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: IN RE: LOCAL CIVIL RULE 83.12 :
: Alternative Dispute Resolution :
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M10-468
ORDER

At its meeting of April 28, 2010, the Board of Judges of the Southern District of New York approved the following amendment to Local Civil Rule 33.12. Alternative Dispute Resolution.

Local Civil Rule 83.12.

The Court's existing alternative dispute resolution ("ADR") program of mediation shall continue as set forth below.

(a) Definition

Mediation is a confidential ADR process in which a disinterested third party directs settlement discussions. By holding meetings, defining issues, diffusing emotions and suggesting possibilities of resolution, the mediator assists the parties in reaching their own negotiated settlement. The main benefits of mediation are that it can produce creative solutions to complex disputes often unavailable in traditional litigation, and result in an expeditious and less costly resolution of the litigation.

(b) Administration

- (1) The Mediation Supervisor, appointed by the Clerk of the Court, shall administer the Court's mediation program. The Chief Judge shall appoint one or more District Judges or Magistrate Judges to oversee the program.
- (2) The Mediation Supervisor, in consultation with other Court personnel, shall ensure that information about the Court's mediation program, including the names of its mediators, is available on the Court's website. The website information will be updated at least bi-annually.

(c) Service as a Mediator

- (1) An individual may serve as a mediator if he or she:
 - (i) has been a member of the Bar of any State or the District of Columbia for at least five years;
 - (ii) is admitted to practice in this Court; and
 - (iii) is certified by the Chief Judge or his/her designee to be competent to perform the duties of a mediator.

- (2) Each individual certified as a mediator shall take the oath or affirmation prescribed by 28 U.S.C. 453 and complete the training program provided by the Court before serving as a mediator.

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(3) All mediators shall serve without compensation and be eligible for credit for pro bono service.

(d) Consideration of Mediation

In all civil cases eligible for mediation pursuant to paragraph (e), each party shall consider the use of mediation and shall report to the assigned Judge at the initial case management conference whether the party believes mediation may facilitate the resolution of the lawsuit. Judges are encouraged to note the availability of the mediation program on the pretrial scheduling order.

(e) Entry into the Program

(1) All civil cases other than social security, habeas corpus, tax, pro se prisoner civil rights and certain other pro se cases are eligible for mediation, whether assigned to Foley Square or White Plains.

(2) The Court may, by Administrative Order, direct that certain specified categories of cases shall automatically be submitted to the mediation program, unless the assigned District Judge or Magistrate Judge exempts a particular case.

(3) For all other cases, the assigned District Judge or Magistrate Judge may determine that a case is appropriate for mediation and may order that case to mediation, with or without the consent of the parties, either at or after the initial Rule 16(b) scheduling conference. Alternatively, the parties may notify the assigned Judge and the Mediation Supervisor at any time of their desire to mediate by filing a stipulation to that effect signed by counsel for all parties.

(f) Assignment of the Mediator

(1) The Mediation Supervisor shall assign the next available mediator from the list of individuals certified as mediators and notify the mediator and the parties of the assignment within ten (10) days of the receipt by the Mediation Supervisor of the Mediation Order either from the Clerk of Court or from the assigned Judge.

(2) When all counsel for the parties believe a mediator with expertise in a particular field would be preferred, they shall within five (5) days of the Mediation Order notify the Mediation Supervisor, who within ten (10) days of the parties' request will, if available, appoint the next mediator with expertise in that field.

(g) Mediation Scheduling

(1) The mediator shall schedule the first mediation session in a case within thirty (30) days of the assignment of the mediator by the Mediation Supervisor. In the event that the mediation cannot begin within the time set forth herein, the assigned mediator shall promptly notify the Mediation Supervisor of the date by which the mediation will begin and the reason for the delay.

(2) In no event is the scheduling of mediation to interfere with any scheduling order of the Court.

(h) Disqualification

(1) The mediator shall disqualify himself or herself in any action in which he or she would be required under 28 U.S.C. §455 to be disqualified if a Justice, District Judge or Magistrate Judge.

(2) Any party may submit a written request to the Mediation Supervisor within ten (10) days from the date of the notification of the mediator's name for the mediator's disqualification for bias or prejudice as provided in 28 U.S.C. § 144. A denial of such a request by the Mediation Supervisor is subject to review by the assigned Judge upon motion filed within ten (10) days of the date of the Mediation Supervisor's denial.

(i) Written Submission

(1) Unless otherwise directed by the mediator, at least seven (7) days before the first scheduled mediation session, each party shall prepare and deliver to the mediator (but not to the adversary) a memorandum presenting in concise form, not exceeding ten double spaced pages:

- (i) the party's contentions as to both liability and damages;
- (ii) the status of any settlement negotiations;
- (iii) the names of the persons, in addition to counsel, with full authority to resolve the matter who will attend the mediation; and
- (iv) the parties' reasonable settlement range, including any non-monetary proposals for settlement of the action.

(2) Upon receipt of each party's memorandum, the assigned mediator may contact counsel to schedule either a joint or individual preliminary case conference.

(j) Mediation Sessions and Location

(1) The attorney primarily responsible for each party's case, in addition to the individual party, or a representative of the party, if a corporation, partnership or governmental entity, with full settlement authority, and a fully authorized representative of the client's insurance company where the decision to settle and/or the amount of settlement must be approved by the insurance company, shall attend each mediation session, unless excused by the mediator.

(2) The first mediation session must be held in the Court's "ADR Center." The mediator, in consultation with counsel for the parties, shall decide the location of subsequent mediation sessions.

(3) The mediation will conclude when the parties reach a resolution of some or all issues in the case or when the mediator concludes that resolution (or further resolution) is impossible.

(k) Reporting

(1) If resolution is reached, a binding agreement shall be signed by all the parties, and a stipulation of discontinuance or other appropriate document filed promptly with the Clerk of Court.

(2) If resolution is not reached, the mediator shall promptly notify the Mediation Supervisor, who shall promptly notify the assigned Judge.

(1) **Confidentiality**

(1) The entire mediation process shall be confidential. The parties and the mediator shall not disclose information regarding the process, including settlement terms, to the assigned Judge or to third persons unless all parties agree or the assigned Judge orders in connection with a judicial settlement conference. The identity of the mediator shall not be disclosed, including to the assigned Judge. However, persons authorized by the Court to administer or evaluate the mediation program shall have access to information and documents necessary to do so, and the parties, counsel and mediators may respond to confidential inquiries or surveys by such persons.

(2) The mediation process shall be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator is disqualified as a witness, consultant, attorney, or expert in any pending or future action relating to the dispute, including actions between persons not parties to the mediation process.

The amendment will be effective October 1, 2010 subject to public comment and review by the Judicial Council of the Second Circuit..

SO ORDERED.



Loretta A. Preska
Chief Judge

Dated: New York, New York
October 12, 2010