation of the neutral and the process shall be concluded within 45 days from designation. The ADR Rules so provide. Rules 7(c) and 8. Rule 9 provides that if a complete resolution is not achieved within 45 days, but the parties and neutral agree that the process should continue, it may go forward (though without any further stay if the Justice has not already lifted the stay). During this experiment, all cases shall in any event be concluded within 75 days.

If a case is not concluded by the 60th day, the Program Administrator will contact the neutral for a status report. After 75 days, the Program Administrator will be compelled to return the case to the assigned Justice for a conference to schedule ongoing litigation unless the Justice specifically authorizes continuation of the ADR process. Therefore, we plead with all neutrals to proceed as expeditiously as possible and to avoid granting the parties numerous or extensive adjournments.

We are grateful for the commitment and dedication of so many neutrals over the five years our ADR program has been in existence. We continue to strive to improve its efficiency and productivity. We hope these experimental changes have these results and that more neutrals will have a chance to handle more cases. We will monitor progress over the next few months and will make whatever modifications experience requires. We will keep you informed.

Sincerely,

Stephen G. Crane

Stephen G. Crane

COURT NOTE

The Alternative Dispute Resolution Program of the Commercial Division will institute an experiment, effective April 16, 2001. Under the experiment, pursuant to ADR Rule 4(a), the Program Administrator will select from the Roster of Neutrals the neutral to be assigned to each matter referred to ADR. Generally, the next available neutral in alphabetical order will be chosen, although the Administrator will have the discretion to designate another member of the Roster in appropriate cases. On or before the fifth business day after the order of reference reaches the Commercial Division Support Office, that Office will advise the parties of the name of the neutral and the date on which the ADR proceeding will take place. The parties will have five business days from the date of such notification within which to agree on another neutral. In order for a substitution to be made, the parties must contact the other neutral directly, whether a member of the Roster of Neutrals or someone else, and make arrangements for that person to conduct the ADR proceeding. Information on the members of the Program's Roster of Neutrals can be found on the Commercial Division website (at http://www.courts.state.ny.us). Any person selected from outside the Roster must comply with the deadlines that govern the Program, and the parties must so inform that person at the time of selection. Within five business days from the date on which the parties are notified of the name of the neutral selected by the Administrator, the parties must report back to the Administrator the name of the substitute neutral and the date on which the proceeding will be held. This five-day period cannot be extended.

The neutral selected by the Administrator will serve without charge. If the parties agree on a substitute neutral, he or she may require that the parties pay reasonable

compensation.

Parties are reminded that the initial ADR session must take place within 30 days from the date a neutral is designated. The entire proceeding must be completed within 45 days from this designation. ADR Rules 7(c) and 8. If the case has not been entirely resolved and the parties and the neutral agree, the process may continue beyond the 45 days although any stay will end. ADR Rule 9.

In addition, Rule 9 of the ADR Rules is being amended for the duration of this experiment by the inclusion of the underscored material:

> Rule 9. Continuation of ADR after Expiration of the Stay: If the matter has not been entirely resolved within the 45-day period as provided in Rule 8 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, absent extraordinary circumstances, there shall be no additional stay of other proceedings in the case. The ADR process shall be completed within 75 days from the designation of the Neutral unless the assigned Justice specifically authorizes the Process to continue beyond that date.

This experiment shall continue until further notice.

March 22, 2001

STEPHEN G. CRANE
ADMINISTRATIVE JUDGE

COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY

ALTERNATIVE DISPUTE RESOLUTION PROGRAM

STANDARDS OF CONDUCT FOR MEDIATORS

The following Standards of Conduct shall govern all who serve as mediators in cases that undergo mediation pursuant to the Rules ("the ADR Rules") of the Alternative Dispute Resolution Program of the Commercial Division ("the ADR Program").[1] Separate Standards of Conduct for Arbitrators and Neutral Evaluators have been issued.

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 Program must have the confidence of the Bar and the public. All activities undertaken pursuant to the ADR Rules will reflect upon the Commercial Division and the court system as a whole. Therefore, the Program must be marked at all times by the highest possible standards of integrity, honesty, fairness, openness, intelligence, and diligence.

STANDARD I
SELF-DETERMINATION

A mediator should recognize that mediation is based on the principle of self-determination.

Self-determination is the fundamental principle of mediation. Mediation is built upon the ability and right of the parties 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.

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[1] In these Standards, the Commercial Division has sought to tailor to the particular characteristics of the Program and to implement standards that have gained national recognition and wide acceptance among ADR neutrals, Judges, court administrators, the Bar, and members of the public utilizing these processes. These Standards have been derived from the Model Standards of Conduct for Mediators, a product of the joint labors of the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

Ethical Considerations

1. As set forth in Standard VI, a mediator should provide information about the process to the parties. The primary role of the mediator is to foster dialogue and, when desired by the parties, facilitate a voluntary resolution of a dispute. A mediator may identify issues and help parties to communicate and explore options. A mediator should never do anything to undermine an atmosphere of free exchange of views and ideas, or to coerce an agreement.

2. The mediator may facilitate the parties' own engagement in assessment of risks or analysis of legal positions, in private discussions ("the caucus") or in joint sessions, if that will assist the parties to understand options fully. A mediator may also, where appropriate, provide an assessment of the risks associated with litigation or other binding processes.

3. A mediator should encourage balanced discussion and discourage intimidation by either party. A mediator should work to promote each party's understanding of and respect for the perspective, interests, feelings, concerns, and position of each of the other parties, even if they cannot agree.

4. A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement. However, a party in the ADR Program will normally be represented by counsel and the mediator should provide full opportunity to parties and their attorneys to consult with each other and, if necessary, for both to consult with outside professionals.

5. If the mediator discovers an intentional abuse of the process, the mediator may discontinue the process.

STANDARD II
IMPARTIALITY

A mediator should conduct the mediation in an impartial manner.

A mediator should act at all times with the utmost of impartiality and evenhandedness. A mediator should mediate only those matters in which he/she can remain impartial and evenhanded. The mediator should withdraw if unable to do so at any time.

Ethical Considerations

1. A mediator should avoid all conduct that gives the appearance of partiality toward one of the parties. A mediator should avoid favoritism or prejudice based on the parties' background, prominence, personal characteristics, economic importance, performance at the mediation, or any other factors. The quality of the mediation process is enhanced and the reputation of the Program protected when the parties have confidence in the impartiality of the mediator.

2. The principle of impartiality does not prohibit the mediator from engaging in caucuses in accordance with these Standards as part of the mediation process.

STANDARD III
CONFLICTS OF INTEREST

A mediator should decline any appointment if acceptance would create a conflict of interest. Before accepting an appointment, a mediator should disclose all potential conflicts of interest. After such disclosure, the mediator may accept the appointment if all parties so request. The mediator should avoid conflicts of interest during and even after the mediation.

A mediator offered an appointment in a case should comply with the ADR Rules regarding conflicts of interest. A mediator 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. Consistent with the principle of self-determination by mediating parties, a mediator 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 should err on the side of disclosure. If all parties agree to mediate after such disclosure, the mediator may proceed. If, however, the conflict of interest or potential conflict would cast serious doubt on the integrity of the process or the Program, the mediator should decline the appointment.

A mediator should avoid conflicts of interest during and even after the mediation. Before or during the mediation the mediator should not discuss with any party future retention in any capacity.

Ethical Considerations

1. If, during a mediation, the mediator discovers a conflict, the mediator should notify the Program Administration and counsel. Unless the mediator, the parties, and the Program Administration all give their informed consent to the mediator's continuation and continuation would not cast serious doubt on the integrity of the process or the Program, the mediator should withdraw.

2. A mediator should not recommend the services of particular professionals to assist the parties and counsel in the mediation unless a request for a recommendation is made jointly by all parties and provided that in so recommending the mediator does not engage in a conflict of interest. A mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.

STANDARD IV
COMPETENCE

A mediator should mediate only when he/she has the qualifications necessary to satisfy the reasonable expectations of the parties.

In principle, any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. However, training and experience are necessary for effective mediation. All members of the Roster of Neutrals should comply with the Division's training standards within the deadlines set forth. Parties in the Program are free to utilize mediators not listed in the Roster. Any person who offers to serve as mediator in a case represents that he/she has the training and competency to mediate effectively. If the mediator in fact lacks that ability, due to the complexity or difficulty of the matter or other factors, the mediator should decline the appointment.

Ethical Considerations

1. All members of the Roster of Neutrals should supply the Program Administration with information on their backgrounds and ADR training and experience so that parties will have the information they need to make a fully informed choice of neutral for their case.

2. A Commercial Division mediator should cooperate with the Program Administration to assist in the determination of whether the mediator is qualified for a particular mediation.

STANDARD V
CONFIDENTIALITY

A mediator should comply with the ADR Rules regarding confidentiality and should respect the reasonable expectations of the parties on that subject.

The ADR Rules provide for confidentiality in mediation, recognizing that confidentiality is essential to the process. Mediators 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 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.

Ethical Considerations

1. At the outset, the mediator should explain to all parties the principle of

confidentiality, with regard to both joint sessions and caucuses.

2. If a party conveys to the mediator in a caucus information that the mediator knows or believes the other party to the case does not possess, the mediator should exercise the utmost diligence to prevent revelation of that information to the other party unless the communicating party has specifically agreed to disclosure.

3. A mediator should not disclose confidential information to the Program Administration or the assigned Justice, including with regard to the merits of the case, settlement offers, and how the parties acted in the process, except that, as provided in the ADR Rules, the mediator may report violations of the Rules to the Administration.

4. Confidentiality should not be construed to prohibit effective monitoring or evaluation of the Program by the Program Administration. Thus, a mediator may report to the Administration, in general terms, whether the process is continuing and the future schedule for the proceeding. Under appropriate circumstances, the Program Administration may allow researchers access to general statistical data and, with the specific permission of all parties, individual case files, observations of live mediations, and interviews with participants. Similarly, mentors and trainees may observe live mediations, but only with permission of all parties and subject to the ADR Rules on confidentiality.

5. A mediator should not, at any time, use confidential information acquired during the ADR process to gain personal advantage or advantage for others, or to affect adversely the interests of another.

STANDARD VI
QUALITY OF THE PROCESS

A mediator should conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination.

A mediator should work to ensure a process of high quality. This requires a commitment by the mediator to fairness, diligence, sensitivity toward the parties, and maintenance of an atmosphere of respect among the parties. The mediator should guarantee that there is adequate and fair opportunity for counsel and each party to participate in discussions. The mediator should observe deadlines and handle his/her responsibilities with diligence and expedition. The parties decide when and under what conditions they will reach an agreement.

Ethical Considerations

1. A mediator should agree to accept an appointment only when able to commit the time and attention essential to a fair and effective process. If the mediator may be too busy with

other matters to do so, then the proposed appointment should be declined. If after acceptance of the appointment, circumstances develop that prevent the mediator from serving, the mediator should withdraw. Withdrawal may cause significant inconvenience for the parties; therefore, the mediator should exercise diligence to determine availability in advance of commencement of the proceeding.

2. A mediator should keep the Program Administration informed about the schedule for the process. A mediator should not allow a mediation to be unduly delayed and should consult with the Administration if delay substantially threatens the process.

3. A mediator should treat parties and counsel with sensitivity, civility and respect and should encourage parties and counsel to treat each other in the same way. A mediator should foster cooperation and work to build reasonable trust among the parties in the process. A mediator should provide all counsel and parties with an adequate and fair opportunity to state positions, opinions and interests.

4. The primary purpose of the mediator is to facilitate communication by the parties, their own generation and assessment of options, and a voluntary agreement. A mediator should refrain from providing professional advice and should at all times distinguish between the roles of mediator and adviser. A mediator may, when appropriate, recommend that counsel and parties seek outside professional advice or consider resolving the dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who at the request of the parties agrees to undertake an additional dispute resolution role in the same matter is governed by other Standards of Conduct.

5. A mediator should explain to all participants at the outset of the process the procedures that will be followed in the process and what the mediator's role will be, including, insofar as practical, the extent to which the mediator will undertake an evaluative function. (Within the ADR field, there are differences of view as to whether, when, and to what degree a mediator may assume an evaluative approach.) The mediator should make reasonable efforts during the process to explain to the parties the mediator's role and these procedures.

6. A mediator should withdraw from a mediation or postpone a session if the mediation is being used to further illegal activity, or if a party or counsel is unable to participate due to physical or mental incapacity.

7. A mediator's behavior should not be distorted by a desire for a high settlement rate.

8. A mediator should be mindful of the needs of persons with disabilities, including but not limited to, obligations under the Americans with Disabilities Act.

STANDARD VII
COMPENSATION

If compensation is permitted under the ADR Rules, the mediator should, at the outset, fully disclose and explain the basis of compensation charged to the parties. A mediator should not seek compensation in other circumstances.

The Program at present primarily offers the services of the members of its Roster of Neutrals on a *pro bono* basis. A mediator should comply with the requirements of the Program as to the minimum necessary commitment of services on a *pro bono* basis. If a mediator is unable to comply, he/she should withdraw from the Roster. To the extent that payment for services is permitted by the ADR Rules, the mediator should comply with those Rules. A mediator permitted to charge a fee should, before the process begins, refer the parties to the relevant Rules and explain the compensation being sought. Any fee should be reasonable considering, among other things, the dispute resolution service, the type and complexity of the matter, the expertise of the neutral, the time required, and the rates customary in the community. Any agreement as to fees should be in writing and signed by all parties.

Ethical Considerations

1. A mediator who accepts a *pro bono* appointment should not, directly or indirectly, request from the parties any compensation as a condition to continuing to perform mediation services in that matter. Such a mediator should not withdraw, terminate the process, or threaten to do so because he/she is not being paid. However, all parties, at their own initiative, may volunteer to compensate a *pro bono* mediator and the mediator may accept that compensation if, in the mediator's judgment, the manner in which compensation is offered, the nature of the compensation, and the division of responsibility for such compensation among the parties do not compromise the mediator's impartiality or the appearance of impartiality.

2. A mediator who withdraws from a mediation should return any unearned fee to the parties.

3. A mediator should not accept a fee or other benefit for referral of a matter to anyone.

4. Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

5. A mediator who joins the Roster of Neutrals should provide ADR services on a *pro bono* basis to the extent required by the Division. Such a mediator should not unreasonably decline to accept appointments upon request of the Program Administration.

STANDARD VIII
OBLIGATIONS TO THE MEDIATION PROCESS

Mediators are regarded as knowledgeable about the process of mediation. They should use their expertise to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities. Mediators should cooperate with efforts of court administrators to promote adequate professional skills among those who function as mediators. When serving in the Program, mediators should conduct themselves so as to protect and promote the integrity and standing of the Program.

Dated: March 1, 2000

HON. STEPHEN G. CRANE
ADMINISTRATIVE JUDGE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
COMMERCIAL DIVISION

PRESENT: Hon. _____ Justice

Part _____

----------X

Index No. _____

Plaintiff,

- against -

ORDER OF REFERENCE TO ALTERNATIVE DISPUTE RESOLUTION

Defendant.

----------X

This matter having come before the Court on _____, and due deliberation having been had, it is hereby ORDERED that

(1) This case is referred to the Alternative Dispute Resolution Program of the Commercial Division; (2) an alternative dispute resolution proceeding shall be conducted in accordance with and subject to the Program's Rules; and (3) all proceedings in this action in this court, including discovery and motion practice, shall be stayed from the date of this order until the expiration of the 45-day ADR period set forth in the Rules, unless the undersigned Justice has initialed the box below:

_____ All proceedings shall continue during the ADR process.

Notwithstanding a stay, limited discovery tailored to ADR may take place if the Neutral believes that will be productive, the parties agree, and no court order is violated thereby. In the event the ADR proceeding fails to resolve this case, the parties shall appear for a conference with the court on _____ at _____AM/PM.

Dated: _____

_____

64

COUNSEL TO ALL PARTIES

For Plaintiff:

_____

_____

_____

Phone: _____

Fax: _____

For Defendant:

_____

_____

_____

Phone: _____

Fax: _____

For Others:

_____

_____

_____

Phone: _____

Fax: _____

PLEASE COMPLETE AND FILE WITH ROOM 148 WITHIN THE FIVE-DAY DEADLINE SET FORTH IN THE RULES. NO EXTENSIONS OF TIME ALLOWED.

SUPREME COURT, NY COUNTY
COMMERCIAL DIVISION

----------X Part ___

Plaintiff, **Index No. _____**

- against -

Defendant. **ADR INITIATION FORM**

[FULL CAPTION OR ATTACH COPY]

----------X

1) This case was referred to the Alternative Dispute Resolution Program (order of Justice _____ dated _____).

2) The attorneys for the parties herein are as follows:

For Plaintiff:

Phone:

Fax:

E-Mail:

For Defendant:

Phone:

Fax:

E-Mail:

For Others:

Phone:

606

Phone:

Fax: **Fax:**

E-Mail: **E-Mail:**

3) Please briefly describe this case, including, if possible, the damages claimed:

4) In order that the Neutral tentatively selected may run the required conflicts check, counsel for any corporate party must list here or on an attached sheet the names of all corporate parents, subsidiaries or affiliates:

5) This case will be mediated unless otherwise agreed, in which event, identify the procedure selected:

Arbitration **Other (Specify):**

6) Please indicate whether there are in this case:

Motions *sub judice*: Yes __ No__ **Appeals: Yes __ No __**

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

7) By signing below, counsel, on behalf of the parties, certify that they have read and will comply with the ADR Rules of the Commercial Division.

For further information, consult the Commercial Division Internet home page (www.courts.state.ny.us/comdiv) or contact the Division's ADR Program at (646) 386-3020 (Phone) or (212) 608-4873 (Fax).

Counsel for Plaintiff **Counsel for Defendant**

Counsel for **Counsel for**

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This form may be filed by fax (212-748-5312)

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Alternatives
January 1995

*9 GETTING RELUCTANT PARTIES TO MEDIATE
A GUIDE FOR ADVOCATES

J. **Michael Keating,** Jr. [FNa]

WESTLAW LAWPRAC INDEX
AMS -- Arbitration, **Mediation,** Settlement or other forms of Alternative Dispute Resolution

Once parties agree to **mediate** a dispute, they stand at least a 75 percent chance of resolving the conflict without litigation. Yet persuading reluctant parties in business disputes to try **mediation** may require as much creativity, persuasiveness and flexibility as the **mediation** process itself. The following guide for advocates outlines some persuasive gambits to convince disputants and their counsel to consider **mediation.**

Nature of the Process

A first group of inducements to **mediate** relate to the nature of the process.

Control over the substantive outcome. Because **mediation** is not a binding process (the parties settle their dispute only if the outcome is mutually acceptable), the disputants never have to surrender control over the result to an outsider who may not understand the nature and context of their confrontation. Mediation is facilitated negotiation, and one of the cardinal rules of negotiation is that you do not accept the proffered outcome unless it is as good as or better than any available alternative. That central understanding ensures that the parties, not the neutral, will decide the outcome.

Parties retain control over the outcome in two senses. First, they retain for themselves the power to define the final result. In addition, they avoid the necessity of handing over to randomly-selected judges or barely-known arbitrators responsibility for crafting a resolution. Binding adversarial processes, on the other hand, deprive the parties of control in both of these senses. Even non-binding adversarial procedures, like court-annexed arbitration, exclude the parties from an active role in formulating a resolution.

In many commercial disputes, retaining control over the outcome is critical. Astute business people don't want to delegate the resolution of complex and potentially expensive commercial disputes to outsiders who can be ignorant of or indifferent to the realities of business life. The more control business executives preserve over the outcome of their disputes, the more fully a company's interests are likely to be served.

Control over the process. The procedural flexibility of **mediation** allows parties to fashion a process that responds directly to their needs and concerns. Parties decide whether they prefer an evaluative or a facilitative process. They can dictate the characteristics and experience of the **mediator;** they identify the issues they want the **mediator** to help them decide; and they can limit the duration of the **mediation** process. They also can prescribe such details as scheduling, logistics, fees and the scope of pre-**mediation** and **mediation** presentations.

Mediation eliminates the lock-step ritual of traditional adversarial approaches. Instead, lawyers become the true architects of conflict resolution, able to fashion creative dispute resolution procedures. No one is happier about this development than lawyers' business clients, who see procedural design as a key component in containing the cost of resolving commercial disputes.

Opposition to mediation often springs from attorneys' ignorance about its intricacies. One way to overcome that kind of reluctance is by engaging opposing counsel directly in the design of a custom-tailored process. If the other side is convinced that some legal issue needs to be thoroughly aired in the course of the **mediation,** include the opportunity to do so in the framework of **mediation** proposed. A competent **mediator** will be responsive to such concerns and help to incorporate the procedural requirements of parties into the process.

Opportunity for better solutions. The most powerful argument for the use of **mediation** is the opportunity it offers, particularly in the business context, for generating better solutions to complex problems. A Chinese proverb observes, "Conflict is opportunity riding on the crest of a dangerous wave." **Mediation** provides a unique vehicle for capturing that opportunity.

By shifting the focus and energy of disputants away from the purely legal aspects of their confrontation, facilitative **mediation** promotes a search for settlement options directly responsive to the commercial interests and concerns of the parties. **Mediation** promotes a full understanding of underlying business interests and a search for resolutions that best meet those interests.

Nature of the Dispute

Another set of reasons for using **mediation** in particular cases relates to the nature of the dispute.

Relationship of the parties. Whenever the parties to a dispute anticipate a relationship that will outlast the particular confrontation, **mediation** ought to be the dispute resolution process of choice. Adversarial alternatives are ***10** too divisive and rely too exclusively on demonstrating culpability and liability. **Mediation** eschews the placing of blame, and concentrates instead on finding solutions that meet the parties' interests, preserve the relationship and cut further losses. The relationships may include business people locked in some continuing commercial embrace, sibling heirs, landlords and tenants, merchants and customers, service providers and clients. Whenever there is an important stake in future cooperation, only fools will leap to litigation without an attempt at mediation.

Complexity of the dispute. Some disputes are so factually dense that litigation would inevitably be prolonged and dubiously probative. Almost always such disputes involve an orgy of documentary discovery that drives the transactional cost of the case into orbit. Mediation is not a substitute for discovery, but it can be useful for identifying real disclosure needs. It also can limit abuses, especially in cases when the parties seek genuinely to establish and control compensable losses.

Another measure of complexity may be the number of parties on one or another side of a dispute. Most commercial cases involve insurers--at least for one party--and many, such as environmental cases, bring a dozen or more parties to the table. These sorts of cases often involve co-plaintiffs and co-defendants who often differ amongst themselves, as well as with their mutual opponent. When defendants' intramural efforts to fix blame on each other help make the plaintiff's case, mediation clearly makes sense. If you represent one of the defendants in such a situation, you would do well to persuade your fellow counsel to cooperate to draw the plaintiff into mediation.

Time imperative. Disputes that involve continuing damage to business interests in the absence of quick resolution are particularly appropriate for mediation. When attorneys ponder the evils of litigation, they think most often in terms of transactional costs, but the hemorrhaging of business interests and opportunities is often the principal concern of their business clients. Mediation can be activated quickly and is far removed from the plodding pace of litigation, making it powerfully attractive to business adversaries.

Containing damage to reputation. In addition to the direct damage to the bottom line of business entities caught up in litigation, the adversarial struggle often seriously harms the combatants' reputations within their immediate business communities. This is one reason for growing reliance on mediation in disputes among joint venturers, whose reputations--geographically and within an industry--are important to their doing business together. Sometimes reluctant parties are willing to come to the mediation table to end the reputational attrition associated with a long and acrimonious suit.

The literature on mediation is full of wildly optimistic emphasis on the capacity of the process to deliver "win-win" resolutions. More accurately, mediation may help develop "lose-less-lose-less" resolutions to contain costs and minimize the future adverse impact associated with current disputes. Many business clients know that once suit is filed--or even before suit is filed if an important deal has already fallen apart--any process for cleaning up the mess will involve a struggle simply to keep losses at some acceptable level.

General Benefits of ADR

Some more general advantages of **mediation** accrue from its status as one alternative to the judicial process.

Privacy. **Mediation** preserves the privacy of the disputants' concerns during the continuing dispute. If the **mediation** occurs prior to recourse to the courts, the conflict need never be subjected to public scrutiny at all; if **mediation** comes after the initiation of suit, all that need become public is the stipulation of settlement or dismissal.

In addition, most states provide some statutory protection to matters discussed in the course of **mediation.** While the extent of the protection varies in different jurisdictions, its purpose is to encourage free and open communication among the parties and the **mediator.** Parties can further enhance confidentiality through a **mediation** agreement. Courts have supported broadly efforts to assure confidentiality in the **mediation** process. Thus, concern over the confidentiality of the process ought not to prevent parties from engaging in **mediation.**

Timeliness. An obvious advantage of **mediation** is the freedom it offers from judicial dockets. **Mediators** are used to responding promptly to requests for their services, and can often bring a case to **mediation** within days of the parties' request.

The relatively swift logistics of **mediation** make it popular in construction disputes, for instance. For many years, the construction industry's cure for excessive and untimely litigation was arbitration, typically tripartite arbitration with a panel representing several disciplines. Yet this format proved to be a logistical monster. Convening panels of busy lawyers, contractors, engineers or architects could be nearly as time-consuming as litigation. Mediation has avoided similar pitfalls.

Reduction of transactional costs Clearly the most salient benefit of mediation from the viewpoint of most business clients, especially corporate clients, is saving time and money by avoiding litigation. There are few business conflicts that cannot be more quickly and economically handled through mediation rather than litigation. While most cases reach settlement prior to or during trial, litigation still imposes an enormous burden

through the inattention to cases for long periods of time, costs of discovery and motion practice and the interruption of business for depositions.

Better understanding of the case. If mediation fails, it will escalate the cost of dealing with the dispute, skeptics argue. A quick response: point out mediation's reported success rate of 75 to 85 percent. Available research on *11 mediation, moreover, suggests strongly that parties are more likely to comply with the terms of a mediated settlement than they are with the terms of a court order, perhaps because they have had a key role in shaping those terms. Even when mediation fails to settle the dispute fully, it may resolve some elements of the conflict. In any event, it leaves the parties with a better grasp of the respective strengths and weaknesses of their cases and a much firmer understanding of both the legal and business issues in the dispute.

Resources for Promoting Mediation

Parties and their counsel now have an expanding array of resources to turn to for help in bringing reluctant opponents to the mediation table.

Individual judges. Sometimes you can persuade an interested judge to help you entice the other side into mediation. In one case in which I was involved, a state-court judge ordered to mediation a dispute involving the state transportation department, which promptly appealed the case to the state supreme court to avoid mediation. The appellate court confirmed the trial judge's right to require the parties to mediate, so long as he didn't compel settlement. In the face of complex civil litigation promising to eat up weeks of a trial calendar, judges are often willing to lean heavily on parties to engage in an alternative process. If you are meeting resistance to mediation from the other side, try eliciting the support of your trial judge.

Court-annexed mediation programs. At both the state and federal levels, courts increasingly are initiating formal, court-annexed mediation programs. The Civil Justice Reform Act of 1991 gave great impetus to the development of such programs in federal trial courts, and state courts, often captive to bloated criminal dockets, are similarly encouraging the expansion of alternative programs. In jurisdictions with such programs, the stigma associated with mediation in the minds of litigators may be dramatically reduced. Where such programs are mandatory or can become mandatory on the request of only one party, dragging a reluctant opponent into mediation is a piece of cake. Even when mediation is voluntary, you can sometimes recruit the administrator or judge/magistrate responsible for the program to urge opponents into the process.

ADR providers. A growing number of non-profit and for-profit independent entities specialize in delivering third-party services in a wide range of disputes. Almost always, you can recruit at no cost the help of these organizations in cajoling a reluctant opposite number into mediation; most will charge the parties an administrative fee if disputants agree to mediate. Most mediators, moreover, believe it part of their business development strategy to provide such help free of charge.

Literature and videos. There is also an exploding variety of sophisticated publications and videos on mediation. The latest generation of videos, such as CPR's "Mediation in Action: Resolving a Complex Business Dispute," rehearse the reasons for engaging in mediation and provide a thoughtful overview and demonstration of the process. Buy one of the better tapes or books and give it to your opponent hesitant about mediation. The investment, if successful, will be repaid.

Increasingly, both dispute resolution literature and specialized industrial publications report regularly on mediation success stories. Typically, the cases chronicled involve many parties, multi-million dollar claims or long-standing and complex substantive issues. Present your reluctant adversary with a list of such cases from the

literature, with references.

Contract clauses. The easiest and best way to get the other side in a business dispute into mediation is to agree at the beginning of the relationship to submit future conflicts to ADR. A number of organizations are developing sample clauses for the purpose, and most include graduated recourse to an array of dispute resolution alternatives. CPR offers "Dispute Resolution Clauses: a Guide for Drafters of Business Agreements," which includes clauses appropriate for a wide range of substantive matters, as well as sample ADR clauses designed for specific types of contractual relationships.

If all else fails, here are two fall-back gambits that may prod the unwilling adversary into **mediation:**

Financial incentives. You can sometimes get people to the table by offering to pay the **mediator's** tab for the first or, possibly, all of the **mediation** sessions. Lots of business cases, including many that have deeply penetrated the legal system, can be resolved through **mediation** in a few hours, or half a day, or one full day. Indeed, only a small percentage of **mediations** need take much longer. Under normal circumstances, the parties split the **mediator's** fee. Paying the other side's portion of the **mediator's** fee for a day may cost you an additional $600 or $700, but the investment may save your client a five-day trial, plus all of the required preparation time. A first **mediation** session may cost you as little as $200 or $300 more; so long as your opponent is not paying for her peek at how **mediation** works, she may be happy enough with what she sees to commit fully to the process.

Selection of the **mediator.** Another desperate measure is to let your adversary select the **mediator,** whom you may reject only if there is a conflict of interest. Such an offer is a testament to your understanding of the process of **mediation,** and your confidence that **mediation** cannot compel you to enter an agreement against your client's interest.

A last persuasive effort might combine your abdication of the choice of the **mediator** with the assumption of the **mediator's** fee. Such an offer might qualify you for the **Mediation** Users' Hall of Fame.

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ALTERNATIVE

Top 10 Things

ART BY JAMES ENDICOTT

Avoid aborting the process and its possibilities.

BY SIMEON H. BAUM

MEDIATION is widely used these days. Federal court mediation programs have been in place since the 1990s; the Supreme Court's Commercial Division has a thriving Alternative Dispute Resolution (ADR) program; there are court-annexed mediation programs for specific areas — matrimonial, family, criminal court community disputes, landlord/tenant, and small claims court, to name a few. Agencies like the Equal Employment Opportunity Commission and quasi-governmental entities like the United States Postal Service have longstanding mediation programs, as do self-regulating organizations like the National Association of Securities Dealers and the New York Stock Exchange.

Beyond those programs, there is a growing use of private professional mediation. Corporations with pre-dispute ADR clauses, insurers with inter-company agreements, and attorneys with cases on an ad hoc basis are regularly turning to mediators to help them resolve their disputes and save their clients the cost, disruption and aggravation of protracted litigation.

Given this burgeoning use of mediation, it is likely that most litigators, and many legal dealmakers, will find themselves representing clients in this process. It is thus imperative to understand the mediation process, its goals and possibilities, and to be effective in that process, understanding what works and what can abort the process and its positive possibilities.

It is just as important to understand what not to do in the mediation process. Here is a non-comprehensive list of 10 choices counsel or parties might make that reduce the likelihood of arriving at a mutually acceptable resolution through mediation.

1. Insult the Other Party

An agreement, which by its nature must be mutually acceptable, is the product of consent, not force. It is thus important to keep the other side willing and active participants in the dance of negotiation.

Offensive comments — such as calling the other party a liar, an incompetent, or a fool — are discouraging. They communicate a low likelihood of understanding the other. In the face of such comments, parties may conclude that there is no point in continuing because an offer based on so negative a point of view will be inadequate to the true value of what is at issue.

Offensive comments might gratify the speaker, but they anger the recipient. This

Simeon H. Baum, *president of Resolve Mediation Services, Inc. and an experienced mediator, was recently involved in the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site.*

DISPUTE RESOLUTION

Not to Do in Mediation

can trigger primal responses — revenge (fight), defense, suppression, avoidance (flight), adding needless complexity to the other's communication.

At the core, the mediation process depends on communication. The mediator works to facilitate and enhance the quality of the parties' communication like a radio tuner. It is counterproductive to create static.

2. Give Up

Settlement opportunities are missed by quitting too soon. Often, the mediator, who has the chance to speak privately with each party, sees that a resolution is possible when the parties, having not been privy to all conversations, do not. Causes of premature departure include emotional reactions, frustrations with case assessment, and misreading of bargaining moves.

The converse of unwisely provoking a reaction through offensive remarks is succumbing to reactions to comments deemed offensive, and walking out. A good negotiator learns to sift negative remarks for the elements that might lead a party in good faith to make such remarks, and then addresses that content rather than reacting to the form.

Misunderstanding case assessment issues by either side may also prompt premature departure. One might be missing weaknesses that should be processed. If the other side does not appear to be getting it, the mediator should be given the time to work with that party in caucus to engage in reality testing. Time and gentle persistence can be the mediator's best tool; do not take it away. Confidentiality of caucuses prevents the mediator from reporting progress in the other party's case evaluation. Counsel should not conclude from silence that progress is not being made.

3. Focus Only on Dollars

Focusing only on dollars can mean missing integrative possibilities.

Mediation offers more than a settlement payment, and the mediation process is more than finding an acceptable number in a range formed by the extremes of low offer and high demand. While many settlements involve solely economic terms, there are times that openness to integrative possibilities, or a search for satisfaction of non-economic party interests, is key to reaching a resolution.

Mediators report business deals and new ventures emerging from the mediation of business cases. Employment dispute settlements can involve return to the workplace, reference letters, retirement or benefits packages, sensitivity training, and apologies. Even economic terms can be reworked to meet interests or party limitations through payment plans and contingent packages.

The ability to keep eyes open to non-economic interests produces surprising results. In one case involving the reduction in force of a large number of workers emerging from a plant closing, the attorneys had arrived at a possible resolution, which several of the plaintiffs, including a couple of management "tag-alongs," were not ready to accept. Mediation permitted the strongest objector, one of the management plaintiffs, to hear for the first time an explanation of the company's actions.

That plaintiff particularly objected that certain plaintiffs, in particular a widow with children, should be receiving more. This opened the door for the mediator to explore whether the management plaintiff would prefer to have the funds earmarked for him to go to the widow. As a testament to the importance of not overlooking altruism as a component of human interests, the management plaintiff agreed, and the case

Continued on page S10

ALTERNATIVE

What Not to Do in Mediation

Continued from page S5

settled. Plainly, a non-economic interest, and, indeed, a sense of identity, broke that impasse.

4. Gag the Client

Prohibiting your client from speaking during a mediation session misses various opportunities unique to this process.

Having your client speak during the opening in joint session can showcase a strong witness, giving the other parties and their counsel a sense of what things might look like if the matter goes forward. More importantly, however, the client's speaking in a non-trial mode lets the genuine story emerge naturally and efficiently, and can show the other party the real human impact of the issues in this mediation. It enables your client to go beyond marshalling the facts to present his or her core concerns and interests and make a genuine connection with the other party. This paves the way for real dialogue, which is impossible in a trial context.

Both in joint session and caucus, active participation increases client "buy-in" for the eventual settlement. This can be more efficient than a double negotiation of attorneys, as agents for their clients, with each other and then the negotiation of attorney with client, in effect of agent and principal.

In addition, both in caucus and in joint session, the party's direct participation enhances brainstorming, i.e., the generation of ideas as possible options for settlement proposals. Brainstorming works best if the participants agree to refrain from critical judgment as ideas emerge, so that parties' creative efforts are not inhibited. A party is in a better position than his or her counsel to make suggestions that reflect business needs or might satisfy the party's interests.

Permitting the client to engage with the neutral in analyses of the risks and transaction costs of proceeding with litigation enhances the value that the neutral brings. While some clients might criticize their attorneys as being less than zealous for raising possible weaknesses, risks or costs, the client is not likely to fault the mediator for raising these issues and concerns.

Direct engagement of your client with the mediator increases the chance that "reality testing" by the mediator might have an impact on the client. This is helpful in facilitating change. Conversely, counsel can always correct any misimpressions formed by this discussion, either in or outside of the mediator's presence. On "BATNA" [1] analyses, it is the client's values and interests that govern an analysis of the "best alternative to a negotiated agreement;" and thus, it makes sense for the client to discuss this directly.

5. Balk at Emotion

The informal and confidential nature of mediation communications creates an opportunity for parties to express emotion and share their perspectives in a way that would be irrelevant or possibly damaging in court. This results in greater satisfaction for the party and offers the chance of greater understanding between the parties. Advising your client not to speak may prevent critical comments, but the gain from a wholesale bar on emotional expression may be outweighed by the loss of client satisfaction and constructive impact of genuine emotion.

In one mediation, a broker, who had sat silently for an hour and a half, let loose his feelings of betrayal and frustration, communicating to a former customer that he had nothing to do with the losses in question and that this claim had a very negative impact on his reputation and career. The customer heard the message loud and clear, and a half hour later all claims against that broker were withdrawn.

Emotional expression by the other party can also be useful. "Venting" emotion, particularly if validated, frees parties to move on to constructive problem solving. It also offers a window into the concerns of that party, which counsel and your client can then seek to satisfy in their advance towards a deal.

6. Misread Late Demand or Offer

Mediation takes time, and each mediation proceeds at its own pace. Counsel should not expect mediation to occur at the pace of an in-court settlement conference, with numbers emerging within minutes from the meeting's inception.

There are times when development of facts, reality testing, and interest exploration may take hours. Sometimes the mediator may choose to work on adjusting expectations rather than communicate to the parties the extreme — and discouraging — number suggested in a caucus. And, there are times that a party's negotiation style compels that party to begin with an extreme offer and demand, regardless of whether it is already mid-afternoon.

On these occasions, patience is advised. If much work was done prior to the first and late offer or demand, then once the ball starts rolling, movement can be generated and resolutions can occur, despite the negative message that the extreme position seems to communicate. Trust the mediator, if he or she encourages counsel and parties to keep going.

7. Lack a Person With Authority

The mediation process works best when all parties are at the table and can be directly affected by the discussion; when their own participation generates the "buy-in" mentioned above; when their needs and interests can be fully and immediately expressed and explored; and, when decisions can be made on the spot.

Sometimes keeping the decision-maker apart from the negotiation creates the opportunity to renegotiate, to play "good cop, bad cop." This separation, however, can lead to bad feelings in the party that is present with full authority, or to a strategic withholding of fulsome proposals by the other party in anticipation of renegotiation, thus stalling meaningful negotiations.

Beyond this aspect, mediation involves transformation. Information learned during the process leads to adjustment and

accommodation, to compromise as well as collaboration. If the decision maker is absent, he or she will not be affected by the process. Missing the mediation gestalt, the absent decision maker might not fully appreciate the explanations of counsel or the on-site representative. Political factors might inhibit the on-site representative from giving a full blast of reasons to adjust the party's position. Presence of the decision maker eliminates these problems.

8. Overlook Information Need

Do not overlook the other party's need for information.

Mediating early in the life of a case, before discovery, increases the settlement pot and enhances cost savings. Yet, it is often predictable that certain parties will not settle without certain information.

Personal injury matters typically require development of medical information. Coverage claims require development of policy-related information, or possibly information relating to the application for coverage. Property damage claims require development of proof of loss. Customer-broker securities claims require development of the profits and losses on an account, and might also require information about prior trading experience, e.g., in a suitability claim. Employment discrimination claims require, inter alia, development of mitigation efforts, current employment status and past compensation. Breach of contract claims require development of the contract terms, information relating to the breach and damages assessment.

Settlements occur based on certain assumptions. The mediation of most matters in which counsel participate will likely require development of information in order to satisfy the need of the other party before those assumptions are accepted. Conversely, your own willingness to resolve a matter under a certain set of terms and conditions is also based upon assumptions. To the extent information can be developed prior to the mediation to address these assumptions, one enhances the speed and likelihood of a resolution.

9. Give an Ultimatum

Prior to arriving at the first mediation session, prepared counsel and parties might have discussed their communication strategy, developed their case analysis, analyzed their BATNA, set their aspiration (best deal within the realm of realistic possibility) and assessed their "walk away." It is always advisable to keep these goals flexible and provisional, with the understanding that new information or insights gained from mediation might affect your analysis.

With all this preparation, it is still advisable to avoid making a "take it or leave it" demand. Negative consequences of the ultimatum include: (a) it can produce a reflexive reaction, needlessly ending discussions; (b) it hardens your own thinking, when additional information might fairly lead to an adjustment; and (c) it puts the party making the demand in a bind. Having made an ultimatum, one fights a credibility loss if it is not taken and one wishes to continue in the negotiation. But, walking out to preserve credibility may literally be cutting off your nose to "save face."

10. Misunderstand Mediator's Role

The mediator is a tremendous resource — a neutral third party, with effective facilitation skills, usually[2] motivated to help parties reach a resolution. It is advisable to take advantage of what the mediator has to offer, and not to misunderstand what that is. Following are several roles not played by the mediator.

Judge. To arrive at a deal, you must convince the other parties, not the mediator. Some attorneys work hard to "spin" the mediator. While there is utility in helping the mediator recognize valid issues in a case, to aid in reality testing, this has limited value. Sometimes directing remarks to the mediator in joint session can deflect tension. Often, though, it makes sense to address comments generally to all present, or to direct them to the other parties. At a minimum, one must recognize that they are the real audience.

Policeman. The mediator can help set ground rules for the discussion, e.g., no interruption. But the mediator is a facilitator, and party self-determination is at the heart of the process. The best assumption is that the participants are autonomous adults, and that the mediator is not busy keeping everyone in line.

Director. Along these lines, while the mediator may suggest that parties break for caucus, address or defer certain issues, or undergo certain processes, because this is a party-driven process, counsel and their clients are free to make suggestions on the process or to express a preference not to undertake action suggested by the mediator.

Dealmaker. While the mediator might "coach" parties in caucus on the timing of offers and other negotiation strategy to keep the negotiation moving constructively, ultimately, the offers are from parties. Do not blame unacceptable proposals on the mediator.

Adverse party. Parties and counsel may confide in the mediator and take advantage of his or her unique position of having access to information from all parties and having a modicum of trust from all parties. Holding information back from the mediator can be counterproductive. Providing information enables the mediator to find solutions that defensive parties, not privy to information from the other party, might miss.

Don't Forget

Attorneys have the power to enhance the effectiveness of mediations. Awareness of what not to do may lead counsel to take approaches designed to elicit constructive responses leading to a resolution of the dispute.

1. Fisher and Ury popularized this concept in Getting to Yes and other writings. Understanding one's BATNA or "best alternative to a negotiated agreement" enables a party to have a basis for judging whether a proposal is worth taking, or whether the party would do better without this agreement.

2. In the transformative mediation model, the mediator's purpose is not settlement or problem solving, but fostering empowerment and recognition in the parties. See, Bush & Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey Bass, Inc. 1994).

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Alternative Dispute Resolution

COURT-ANNEXED ADR ON THE RISE

USE WILL EXPAND UNDER NEW PROGRAM

By Ann T. Pfau And Daniel M. Weitz

IN 1998, THE New York State Unified Court System (Court System) received over 3.4 million new filings. At 1.3 million, civil matters made up the largest segment of the caseload, representing a new record for annual filings.

Last month, Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman announced a Comprehensive Civil Justice Program aimed at reducing delays and backlogs in the civil caseload. Among the significant reforms featured in this program is the expanded use of court-annexed alternative dispute resolution programs.

Alternative dispute resolution (ADR) is an umbrella term that describes a variety of processes used to resolve legal disputes. The most common forms of ADR are negotiation, mediation and arbitration. Other ADR processes include early neutral evaluation, summary jury trials and mini-trials.

The use of ADR in the New York courts has grown steadily over the years. In 1994, Chief Judge Kaye convened a task force to study the use of ADR in New York. At the conclusion of its two-year study, this group recommended that pilot ADR programs be introduced in courts throughout the state, and called for the establishment of a statewide ADR office to oversee these programs.

The Court System has since developed and implemented a series of pilot programs in courts at every level throughout the state, primarily using mediation, early neutral evaluation and arbitration. These pilot programs have great flexibility with regard to program design, in order to encourage innovation and generate programs that are responsive to the specific needs of the legal environments in which they operate. Most of the pilot programs encourage active party participation in the dispute resolution process, which usually means higher compliance rates and increased satisfaction among the parties.

In January 1998, the Court System opened the Statewide Office of Alternative Dispute Resolution. This office is led by a State ADR Coordinator who provides tech-

nical assistance to all district administrative judges in developing and implementing ADR programs. The State ADR Office also disseminates information about ADR programs throughout the state, and provides educational programs for members of the judiciary, the bar and court litigants.

In conjunction with this effort, the Court System has established a Statewide ADR Advisory Committee to provide guidance to the State ADR Office and the various court-annexed ADR initiatives. Select members of the judiciary and the private bar as well as leading academics and practitioners have agreed to serve on this committee, which will hold its first meeting at the end of April. Through the success of the pilot programs and the efforts of the State ADR Office, ADR is proving an expeditious alternative to litigation that is gaining wider acceptance by both the bench and the bar.

Mediation

Mediation is widely used in the Court System's ADR programs. Mediation is a confidential, non-binding dispute resolution process in which a neutral third party assists two or more disputing parties in reaching a mutually acceptable agreement. Generally, mediators express no opinion about the case and have no authority to impose a settlement.

Parties and their attorneys often choose to resolve their dispute through mediation because, unlike litigation, it allows them to maintain complete control over the outcome. If the parties cannot resolve their differences following a reasonable effort to negotiate, they may terminate the mediation process and proceed with their lawsuit.

Mediation also provides a more flexible and informal atmosphere than litigation. As a result, the parties can discuss certain confidential information with the mediator that they would not otherwise discuss with the other party or a judge. A skilled mediator can uncover, through this confidential exchange, underlying interests and settlement options that would not have been explored in direct negotiations, litigation or even a typical settlement conference. Mediation, therefore, often results in substantial savings in litigation costs and creative solutions tailored to the specific interests of the parties.

Mediation has been used extensively in the New York State Supreme Court, with particular success in the New York County Commercial Division. Established in 1995 as one of the first court-annexed ADR programs for commercial cases in New York, this program has developed a statement of procedures that serves as a model for other potential ADR programs throughout the state. Although early neutral evaluation and arbitration services are also offered, mediation is the most popular dispute resolution process for litigants in the Commercial Division.

Commercial Division judges may order cases to ADR at the earliest practical point

in the case or at any other time they deem appropriate. Referring cases to ADR as early as possible can increase the likelihood of settlement, since the parties have yet to invest a significant amount of time or money in the case.

When making a referral, the judge signs an order of reference directing the parties and their attorneys to the ADR program in accordance with the court's rules, including all deadlines and confidentiality provisions that apply. The order of reference is delivered to the Commercial Division's support office, which immediately contacts the parties and sends them a copy of the order.

The parties must then decide which ADR process to use, designating a neutral from the court's roster to assist them. This roster can be downloaded from the Commercial Division's home page on the Court System's Internet Web site (http://ucs.ljx.com) or obtained in hard copy from the Commercial Division's support office at 60 Centre Street in Manhattan. Parties referred to the ADR program also have the option of using a private ADR provider.

The parties submit a signed ADR Initiation Form that includes a list of prospective neutrals within five business days from the date on which they were notified of the order. The tentatively selected neutral conducts a conflict of interest check to ensure that he or she is able to function in a completely fair and impartial manner. The neutral must disclose any conflicts of interest to the parties and may only serve thereafter with the parties' consent.

Parties are required to attend the mediation session along with their attorneys, and only those who show good cause and have the permission of the court's neutral may be excused. Party participation in the mediation process increases the likelihood of settlement. By attending the mediation, parties may deal directly with each other, exploring creative solutions instead of only that which is permissible under the law.

Since its inception in 1995, the Commercial Division's ADR program has achieved a 59 percent settlement rate for mediated cases. In an effort to build on the success of the program and increase the number of cases sent to ADR, judges outside the Commercial Division will soon be authorized to refer cases to the ADR program as well. The New York County Supreme Court, Civil Term, is also working on a notice that the County Clerk will distribute to provide information to attorneys upon filing about the court's ADR programs and ADR in general.

Similar mediation programs for commercial cases are presently being established in the newly created Commercial Divisions in Westchester, Nassau and Erie counties. A mediation program for personal injury cases under $100,000 has also been established in Erie County Supreme Court.

Mediation can help to preserve important business relationships or reduce the level of acrimony and stress for divorcing couples. For example, in Orange County Supreme Court, a panel of 25 volunteer mediators made up of both attorneys and

non-lawyers is helping divorcing couples settle their differences. To qualify as a volunteer, an attorney must complete 25 hours of mediation training, while non-lawyers are required to have substantial mediation experience along with 15 hours of orientation training in divorce-related issues.

Judges use discretion in referring matrimonial cases to mediation, considering the wishes of each party in making this decision. The presiding judge signs an order of reference which outlines the parameters of the mediation process and orders that the process be kept confidential.

To provide balance to the process, each case is assigned two volunteer mediators, an attorney and a non-lawyer, with both genders usually represented on this team. This co-mediation model is proving extremely effective, as it ensures that significant legal issues will not be ignored while sufficient attention is paid to the difficult interpersonal issues often faced by divorcing couples. This program has experienced an overall settlement rate of 50 percent for cases sent to mediation, with an additional 12 percent resulting in a reconciliation between the parties.

Neutral Evaluation

Neutral evaluation (i.e. early neutral evaluation) is another form of ADR widely used in New York State Supreme Court. In neutral evaluation, attorneys with special knowledge in the subject matter relating to the dispute listen to abbreviated case presentations, and provide an evaluation of likely court outcomes, in an effort to help parties reach a settlement. This is a confidential, non-binding process that also offers case planning guidance and settlement assistance at the parties' request.

While neutral evaluation is similar to mediation in that it is confidential and non-binding, it does not emphasize underlying interests or tailor-made solutions to the same extent. Neutral evaluation provides litigants an opportunity to analyze the merits of their case before significant amounts of time and money are expended. The evaluator's confidential assessment as to the value of the case provides a reliable basis upon which the litigants may conduct their settlement discussions.

Neutral evaluation programs for matrimonial cases in Supreme Court have been established in New York, Nassau and Monroe counties. In New York County, volunteer attorneys who have practiced matrimonial law for at least seven years, or who have comparable legal experience, make up the court's panel of neutrals. Before joining the panel, these volunteers must complete a training program in substantive law and ethics sponsored by the court.

Parties may be ordered to the neutral evaluation program at the discretion of the assigned judge, but are required to attend only one session. If no resolution is achieved at the close of the first session, either party may terminate the pro-

cess. Parties may agree on their own to submit their case to a neutral evaluator, but will be considered for the program only if both parties are represented by counsel. This program, which has been in operation since 1997, has a 56 percent settlement rate.

In Nassau County, a panel of three volunteer lawyers conducts the neutral evaluation. Similar to the program in New York County, judges may order the parties to attend one neutral evaluation session. Prior to the session, parties provide the panel with several documents, including copies of the pleadings, a brief, two-page statement of the facts and issues, net worth statements, income tax returns for the prior three years and any appraisal reports if available.

Only couples represented by counsel may be referred to the program, and both parties and each of their lawyers are required to attend. To qualify as a neutral evaluator in Nassau County, an attorney must have a minimum of either 10 years of substantial matrimonial law experience or five years of exclusive matrimonial law experience.

The neutral evaluation program in Monroe County Supreme Court has achieved a settlement rate of 71 percent since it began in 1998. Additional neutral evaluation programs for matrimonial cases will soon be established in Queens, Kings and Suffolk counties.

Neutral evaluation, like mediation, has also proven useful outside the realm of matrimonial cases. In the Civil Division of New York County Supreme Court, a neutral evaluation program for non-New York City tort cases has been operating since 1996. This program is conducted entirely by one evaluator, who meets with the parties and their counsel in joint session and private caucus to explore settlement. Cases are directed to neutral evaluation from a non-city waiting list in the Trial Assignment Part (TAP), with parties required to use the process once their case is selected off the TAP waiting list. Nearly 1,100 cases have settled through this program since it began in August 1996.

Other ADR Models

The Court System also encourages the use of voluntary arbitration for Supreme Court cases. Voluntary arbitration is an adversarial dispute resolution process in which opposing parties submit their case to a neutral third party who conducts an informal trial and renders a final and binding decision.

A voluntary arbitration program for tort cases is available in Nassau County Supreme Court, with six to eight judicial hearing officers serving as the program's arbitrators. For those matters already on the trial calender, the parties must agree to use the program on or prior to the date that the case is marked for jury selection. Litigants from non-jury cases must decide to use the program prior to the assignment of a trial part. Since this program is voluntary, the arbitrator's

award is final and there is no right to a trial de novo.

One of the most unique experimental Supreme Court ADR programs in New York State is the summary jury trial program (SJT) in Chautauqua County. Summary jury trial is a non-binding dispute resolution process in which actual jurors hear abbreviated arguments and render an advisory verdict. Most litigants come to this program by way of judicial order, although some voluntarily agree to a summary jury trial, in which case the jury's verdict is binding.

The program is used primarily for "non-complex" personal injury cases under $100,000. The presiding judge selects anywhere between six and eight "leftover" jurors from the court's general jury pool to serve on the SJT panel, which is initiated and completed on the same day. Attorneys, who are each given about one hour to present the case, usually do not participate in picking the jurors. There is no live testimony or use of experts during these trials, although medical reports are allowed.

ADR services have also been available for many years through the Court System's Community Dispute Resolution Centers Program (CDRCP). The CDRCP offers mediation and conflict resolution services for a variety of disputes, including those between landlords and tenants, consumers and merchants, family members, neighbors and community groups.

Cases are generally referred by the court or police to a community dispute resolution center located in each of New York's 62 counties. Volunteer mediators are certified through a local center after completing 25 hours of basic mediation skills training followed by an apprenticeship with an experienced mediator. The CDRCP handled a total of 40,113 cases between 1997 and 1998, of which 77 percent were resolved.

The CDRCP also administers a Family Court Mediation Project, which provides mediation services for cases originating in Family Court involving custody, visitation and support issues. The Family Court Mediation Project presently operates in 55 of the state's 62 counties. For the most part, litigants are referred to this program by a Family Court judge. Once the case is referred, a trained staff member screens it to determine whether or not the case is appropriate for mediation. For example, domestic violence cases are typically not accepted.

Once a case gets past this screening process, the disputing parties will then decide whether to opt for mediation. Mediators in the Family Court Mediation Project must complete 25 hours of basic mediation skills training and participate in an additional 15-hour training that focuses on family related issues. From 1997 to 1998, approximately 1,600 Family Court cases were successfully resolved through mediation at the rate of 80 percent.

Conclusion

New York's Court System has never been more committed to the development of ADR programs throughout the state. ADR may not be appropriate for every case or litigant. However, by increasing the range of dispute resolution options that are available through the courts, many disputes can be settled with increased party satisfaction as well as in a less costly and more timely fashion.

ADR provides a number of flexible processes that can be tailored to the specific goals of the litigants, whether they want to resolve the matter as quickly as possible or to get a neutral opinion on the likelihood of success at trial. Furthermore, by resolving cases with greater speed and efficiency, the Unified Court System benefits from a lighter caseload, and is able to fulfill its mission of providing an innovative response to the needs of the public it serves.

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Effective Representation of Clients in the Mediation of Securities Disputes

I. *What is Mediation?*

The phrase "ADR" or "Alternative Dispute Resolution" has gained wide recognition over the last few years, and with it the term "mediation." ADR, sometimes termed "appropriate" dispute resolution, is commonly understood to include any non-violent form of dispute resolution other than litigation. Thus, ADR can include both arbitration and mediation.

Mediation appears in many contexts. We have heard of baseball mediation, mediation of the Middle East, and mediation of labor disputes to name a few.

In the securities industry, the National Association of Securities Dealers, now known as NASD Regulation, Inc., has long provided a forum for one ADR mechanism – arbitration. More recently, however, the NASD has added mediation to its ADR palette. In addition, the NYSE has been experimenting with the development of a small mediation panel as well; and it is likely to increase the size and use of this panel. Beyond this, securities mediations can occur at the American Arbitration Association (the "AAA"), through the AMEX window, and on consent before any number of private providers. Mediation thus seems destined to become a permanent part of the dispute resolution landscape in the securities industry – applicable in customer-broker disputes, in inter-broker disputes and even in employment disputes.

Various users of the mediation process, as well as a wide variety of neutral parties, have used the phrase "mediation" with different meanings and emphases. Perhaps the most commonly accepted definition of mediation is that it is a "facilitated negotiation" – a negotiation in which a neutral third party aids the parties to the dispute in communicating about their issues and coming to a resolution fashioned not by the third party, but by the disputants themselves.

Part of what makes mediation effective is that it is an informal process typically conducted under the rule of confidentiality. Parties are advised that statements made in mediation may not leave the room, are made without waiver of the attorney-client privilege, and do not constitute admissions against interest for use against the speaker in a later adjudicative proceeding. This rule of confidentiality is designed to promote more open communications between the parties.

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II. *How Does Mediation Differ From Arbitration?*

In arbitration, parties present their case, and submit evidence, to one or more neutral third parties who are charged with deciding the outcome of the matter. While more informal than litigation, arbitration still involves a weighing of the evidence by the arbitrators, and makes use of techniques common to litigation, such as direct and cross examination, submission of briefs, and occasionally the making of motions. While initially intended to be fast, arbitration has grown into a more cumbersome process than originally hoped due, *inter alia*, to discovery disputes, motions and lengthy presentation of testimony, all designed to win over the arbitrators to the justice of one's cause. The finality of the arbitrators' determination places an added burden on the process to guaranty the fair result. It remains a primarily adversarial process.

By contrast, in mediation, the neutral third party makes no determination of the outcome. Many professionals in the mediation world would go further to urge that the mediator not engage in any evaluative function, binding or non-binding. A non-binding evaluation by a neutral third party, might be called "neutral evaluation" and would still place more emphasis upon the mediator's perspective, leading parties to focus their efforts on persuading the mediator, rather than on working with each other to arrive at a mutually satisfactory resolution.

Thus, unlike arbitration, mediation is a non-adversarial process, in which cooperation, rather than competition is the governing norm.

III. *The Mediation Process.*

While it is a fluid, flexible and informal process, there tend to be certain regular features in mediation.

Selection of the Mediator

Taking the NASD process as our model, the first step in mediation is selection of the mediator. The NASD administrator ordinarily sends the parties a list of several mediators on the NASD panel and leaves it to the parties to select the mediator.

Pre-Mediation Communications

After the mediator is selected, the mediator will normally contact the parties to ascertain generally what the issues are in the matter, who should be present at the mediation session and to encourage the parties to submit a confidential pre-mediation statement to the mediator. Some mediators – to avoid the appearance of bias or impropriety – will do this in a joint telephone conference with counsel for all parties to the dispute. Other mediators will hold these pre-mediation session telephone conferences separately with each party's counsel. The theory here is that, while in arbitration *ex parte* communications are forbidden, in mediation the mediator's role is purely facilitative, and thus little harm can come from the "*ex parte*" communication. Moreover, since (unlike arbitration) the formal mediation process permits caucuses, pre-session caucuses do not violate the ideal of the process. They afford the mediator the opportunity to

maximize the efficiency of the joint session by exploring in advance issues (such as settlement authority and communications concerns) that the parties might not be comfortable discussing in each other's presence. They also enable the mediator to ascertain at a finer level of detail whether certain information should be developed before the mediation session commences.

The Mediation Session – Introductions

The first formal mediation session ordinarily opens with introductions of the parties, counsel and of the mediator. The hope is to humanize the process and begin setting the stage for effective communications. Next, the mediator describes the ground rules of the mediation, explaining the mediator's role, advising the parties about the confidentiality of communications, orienting them to the cooperative bargaining model, and letting them know the order of communications, including the way joint sessions and caucuses will occur.

Joint Sessions & Caucuses Defined

A joint session is a mediation session with all parties present. A caucus is a meeting of the mediator with less than all parties. In a multi-party dispute, the mediator might choose to meet separately with each party, and might also meet with several parties, *e.g.*, the individual broker, his or her manager and any other representative of the broker-dealer (such as a compliance officer), at the same time. Ordinarily – but not of necessity – the mediation will begin with a joint session, then break into caucuses, and later return to joint session, weaving in and out of joint sessions and caucuses as the needs of the parties and nature of communications dictate.

Opening Statements

After the mediator's introduction of the process, the parties will have the chance to make their "opening statements." This term should be used loosely and is not to be compared to the opening made at arbitration. Here, the opening could be an opportunity for a party (as opposed to counsel) to say what is on his mind; it could be a chance for a party to express his aspiration concerning what he hopes to get out of the process; it could be a chance to set a tone for the communications. Thus, while the opening statement might be an opportunity for counsel to present the strength of its parties position, this is not the tact necessarily indicated by the process.

During presentation of one party's statement, the other party is encouraged to listen – not simply to find rebuttal points, but also to find points of agreement, to identify common interests, to arrive at a better understanding of the speaker's perspective, and to look for ways to find agreement and fashion a mutually acceptable resolution.

Joint Session

After opening statements, the mediator may permit parties to follow up and open discussion stemming from what has already been said. The mediator might ask questions to

clarify points that have been made, to uncover the parties' interests and to assist the parties at coming to better understanding of their own positions and of each other's position.

During the joint session, the mediator will likely be careful not to permit his or her own viewpoint from coloring the discussions. Yet, the mediator will endeavor to identify emotionally charged statements and possibly "reframe" the statements in a neutral yet empathetic formulation that makes the underlying interest and feeling transparent without attributing blame, and that identifies an issue to be resolved or an interest seeking satisfaction.

Caucuses

There might come a time where the mediator determines that private communication with less than all parties, *i.e.*, caucus, is in order. Communications made to the mediator in caucus are strictly confidential. The mediator may not disclose these communications to any party not participating in the caucus without express authorization by the speaker to make the disclosure. This rule of confidentiality frees the parties to make more full and open disclosures.

Caucus enables the mediator to explore strengths and weaknesses of a party's position in private, so that the party is not forced into taking a firm stance for the benefit of its adversary. A facilitative-style mediator will ordinarily seek to inquire about the party's claims or defenses in a manner that does not directly disclose the mediator's viewpoint. Naturally, as the process unfolds, and trust in the mediator develops, the party might be more inclined to discuss both strengths and weaknesses frankly with the mediator. A more evaluative-style mediator might directly advise the parties of that mediator's prediction of the outcome or opinion concerning what an appropriate resolution of the dispute might be. A danger here is that the party will perceive the mediator as taking sides, might be less inclined to be frank, and might grow alienated as the result of the mediator's adverse statements. Moreover, to the extent that the evaluative mediator forces the parties into a settlement of the mediator's own devising, the parties would have lost some of the potential benefits of arriving at a solution tailored to their own needs and interests, and there might be a greater likelihood of failure to honor the settlement agreement.

In addition to "reality testing", the mediator may use caucus to uncover the underlying interests of the parties, explore some of the more emotionally sensitive issues, give the parties a sense that their pain has been heard, and engage in brainstorming to explore options for resolving the dispute.

Settlement

In the context of securities industry disputes, settlement of the dispute is likely the desired end of the mediation. When the parties arrive at a resolution in principle, and the parties present have authority to resolve the matter, the mediation session should end with at least a draft agreement memorializing the essential terms of their deal.

IV. *What are the Unique Opportunities Afforded by Mediation?*

Flexibility

Both in the ordering of events occurring in the mediation process, in the style of communications, and in the structuring of the settlement, the mediation process offers far greater flexibility than can be afforded in arbitration or in other adjudicative processes governed by rules of relevance and third party outcome determination. Mediation can offer remedies not granted by an arbitrator or a judge, such as a letter of recommendation, a stipulated award removing allegations that perhaps should never have been made, an annuity, or a structured pay out schedule tailored to a party's economic ability.

Informality

Parties may communicate directly in mediation without having to wait for direct questions from their attorneys or having to respond to cross examination by adverse counsel. Documents may be immediately shared without evidentiary concerns, and without having to wait for ones time to present to case in chief or time for rebuttal. The quality of communications permits people to function on a first name basis and to focus on solving the problems presented by the dispute.

Confidentiality

Securities claims involve private economic matters that claimants might prefer not be disclosed to a panel of three arbitrators or to a variety of witnesses. From the perspective of brokers and broker-dealers, they function in an industry where reputation is essential to success. Mediation affords a chance quietly to resolve the dispute without the need for harm to reputation, within the limits permitted in a regulated industry.

Minimal Acrimony

The focus on problem solving and the search for mutual understanding cultivated in mediation permit the parties to move away from adversarial posturing, recriminations and allocation of blame. It is surprising how often, even in an industry in which finances are the main focus, parties are able to leave the room with lessened animosity after settlement of their case.

Maximized Expression

Parties are permitted to express feelings in mediation that would be irrelevant, prejudicial or just out-of-line in arbitration or other adjudicative proceedings. Often, this emotional expression, when validated by the mediator or the other party, enables the aggrieved party to move on to constructive problem solving efforts. This is also a safe context for an apology, which can work wonders in satisfying a party's need and turning him to resolution.

In addition to emotional expression, the frank discussion of positions can permit parties for the first time really to hear and understand legal or factual problems inherent in their claims or defenses, and to recognize the risks of proceeding to adjudication.

Parties may also come to appreciate the circumstances under which the other party functioned – why, *e.g.*, calls were not made or what is meant by a non-discretionary account. They might come to recognize credibility issues that might hurt them if the matter went into arbitration.

Another type of expression available only in mediation, is the expression of interests and brainstorming of options. Economic limitations, of claimant or of the broker-dealer, may be more openly discussed and considered as a legitimate factor in settlement negotiations. These disclosures, in turn, may lead to remedies more flexible than those afforded by an arbitral award, such as a structured settlement for payment over time.

Future Relations

Unfortunately, by the time most matters come to mediation, relationships between broker and customer have deteriorated beyond repair. Nevertheless, there are times when the cooperative problem solving model used in mediation successfully disposes the parties to arrive at a sufficient reconciliation that they can continue to have a future business relationship. This is particularly applicable in inter-broker disputes and in employment disputes, where parties remain in the same industry and are destined to have dealings in the future. At a minimum, even parties who will not likely seek each other out in the future may walk away from mediation having more fully recognized the other's position, and thus will be less likely to besmirch one another's reputation or cross to street to avoid interaction in the future.

Reduced Time

The typical NASD mediation is a one day affair, although there may be repeated sessions, if the parties deem it useful and appropriate. Well more than half of the mediations conducted at the NASD settle after one day's mediation. Nationally, a fair number of mediation providers cite settlement rates at 80% or higher.

Reduced Cost

Fees of experts and counsel have begun to irk parties who saw arbitration as a way out of heavy court costs. With a limited amount of time spent in mediation and the fee for one day's mediation split by the parties, mediation offers clients a less expensive road to resolution. For claimant's attorneys on a contingent fee, it also permits more efficient use of time. The cost saving is appreciated by in-house industry counsel, as well. Additionally, it enables outside counsel to gain the respect and gratitude of their clients, preserving a vital role for defense counsel in the process and enhancing the likelihood of repeat business in a climate where mediation is here to stay.

Increased Party Satisfaction

Studies show that parties are more satisfied with resolutions they created than with decisions imposed upon them by third parties. Moreover, the mediated settlement eliminates the win/lose risk of an adjudicated determination.

Increased Honoring of Settlement Agreement

In the securities industry, the threat to a broker's ability to continue in business strongly motivates parties to honor arbitral awards. Mediations, however, have also included brokers who have left the securities industry and nevertheless choose to participate in the process. Because the mediated settlement takes into account not only what is fair but also what is doable, the settlement agreement has a greater likelihood of being honored without the need to seek judicial confirmation and undertake collection efforts.

V. *Cooperative and Competitive Bargaining.*

Mediation proceeds on the theory that, as a facilitated negotiation, a cooperative bargaining model is most productive. Roger Fisher and William Ury, authors of *"Getting to Yes"* and of *"Getting Past No"* are well known proponents of the cooperative style of negotiation. Their essential thesis is that it is most effective to dispense with *ad homina* and focus on the objective problems in the negotiation of a dispute. They encourage negotiators to take a cooperative stance of seeking to define the objective problem, seeking to identify underlying interests common to the parties, and brainstorming to invent options for resolution most likely to satisfy the largest portion of the most essential interests of all parties – the "win/win" solution.

In tandem with cooperative negotiation, they propose use of the "BATNA" analysis, calculation of the *best alternative to a negotiated agreement*. Parties could also consider their worst and most likely alternatives. Understanding risks and possibilities enhances a party's ability to arrive at the best possible agreement under the circumstances.

VI. *What is the Role of Counsel in Mediation?*

The attorney has many vital functions in mediation.

Process Guide

First counsel may explain the process to the client and prepare for the mediation.

Mediator Selection

Counsel should be actively involved in mediator selection. Counsel should investigate whether the mediator has process expertise or industry expertise, and should consider whether a purely facilitative or mainly evaluative style mediator is sought. Counsel should not overlook

the advantages available through a facilitative process, and should not underestimate the power of good arguments and good advocacy. If there is strength in one's position, a facilitative mediator should be quite capable of recognizing it and clarifying it with the other side, without having to take an evaluative approach. Given the facilitative nature of the process, industry expertise should not be sought at the expense of obtaining a mediator with good process skills.

Case Analysis: BATNA Analysis

Counsel may actively help the client assess the strengths and weaknesses of the case to calculate the BATNA, WATNA or MLATNA. This is the attorney's opportunity to advise his client on the legal merits of the matter, on any factual problems and on credibility or proof issues.

Moving beyond the legal analysis, the attorney can encourage the client to assess not only what is likely to occur in arbitration, but also what possibilities there might be for settlement, and the types and timing of offers the client might consider making. Counsel should not overlook the possibility and value of non-economic inducements in settlement.

Pre-Mediation Communications with Mediator

After mediator selection, the attorney's craft comes to play in pre-mediation discussions with the mediator and preparation of the written submission to the mediator. This is an opportunity for the attorney to gain credibility by showing an understanding of the nature of the process and demonstrating good will. This might take counsel even further than simply making one-sided arguments in the hope of swaying the mediator.

The Written Submission

The written submission is typically not disclosed to ones adversary. This is the best place for pure advocacy. A simple, credible statement of the facts is helpful. In addition – while the pre-mediation statement is not a brief – to the extent there is any pivotal law or regulation, the written statement is a prime opportunity to bring the mediator up to speed on this law. It is helpful actually to annex the source materials rather than simply offer a citation in the hope that the mediator will look it up. This is another way to demonstrate professionalism, gain credibility and be perceived as a friend to the process.

There is more to the written submission than facts and law. Good story telling is key. Of equal value is helping the mediator detect underlying interests, spot any communications concerns, and identify issues that might affect the bargaining process. This could be a good place to suggest a private meeting of the parties, if that might be helpful; or to warn against having certain parties together in the same room.

Bringing the Right Parties to the Table

In the written submission, and in pre-mediation conferences with the mediator, it is wise for counsel to help the mediator understand who should attend the mediation session. Mediations conducted by parties lacking authority to settle might be quite moving experiences, but can also be exercises in futility if the parties moved by the process are unable similarly to move the person with authority when they return to home base. The dynamic interaction, the ability to engage in dialogue, the active influence of the mediator – including the mediator's ability to sense lack of agreement and ask questions bringing parties to a more common understanding – will all be lost on the party who does not actually attend the mediation.

Bringing Necessary Information to the Table

Counsel should advise the mediator if certain information – *e.g.*, the opening account statement, tax returns, tapes of conversations, or telephone records – will be essential to have at the mediation. While a mediation is not a trial or evidentiary hearing, certain information might be critical to bringing parties to a realistic assessment of their own position. Counsel should be diligent in attempting to maximize the efficiency of the process by having this information available and attempting to guaranty that the adverse party will do the same.

If, however, it appears that the other side will never bring crucial information to the first mediation session, counsel should attempt to determine if this will be a good faith process. Counsel should not overlook the genuine possibility, however, that the mediation itself may assist adverse counsel in obtaining this information; critical information may first emerge several hours into the mediation.

Roadblock Anticipation & Strategies

In addition to expertise as an advocate, the attorney's experience as a negotiator, and as a learned human being, should not be overlooked. The attorney can consider with his or her client, or with the mediator, whether there are certain emotional issues in the matter, or whether there are certain underlying interests, that will affect the parties' communications and their willingness to settle – and the attorney can develop strategies for handling these factors. Among the possibilities an attorney might consider in advance is whether an apology might be helpful, and the timing and form of such an apology. This is very subtle psychological material. An up-front apology could relax the adverse party and open the way to genuine dialogue and resolution. Conversely, it might be perceived as an empty ploy, crocodile tears cynically shed to avoid more painful exaction in lucre. Real judgment must be exercised not only in advance of the mediation, but also, again, at the mediation session, with a comprehensive reading of the parties present.

Opening Statement

During the mediation session, the attorney may use the opening to communicate the strength of the client's position. This might be the first time it is presented in this light to the

other party. The attorney may make the judgment of how and when the client should contribute to the process.

An overly aggressive presentation, however, might have a chilling effect upon negotiations. Each attorney develops his or her own style. One effective approach might be to blend empathy and recognition of the value of settlement – given the transaction costs, risks and disruption caused to the parties – with a dispassionate and analytically persuasive acknowledgment of the likelihood of ones client's success in the event the matter proceeds to arbitration.

The opening statement is a good opportunity for the real parties in interest to speak. Effective preparation of the client should enable the client to speak for himself. This is an opportunity for a claimant to discuss in genuine and affecting manner the way in which he was aggrieved, the facts that show how he was disadvantaged, and even the shame and betrayal he experienced. It is a good opportunity for a broker to show empathy with the claimant and yet show how carefully the account was managed. The broker has the chance to explain the rules, conditions and structure under which the broker reasonably operates that limit the broker's ability, *e.g.*, to review every trade or guaranty market performance.

Permitting the client to speak is a good way to demonstrate confidence in ones position, genuine good faith, and a recognition that the mediation is a party driven, consensus building process. Where arbitration is heavily influenced by credibility, showcasing a credible witness gives the adverse party serious cause to reconsider that party's position, and gives the mediator something to discuss with that adverse party in caucus.

Organized Presentation of Information

Particularly in cases where a variety of trades has occurred, it is helpful to a focussed discussion if counsel has organized the pertinent trading history for presentation at the mediation. Use of a spreadsheet with indexed backup is a very helpful presentation.

Since mediation looks to a consensual resolution, counsel should overcome the inclination to "hide the ball"; the adverse party cannot reasonably be expected to agree to a settlement where crucial information that should be available is left in the dark.

Guardian & Guide

Counsel can be a guardian against abuses of the process by a party operating in bad faith, *e.g.*, a party using the process as a practice run or a cheap deposition. Despite the rule of confidentiality, if there is any truly sensitive fact, counsel should help his or her client understand that, if this is disclosed and the matter does not settle, it might make for an uncomfortable cross examination or could produce pointed discovery demands, later on.

But counsel should be careful not to let an attorney's natural caution or suspicion block creative lines of communication from unfolding.

Communicating Risks & Possibilities

Both in the opening statement and throughout the mediation, counsel can take an active role in highlighting both the risks the adverse party faces in arbitration and the superior possibilities of resolution offered by the mediation process. In "Getting Past No" William Ury describes this as "using power to educate" and "building a golden bridge" for ones adversary, respectively. Used in tandem, without an overly heavy hand, this can be an effective negotiating tool.

Assisting in Communications

The benefits available in mediation appear to be maximized by cooperative style negotiation. This includes the ability to hear and reflect back to the speaker the speaker's underlying interest or issue in neutral, objective terms that show understanding and that identify the issue embedded in the speaker's statement, without necessarily conceding the speaker's point. While this manner of listening and speaking is generally employed by the mediator, it can be effective when used by counsel as well. It can disarm the other party and open that other party to hearing ones own point of view.

Counsel may also help his or her own client by reframing what that client says in less emotional terms, and making clear the strength of the client's point without beating on the adverse party.

While questions in mediation should not be approached as direct or cross examination, counsel may play a useful role by seeking clarification of statements made and by raising fruitful areas of inquiry.

Negotiation Consultant

Throughout the mediation, counsel is free to ask to speak privately with the client. Private conferences can be useful to check on whether some information should be raised, whether points should be clarified, and to touch base with the client's feelings. The "time out" may be called if counsel senses that client is going in a direction that might be destructive to fruitful negotiations.

It is also a good opportunity to check on where the client wishes to go in the settlement "bid" and "ask." In calculating settlement positions, the counsel may go over strengths and weaknesses, review what has already been discussed in the mediation, and recalculate the BATNA, WATNA or MLATNA.

Brainstormer; Option Generator

Whether in joint session, in caucus with the mediator, or even in private huddles with the client, the attorney may play a useful role in helping the client brainstorm in a search for

settlement options. This requires the attorney to help the client dig for the client's own interests, try to figure out with the client what the adverse party needs, and look for ways to reach satisfaction of those goals. Most counsel already have substantial experience in looking at staggered payouts, tax issues and other forms of structured settlements. Counsel should not overlook non-economic possibilities for meeting parties' needs. These may include apologies, expunging the record by an arbitrators' consent award, alternative investment vehicles, barter, and, in employment matters: a letter of recommendation, pension and health benefits and the like.

Brainstorming works best when the parties are permitted to generate a host of ideas and hold the critical assessment of the ideas until a sufficient number are on the table.

Crafting Settlements

Attorneys are uniquely well qualified to draft settlement agreements, and mediation is an ideal forum for application of this skill.

VII. *Unique Features of Securities Mediations.*

Customer-broker disputes bear some recurring themes. Often, from the customer standpoint, there is a feeling of betrayal accompanied by a feeling of shame, mixed with doubt over whether one should have known better. From the broker's standpoint, there is a high level of concern relating to the effect of a complaint on the broker's reputation, given reporting requirements on the CRD.

Mediation offers a safe context for the expression of emotions. It enables a customer to tell his broker "you dogged me" and supplies a mediator who can reframe the message positively as a pained expression of a feeling of betrayal and a search for a fair resolution. This type of reframing works to the benefit of the parties in building understanding and moving them past the hurt to settlement.

It also is a safer context for containing some of the reputational harm to brokers that accompanies arbitration.

New York State Unified Court System

Rules

Part & Title:

200
Uniform Rules for Courts Exercising Criminal Jurisd.

201
[Reserved]

202
Uniform Civil Rules for the Supreme Court and County Court

203
[Reserved]

204
[Reserved]

205
Uniform Rules for the Family Court

206
Uniform Rules for the Court of Claims

207
Uniform Rules of the Surrogate's Court

208
Uniform Rules for the New York City Civil Court

209
[Reserved]

210
Uniform Civil Rules for the City Courts Outside of NYC

211
[Reserved]

212
Uniform Civil Rules for the District Courts

213
[Reserved]

214
Uniform Civil Rules for the Justice Dept.

215
Use of Recycled Paper

216
Sealing of Court Records in Civil Actions in the Trial Courts

Uniform Rules for N.Y.S. Trial Courts

PART 216. Sealing Of Court Records In Civil Actions In The Trial Courts

216.01 Sealing of court records

Section 216.01 Sealing of court records.

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

Historical Note
Sec. filed Feb. 28, 1991 eff. March 1, 1991.

COURTS

LITIGANTS

ATTORNEYS

JURORS

JUDGES

CAREERS

SEARCH

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The New York City Bar Association Committee on State Courts of Superior Jurisdiction (the "Committee") has become aware of the substantial expenditure of time and resources of the court and counsel in connection with the negotiation and drafting of confidentiality agreements. It is our impression that confidentiality agreements are used with greater frequency, particularly in cases filed in the Commercial Division. To assist the court and the Bar, and to promote efficiency in these cases, the Committee has drafted a standardized form of confidentiality agreement.

The Committee spent a significant amount of time deliberating over the contents of the Stipulation and Order for the Production and Exchange of Confidential Information ("Stipulation and Order"). Our primary concerns related to the filing under seal documents which had been designated as confidential under the Stipulation and Order, and whether to provide a mechanism for the designation of documents classified as "Attorneys' Eyes Only."

Filing Under Seal

In New York, there is a strong presumption favoring public legal proceedings and against sealing files without good cause shown. *Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 711 N.Y.S.2d 419 (1st Dep't 2000); In re Twentieth Century Fox Film Corp., 190 A.D.2d 483, 601 N.Y.S.2d 267 (1st Dep't 1993). NYCRR § 216.1 provides:

Sealing of court records

> (a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the

court may prescribe appropriate notice and opportunity to be heard.

(b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103(a).

However, litigants have legitimate concerns about keeping private information private and protecting trade secrets, particularly in this age of electronic filing and the Internet. George F. Carpinello, "Public Access to Court Records In New York: The Experience Under Uniform Rule 216.1 and the Rule's Future in a World of Electronic Filing," 66 Alb.L.Rev.1089 (2003). In fact, many proposed confidentiality orders are rejected, particularly in the Commercial Division, because parties attempt to seal files by agreement.

With respect to filing under seal, the Stipulation and Order provides that the party who designated the documents as confidential will be given notice of the other party's intent to file such material with the court, and the designating party may then file a motion to seal the document or the file within seven days. *See e.g. Eusini v. Pioneer Electronics (USA), Inc.*, 29 A.D.3d 623, 815 N.Y.S.2d 653 (2d Dep't 2006). The confidential material may not be filed until the court decides the motion to seal. Alternatively, any party may submit confidential documents in a sealed envelope to the clerk of the part or chambers, and the documents will be returned upon disposition of the motion or other proceeding.

Attorneys' Eyes Only

As for "Attorneys' Eyes Only," the Committee decided not to include the option for such protection primarily out of a concern that it would be invoked far more than necessary. Inevitable disputes over the propriety of a party's invoking "Attorneys' Eyes

Only" protection would undercut the overall goal of the Committee to reduce the time required to negotiate confidentiality agreements.

Counsel are encouraged to agree to the Stipulation and Order or modify it to accommodate the needs of each case. The court's time spent reviewing the Stipulation and Order will be minimized when the court is informed that the parties have agreed to the Stipulation and Order.

We hope the Stipulation and Order will contribute to the further efficiency of the courts and the bar.

Andrea Masley, Chair*
Janis M. Felderstein, Secretary
Amy K. Adelman
Frederick A. Brodie*
Darryll A. Buford*
Hon. Cheryl E. Chambers
Louis A. Craco
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Jeffrey M. Eilender
Sherri L. Eisenpress
R. Brent English*
Cecelia L. Fanelli*
Jeffrey A. Fuisz
Christopher R. Gette
Ann L. Goldweber
Peter G. Goodman*
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Monica J. Stamm
Paul M. Tarr
Gabriel Torres
Steven Telzak
Raymond Leonard Vandenberg
Lauren J. Wachtler
Elizabeth M. Young

*Members of Subcommittee which drafted agreement.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

_____,	:	Index No. _____
Plaintiff,	:	**STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION**
-against-	:	
_____,	:	
Defendant.	:	

----------X

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential and/or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the parties agree merit confidential treatment (hereinafter the "**Documents**" or "**Testimony**").

2. Either party may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the parties

hereto, or by other appropriate means.

3. As used herein:

(a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients.

(b) "Producing party" shall mean the parties to this action and any third-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the party asserting the confidentiality privilege, as the case may be.

(c) "Receiving party" shall mean the party to this action and/or any non-party receiving "Confidential Information" in connection with depositions, document production or otherwise.

4. The Receiving party may, at any time, notify the Producing party that the Receiving party does not concur in the designation of a document or other material as Confidential Information. If the Producing party does not agree to declassify such document or material, the Receiving party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall

continue to be treated as Confidential Information. If such motion is filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise.

5. Except with the prior written consent of the Producing party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

a. personnel of plaintiff or defendant actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

b. counsel for the parties to this action and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

c. expert witnesses or consultants retained by the parties or their counsel to furnish technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

d. the Court and court personnel, if filed in accordance with paragraph 12 hereof;

e. an officer before whom a deposition is taken, including stenographic reporters and

any necessary secretarial, clerical or other personnel of such officer, if furnished, shown or disclosed in accordance with paragraph 10 hereof;

f. trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

g. any other person agreed to by the parties.

6. Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purposes.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving party shall provide the expert's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party at the time of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any of the parties to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of

evidence, such party may do so only after taking such steps as the Court, upon motion of the disclosing party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for the parties from using during any deposition in this action any documents or information which have been designated as "Confidential Information" under the terms hereof. Any court reporter and deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute the certificate annexed hereto. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party.

11. A party may designate as Confidential Information subject to this Stipulation any document, information, or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the party asserting the confidentiality privilege. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such a designation is made in a shorter period of time), all such documents shall be treated as Confidential Information.

12. (a) A Receiving Party who seeks to file with the Court any deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information, shall provide all other parties with seven (7) days' written notice of its intent to file such material with the Court, so that the Producing Party may file by Order to Show Cause a motion to seal such Confidential Information. The Confidential Information shall not be filed until the Court renders a decision on the motion to seal.

In the event the motion to seal is granted, all deposition transcripts, exhibits, answers to interrogatories, and other documents which have previously been designated by a party as comprising or containing Confidential Information, and any pleading, brief or memorandum which reproduces, paraphrases or discloses such material, shall be filed in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as an indication of the nature of the contents, and a statement in substantially the following form:

"This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of

the Court or consent of the parties. Violation hereof may be regarded as contempt of the Court."

(b) As an alternative to the procedure set forth in paragraph 12(a), any party may file with the court any documents previously designated as comprising or containing Confidential Information by submitting such documents to the Part Clerk in sealed envelopes or other appropriate sealed container on which shall be endorsed the caption of this litigation, the words "CONFIDENTIAL MATERIAL-SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION AND EXCHANGE OF CONFIDENTIAL INFORMATION" as an indication of the nature of the contents, and a statement in substantially the following form: "This envelope, containing documents which are filed in this case by (name of party), is not to be opened nor are the contents thereof to be displayed or revealed other than to the Court, the parties and their counsel of record, except by order of the Court or consent of the parties."

Such documents shall be returned by the Part Clerk upon disposition of the motion or other proceeding for which they were submitted.

(c) All pleadings, briefs or memoranda which reproduces, paraphrases or discloses any documents which have previously been designated by a party as comprising or containing Confidential Information, shall identify such documents by the production number ascribed to them at the time of production.

13. Any person receiving Confidential Information shall not reveal or discuss such

information to or with any person not entitled to receive such information under the terms hereof.

14. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 and/or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

15. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential Information shall in no way constitute a waiver of each party's right to object to the production or disclosure of other information in this action or in any other action.

17. This Stipulation is entered into without prejudice to the right of either party to seek relief from, or modification of, this Stipulation or any provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the Civil Practice Law and Rules or other applicable law.

18. This Stipulation shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a party may seek the written

permission of the Producing party or further order of the Court with respect to dissolution or modification of any the Stipulation. The provisions of this Stipulation shall, absent prior written consent of both parties, continue to be binding after the conclusion of this action.

19. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

20. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof, shall be returned to the Producing Party or shall be destroyed, at the option of the Producing Party. In the event that any party chooses to destroy physical objects and documents, such party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits. This Stipulation shall not be interpreted in a manner that would violate any applicable cannons of ethics or codes of professional responsibility. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any party, or of experts specially retained for this case, to represent any individual,

corporation, or other entity adverse to any party or its affiliate(s) in connection with any other matters.

21. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

[FIRM]
By: _____
_____
_____
New York, New York _____
Tel.: _____

Attorneys for Plaintiff

Dated: _____

[FIRM]
By: _____
_____
_____
New York, New York _____
Tel.: _____

Attorneys for Defendant

Dated: _____

SO ORDERED_____
J.S.C.

EXHIBIT "A"

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

----------X

_____,
Plaintiff,

-against-

_____,
Defendant.

Index No. _____

AGREEMENT TO RESPECT CONFIDENTIAL MATERIAL

----------X

I, _____, state that:

1. My address is _____.

2. My present employer is _____.

3. My present occupation or job description is _____

_____ 4.

I have received a copy of the Stipulation for the Production and Exchange of Confidential Information (the "**Stipulation**") entered in the above-entitled action on

_____.

5. I have carefully read and understand the provisions of the Stipulation.

6. I will comply with all of the provisions of the Stipulation.

7. I will hold in confidence, will not disclose to anyone not qualified under the Stipulation, and will use only for purposes of this action, any Confidential Information that is disclosed to me.

8. I will return all Confidential Information that comes into my possession, and documents or things that I have prepared relating thereto, to counsel for the party by whom I am employed or

retained, or to counsel from whom I received the Confidential Information.

9. I hereby submit to the jurisdiction of this court for the purpose of enforcement of the Stipulation in this action.

Dated: _____ _____

NEW YORK COUNTY LAWYER

September 2006 | Visit us at www.nycla.org | Volume 2 / Number 7

By employing tactics such as military-le raids, Col. Bogdanos was able to re-eve many o' the thousands of ancient ifacts that were looted during the 2003

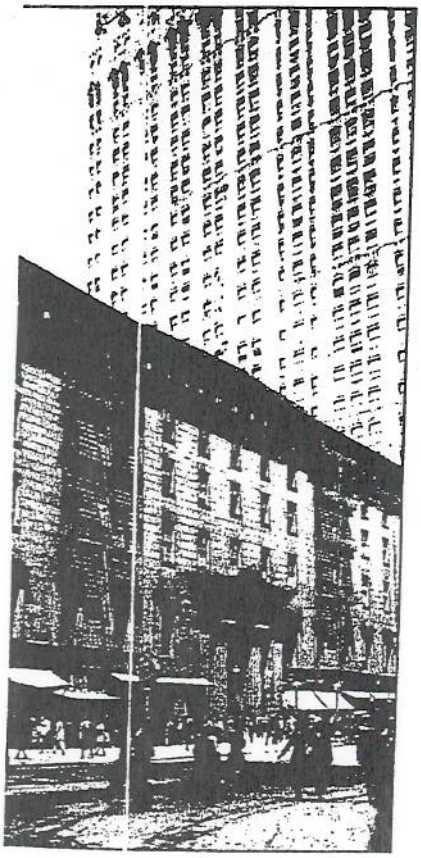
Diddy" Combs and played an active part in seeking out terrorist suspects from the September 11 attacks. After September 11, Col. Bogdanos left the courtroom and

Ms. Slotnick is the Communications Assistant at New York County Lawyers' Association.

ld Broadway: l now

ome of Law" He was so set on having /CLA make its home on Vesey Street at he ultin ately contributed over 50,000 toward the building expenses d served as the Association's President m 1927-193 0. In 1927, NYCLA took nership of the properties on 12, 14 and Vesey Street and in 1929, the cornerne, which contains a time capsule, was l. Cass Gilbert designed the auditorium er the main chamber of Independence ll in Philadelphia and his plan for the lding became a reality in 1930 when NYCLA Home of Law was completed. *The 1913 photograph is a gift to /CLA from K. Jacob Ruppert, Esq., great great grandson of brewer cob Ruppert Sr. and the NYCLA .E Institute s Senior Program Attor- from 200 -2004. He also serves as family's historian.*

. Slotnick is the Communications sistant a New York County wyers' Association.



Online access to New York State Supreme Court records and data

by Robert C. Meade Jr.

In mid September, the New York County Supreme Court, implementing the vision of Chief Judge Judith S. Kaye, inaugurates a program that will provide online access to New York State Supreme Court, Civil Branch's records and data. What follows is a brief summary of this project, one of two in the State (Broome County is the other venue).

In the New York County project, a joint effort between the County Clerk of New York County, Hon. Norman Goodman, and the Court (Hon. Jacqueline W. Silbermann, Administrative Judge), County Clerk and Court staff have scanned and posted various civil case records in PDF format on the Court's internet website (www.nycourts.gov/supctmanh). On that site, through a program created by the Court called the "Supreme Court Records On-Line Library" (or "SCROLL"), attorneys will be able to access, at no charge, case information (County Clerk data and data from the Court's Civil Case Information System (CCIS)) and images of key documents in each case in an integrated format.

Many types of documents will be accessible: the complaint or other initiating papers, the answer and other pleadings, Requests for Judicial Intervention, discovery orders, decisions (unless otherwise ordered), notices of motion and proposed orders to show cause (but not the supporting or opposing papers), notes of issue, jury demands and judgments. Cases will be available in SCROLL with a few exceptions: documents from Mental Hygiene Law cases, matrimonial cases and matters in which a sealing order has been issued will not be included.

Four related local court rules have been proposed to assure that certain private information will not be posted on the internet. In addition to documents in the case categories mentioned, bills of particulars, affidavits and memos of law will be excluded. Beyond this, the rules direct attorneys who are filing documents covered by the project to avoid including therein bank account numbers, social security numbers and the like. To the extent that such information must be stated, it should be limited (e.g., only a few digits of a bank account number). The rules further provide that if such information must be set out in full, the filer shall seek a court directive that the document be excluded from the SCROLL system. Also, any party or person who may be adversely affected can request a directive of exclusion or deletion if the document has already been posted. Persons who wish to make this request can present it in a letter to the assigned Justice or the Administrative Judge (if the case is unassigned).

The public access project will generate a digital file similar to that in the New York Court System's electronic filing program (see Uniform Rule 202.5-b), which is authorized in tort, commercial and tax certiorari cases in Supreme Court in 16 counties across the State (including Broome and New York), the Court of Claims and Erie County Surrogate's Court. E-filing, however, will offer benefits to the Bar that the public access project cannot (e.g., online filing, payment of court fees and service of interlocutory papers) and attorneys may thus find it useful to e-file their cases.

In transmitting to NYCLA and other bar groups a Notice to the Bar on this subject (also posted on the Court's website), Administrative Judge Silbermann has invited comments and suggestions. NYCLA Committees and Sections are welcome to submit them to Judge Silbermann at the courthouse at 60 Centre Street (Room 611).

Mr. Meade is the First Deputy Chief Clerk, Supreme Court, Civil Branch, New York County. He is a member and former Co-Chair of NYCLA's Supreme Court Committee.