NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

April 10, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Commercial Division Practice Rules 10 and 11 to Address Alternative Dispute Resolution

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of Commercial Division Practice Rules 10 and 11 (22 NYCRR §202. 70[g], Rules 10 and 11), proffered by the Commercial Division Advisory Council, to require certification by attorneys that they have discussed with their clients the availability of alternative dispute resolution options in their case. As described in a memorandum supporting the proposal (Exh. A), the Council believes that such a requirement, similar to practices in various federal court jurisdictions, would be a useful step in the encouragement of cost-saving early mediation and settlement in Commercial Division matters. The proposal would require counsel to submit a statement at the preliminary conference and each compliance or status conference, on a form prescribed by OCA, certifying that counsel has discussed the availability of ADR with the client and stating whether the client "is presently willing to pursue mediation at some point in the litigation" (Exh. A, p. 6); the court would set a date in the preliminary conference order for identification of a mediator by the parties in appropriate cases.

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Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 5, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: January 20, 2017

RE: Proposal to Require Attorney Certification Concerning Client's Willingness to Engage a Mediator and To Set a Deadline for Identification of a Mediator

The Commercial Division Advisory Council proposes amendments to Rule 10 and 11 of the Rules of Practice for the Commercial Division of the Supreme Court (the "Commercial Division Rules") to require counsel for each party to certify to the court that they have discussed with their clients the availability of Alternative Dispute Resolution ("ADR") options – through the Commercial Division ADR programs or otherwise – by the date of the preliminary conference, and indicate, on a form to be submitted at the preliminary conference (and at each subsequent compliance or status conference), whether their clients presently wish to pursue mediation at some point during the litigation. If the parties are willing to mediate, counsel would then be required to jointly propose in the preliminary (or compliance or status) conference order a date by which a mediator shall be identified for assistance with resolution of the action. The proposed amendments to Rules 10 and 11 (the "Proposal") are set forth at the conclusion of this Memorandum, and the prescribed form of certification to be submitted to the court and served and filed is attached as Exhibit A.

BACKGROUND

Section IV of the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the "Task Force Report") encouraged efforts to facilitate early resolution of business disputes through mediation, recognizing that the overwhelming majority of business disputes ultimately result in settlement:

> Among the hallmarks of an effective forum for resolving business disputes are the efficiency with which the disputes can be resolved, the cost-effectiveness of the process to achieve the resolution and the parties' satisfaction with the fairness of the result. . . .
>
> Where mediation has been used in the Commercial Division, both formal and informal measures indicate success. Matters are resolved faster and less expensively, and, by definition, in a manner that parties find acceptable . . . . **Unfortunately, despite these successes, because of the inherent adversarial nature of litigation and because there is a broad disparity in the degree to which judges refer matters to mediation, the Task Force believes mediation is substantially underutilized in New York.**

(Task Force Report at 26 (emphasis added).)

The Commercial Division has already taken steps to foster the use of mediation. Rule 8 of the Commercial Division Rules already requires counsel for all parties to consult prior to a preliminary or compliance conference about: "(i) resolution of the case, in whole or in part, ... (iii) the use of alternative dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree will help aid early settlement of the case." The Revised Preliminary Conference Order, adopted for optional use by Commercial Division justices (AO/132/16), effective as of August 1, 2016, asks the parties to identify in Section VI when they believe ADR will be most effective (*e.g.*, within 60 days of the Preliminary Conference, within 30 days after interrogatory and document discovery have been completed, etc.).

In light of the Task Force's findings, as well as the Commercial Division Advisory Council's members' own experience, the Commercial Division Advisory Council believes that the Proposal is an appropriate next step that will help further institutionalize the use of ADR in Commercial Division cases, and ensure that ADR options are specifically considered early on, before substantial legal fees have been incurred in discovery and motion practice, and clients' positions have further hardened.

The Proposal also provides a mechanism for the introduction of a parallel ADR track – in a way that does not signal weakness – by simply requiring the parties, if they are willing to entertain the use of ADR at some point, to set a deadline in the preliminary conference order by which they will *identify* a proposed mediator – whether through the Commercial Division's ADR Program or otherwise. By requiring the parties that are agreeable to mediation to identify a proposed mediator, both counsel *and the parties* will necessarily focus on areas of compromise and resolution and consider the value of having an independent advocate for resolution that the mediation process can offer.

In-house counsel, outside counsel and mediators that the Commercial Division Advisory Council polled consistently noted that the presence of a mediator in a case – even after an apparently "unsuccessful" mediation session – often acts as a catalyst for settlement efforts and more cost-effective prosecution and defense of a litigation. The mediation session or mediator often helps the parties to focus on their true objectives in the litigation, and, if the mediator stays involved, can kick-start a new round of settlement discussions as motions are filed, decisions are rendered or expensive or burdensome discovery phases are about to begin.

Notably, the Proposal does not set a deadline for the mediation to commence. After identifying the mediator, although the parties and counsel (with or without the Court's intervention) can certainly begin a formal mediation process, they have other options: They can (a) simply engage the mediator for introductory purposes, (b) use the mediator, while discovery and motion practice is proceeding, to have a neutral available to help narrow issues or help float settlement proposals, or (c) having worked to identify an appropriate neutral, defer engaging the mediator until a time when the parties and counsel believe their chosen mediator will be most

effective. The Proposal's goal is to foster an alternative track for resolution that, experience has shown, tends to reduce the costs and duration of litigation.

The Commercial Division Advisory Council has informally surveyed the practices of other courts, and has found that many federal court local rules similarly require attorneys to discuss ADR with their clients and adversaries, to address in their case management plan the appropriateness of ADR for the case, and to be prepared to discuss ADR with the judge at the federal Rule 16 scheduling conference. See, e.g., S.D.N.Y. Local Rule 83.9(d) (requiring parties to report at the initial Rule 16(b) case management conference, or subsequently, whether they believe mediation or a judicial settlement conference may facilitate resolution of the litigation); W.D.N.Y. Local Rule 16(b)(3)(B) (requiring counsel to be prepared to discuss stipulation to a confidential ADR process); D.D.C. Local Rule 16.3(c) (requiring discussion of ADR at Rule 16 conference).[1]

The Commercial Division Advisory Council is of the view that imposing the certification requirement upon counsel will ensure that all parties are aware of the availability of ADR options at a relatively early stage in the case, and prompt parties who might not otherwise be inclined to mediate to give the process a chance. In addition, the Commercial Division Advisory Council has received feedback supporting the Proposal both from in-house counsel, who have indicated a desire to signal an interest in mediation to the court without appearing weak, and from

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[1] A number of courts require certifications broadly similar to the type the ADR Committee proposes here. See, e.g., D.S.C. Local Rule 16.03 (requiring attorney certification). Other courts require certifications to be signed by both counsel and the client. See, e.g., N.D. Cal. ADR L.R. 3-5(b). The Commercial Division Advisory Council does not believe it is necessary or appropriate to require client certification. Except when a client gives evidentiary testimony through affidavit or deposition or verifying the accuracy of interrogatory responses, it is the lawyer, through a Rule 130-1.1 certification, who makes representations to the Court, and the Court relies on the trustworthiness of counsel. We see no reason to alter that process for the ADR certification in the Proposal.

Commercial Division Justices, who want to know whether clients are willing to entertain mediation notwithstanding typical concerns raised by outside counsel that mediation will not be effective early in a case. Nothing in the Proposal alters existing Rule 3 of the Commercial Division Rules, which permits the court to direct, or counsel to seek, the appointment of a mediator at any stage of the action.

PROPOSAL

For the reasons set forth above, the Commercial Division Advisory Council recommends that Rules 10 and 11 of the Commercial Division Rules be amended to add the following underlined language:

Rule 10. Submission of Information; Certification Relating to Alternative Dispute Resolution.

> At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case. Counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms provided by the Commercial Division and/or private ADR providers, and stating whether the party is presently willing to pursue mediation at some point during the litigation.

Rule 11. Discovery

> (a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF_____: COMMERCIAL DIVISION

	)	
	)	C/A No.:
	)	
Plaintiff(s),	)	
	)	
	)	
Defendant(s).	)	

ALTERNATIVE DISPUTE RESOLUTION ("ADR")
ATTORNEY CERTIFICATION

Pursuant to Rule 10 of the Commercial Division Rules, I certify that I have discussed with my client any Alternative Dispute Resolution options available through the Commercial Division and those offered by private entities. My client:

( ) presently wishes to jointly engage a mediator at an appropriate time to aid settlement.

( ) does not presently wish to jointly engage a mediator at an appropriate time to aid settlement.

Dated:_____ Signature: _____

Printed Name and Address:

_____

_____

ATTORNEY FOR:

_____

Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court at the time of each conference. A separate certification is required for each party represented.