

ALTERNATIVE DISPUTE RESOLUTION PLAN

June 1, 2000

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I. INTRODUCTION

The Alternative Dispute Resolution Act of 1998 requires that each district court authorize the use of Alternative Dispute

Resolution (ADR) in all civil actions including adversary proceedings in bankruptcy. 28 U.S.C. §§ 651 et seq. It is the intention of the Court, through the adoption of Local Rule 16.4 and implementation of this Plan for Alternative Dispute Resolution in the District of Massachusetts (the Plan), to provide a broad program of court-annexed dispute resolution processes designed to provide quicker, less expensive, and generally more satisfying alternatives to continuing litigation. The Plan is designed to give litigants ready access to case evaluation and/or modern ADR settlement techniques. The program seeks to encourage a mutually satisfactory resolution to disputes in the early stages of litigation. Such early case resolution is likely to increase litigant satisfaction with the judicial process and make more efficient use of judicial and private resources.

The parties are encouraged to resolve their disputes in ways that satisfy the underlying interests of all parties, minimize their costs, and take account of their legal rights based upon the facts of their cases. Judges and lawyers know that the majority of the cases filed in this court settle without a trial. They also know that cases that are settled early in the process save litigation costs to the parties and the court, and that settlements can provide creative solutions which may not be obtainable from a formal court proceeding. Some cases will require a full in-court adjudication. Many cases, however, can reach a satisfactory resolution by using procedures other than trial at any stage of the litigation.

This court requires litigants to consider the ADR options which can be utilized to achieve a realistic outcome in their case. The various ADR alternatives are designed to address the underlying interests of all parties, reduce delay and expense in satisfying those interests and also recognize the importance of the litigants' rights. Many ADR procedures are confidential and private. If appropriate and necessary, participants may be asked to enter into confidentiality agreements. Unless otherwise agreed, only the result of the proceedings will be provided to the court and no information regarding the substance or merits of the case will be communicated.

Parties in all civil cases are encouraged to participate in at least one of the ADR alternatives that are available through the court. ADR options are designed so that the parties can adopt or

adjust an existing program to one which will meet the needs of their dispute. Unless otherwise agreed, these programs are non-binding. The parties are not required to accept any results or recommendations. Except for special masters and private providers of ADR services, the programs available through the court are without cost to the participants.

All of the district judges and magistrate judges encourage and support ADR initiatives and are willing to assist as ADR providers in cases other than those assigned to them for trial to reach an early resolution of the parties' dispute. The court has also enlisted the aid of a panel of highly qualified individuals (the Panel) who have volunteered to assist the court as neutrals for various ADR options. Court sponsored ADR programs generally provide the least costly methods to resolve disputes.

II. COURT SPONSORED ALTERNATIVE DISPUTE RESOLUTION OPTIONS

A. Early Neutral Evaluation

Early neutral evaluation is intended to take place at an early stage in the proceedings. It involves a presentation by the parties, directly or through counsel, of a brief summary of the case or claim to a neutral party for evaluation. The evaluator may be an impartial individual selected from the Panel established by the court or a judicial officer of this court other than the one to whom the case is assigned. The evaluator gives an opinion as to the likely court outcome and may offer comments on the relative strengths and weaknesses of each side's case. The evaluator can also provide case planning guidance. Counsel and the parties can use this advice in further negotiations to attempt to reach a voluntary settlement.

In some cases, it may be appropriate to use a neutral expert solely to provide an opinion on technical questions.

In other cases, a neutral expert may provide an evaluation of damages or may provide an evaluation on all aspects of the dispute. Early Neutral Evaluation can also serve as the basis for a subsequent mediation process.

B. Mediation

Mediation is a process in which the parties meet with a designated mediator to isolate disputed issues, to develop options, and to consider settlement alternatives, in an effort to reach a consensual agreement that will accommodate the needs and interests of all parties. The mediator may be an impartial individual selected from the Panel established by the court, or a judicial officer of this court other than the one to whom the case is assigned. Entering the mediation process is ordinarily voluntary and reaching an agreement is always voluntary.

The mediator does not impose any terms or result upon the parties but rather seeks to facilitate the process of negotiation. This is accomplished by exploring alternatives in joint or separate meetings, and communicating options and alternatives, when authorized.

C. Mini-trial

The mini-trial is a procedure in which the attorneys for each side, after development of factual and legal positions, present each side of the dispute to the decision-makers, usually high-level executives, for both parties in a private setting. After the presentation by the lawyers, the decision-makers conduct negotiations. A neutral advisor who can be a judicial officer, presides over the mini-trial during the parties' presentations and, where appropriate, may assist as a mediator. In the event that a settlement is not reached, the parties may request the neutral advisor to act as a facilitator during negotiations, evaluate the case, and /or issue an advisory opinion as to the possible outcomes if the case were litigated.

D. Summary Jury/Bench Trial

A summary jury/bench trial is a court-run process in which the parties present abbreviated versions of their case to an advisory jury (usually of six rather than twelve people) empaneled by the court in which an action is pending, or to a judge other than the one assigned to the case. Any case in which a trial is authorized is eligible to participate in the summary jury/bench trial process.

In a summary jury trial the jury deliberates briefly and issues a non-binding decision on all issues presented to them. The parties may be permitted to question the jurors as to the reasons for their decision and their reactions to particular arguments and evidence. The purpose of a summary jury trial is to give the parties a realistic assessment of their likelihood of success. This could be scheduled in any type of case in which the parties are eligible for a jury trial.

A summary bench trial is essentially the same as a summary jury trial except that a judge (other than the one who would preside at a binding trial) rather than a jury will enter an advisory opinion and provide a factual and legal analysis to assist the parties in settlement negotiations.

E. Consent to Jury Trial or Court Trial Before a Magistrate Judge

The parties to a civil action may elect, by written stipulation, to have a Magistrate Judge, instead of a District Judge, conduct all proceedings, including presiding over a jury or non-jury trial. The same procedural and evidentiary rules apply and the right of appeal is preserved. A consent form is available in the Clerk's Office.

F. Settlement Conferences Conducted by District Judge or Magistrate Judge

A settlement conference with a judicial officer, other than the one to whom the case is assigned, may be conducted at any stage of the litigation. The conference is usually requested by one or more of the parties, or by the judge to whom the case is assigned. The judicial officer acts as a facilitator at the conferences, meeting with the parties, promoting communications, offering an objective assessment of the case and suggesting settlement options.

G. Special Masters

Under Rule 53 of the Federal Rules of Civil Procedure, all or part of a civil action may be referred to a court-appointed master for decision. Reference of a dispute to a master gives the parties some measure of control over the scheduling and location of the

hearing and the identity of the decision-maker, since these matters may be specified by the parties, subject to approval by the court in which the action is pending. Parties must share the costs of the services of the special master.

H. Private Alternative Dispute Resolution

By agreement, the parties may pursue any other form of private alternative dispute resolution program at their own expense. Providers range from organizations to single practitioners with experience in particular areas.

I. State Court Multi-Door Courthouse

The Multi-Door Courthouse (MC) is a court-connected dispute resolution program within the Massachusetts Trial Courts. The MC's primary base of operations is in Middlesex Superior Court in Cambridge with satellite programs in the Worcester Superior Court and the Middlesex Probate and Family Court. Using a multi-option model, the program features mandatory screening conferences with voluntary referral to one of several ADR processes, including mediation, case evaluation, arbitration, complex case management, and various hybrid models. Although this is primarily a program for cases proceeding through the state court system, it has been utilized in the Central Section of the District Court located in Worcester to help resolve some of our Worcester cases. Under this program there is no charge for the screening conference. If the parties elect one of the dispute resolution options with the MC, there is an administrative fee and per hour neutral fee that is split equally. The MC offers fee reductions and waivers when appropriate.

III. ADR PROVIDERS

A. Judicial Officers

The judges of the court are supportive of ADR and are willing to act as ADR providers or neutrals in cases other than their own. If the parties would like one of the district judges or magistrate judges to conduct one of the ADR options in their case, they can indicate their preference or have a judge assigned by the ADR administrator or the liaison judge for the ADR Program.

B. Federal Court Panel

The Boston Bar Association (BBA) has agreed to work with the court to recruit volunteers who have agreed to act as ADR providers in Federal Court cases referred for Early Neutral Evaluation, Mediation and Mini-trials. Membership on the Panel will be determined based on a review of applications, with the qualification requirements as described below, and will be reviewed annually. The question of whether to continue the provision of ADR services on a pro bono basis will also be reconsidered annually.

1. Recruitment

The BBA will recruit applicants for the Panel of ADR providers by announcing the positions in publications and websites of various organizations, including Massachusetts Lawyers Weekly, newsletters for bar associations and ADR professionals' associations, and other appropriate publications. The BBA will reach out to diverse communities as part of its recruitment efforts.

The court will make the final determination regarding the selection of individuals who will serve on the ADR panel. In addition to those individuals recruited, the court may recognize other individuals who have previously served as ADR providers for the U.S.D.C. and meet the minimum qualifications recommended by the BBA.

2. Qualifications for Federal Court ADR Panel To be eligible for appointment to the ADR panel the provider should have ten (10) years experience, including various possible combinations of litigation or dispute resolution experience which add up to a total of ten (10) years. ADR providers need not be attorneys but must possess specialized knowledge, skill, education, training or experience in a relevant subject matter. ADR providers must have completed a court-approved ADR training program or demonstrate equivalent training or ability through relevant experience in professional practice.

Experience with federal cases, either as a litigator or as a neutral, is preferable but is not mandatory. The ADR provider selection process will reflect the desire to have a diverse panel.

3. ADR Panel Administration

The Court will maintain a list of qualified ADR neutrals, in addition to the judges, which will be available for review by the parties. Information identifying the areas of expertise of the neutral will be included in the panel list.

In order to ensure an even distribution of case assignments among neutrals, assignments will be rotated to the maximum extent possible. However, this procedure may be altered if case assignments are made based upon subject matter expertise requirements and/or if a neutral becomes disqualified for a particular case due to conflict of interest concerns.

The list of ADR neutrals is available through the Court's ADR administrator and will be used to assign cases to neutrals if the parties do not agree upon one of the judicial officers or panel members to act as a neutral for the ADR proceedings.

The U.S.D.C. ADR administrator, in consultation with the ADR liaison judge, will be responsible for the assignment of the ADR providers for a specific case, based upon schedule, availability and willingness to accept the case. Each ADR session will be scheduled for a minimum of three to four hours in length and may be scheduled for additional sessions by agreement of the parties and the neutral.

C. Private ADR Providers

By agreement, the parties may select any private ADR provider. The list of approved programs and those with exclusive arrangements with the Commonwealth of Massachusetts Trial Court may be referenced for the selection of an ADR provider. The parties may also reach agreement on another professional ADR organization to conduct the dispute resolution process. The court should be notified by letter or stipulation when a private ADR provider is utilized so that an Order of Reference to ADR can be completed and the appropriate information entered on the docket. The attorneys for the parties should also notify the court upon completion of these ADR proceedings.

IV. ADR ADMINISTRATOR

The proposed ADR options require an ADR administrator to manage and supervise their operations. The ADR administrator is appointed by the Clerk of this Court and, works for the Clerk's Office. Because of funding constraints, the ADR administrator may have other duties assigned, unrelated to the ADR program. In addition to reporting to the Clerk, the ADR administrator also works closely with the liaison judge for ADR. The ADR administrator possesses a full range of authority and responsibility to implement and direct the program options described in this Plan.

The ADR administrator shall:

- Administer the selection and use of a panel of neutrals for the various ADR options established by the Court;
- Serve as a member of the Court's ADR Advisory Committee;
- Serve as liaison to judges, the Clerk, and other staff on matters relating to the ADR program;
- Direct and coordinate the ADR Program;
- Provide strategic and master planning relating to ADR services in the district;
- Draft and propose revisions of the ADR Plan, local rules, or orders and/or procedures that may improve the efficiency and effectiveness of the ADR program;
- Collect and maintain lists of ADR panel members including limited biographical data on neutral ADR providers to permit assignments commensurate with the neutral's experience, training and expertise and make the collected biographical data available to parties and counsel;
- Prepare reports required by the United States Government or other funding sources on the use of funds in the operation and evaluation of the established ADR options;
- Develop and maintain necessary forms, records, docket controls, and data to administer and evaluate the options effectively;

- Periodically evaluate, or arrange for the outside evaluation of the ADR Program, if necessary, and submit the resulting evaluation to the Court, along with appropriate recommendations for change;
- Develop, and make available upon request, a list of private or extra-judicial ADR providers;
- Receive, review and process complaints regarding the ADR program in accordance with established court procedures.
- Monitor legal decisions and congressional action in the ADR area and advise the Court of new developments in other courts and private ADR entities.

V. CONFIDENTIALITY IN ADR PROCEEDINGS

The court intends through implementation of this ADR program that ADR proceedings offer an alternative to the formal litigation process. To that extent, ADR proceedings must be conducted in a manner that encourages an informal and confidential exchange among counsel, the parties, and the ADR provider(s) to facilitate resolution of disputes. The parties and the ADR provider shall not disclose information regarding the process, including settlement terms, to the court or to third persons unless all parties otherwise agree. Parties, counsel and neutrals, however, may respond to confidential inquiries or surveys by persons authorized by the court to evaluate the ADR program. Responses provided to such inquiries or surveys shall remain confidential and shall not be identified with particular cases.

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

The parties to a case, and/or their attorneys will be requested to execute a confidentiality statement in the form of Exhibit 1.

VI. CONFIDENTIALITY IN ADR COMMUNICATIONS

Motions, memoranda, exhibits, affidavits, and other written communication submitted by counsel or the parties to the ADR panel member(s) pursuant to the requirements of this plan or at the direction, if any, of the ADR panel member(s), must not be made part of the record or filed with the clerk of court. Such communication must not be transmitted to the district or magistrate judge to whom the case is assigned except as agreed to by the parties. The clerk will file and include in the court's record only the order referring a case to ADR and other routine ADR scheduling and proceeding notices.

ADR panel members must not disclose to or discuss with anyone, including the designated judge, any information related to the ADR proceedings unless the parties specifically authorize disclosure. ADR neutrals must secure and ensure the confidentiality of ADR proceeding records and must return them to the submitting parties or destroy them, as appropriate, at the conclusion of the proceeding. ADR panel members designated to serve as neutrals must keep confidential from other parties any information obtained in individual caucuses unless the party to the caucus specifically authorizes disclosure.

VII. ETHICAL STANDARDS

A. Introduction

If there is a conflict between the Ethical Standards and the Rules of Professional Responsibility, the Rules of Professional Responsibility control.

B. Impartiality

Impartiality means freedom from favoritism or bias in conduct and appearance. A neutral must be impartial regarding the parties and the subject matter. If a neutral cannot be impartial at any point in the process, he or she must withdraw even if the parties do not object.

C. Informed Consent

The neutral must make all reasonable efforts to help each party understand the process and the agreement and to ensure that each party consents to any agreement. If the neutral thinks a party is unable to participate effectively, the neutral should limit the scope of the process or end it. A neutral should tell a party if the neutral believes the party needs the assistance of a lawyer or other expert information or advice in order to reach an informed agreement. A neutral may give information to the parties but may not give legal advice, counseling or other professional services. The neutral must inform the parties that they may withdraw from the process at any time for any reason. The neutral must not coerce the parties to reach an agreement. While remaining impartial, the neutral should raise questions so the parties may consider whether they have the information they need to reach a fair and fully informed agreement.

D. Fees

One of the court's main objectives is to provide the litigants with a forum to resolve their disputes as quickly and efficiently as possible with a minimum of expense, both to the litigants and the court. There are no costs associated with the use of court facilities, judicial officers or volunteer neutrals in the court sponsored ADR options. The only cost to the litigants would be for the time spent by their lawyers in preparing for and participating in the ADR process.

The costs of the private ADR alternatives would be entirely up to the participants and the ADR provider to agree upon. The court has no control over these costs. The private provider must inform the parties of any fees that will be charged, to whom the fee is paid, and whether the parties may apply for a fee waiver or reduction. Before the process begins there must be a written agreement between the neutral and the parties regarding the fee and the time and manner of payment.

E. Conflict of Interest

A neutral must disclose all actual or potential conflicts of interest. A neutral should not serve if he or she knows of a conflict. A neutral must withdraw if a conflict is significant. A neutral may proceed if a conflict is not significant and the parties all consent.

Neutrals must avoid even the appearance of conflict and must disqualify themselves from the proceeding under any circumstance that would justify judicial disqualification pursuant to 28 U.S.C. §455.

F. Responsibility to Non-participating Parties

A neutral should consider and encourage the parties to consider the interests of persons – especially children– who are not participating in the process but who are affected by actual or potential agreements.

G. Advertising, Soliciting or Other Communications by Neutrals

Neutrals must be truthful in advertising and must not make claims of specific results or benefits of the process which imply favoring one side over another.

H. Withdrawal

A neutral must withdraw if continuing in the process would violate an Ethical Standard or jeopardize the safety of a party or if the neutral cannot provide effective service. The neutral must attempt, while withdrawing, to protect the parties' safety and rights. A neutral should notify the ADR administrator promptly, so that a replacement can be assigned to the matter without undue delay.

VIII. REFERRAL PROCESS

The judicial officer to whom the case is assigned for trial, following an exploration of the matter with all counsel, or by agreement of the parties, may refer appropriate cases to ADR processes that have been designated for use in the district court. The judicial officer shall encourage the resolution of disputes by settlement through the ADR program. All ADR options offered by the Court are voluntary.

A. Order of Reference

Once a determination has been made, either by agreement of the parties or discussion at a conference with the court, that a

case should be referred for an ADR process, an Order of Reference is entered in a form similar to that attached as Exhibit 2. If the parties can agree on a specific designation to an ADR provider, either a judicial officer or ADR Panel member, the name shall be included in the Order of Reference. If there is no agreement on a specific ADR provider, the Order of Reference shall designate referral to the ADR Program. A neutral will be selected from the available judicial officers or from the list of ADR Panel members. The type of case shall also be included in the reference, so that if necessary, cases can be assigned to an appropriate ADR neutral by area of expertise. A copy of each Order of Reference shall be forwarded to the ADR administrator.

B. Selection of ADR Provider

If the parties can agree on one of the judges or a Panel member who has been approved by the court to act as a neutral in ADR proceedings, they can request that the particular judge or Panel member be appointed. Otherwise, the parties will be notified by the ADR administrator that they may submit several choices from among the judicial officers or ADR Panel members. The ADR administrator will then make the selection based upon availability, and several other factors, including expertise of the neutral. The neutral can also be selected by the ADR administrator, without suggestions from the parties, from the available judges or volunteer facilitators if the parties desire. The ADR administrator will try to distribute the cases among the Panel members as evenly as possible. The parties will be notified by the ADR administrator once the neutral has been selected and/or a date for the ADR proceeding has been set. See Exhibit 3.

C. Location of ADR Proceedings

Court-sponsored ADR proceedings will be held in the courthouse. A courtroom or conference room will be made available whenever possible, and in all cases in which one of the judges is presiding. Space in the courthouse will also be provided when the ADR proceeding is being conducted by a volunteer facilitator from the Court's list of approved ADR providers. If the ADR is being conducted by a private ADR provider, the proceeding will take place outside the courthouse at an agreed upon location.

D. Attendance at the ADR Proceeding

The lawyers who will be conducting any trial of the case, the parties to the case and/or anyone having authority to settle the case must attend or be available by telephone for all ADR proceedings unless they have been excused after consultation with the ADR provider.

E. Scheduling ADR Conferences

Once the ADR provider has been designated, the ADR administrator or courtroom clerk for the assigned judicial officer will coordinate with the parties to schedule the ADR process in a timely manner. The parties will be notified of the date and location of the proceeding by the ADR administrator or courtroom clerk, along with any requirement to submit memoranda or other information that will be helpful to the neutral.

F. Reporting Results of ADR Proceedings

The ADR provider will report the result of the proceedings to the Court by completing the form entitled "Report Re: Reference for Alternative Dispute Resolution". See Exhibit 4. This will indicate the current status of the case to the presiding judge in order to schedule the matter for further proceedings, unless the case has been resolved. No other information relating to the ADR proceeding will be disclosed to anyone by the ADR provider, unless specifically authorized by the parties.

G. Public Information

The only information regarding ADR proceedings that will be referenced on the public docket for the case will be the entry of the Order of Reference, the Report Re: Reference for Alternative Dispute Resolution and other routine notices and scheduling, and ADR provider information. Memoranda, exhibits, affidavits, and other written communication submitted by counsel, parties or the ADR provider in connection with an ADR process must not be made part of the record or filed with the Clerk of Court.

IX. EVALUATION AND REPORTING

In order to examine the effectiveness of the ADR program, the Court has developed several forms to gather information at the conclusion of the ADR proceeding. Each participant in the ADR process will be asked to complete a brief evaluation form for submission to the ADR administrator in the Clerk's Office. Samples of these forms are attached as Exhibits 5, 6 and 7. The Court may periodically revise these forms. The Court may also conduct other inquiries or surveys to periodically evaluate various elements of the ADR program or to respond to requests for statistical information regarding the success of the program. Any information provided in such inquiries or surveys regarding specific cases shall remain confidential and shall not be identified with any reference to specific cases.

X. COMPLAINTS, REVIEWS AND APPEALS CONCERNING ADR

A. Filing Complaints

Any participant in the ADR Program who is dissatisfied with an aspect of the process, including the conduct of an ADR provider or another participant, may file a written complaint with the Court's ADR Administrator. The complaint may be in the form of a letter and should include the name and docket number of the case, the names of the parties, counsel and ADR provider, the date(s) of the ADR proceeding, and the reason for the complaint. The Administrator shall keep a record of all complaints filed.

B. Response to Complaints

Complaints from participants in the ADR Program will be reviewed and addressed promptly. The Administrator will screen any complaints received and may discuss a complaint in confidence with the person who made it and with the ADR provider or other participants. The Administrator then will consider all information available. With the exception of complaints alleging material violations of the Local Rules (see Section E), the Administrator may attempt to resolve a complaint informally, and if successful, may dismiss the complaint without further action. While protecting the confidentiality of information gathered during the investigation of a complaint, the Administrator will notify the person who made the complaint about the dismissal of the complaint. Otherwise, review

of a complaint will be done in accordance with the procedures detailed below.

C. Review Procedures

If the Administrator initiates a review of the conduct of a participant in ADR (counsel, party or ADR provider) for any reason, the Administrator will notify the participant of the pending review in writing. The Administrator shall collect and review all pertinent information, including interviews with or written statements from the ADR provider, parties' counsel and court personnel. On the basis of the information gathered, the Administrator will make a recommendation about what action to take. With regard to complaints about the conduct of ADR providers, options include, but are not limited to, terminating the review without action, setting conditions or requirements for the ADR provider to meet, or suspending or removing the ADR provider from the Panel. The Administrator will pass the recommendation to the judge with responsibility for the ADR Program ("Liaison Judge") for review and approval. The Liaison Judge may elect to conduct further investigation of the matter. On completion of the review, the Liaison Judge may affirm or modify the Administrator's recommendation, or decide on alternative action. The decision of the Liaison Judge shall be final. The Administrator will notify the complainant and the participant about whom the complaint was made in writing about the outcome of the review.

D. Removal

The Administrator, after consultation with the Liaison Judge, may remove or suspend an ADR provider from the Panel prior to completion of the review procedure upon the Administrator's determination that it is in the best interests of the ADR Program to do so.

E. Alleged Violations of Local Rules

If a complaint alleges a material violation of the Local Rules pertaining to ADR, for example, a serious breach of confidentiality, the Administrator shall pass the complaint on to the Liaison Judge for immediate review. The Liaison Judge will take such steps as he or she deems appropriate, including, but not limited to, conducting

an informal investigation, requesting motion papers, issuing an order to show cause why sanctions should not be imposed, making rulings, or ordering sanctions pursuant to Local Rule 1.3. The Liaison Judge will afford all interested parties an opportunity to be heard before deciding whether to impose sanctions.