

## COURT ADR RULES NUTS & BOLTS

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One of the most important tasks a court must undertake in the creation of an alternative dispute resolution program is to write rules for it that are clear, unambiguous, and thorough. This is a critical step in providing for high-quality ADR services for those who turn to the court system to deal with their disputes. Writing the rules about how a court ADR program will function, often will clarify exactly what a program is intended to accomplish.

For rules to be clear, they should be written in easily understood language and be well-organized in intuitive chunks of information. Rules should be readily understood on first reading and should be organized so that all of their elements are easily found.

To be unambiguous, rules should be detailed and precise in their language. Lack of detail or precision may lead to conflict and unnecessary hearings on issues arising from the ADR process. For example, if a rule states that communication in mediation is confidential, what does this mean? What constitutes a communication in this context? Does it include oral as well as written communication? Is it limited to the mediation session, or does it include information provided to the mediator before the session begins? Leaving this open to interpretation leaves open the possibility of conflicts arising between the parties, between a party and the court, or between the mediator and the court as to what can be revealed about what took place in a mediation.

To be thorough, rules should cover all areas of the process, from eligibility and referral to termination and reporting. The more thorough a rule is, the more control the court has over the quality of the ADR process. It should be noted, however, that no rule can cover every eventuality and trying to do so would lead to overly complex rules. A balance must be struck. What should be in a rule is discussed below.

### WHAT SHOULD BE INCLUDED IN ALL RULES

No matter what ADR process is used or what case type is involved, all rules should cover a number of different topics in order to provide sufficient guidance to those using the process and to help ensure the quality of the program. All rules should cover the following:

*Definitions:* Clear definitions of the process and the neutral set the stage for the entire rule. They outline the court's own understanding of what the program is doing and what services it is providing.

A rule with a good definitions section is Maryland's [Title 17: Alternative Dispute Resolution](#).

*Eligibility:* The court should always state clearly which cases must be, can be, or cannot be mediated.

*Referral process:* This includes whether cases are automatically assigned, whether the court orders cases to ADR on its own discretion and/or at the request of one

or more parties, and whether and how parties may opt out of the process.

*Selection of neutral:* A structured process should be described in order to allay any conflicts about the selection or appointment of neutrals. This includes who selects the neutral – the court or the parties. If the court, there should be a provision allowing objection to the neutral on specific grounds. If the parties, there should be a provision for what occurs if the parties cannot agree on a neutral. Another option is a hybrid selection process in which the court provides the parties with a short list of neutrals, from which they are free to reject a specified number. The court then selects the neutral from among the ones on which the parties agree. No matter what method is used, a deadline as to when the selection is made should be included in the rule.

*Deadlines:* ADR should never slow down the process of the case through the system. Therefore, rules should set deadlines for moving through ADR. The deadlines should include selection of neutral, completion of ADR, and reporting of the results.

The Washington, D.C. [Superior Court Civil Arbitration Rules](#) and the Ninth Judicial Administrative District of Georgia [Alternative Dispute Resolution Rules](#) both have strong and reasonable deadlines.

*Confidentiality:* Courts should address the parties' expectations regarding



the privacy of the ADR process. Confidentiality in party-centered processes helps the parties to discuss issues openly and candidly without fear that such communications will be used in any later proceedings. This in turn makes such processes successful. In more adjudicative processes, confidentiality may be very limited or simply not be part of the process. The confidentiality provision in a court rule must be explicit as to what can and cannot be communicated about what occurred and about the exceptions to confidentiality.

The U.S. District Court for the Northern District of California has written a good [confidentiality rule](#) for its ADR program.

*Monitoring and evaluation:* All courts should put in place a way in which to monitor and evaluate their ADR programs. This is true even if the court is simply referring cases out to another organization to provide ADR services. In this case, it may be this organization that provides the monitoring and evaluation. Detailed information on this topic can be found in the [Monitoring and Evaluation](#) section of the *Instruction Manual*.

A particularly good example of an evaluation requirement is found in [Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes](#) under the North Carolina Custody and Visitation Mediation Program. Another example is the U.S. District Court for the Northern District of California [Local ADR Rules](#).

#### WHAT TO INCLUDE IF THE PROGRAM IS ADMINISTERED AND MANAGED BY THE COURT

*Attorney and party responsibility before, during, and after the ADR session/hearing:* Detailing the responsibilities

of the attorneys and parties helps to avoid confusion about what is expected of them and should work to make the process run more smoothly. Rules that clearly outline such responsibilities usually include the need for attorneys to explain the ADR process to their clients and to discuss the option with them, what materials attorneys should be providing the neutrals, and what information the attorneys should be providing to the court. They also discuss the attendance requirements and the party's responsibility in compensating the neutrals.

The Rules for the San Francisco Superior Court's [Child Dependency Mediation Program](#) and the North Carolina [Rules Implementing Mediation in Matters before the Clerk of Superior Court](#) both do a good job of outlining these responsibilities in two very different contexts.

*Neutral responsibility before, during, and after the ADR session/hearing:* Detailing the responsibilities of the neutrals helps to control quality and provides attorneys and parties with an idea of what to expect from the process. An understanding by all involved of what the neutrals' responsibilities are can 1) help to reduce grievances either because the neutrals better understand their responsibilities or because the parties better understand them, and 2) help to determine if neutrals have not acted according to their responsibilities once grievances have been filed.

Two rules that have done a good job outlining these responsibilities are the [South Carolina Circuit Court Alternative Dispute Resolution Rules](#) and the [Rules of the North Carolina Supreme Court](#)

[Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases](#).

*Training and qualifications of neutrals:* Quality begins with the neutrals; therefore, it is essential to create training and qualification requirements that reflect the skills and knowledge that the neutrals will need to effectively conduct the sessions/hearings. More information on this topic can be found in the [National Standards for Court-Connected ADR Programs](#).

[Maryland](#) and Georgia's [Ninth Judicial Administrative District](#) have put good training and qualification of neutrals sections into their rules.

*Removal of neutral:* There should be some process for parties to ask for the removal of an assigned mediator in the case of conflict of interest or perceived ethical lapse.

*Immunity:* Many courts protect their neutrals from liability by providing them with quasi-judicial immunity. Others state that they are immune from lawsuit for any action with the exception of gross misconduct or negligence. In any case, some form of immunity should be granted so that the neutrals can perform their duties without fear of reprisal for such things as outcomes parties feel are unfair or unfounded perceptions of bias.

*Grievance process:* Quality control calls for a method for parties to make complaints against neutrals who do not fulfill their duties. The method also should provide a process to protect the mediators in that complaint process, particularly against complaints that lack foundation.



A well-constructed grievance process is found in South Carolina's [Circuit Court Alternative Dispute Resolution Rules](#).

*Standards:* Adopting standards of conduct helps to hold the neutrals to certain ethical and competency standards. These need not be written by the court, but may be adopted from model documents, such as the [Model Standards of Conduct for Mediators](#) or the [Model Standards of Practice for Family and Divorce Mediation](#). This helps in both quality control and in dealing with grievances.

Two states that have created good standards for their neutrals are [Utah](#) and [Maryland](#).

#### Other Issues

*Good faith:* Many courts have written into their rules that the parties to mediation need to participate in good faith. Often, this term is not defined, leaving open to interpretation what it means. This has led to motions asking the court to sanction parties for allegedly not participating in good faith, and then appeals to any sanctions the court may impose. Blanket good faith clauses are not recommended because they are open to interpretation, are hard to define, can impose upon the tenet of self-determination on which mediation is based; however, should a court decide that it would prefer such a clause, it should be specific in its definitions.

*Pro bono provision:* If the rule calls for the parties to pay the neutrals, some provision should be put in place for those who cannot afford services. This may be requiring the neutrals to provide pro bono services each year, the court paying for the services, or a volunteer alternative.

In any case, the court should be sure that the quality of services is the same as for those who pay.

#### RULES FOR SPECIFIC TYPES OF CASES

Below are issues that arise when writing rules for the most common types of cases in ADR programs. Juvenile and criminal cases are not included because courts generally do not write rules for ADR programs dealing with those case types.

##### Family

*Domestic violence:* One of the most important issues to address in rules for family cases is domestic violence. The first decision to be made is whether cases involving domestic violence will be mediated. There are strong arguments for permitting such cases to be mediated and equally strong arguments to not mediate these cases without a protocol in place for identifying cases and ensuring the safety of the party. (See [Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program](#) for a discussion of these arguments.) If it is decided that such cases should be mediated, the rules should call for the mediators to be specially trained in domestic violence issues. Additionally, the protocol that is put in place should safeguard the physical and emotional well-being of the abused party, as well as that party's legal rights. A particularly good protocol has been developed in [Michigan](#).

*Role of attorneys:* Another issue that should be addressed in the rule is the role of the attorneys. Many programs exclude attorneys from the mediation session believing that it is easier for the parties to negotiate if attorneys are not present. If this is done, a provision should

be made for their attorneys to look over any agreement that is reached before it is signed. Jurisdictions in states that have adopted the Uniform Mediation Act should pay particular attention to this issue.

##### Civil Mediation

*Discovery:* Discovery is a particularly important issue in civil mediation. Jurisdictions vary as to whether discovery is stayed during an ADR process, whether it can continue, or whether it is decided on a case by case basis. There are good arguments for all three. The most important issue is that the attorneys have the opportunity to conduct enough discovery so that they and their clients have sufficient information to participate meaningfully in mediation.

##### Civil Arbitration

*Sanctions:* A question that needs to be addressed for all civil non-binding arbitration rules is whether sanctions should be imposed for rejection of the award. Some courts attempt to reduce the rejection of awards by imposing sanctions for doing so. Others only impose sanctions if the verdict at trial is not more favorable than the award. Many others impose no sanctions. Arguments against imposition of sanctions focus on arbitration as a non-binding process in which parties may pursue a trial de novo if they are dissatisfied with the result in arbitration. Imposing a steep penalty for rejection of the arbitration award is seen as building too great a barrier to the traditional courtroom.

##### Child Dependency

*Timing of referral:* The primary issue to be dealt with in child dependency mediation programs is at what stage of the case referral can be made. The



options range from only at the beginning of the case, only at the end, only after disposition, or at all stages of the case. The goal of the program can inform this decision. For example, a goal of finding appropriate placement for children dictates early referral to mediation. A goal of helping natural parents to adjust to the termination of their parental rights points to referral at the end. More universal goals of reducing conflict among those involved in the case, increasing parental compliance with treatment plans, or increasing parental involvement in the case indicate referral at all stages of the case.

*Issues to be mediated:* Another matter to be dealt with is what issues can be mediated. In many programs, any issue may be referred to mediation, although it is often left to the discretion of the judge as to whether a case involving physical or sexual abuse may be referred. In other programs, specific issues may be mediated, such as services or placement. This may depend upon the timing of the referral. If the timing is very early or very late, the mediation would very likely be limited to specific issues: for example, early referrals may be limited to services and placement, while very late referrals may be limited to case closure issues. Programs that allow referral during each stage of the case would most likely permit referral on a broad range of issues.

*Domestic violence:* Because many cases deal with domestic violence, it is essential that a protocol be put in place to determine the level of abuse and the necessary steps to safeguard the health and well-being of the abused party.

A particularly good protocol has been developed in [Michigan](#). A good example

from a child dependency mediation program is the [local rule](#) for the San Francisco Superior Court.

### Appellate

*Case screening:* The process for referring cases to mediation at the appellate level is largely based upon the screening of appropriate cases. The most important issue in the screening of cases at this level is who does the screening. Initial screening in voluntary programs may be done by the judge or the attorneys. Mandatory programs also need screening because not all cases go to mediation, even in mandatory programs. These may have a knowledgeable staff member screen the cases. Knowledgeable screening of cases is one of the more important factors in determining the success of a program.

Alabama's [Rules of Appellate Mediation](#) contain a good screening process.

### Next Steps

Aside from the rules mentioned above, there are more sample rules to be found on [courtadr.org](#). These may be useful for getting a more complete picture of what good rules look like, as well as providing help on wording and organization. For a broader perspective, hundreds of rules can be accessed through [courtadr.org's database search](#).