# NEW JERSEY

## Civ. RULE 201.1 ARBITRATION

### (a) Certification of Arbitrators

(1) The Chief Judge shall certify as many arbitrators as determined to be necessary under this Rule. Arbitrators shall be designated for terms of service up to three years, subject to extension at the discretion of the Chief Judge, and all such terms shall be staggered to provide orderly rotation of a portion of the membership of the panel of arbitrators.

(2) An individual may be designated to serve as an arbitrator if he or she: (a) has been for at least five years a member of the bar of the highest court of a State or the District of Columbia, (b) is admitted to practice before this Court, (c) is determined by the Chief Judge to be competent to perform the duties of an arbitrator, and (d) has participated in a training program (or the equivalent thereof) to the satisfaction of the Chief Judge.

(3) Each individual certified as an arbitrator shall take the oath or affirmation prescribed by 28 U.S.C. §453 before serving as an arbitrator.

(4) A list of all persons certified as arbitrators shall be maintained in the office of the Clerk.

(5) Each arbitrator shall, for the purpose of performing his or her duties, be deemed a quasijudicial officer of the Court.

### (b) Designation of Compliance Judge

The Board of Judges shall designate a Judge or Magistrate Judge to serve as the compliance judge for arbitration. This compliance judge shall be responsible to the Board of Judges for administration of the arbitration program established by this Rule and shall be responsible for monitoring the arbitration processes; provided, however that the compliance judge shall not be responsible for individual case management.

### (c) Compensation and Expenses of Arbitrators

An arbitrator shall be compensated $250 for service in each case assigned for arbitration. In the event that the arbitration hearing is protracted, the Court will entertain a petition for additional compensation. The fees shall be paid by or pursuant to an order of the Director of the Administrative Office of the United States Courts. Arbitrators shall not be reimbursed for actual expenses incurred by them in the performance of their duties under this Rule.

### (d) Civil Cases Eligible for Compulsory Arbitration

**(1) Compulsory Arbitration.** Subject to the exceptions set forth in L.Civ.R. 201.1(d)(2), the Clerk shall designate and process for compulsory arbitration any civil action pending before the Court where the relief sought consists only of money damages not in excess of $150,000 exclusive of interest and costs and any claim for punitive damages.

**(2) Exclusion from Compulsory Arbitration.** No civil action shall be designated or processed for compulsory arbitration if the claim therein is

(A) based on an alleged violation of a right secured by the Constitution of the United States; or

(B) jurisdictionally based, on whole or in part, on (i) 28 U.S.C. §1346(a)(1) (tax refund actions) or (ii) 42 U.S.C. §405(g) (Social Security actions). Upon filing its initial pleading a party may request that an otherwise eligible case not be designated or processed for compulsory arbitration if either circumstances encompassed within L.Civ.R. 201.1(e)(6) are present or other specific policy concerns exist which make formal adjudication, rather than arbitration, appropriate.

**(3) Presumption of Damages.** For the sole purpose of making the determination as to whether the damages are in excess of $150,000 as provided in L.Civ.R. 201.1(d)(1), damages shall be presumed in all cases to be $150,000 or less, exclusive of interest and costs and any claim for punitive damages, unless counsel of record for the plaintiff at the time of filing the complaint or counsel of record for any other party at the time of filing that party's first pleading, or any counsel within 30 days of the filing of a notice of removal, files with the Court a document signed by said counsel which certifies that the damages recoverable exceed the sum of $150,000 exclusive of interest and costs and any claim for punitive damages. The Court may disregard any certification or other document complying with 28 U.S.C. § 1746 filed under this Rule and require arbitration if satisfied that recoverable damages do not exceed $150,000. No provision of this Rule shall preclude an arbitrator from entering an award exceeding $150,000 based upon the proofs presented at the arbitration hearing; and an arbitrator's award may also include interest, costs, statutory attorneys' fees and punitive damages, if appropriate.

**(e) Referral for Arbitration**

(1) After an answer is filed in a case determined eligible for arbitration, the Clerk shall send a notice to counsel setting forth the date and time for the arbitration hearing consistent with the scheduling order entered in the case and L.Civ.R. 201.1(e)(3). The notice shall also advise counsel that they may agree to an earlier date for the arbitration hearing provided the Clerk is notified within 30 days of the date of the notice. In the event additional parties have been joined in the action, this notice shall not be sent until an answer has been filed by all such parties who have been served with process and are not in default.

(2) The arbitration hearing shall be held before a single arbitrator. The arbitrator shall be chosen by the Clerk from among the lawyers who have been certified as arbitrators by the Chief Judge. The arbitrator shall be scheduled to hear not more than three cases on a date or dates which shall be scheduled several months in advance.

(3) The Judge to whom the case has been assigned shall, at least 30 days prior to the date scheduled for the arbitration hearing, sign an order setting forth the date and time of the arbitration hearing and the name of the arbitrator designated to hear the case. In the event that a party has filed a motion to dismiss the complaint, for judgment on the pleadings, summary judgment or to join necessary parties, or proceedings are initiated under L.Civ.R. 201.1(e)(6), the Judge shall not sign the order required herein until the Court has ruled on the motion or order to show cause, but the filing of such a motion on or after the date of said order shall not stay arbitration unless the Judge so orders.

(4) The Plaintiff shall within 14 days upon receipt of the order appointing arbitrator send to the arbitrator a copies of any complaint, amended complaint and answers to counterclaim; counsel for each defendant shall, within 14 days upon receipt of this order, send to the arbitrator any answer, amended answer, counterclaim, cross-claim and answer hereto, any third-party Complaint. Upon receipt of these materials, the arbitrator shall forthwith inform all parties, in writing, as to whether the arbitrator, or any firm or member of any firm with which he or she is affiliated has (either as a party or attorney), at any time within the past five years, been involved in litigation with or represented any party to the arbitration, or any agency, division or employee\ of such a party.

(5)(A) Statutory Disqualification. Persons selected to be arbitrators shall be disqualified for bias or prejudice as provided in 28 U.S.C. §144, and shall disqualify themselves in any action in which they would be required under 28 U.S.C. §455 to disqualify themselves if they were a justice, judge, or magistrate judge.

(B) Impartiality. An arbitrator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance.

(C) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions.

i. An arbitrator must disclose to the parties and to the compliance judge any current, past, or possible future representation or consulting relationship with, or pecuniary interest in, any party or attorney involved in the arbitration.

ii. An arbitrator must disclose to the parties any close personal relationship or other circumstance which might reasonably raise a question as to the arbitrator's impartiality.

iii. The burden of disclosure rests on the arbitrator. All such disclosures shall be made as soon as practical after the arbitrator becomes aware of the interest or relationship. After appropriate disclosure, the arbitrator may serve if all parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator shall withdraw irrespective of the expressed desires of the parties.

iv. In no circumstance may an arbitrator represent any party in any matter during the arbitration.

v. An arbitrator shall not use the arbitration process to solicit, encourage, or otherwise incur future professional services with any party.

(6) Either *sua sponte*, or upon a recommendation received from the arbitrator, or upon the application of a party, the Judge to whom the case is assigned may exempt from arbitration any action that would otherwise be arbitrable under this Rule if (a) it involves complex or novel legal issues, or (b) the legal issues predominate over the factual issues, or (c) other good cause is shown. When initiating such a review either *sua sponte* or upon recommendation of the arbitrator, the Judge may proceed pursuant to an order to show cause providing not less than 14 days notice to all parties of the opportunity to be heard. Any application by a party to exempt an action from arbitration shall be by formal motion pursuant to these Rules.

**(f) Arbitration Hearing**

(1) The arbitration hearing shall take place on the date and at the time set forth in the order of the Court. The arbitrator is authorized to change the date and time of the hearing, provided the hearing is commenced within 30 days of the hearing date set forth in the Court's order. Any continuance beyond this 30-day period must be approved by the Judge to whom the action is assigned. The Clerk must be notified immediately of any continuance.

(2) Counsel for the parties shall report settlement of the action to the Clerk and to the arbitrator assigned to that action.

(3) The arbitration hearing may proceed in the absence of any party who, after notice, fails to be present. In the event that a party fails to participate in the arbitration process in a meaningful manner, the arbitrator shall make that determination and shall support it with specific written findings filed with the Clerk. Thereupon, the Judge to whom the action is assigned shall conduct a hearing upon notice to all counsel and personal notice to any party adversely affected by the arbitrator's determination and may thereupon impose any appropriate sanctions, including, but not limited to, the striking of any demand for a trial *de novo* filed by that party.

(4) Fed. R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and the production of documentary evidence at an arbitration hearing under this Rule. Testimony at an arbitration hearing shall be under oath or affirmation.

(5) The Federal Rules of Evidence shall be used as guides to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least 14 days prior to the hearing and the arbitrator shall receive exhibits into evidence without formal proof unless counsel has been notified at least seven days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator may refuse to receive into evidence any exhibit a copy or photograph of which has not been delivered to the adverse party, as provided herein.

(6) A party desiring to have a recording and/or transcript made of the arbitration hearing shall make all necessary arrangements for same and shall bear all expenses so incurred.

**(g) Arbitration Award and Judgment**

Within 30 days after the hearing is concluded, the arbitrator shall file under seal with the Clerk a written award, accompanied by a written statement or summary setting forth the basis for the award which shall also be filed under seal by the Clerk. Neither the Clerk nor any party or attorney shall disclose to any Judge to whom the action is or may be assigned the contents of the arbitration award except as permitted by 28 U.S.C. §657(b). The arbitration award shall be unsealed and entered as the judgment of the Court after the time period for demanding a trial *de novo*, pursuant to L.Civ.R. 201.1(h), has expired, unless a party demands a trial *de novo* before the Court. The judgment so entered shall be subject to the same provisions of law, and shall have the same force and effect as a judgment of the Court in a civil action, except that it shall not be the subject of appeal. In a case involving multiple claims and parties, any separable part of an arbitration award may be the subject of a trial *de novo* if the aggrieved party makes a demand for same pursuant to L.Civ.R. 201.1(h) before the expiration of the applicable time period. If the aggrieved party fails to make a timely demand pursuant to L.Civ.R. 201.1(h), that part of the arbitration award shall become part of the final judgment with the same force and effect as a judgment of the Court in a civil action, except that it shall not be the subject of appeal.

**(h) Trial *De Novo***

(1) Any party may demand a trial *de novo* in the District Court by filing with the Clerk a written demand, containing a short and plain statement of each ground in support thereof, and serving a copy upon all counsel of record or other parties. Such a demand must be filed and served within 30 days after the arbitration award is filed and service is accomplished by a party pursuant to 28 U.S.C. §657(a), or by the Clerk (whichever occurs first), except that in any action in which the United States or any employee or agency thereof is a party the time period within which any party therein may file and serve such a demand shall be 60 days.

(2) Upon the filing of a demand for a trial *de novo*, the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, except that no additional pretrial discovery shall be permitted without leave of Court, for good cause shown. Any right of trial by jury that a party would otherwise have shall be preserved inviolate.

(3) The Magistrate Judge shall conduct a pretrial conference within 60 days of filing of a demand for a trial *de novo*.

**(i) Guidelines for Arbitration**

The Court, the Clerk, the parties, attorneys and arbitrators are hereby referred to the Guidelines for Arbitration (Appendix M to these Rules) for their information and guidance in civil actions arbitrated pursuant to this Rule. Amended: March 31, 1999, April 19, 2000, July 5, 2001, March 9, 2007, June 19, 2013
**Source:** G.R. 47.

**Civ. RULE 301.1 MEDIATION**

**(a) Designation of Mediators**

(1) The Chief Judge shall designate as many mediators as determined to be necessary under this Rule. Mediators shall be designated for terms of service up to three years, subject to extension at the discretion of the Chief Judge, and such terms shall be staggered to provide orderly rotation of a portion of the membership of the panel of mediators.

(2) An individual may be designated to serve as a mediator if he or she:

(A) has been for at least five years a member of the bar of the highest court of a State or the District of Columbia;

(B) is admitted to practice before this Court;

(C) is determined by the Chief Judge to be competent to perform the duties of a mediator; and

(D) has participated in a training program (or the equivalent thereof) to the satisfaction of the Chief Judge.

(3) Each mediator shall, for the purpose of performing his or her duties, be deemed a quasijudicial officer of the Court.

**(b) Designation of Compliance Judge**

The Board of Judges shall designate a Judge or Magistrate Judge to serve as the compliance judge for mediation. This compliance judge shall be responsible to the Board of Judges for administration of the mediation program established by this Rule and shall entertain any procedural or substantive issues arising out of mediation.

**(c) Compensation of Mediators**

Each mediator designated to serve by the Chief Judge under L.Civ. R. 301.1 (a) shall be compensated $300 an hour for service in each civil action referred to mediation, which compensation shall be borne equally by the parties. Where all parties select as a mediator a person not designated as a panel mediator under L. Civ. R. 301.1 (a), the parties and the mediator may, by written agreement, fix the amount and terms of the mediator's compensation.

**(d) Civil Actions Eligible for Mediation**

Each Judge and Magistrate Judge may, without the consent of the parties, refer any civil action to mediation. The parties in any civil action may, with consent of a Judge or Magistrate Judge, agree to mediation and, if such consent is given, select a mediator. Notwithstanding the above, no civil action described in L.Civ.R.72.1(a)(3)(C), may be referred to mediation.

**(e) Mediation Procedure**

(1) Counsel and the parties in each civil action referred to mediation shall participate therein and shall cooperate with the mediator, who shall be designated by the compliance judge.

(2) Whenever a civil action is referred to mediation the parties shall immediately prepare and send to the designated mediator a position paper not exceeding 10 pages in length. The parties may append to their position papers essential documents only. Pleadings shall not be appended or otherwise submitted unless specifically requested by the mediator.

(3) Counsel and the parties (including individuals with settlement authority for specific individuals) shall attend all mediation sessions unless otherwise directed by the mediator.

(4) If the parties and the mediator agree, the mediation session may include a neutral evaluation by the mediator of the parties' positions on any designated claims, counterclaims, defenses or other material issues; and the parties and mediator may arrange a schedule within the mediation timetable for briefing and discussing such matters.

(5) The mediator may meet with counsel and the parties jointly or *ex parte*. All information presented to the mediator shall be deemed confidential unless requested otherwise and shall not be disclosed by anyone, including the mediator, without consent, except as necessary to advise the Court of an apparent failure to participate. The mediator shall not be subject to subpoena by any party. No statements made or documents prepared for mediation shall be disclosed in any subsequent proceeding or construed as an admission.

(6) All proceedings (including motion practice and discovery) shall be stayed for a period of 90 days from the date a civil action is referred to mediation. Any application for an extension of the stay shall be made jointly by the parties and the mediator and shall be considered by the referring Judge or Magistrate Judge.

**(f) Guidelines for Mediation**

The Court, the Clerk, the parties, attorneys and mediators are hereby referred to the Guidelines for Mediation (Appendix Q to these Rules) for their information and guidance in civil actions referred to mediation pursuant to this Rule. Said Guidelines for Mediation shall have the same force and effect as the provisions of this Rule.

**(g) Ethical Standards for Mediators**

**(1) Impartiality**

A mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice, or impartiality. Impartiality means freedom from favoritism or bias in word, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to an individual party, in moving toward an agreement.

(A) A mediator shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

(B) A mediator shall withdraw from mediation if the mediator believes the mediator can no longer be impartial.

(C) A mediator shall not accept or give a gift, request, favor, loan or any other item of value to or from a party, attorney, or any other person involved in and arising from any mediation process.

**(2) Conflicts of Interest and Relationships; Required Disclosures; Prohibitions**

(A) A mediator must disclose to the parties and to the compliance judge any current, past, or possible future representation or consulting relationship with, or pecuniary interest in, any party or attorney involved in the mediation.

(B) A mediator must disclose to the parties any close personal relationship or other circumstance, in addition to those specifically mentioned in L.Civ.R. 301.1(g)(2)(A), which might reasonably raise a question as to the mediator's impartiality.

(C) The burden of disclosure rests on the mediator. All such disclosures shall be made as soon as practical after the mediator becomes aware of the interest or the relationship. After appropriate disclosure, the mediator may serve if all parties so desire. If the mediator believes or perceives that there is a clear conflict of interest, the mediator shall withdraw irrespective of the expressed desires of the parties.

(D) In no circumstance may a mediator represent any party in any matter during the mediation.

(E) A mediator shall not use the mediation process to solicit, encourage, or otherwise incur future professional services with any party.

**(h) Grievance Procedure**

Any grievance concerning the conduct of a mediator, attorney, or other participant in mediation shall be in writing to the compliance judge within 30 days from the event giving rise to the grievance. The compliance judge may investigate the grievance and take such action in response thereto as may be appropriate, upon due notice to all affected persons or entities.

**GUIDELINES FOR ARBITRATION**

**I. Case Management Responsibility of the Assigned District Judge**

The referral of civil actions to the Arbitration Program, pursuant to L.Civ.R. 201.1(d), does not divest the assigned District Judge and Magistrate Judge of the responsibility for exercising overall management control over a case during the pendency of the arbitration process, nor does it preclude the parties from filing pretrial motions or pursuing discovery.

The Arbitration Program has been revised to provide for a "compliance judge for arbitration." The duty of this judicial officer is to administer the arbitration program as a whole and to monitor the arbitration processes. Individual case management, however, remains at all times with the assigned District Judge or Magistrate Judge.

The management of cases referred to arbitration will continue to be subject to this Court's procedures regulating discovery and other pretrial matters, the applicable Federal Rules of Civil Procedure, and the Local Civil Rules of the Court. As in other cases, the dates for concluding pretrial discovery (including expert discovery) will be set at the scheduling conference under Fed. R. Civ. P. 16(b), and the parties will be required to complete all pretrial discovery before the arbitration hearing. Unlike other cases, these dates will not be extended except where a new party has been joined recently or an exceptional reason is presented to the Judge or Magistrate Judge. Extended discovery and the final pretrial conference will be eliminated. This means that approximately one (1) month following the filing of the last answer plus a 120-day discovery period, or at such other date as set by the scheduling order, the case will be set for arbitration through the Arbitration Clerk.

This procedure provides litigants with a prompt and less expensive alternative to the traditional courtroom trial and relieves the heavy burden of the constantly increasing case load. The Court intends for the resulting arbitration hearing to be similar in purpose to a bench trial but without the formality required by the Federal Rules of Evidence.

**II. Arbitrator's Responsibility for Managing the Arbitration Hearing Process**

**A.** Although the assigned District Judge retains overall responsibility for cases referred to the arbitration program, the Court delegates authority to the arbitrator to control and regulate the scope and duration of the arbitration hearing, including:

(1) Ruling upon the admissibility of testimonial evidence.

(2) Ruling upon the admissibility of documentary evidence.

(3) Ruling upon the admissibility of demonstrative evidence.

(4) Ruling upon objections to evidence.

(5) Ruling upon requests of counsel to excuse individual parties or authorized corporate representatives from attending the arbitration hearing.

(6) Commencing the hearing in the absence of a party.

(7) Limiting the time for presentation of evidence and summary arguments by a party.

(8) Compelling the presence of witnesses, if desirable.

(9) Swearing witnesses.

(10) Adjourning the arbitration hearing to a date certain, not to exceed 30 days from court order date, to accommodate lengthy proceedings or an unavailable witness whom the arbitrator determines to be essential to the proceedings.

(11) Preparing the Arbitration Award. The scope of delegation to the arbitrator does not include the powers to:

(1) Exercise civil or criminal contempt.

(2) Continue the hearing for an indefinite period.

**B. Arbitrator as Adjudicator.** The arbitrator's role is as a non-jury adjudicator of the facts based upon evidence and arguments presented at the arbitration hearing. The arbitrator is not a mediator, and the arbitrator shall not convene a settlement discussion at any point in the arbitration process unless all litigants have first explicitly requested the arbitrator to preside over settlement discussions. The arbitrator may decline the parties' request for a settlement discussion if the arbitrator believes that such participation would bring his or her own impartiality into question if the matter is arbitrated. The Court expects that the arbitrator and counsel shall strive at all times to preserve the essential functions of a finder of facts at a hearing which, though less formal than a trial, nonetheless inspires similar confidence in the objectivity and validity of the fact-finding process.

## III. Suggested Format for the Presentation of Evidence at Arbitration Hearings

The Court intends that attorneys shall be prepared to present evidence through any combination of exhibits, affidavits, deposition transcripts, expert reports and, if desirable, live testimony. The Court further expects that testimonial evidence shall be limited to situations involving issues of credibility of witnesses. Evidence shall be presented primarily through the attorneys for the parties, who may incorporate arguments on such evidence in their presentation. Expert opinion may normally be presented through written reports, although live expert testimony is desirable where helpful to resolving profound differences of opinion between such experts through direct and cross-examination. In a general sense, the Court envisions this presentation process to be somewhat similar to a combination of opening and closing arguments augmented by live testimony where necessary to aid the arbitrator's fact-finding function.

In developing their arguments, counsel may present only factual representations supportable by reference to discovery materials; to a signed statement of a witness; to a stipulation; to a document; or by a representation that counsel personally spoke with the witness and is repeating what the witness stated.

Arbitrators and counsel are reminded that L.Civ.R. 201.1(f)(5) notes that the Federal Rules of Evidence shall be employed as a guide; however, the Rules should not be construed in a manner to preclude the presentation of evidence submitted by counsel in the fashion discussed above. L.Civ.R. 201.1(f)(5) further requires, "Copies of photographs of all exhibits, except exhibits intended solely for impeachment, must be marked for identification and delivered to adverse parties at least 14 days prior to the hearing... ." To facilitate this exchange, counsel may obtain

exhibit stickers from the Clerk's office. Copies of all exhibits exchanged must also be forwarded to the arbitrator at least 14 days prior to the hearing.

With respect to the admissibility and subsequent use of evidence offered at an arbitration hearing, counsel are reminded that L.Civ.R. 201.1(h)(2) provides: "Upon the filing of a demand for trial *de novo* ... the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration..." Therefore, neither the fact that the case was arbitrated nor the amount of the arbitrator's award is admissible. However, testimony given upon the record of the arbitration hearing may be used to impeach the credibility of a witness at any subsequent trial *de novo*. In light of the limitation placed by the Court upon the use of exhibits at subsequent Court proceedings, the arbitrator should return all exhibits to counsel at the conclusion of the arbitration hearing.

**IV. Attendance of Parties; Participation in a "Meaningful Manner"**

Although L.Civ.R. 201.1(f)(3) provides for the arbitration hearing to proceed in the absence of any party, the Court has determined that the attendance of the parties and/or corporate representatives is essential for the hearing to proceed in a meaningful manner. The goals of the arbitration program and the authority of the Court will be seriously undermined if a party were permitted to refuse an attend an arbitration hearing and then demand trial *de novo.* Accordingly, the Court has, in the same Rule, allowed for the imposition of "appropriate sanctions, including, but not limited to, the striking of any demand for a trial *de novo*" filed by a party who fails to participate in the arbitration process in such a "meaningful manner." Failure by a party or counsel to follow these Guidelines will also be considered in determining whether there has been meaningful participation in the process.

**V. Stenographic Transcript**

A party desiring to have a recording and/or transcript made of the arbitration hearing shall make all necessary arrangements for same and shall bear all expenses so incurred.

**VI. The Arbitration Procedure - A Summary**

Upon receipt of the order referring the case to arbitration and appointing an arbitrator, counsel for plaintiff shall *promptly* forward to the arbitrator copies of *all pleadings* including any counterclaim or third party complaint and answers thereto. Thereafter, and at least *14 days* prior to the arbitration hearing, each counsel shall comply with L.Civ.R. 201.1(f)(5) by delivering to the arbitrator and to adverse counsel premarked copies of *all exhibits*, including expert reports and all portions of depositions and interrogatories, to which reference will be made at the hearing (but not including documents intended solely for impeachment). Failure to timely submit such exhibits may be deemed a failure to meaningfully participate in the process under L.Civ.R. 201.1(f)(3).

The arbitrator will have reviewed the pleadings prior to the arbitration hearing. At least one week prior to the scheduled date of the arbitration hearing, the arbitrator should conduct a conference call with the attorneys to determine whether live testimony will be necessary and who the witnesses will be.

The following is presented as an example of the agenda for a typical arbitration hearing; however, the arbitrator is empowered to define the scope and sequence of events at the hearing.

(1) Convening of the arbitration hearing and introduction of the arbitrator, counsel for the parties, and the parties.

(2) Brief procedural overview presented by the arbitrator.

(3) Opening statement by plaintiff's counsel.

(4) Opening statement by defendant's counsel.

(5) Presentation of evidence by plaintiff's counsel including, if desirable, live testimony.

(6) Presentation of evidence by defendant's counsel including, if desirable, live testimony.

(7) Summation by plaintiff's counsel.

(8) Summation by defendant's counsel.

(9) Adjournment of the arbitration hearing.

(10) Retirement of the arbitrator for deliberation and for documentation of the arbitration award.

## VII. Scope of the Arbitration Award

The $150,000 limit of L.Civ.R. 201.1(d)(3)is jurisdictional for the purpose of referring cases to the program pursuant to L.Civ.R. 201.1. However, once a case has been referred to the program, the actual award need not be limited to $150,000. The arbitrator's award may also make provisions for interest and punitive damages if appropriate.

## VIII. Processing the Arbitration Award

At the conclusion of the hearing, the arbitrator shall promptly file the award with the Clerk. When the award is filed, the Clerk's Office will docket the fact of the award, leaving out the details, and mail a copy of the award and the arbitrator's written statement or summary setting forth the basis for the award to the arbitrator and counsel.

## IX. Compensation of Arbitrators

In the event that an arbitration hearing is protracted, the District Judge to whom the matter is assigned may entertain a petition for additional compensation. Although the Clerk's Office does not make any deductions from the compensation paid to arbitrators, it should be treated as ordinary income for tax purposes.

## X. Alternative Dispute Resolution

After enactment of the Civil Justice Reform Act of 1990, then – General Rule 47 (now Local Civil Rule 201.1) was amended to provide for arbitration by consent of any civil action regardless of amount in controversy. Provision was also made for the parties to "consent to participation in any other form of alternative dispute resolution."

The Alternative Dispute Resolution Act of 1998 required the district courts to make at least one alternative dispute resolution "process" available to litigants. One such process could arbitration by consent. However, the act placed limitations on civil actions that could be referred to arbitration by consent, including a maximum dollar "value" of $150,000.

This Court has a compulsory arbitration program with the same limitations as are imposed for arbitration by consent under the Alternative Dispute Resolution Act of 1998. Accordingly, "consent" to arbitration becomes meaningless when an eligible civil action would be subject to compulsory arbitration. This led to amendment of Local Civil Rule 201.1 to delete the "arbitration by consent" provision.

It remains the intent of the Court to encourage parties to choose a particular form of alternative dispute resolution. Parties may agree to participate in the mediation process prescribed in L.Civ.R.301.1 or may participate in other forms of alternative dispute resolution such as, by way of example only, mini-trials or summary jury trials. Any such agreement between the parties must, however, be presented to the Judge or Magistrate Judge for approval, who shall consider it with due regard for the calendar and resources of the Court. Should the parties agree on some form of alternative dispute resolution, the District Judge may administratively terminate the civil action pending completion of the alternative dispute resolution procedure.

## APPENDIX Q. GUIDELINES FOR MEDIATION

### I. Case Management Responsibility of the Assigned Judicial Officers; Stay of Proceedings

Mediation is intended to afford litigants a less expensive alternative to traditional litigation. L.Civ.R. 301.1, which provides for both compulsory and voluntary mediation, is expected to conserve the resources of litigants which would otherwise be expended in discovery and to concentrate those resources on meaningful and intensive settlement negotiation. Mediation is also intended to conserve judicial resources, enabling Judges and Magistrate Judges to concentrate on cases which have not been referred to mediation. The Court expects and requires both litigants and their attorneys to participate in mediation in good faith.

Any case pending in the Court may be referred to mediation by the assigned Judge or Magistrate Judge. However, there are certain categories of cases (described in L.Civ.R.72.1(a)(3)(C)) which the Court has determined are not generally appropriate for mediation. Moreover, any pending case (other than in these categories) may be referred to mediation if all parties consent.

The referral of cases to mediation does not divest the assigned Judge and Magistrate Judge of the responsibility for exercising overall management control over a case during the pendency of the mediation process. However when a case is referred to mediation all proceedings (including pretrial motions or the pursuit of discovery) are stayed for a 90-day period. The purpose of this

stay is to afford a reasonable period of time within which to reach a settlement. If it appears that it would be futile to continue mediation efforts before the stay expires the mediator may request that the case be restored to the active calendar forthwith.

When the stay expires, a case which has not been settled will be restored to the active calendar, protecting the parties from an extended (and unfruitful) stay. L.Civ.R. 301.1(e)(5) does provide that the parties and the mediator may make a joint application for an extension of the stay, thus recognizing that certain cases may need additional time for settlement. This application shall be made to and considered by the referring Judge or Magistrate Judge.

L.Civ.R. 301.1(b) provides for the designation of a "compliance judge for mediation." The duty of this judicial officer is to administer the mediation program and resolve procedural or substantive issues which might arise. Any such issue (including recusal of a mediator) may be brought to the attention of the compliance judge by either the parties or the mediator.

**II. Mediator's Responsibility for Managing the Mediation Process**

**A.** When a case is referred to mediation the compliance judge shall designate a mediator or co-mediators as may be appropriate. With the designation of a mediator, the Court has delegated to him or her the authority to control and regulate the mediation process, including:

(1) Communicating with counsel to establish an expedited schedule for, among other things, the submission of position papers and the selection of dates for first and subsequent mediation sessions.

(2) Communicating on an *ex parte* basis.

(3) Determining and designating the appropriate representatives of parties, including individuals with settlement authority or other specific individuals, to attend mediation sessions.

**B.** The function of the mediator is to serve as a neutral facilitator of settlement. The mediator is expected to conduct the mediation process in an expeditious manner. Neither the parties nor the mediator may disclose any information presented during the mediation process without consent. The only exception to this rule of confidentiality is when disclosure may be necessary to advise the compliance judge of an apparent failure to participate in the mediation process.
Mediation, unlike arbitration, is not intended to be a fact-finding or decision-making process. Instead, the focus of mediation is to resolve the dispute between the parties. Resolution of that dispute may lead the parties and the mediator to explore questions of law or issues of fact beyond the scope of the pleadings or to reach settlements which go beyond the relief sought in the pleadings. Furthermore, a mediation may include the submission of "claims, counterclaims, defenses and other material issues" to the mediator for his or her evaluation as a neutral at any point in the mediation, should the parties agree. See L.Civ.R.301.1(e)(4). The purpose of neutral evaluation by the mediator is to secure his or her views on material issues which, often because of contrary position strongly held by the parties, are erecting barriers to a negotiated settlement. Such a neutral evaluation may result in an advisory opinion as to the strengths and/or weaknesses

of a party's legal or factual position on an issue so presented to the mediator. It is anticipated that, upon completion of any such evaluation and its assessment by the parties, either the action will settle or the mediation will resume to its conclusion. In short, mediation is a flexible process which may be molded to fit the needs of a particular case. No specific procedures have been set for the mediator to follow. Instead, the intent of L.Civ.R. 301.1 is for the mediator to assist the parties to reach a negotiated settlement by conducting meetings, defining issues, defusing emotion and suggesting possible ways to resolve the dispute.

**III. Attendance of Parties; Participation in a Meaningful Manner**

The attendance of the parties or their representatives may be deemed by the mediator to be appropriate for mediation to proceed in a meaningful manner. Moreover, one of the goals of the mediation program is to involve both parties and attorneys more intimately. Likewise, the assurance of confidentiality furthers the intimate involvement of parties and attorneys as well as the frank and open discussion required for mediation to succeed. Accordingly, appropriate sanctions may be imposed on any party or attorney who fails to participate in a meaningful manner or to cooperate with the mediator or who breaches confidentiality.249

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**B.** A mediator who is selected by the parties who is not a member of the panel of mediators designated by the Chief Judge may be compensated according to the amount and terms mutually agreed to by the mediator and the parties. Such agreement must be in writing.

**V. Mediation by Consent**

If all parties consent to have a case referred to mediation the parties may request the appointment of a mediator from the panel approved by the Chief Judge or may select any other individual or organization to serve as the mediator.

**IV. Compensation of Mediators**

**A.** A mediator who is selected by the court or by the parties from the panel of mediators designated by the Chief Judge shall be compensated at the rate of $300.00 an hour. The time incurred by a mediator in reviewing the submissions of the parties shall be included in the calculation of his or her time. The compensation, which shall be paid equally by the parties, may not be varied by the consent of the parties.