NAM
NATIONAL ARBITRATION AND MEDIATION

JOIN US FOR A WEBINAR PRESENTED TO

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Inside the Mind of a Mediator: Avoiding Impasse and Maximizing Outcomes in Mediation

Presented by Richard P. Byrne, Esq.

Although mediation resolves most disputes, some mediations end in impasse. Such disappointments can usually be avoided and positive resolutions achieved when advocates are armed with knowledge of common mediation pitfalls and develop negotiation skills that can enhance mediation outcomes.

Learn how appropriate preparation, smart brief-craft and thoughtful strategies during the mediation session – focused on the purpose, logistics and goals for the session – cannot only reduce the potential for failure, but also maximize results.

EVENT DETAILS

DATE | TIME

Thursday, September 24, 2020

5:00 PM – 6:00 PM

To register for this webinar, simply click on the link below:

https://namadr.zoom.us/webinar/register/WN_ePjefW0RQOu9dCjdpP1VvA

For attorneys admitted in New York: The Defense Association of New York has been granted CLE accreditation by the New York Office of Court Administration.

Complimentary CLE – 1 Credit in Skills for both experienced and newly admitted attorneys. For New York CLE attendance verification purposes, any course codes announced during the program must be recorded on the affirmation form available on the CLE Board website at: https://ww2.nycourts.gov/sites/default/files/document/files/2018-03/affirmation_sample.pdf

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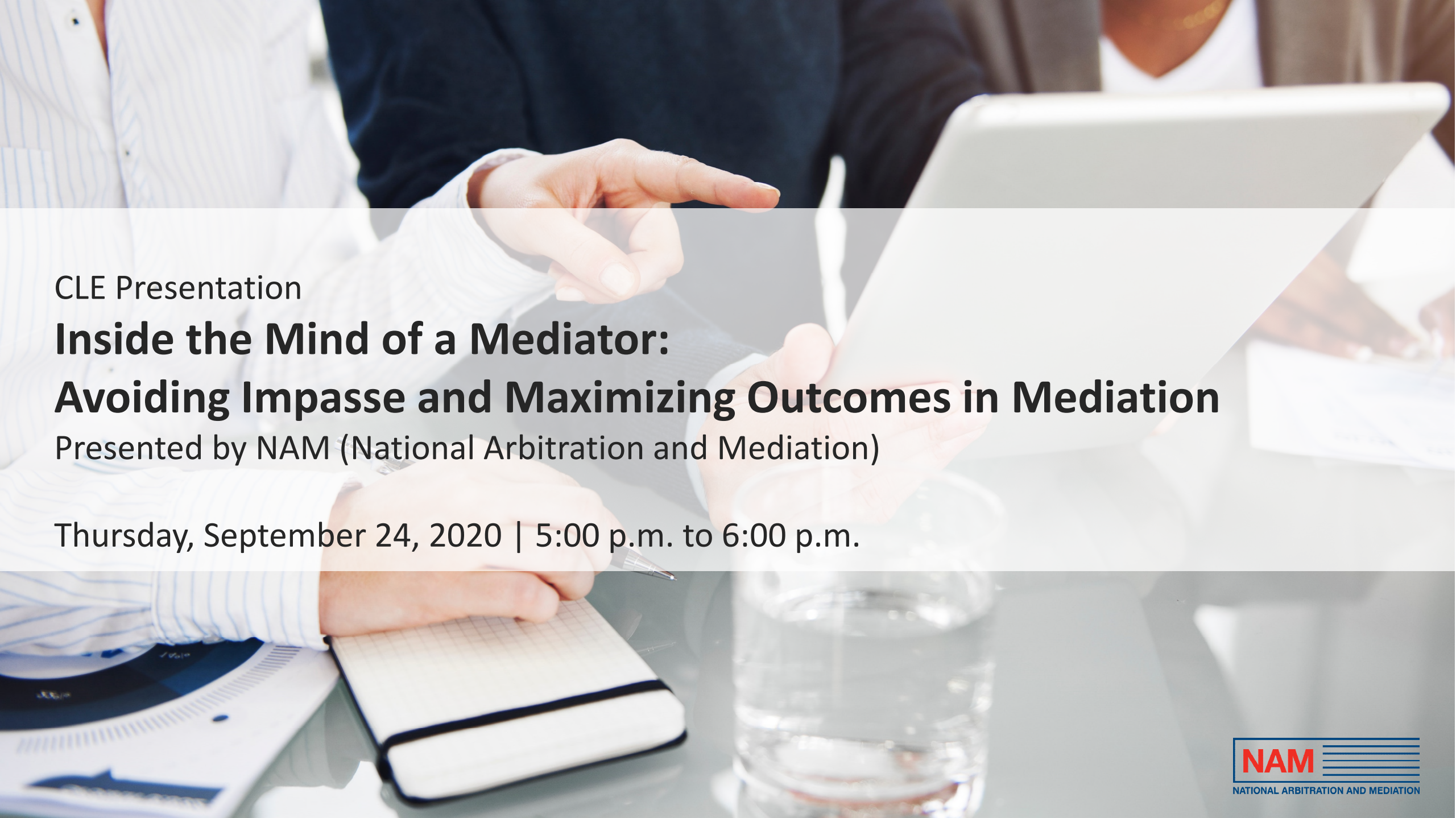

CLE Presentation

Inside the Mind of a Mediator: Avoiding Impasse and Maximizing Outcomes in Mediation

Presented by NAM (National Arbitration and Mediation)

Thursday, September 24, 2020 | 5:00 p.m. to 6:00 p.m.

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Today's Moderator

Richard P. Byrne, Esq.
Commercial Specialist
NAM (National Arbitration and Mediation)

Speak to Your Mediator Early and Often

- Many attorneys do not take advantage of speaking to the mediator in advance of the mediation.
- Topics can range from procedural to substantive overviews on the factual and legal issues of the case.
- It can be very valuable to preview these issues - it allows the mediator to digest and process information in advance.

Know Before You Go

Good Faith Disclosure Will Prevent the Mediation from Being Sabotaged Before Real Negotiations Begin

- A change in the demand or offer previously exchanged.
- New evidence that substantially strengthens a claim or a defense that will affect opposing counsel's evaluation of the same.
- Who will be in attendance at the mediation?
- Insurance coverage amounts and any issues that involve a reservation of rights, disclaimer or erosion of coverage.

Crafting the Mediation Brief

- ✓ Always submit a brief.
- ✓ Use the brief to educate the mediator and your adversary as to your position in advance of the Mediation.
- ✓ Use the brief to maximize your use of time and to avoid lengthy arguments during the joint session.
- ✓ Always exchange the brief with your adversary.
- ✓ Exclude from the brief any materials which you believe should be withheld for tactical advantage.

Crafting the Mediation Brief
(Continued)

- ✓ Submit an accurate, brief and clear summary of your position.
- ✓ Address the procedural status of the case, the basic facts and your arguments in support of your position inclusive of applicable law.
- ✓ Avoid redundancy – less is more.
- ✓ Attach exhibits which are critical to your case.
- ✓ Submit your brief well in advance.

Opening Statements – Don't Pass Up the Opportunity

- Some practitioners look to bypass opening statements – operating under the belief they have heard it all before.
- The bottom line: bypassing the opening statement solely to opposing counsel might be acceptable – but the mediator and the adversary's client need to be considered.
- Do not underestimate how ears less familiar with the granular details of the case might hear broader themes and issues.

Absence of Decision-Makers

- The lack of a living, breathing person to resolve the dispute is always problematic.
- Absentee decision-makers do not obviously participate in the negotiations in “real time,” nor can they appreciate the nuances of the situation as it is developing.
- The logistical hurdles and delays in communication serve only to frustrate matters and, “turn off” the other side.

Wearing Trial Blinders

- On the eve of trial, counsel may be in the “trial zone” – the zone in which a settlement may no longer be seen as the goal with the focus on prevailing at trial.
- When in “the zone,” both sets of counsel may have difficulty listening to critiques of their positions.
- Valid points conveyed may be met by immediate and defensive responses.
- The challenge: the mediator must find a means to remove the “trial blinders” in order to allow for meaningful discussions and effective negotiations.

Wearing Trial Blinders (continued)

- If the mediator cannot reach a breakthrough with trial counsel, they need to identify someone else at the table who is perhaps more objective.
- Focus and attention should be brought to that person with the hope that he or she will have influence on the balance of their team and its trial counsel behind closed doors.

Acknowledging Weakness in Mediation

- Human nature is such that none of us will readily acknowledge our weaknesses.
- The trait is especially amplified in attorneys advancing the cause of a client.
- The irony of this approach is that the weakest points in a client's matter can then absorb an undue amount of time and energy, leading to a hardening of positions on both sides.

Acknowledging Weakness in Mediation (continued)

- The privacy of mediation allows litigants the opportunity and freedom to strategically retreat from weak positions and establish themselves on higher ground.
- Acknowledging the shortfalls in one's case at mediation, even tacitly, builds credibility.
- The bottom line: counsel is encouraged to demonstrate the strength of their client's positions by acknowledging their weaknesses – it will lead to a more focused, productive, and ultimately successful mediation.

Overcoming an Impasse – Emotion and Anxiety

- Mediation is often marked with emotion and anxiety for clients, even if hard-shelled professionals.
- The dispute may be long running, contentious and expensive – clients may enter a mediation tightly wound and with a short fuse.
- The mediator needs to keep matters in balance and, slowly, allow pressure to be released.
- Addressing the psychological component of a mediation is often as critical as the substantive issues – failure to do so can lead to an impasse.

Overcoming an Impasse – Emotion and Anxiety (continued)

- Clients (and their counsel) need the opportunity to vent and complain.
- If the ability to "get things off their chest" is not allowed or blocked by the mediator – catharsis cannot begin.
- If that occurs – the mediation may begin to head off the track from its inception and may not be able to recover.
- Equilibrium needs to be maintained while pressure is relieved so that parties can get down to business and engage in negotiations.

Overcoming an Impasse – Hardball Negotiation Tactics

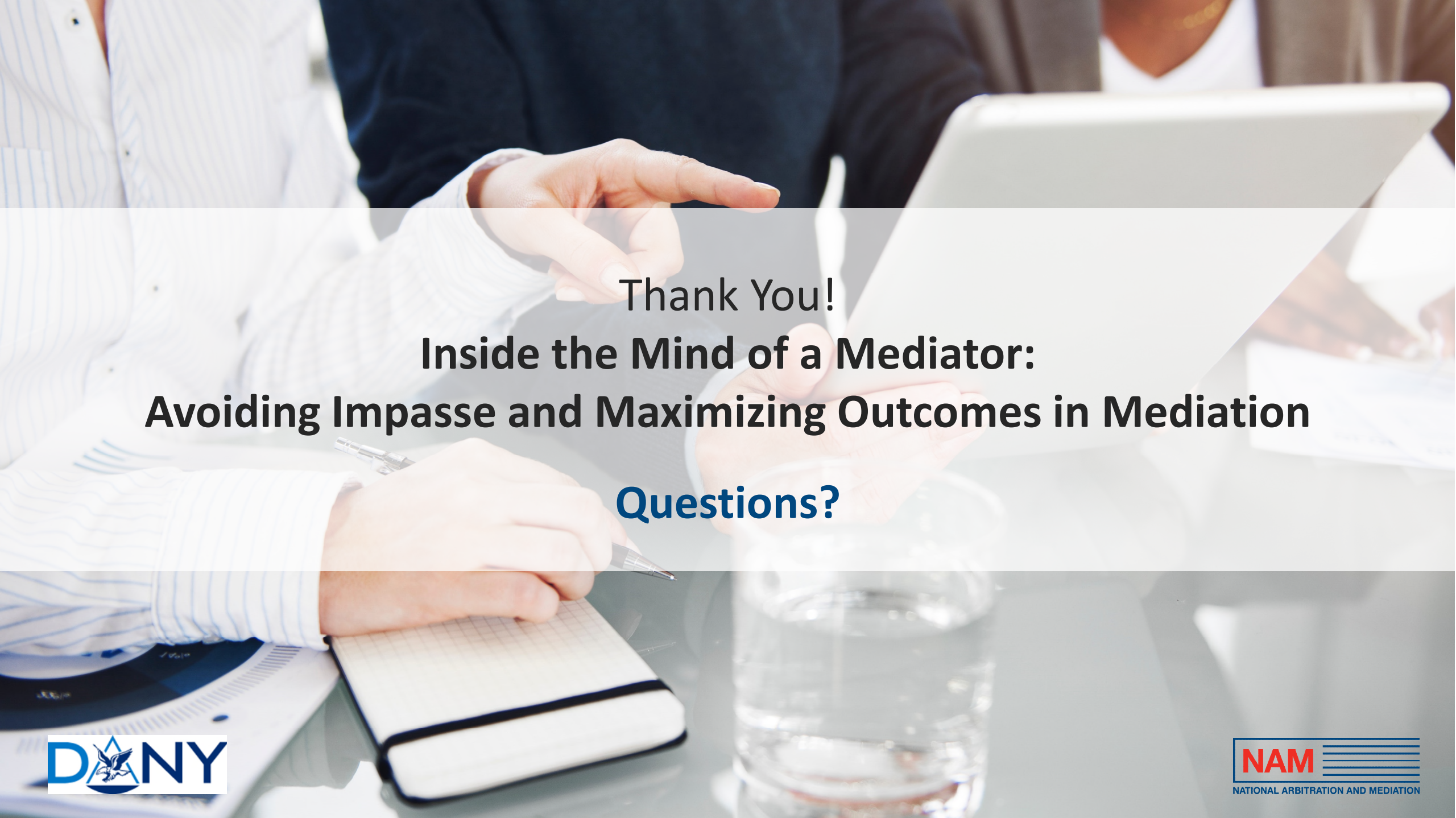
- Addressing unreasonably high demands and low offers.
- Employing conditional demands and offers.
- Mediator proposals.

Ethical Issues and Concerns

- Advocacy versus misrepresentation.
- Disclosing your authority and asking the mediator to “save you something” off that figure.
- Discovering a party has committed an error or under-valued their client’s case.
- Respecting the confidentiality of communications with the mediator.

Last Minute Surprises

- Oftentimes, parties come to a mediation session completely focused on “big-picture” issues.
- Significant progress may be seen during the mediation session. Parties believe that a deal has been struck and a settlement in principle has been achieved.
- Until one side interposes a condition which to them might have been an afterthought – scuttling the settlement.
- The path to avoiding this encounter – counsel should place any such conditions on the table at the start of the session.
- Some practitioners are hesitant to announce such conditions for fear it may be misperceived as weakness.
- To alleviate these concerns – the mediator can be employed to keep both sides on equal footing by inquiring at a joint session if the parties have any required terms or conditions.



Thank You!

Inside the Mind of a Mediator:
Avoiding Impasse and Maximizing Outcomes in Mediation

Questions?

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HEARING OFFICER RESUME

RICHARD P. BYRNE, ESQ.

Commercial Specialist

Richard P. Byrne, Esq. has been serving as a Mediator since Mediation first came on the horizon as a cost-effective means of resolving litigation and other disputes. He is well-respected professionally and has a reputation for bringing the most contentious disputes to full and final resolution. A strong proponent of Alternative Dispute Resolution (ADR) and a Certified Mediator with the United States District Court, Richard P. Byrne brings more than 25 years of ADR experience to NAM's New York Metro panel of neutrals.

He has successfully mediated issues in a wide variety of specialty areas, including commercial disputes, employment discrimination claims, employment contract disputes, wage and hour/FLSA claims, construction matters, complex personal injury and property damage claims, insurance and reinsurance matters, risk transfer disputes and life, health and disability claims. His legal career of over 35 years brings an added dimension of expertise to the matters over which he presides.

In 2013, Mr. Byrne was selected by Kenneth R. Feinberg, the former Administrator of the September 11th Victim Compensation Fund, to assist in the mediation and resolution of Hurricane Sandy claims. He was also asked to join a sub-panel for the United States District Court to help resolve a backload of over 1,400 Hurricane Sandy lawsuits. Mr. Byrne is a member of the Mediation panels for both the United States District Court and the United States Bankruptcy Court for the Eastern District of New York. In 2016, Mr. Byrne was appointed to serve on the Advisory Council to the ADR Department of the United States District Court for the Eastern District of New York.

In 2020, for the sixth year in a row, Mr. Byrne was named one of the Top Three Mediators in the United States by The National Law Journal Best Of Survey. He was ranked a Top Ten Mediator for the sixth consecutive year by the 2019 New York Law Journal Best Of Survey and he was voted a Top Three Mediator by the 2018 Corporate Counsel Best Of Survey. Mr. Byrne was also named a National Law Journal 2018 Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide.

Mr. Byrne has been awarded an A-V rating by Martindale-Hubbell, the highest rating available, based on its peer review process and has consistently been recognized by his peers as a New York Metro Super Lawyer.

Richard Byrne is available to mediate cases throughout the United States.

AREAS of EXPERIENCE

- Commercial
- Construction
- Life, Health and Disability Claims
- Employment Disputes
  - Discrimination
  - Employment Contracts
  - Harassment
  - Hostile Work Environment
  - Wage and Hours/ FLSA
  - Wrongful Termination
- Insurance/Reinsurance
- Labor Law
- Personal Injury/Negligence
- Product Liability
- Property Damage
- Risk Transfer

LECTURES and PUBLICATIONS

- Speaker, Webinar: *Reduce Time & Cost: Crafting Effective Arbitration Clauses*, presented to Clear Law Institute, 2020
- Author, *Back to the Future – Where Does Mediation Go From Here?*, Law.com, 2020
- Panel Member, Webinar: *The Means and Methods of Resolving Coverage Disputes in Mediation*, presented to the New York State Academy of Trial Lawyers, 2020
- Panel Member, Webinar: *Resolving Coverage Disputes in Mediation*, presented to the New York State Academy of Trial Lawyers
- CCBJ Interview: *Coming Face-To-Face with Virtual Alternative Dispute Resolution*, Corporate Counsel Business Journal (CCBJ), 2020
- Speaker, Webinar: *An Introduction to the Use of Video Conferencing for Arbitration and Mediation and Its Benefits*, NAM (National Arbitration and Mediation), 2020
- Author, *The Virtues of Virtual ADR*, New York Law Journal, 2020
- Author, *Conditional and Alternative Demands/Offers Can Often Make the Difference in Mediation*, New York Law Journal, 2020
- Speaker, *Crafting Arbitration Clauses: How Specificity Reduces Dispute Time and Costs*, presented to Pryor Cashman, LLP, 2019
- Co-Author, The Benefits of Early Mediation: The Path Least Taken Requires Commitment, (with Hon. Peter B. Skelos), New York Law Journal ADR Special Report, 2019
- Author, *The Role of Humor in Mediation – No Laughing Matter!*, New York Law Journal, 2019
- Speaker, *Mediating Construction Defect Claims*, presented to Vela Insurance Services, 2019
- Speaker/Panel Member, *Inside the Mind of a Mediator: Avoiding Impasse and Maximizing Outcomes in Mediation*, Association of Corporate Counsel – New York City Chapter, Signature CLE, 2019
- Speaker, *Mediating Construction Defect Claims and Delay Claims*, presented to Troutman Sanders LLP, 2019
- Speaker/Panel Member, *In Mediation, Your Gotta Have (Good) Faith*, ACC-NYC Ethics Marathon, 2019
- Author, *Speak to Your Mediator – Early and Often!*, New York Law Journal, 2019
- Speaker/*Panel Member, Inside the Mind of a Mediator: Avoiding Impasse and Maximizing Outcomes in Mediation*, presented to Pryor Cashman, 2019
- Speaker, *Why Mediations Fail and How To Achieve Better Results*, Webcast presented in cooperation with Law.com, 2018
- Speaker, *How to Achieve Resolution and Avoid Pitfalls Commonly Faced During Mediation*, presented to the Counsel on Litigation Management (CLM), 2018
- Speaker/Panel Member, *The Future of Arbitration: Is It So Bright You Have to Wear Shades?*, American Bar Association (ABA) Annual Meeting, 2018
- Speaker/Panel Member, *The Art of Mediation, Best Practices and Tips from the Bench and Bar*, presented to Pryor Cashman, 2018
- Co-author, *Dispute Resolution of Construction and Labor Law Claims* chapter published in the American Bar Association's (ABA) treatise, *Resolving Insurance Claims Disputes Before Trial*, 2018
- Author, *The Challenges in Mediating Multi-Defendant Cases*, New York Law Journal, 2018
- Speaker/Panel Member, *Arbitration of Commercial Disputes: Hot Topics and Tips*, presented to Blank Rome LLP, 2018
- Speaker/Panel Member, *Mediating Construction Defect Claims as Catharsis – Legal and Therapeutic*, American Bar Association (ABA) Section of Dispute Resolution Spring Conference, Washington, D.C., 2018
- Author, *Why Mediations Fail*, *New York Law Journal Litigation Special Report*, 2017
- Speaker/Panel Member, *The Art of Arbitration: Best Practices and Tips from The Arbitrators*, presented to the Queens County Bar Association, 2017
- Author, *Taking Control of ESI in Arbitration*, *National Law Journal*, 2017
- Speaker, *Construction Defect Claims: A Mediator's Perspective*, presented to the Chartered Property Casualty Underwriters (CPCU), Atlanta I-Day, 2017

- Speaker/Panel Member, *Arbitration of Commercial Disputes: Hot Topics and Tips From 3 Perspectives*, presented to Reed Smith LLP, 2017
- Speaker/Panel Member, *Best Practices for Mediator Construction Defect Claims*, CLE presented by NAM and The New York Law Journal, 2017
- Speaker/Panel Member, *Best Practices and Tips for Mediation: 4 Perspectives*, presented to Goldberg Segalla LLP, 2017
- Moderator/Panel Member, *Arbitration of Commercial Disputes: Best Practices and Tips from the Arbitrators*, presented to Kelley Drye & Warren, LLP, 2017
- Author, *Demonstrating Strength by Acknowledging Weakness in Mediation*, New York Law Journal, 2017
- Speaker/Panel Member, *Mediating Construction Defect Claims*, presented to Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana LLP, 2016
- Author, *Construction Defect Claims – A Mediator's Perspective*, *National Law Journal, Corporate Counsel*, 2016
- Author, *Mediator Settlement Recommendations - Be Careful What You Ask For!*, *National Law Journal, Corporate Counsel*, 2016
- Speaker/Panel Member, *Mediation Pointers For Claims Professionals*, presented to the Chartered Property Casualty Underwriters (CPCU), Atlanta I-Day, 2016
- Author, *Don't Fear The Expert at Mediation*, *National Law Journal and Corporate Counsel*, 2016
- Author, *Opening Statements In Mediation - Don't Pass Up The Opportunity*, *National Law Journal, Corporate Counsel*, 2016
- Author, *Mediation as Catharsis- Legal and Therapeutic, National Law Journal, Corporate Counsel*, 2016
- Author, *Identifying Conditions to Settlement Prior to the Commencement of Negotiations*, *National Law Journal, Corporate Counsel*, 2016
- Author, *Preparation, Preparation, Preparation - Investing in the Mediation*, *National Law Journal, Corporate Counsel*, 2016
- Author, *The Pre-Mediation Mediation - When, Where, and Why*, *National Law Journal, Corporate Counsel*, 2016
- Speaker/Panel Member, *Best Practices and Tips on Mediation and Arbitration from a Neutral*, 2015
- Speaker/Panel Member, *When and How to Settle…or Fight*, sponsored by the New York State Trial Lawyers Association, 2015
- Author, *Removing the Trial Blinders to Achieve Effective Mediation*, *National Law Journal, Corporate Counsel*, 2015
- Speaker/Panel Member, *Introduction to Alternative Dispute Resolution*, sponsored by the Brooklyn Bar Association, 2015
- Speaker/Panel Member, *Mediation as a Tool to Resolving Complex E-Discovery Disputes*, sponsored by NAM (National Arbitration and Mediation) and the New York Law Journal, 2015
- Author, *ESI, E-Discovery Plans and the Mediator - Facing the Future of Electronic Discovery*, *New York Law Journal*, 2015
- Speaker/Panel Member, *Risk Transfer*, 2015
- Speaker/Panel Member, *An Expedited Way to Resolve Coverage Disputes: The Use of Mandatory ADR Clauses in Insurance Policies*, sponsored by the Claims and Litigation Management Alliance (CLM), Insurance Bad Faith and Coverage Conference, 2014
- Author, *Priority of Insurance Coverage – Who Holds the Trump Card?, New York Law Journal*, 2014
- Author, *Pre-Claim Liability Transfer - Avoiding the Pound of the Cure*, *New York Law Journal*, 2014
- Speaker/Panel Member, "Achieving Optimal Risk Mitigation Through Effective Risk Transfer", sponsored by NAM (National Arbitration and Mediation) and the New York Law Journal, 2014

HONORS and AWARDS

- Ranked a Top Three Mediator in the United States by the 2020 National Law Journal Best Of Survey
- New York Law Journal Best Of Survey 2019, Top Ten - Best Individual Mediator Category
- Ranked a Top Three Mediator in the United States by the 2019 National Law Journal Best Of Survey
- Ranked a Top Three Mediator by In-House Corporate Counsel, 2018 Corporate Counsel Best Of Survey

- Ranked a Top Three Mediator in the United States by the 2018 National Law Journal Reader Rankings Survey
- Ranked a Top Three Mediator in the United States by the 2017 National Law Journal Reader Rankings Survey
- Ranked a Top Three Mediator in the United States by the 2016 National Law Journal Reader Rankings Survey
- Ranked a Top Three Mediator in the United States by the 2015 National Law Journal Reader Rankings Survey
- National Law Journal, *2018 Alternative Dispute Resolution Champion*
- National Law Journal, *2017 Alternative Dispute Resolution Champion*
- National Law Journal, *2016 Alternative Dispute Resolution Champion*
- New York Law Journal Reader Rankings Survey 2018, Top Three - Best Individual Mediator Category
- New York Law Journal Reader Rankings Survey 2017, Top Ten - Best Individual Mediator Category
- New York Law Journal Reader Rankings Survey 2016, Top Ten - Best Individual Mediator Category
- New York Law Journal Reader Rankings Survey 2015, Top Ten - Best Individual Mediator Category
- New York Law Journal Reader Rankings Survey 2014, Top Ten - Best Individual Mediator Category
- 2015 Legal Leaders in Construction Law, American Lawyer Media and Martindale-Hubbell
- AV Rating, Martindale-Hubbell Peer Review Ratings System
- Mediator of the Year Award, Institute of Jewish Humanities 2014
- New York Metro Super Lawyer Peer Rating
- Member and Editor of the Law Review, New York Law School
- Member and Editor of the Journal of International and Comparative Law, New York Law School

LEGAL EXPERIENCE

- Co-Managing Partner, L'Abbate, Balkan, Colavita & Contini, L.L.P., 2002
- Senior Partner, L'Abbate, Balkan, Colavita & Contini, L.L.P., 1999
- Partner, L'Abbate, Balkan, Colavita & Contini, L.L.P., 1990
- Associate, L'Abbate, Balkan, Colavita & Contini, L.L.P., 1985
- Associate, Wilson, Elser, Moskowitz, Edelman & Dicker, 1982-1985

PROFESSIONAL LICENSES and ADMISSIONS

- United States District Court, Western District of New York, 2015
- United States District Court, Northern District of New York, 2009
- United States District Court, Eastern District of New York, 1989
- United States District Court, Southern District of New York, 1984
- Courts of the State of New York, 1983
- FLSA Mediation Training, Eastern District of New York
- United States District Court, Eastern District of New York, Certified Mediator
- United States District Court, Eastern District of New York, Mediation Panel
- United States Bankruptcy Court, Eastern District of New York, Mediation Panel

PROFESSIONAL AFFILIATIONS and ASSOCIATIONS

- Counsel on Litigation Management, ADR subcommittee, Member
- Nassau County Bar Association, ADR subcommittee, Member

EDUCATION

- New York Law School, J.D., *magna cum laude*, 1982
- Saint Peter's College, B.A., History, *magna cum laude*, 1979

OPENING STATEMENTS IN MEDIATION – DON'T PASS UP THE OPPORTUNITY

By: Richard P. Byrne, Esq.

May, 2016

Some practitioners look to bypass opening statements in a Mediation session – operating under the belief that they have heard it all before and, therefore, the parties are better served by getting "right down to business." And while this Mediator may agree that 3 ½ hour PowerPoint presentations can dull the senses and delay the start of an effective Mediation, the rejection of opening statements altogether is far less productive.

To begin, while most (if not all) of what is being brought forth in an opening statement may not be news to the litigators, that is certainly not the case for the Mediator or even the client representatives. This Mediator will attest that even after reading the most detailed pre-mediation submissions with voluminous accompanying exhibits, there are undoubtedly one or more issues which shine through via the opening statements. Indeed, it is not uncommon for even the other side's counsel to indicate in the initial private caucus that he or she heard a point in the opening statement for the first time. Perhaps it is a matter of emphasis or simply the distillation of claims or defenses in order to make a concise and impactful opening statement, but therein lies the value.

As lawyers, we tend to think we know it all – that we have explored every nook and cranny of our case and that of our adversary to the point where there can be nothing new and there are no surprises. But that conceit ignores how themes, testimony and documents might be perceived by the Mediator and/or the client representative sitting across the table.

Recently, I conducted a Mediation session where long-disclosed documents, painstakingly vetted and analyzed beforehand, were addressed in an opening statement – not in the manner they were being digested by the sophisticated business folks and attorneys – but in the fashion that might be understood and processed by laypeople on a jury. It was rather remarkable and, in fact, caught the other side off-guard. It clearly had not been part of the attorneys' dialogue prior to the Mediation and was not brought forth in the written submissions. Evidently, it began to evolve in the preparation for the Mediation itself and, frankly, it had the flavor of a work in progress. Nonetheless, the nascent approach played a role in the negotiations which followed because it foreshadowed what the future might hold if the case were to be tried.

Even in a less dramatic setting, the opening statement allows one to convey intangibles – beyond the factual/legal arguments – directly to the opposing client representative. Why would one want to forego that opportunity? It is the time to communicate preparedness and conviction, tempered

by a willingness to maintain an open mind and to seek common ground. And although admittedly superficial, do not discount the value of making a positive impression on your adversary's client from first appearances and initial exchanges.

The bottom line is that those who believe that parties should fast forward through opening statements at Mediation might be right – if they were being presented solely to opposing counsel. However, that is not the audience with whom they should be concerned. Opening statements are for the Mediator and the adversary's client. Do not underestimate how ears less familiar with the granular details of the case might hear broader themes and issues – to which the attorneys themselves may have grown tone deaf through the course of the litigation process.

Richard P. Byrne, Esq., is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. In 2019, for the fifth year in a row, he was voted a Top 3 Mediator in the country by the National Law Journal Reader Rankings Survey and was also voted a Top 3 Mediator by the 2018 Corporate Counsel Best of Survey. Also, in 2018, for the third straight year, he was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide. Further, he was ranked a Top 10 Mediator in New York State by the 2018 New York Law Journal Reader Rankings Survey for the fifth year in a row.

For any questions or comments, please contact Jacqueline I. Silvey, Esq. / NAM General Counsel, via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.

MEDIATION AS CATHARSIS – LEGAL AND THERAPEUTIC

By: Richard P. Byrne, Esq.

February, 2016

The approach of Mediation is often marked with the advent of emotion for clients, even if they are hard-shelled professionals. The dispute in question may be long-running, contentious, expensive and even personal, and now it is building to a crescendo. Practitioners, in their advocacy mode, may even stoke the clients' anxiety levels in advance of the Mediation session as preparation is underway. Thus, clients may enter a Mediation tightly wound and with fuses lit.

Here, a Mediator – true to his or her title and role – needs to keep matters in balance and, slowly, as the session proceeds, allow the pressure to be released. Addressing this psychological component of a Mediation is often as critical as the substantive issues and can be accomplished by the employment of two devices.

First, the clients (and, frankly, sometimes their counsel), need the opportunity to vent – to complain about the miserable adversaries on the other side, the havoc which they have wrought in the pursuit of their nonsensical claims/defenses, and the injustice of it all. If that ability to "get things off their chest" is not allowed – or, worse, is blocked by the Mediator – catharsis cannot begin and the Mediator may find him or herself perceived as disinterested or ineffective because "he/she is not listening to me." If that occurs, the Mediation may begin to head off the track from its inception and not be able to recover. That is not to say, however, that the clients should be permitted to stay upon their soap box indefinitely and hijack the session. Equilibrium needs to be maintained while pressure is relieved so that the parties can get down to business and engage in negotiations driven less by emotion and more by substance.

Second, the concept of control needs to be emphasized to the clients; specifically, that they should be the ultimate decision-makers on the resolution of their dispute, and not leave it to strangers in the form of a judge or jury. Having the clients actively participate in bringing the dispute in for a "controlled landing" via negotiation is as equally important to the catharsis as the opportunity to vent and "be heard."

As a means to visualizing resolution, this Mediator often suggests that the client project: "What might it be like to wake up tomorrow morning and have this dispute behind you?" A bit of armchair psychology? No doubt. But it begins to bring matters full circle from the start of the Mediation session when the air was initially charged with emotional tension and the prospects of resolution were beyond the horizon. Mediation can thus serve the therapeutic as well as legal

needs of the clients. That cathartic factor should be recognized and embraced in order to bring the parties to closure.

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DEMONSTRATING STRENGTH BY ACKNOWLEDGING WEAKNESS IN MEDIATION

By: Richard P. Byrne, Esq.

January 2017

Generally speaking, human nature is such that none of us will readily acknowledge our weaknesses, particularly in a public setting. This trait is especially pronounced and amplified in attorneys advancing the cause of a client, who often feel compelled and duty-bound to hold tight-fisted to every issue, refusing to release even an inch of ground until ordered to do so by a court. And, even then, at least for appearances sake, an attorney will file an appeal or, minimally, continue to voice objections as to how the judge "got it wrong." The irony in this approach is that the weakest points in a client's matter can then be caused to absorb an undue amount of time and energy, leading to a hardening of positions on both sides.

The privacy of Mediation allows litigants the opportunity and freedom to strategically retreat from weak positions and establish themselves on higher ground from which their more meaningful claims or defenses can be pressed. The sophisticated practitioner, for example, will make note in his or her opening statement that: "For today's purposes – and for today's purposes only – we are not going to contest liability." In this fashion, the defense can then attempt to focus the discussions at Mediation solely on damages – where its strengths lay, rather than allow the plaintiff to "beat the drum" on liability and, therefore, detract from the defense as a whole. In this same vein, a plaintiff's attorney may come to a Mediation session and announce that he or she is only going to focus on their top 3 claims for purposes of the proceedings. Again, this approach serves to defuse debate on any defenses the other side may have on the plaintiff's weaker claims which, in turn, would be employed as a diversionary tactic and a means to "taint" the plaintiff's overall case.

Most importantly, acknowledging the shortfalls in one's case at Mediation, even tacitly, builds credibility. One can emphasize the strengths in their position by acknowledging their weaknesses without fear of ultimate admission or compromise because it is done within the safety of the Mediation process. The message being communicated is that the practitioner has evaluated his or her case realistically and has come to the Mediation with confidence, the intention to negotiate in good faith and, in short, to "get the job done." Adversaries are encouraged accordingly to respond in kind and to forego more pedestrian arguments, leading to meaningful and productive discussions. The opposite proposition, though, is equally true. Those practitioners who refuse to acknowledge even the slightest flaws in their most tangential points can appear unprepared and/or arrogant, since they are unable or unwilling to address the issues in an educated and

balanced manner. While the goal might be to appear tough and fearless, the reality is that the contrary impression is conveyed – the practitioner appears weak and out of touch, lacking an understanding and appreciation of their strongest claims or defenses.

The bottom line is that this Mediator strongly encourages counsel to demonstrate the strengths of their client's positions by acknowledging their weaknesses. It is an approach that will lead to a more focused, productive and, ultimately, successful Mediation.

Richard P. Byrne, Esq., is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. In 2019, for the fifth year in a row, he was voted a Top 3 Mediator in the country by the National Law Journal Reader Rankings Survey and was also voted a Top 3 Mediator by the 2018 Corporate Counsel Best of Survey. Also, in 2018, for the third straight year, he was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide. Further, he was ranked a Top 10 Mediator in New York State by the 2018 New York Law Journal Reader Rankings Survey for the fifth year in a row.

For any questions or comments, please contact Jacqueline I. Silvey, Esq. / NAM General Counsel, via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.

REMOVING THE TRIAL BLINDERS TO ACHIEVE AN EFFECTIVE MEDIATION

By: Richard P. Byrne, Esq.

November, 2015

Resolving a dispute through Mediation on the eve of trial presents a unique challenge to the Mediator because the parties' counsel are in the "trial zone" – the zone in which settlement no longer is seen as the goal and, instead, the focus is solely on prevailing at trial. When in "the zone", both sets of counsel may have difficulty listening to critiques of their respective client's positions. Valid points conveyed may be met by an immediate, snappy and defensive response – without acknowledgment that the point may have legitimacy. Might it be posturing? No doubt. But we know that at some moment close to the commencement of trial, litigators do transition over into this zone – as they must – in order to be prepared to advocate their client's case to verdict.

The challenge to the Mediator is to find a means by which the "trial blinders" can be removed in order to allow for meaningful discussions and effective negotiations. Some suggest having a "negotiating" or settlement attorney attend in lieu of trial counsel. This Mediator does not agree with that approach and believes it is absolutely necessary to have trial counsel present. Even if they are fully immersed in "trial mode", they, nonetheless, remain the number one resource for the Mediator to utilize in securing factual and legal ammunition to use with the other side. The question is not whether trial counsel should participate but, rather, what is the best method to employ them while encouraging a lifting of the blinders sufficient to allow for a productive Mediation?

In seeking to achieve that balance, the first goal is to secure an admission from counsel that they might possibly, just possibly, have trial blinders on in the first instance. From there, the incremental goal is to press for recognition that, again – just possibly, there is one key issue on which the scales might tip to the other side. The Mediator can then build upon those concessions in an effort to bring trial counsel back to the mindset in which they may have been just a few months earlier, when the issues were not so rigidly viewed and a few inches of territory might have possibly been conceded in the context of a discussion focused on compromise.

Tied to this, at times, is a need to defuse the animosity that may have built up between the parties and/or their attorneys over an extended period of time – recognizing that it may be about to hit a climatic crescendo where one side at trial is going to be deemed "The Winner" and the other "The Loser." Or there may be a need to have the clients understand that the money which has been incurred in the litigation and, particularly, in recent trial preparations, has not been in vain. It is important to point out to the parties and their counsel that value has been received and that their negotiation posture has been advanced by the investment. Otherwise, resolution on the

verge of trial may be viewed as capitulation for which counsel or the client's decision-maker may be questioned and criticized after the fact.

If, despite best efforts, the Mediator cannot reach a breakthrough with trial counsel, they alternatively need to identify through the caucus process someone else at the table who is one-step removed and, therefore, perhaps a bit more objective. Focus and attention should be brought to that person with the intention and hope that he or she will then have adequate influence on the balance of their team and its trial counsel behind closed doors. It becomes telling for the Mediator, of course, when that person begins to take on a more active role and evolves to serve as the spokesperson for the group. It is a clear sign of progress and bodes well for continued negotiations.

No matter how it is achieved, though, a Mediation can only proceed effectively if the trial blinders are lifted and can only succeed if, in the end, a resolution can be crafted which avoids the need for the blinders to again be placed on

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For any questions or comments, please contact Jacqueline I. Silvey, Esq. / NAM General Counsel, via email at jsilvey@namadr.com or direct dial telephone at 516-941-3228.

STANDARD RULES AND PROCEDURES

(Effective 4/15/20)

NAM (National Arbitration and Mediation)
990 Stewart Avenue, First Floor
Garden City, NY 11530
Phone: 1-800-358-2550
Fax: 516-794-8971
www.namadr.com

RULE NO. 1: APPLICATION OF RULES

All rules set forth herein are NAM's STANDARD RULES AND PROCEDURES ("NAM. R.P.") and shall govern non-binding Mediations and binding Arbitrations of disputes that are administered by NAM by the parties' mutual agreement to use these rules. These rules shall serve to secure the most expeditious, private and inexpensive determination of every case, whether in law or equity.

The parties are free, however, to enter into a written agreement, at any time, to amend or modify any of NAM's rules for their case.

RULE NO. 2: PRIVACY

All documents and materials submitted to or filed with NAM shall remain private and not subject to public scrutiny. By the parties' agreement (as further set forth in NAM. R.P.4), all communications, whether oral or written, and all testimony will remain confidential, and inadmissible in any other judicial or alternative dispute resolution proceeding, with the exception of an appeal if the parties mutually agree in writing to an appeal process. Such appeal would then be subject to NAM's Appellate Dispute Resolution Rules and Procedures. There shall be no photographing or recording of any kind, including but not limited to video or audio recording, of any conference or hearing, or part thereof, absent all parties' agreement.

RULE NO. 3: EXCLUSION OF LIABILITY

A. Neither NAM, nor its Officers, Directors, employees, representatives, Arbitrators or Mediators shall be liable for any act or omission in connection with any Arbitration or Mediation conducted under these Rules or any other rules and procedures mutually agreed upon by the parties.

B. Neither NAM, nor its Officers, Directors, employees, representatives, Arbitrators or Mediators is a necessary party in any further alternative dispute resolution or judicial proceeding and may not be called to testify at any subsequent proceeding.

C. The parties agree not to make any claims against NAM for damage, loss or injury and hereby waive any cause of action or other remedy against NAM, its employees, Arbitrators/Mediators, agents, etc.

RULE NO. 4: INITIATION OF ACTION

A. Parties initiate a case by submitting a jointly-executed submission form to NAM or by requesting NAM to invite another party to join in a submission to Arbitration or Mediation. The submission form will include: names, addresses and telephone numbers of each party to the case, internal filing numbers (for corporate parties), whether Mediation (settlement conference) or Arbitration is selected, the nature of the claims, and an agreement by the parties that:

   i. settlement offers will not be admissible in any public adjudication;
   ii. in the case of Mediations, that the Mediator will not be called as a witness in any subsequent litigation;
   iii. in the case of Arbitrations, that the parties will be bound by the Arbitrator's decision (subject to any High/Low limitations agreed upon by the parties);

iv. that all communications made during any Arbitration or Mediation will be confidential and inadmissible in any other judicial or alternative resolution proceeding and will be not be disclosed in any other context, and;
v. that parties will destroy all documents received from any other party during the Arbitration or Mediation (except for decisions and settlement agreements) within ten days of the action's resolution.

B. Submission forms may be either mailed or telecopied to NAM.

C. An action is officially commenced upon NAM's receipt of a completed and mutually executed submission form.

D. After agreeing to the selection of a Hearing Officer or Officers, the parties will negotiate and submit to NAM a Mediation or Arbitration schedule, together with payment of each party's administrative fee.

E. For Mediation, the parties' schedule will be limited to a series of three preferred conference dates. For Arbitrations, the parties will provide a completed NAM schedule containing: deadlines for limited discovery (if discovery is required and subject to NAM. R.P.11 and 12), parameters for maximum and minimum awards (if High/Low Arbitration is selected) and any advance amendments or modifications to NAM's RULES AND PROCEDURES.

F. NAM will process Arbitration schedules in accordance with the availability of its Hearing Officers.

G. Parties may mutually amend Arbitration schedules and/or schedule discovery conferences, where discovery issues arise in a case and need to be resolved by the presiding Hearing Officers.

RULE NO. 5: FILING AND TIME PERIODS

Within 24 hours of filing, and in accordance with NAM. R.P.13, the filing party shall send copies of all filed papers to all other appearing parties. As further described in NAM. R.P.2, all such papers shall remain private and confidential and not subject to examination by non-parties.

For purposes of NAM. R.P., "days" are defined as calendar days. That is, official holidays and non-business days are included in the calculation of the time period. However, if the last day of a time period is a holiday or non-business day, the time period shall expire on the next business day.

RULE NO. 6: NATURE OF HEARING OFFICERS

A. In general, Arbitrations and Mediations are conducted by one Hearing Officer of the parties' choosing. For Arbitrations, the parties may elect to have additional Arbitrators to judge their dispute.

B. Each Hearing Officer shall be independent and impartial.

C. Each Hearing Officer shall be bound by NAM's RULES.

RULE NO. 7: LEGAL REPRESENTATION

Any party submitting to dispute resolution pursuant to NAM's RULES AND PROCEDURES may be represented by a member of any federal or state bar.

RULE NO. 8: NATURE OF MEDIATION PROCEEDING

Any Hearing Officer selected shall serve as a neutral Mediator for such conferences. Mediation sessions are scheduled for one or more hours and are only binding where an agreement is reached. Documentary evidence may be used by the parties and submitted to the Hearing Officer to facilitate negotiations.

RULE NO. 9: NATURE OF ARBITRATION PROCEEDING

Arbitration proceedings are binding. Parties have an opportunity to present their case in a manner similar to a non-jury trial in the public court system. Hearings are usually scheduled for one hour or more and allow for limited live testimony. The parties may elect to have an accelerated hearing which does not permit hearing live testimony by non-party witnesses. In general, accelerated hearings are concluded within a matter of hours.

RULE NO. 10: INTERIM ORDER

At the request of either party, the Arbitrator(s) may issue an Interim Order regarding the subject matter of the dispute. The Arbitrator(s) may exercise his/her discretionary powers and order the apportionment of costs associated with applications for Interim Orders.

RULE NO. 11: ARBITRATION PRE-HEARING PROCEDURE

A. At the parties' request, the assigned Hearing Officer shall schedule a conference to facilitate and expedite the disposition of the action. Examples of matters which may be considered at such conferences are: the possibility of consensual admissions of fact; limitations for the number of witnesses; and scheduling of discovery.

B. At least ten (10) days before the hearing date, the parties shall submit a pre-hearing memorandum including the following elements:

   i. A statement of facts;
   ii. a statement of each claim being asserted (including relevant statutes and case law); and
   iii. a statement of the evidence to be presented, including live witness testimony (and the amount of time anticipated for such testimony).

C. In the event the parties have agreed and stipulated to an Arbitration that is based on written submissions, a date will be agreed upon and assigned for the submission of all papers to NAM and all involved parties. The parties will then have seven (7) days to rebut any information in their adversary's submissions, which they will send to NAM and all involved parties. At the conclusion of the seventh day, NAM will forward all submissions and rebuttals to the agreed upon Hearing Officer.

RULE NO. 12: LIMITED DISCOVERY

NAM's Arbitrations do not entail comprehensive discovery. Unlimited discovery would be contrary to NAM's goal of efficient and economical resolutions. The parties shall have the right to take depositions and to request documents on an expedited and limited basis subject to the approval of the Hearing Officer.

RULE NO. 13: CONDUCT OF ARBITRATION HEARINGS

A. Hearing Officer's Powers

Assigned Hearing Officers shall have the following powers: to rule upon the admissibility of evidence; to accept as evidence deposition testimony; to require the submission of briefs; and to make rulings on motions.

B. Attendance

Except by the parties' agreement, only the parties and/or their attorneys, agents and/or witnesses shall be permitted to attend or participate in conferences or hearings.

C. Evidence

i. Except as otherwise provided by this rule or agreed to by the parties, the Federal Rules of Evidence shall be followed at all hearings.
ii. At least ten (10) days prior to the hearing, together with the pre-hearing memorandum, each party shall send to all other parties a list of documents to be submitted and witnesses to be presented at the time of the hearing, together with a copy of any listed document not previously provided. Any document not sent in accordance with NAM. R.P.5 or any witness not so identified, except those required in rebuttal to any claim or defense, may be excluded at the time of hearing.
iii. Subject to the Hearing Officer's approval, and upon prior notice to other parties, the following original documents or copies of original documents shall be accepted into evidence: records maintained in the ordinary course of business; bills; written estimates of value, damage to, cost of repair of, or loss of property; and medical reports, statements, affidavits.
iv. At least five (5) days prior to the hearing, any party may deliver to the party proposing the report, record or document, a written demand that a witness or custodian be produced in person to testify at the hearing concerning such item and be subject to cross-examination. If there is an objection to such demand, the assigned Hearing Officer shall be the final Arbitrator of that dispute.

RULE NO. 14: NON-PARTICIPATING OR DEFAULTING PARTIES

A. If a matter is called for a hearing and a party fails to appear, the Hearing Officer has broad discretion to either conduct the Arbitration in that party's absence and render a decision, or to grant a continuance.

B. The Hearing Officer shall not render a decision based solely on the failure of the defaulting party to comply in the above circumstances. The Hearing Officer shall require the submitting or attending party to present such evidence as the Hearing Officer deems necessary to render a decision.

RULE NO. 15: DISMISSAL OF CASE

Any action may be dismissed, without prejudice, before final adjudication, by filing a stipulation of dismissal signed by all parties.

RULE NO. 16: ARBITRATION DECISIONS

A. All Arbitration decisions issued by NAM shall be in writing and signed by the Hearing Officer(s) issuing the same. The decision of the Hearing Officer(s) shall be final and binding (with limited exception per Rule No. 16 D below) and a judgment may be entered for its enforcement in a public court pursuant to the rules of the relevant jurisdiction for enforcement or arbitral decisions. No application shall be made to NAM or the Hearing Officer, absent all parties' consent, for reconsideration or review of an Arbitration decision, except regarding mathematical errors.

B. Arbitration decisions shall be rendered within a reasonable time of the closing of the record and shall, providing all parties have paid all requisite fees to NAM, be promptly mailed to each party or their attorney.

C. All Arbitration decisions, whether monetary, injunctive or declaratory, are subject to the rules of the relevant jurisdiction for enforcement of Arbitration decisions.

D. If the parties mutually agree in writing to provide for an appeal process with respect to the arbitration, such appeal would then be subject to NAM's Appellate Dispute Resolution Rules and Procedures (available at www.namadr.com). For more information, please contact NAM at 800-358-2550 Appeals Department.

COMPREHENSIVE DISPUTE RESOLUTION RULES AND PROCEDURES

(Effective 9/18/19)

NAM (National Arbitration & Mediation)
990 Stewart Avenue, First Floor
Garden City, NY 11530
Phone: 1-800-358-2550
Fax: 516-794-8971
www.namadr.com

SCOPE OF RULES

RULE NO. 1: APPLICATION OF RULES

All rules set forth herein are National Arbitration & Mediation ("NAM")'s Comprehensive Dispute Resolution Rules and Procedures (hereinafter "NAM's Rules") and shall govern non-binding Mediations and binding Arbitrations of disputes that are administered by NAM by the parties mutual agreement to use these rules or pursuant to any written agreement between the parties.

NAM may administer a case pursuant to these Rules where a written agreement between the parties designates NAM as the Administrator for the arbitration and/or mediation. In addition, in the event the written agreement between the parties designates an administrator who is unable or unwilling to administer the case, NAM may administer the case if (i) the parties consent to same or (ii) after the Claimant serves a Demand for Arbitration/Request for Mediation upon the Respondent and files the case with NAM, the Respondent does not object to NAM's administration of the case within 10 days of service of the Demand for Arbitration/Request for Mediation. In any event, it is within NAM's sole discretion to accept or reject any case for administration.

These rules are designed to secure the most expeditious, private and inexpensive resolution and determination of every case, whether in law or equity.

The parties are free, however, to enter into a mutually executed written agreement at any time to amend or modify any of NAM's Comprehensive Rules for the purpose of their case.

These Rules are also to be used when contractual dispute resolution provisions/programs have been established whereby both entities have agreed to utilize Arbitration and/or Mediation to resolve such contractual disputes. When such a provision/program exists, there may be instances in which the Rules and Procedures of the provision/program as written and as agreed upon by the entities differ from some of the Rules and Procedures as contained herein. In these instances, NAM's Rules and Procedures contained herein may be modified to conform to that of the program as established and mutually agreed upon by the entities. Such modifications would be subject to NAM's review and acceptance.

RULE NO. 2: DEFINITIONS

For purposes of these Rules, the following definitions apply:

A. **Arbitration Agreement** – any written agreement between the parties to resolve a dispute, claim or controversy through binding Arbitration.

B. **Arbitration Hearing** – any proceeding in which disputes, claims or controversies are resolved, including:

   i. **In-Person/Oral Arbitration Hearing** – any proceeding in which an Arbitrator entertains oral testimony or arguments and reviews documents and evidence to render an award or judgment. The hearing may be conducted in-person or via telephone.

ii. **Arbitration based on Written Submissions** – any proceeding in which the Arbitrator reviews documents, evidence or property and bases his or her decision solely on the documentary evidence presented to him or her.

C. **Arbitration Notice** – a written notice which the Claimant files and serves upon the Respondent to initiate the claim and request Arbitration. Also referred to as a Demand For Arbitration.

D. **Arbitrator** – an individual conducting Arbitration Hearings.

E. **Award** – any binding award issued by an Arbitrator establishing the final rights and obligations of the parties. A judgment may be entered for enforcement in a public court pursuant to the rules of the relevant jurisdiction for enforcement of arbitral awards.

F. **Claim** – any claim seeking a remedy or relief submitted by one party against other parties including an initial claim, counter or cross claim.

G. **Claimant** – any party initiating an Arbitration or Mediation and making a Claim under these Rules and Procedures.

H. **Consumer** – an individual who purchases, seeks or acquires good or services for personal, family or household use.

I. **Consumer Cases** – disputes which arise pursuant to a pre-dispute arbitration agreement in which the business has a standardized, systematic application of arbitration clauses with customers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause. Cases arising from commercial transactions between a lender and commercial borrowers or a company and commercial customers or other financial services such as investment and real estate transactions are NOT considered to be Consumer Cases. Also, if the agreement to arbitrate was negotiated by the individual consumer and the company, any disputes arising there from are NOT considered to be Consumer Cases. The NAM Administrator, in his/her sole discretion, will determine whether a party is to be classified as a consumer.

J. **Deposition** – testimony under oath, especially a statement by a witness that is written down or recorded for use in legal proceedings at a later time.

K. **Discovery** – the compulsory disclosure of pertinent facts or documents to the opposing party in a legal proceeding.

L. **Document** – any writing or data compilation containing evidential information such as facts, opinions, statements, reasons, descriptions, legal arguments or any other information in any form such as an agreement, record, correspondence, tape, disk, request, notice, affidavit, memorandum or other writing. Documents shall include, but not be limited to, all written notifications and communications, pleadings, reports, photographs, bills, receipts, invoices, records maintained in the ordinary course of business, medical reports, contracts and any other written documents.

M. **Fee Schedule** – the then current Fee Schedule in effect at the time of the filing of the claim which is subject to NAM's Comprehensive Dispute Resolution Rules and Procedures and is made a part of these Rules and incorporated by reference herein.

N. **Comprehensive Dispute Resolution Rules and Procedures** – the rules and procedures administered by NAM to assist parties to resolve disputes that may arise.

O. **Interim Order** – any order providing temporary or preliminary relief pending a final Award.

P. **Interrogatory** – a formal or written question asked to a witness, usually requiring an answer under oath.

Q. **Mediation** – a non-binding settlement conference. Mediation sessions are only binding where an agreement is reached. Documentary evidence may be used by the parties and submitted to the Hearing Officer to facilitate negotiations.

R. **Mediator** – an individual conducting a Mediation Conference.

S. **Mediation Agreement** – any written agreement between the parties to resolve a dispute, claim or controversy through non-binding Mediation.

T. **Mediation Conference** – a non-binding settlement proceeding in which each party is given an opportunity to describe the facts of the case and explain its position to a Mediator who in turn meets privately with each side to evaluate their respective cases and to discuss potential settlement figures with a view toward guiding the parties to the settlement of their dispute. The hearing may be conducted in-person or via telephone.

U. **Mediation Notice** – a written notice which the Claimant files and serves upon the Respondent to initiate the claim and request Mediation. Also referred to as a Request For Mediation.

V. **NAM** – the administrator of the Comprehensive Dispute Resolution Rules and Procedures, headquartered at 990 Stewart Avenue, First Floor, Garden City, NY 11530; telephone # is 800-358-2550.

W. **NAM Administrator** – the individual or individuals appointed by NAM to administer NAM's Comprehensive Dispute Resolution Rules and Procedures. Unless specifically directed to do so by the NAM Administrator or the Arbitrator(s)/Mediator, all communications among the parties and NAM, whether verbal or written, should be addressed to the NAM Administrator at 990 Stewart Avenue, First Floor, Garden City, NY 11530 and not directly to the Arbitrator(s)/Mediator. The NAM Administrator may, in his or her discretion, appoint a NAM employee or employees to assist in the administration of a claim submitted to NAM.

X. **Order** – any order issued by an Arbitrator establishing specific rights and obligations of the parties.

Y. **Party** – any individual or entity who makes a claim or against whom a claim is made, including Claimants and Respondents.

Z. **Reply** – a written response by the Respondent to an Arbitration Notice filed by the Claimant.

AA. **Representative** – any individual, including an attorney, who represents a party in an Arbitration or Mediation.

BB. **Respondent** – any party against whom a claim is made.

CC. **Sanctions** – may include the dismissal of the claim or counter-claim, preclusion of evidence, admission of facts, payment of fees, costs or attorney's fees or the granting of an award. The Arbitrator may impose sanctions against a party, a representative or both.

DD. **Service** – the methods of delivery specified in Rule No. 13 by which a party may deliver an Arbitration Notice or Reply, or any other documents or written communications to another party or to the NAM Administrator.

EE. **Signature** or **Signed** – a mark or symbol intended as an attestation, produced by reliable means, intended as a signature.

FF. **Witness** – an individual who may or may not be a party, who will appear at an Arbitration hearing and give sworn testimony regarding the dispute, claim or controversy.

GG. **Written Submissions** – the legal memorandum, position paper, case law, deposition transcript, witness statements, expert reports, photographs, bills, receipts, invoices, or any other written documentary evidence submitted by a party in support of its position.

RULE NO. 3: PRIVACY

All documents and materials submitted to or filed with NAM shall remain private and are not subject to public scrutiny. All communications, whether oral or written, and all testimony at an Arbitration shall remain confidential and inadmissible in any other judicial or alternative dispute resolution proceeding, with the exception of an appeal if the parties mutually agree in writing to an appeal process. Such appeal would then be subject to NAM's Appellate Dispute Resolution Rules and Procedures. With respect to Mediations, the NAM Administrator, the Mediator and the parties shall keep all matters relating to the Mediation proceeding, including the terms of the settlement agreement, confidential unless the parties mutually agree otherwise or disclosure is necessary for the purposes of implementation and enforcement.

RULE NO. 4: EXCLUSION OF LIABILITY

A. Neither NAM, nor its Officers, Directors, employees, representatives, Arbitrators or Mediators shall be liable for any act or omission in connection with any Arbitration or Mediation conducted under these Rules or any other rules and procedures mutually agreed upon by the parties.

B. Neither NAM, nor its Officers, Directors, employees, representatives, Arbitrators or Mediators is a necessary party in any further alternative dispute resolution or judicial proceeding and may not be called to testify at any subsequent proceeding.

C. The parties agree not to make any claims against NAM for damage, loss or injury and hereby waive any cause of action or other remedy against NAM, its employees, Arbitrators/Mediators, agents, etc.

RULE NO. 5: REPRESENTATION

Parties may act on their own behalf or may be represented by a person with authorization to act on their behalf. The name, address and contact information of such persons shall be communicated to NAM and all other parties at least thirty (30) days prior to the scheduled hearing or conference.

RULE NO. 6: ADJOURNMENTS FOR ARBITRATIONS OR MEDIATIONS

The Arbitrator(s)/Mediator may, in his/her discretion, grant a party's request for postponement of a scheduled In-Person/Oral Arbitration Hearing, a scheduled Mediation conference or the date fixed for the receipt of documentary evidence for an Arbitration based on Written Submissions.

RULE NO. 7: FEES

The parties shall pay those fees set forth in the then current Fee Schedule in effect at the time of the filing of the claim which is subject to NAM's Comprehensive Dispute Resolution Rules and Procedures which is incorporated by reference herein and made part of these Rules. In the event that the administration of a matter extends beyond a one-year period, NAM may, in its sole discretion, charge the most current fees set forth in the most recent Fee Schedule for additional time expended on the matter.

NAM may, in its sole discretion, modify the fees for specific case types or programs and may refund or waive all or a portion of the fees in cases of extreme economic hardship.

RULE NO. 8: MODIFICATION OF RULES

NAM reserves the right to modify these Rules at any time without prior written notice to the parties. If the parties have entered into an Arbitration or Mediation Agreement, the version of the Rules in effect at the time the claim is filed with NAM will govern the Arbitration or Mediation, unless the parties mutually agree to another version. If the parties have not entered into an Arbitration or Mediation Agreement, the version of the Rules in effect at the time the parties file the joint submission with NAM will govern the proceedings. The parties are free at any time to enter into a written agreement to amend or modify any of NAM's Rules for the purpose of their case. However, NAM's Fee Schedule is not subject to such modification or amendment except in the sole discretion of the NAM Administrator.

RULE NO. 9: ENFORCEABILITY OF RULES

If the provisions of these Rules are held invalid or unenforceable by a court of law, the parties have not waived any of their rights, privileges or remedies to submit their claims, counter-claims and cross-claims to the applicable court of law or to avail themselves of any other legal rights, privileges or remedies.

COMMENCEMENT OF CLAIM

To initiate an Arbitration, please refer to Rule No. 10 through Rule No. 36.

To initiate a Mediation, please refer to Rule No. 37 through Rule No. 53.

ARBITRATIONS

RULE NO. 10: INITIATION OF ARBITRATION

In the case of Arbitration, Parties shall initiate Arbitration by one of the following methods:

A. The parties may send a jointly executed submission form to NAM at 990 Stewart Avenue, First Floor, Garden City, NY 11530 (hereinafter "NAM's headquarters"). The submission form should include the names, addresses, telephone and fax numbers of each party to the case, internal filing or claim numbers (for corporate entities), a brief description of the nature of the claim, the amount in controversy, the remedy sought, the number of Arbitrator(s) agreed upon by the parties and a copy of the contract or agreement, if any, upon which the joint submission is based; or

B. If the parties have not filed a jointly executed submission form but the parties previously have agreed in a written contract to use Arbitration to resolve disputes, and per the contract, NAM would be an eligible provider of such services:

i. The initiating party (hereinafter the "Claimant") shall:

a. File a written notice of its intention to Arbitrate (hereinafter "Demand for Arbitration") by forwarding the fully executed Demand for Arbitration to the Respondent. The Demand for Arbitration shall set forth the names, addresses, telephone and fax numbers of each party to the case, internal filing or claim numbers (for corporate entities), a brief description of the nature of the claim, the amount in controversy and the remedy sought.

b. The Demand for Arbitration must state, in part, that if the Respondent fails to respond in writing within 30 days of Service, the Arbitrator(s) may enter an award against the Respondent. In his/her sole discretion, the NAM Administrator may extend this time limit.

c. In order for the claim to proceed to Arbitration, the following must be sent to the NAM Administrator at the address listed in Rule No. 10(A) above:

- a copy of the written contract which states that Arbitration through NAM can be used to resolve the dispute;
- proof of service of the Demand for Arbitration to the Respondent; and
- an original and two (2) copies of the Demand for Arbitration and any accompanying paperwork.

C. The parties shall request either an In-Person/Oral Arbitration Hearing or an Arbitration based on Written Submissions. To the extent that all of the parties do not agree, and the underlying written agreement providing for arbitration of the matter (if applicable) is silent as to whether the Arbitration is to be conducted based on Written Submissions or at an In-Person/Oral Arbitration Hearing, then an In-Person/Oral Arbitration Hearing shall be conducted. To the extent that a party requests an Arbitration based on Written Submissions and the other party (ies) does (do) not

respond within the time frame specified by NAM's Rules for submitting a reply, the type of arbitration to be conducted will be in accordance with the underlying written agreement providing for arbitration of the matter (if applicable), if specified. If not specified by the underlying written agreement (that is, the agreement is silent on this issue), then the matter will be conducted based on Written Submissions.

RULE NO. 11: RESPONSE AND COUNTERCLAIM

A. The Respondent shall file a Response to the Demand for Arbitration (hereinafter "Response") at NAM's headquarters within 30 days of service of the Demand for Arbitration. The Response shall include a brief statement of the basis for Respondent's defenses to the claim including any counter or cross claims.

B. Respondent shall also serve its Response upon the Claimant within 30 days of service of the Demand for Arbitration. Such service must be completed pursuant to Rule No. 13 below.

C. Any party that receives a counter or cross claim may file and serve a Response to such counter and cross claim within 10 days of service of the counter or cross claim in the Response.

D. If any party fails to respond to a Demand for Arbitration or counter or cross claim, that party will be deemed to have denied all claims, counter and cross claims asserted against him/her, although the party has thereby waived his/her right to assert other claims, including counter and cross claims, at the Arbitration by failing to respond.

E. Amendments or additions to claims and counter and cross claims must be made upon mutual agreement of the parties or application to the Arbitrator(s), upon notice to the other party and will be permitted only upon a showing of good cause and no prejudice to the other party. The other party shall have an opportunity to oppose the application for such amendment or addition. However, the Arbitrator(s) shall make the final decision regarding amendments or additions to claims and counter and cross claims.

Rule No. 12: Emergency Relief

A. In the event a party is in need of emergency relief prior to the appointment of an Arbitrator for a particular matter, the requesting party shall, in writing, notify NAM and all other parties to the matter of the relief being requested, the reason why the relief is being sought on an expedited basis, and why the requesting party is entitled to such relief (the "Request"). The Request may be sent to NAM and the other parties via e-mail, facsimile, overnight delivery or personal delivery. Proof of service on all other parties shall be included with the Request sent to NAM. If there are parties who were not notified, an explanation of the reason why they could not be notified, and the efforts made to notify such parties shall also be included.

B. Upon receipt of the Request, NAM shall promptly appoint one (1) Emergency Arbitrator to rule on the Request. NAM will attempt to appoint the Emergency Arbitrator within 1 business day of receipt of the Request. The Emergency Arbitrator shall promptly disclose any issue that might affect his/her ability to be impartial or independent based upon the information disclosed in the Request.

C. Any challenge to the appointment of the Emergency Arbitrator shall be made within 1 business day of NAM's notification to the parties of the appointment of the Emergency Arbitrator and the Emergency Arbitrator's disclosures, if any. NAM shall decide any such challenge, which decision will be final.

D. The Emergency Arbitrator shall, within 2 business days after his/her appointment, or as soon thereafter as possible, establish a schedule for consideration of The Request. The schedule shall provide all parties with reasonable opportunity to be heard which may include the submission of written position papers, scheduling of telephone conference calls, videoconferences and/or in-person hearings/ oral argument.

E. The requesting party should be able to demonstrate the following: (i) entitlement to the relief requested and (ii) that immediate and irreparable loss or damage will result unless the emergency relief as requested is granted.

F. The Emergency Arbitrator shall render his/her decision and the reasons therefore. The Emergency Arbitrator shall have the same level of authority and power as that of the appointed Arbitrator pursuant to the rules herein, in order to resolve all matters with respect to the Request.

G. Any party seeking to modify the Emergency Arbitrator's decision may only do so if the modification is based upon a change in circumstances. Any such application shall be made to the Emergency Arbitrator unless an Arbitrator(s) has been appointed for the matter, in which case, any request related to the relief sought shall be determined by the appointed Arbitrator(s). Once an Arbitrator is appointed, the Emergency Arbitrator shall have no further power to act unless the parties agree otherwise, in writing.

H. The Emergency Arbitrator shall have the discretion to condition any interim award of emergency relief on the provision of adequate security by the requesting party.

I. A party's request for expedited relief to a judicial authority shall not be deemed incompatible with this rule or with the agreement to arbitrate or any waiver of the right to arbitrate.

J. The requesting party shall bear the costs associated with the Request and such costs shall be paid by that party to NAM. The Emergency Arbitrator may address the apportionment of such costs (if any) between the parties. However, such determination will be subject to the decision of the appointed Arbitrator(s) of the apportionment of final costs between the parties, if any.

RULE NO. 13: SERVICE OF DOCUMENTS; TIME LIMITS

A. At least ten (10) days before the hearing date, the parties shall submit a pre-hearing memorandum including the following elements: (a) a statement of facts; (b) a statement of each claim being asserted (including relevant statutes and case law) and (c) a statement of the evidence to be presented, including live witness testimony (and the amount of time anticipated for such testimony). At least ten (10) days before the hearing date, together with the pre-hearing memorandum, each party shall send a list of documents to be submitted and witnesses to be presented at the time of the hearing, together with a copy of any listed document. Any document not sent in accordance with this Rule No. 13 or any witness not so identified, except those required in rebuttal to any claim or

defense, may be excluded at the time of the hearing. Each party shall send the pre-hearing memorandum and all documents and lists of documents, etc., to all other parties and to the NAM Administrator. However, the NAM Administrator may elect to have the parties send such information directly to the Arbitrator(s) (in lieu of having the information sent to the NAM Administrator) by notifying the parties accordingly.

B. At least five (5) days prior to the hearing, any party may deliver to the party proposing the report, record or document, a written demand that a witness or custodian be produced in person to testify at the hearing concerning such item and be subject to cross-examination. If there is an objection to such demand, the Arbitrator shall resolve the matter as he/she sees fit under the circumstances.

C. Service of documents may be completed by any one of the following methods: delivery by messenger service, overnight delivery service by a nationally recognized courier company or by certified mail. The party must obtain a record of the sending thereof. Service by any of the aforementioned means is considered effective upon the date of deposit of the document. Documents shall be served to the last known address of the party or its representative for whom same are intended.

D. In addition to the methods of service provided for in Rule No. 13(C), the NAM Administrator and the Arbitrator may also communicate with the parties and/or each other, and/or serve any document, by electronic fax transmission (fax), electronic mail (email) and U.S. mail.

E. The time periods fixed under NAM's Rules shall begin to run on the next day after service is effected by one of the methods described in Rule No. 13 (C). Official holidays and non-business days are included in the calculation of the time period. However, if the last day of a time period is a holiday or non-business day in the country where the responding party is located, the time period shall expire on the next business day.

F. The Arbitrator may require the parties to provide proof of service of the Arbitration Notice and Reply and/or proof of prior notice of any claim, remedy, counter or cross claim or affirmative defenses prior to or at the Arbitration. The Arbitrator may, in the absence of proof of service and/or prior notice to the other parties, preclude any party from asserting any claim, remedy, counter or cross claim or affirmative defenses at the Arbitration. The parties may agree, however, that the Arbitrator should consider such claim, remedy, counter or cross claim or affirmative defenses despite the lack of proof of service or lack of prior notice.

RULE NO. 14: COMMUNICATION BETWEEN PARTIES AND ARBITRATOR(S)

No party shall communicate directly with the Arbitrator(s) regarding any issue related to the Arbitration, until such time as the NAM Administrator or the Arbitrator(s) permits such direct communication. Until that time, all communications with the Arbitrator(s) must be directed to the NAM Administrator at NAM's headquarters at 990 Stewart Avenue, First Floor, Garden City, NY 11021; telephone # is 800-358-2550. Any necessary communication should be in plain written language, including but not limited to, a request for a conference, objection to a discovery request or question regarding the Arbitration hearing itself. The NAM Administrator will contact the Arbitrator as soon as practicable and inform the Arbitrator about the party's request to communicate. The Arbitrator shall have the authority and discretion to take any action the Arbitrator deems appropriate under the circumstances.

RULE NO. 15: LOCATION OF ARBITRATION

Subject to the provisions of the underlying contract/agreement, if applicable, or unless agreed upon in writing by the parties, the Arbitrator(s) or the NAM Administrator (if such decision is needed prior to the appointment of the Arbitrator(s)) shall determine the actual location of the hearing. The Arbitrator(s) may travel to any place necessary in order to conduct hearings, receive witness testimony, and inspect goods, property or documents. The out-of-pocket cost for such travel shall be borne by the parties.

RULE NO. 16: LANGUAGE OF THE ARBITRATION PROCESS

A. Unless the parties have agreed otherwise, the Arbitration shall be conducted in English. If a party requests a language other than English and the other party objects to such a request, the Arbitrator(s) shall decide the language(s) of the Arbitration. The Arbitrator(s) shall consider the language of the contract and any other matter deemed appropriate. In the event any translation, interpreting or other services are requested as a result of a hearing which is to be held in a language other than English, expenses for such services will be borne by the party which requests them.

B. In cases where there is a non-participating or defaulting party, the Arbitration proceeding shall be conducted in the language as agreed to by the participating parties, subject to the approval by the Arbitrator(s) or the NAM Administrator (if the Arbitrator(s) has yet to be appointed). The non-participating or defaulting party shall have no cause for complaint if communications to and from NAM and the Arbitration proceedings are conducted in a language approved by the Arbitrator(s) or the NAM Administrator.

C. In the event that the parties previously agreed in writing that the Arbitration proceedings shall be conducted in more than one language, NAM shall administer the Arbitration proceedings in the agreed-upon languages, unless the parties agree subsequently in writing to the contrary or the Arbitrator(s) orders otherwise.

D. If any document is presented in a language other than the language(s) agreed to by the parties or directed by the Arbitrator and no translation of such document is submitted by the party relying upon the document, the Arbitrator(s) or NAM (if the Arbitrator(s) has not been appointed) may order that party to submit a translation in a language to be determined by the Arbitrator(s) or NAM.

E. A party to the Arbitration proceeding may request translation of documents or interpreters at any stage of the process. The requesting party shall bear the costs of the translation or interpreters.

RULE NO. 17: APPLICABLE RULES OF LAW

The Arbitrator(s) shall have broad discretion to rule upon all arbitrable issues under the applicable substantive law. In all cases, the Arbitrator(s) shall consider the provisions of the underlying contract/agreement, if applicable.

RULE NO. 18: DISCOVERY PROCEDURE

A. The parties shall conduct discovery on a voluntary basis, the procedure of which shall be agreed to by the parties. Failing such agreement, the Arbitrator(s) shall have the power to order such discovery, by way of document production, interrogatory, deposition, or otherwise, as the Arbitrator(s) considers necessary for a full and fair exploration of the issues in dispute.

B. When deciding upon the nature and extent of discovery, the Arbitrator(s) shall take into account the following factors:

i. The nature of the claim and counter-claim;
ii. The expedited nature of the Arbitration process;
iii. Relevancy of the discovery sought by a party and
iv. The cost of discovery must be commensurate with the amount of the claim and the request must not be unduly burdensome and expensive on the parties.

RULE NO. 19: INTERIM ORDER

At the request of either party, the Arbitrator(s) may issue an Interim Order regarding the subject matter of the dispute. The Arbitrator(s) may exercise his/her discretionary powers and order the apportionment of costs associated with applications for Interim Orders.

RULE NO. 20: NUMBER OF ARBITRATOR(S)

Subject to the provisions of the underlying contract/agreement, if applicable, or unless mutually agreed upon by all parties, one Arbitrator shall resolve all matters in which the Claimant seeks $1 million or less. In all other matters, including those matters in which non-monetary relief is sought, the NAM Administrator shall have the sole discretion to determine whether a matter should be heard by one (1) or three (3) Arbitrator(s).

RULE NO. 21: PAYMENTS/DEPOSITS AS TO COSTS

A. In accordance with the NAM fee schedule, fees are due and payable by the Claimant when a Demand for Arbitration is filed and by the Respondent when a Demand for Arbitration is responded to. In any event, all such fees must be paid before a hearing is scheduled.

B. To the extent that additional Arbitrator time is required beyond that which was originally anticipated or if other circumstances arise whereby additional fees are incurred, NAM may direct the parties to make one or several advance, interim or final payments for the costs associated with the Arbitration process. Such deposits shall be made to NAM. The Arbitrator(s) shall not proceed with the Arbitration until receiving confirmation that all outstanding payments have been made to NAM by the parties.

C. In the event that a party fails or refuses to provide any deposit as directed by NAM, NAM may direct the other party or parties to effect a substitute payment to allow the Arbitration to proceed

(subject to any Award for costs). In such circumstances, the party paying the substitute payment may be entitled to recover that amount from the defaulting party.

D. Each party is responsible to pay the fees billed to them by NAM directly to NAM. If, as part of the award, the Arbitrator(s) awards the total cost of the Arbitration to one party or apportions such costs between the parties, such reimbursement is to be made between/among the parties after NAM has been paid in full and without the involvement of NAM.

E. Failure by a Claimant or Respondent to provide prompt and full payment of the required deposit may be treated by NAM and the Arbitrator(s) as a cancellation of the claim or counterclaim.

RULE NO. 22: ARBITRATOR(S) SELECTION AND APPOINTMENT PROCESS

NAM shall appoint the Arbitrator(s) as promptly as possible.

With regard to Arbitrations based on Written Submissions, unless both parties agree otherwise or NAM determines in its discretion that another method for the selection of the Arbitrator(s) is appropriate for the case, the Arbitrator(s) shall be selected in the following manner:

A. If the claim amount is for $10,000 or less, the NAM Administrator shall appoint the Arbitrator(s).

B. If the claim amount is in excess of $10,000, the following procedures apply:

i. NAM shall forward to the parties identical lists containing at least three (3) names;
ii. After receipt of this list, each party may strike one (1) name from the list. The parties shall number the remaining names on the list in the order of their preference and return the list to the NAM Administrator within 15 days of service of the document;

With regard to In-Person/Oral Arbitration Hearings, unless both parties agree otherwise or NAM determines in its discretion that another method for the selection of the Arbitrator(s) is appropriate for the case, the parties shall select the Arbitrator(s) in the following manner:

C. NAM shall forward to the parties identical lists containing at least five (5) names if a sole Arbitrator is to be appointed and eight (8) names if three Arbitrators are to be appointed;

D. After receipt of this list, each party may strike two (2) names from the list. The parties shall number the remaining names on the list in the order of their preference and return the list to the NAM Administrator within 15 days of service of the document;

In either case, whether there is to be an Arbitration based on Written Submissions or an In-Person/Oral Arbitration Hearing, the following steps apply (unless the NAM Administrator is selecting the Arbitrator as noted in Rule No. 22A above):

E. The NAM Administrator shall appoint the Arbitrator(s) from among the names remaining on the list and in accordance with the order of preference indicated by the parties;

F. If, for any reason, the appointment cannot be made according to this procedure, the NAM Administrator may exercise his/her discretion in appointing the Arbitrator(s). In making the appointment, NAM shall secure the appointment of independent and impartial Arbitrator(s). No Arbitrator(s) shall act as an advocate for any party and no Arbitrator, whether before or after appointment, shall advise any party on the merits or outcome of the dispute.

G. NAM has emphasized the importance of neutrality and impartiality in the Arbitration process to its Arbitrators. NAM may, in its sole discretion, disqualify an Arbitrator if circumstances exist that create a conflict of interest or cause the Arbitrator to be unfair or biased, unless the parties agree to permit the Arbitrator to preside over the matter. Examples of such circumstances include:

i. the Arbitrator has a personal bias or prejudice concerning a party or has personal knowledge of disputed facts;
ii. the Arbitrator has served as an attorney to any party;
iii. the Arbitrator is a material witness regarding the dispute or the Arbitrator or a member of the Arbitrator's family has a direct financial interest in the outcome of the case;
iv. the Arbitrator or a member of the Arbitrator's family is a party to the case or is appearing as a representative for one of the parties to the case.

H. An Arbitrator shall disclose immediately to NAM circumstances that create a conflict of interest or that may cause the Arbitrator to be biased or unfair. If the Arbitrator is disqualified, the parties shall select a new Arbitrator in the manner described in paragraphs (A) through (D) above.

RULE NO. 23: CHALLENGE OF ARBITRATOR(S)

A. A party may challenge the nomination of an Arbitrator if circumstances exist that give rise to justifiable doubts as to the Arbitrator's impartiality or independence. Such a challenge shall be made by written submission to the NAM Administrator, specifying the facts and circumstances on which the challenge is based.

B. As set forth in Rule No. 22(H), the Arbitrator(s) has a duty to disclose immediately to NAM circumstances that create a conflict of interest or that may cause an Arbitrator to be unfair or biased. Not withstanding the foregoing, the parties and their Representatives have a duty to perform conflict checks upon the nominated Arbitrator(s) and to communicate any potential conflicts of interest between the parties and/or their Representatives and the Arbitrator(s) to the NAM Administrator as soon as they are discovered. The parties and their Representatives are requested to make inquiries of their officers, directors, agents, trustees, witnesses, immediate and extended families and the attorneys in their respective practices/firms to ascertain any potential conflicts or associations concerning the Arbitrator(s) and to disclose any such information as soon as it is discovered. The parties and their Representatives and the Arbitrator(s) understand and agree that NAM shall make no efforts to investigate potential conflicts of interest until such conflicts are disclosed by the parties, their Representatives or the Arbitrator(s) to NAM. The burden is upon the parties and their Representatives to notify the NAM Administrator of any potential conflict or association or potential for same, that will or may affect the Arbitrator's ability to be impartial in the case.

C. A party who intends to challenge an Arbitrator shall send notice of the challenge to NAM and the other parties within 15 days after the appointment of the challenged Arbitrator or from the date the alleged circumstances giving rise to the challenge first becomes known to that party, whichever is first.

D. If one party has challenged an Arbitrator, the other parties may agree to the challenge. The Arbitrator may also agree to withdraw from the case. In neither case does this imply acceptance of the validity of the grounds for the challenge. In all cases the procedure for the replacement of the Arbitrator set forth in Rule No. 24 shall be followed.

E. If the other parties do not agree to the challenge and the challenged Arbitrator does not withdraw, then NAM shall decide on the admissibility and merits of the challenge. NAM shall provide an opportunity for the Arbitrator concerned, the other party or parties and any of the other Arbitrator(s) to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the Arbitrator(s). Absent fraud or misrepresentation by the Arbitrator, the parties shall be responsible to pay any fees or expenses incurred by NAM and/or the Arbitrator prior to the challenge.

RULE NO. 24: REPLACEMENT OF ARBITRATOR(S)

A. An Arbitrator shall be replaced under the following circumstances:

i. his/her death;
ii. the acceptance by the NAM Administrator of the Arbitrator's resignation;
iii. the acceptance by the NAM Administrator of a challenge by one of the parties, or
iv. upon the request of all the parties.

B. The NAM Administrator may, in his/her sole discretion, replace an Arbitrator by his/her own initiative if he/she decides that the Arbitrator is prevented de jure or de facto from fulfilling his or her functions, or that the Arbitrator is not fulfilling his or her functions in accordance with NAM's Rules or within the prescribed time limits.

C. If an Arbitrator is to be replaced, the NAM Administrator, in his/her sole discretion, can decide whether or not to follow the original nominating process in naming the new Arbitrator. Once the nomination process is complete, the Arbitrator(s) shall determine if and to what extent prior proceedings shall be repeated before the new Arbitrator(s).

D. Prior to the closing of the proceedings, instead of replacing an Arbitrator who has died or has been removed by NAM pursuant to these Rules, NAM may decide that the remaining Arbitrator(s) (if there was a Three-Arbitrator panel deciding the case) shall continue the Arbitration. In making its determination, NAM shall consider the views of the remaining Arbitrator(s) and of the parties and such other matters that it considers appropriate.

RULE NO. 25: PRESIDING CHAIRPERSON FOR A THREE-ARBITRATOR PANEL

If the parties request a Three-Arbitrator panel, one of the panel members shall be elected to chair the Arbitration. The Arbitrator(s) shall elect a presiding Chairperson within five (5) days after the panel has been

notified of their appointment. If the appointed Arbitrators are unable to agree on such a choice within the time frame allowed, the NAM Administrator shall make such selection.

RULE NO. 26: CONSOLIDATION

A. **Claims.** The Arbitrator shall have the power to hear as many claims as the Parties may have against one another consistent with these Rules. The Arbitrator may hear additional claims that were not mentioned in the Arbitration Request Form, provided the Party adding claims notifies the other Party at least thirty (30) calendar days prior to a scheduled Arbitration, the additional claims are timely as of the date on which they were added, and the other Party is not prejudiced in its defense by such addition.

B. **Parties.** The Arbitrator shall not consolidate claims of different Parties into one proceeding unless NAM allows such consolidation in accordance with Rule 26 (C) immediately following.

C. **Class Actions.** A class action involves an Arbitration or lawsuit where representative members of a large group (or "class") claim to share a common interest and seek relief on behalf of the group (or "class"). It is NAM's policy to administer class action Arbitrations if the underlying Arbitration agreement allows for the submission of class actions to Arbitration. If the Arbitration agreement is silent with respect to class actions, consolidation or joinder of claims, NAM will **not** administrate the case as such, unless the parties agree to same and authorize NAM, in writing, to do so. NAM will **not** administer a class action Arbitration if prohibited by: (1) the underlying Arbitration agreement, (2) court order or (3) applicable law, **unless** a court orders the matter to Arbitration as a class action.

RULE NO. 27: ARBITRATION BASED ON WRITTEN SUBMISSIONS

Subject to the provisions of the underlying contract/agreement, if applicable, or if agreed upon in writing by the parties or if requested by a party and the other party (ies) does (do) not respond within the time frame specified by NAM's Rules for submitting a reply, and the underlying contract/agreement is silent on this issue, the Arbitrator(s) may decide the dispute based on the written submissions of the parties (Refer to Rule No. 10C for additional clarification). In such a case, the Arbitrator(s) shall not entertain oral testimony or arguments. The written submissions shall include, but not be limited to, the legal memorandum, position papers, case law, deposition transcripts, witness statements, expert reports, photographs, bills, receipts, invoices, records or any other relevant written documentary evidence. All written submissions and documentary evidence must be filed with the NAM Administrator and served upon all parties prior to the Arbitration on a date fixed by the NAM Administrator or the Arbitrator(s). Any such submission not received within the specified time frame may be excluded by the Arbitrator(s). To the extent a date is not fixed by the NAM Administrator or the Arbitrator(s), such date for receipt of documents by the parties and to the NAM Administrator is to be no less than ten (10) days before the hearing date. However, the NAM Administrator may elect to have the parties send such information directly to the Arbitrator(s) (in lieu of having the information sent to the NAM Administrator) by notifying the parties accordingly.

RULE NO. 28: IN-PERSON/ORAL ARBITRATION HEARING

Subject to the provisions of the underlying contract/agreement, if applicable, or if agreed upon in writing by the parties, the Arbitrator(s) may decide the dispute at an In-Person/Oral Arbitration Hearing.

The Arbitrator shall conduct the Arbitration Hearings as follows:

A. The NAM Administrator or the Arbitrator(s) shall fix the date, time and physical location of any meetings, conferences or hearings and shall give the parties reasonable notice thereof.

B. Arbitrations are binding upon the parties (with limited exception per Rule No. 36). Parties have an opportunity to present their case in a manner similar to a non-jury trial in the public court system. The Arbitrator(s) will conduct the Arbitration hearing in the manner set forth in these rules. However, an Arbitrator has the discretion to vary these procedures if it is reasonable and appropriate to do so.

C. The Arbitrator(s) will rule upon the admissibility of evidence and will be guided by the Federal Rules of Evidence. However, strict conformity to the Federal Rules of Evidence is not required. The Arbitrator(s) will consider evidence that the Arbitrator(s) deems relevant and material to the dispute and will accord such weight to the evidence as the Arbitrator(s) deems appropriate.

D. The Arbitrator(s) shall have the authority to make rulings on motions.

E. If any of the parties, although duly summoned, fails to appear without valid excuse, the Arbitrator(s) shall have the power to proceed with the hearing despite that party's absence.

F. The Arbitrator(s) may require witnesses in a party's employ or control to testify under oath if requested to do so by the other party. The Arbitrator(s) may limit testimony or exclude witnesses or evidence that the Arbitrator(s) considers immaterial or unduly repetitive.

G. The Arbitrator(s) may issue subpoenas for the attendance of witnesses or the production of documents and the parties agree to abide by such.

H. The Arbitrator(s) will accept and consider witnesses' deposition testimony provided that the other party(ies) had the opportunity to attend the deposition and cross-examine the witness. In the event the other party(ies) does(do) not have the opportunity to attend the deposition(s) and cross-examine the witness(es), the Arbitrator(s) may exclude such witnesses' deposition testimony. The Arbitrator(s) may consider witness affidavits, but will give that evidence only such weight as the Arbitrator(s) deems appropriate.

I. The In-Person/Oral Arbitration Hearing will conclude only after all parties have had an opportunity to present all relevant and material evidence and witness testimony to the Arbitrator(s).

J. All meetings and hearings shall be in private unless the parties agree otherwise in writing or if the Arbitrator(s) directs otherwise.

K. The Arbitrator(s) shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Except with the approval of the Arbitrator(s) and the parties, persons not involved in the proceedings shall not be admitted.

L. In all cases, the Arbitrator(s) shall act fairly and impartially and ensure that each party has a reasonable opportunity to present his/her case.

M. At the conclusion of the Arbitration, the Arbitrator(s) may require the parties to submit post-hearing briefs, including legal memorandum, prior to issuing a decision regarding the case. The Arbitrator(s), with the assistance of the parties, will determine the schedule for the submission of post-hearing briefs.

RULE NO. 29: PRE-HEARING CONFERENCE

The Arbitrator(s) may conduct a telephone conference call twenty (20) days after NAM has appointed the Arbitrator(s). The Arbitrator(s) may discuss some or all of the following matters with the parties at the Pre-Hearing Conference:

A. the scheduling and completion of discovery;

B. the laws, rules of evidence and burdens of proof that the Arbitrator(s) will apply at the hearing;

C. the scheduling and procedure of the Arbitration;

D. the approximate duration of the Arbitration;

E. the physical location of the Arbitration;

F. possible expenses of the Arbitrator(s) (such as travel costs, accommodations, etc.);

G. the need for translators;

H. the timing and filing of any documents the Arbitrator(s) considers necessary;

I. the filing of pre-hearing briefs;

J. the filing of stipulations of uncontested facts;

K. the filing of witness lists;

L. the identity of the Presiding Chairperson;

M. any other matters that the Arbitrator(s) considers necessary.

RULE NO. 30: NON-PARTICIPATING OR DEFAULTING PARTIES

A. If the Respondent fails to file a Response to the Demand for Arbitration with NAM, or if any party fails to file and serve written submissions by the date fixed by the Arbitrator where the Arbitration is based on Written Submissions, or when a party fails to appear at an In-Person/Oral Arbitration Hearing after receiving due notice thereof, then the Arbitrator(s) may conduct the Arbitration in that party's absence.

B. The Arbitrator(s) shall not base the Award solely on the failure of the defaulting party to comply in the above circumstances. The Arbitrator(s) shall require the submitting or attending party to present

such evidence as the Arbitrator(s) deems necessary for the making of the Award and the Claimant must demonstrate that the Respondents were properly served with the Arbitration Notice.

RULE NO. 31: WITNESSES AND EXPERT WITNESSES

A. For In-Person/Oral Arbitration Hearings, the NAM Administrator or the Arbitrator(s) shall give the parties adequate advance notice of the date, time and place thereof.

B. For In-Person/Oral Arbitration Hearings, if witnesses are to testify, at least 10 days before the hearing, each party shall communicate to the Arbitrator(s) and to the other party the names and addresses of the witnesses that will testify, the subject of the testimony and the languages in which such witnesses will testify.

C. For In Person/Oral Arbitration Hearings, the parties shall make arrangements for the translation of oral testimony and for a transcription of the hearing if either is deemed necessary by the NAM Administrator, the Arbitrator(s) or if the parties have agreed thereto and have communicated such agreement to the NAM Administrator and the Arbitrator(s) at least 15 days before the hearing date. If the parties are unable to agree upon the arrangement for the translation of oral testimony or the transcription of the hearing, or if the parties request, NAM or the Arbitrator(s) may assist the parties in arranging for the translation and transcription.

D. For In-Person/Oral Arbitration Hearings, the Arbitrator(s) may determine the order and manner in which witnesses testify at the hearing. The Arbitrator(s) may permit a party to present the testimony of a witness in written form, either as a signed statement, sworn affidavit or properly notarized deposition transcript.

E. For In-Person/Oral Arbitration Hearings, the Arbitrator(s) shall determine the admissibility, relevance, materiality and weight of the evidence offered. The Arbitrator(s) also shall determine the time, manner and form in which such materials should be exchanged between the parties and presented to the Arbitrator(s). The Arbitrator(s) may, in his/her discretion, allow, refuse, or limit the appearance of witnesses (whether fact witness or expert witness) or the submission of documentary evidence.

RULE NO. 32: SETTLEMENT OR OTHER REASONS FOR TERMINATION

A. If the parties agree on a settlement of the dispute before the Arbitrator(s) renders an award, the Arbitrator(s) shall either issue an order for the termination of the Arbitration proceedings or, if requested by both parties, indicate that a settlement has been reached. In the event of a settlement, the Arbitrator(s) may provide the parties with a settlement contract indicating the agreed upon terms. In the event of a settlement, the Arbitrator(s) is not obligated to give reasons for such a settlement.

B. If, before the Arbitrator(s) renders an Award, the continuation of the Arbitration proceeding becomes unnecessary or impossible for any reason not mentioned in paragraph A, the Arbitrator(s) shall issue an order for the termination of the proceedings.

Copies of the order for termination of the Arbitration proceedings or of the settlement contract on agreed-upon terms shall be signed by the Arbitrator(s) and forwarded to the NAM Administrator and to the parties.

RULE NO. 33: CLOSURE OF HEARING AND TIME LIMITS FOR THE AWARD

The Arbitrator(s) will communicate with the NAM Administrator as to the status of the Arbitration. The Arbitrator(s) will attempt to render the final Award within thirty (30) days from the date the Arbitration is declared closed by the Arbitrator(s). Upon request from the Arbitrator(s), the NAM Administrator may extend this time limit if it becomes necessary to do so.

RULE NO. 34: DRAFTING OF THE AWARD

A. The Award shall be made in writing and shall be final and binding on the parties (with limited exception per Rule No. 36). The parties undertake to carry out the Award without delay.

B. The Arbitrator(s) may award the total costs of the Arbitration to one party or may apportion such costs between the parties if the Arbitrator(s) determines that apportionment is appropriate.

C. The Arbitrator(s) may award the cost of legal representation to one party or may apportion such costs between the parties if the Arbitrator(s) determines that apportionment is appropriate.

D. Any award of interest made by the Arbitrator is to be governed by the laws of the applicable jurisdiction.

E. The obligation of the party[ies] as stated in the Award shall be binding upon each such party, his/her heirs or its successors or those who are its assigns.

F. The Arbitrator(s) shall sign an Award and it shall contain the date on which the Award was rendered. Where there are three Arbitrator(s) and one of them fails to sign, the Award shall state the reason for the absence of the signature.

G. Copies of the Award signed by the Arbitrator(s) shall be forwarded to the NAM Administrator by the Arbitrator(s). The NAM Administrator shall forward copies of the decision to all parties once all outstanding fees are paid.

H. If the Arbitration law of the country where the Award is made requires the Arbitrator(s) to file or register the Award, the Arbitrator(s) shall comply with this requirement within the period of time required by law. In such event, a fee for such service will be determined by the NAM Administrator at his/her sole discretion at the time such services are requested.

I. Parties to these Rules and Procedures shall be deemed to have consented that judgment upon the Arbitration award may be entered in any federal or state court or any other court having jurisdiction thereof.

J. In addition to making a final Award, the Arbitrator(s) shall be entitled to render interim, interlocutory, or partial Awards.

K. For Arbitration Hearings before a Tri-panel of Arbitrators, an Award must be made by a majority of the Arbitrator(s). If no majority exists or if the Arbitrator(s) so authorize, the Chairperson Arbitrator may decide an issue on his/her own.

RULE NO. 35: CORRECTION OF THE AWARD

Within 15 days after the receipt of the Award, either party, with notice to the other party, may request the Arbitrator(s) to correct the Award regarding any clerical, typographical or mathematical error in the computation of the Award. The Arbitrator(s) may make such corrections on his/her own initiative within 30 days after rendering the Award. Such correction shall form part of the Award and shall be in writing. Arbitrator(s) may charge no additional fees for correction or completion of the Award.

RULE NO. 36: APPEALS PROCESS

If the parties mutually agree in writing to provide for an appeal process with respect to the arbitration, such appeal would then be subject to NAM's Appellate Dispute Resolution Rules and Procedures (available at www.namadr.com). For more information, please contact NAM at 800-358-2550 Appeals Department.

MEDIATIONS

RULE NO. 37: COMMENCEMENT OF MEDIATION PROCEEDINGS

In the case of Mediation, Parties shall initiate Mediation as follows:

A. The party initiating the Mediation process may send the other party, through NAM, a Request for Mediation, pursuant to these Rules. The request should briefly identify the subject of the dispute with the parties' contact information, such as the parties' and their representatives' names, addresses, telephone and fax numbers.

B. Mediation proceedings are deemed commenced when the other party accepts the request to mediate. If the acceptance is given orally, the parties must confirm the agreement to mediate in writing on the Request for Mediation form or another form supplied by NAM. Such written form shall be forwarded to NAM and the other parties.

C. If the other party rejects the request to mediate, there will be no Mediation proceedings.

D. If the initiating party does not receive a response within such other period as specified in the request form, the initiating party may elect to treat this lack of response as a rejection of the invitation and may inform the other party accordingly.

RULE NO. 38: NUMBER OF MEDIATOR(S)

Unless the parties agree otherwise, one Mediator shall preside over the Mediation proceedings. When more than one Mediator presides over a Mediation, they shall act jointly.

RULE NO. 39: APPOINTMENT OF MEDIATOR(S)

A. Once the parties agree to mediate, NAM shall forward a list of 5 suggested Mediators to the parties' for their consideration. The parties are then requested to contact one another to mutually select the Mediator to hear this matter.

B. The parties may also request that the NAM Administrator directly appoint one or more Mediators.

RULE NO. 40: SUBMISSION OF STATEMENTS TO MEDIATOR

A. The submission of a brief written statement by each party describing the general nature of their dispute and the points at issue may be made (a) at the request of the Mediator or (b) by the parties of their own choice.

B. The Mediator may request each party to submit a further written statement of the party's position and the facts and legal arguments in support thereof. The parties may supplement this statement with documents or other evidence that they deem appropriate to their position.

C. At any stage of the Mediation proceedings, the Mediator may request a party to submit such additional information as the Mediator deems appropriate.

RULE NO. 41: REPRESENTATION AND ASSISTANCE

The parties may be represented or assisted by persons of their choice. The parties shall communicate the names and addresses of such persons to the Mediator and all other parties, including the NAM Administrator. Such communications are made to specify whether the appointments are made for the purposes of representation or assistance.

RULE NO. 42: ROLE OF THE MEDIATOR

A. The Mediator's role is to assist the parties to reach an amicable resolution to their dispute. The Mediator is to preside over the Mediation in an independent and impartial manner.

B. The Mediator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usage's of the trade at issue, the circumstances surrounding the dispute, including any previous business practices between the parties.

C. The Mediator may conduct the Mediation proceedings in any manner that he or she deems appropriate, taking into account the circumstances of the case, the requests of the parties and the need for a speedy settlement of the dispute.

D. The Mediator may, at any stage of the Mediation proceedings, make proposals for the settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons for the proposal.

E. The Mediator must disclose any conflicts, potential or otherwise, including any financial or personal interest in the dispute or any event that may create an actual bias or a strong appearance of bias. The NAM Administrator immediately shall advise the parties of a potential conflict of interest and the parties shall have the opportunity to submit comments regarding whether the Mediator shall continue to serve. If the parties are unable to agree on whether the Mediator shall continue service, the final decision as to the Mediator's continued service shall be made by the NAM Administrator.

F. The parties and their Representatives have a duty to perform conflict checks upon the nominated Mediator and to communicate any potential conflicts of interest between the parties and/or their Representatives and the Mediator to the NAM Administrator as soon as they are discovered. The parties and their Representatives are requested to make inquiries of their officers, directors, agents, trustees, witnesses, immediate and extended families and the attorneys in their respective practices/firms to ascertain any potential conflicts or associations concerning the Mediator and to disclose any such information as soon as it is discovered. The parties and their Representatives and

the Mediator understand and agree that NAM shall make no efforts to investigate potential conflicts of interest until such conflicts are disclosed by the parties, their Representatives or by the Mediator to NAM. The burden is upon the parties and their Representatives to notify the NAM Administrator of any potential conflict or association or potential for same, that will or may affect the Mediator's ability to be impartial in the case.

RULE NO. 43: COMMUNICATION BETWEEN THE MEDIATOR AND PARTIES

A. The Mediator may invite the parties to meet with the Mediator or may continue to communicate with them orally or in writing. The Mediator may meet or communicate with the parties together or separately.

B. Unless the parties have agreed upon the place where the meetings will be held, the Mediator or the NAM Administrator shall select the location of the meetings, taking into account the requests of the parties.

RULE NO. 44: DISCLOSURE OF INFORMATION

The Mediator may disclose any factual information received from one party to the other party, unless the party providing the information requests that the Mediator keep the information confidential. The purpose of disclosing the factual information is to permit the other party to respond and present explanations regarding the information submitted to the Mediator.

RULE NO. 45: COOPERATION OF PARTIES WITH THE MEDIATOR

The parties will cooperate in good faith and will endeavor to comply with the Mediator's requests to submit written materials, provide evidence and attend meetings.

RULE NO. 46: SUGGESTIONS BY THE PARTIES FOR SETTLEMENT OF THE DISPUTE

Each party may submit suggestions for the settlement of the dispute on its own initiative or at the request of the Mediator.

RULE NO. 47: SETTLEMENT AGREEMENT

A. If a settlement appears likely, the Mediator may formulate the terms of a possible settlement agreement and submit the terms to the parties for their consideration. If necessary, the Mediator may reformulate the terms of settlement based upon the parties' recommendations and mutual agreement.

B. If the parties reach an agreement on the settlement of the dispute, the parties shall prepare a written settlement agreement setting forth the terms thereof. If requested by the parties, the Mediator may draft or assist the parties in drafting the settlement agreement.

C. By signing the settlement agreement, the parties agree to be bound by the terms thereof and to conclude the dispute.

D. Fully executed copies of the settlement agreement shall be filed with the NAM Administrator and forwarded to all parties.

RULE NO. 48: TERMINATION OF MEDIATION PROCEEDINGS

The Mediation proceedings shall be terminated by one of the following:

A. A settlement agreement executed by the parties;

B. A written declaration by the Mediator stating that, after consultation with the parties, further efforts at Mediation are no longer justified;

C. A written declaration by all parties addressed to the NAM Administrator stating that the Mediation proceedings are terminated;

D. A written declaration between the parties and the Mediator, if appointed, stating that the Mediation is terminated.

RULE NO. 49: JUDICIAL OR ARBITRAL PROCEEDINGS

The parties agree not to initiate any judicial or arbitral proceedings regarding a dispute that is the subject of the Mediation proceedings until the Mediation is terminated, unless a party must initiate a judicial or arbitral proceeding to preserve its rights.

RULE NO. 50: COSTS

The costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment or unless the NAM fee schedule for a particular type of case specifies otherwise. All other expenses incurred by an individual party shall be borne by that party.

RULE NO. 51: PAYMENTS/DEPOSITS AS TO COSTS

A. In accordance with the NAM fee schedule, fees are due and payable by the Claimant when a request for Mediation is filed and by the Respondent when a request for Mediation is responded to. In any event, all such fees must be paid before a conference is scheduled.

B. To the extent that additional Mediator time is required beyond that which was originally anticipated or if other circumstances arise whereby additional fees are incurred, NAM may direct the parties to make one or several advance, interim or final payments for the costs associated with the Mediation process. Such deposits shall be made to NAM. The Mediator(s) shall not proceed with the

Mediation until receiving confirmation that all outstanding payments have been made to NAM by the parties.

C. If the parties fail to pay in full the deposits after being requested to do so, the NAM Administrator may have the Mediator suspend the Mediation proceedings or issue a written declaration of termination to the parties, effective on the date of termination.

D. Upon termination of the Mediation proceedings, the NAM Administrator shall render an accounting to the parties of the costs incurred and the deposits received and return any unexpended balance to the parties or bill any outstanding costs accordingly.

RULE NO. 52: ROLE OF THE MEDIATOR IN OTHER PROCEEDINGS

The parties and the Mediator agree that the Mediator shall not act as an Arbitrator or as a Representative or counsel to a party in any subsequent arbitral or judicial proceedings regarding the dispute that is the subject of the Mediation proceeding. The parties also agree that they will not present the Mediator as a witness in any subsequent proceedings.

RULE NO. 53: ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

The parties agree not to rely upon or introduce as evidence in any subsequent arbitral or judicial proceeding, any of the following:

A. Views expressed or suggestions made by the other party regarding the possible settlement of a dispute;

B. Admissions made by the other party during the course of the Mediation;

C. Proposals made by the Mediator;

D. The fact that the other party indicated a willingness to accept a proposal for settlement made by the Mediator.

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