

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:)
)
ALTERNATIVE DISPUTE RESOLUTION) Misc. No. 06-203
POLICIES AND PROCEDURES)

WHEREAS, pursuant to Local Rule 16.2, the Alternative Dispute Resolution (“ADR”) program is governed by the ADR Policies and Procedures, as adopted by the Board of Judges for the United States District Court for the Western District of Pennsylvania;

WHEREAS, the Court’s ADR Policies and Procedures are in support of Local Rule 16.2;
and,

WHEREAS, the Court finds that changes to the ADR Policies and Procedures are necessary and appropriate.

AND NOW, this 16th day of February, 2018, IT IS
HEREBY ORDERED THAT effective immediately (i) Sections 2.8, 2.9, and Appendix A are added to the ADR Policies and Procedures, and (ii) Sections 3.4, 3.5, 4.4, 4.5, 4.9 of the ADR Policies and Procedures are amended, as set forth in the attached.

FOR THE COURT:

s/ Joy Flowers Conti

Chief United States District Judge

2.8 Good Faith Definition

It is the expectation of the court that all parties ordered to mediation shall attend with full and complete settlement authority and shall participate in good faith. "Good faith" shall refer to the duty of the parties to meet and negotiate with a willingness to reach agreement, full or partial, on matters in dispute. If parties and/or party representatives with full settlement authority participate, consider and respond to the proposals made by each other, and respect each other's role by not acting in a manner which is arbitrary, capricious or intended to undermine the mediation process, the parties are deemed to be acting in good faith.

In good faith negotiations, neither party is required to make a concession or agree to any proposal, nor are they precluded from seeking the best possible resolution for their own interests. If a party is attending a mediation session with the intent not to make any demand or offer of settlement, or if they intend to wait until the disposition of certain motions to engage in settlement discussions, they shall explicitly inform the mediator and all other parties in writing no later than 10 calendar days prior to the mediation. Following this disclosure, the parties will either proceed to the mediation or move the court to amend its ADR referral order.

2.9 Motion for Sanctions

All ADR Motions for Sanctions must be consistent with the process outlined in Attachment A.

3. MEDIATION

value from any source other than the parties. The Court may review the reasonableness of the fee and, if necessary, enter an Order modifying the fee. Compensation must be paid directly to the neutral upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the mediator. Failure to pay the mediator must be brought to the Court's attention.

- C. Fee Waiver.** A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint a mediator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

3.4 Timing and Scheduling the Mediation

- A. Scheduling by Mediator.** Promptly after being chosen to mediate a case, the mediator shall, after consulting with all parties, fix the date and place of the mediation within the deadlines set by paragraph B below, or the order referring the case to mediation.

- B. Deadline for Conducting Mediation.** Unless otherwise ordered or extended by the Court for good cause shown pursuant to Section 3.5 infra, the mediation shall be held within 60 days after the initial scheduling conference (see LCvR 16.1.A.2). ~~Initial Case Management Conference (Rule 16) or issuance of the Initial Case Management Order, whichever occurs first.~~

3.5 Request to Extend the Deadline

A. Motion Required. Requests for extension of the deadline ~~to conduct for~~ ~~conducting a mediation must be made as soon as practicable or when a~~ ~~conflict is first known in a motion no later than 15 days before the session is to~~ ~~be held and must be directed to the assigned Judicial Officer, in a motion~~ ~~under LR 7.1,~~ with a copy to the other parties and the mediator.

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;
2. Indicate whether the other parties concur in or object to the request; and
3. Be accompanied by a proposed order setting forth a new deadline by which the mediation ~~will~~ must be held.

3.6 Telephone Conference Before Mediation

The mediator must schedule a brief joint telephone conference with counsel and any unrepresented parties before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, and which client representatives will attend.

3.7 No Written Mediation Statements Required

Written mediation statements are not required for mediations.

3.8 Procedure at Mediation

A. Procedure. The mediation must be informal and must employ a facilitative

Compensation must be paid directly to the evaluator upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the evaluator. Failure to pay the evaluator must be brought to the Court's attention.

- C. **Fee Waiver.** A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint an evaluator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

4.4 **Timing and Scheduling the Early Neutral Evaluation (ENE)**

- A. **Scheduling by Evaluator.** Promptly after being appointed to a case, the evaluator must, after consulting with all parties, fix the date and place of the ENE within the deadlines set by paragraph B below, or the order referring the case.

- B. **Deadline for Conducting Session.** Unless otherwise ordered or extended by the Court for good cause shown pursuant to Section 4.5 *infra.*, the ENE shall ~~must be held~~ within 60 days after the initial scheduling conference (see LCVR 16 J.A.2), Initial Case Management Conference (Rule 16) or the issuance of the Initial Case Management Order (Rule 16), whichever occurs first

4.5 **Requests to Extend Deadline**

- A. **Motion Required.** Requests for extension of the deadline for to conduct ~~conducting an ENE session~~ must be made as soon as practicable or when a

~~conflict is first known, in a motion directed to the assigned Judicial Officer, no later than 15 days before the ENE is to be held and must be directed to the assigned Judicial Officer, in a motion under Civil LR 7.1, with a copy to the other parties and the evaluator.~~

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;
2. Indicate whether the other parties ~~consent~~ ~~concur~~ in or object to the request; and
- ~~1-3.~~ 3. Be accompanied by a proposed order setting forth a new deadline by which the ENE ~~will~~ must be held.

4.6 Ex Parte Contact Prohibited

Except with respect to scheduling matters, there must be no *ex parte* communications between parties or counsel and the evaluator, including private caucuses to discuss settlement, until after the evaluator has either delivered orally his or her evaluation or, if so requested by the parties, has committed his or her evaluation to writing, or all parties have agreed that *ex parte* communications with the evaluator may occur.

4.7 Telephone Conference Before Early Neutral Evaluation

The evaluator must schedule a brief joint telephone conference with counsel before the ENE to discuss matters such as the scheduling, the procedures to be followed, the nature of the case, and which client representatives will attend.

meaningful settlement negotiations;

5. Describe the history and status of any settlement negotiations; and

6. Include copies of documents out of which the suit arose (*e.g.*, contracts), or whose availability would materially advance the purposes of the evaluation session, (*e.g.*, medical reports or documents by which special damages might be determined).

4.9 Procedure at an Early Neutral Evaluation

A. Components of Early Neutral Evaluation

Unless otherwise agreed to by the parties and evaluator, the evaluator must:

1. Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;
2. Help the parties identify areas of agreement and, where feasible, enter stipulations;
3. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain the reasoning that supports these assessments;
4. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

5. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;
6. Help the parties assess litigation costs realistically; and
7. If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and
8. Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

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

C. Evaluation. ~~The evaluation must be presented orally to all the parties orally, (including, as applicable, party representatives, insurers and risk pool representatives), and may be supplemented by a written evaluation within ten days of the ENE if so requested by the parties. The recipients of any oral presentation should include party representatives, insurers and risk pool representatives, as applicable. The parties should determine in advance whether the oral evaluation will be delivered in a joint or separate session. In the event that the parties cannot agree, the oral evaluation shall be delivered in separate sessions. Any party's evaluation may be reduced to writing and provided to that party upon their request.~~ The Any evaluation, oral or written, constitutes confidential information which shall not be disclosed to the assigned Judicial Officer or anyone else except as provided in Section 6.D., infra.

APPENDIX A

MOTION FOR SANCTIONS PROCESS

1. Prior to the filing of any motion for sanctions regarding the ADR session, the moving party shall serve on opposing counsel a file-ready copy of their proposed motion for sanctions.
2. Within 14 days of service of the proposed motion for sanctions, the parties or their counsel shall engage in thorough discussions in an attempt to resolve the issue(s) being raised.
3. If the parties reach a resolution of the underlying issue, no further action is required.
4. If the parties are unable to reach a resolution of the underlying issue, and adjudication by the court is required, counsel shall proceed as follows:
 - a. Prepare a certificate:
 - i. attesting that the parties met and discussed, either in person or by telephone, the content of the proposed motion for sanctions;
 - ii. attesting that the parties were unable to resolve the issue(s) raised in the potential motion after thorough discussions, and;
 - iii. stating whether they agree (or disagree) that confidential information will be implicated in the resolution of the potential motion.
 - b. Moving party shall file a "Notice of Intent to File Motion for Sanctions" (in the form attached), attaching the certificate described in subsection a. Both the notice and the certificate shall refrain from making any specific references to the alleged breach and shall maintain the confidentiality of the ADR process.

5. Once the "Notice of Intent to File Motion for Sanctions" is filed, the assigned judge has the discretion to decide whether they will handle the motion for sanctions or refer it to the ADR Judge, or a designee, for resolution, per ADR P&P 2.4.
6. Once a determination is made concerning which judge will handle the motion for sanctions, that judge shall schedule a conference in an attempt to resolve the issue prior to the filing of the proposed motion. No motion for sanctions may be filed until leave is granted through entry of an order by the judge handling the dispute.
7. If leave to file the motion for sanctions is granted, the order granting same will also set forth the dates for the filing of the motion and supporting documents, as well as the response. The motion, response and any supporting documents will be filed **under seal**.
8. No additional briefing, replies and/or sur-replies will be allowed.
9. If a hearing or argument is scheduled regarding the motion for sanctions, said proceedings will be held **under seal**.
10. The judge resolving the motion (either assigned or ADR) shall enter an order on the court's docket terminating the motion for sanctions.
11. Should a written opinion be issued resolving the motion for sanctions, that opinion shall be filed **under seal**. Distribution of the opinion shall be made to all parties to the motion, as well as the ADR Coordinator, who shall prepare a brief synopsis of the underlying issue(s) and resolution, without attribution to the judge and without identifying any parties. The synopsis will be placed on the Court's website under the ADR Program information tab. The purpose of this synopsis will be to instruct litigants on opinions issued by the court and to serve as an aid in the continual evaluation of the Court's ADR Processes (see ADR P&P 2.6 and ADR P&P 6.D). While the content of any synopsis will not be violative of confidentiality, the written opinion resolving a motion for sanctions shall be deemed confidential, pursuant to ADR P&P 6.A.

NOTICE OF INTENT TO FILE MOTION FOR SACTIONS FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

_____)
 _____)
 _____)
 _____) CIVIL ACTION NO. _____
 _____)
 _____)
 _____)
 _____)

NOTICE OF INTENT TO FILE MOTION FOR SANCTIONS

PLEASE TAKE NOTICE that _____ (Name of Moving Party)
 _____ intends to present to this Honorable Court a Motion for Sanctions
 regarding the ADR session in the above captioned case. Attached to this notice is a certificate
 that the parties have met and conferred, either in person or by telephone, and were unable to
 resolve the issue(s) giving rise to the forthcoming motion.

The parties stipulate that the issue(s) raised in the Motion for Sanctions (check one)

- will require the disclosure of confidential information
- will not require the disclosure of confidential information
- no agreement was reached on the disclosure of confidential information

Dated: _____, 20____ Signature of Counsel _____