APPENDIX M. GUIDELINES FOR ARBITRATION
Revised May 18, 1989, December 19, 1991, December 22, 1993, April 1, 1997, April 19, 2000 and March 1, 2010

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I. Case Management Responsibility of the Assigned District Judge

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

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

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

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

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

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

(1) Ruling upon the admissibility of testimonial evidence.
(2) Ruling upon the admissibility of documentary evidence.
(3) Ruling upon the admissibility of demonstrative evidence.
(4) Ruling upon objections to evidence.
(5) Ruling upon requests of counsel to excuse individual parties or authorized corporate

representatives from attending the arbitration hearing.

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

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

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

(9) Swearing witnesses.

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

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

(1) Exercise civil or criminal contempt.

(2) Continue the hearing for an indefinite period.

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

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

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

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

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

With respect to the admissibility and subsequent use of evidence offered at an arbitration hearing, counsel are reminded that L.Civ.R. 201.1(h)(2) provides:

> "Upon the filing of a demand for trial *de novo* ... the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration..."

Therefore, neither the fact that the case was arbitrated nor the amount of the arbitrator's award is admissible. However, testimony given upon the record of the arbitration hearing may be used to impeach the credibility of a witness at any subsequent trial *de novo*. In light of the limitation placed by the Court upon the use of

exhibits at subsequent Court proceedings, the arbitrator should return all exhibits to counsel at the conclusion of the arbitration hearing.

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

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

V. Stenographic Transcript

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

VI. The Arbitration Procedure - A Summary

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

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

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

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

(2) Brief procedural overview presented by the arbitrator.

(3) Opening statement by plaintiff's counsel.

(4) Opening statement by defendant's counsel.

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

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

(7) Summation by plaintiff's counsel.

(8) Summation by defendant's counsel.

(9) Adjournment of the arbitration hearing.

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

VII. Scope of the Arbitration Award

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

VIII. Processing the Arbitration Award

At the conclusion of the hearing, the arbitrator shall promptly file the award with the Clerk. When the award is filed, the Clerk's Office will docket the fact of the award, leaving out the details, and mail a copy

of the award and the arbitrator's written statement or summary setting forth the basis for the award to the arbitrator and counsel.

IX. Compensation of Arbitrators

In the event that an arbitration hearing is protracted, the District Judge to whom the matter is assigned may entertain a petition for additional compensation.

Although the Clerk's Office does not make any deductions from the compensation paid to arbitrators, it should be treated as ordinary income for tax purposes.

X. Alternative Dispute Resolution

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

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

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

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