

Mediation Rules

General Scope and Authority. New Section 50 establishes the scope and authority of the Mediation Rules. This Section provides that the Mediation Rules will apply to mediations administered by the Association and calls for the designation of a Director to administer mediations. Section 50 also specifies that the Director will consult the National Arbitration Committee ("Committee") on administering the NASD mediation program. The Committee, as necessary, may make recommendations concerning the administration of the mediation program to the Director and recommend amendments to the rules to the NASD Board. Finally, Section 50 states that neither any mediator nor the NASD shall have any authority to compel a party to submit to mediation or to settle a matter. This last provision is intended to clarify the voluntary nature of mediation.¹⁰

Submission of Eligible Matters. New Section 51 provides that any matter, or part of a matter (such as procedural issues), eligible for arbitration under the Code may be mediated. The Director has the sole authority to determine the eligibility of any particular matter for mediation. New Section 51 also provides that a matter will be deemed submitted when the Director has received an executed mediation Submission Agreement from each party. The submission of a matter will trigger the obligation to pay applicable fees and will trigger the NASD's activities in finding a mediator and making arrangements for facilities for the mediation.

As noted above, the NASD has stated that it intends to solicit participation in mediation by approaching parties to arbitration cases to advise them about mediation, explain the program and its merits and explore whether mediation might meet the needs of the parties. Parties may volunteer to mediate a matter even if the Director has not solicited indications of interest in mediation. If a party expresses interest in mediating a matter, the Director will seek commitments to participate from other parties. If commitments are obtained from all parties, either orally or in writing, the Director will forward a

mediation Submission Agreement to the parties for execution.

Stay or Delay of Arbitration Pending Mediation. New Section 52 provides that any arbitration pending at the time of a mediation will not be stayed or delayed unless the parties agree. This provision is intended to prevent gamesmanship through the use of mediation as a delaying tactic.

Mediator Selection. New Section 53 provides for the appointment of mediators and permits parties to select a mediator from a list supplied by the Director, or to obtain, on their own, a non-NASD mediator. If the parties do not act to select a mediator, the Director will assign a mediator. The parties also will be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's experience, training, and credentials as a mediator. Section 53 also requires mediators to comply with the same background disclosure requirements as arbitrators.¹¹

Finally, new Subsection 53(c) prohibits a mediator from serving as an arbitrator or from representing any party to a mediation in any subsequent arbitration proceeding relating to the subject matter of the mediation. A mediator functions as a third party neutral who assists parties in exploring the strengths and weaknesses of their case. Mediation can function effectively only if parties can fully trust the mediator to provide impartial guidance and not to divulge confidential information disclosed. Parties are unlikely to trust a mediator if that mediator is permitted to serve as an arbitrator or represent a party to a mediation in a subsequent adversarial proceeding relating to the subject matter of the mediation. With respect to judicial proceedings, state law, attorney codes of ethics, and mediator codes of conduct¹² should provide sufficient protection for parties in judicial forums.

Liability Limitation. New Section 54 provides for the limitation of liability of mediators, the Association, and its employees, for any act or omission in connection with a mediation administered by the NASD under the rules.

Ground Rules. New Subsection 55(a) states that Section 55 sets forth standard Ground Rules governing mediations and permits the parties to amend any of the Ground Rules at any time. The Subsection also provides that the Ground Rules are intended to be standards of conduct for the parties and for the mediation. Parties will be able to tailor the ground rules governing their mediation to meet their needs.

New Subsection 55(b) states that mediation is voluntary and that parties may withdraw from a mediation at any time prior to the execution of a settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director. This provision is intended to clarify that, while the goal of mediation is to explore and settle outstanding disputes, if possible, the proposed rules are process oriented, not result oriented. Mediation is wholly voluntary and any party may withdraw from a mediation at any time and for any reason, or for no reason at all.

New Subsection 55(c) establishes that the mediator's role is to act as a neutral and impartial facilitator, without authority to impose decisions or a settlement on the parties.

New Subsection 55(d) requires that the parties and their representatives meet jointly with the mediator, in person or by conference call as determined by the mediator or by mutual agreement of the parties. The mediator will facilitate through joint sessions, caucuses and/or other means, discussions between the parties on the subject matter of the mediation.

New Subsection 55(d) also provides that the mediator will determine the procedure for the mediation. Under this subsection, parties would agree to cooperate with the mediator in conducting the mediation expeditiously, to make reasonable efforts to be available for mediation sessions, and to be represented at all sessions either in person or by a representative with authority to settle the matter. This subsection is intended to avoid common obstacles to expeditious, effective mediation and it sets forth rules that are intended to prevent gamesmanship and discourage dilatory conduct.

New Subsection 55(e) permits the mediator to meet with and communicate separately with each party, provided the mediator notifies the other parties. This is intended to permit the mediator to pursue a candid discussion with all parties of the issues and priorities in the dispute and the strengths and weaknesses of their positions. However, Subsection 55(g), discussed below, bars the mediator from disclosing one party's

¹⁰ The NASD has stated that it intends to solicit participation in mediation by approaching parties to arbitration cases to advise them about mediation, explain the program and its merits and explore whether mediation might meet the needs of the parties. These efforts are intended to increase the number of matters submitted to mediation and reduce the number of matters submitted to arbitration.

¹¹ See NASD Manual, Code of Arbitration Procedure, Part III, Sec. 23, (CCH) ¶ 3723.

¹² The American Bar Association ("ABA") is considering draft mediator standards of conduct. Draft Standard III states in pertinent part that "[w]ithout the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process."