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States' Alternative Dispute Resolution Statutes

State of Massachusetts

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States' Alternative Dispute Resolution Statutes

STATE OF MASSACHUSETTS

Index

Uniform Arbitration Act for Commercial Disputes

Part III, Title IV, Chapter 251, § 2A

Current through the 2008 Second Annual Session

. § 1. Validity of agreements; non-applicability to collective bargaining agreements

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. The provisions of this chapter shall not apply to collective bargaining agreements to arbitrate, which are subject to the provisions of chapter one hundred and fifty C, except as provided by the provisions of chapter one hundred and fifty-two.

§ 2. Refusal to arbitrate; application to superior court

(a) A party aggrieved by the failure or refusal of another to proceed to arbitration under an agreement described in section one may apply to the superior court for an order directing the parties to proceed to arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall, if it finds for the applicant, order arbitration; otherwise, the application shall be denied.

(b) Upon application, the superior court may stay an arbitration proceeding commenced or threatened if it finds that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily determined, and if the court finds for the applicant it shall order a stay of arbitration; otherwise the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under paragraph (a), the application shall be made therein, otherwise and subject to section seventeen, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect to such issue only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

§ 2A. Consolidation or severance of arbitration proceedings; application; determination

A party aggrieved by the failure or refusal of another to agree to consolidate one arbitration proceeding with another or others, for which the method of appointment of the arbitrator or arbitrators is the same, or to sever one arbitration proceeding from another or others, may apply to the superior court for an order for such consolidation or such severance. The court shall proceed summarily to the determination of the issue so raised. If a claimant under section twenty-nine of chapter one hundred and forty-nine applies for an order for consolidation or severance of such proceedings, the issue shall be decided under the applicable provisions of said section twenty-nine of said chapter one hundred and forty-nine governing consolidation or severance of such actions; otherwise the issue shall be decided under the Massachusetts Rules of Civil Procedure governing consolidation and severance of trials and the court shall issue an order accordingly. No provision in any arbitration agreement shall bar or prevent action by the court under this section.

§ 3. Appointment of arbitrators

If the arbitration agreement provides a method of appointment of arbitrators, such method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or if an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint an arbitrator. An arbitrator so appointed shall have all the powers of an arbitrator specifically named in the agreement.

§ 4. Powers of arbitrators

The powers of the arbitrators may be exercised by a majority thereof unless otherwise provided by the agreement or by this chapter.

§ 5. Hearings; time and place; rights of parties; conduct of hearings

Unless otherwise provided by the agreement:--

(a) The arbitrators shall appoint a time and place for the hearing and cause written notice to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing shall constitute a waiver of such notice. The arbitrators may adjourn the hearing from time to time and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties shall have the right to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

§ 6. Representation by counsel

A party shall have the right to be represented by an attorney at any proceeding or hearing under this chapter, notwithstanding any waiver of such right prior to the proceeding or hearing.

§ 7. Witnesses; production of documents and things; entry on land for inspection

(a) The arbitrators may cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the superior court.

(e) Any party in an arbitration proceeding may serve upon any other party a request for the production of documents and things and for entry upon land for inspection and other purpose as permitted by and in accordance with the procedure set forth in rule thirty-four of the Massachusetts Rules of Civil Procedure in effect at the time the request is made. The enforcement and objections of such request shall be made to the arbitrators and the arbitrators only shall issue such orders as they deem necessary on objections and on requests for enforcement of production both prior to and after the commencement of the hearing.

§ 8. Award; form; delivery; time; waiver of objections

(a) The award shall be in writing and signed by the arbitrators concurring in the award. The arbitrators shall deliver a copy of the award to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if said time is not so fixed, within such time as the court orders upon application of a party. The parties may by an agreement in writing extend the time either before or after the expiration thereof. A party shall be deemed to have waived the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

§ 9. Award; modification by arbitrators

Upon application of a party or, if an application to the court is pending under sections eleven, twelve or thirteen, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in (1) and (3) of subdivision (a) of section thirteen, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected shall be subject to the provisions of sections eleven, twelve and thirteen.

§ 10. Costs and expenses

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.

§ 11. Award; confirmation by court

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections twelve and thirteen.

§ 12. Vacation of award; grounds; time for application; rehearing; confirmation

(a) Upon application of a party, the court shall vacate an award if:--

(1) the award was procured by corruption, fraud or other undue means;

(2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;

(3) the arbitrators exceeded their powers;

(4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five, as to prejudice substantially the rights of a party; or

(5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within thirty days after delivery of a copy of the award to the applicant, but, if such application is predicated upon corruption, fraud, or other undue means, it shall be made within thirty days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of paragraph (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with section three, or if the award is vacated on grounds set forth in clauses (3) and (4) of paragraph (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with section three. The time within which the agreement requires the award to be made shall be applicable to the rehearing and shall commence from the date of the order.

(d) If the application to vacate an award is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

§ 13. Award; modification by court; time for application; grounds; joinder with application to vacate

(a) Upon application made within thirty days after delivery of a copy of the award to the applicant, the court shall modify or correct the award if:--

(1) there was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected; otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

§ 14. Judgment or decree; costs

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall

be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements in connection therewith may be awarded by the court.

§ 15. Applications to court

Except as otherwise provided, an application to the court under this chapter shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of an original writ of summons.

§ 16. Court; jurisdiction

The term "court" means any court of competent jurisdiction of this state. The making of an agreement described in section one providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder.

§ 17. Venue

An initial application shall be made to the superior court for the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the superior court for any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

§ 18. Appeals

(a) An appeal may be taken from:--

(1) an order denying an application to compel arbitration made under paragraph (a) of section two;

(2) an order granting an application to stay arbitration made under paragraph (b) of section two;

(3) an order confirming or denying confirmation of an award;

(4) an order modifying or correcting an award;

(5) an order vacating an award without directing a rehearing; or

(6) a judgment or decree entered pursuant to the provisions of this chapter. Such appeal shall be taken in the manner and to the same extent as from orders or judgments in an action.

§ 19. Uniformity of interpretation

This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those

states which enact it.

Mandatory Alternative Dispute Resolution Program
Part III, Title I, Chapter 211B

Current through the 2008 Second Annual Session

§ 19. Mandatory alternative dispute resolution program

The chief justice for administration and management may establish and promulgate rules for a mandatory alternative dispute resolution program for civil actions within the trial court subject to the approval of the supreme judicial court, subject to appropriation; provided, however, that the parties to a dispute resolution shall not be bound by the results thereof. The chief justice for administration and management shall supervise and establish standards for the implementation of such program and shall further implement a program of certification for all personnel conducting alternative dispute resolution programs in the courts of the commonwealth.

The chief justice of administration and management shall establish a pilot program of alternative dispute resolution within the counties of Bristol, Worcester and Suffolk under his direct supervision. Pursuant to said pilot program, he shall be responsible to fund, coordinate, and evaluate activities of the trial court within said counties to screen and refer cases to alternative dispute resolution. Within said counties, the chief justice for administration and management shall, no later than twelve months from the date of filing any civil litigation which involves a contract claim, tort claim, equitable remedy dispute or other litigation the trial court may determine to be appropriate, be screened for referral to a qualified alternative dispute resolution program. Screening should enable litigants or their attorneys to select among options which include self-directed settlement negotiation, case evaluation, mediation, non-binding arbitration, expert fact finding and binding arbitration. The chief justice for administration and management shall monitor and evaluate the cost, impact and effectiveness of activities undertaken to screen and refer cases to alternative dispute resolution and report annually to the general court on his findings. The annual report should identify unmet needs and promising opportunities for additional screening and referral activities and recommend legislative actions required to implement these activities.

Work Product of Mediator Confidential; Confidential Communications; exceptions; mediator defined
Part III, Title II, Chapter 233.

Current through the 2008 Second Annual Session

§ 23C. Work product of mediator confidential; confidential communications; exception; mediator defined

All memoranda, and other work product prepared by a mediator and a mediator's case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of

and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

Uniform Rules on Dispute Resolution

Rules of the Supreme Judicial Court. Chapter One, Rule 1:18.

Current with amendments received through July 2008

Rule 1. Scope, Applicability, Purpose and Guiding Principles of Rules *

(a) Scope, Applicability and Purpose of Rules. These rules govern court-connected dispute resolution services provided in civil and criminal cases in every department of the Trial Court. The Ethical Standards in Rule 9 also apply to neutrals who provide court-connected dispute resolution services in the Supreme Judicial Court and the Appeals Court. The purpose of the rules is to increase access to court-connected dispute resolution services, to ensure that these services meet standards of quality and procedural fairness, and to foster innovation in the delivery of these services. The rules shall be construed so as to secure those ends. To the extent that there is any conflict between these rules and the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Criminal Procedure, the Massachusetts Rules of Appellate Procedure, the Massachusetts Rules of Domestic Relations Procedure, the Juvenile Court Rules, the Standards and Forms For Probation Offices of the Probate and Family Court Department (hereinafter the "Probation Standards") promulgated by the Office of the Commissioner of Probation effective July 1, 1994, or the Rules of the Supreme Judicial Court and the Appeals Court, then the Massachusetts Rules of Civil, Criminal, Appellate, and Domestic Relations Procedure, the Juvenile Court Rules, the Probation Standards, or the Supreme Judicial Court and Appeals Court rules shall control. The Supreme Judicial Court, the Appeals Court, the Chief Justice for Administration and Management, and each Trial Court department may adopt additional rules or administrative procedures to supplement these rules, provided that they are consistent with these rules.

(b) Guiding Principles. The interpretation of these rules shall be guided by the following principles:

(i) Quality. The judiciary, collaborating with others experienced in dispute resolution, is responsible for assuring the high quality of the dispute resolution services to which it refers the public.

(ii) Integrity. Dispute resolution services should be provided in accordance with ethical standards and with the best interest of the disputants as the paramount criterion.

(iii) Accessibility. Dispute resolution services should be available to all members of the public regardless of their ability to pay.

(iv) Informed choice of process and provider. Wherever appropriate, people should be given a choice of dispute resolution processes and providers and information upon which to base the choice.

(v) Self-determination. Wherever appropriate, people should be allowed to decide upon the issues to be discussed during a dispute resolution process, and to decide the terms of their agreements.

(vi) Timely services. Dispute resolution services, to be most effective, should be available early in the course of a dispute.

(vii) Diversity. The policies, procedures and providers of dispute resolution services should reflect the diverse needs and background of the public.

(viii) Qualification of neutrals. Dispute resolution services should be performed only by qualified neutrals. There are many ways in which a neutral may become competent, and there are many ways to determine qualifications of neutrals, such as assessing performance and considering a neutral's education, training, experience and subject matter expertise.

Rule 2. Definitions

As used in these rules, the following terms shall have the following meanings:

"Arbitration" means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.

"Case evaluation" means a process in which the parties or their attorneys present a summary of their cases to a neutral who renders a non-binding opinion of the settlement value of the case and/or a non-binding prediction of the likely outcome if the case is adjudicated.

"Clerk" means the clerk, clerk-magistrate, recorder, or register of a court, or a designated assistant clerk-magistrate, assistant recorder or assistant register of probate.

"Community mediation program" means a non-profit, charitable program whose goals are to promote the use of mediation and related conflict resolution services by volunteers to resolve disputes including those that come to, or might otherwise come to, the courts.

"Conciliation" means a process in which a neutral assists parties to settle a case by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and, if the case is not settled, explores the steps which remain to prepare the case for trial.

"Court" means the Land Court, the Boston Municipal Court, or a division of the District Court, the Superior Court, the Probate and Family Court, the Housing Court or the Juvenile Court. The provisions of these rules addressed to courts shall apply to judges, clerks, probation officers and other employees of these courts. For the purposes of Rule 9, "court" also includes the appellate courts.

"Court-connected dispute resolution services" means dispute resolution services provided as the result of a referral by a court. "To refer," for purposes of this definition, means to provide a party to a case with the name of one or more dispute resolution services providers or to direct a party to a particular dispute resolution service provider.

“Dispute intervention” means a process used in the Probate and Family Court and in the Housing Court in which a neutral identifies the areas of dispute between the parties, and assists in the resolution of differences.

“Dispute resolution service” means any process in which an impartial third party is engaged to assist in the process of settling a case or otherwise disposing of a case without a trial, including arbitration, mediation, case evaluation, conciliation, dispute intervention, early neutral evaluation, mini-trial, summary jury trial, any combination of these processes, and any comparable process determined by the Chief Justice for Administration and Management of the Trial Court or the Supreme Judicial Court to be subject to these rules. The term “dispute resolution service” does not include a pretrial conference, an early intervention event, a screening, a trial, or an investigation.

“Early intervention” means a compulsory, judicially supervised event, early in the life of a case, with multiple objectives relating to both scheduling of litigation and selection of dispute resolution services.

“Early neutral evaluation” means case evaluation which occurs early in the life of a dispute.

“Immediate family” means the individual's spouse, domestic partner, guardian, ward, parents, children, and siblings.

“Mediation” means a voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties.

“Mini-trial” means a two-step process to facilitate settlement in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a neutral in the presence of individuals with decision-making authority for each party, and (b) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

“Neutral” means an individual engaged as an impartial third party to provide dispute resolution services and includes but is not limited to a mediator, an arbitrator, a case evaluator, and a conciliator. “Neutral” also includes a master, clerk, clerk-magistrate, register, recorder, family service officer, housing specialist, probation officer, and any other court employee when that individual is engaged as an impartial third party to provide dispute resolution services. For purposes of Rule 9, “neutral” also means an administrator of a program providing court-connected dispute resolution services.

“Program” means an organization with which neutrals are affiliated, through membership on a roster or a similar relationship, which administers, provides and monitors dispute resolution services. A program may be operated by a court employee or by an organization independent of the court, including a corporation or a governmental agency. A program operated by a court employee may include one or more court employees or non-employees or a combination of court employees and non-employees on its roster.

“Provider” or “provider of dispute resolution services” means a program which provides dispute resolution services or a neutral who provides dispute resolution services.

“Screening” means an orientation session in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate, and, if so, to which one. In a screening, there may also be discussion to narrow the issues in the case, to set discovery parameters, or to address other case management issues.

“Summary jury trial” means a non-binding determination administered by the court in which (a) the parties' attorneys present a summary of the evidence and arguments they expect to offer at trial to a six-person jury chosen from the court's jury pool, (b) the jury deliberates and returns a non-binding decision on the issues in dispute, (c) the attorneys may discuss with the jurors their reaction to the evidence and reasons for the verdict, and (d) the presiding neutral may be available to conduct a mediation with the parties.

Rule 3. Administrative Structure for Court-Connected Dispute Resolution Services

(a) Appointment of Standing Committee on Dispute Resolution. There shall be a Standing Committee on Dispute Resolution consisting of up to twenty persons appointed by the Chief Justice for Administration and Management in consultation with the Chief Justices of the Trial Court departments. Each department of the Trial Court shall be represented on the Standing Committee. Members shall be appointed for three year terms and may be reappointed for additional terms when their terms expire. The Standing Committee shall be composed of: judges; other court personnel; attorneys; members of the public; academics; and providers of dispute resolution services. In order to achieve diversity in the membership of the Standing Committee, the Trial Court shall attempt to make funds available for expenses associated with participation in the Committee.

(b) Duties of Standing Committee on Dispute Resolution. The Standing Committee shall advise the Chief Justice for Administration and Management of the Trial Court with respect to standards for court-connected dispute resolution services and the implementation and oversight of court-connected dispute resolution services throughout the Trial Court. The Standing Committee shall work to ensure access to court-connected dispute resolution services, to ensure the quality of the services, and to foster innovation in the delivery of the services.

(c) Trial Court Departments. The Chief Justice of each Trial Court department may appoint an advisory committee on that department's court-connected dispute resolution services composed of judges, other court personnel, attorneys, academics, members of the public, and providers of dispute resolution services, including representatives of community mediation programs where they provide services to that court department. In order to achieve diversity in the membership of an advisory committee, the court shall attempt to make funds available for expenses associated with participation in the committee. An advisory committee shall function so as to avoid conflict of interest or the appearance of conflict of interest. Each such Chief Justice may designate an employee as the department coordinator of court-connected dispute resolution services. Every Trial Court chief justice who approves dispute resolution programs pursuant to Rule 4(a) shall develop written policies and procedures governing program operations and record-keeping that will enable evaluation of the program.

(d) Local Dispute Resolution Services Coordinator. The First Justice or the justice with administrative supervision of each court or division within every Trial Court department shall designate one court staff member as the dispute resolution services coordinator for that court or division. By agreement of

affected First Justices, one person may be designated as dispute resolution services coordinator for divisions or courts in more than one department which are located in the same or a nearby building. The dispute resolution services coordinator shall maintain information about court-connected dispute resolution services and assist the public in making informed choices about the use of those services. The coordinator, in collaboration with the program or programs to which the court division refers cases, shall develop a system to record and compile data as required by Rule 6(g).

(e) Technical Assistance for Implementation of Dispute Resolution Services. The Chief Justice for Administration and Management shall, subject to appropriation, provide advice and consultation to Trial Court departments, courts, advisory committees and designated dispute resolution staff to assist in developing and operating court-connected dispute resolution services in accordance with the rules.

Rule 4. Implementation of Court-Connected Dispute Resolution

(a) Development of List of Approved Programs. (i) The Chief Justice of each Trial Court department, subject to review for compliance by the Chief Justice for Administration and Management, shall approve programs to receive court referrals in accordance with these rules. In order to be approved, programs must: agree to meet the operations standards in Rule 7; agree to ensure that the neutrals on their roster who provide court-connected dispute resolution services meet the qualifications standards in Rule 8; and agree to ensure that the neutrals on their roster follow the ethical standards in Rule 9 when providing court-connected dispute resolution services. The list of approved programs shall be developed and maintained through an open process which includes at least the following: advertisement of the opportunity to apply to be on the list; fair assessment of programs; efforts to ensure diversity among neutrals as to race, gender, ethnicity, experience, and training; policies about the length and termination of participation on the list; and procedures for removing a program from the list for cause and/or as a result of a complaint filed pursuant to Rule 4(f).

(ii) The Chief Justice for Administration and Management shall distribute a combined list of the programs approved pursuant to subparagraph (i). The list shall include information as to each program regarding geographic region, fees, and dispute resolution processes; and information as to each program's expertise, including process and subject matter expertise;

(b) Trial Court Department Plans. Each Trial Court department shall develop plans each fiscal year for the use of court-connected dispute resolution services by the courts in the department. The Chief Justice shall develop the plan in consultation with the department advisory committee, the department coordinator of court-connected dispute resolution services, and the courts in the department. Services may be provided only by programs on the list developed pursuant to paragraph (a) of Rule 4. The plan shall set forth information about court-connected dispute resolution services in the department, including at least the following: current status, goals and objectives, plans for the coming year, any plans for collaborating with other departments, a budget request, case selection and screening criteria, plans for early intervention, and needs for education programs. Where appropriate, each portion of the plan shall address: plans with respect to access to dispute resolution services, the quality of the services, and efforts to foster innovation in the delivery of services. Plans shall ensure that court-connected dispute resolution services are available to those who lack the financial resources to pay for the services and those who would not otherwise have access to the services. The plans shall be submitted by September 1 of each year to the Chief Justice for Administration and Management for review and approval.

(c) Pilot Programs for Mandatory Participation in Dispute Resolution Services. Any Trial Court department may propose to the Chief Justice for Administration and Management for review and approval an experimental pilot program which requires parties in civil cases to participate in non-binding forms of dispute resolution services. No Trial Court department shall administer such a pilot program without the approval of the Chief Justice for Administration and Management. Case types not suitable for dispute resolution services should be identified. The pilot program may provide for the mandatory participation of the parties and shall be assessed regularly to control quality. The minimal requirements for mandatory participation shall be as follows:

(i) each party shall be provided with an opportunity to terminate the dispute resolution services, upon motion to the court for good cause shown, but unwillingness to participate shall not be considered good cause;

(ii) the court shall give preference to a dispute resolution process upon which the parties agree;

(iii) the court shall explicitly inform parties that, although they are required to participate, they are not required to settle the case while participating in dispute resolution services; and

(iv) no fees may be charged for mandatory participation in dispute resolution services, but the court may charge fees for elective dispute resolution services.

(d) Funding of Court-connected Dispute Resolution Services. As part of the annual budget requests required by G.L. c. 211B, § 10(viii) and (x), the Chief Justice of each Trial Court department shall include a request for funding for court-connected dispute resolution services. The budget request shall provide for the funding of court-connected dispute resolution services for those parties who lack the financial resources to pay for the services or who would not otherwise have access to the services. Funds may be used for approved programs to provide screening and to provide and/or administer the services. Budget requests shall estimate funds needed to maintain previously funded services provided by approved programs. Additional amounts shall be used for the expansion or improvement of services or for innovative services. Expenditures shall be subject to the approval of the Chief Justice for Administration and Management after consultation with the Standing Committee.

(e) Contracts for Court-connected Dispute Resolution Services. (i) If public funds are appropriated or otherwise available and allocated by the Chief Justice for Administration and Management of the Trial Court for contracts with court connected dispute resolution programs, the Chief Justice for Administration and Management, in consultation with First Justices or other justices with administrative responsibility for courts and the Chief Justices of affected departments, shall issue one or more requests for proposals for dispute resolution services to be provided by contracts with approved programs, shall select programs through a competitive bidding process, and shall execute contracts for services on behalf of departments and courts which may extend for no more than three years. These contracts may provide for a program to receive payments approved under paragraph (d) and may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(ii) If public funds are not involved, but courts seek an exclusive arrangement with a program or programs for court-connected dispute resolution services, the Chief Justice of the affected department or his or her designee shall, in consultation with the Chief Justice for Administration and Management,

issue one or more requests for proposals to be provided by contracts with approved programs, shall select programs through a competitive process, and, with the approval of the Chief Justice for Administration and Management, shall execute contracts for services on behalf of departments and courts which may extend for no more than three years. These contracts may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(iii) In selecting programs with which to contract, the Chief Justice for Administration and Management, or the Chief Justice of the department, as applicable, is encouraged to give preference to programs which demonstrate a record of and commitment to maintaining a diverse roster and operating in a manner which is accountable to the community.

(iv) The competitive bidding requirements in this subsection shall not apply to programs in which dispute resolution services are provided exclusively by court employees.

(f) Complaint Mechanism. The Chief Justice for Administration and Management, in consultation with the Chief Justices of the departments and with the advice of the Standing Committee, shall develop a uniform procedure for handling complaints regarding court-connected dispute resolution services.

Rule 5. Early Notice of Court-Connected Dispute Resolution Services

Clerks shall make information about court-connected dispute resolution services available to attorneys and unrepresented parties. This information should state that selection of court-connected dispute resolution services can occur at the early intervention event or sooner, and that no court may compel parties to mediate any aspect of an abuse prevention proceeding under G.L. c. 209A, § 3. Insofar as possible, information should be available in the primary language of the parties. Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.

Rule 6. Duties of Courts with Respect to Court-Connected Dispute Resolution Services

(a) Referral of Cases. No court may refer cases to a provider of dispute resolution services unless the provider is an approved program included on the list developed pursuant to Rule 4(a). In all cases, courts shall inform parties that they are free to choose any approved program on the list, subject to such reasonable limitations as the court may impose, or any other provider of dispute resolution services. If the parties are unable or unwilling to choose a program from the list or another provider, a court may make a referral to a specific program on the list in which the court has confidence, whether or not the court has a contract for services with that program. The court shall make a reasonable effort to distribute such specific referrals fairly among programs on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, and fee levels. In the alternative, a court may refer all or most of its cases requiring dispute resolution services to one or more approved programs in which the roster consists exclusively of one or more court employees or with which it has a contract for services pursuant to Rule 4(e). Notwithstanding the foregoing, a court may refer a case to a provider that is not on the list in exceptional circumstances, when special needs of the parties cannot be met by a program on the list. The judge shall report any such referral and the exceptional circumstances which required it to the Chief Justice of the department. In a criminal case, the court shall consult with the prosecuting attorney and obtain the approval of the defendant and, where applicable, the victim, before making a referral to a dispute resolution program.

(b) Screening. In civil cases, courts may require parties and/or their attorneys to attend a screening session or an early intervention event regarding court-connected dispute resolution services except for good cause shown.

(c) Time for Dispute Resolution. A court may establish a deadline for the completion of a court-connected dispute resolution process, which may be extended by the court upon a showing by the parties that continuation of the process is likely to assist in reaching resolution.

(d) Choice. No court shall require parties to participate in dispute resolution services without meeting the minimal requirements set forth in Rule 4(c), except that Probate and Family Courts may require parties to participate in dispute intervention. Except in a case affected by a pilot program under Rule 4(c) or a case involving such a referral to dispute intervention, the court shall inform litigants, both at the time of referral and at the beginning of the dispute resolution process, that the decision to participate in a dispute resolution process is voluntary.

(e) Space for Dispute Resolution Sessions. Courts may, subject to guidelines issued by the Chief Justice for Administration and Management of the Trial Court, provide available courthouse space or other resources for court-connected dispute resolution services provided by approved programs. The space provided shall be sufficiently private and readily accessible. Reasonable accommodation shall be made for disabled individuals.

(f) Communication with Program or Neutral. (i) The court shall give a program which is providing court-connected dispute resolution services sufficient information to process the case effectively.

(ii) The program shall give the court's administrative staff sufficient case-specific and aggregate information to permit monitoring and evaluation of the services.

(iii) Communication with the court during the dispute resolution process shall be conducted only by the parties or with their consent. The parties may agree, as part of the dispute resolution process, as to the scope of the information which they, the program, or the neutral will provide to the court. Absent an agreement of the parties and subject to the provisions of Rule 9 regarding confidentiality and subparagraph (iv) below, the program or neutral may provide only the following information to the court: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, and the fact that the dispute resolution process has concluded without parties' having reached agreement.

(iv) At the conclusion of conciliation or dispute intervention, the program or neutral may communicate to the court recommendations, a list of those issues which are and are not resolved, and the program's or neutral's assessment that the case will go to trial or settle, provided that the parties are informed at the initiation of the process that such communication may occur.

(g) Data Collection. The court, in collaboration with the approved program or programs to which it refers cases, shall develop a system to record accurately and compile regularly data sufficient to track cases, monitor services, and provide any information required or requested by the applicable Trial Court department chief justice or the Chief Justice for Administration and Management.

(h) Intake and Selection. Every court shall evaluate cases to ensure that they are appropriate for dispute

resolution based on the case selection criteria of the applicable department developed pursuant to Rule 4(b).

(i) Inappropriate Pressure to Settle. Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for nonsettlement by the parties. The court shall give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties. In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(j) Sanctions for Failure to Attend Sessions. A court may impose sanctions for failure without good cause to attend a mandatory screening session, an early intervention event, or a scheduled dispute resolution session.

Rule 7. Duties of Approved Programs with Respect to Court-Connected Dispute Resolution Services

(a) Program Administration. Programs shall be monitored and evaluated on a regular basis. Settlement rates shall not be the sole criterion for evaluation. Every program shall evaluate its neutrals on a regular basis. Every program shall develop and comply with written policies and procedures governing program administration and operations, including policies regarding evaluation, facilities, communication with the court, data collection, pressure to settle, and intake and selection, which are consistent with policies developed by Trial Court departments pursuant to Rule 3(c) and with Rules 4(a) and 6(a), (e), (f), (g), (h) and (i). A program may refuse to accept a referral from a court if the case does not meet the program's intake and selection criteria.

(b) Diversity. Programs shall be designed with knowledge of and sensitivity to the diversity of the communities served. The design shall take into consideration such factors as the languages, dispute resolution styles, and ethnic traditions of communities likely to use the services. Programs shall not discriminate against staff, neutrals, volunteers, or clients on the basis of race, color, sex, age, religion, national origin, disability, political beliefs or sexual orientation. Programs shall actively strive to achieve diversity among staff, neutrals, and volunteers.

(c) Rosters. Programs shall (i) assemble, maintain and administer rosters of qualified neutrals in conformity with these rules; (ii) except in the case of programs in which the roster consists exclusively of court employees, make a reasonable effort to distribute referrals fairly among individuals on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, scheduling, and fee levels; (iii) adopt a fair and reasonable method by which qualified individuals may join the roster at its inception, when vacancies occur, or when the caseload requires additional neutrals; and (iv) adopt a fair and reasonable method by which individuals may be removed from the roster, including a provision for a periodic review of the roster. The methods used by the program for adding and removing neutrals shall be set forth in writing and made available to individuals applying for affiliation.

(d) Presence of Advisers. Parties, in consultation with their attorneys, if any, shall be permitted to

decide whether their attorney, advocate or other adviser will be present at court-connected dispute resolution sessions.

(e) Fees. Programs may charge fees for service. Parties shall not be charged a fee for attendance at a mandatory screening session or an early intervention event, or for dispute resolution services provided by court employees. Fees charged by a provider of court-connected dispute resolution services shall be approved by the Chief Justice of the applicable court department. The fee schedule shall provide for fee waived or reduced fee services to be made available to indigent and low income litigants. Fees may not be contingent upon the result of the dispute resolution process or the amount of the settlement. Neutrals may assist parties to negotiate an equitable allocation of fees.

(f) Dispute Resolution Sessions. The program shall make reasonable efforts to schedule dispute resolution sessions at the convenience of the parties. The program shall allow adequate time in the dispute resolution session to discuss issues and reach settlement.

(g) Written Agreement. If a settlement is reached, the agreement shall be prepared in writing and signed by the parties, who shall forward for docketing a notice of the disposition of the case to the clerk of the court in which the case is pending. The neutral may participate in the preparation of the written agreement. At the parties' request, the court may allow an oral agreement instead of a written one.

(h) Orientation and Supervision of Neutrals. The program shall ensure that neutrals are familiar with the policies and operations of the court and the program. The program shall supervise its neutrals. During dispute resolution sessions, newly trained neutrals shall have immediate access to an experienced neutral.

(i) Enforcement of Qualifications Standards and Ethical Standards. Each approved program shall be responsible for enforcing the qualifications standards in Rule 8 and the ethical standards in Rule 9, and for taking appropriate action if a neutral on its roster fails or ceases to meet the qualifications standards or violates the ethical standards. Appropriate actions include referral for further training, suspension from the roster, or removal from the roster. If the Chief Justice of a Trial Court Department directs a program to take such action as a result of a complaint about the neutral and the program refuses to act, the Chief Justice may revoke the program's status as a program approved to receive referrals from that department.

Rule 8. Qualifications Standards for Neutrals

(a) Purpose and applicability. The purpose of setting qualifications standards for neutrals who receive court referrals is to foster high quality dispute resolution services. This rule shall apply to neutrals who provide mediation, arbitration, conciliation, case evaluation, dispute intervention, mini-trials or summary jury trials in court-connected programs.

(b) General Provisions.

(i) General Qualifications Requirements. To be qualified to provide dispute resolution services for cases referred by a court to an approved program, a neutral shall satisfy the requirements specified in this rule for the particular process which he or she provides unless exempted pursuant to Rule 8(k). A neutral may meet one or all of these requirements using the alternative method, if any, specified for the

particular process, pursuant to Rule 8(j). To remain qualified, neutrals shall satisfy the continuing education and continuing evaluation requirements, if any, specified in this rule for the particular process.

(ii) Additional Qualifications. Trial Court Departments may establish additional qualifications for neutrals in approved programs in addition to those set forth in this rule provided they are consistent with these rules. In establishing such additional standards, court departments may provide for consideration of such factors as an individual's experience as a neutral, educational background, work experience, or subject matter expertise, and may also require such neutrals to complete specialized training or demonstrate subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive criteria by court departments in establishing additional qualifications for mediators or arbitrators participating in approved programs.

(iii) Competence. In qualifying mediators and arbitrators to handle court referrals, approved programs may consider such factors as an individual's experience as a mediator or arbitrator, educational background, work experience and subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive criteria by approved programs in qualifying mediators and arbitrators for inclusion in court panels. Academic degrees and professional licensure may be used as preclusive criteria for qualifying conciliators, case evaluators, mini-trial neutrals and summary jury trial neutrals.

(iv) Duties of the Chief Justice for Administration and Management. The Chief Justice for Administration and Management (CJAM) shall oversee and monitor the implementation of this rule, and suggest changes as needed. The CJAM shall, in consultation with the Standing Committee, develop guidelines for implementing the provisions of this rule. The CJAM shall collect, publish and distribute to approved programs any changes in the guidelines, and shall maintain the annual certifications submitted by approved programs as to the training, evaluation, mentoring and continuing education of neutrals.

(v) Duties of Approved Programs. Each approved program shall ensure that the neutrals on its roster meet the applicable training, mentoring, evaluation, continuing education, continuing evaluation, professional and experience requirements set forth in this rule and the guidelines adopted pursuant to Rule 8(b)(iv), and any additional qualification requirements adopted by a Trial Court Department. Each approved program shall ensure that the neutrals meet the standards set forth in the rule and guidelines, that any alternative method relied upon by a neutral to meet the standards is in compliance with Rule 8(j) and the guidelines, and that reliance upon the limited exemption is in compliance with Rule 8(k). To carry out these duties, each program shall take the following specific actions:

(a) Attest in its application for program approval that it will assign cases referred by a court only to neutrals who meet the qualifications standards;

(b) Maintain for the tenure of the neutral's association with the program, and for three years thereafter, documentation which demonstrates that the neutral meets the qualifications standards. Such documentation shall include, without limitation, the following:

(i) Name of the neutral;

(ii) Name of the training organization where the neutral satisfactorily completed any required training (or documentation of the neutral's compliance with the alternative method of meeting any training requirement pursuant to Rule 8(j));

(iii) Outcome of any required mentoring and evaluation for each neutral (or documentation of the neutral's compliance with the alternative method of meeting any evaluation requirement pursuant to Rule 8(j));

(iv) Documentation of the neutral's participation in any required continuing education and in any required continuing evaluation;

(v) Documentation demonstrating that the neutral meets any applicable requirements as to professional licensure, experience or subject matter expertise; and

(vi) Documentation demonstrating that the neutral qualifies for the limited exemption set forth in Rule 8(k).

(c) Certify annually to the AOTC that the neutrals on its roster meet the requirements for training, mentoring and evaluation, and continuing education set forth in this rule and the guidelines.

(d) Make the documentation demonstrating a neutral's qualification and the documentation demonstrating the program's compliance with the rules and the guidelines available to the AOTC and to the Chief Justices of the Trial Court Departments for inspection and copying upon request.

(c) Mediators.

(i) Training Requirement. A mediator shall successfully complete a basic mediation training course of at least thirty hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A mediator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement. A mediator shall complete the mentoring and evaluation requirements contained in the Guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. A mediator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. A mediator shall participate in regular evaluation as required by Rule 7.

(d) Arbitrators.

(i) Training Requirement. An arbitrator shall successfully complete a basic arbitration training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8 (b)(iv). An arbitrator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement. An arbitrator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. An arbitrator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. An arbitrator shall participate in regular evaluation as required by Rule 7.

(e) Conciliators.

(i) Professional Qualifications. A conciliator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and have engaged in the practice of law within the Commonwealth of Massachusetts for at least three years.

(ii) Training Requirement. A conciliator shall successfully complete a conciliation training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A conciliator shall also complete any additional, specialized training required by a trial court department.

(iii) Mentoring and Evaluation Requirement. A conciliator shall, if required to do so at the discretion of the approved program with which he or she is affiliated, complete the mentoring and evaluation requirements of that program contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A conciliator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A conciliator shall participate in regular evaluation as required by Rule 7.

(f) Case Evaluators.

(i) Professional Qualifications. A case evaluator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and must have seven years of trial experience within the Commonwealth of Massachusetts as an attorney or judge.

(ii) Training Requirement. A case evaluator shall successfully complete a basic case evaluation training of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A case evaluator shall also complete any additional, specialized training required by a Trial Court Department for case evaluators.

(iii) Mentoring and Evaluation Requirement. A case evaluator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A case evaluator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A case evaluator shall participate in regular evaluation as required by Rule 7.

(g) Mini-Trial Neutrals.

(i) Professional Qualifications. A mini-trial neutral shall have at least ten years experience evaluating legal disputes as a judge, arbitrator, attorney, or executive level decision-maker.

(ii) Training Requirements. A mini-trial neutral shall successfully complete the training required for mediators in Rule 8(c)(i), and the training required for case evaluators in Rule 8(f)(ii).

(iii) Mentoring and Evaluation Requirement. A mini-trial neutral shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education. A mini-trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation. A mini-trial neutral shall participate in regular evaluation as required by Rule 7.

(h) Summary Jury Trial Neutrals.

(i) Professional Qualifications. A summary jury trial neutral shall be an arbitrator qualified under this rule, an attorney, or a former judge, with at least ten years of experience as an arbitrator, trial attorney, or judge. The summary jury trial neutral must be in good standing in any jurisdiction in which he or she is licensed to practice law.

(ii) Continuing Education. A summary jury trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iii) Continuing Evaluation. A summary jury trial neutral shall participate in regular evaluation as required by Rule 7.

(i) Dispute Intervention Neutrals.

(i) Training Requirement. A provider of dispute intervention services shall successfully complete a training course and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A provider of dispute resolution services shall also complete any additional specialized training required by the Trial Court Department in which he or she is providing dispute intervention services.

(ii) Mentoring and Evaluation Requirement. A provider of dispute intervention services shall complete the mentoring and evaluation requirements set forth in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education. A provider of dispute resolution services shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation. A provider of dispute resolution services shall participate in regular evaluation as may be required by the relevant Trial Court Department.

(j) Alternative Methods of Satisfying Requirements. A neutral may be qualified by a program to handle cases referred by a court by demonstrating that he or she meets the alternative methods set forth in the guidelines of satisfying the training, mentoring and evaluation requirements set forth in this rule and the guidelines. Programs that seek to qualify neutrals through the alternative methods provision are required to compile necessary documentation pursuant to Rule 8(b)(v) and applicable guidelines.

(k) Limited Exemption from Training, Mentoring and Evaluation Requirements. As a general rule, all neutrals in approved programs shall satisfy the training, mentoring and evaluation requirements set forth in Rule 8. However, the Chief Justice of any Trial Court Department may elect, as a one-time exception to this rule, to exempt mediators, arbitrators, case evaluators, and conciliators from those requirements, subject to the provisions set forth below. The Chief Justice for Administration and Management shall establish a process for notification and a deadline for submission by departmental Chief Justices of their decision to utilize the exemption, and for programs to apply for the exemption.

(i) One Time Exemption of Certain Neutrals. This exemption will be a one-time option available only to those mediators, arbitrators, case evaluators and conciliators who meet the requirements set forth in Rule 8(k). No other neutral shall be exempted from the training, mentoring or evaluation requirements of Rule 8.

(ii) Designation of Neutrals. Each program approved on or before July 1, 2002, by a Department in which this exemption is available pursuant to this Rule and which continues as an approved program on the date on which Rule 8 becomes effective shall submit to the Chief Justice of that Department pursuant to the process established by the Chief Justice for Administration and Management, a list of any mediators, arbitrators, case evaluators and conciliators who qualify for the exemption. The program shall include a complete and detailed description of the qualifications of each such mediator, arbitrator, case evaluator or conciliator as evidence of his or her eligibility.

(iii) Requirements for Exemption. A program may consider a neutral eligible for this exemption only if he or she was serving as of July 1, 2002, on a panel of a program approved on or before that date which continues as an approved program on the date on which Rule 8 becomes effective. In addition, a program shall consider the neutral's overall experience and other factors under Rule 8 (e.g. prior training, mentoring, evaluation, the recency of his or her experience and the number and types of cases handled). An eligible individual must have served in the process for which he or she is seeking exemption for five years during the last six years prior to July 1, 2002, and meet the following additional requirement:

(a) Mediators. Must have provided at least 300 hours of mediation during that period.

(b) Arbitrators. Must have provided at least 150 hours of arbitration during that period.

(c) Case Evaluators. Must have provided at least 100 hours of case evaluation during that period.

(d) Conciliators. Must have provided at least 100 hours of conciliation during that period.

(iv) Transferability of Exemption. A mediator, arbitrator, case evaluator or conciliator who qualifies for this exemption in a Trial Court Department shall be qualified to provide services in the process in which he or she is exempted in another approved program within that Department subject to the approval of the other program. A mediator, arbitrator, case evaluator or conciliator who seeks exemption in another Department must meet the exemption through a program approved in that other Department.

(v) Limitations on Exemption. This provision does not exempt any mediator, arbitrator, case evaluator or conciliator from complying with the continuing education and continuing evaluation requirements of Rule 8.

(l) Effective Date. The effective date of this rule shall be January 1, 2005, except that to be qualified to provide dispute intervention, individuals employed by the courts on the effective date of this rule shall have until January 1, 2007 to demonstrate compliance with the requirements set forth in this rule. Employees hired to provide dispute intervention after the effective date of this rule must satisfy all the requirements of this rule within thirty-six (36) months of the date of hire.

Rule 9. Ethical Standards

(a) Introduction. These Ethical Standards are designed to promote honesty, integrity and impartiality by all neutrals and other individuals involved in providing court-connected dispute resolution services. These standards seek to assure the courts and citizens of the Commonwealth that such services are of the highest quality, and to promote confidence in these dispute resolution services. In addition, these standards are intended as a foundation on which appellate courts and Trial Court departments can build their dispute resolution policies, programs and procedures to best serve the public. These Standards apply to all neutrals as defined in these Standards when they are providing court-connected dispute resolution services for the Trial Court and the appellate courts, including those who are state or other public employees. State and other public employees are subject to the Massachusetts Conflict of Interest Law, M.G.L. c. 268A, and therefore, to the extent that these standards are in any manner inconsistent with M.G.L. c. 268A, the statute shall govern. In addition, to the extent that these standards are in any manner inconsistent with the Standards and Forms For Probation Offices of the Probate and Family Court Department promulgated by the Office of the Commissioner of Probation effective July 1, 1994, the Probation Standards shall govern. All courts providing dispute resolution services and all court-connected dispute resolution programs shall provide the neutrals with a copy of these Ethical Standards. These Standards shall be made a part of all training and educational programs for approved programs, and shall be available to the public.

(b) Impartiality. A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct as well as appearance.

(i) A neutral shall provide dispute resolution services only for those disputes where she or he can be impartial with respect to all of the parties and the subject matter of the dispute.

(ii) If at any time prior to or during the dispute resolution process the neutral is unable to conduct the process in an impartial manner, the neutral shall so inform the parties and shall withdraw from providing services, even if the parties express no objection to the neutral continuing to provide services.

(iii) No neutral or any member of the neutral's immediate family or his or her agent shall request, solicit, receive, or accept any in-kind gifts or any type of compensation other than the court-established fee in connection with any matter coming before the neutral.

(c) Informed Consent. The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.

(i) A neutral shall make every reasonable effort to ensure at every stage of the proceedings that each party understands the dispute resolution process in which he or she is participating. The neutral shall explain (aa) the respective responsibilities of the neutral and the parties, and (bb) the policies, procedures and guidelines applicable to the process, including circumstances under which the neutral may engage in private communications with one or more of the parties.

(ii) If at any time the neutral believes that any party to the dispute resolution process is unable to understand the process or participate fully in it--whether because of mental impairment, emotional disturbance, intoxication, language barriers, or other reasons--the neutral shall (aa) limit the scope of the dispute resolution process in a manner consistent with the party's ability to participate, and/or recommend that the party obtain appropriate assistance in order to continue with the process, or (bb) terminate the dispute resolution process.

(iii) Where a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the parties, the neutral shall so inform the party or parties.

(iv) A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.

(v) The neutral shall inform the parties of their right to withdraw from the process at any time and for any reason, except as is provided by law or court rule.

(vi) In mediation, case evaluation, and other processes whose outcome depends upon the agreement of the parties, the neutral shall not coerce the parties in any manner to reach agreement.

(vii) In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(d) Fees. A neutral shall disclose to the parties the fees that will be charged, if any, for the dispute

resolution services being provided.

(i) A neutral shall inform each party in a court-connected dispute resolution process in writing, prior to the start of the process, of (aa) the fees, if any, that will be charged for the process, (bb) if there will be a fee, whether it will be paid to the neutral, court, and/or the program, and (cc) whether the parties may apply for a fee-waiver or other reduction of fees.

(ii) If a fee is charged for the dispute resolution process, the neutral shall enter into a written agreement with the parties, before the dispute resolution process begins, stating the fees and time and manner of payment.

(iii) Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.

(iv) Neutrals shall not accept, provide, or promise a fee or other consideration for giving or receiving a referral of any matter.

(v) If the court has established fees for its dispute resolution services, no neutral shall request, solicit, receive, or accept any payment in any amount greater than the court-established fees when providing court-connected dispute resolution services.

(e) Conflict of Interest. A neutral shall disclose to all parties participating in the dispute resolution process all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of conflict. A neutral shall not serve as a neutral in a dispute resolution process after he or she knows of such a conflict, unless the parties, after being informed of the actual or potential conflict, give their consent and the neutral has determined that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral.

(i) As early as possible and throughout the dispute resolution process, the neutral shall disclose to all parties participating in the process, all actual or potential conflicts of interest, including but not limited to the following:

(aa) any known current or past personal or professional relationship with any of the parties or their attorneys;

(bb) any financial interest, direct or indirect in the subject matter of the dispute or a financial relationship (such as a business association or other financial relationship) with the parties, their attorneys, or immediate family member of any party or their attorney, to the dispute resolution proceeding; and

(cc) any other circumstances that could create an appearance of conflict of interest.

(ii) Where the neutral determines that the conflict is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral, the neutral shall withdraw from the process, even if the parties express no objection to the neutral continuing to provide services.

(iii) Where the neutral determines that the conflict is not significant, the neutral shall ask the parties

whether they wish the neutral to proceed. The neutral shall obtain consent from all parties before proceeding.

(iv) A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

(aa) A neutral shall not use the dispute resolution process to solicit, encourage or otherwise procure future service arrangements with any party.

(bb) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter related to the subject of the dispute resolution process.

(cc) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter unrelated to the subject of the dispute resolution process for a period of one year, unless the parties to the process consent to such action or representation.

(v) A neutral shall avoid conflicts of interest in recommending the services of other professionals.

(f) Responsibility to Non-Participating Parties. A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.

(i) If a neutral believes that the interests of parties not participating or represented in the process will be affected by actual or potential agreements, the neutral should ask the parties to consider the effects of including or not including the absent parties and/or their representatives in the process. This obligation is particularly important when the interests of children or other individuals who are not able to protect their own interests are involved.

(g) Advertising, Soliciting, or Other Communications by Neutrals. Neutrals shall be truthful in advertising, soliciting, or other communications regarding the provision of dispute resolution services.

(i) A neutral shall not make untruthful or exaggerated claims about the dispute resolution process, its costs and benefits, its outcomes, or the neutral's qualifications and abilities.

(ii) A neutral shall not make claims of specific results, benefits, outcomes, or promises which imply favor of one side over another.

(h) Confidentiality. A neutral shall maintain the confidentiality of all information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

(i) The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to: the identity of the parties; the nature and substance of the dispute; the neutral's impressions, opinions, and recommendations; notes made by the neutral; statements, documents or other physical evidence disclosed by any participant in the dispute resolution process; and the terms of any settlement, award, or other resolution of the dispute, unless disclosure is

required by law or court rule.

(ii) Confidentiality vis-á-vis nonparties. The neutral shall inform the participants in the dispute resolution process that he or she will not voluntarily disclose to any person not participating in the mediation any of the information obtained through the process, unless such disclosure is required by law.

(iii) Confidentiality within mediation. A neutral shall respect the confidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission from the party from whom the information was received.

(iv) Neutrals who are part of a court-connected dispute resolution program may, for purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential information does not extend to individuals outside their program.

(v) Neutrals may, with prior permission from the parties, use information disclosed by the parties in dispute resolution proceedings for research, training, or statistical purposes, provided the materials are adapted so as to remove any identifying information.

(i) Withdrawing from the Dispute Resolution Process. A neutral shall withdraw from the dispute resolution process if continuation of the process would violate any of the Ethical Standards, if the safety of any of the parties would be jeopardized, or if the neutral is unable to provide effective service.

(i) Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.

(ii) A neutral may withdraw from the dispute resolution process if the neutral believes that (aa) one or more of the parties is not acting in good faith; (bb) the parties' agreement would be illegal or involve the commission of a crime; (cc) continuing the dispute resolution process would give rise to an appearance of impropriety; (dd) in a process whose outcome depends upon the agreement of the parties, continuing with the process would cause severe harm to a non-participating party, or the public; and (ee) continuing discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.

HAZARDOUS WASTE FACILITY SITE SAFETY COUNCIL ARBITRATION

990 CMR 13.01

Current through December 2008

13.01: Timing

(1) Initiation of Arbitration. Arbitration proceedings shall be initiated:

(a) in the case of a host community, when the Council has declared that an impasse exists in negotiations between the developer and the local assessment committee; or

(b) in the case of an abutting community, when either the developer or an abutting community files a request for arbitration indicating dissatisfaction with the Council's determination of the compensation to be paid by the developer to the abutting community.

(2) Duration. Unless granted an extension of time by the Council, the arbitration panel or the single arbitrator shall determine within 45 days of appointment by the Council the terms and conditions of a siting agreement or the amount of compensation to be paid to an abutting community by the developer.

(3) Agreement to Terminate. If at any time during the arbitration proceeding the developer and the local assessment committee agree upon and submit a siting agreement to the Council, or the developer and the abutting community agree upon compensation to be paid the abutting community, the Council shall request that the arbitration be terminated, and upon such request the Chairman of the arbitration panel or the single arbitrator shall immediately terminate the proceeding.

13.02: Selection of Arbitrators

(1) Host Community. In the case where the Council has declared that an impasse exists in negotiations between the developer and the local assessment committee of a host community, arbitration shall be by single impartial arbitrator, jointly selected by the developer and the local assessment committee, if they so choose, or by majority vote of an arbitration panel comprised of three arbitrators, one selected by the developer, one selected by the local assessment committee and a third, impartial arbitrator, who shall act as chairman of the panel, jointly selected by the developer and the local assessment committee.

(2) Abutting Community. In the case where either the developer or an abutting community files a request for arbitration indicating dissatisfaction with the Council's determination as to the compensation to be paid by the developer to the abutting community, arbitration shall be by a single impartial arbitrator, jointly selected by the developer and the chief executive officer of the abutting community, if they so choose, or by majority vote of an arbitration panel comprised of three arbitrators, one selected by the developer, one selected by the chief executive officer of the abutting community and a third, impartial arbitrator, who shall act as chairman of the panel, jointly selected by the developer and the chief executive officer of the abutting community.

(3) Procedure. In either case, the Council shall provide both parties with a list of available arbitrators. If the parties do not agree on the arbitrator to be jointly selected, selection of that arbitrator shall be as follows:

(a) Each party shall eliminate any arbitrator from the list it finds clearly unacceptable, and rank the remaining arbitrators according to preference. The ranking given each arbitrator shall be compared and the arbitrator with the highest ranking by both parties shall serve as the jointly selected arbitrator.

(b) If an arbitration panel or single impartial arbitrator has not been selected within 30 days after arbitration proceedings have been initiated pursuant to 990 CMR 13.01(1), the Chairman shall appoint the single arbitrator or the arbitrators necessary to complete the three-person panel.

13.03: Compensation for the Arbitrator

The Council shall compensate an arbitrator for each day or part thereof of his services, as the Council shall determine. The Council shall also reimburse an arbitrator for all reasonable expenses actually and necessarily incurred in the performance of his official duties.

13.04: Conduct of Hearings

(1) Schedule. Upon selection, the arbitrator(s) shall schedule a prehearing conference and a formal hearing. The arbitrator(s) shall hold a prehearing conference with the parties or their counsel for clarification of the issues and stipulation of uncontested facts, so as to expedite the arbitration proceedings. The formal hearing and any subsequent hearings may be held when and as often as the arbitrator(s) deem(s) necessary, within the 45 day time period for arbitration.

(2) Ex Parte Communications. No party or other person directly or indirectly involved in arbitration shall submit to the arbitrator(s) any evidence, argument, analyses or advice, whether written or oral, regarding any matter at issue in the arbitration unless such submission is part of the record or made in the presence of all parties. This provision does not apply to consultation among arbitrators.

(3) Right to Attend. Members of the local assessment committee, the developer or his representatives, witnesses, legal counsel and technical experts for either party are entitled to attend hearings. The arbitrator or the chairman of the arbitration panel shall otherwise have the authority to determine the propriety of the attendance of any other person, and shall further have the authority to exclude any person whom he determines is disrupting the orderly process of the hearing.

13.05: Standards for Arbitration

The arbitrator(s) shall determine the terms, conditions and provisions of a siting agreement or the amount of compensation to be awarded to abutting communities. In reaching such determination the arbitrator(s) shall consider:

(1) the factual stipulations of the parties;

(2) any interests of the community, including:

(a) all potential adverse impacts to the health, safety, and social and economic security of the community;

(b) all potential adverse impacts to the environment and natural resources of the community;

(c) fiscal impacts, such as the effects of added service costs, financing costs for any needed capital improvements and demonstrable secondary costs;

(d) the impact on property values;

(e) the benefits to the community of the proposed project and of any compensation offered by the developer or requested by the community;

(3) any interests of the developer, including:

(a) the projected profitability of the facility;

(b) the cost of impact mitigation and redesign alternatives;

(c) the costs to the developer of any compensation offered by the developer or requested by the community;

(d) the financial risks and uncertainties borne by the developer;

(4) abutting community interests. In the case of arbitration involving a host community the arbitrator(s) shall also consider the impacts specified in 990 CMR 13.05(2) on abutting communities. In the case of arbitration involving an abutting community, the arbitrator shall consider the impacts specified in 990 CMR 13.05(2) on other abutting communities;

(5) all relevant information available to the arbitrator(s), which may include:

(a) the PPIR;

(b) studies produced under state technical assistance grants;

(c) reports submitted by the negotiating parties; and

(d) the draft license issued by the Department of Environmental Quality Engineering;
(6) past management and operational history of the developer.

13.06: Outcome of Arbitration

After the last arbitration hearing and pursuant to the standards set forth in 990 CMR 13.05, the single arbitrator or the chairman of the arbitration panel shall prepare a draft siting agreement or a draft determination of the compensation to be paid an abutting community by the developer. The draft shall be reviewed by the two other arbitrators in the case of a three person panel or by a single designee of each party in the case of a single arbitrator. After consideration of the comments made by the reviewing parties, the single arbitrator or the chairman of the arbitration panel shall prepare a final draft of the siting agreement or of the compensation to be paid and submit it to the Council.