STATE OF NEW YORK
UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

December 11, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed creation of a pilot mandatory mediation program in the Commercial Division of the Supreme Court, New York County.

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The Commercial Division Advisory Council has recommended adoption of a pilot program for mandatory mediation in the Commercial Division, New York County (Exh A). This initiative was originally proposed in June 2012 by the Chief Judge's Task Force on Commercial Litigation in the 21st Century, which found that mediation is underutilized in commercial disputes in New York despite its potential to foster settlements and reduce discovery disputes.

As set forth in the draft "Statement of the Administrative Judge Regarding Implementation of a Rule of the Commercial Division" (Exh B), the mediation program would apply to "every fifth newly assigned case" in the Commercial Division. Completion of mediation would be required within 180 days of a case's assignment to a Justice, unless all parties stipulate in writing to reject mediation or a party makes a good cause showing that mediation would be ineffective or unjust. The parties would be given flexibility to select their own mediator or request one from the Commercial Division's roster of neutrals. The pilot program would have an 18-month sunset provision to allow for a period of study prior to expansion, modification or cancellation, as the study's findings may warrant.

Persons wishing to comment on this proposal should e-mail their submissions to CommDivMedPilot@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 February 11, 2014.**

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. The issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the court system.

EXHIBIT A

Proposal of the ADR Committee of the Commercial Division Advisory Council To Implement the Task Force Report's Proposal for a Pilot Mandatory Mediation Program

September 13, 2013

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") proposes two initiatives the Task Force concluded will aid parties in reaching early resolution of their business disputes: (1) a pilot mandatory mediation program; and (2) procedures to help identify limited discovery that will aid settlement discussions before comprehensive electronic discovery and depositions multiply the costs of dispute resolution. After consultation with the New York County Commercial Division Justices and the Administrative Judge for Civil Matters, New York County, and after further discussion and analysis, the ADR Committee proposes that the Commercial Division Advisory Council endorse this recommendation of the Task Force Report, in part, and seek its immediate adoption. To expedite the implementation of this proposal, the ADR Committee proposes that the New York County Commercial Division act as it has on prior occasions by issuing a "Statement of the Administrative Judge Regarding Implementation of a Rule of the Commercial Division" in the form attached hereto.

The Task Force, after speaking to in-house and outside counsel and reviewing steps taken by other domestic and international courts that regularly handle commercial disputes, concluded that court systems that require parties to engage in mediation in most business disputes facilitate the efficient, fair and cost-effective resolution of those disputes. These "hallmarks" of an effective adjudicative forum, the Task Force concluded, will help ensure that businesses in the increasingly competitive global economy will continue to view New York as a desirable place to conduct business and the Commercial Division as a forum that will facilitate the cost-effective resolution of their disputes. Moreover, the Task Force reasoned, reforms that help facilitate settlement and reduce discovery disputes will enable Commercial Division Justices to focus more of their resources on substantive legal and factual issues and the development of New York commercial and business law they are particularly suited to address.

Notwithstanding the above, and notwithstanding the evidence that mediation has been used successfully in the Commercial Division, because of both the inherent adversarial nature of the litigation and the broad disparity in the degree to which judges refer matters to mediation, the Task Force concluded that mediation is "substantially underutilized in New York." Accordingly, the Task Force proposed the implementation of a Pilot Mandatory Mediation Program, including procedures for early settlement-related discovery to facilitate mediation or other settlement efforts. The language of the Task Force proposal is as follows:

In addition to cases that are directed to mediation pursuant to Rule 3 of the Uniform Rules of the Commercial Division, every fifth newly assigned case to the New York Count Commercial Division would be required to be mediated within 180 days of assignment to a Commercial Division Justice unless (a) all parties stipulated that they did not want the case to be mediated or (b) a party made a showing of "good cause" as to why mediation would be ineffective or otherwise unjust.

By no later than 90 days after assignment of the case to a Commercial Division Justice, the parties shall jointly inform the ADR Administrator that they either (a) have engaged a mediator or (b) request assignment of a mediator. If the parties request assignment of a mediator, the ADR Administrator shall identify no more than five possible mediators from the list of ADR Neutrals. Within seven days of receiving the list of neutrals, the parties shall either advise the ADR Administrator that they have agreed upon a neutral or provide the ADR Administrator [with] their rankings of the ADR Neutrals. For example, the first choice "1", the second choice "2", the third choice "3" and so on. The ADR Administrator will select the mediator who gets the lowest number on the combined lists of preferences. Once the mediator is selected, the parties shall comply with the Rules of the Alternative Dispute Resolution Program of New York County.

In the event that mediation has not been scheduled prior to the Preliminary Conference, counsel and the court shall identify at the Preliminary Conference any limited discovery that would be necessary for a successful mediation, which would be given priority over other discovery. If mediation proceeds before the Preliminary Conference has been scheduled, the parties and the mediator can independently arrange for any information exchange that would help enable resolution.[1]

In light of the Task Force's findings, as well as the ADR Committee members' own experience with mediation, the ADR Committee agrees with the Task Force that instituting the Pilot Mandatory Mediation Program will further the important goal of facilitating the efficient, fair and cost-effective resolution of Commercial Division disputes and therefore recommends that the pilot program described in the first two paragraphs of the above proposal be implemented as soon as practicable. In making this recommendation, the ADR Committee considered the view that requiring mediation may unduly interfere both with judges' discretion to manage their cases and dockets as they see fit as well as litigants' freedom to decide whether and when they wish to engage in mediation. With these concerns in mind, the ADR Committee

[1] In a separate section of its report, the Task Force expanded on this paragraph and specifically proposed that "Rules 7 and 8 of the Uniform Rules be amended to address at the Preliminary Conference, whether any particular limited disclosure – whether in the form of document exchange, interrogatories or partial depositions of one or two key witnesses or party representatives – would help facilitate settlement discussions or a mediation."

discussed various potential alternative proposals that might mitigate these concerns, such as eliminating the mandatory language entirely, further limiting the subset of cases that would be subject to the mediation requirement or exempting from the mediation requirement any case in which a motion to dismiss is filed, so long as that motion remains pending. The ADR Committee decided, however, that a number of factors weighed against such proposed modifications:

First, the Task Force's proposal is already fairly conservative in a number of respects. In addition to applying to only 1 in 5 new cases, the proposal allows parties who are subject to mandatory mediation to opt out of the requirement on consent, or upon one party's showing of "good cause" that the mediation would be ineffective or unjust, which provides a fair amount of protection for those concerned about being forced to waste time and money on a mediation which has little to no chance of success. Party control and flexibility is also maintained via the proposal's language allowing parties to either select the mediator from the roster of ADR neutrals maintained by the New York County ADR Administrator or choose a neutral that they separately identify; and even when the parties cannot agree, the ADR Administrator will use a ranking procedure to identify a mediator that all parties seem to prefer. With respect to courts, there is nothing in the Task Force proposal which, in the ADR Committee's view, requires a judge to do anything other than potentially hear and decide "good cause" motions and refer cases assigned to them for mediation within 180 days. Judges would otherwise be free to manage their cases and dockets in accordance with their usual practice while the parties separately engaged in private mediation efforts. Indeed, to the extent increased use of mediation leads to more settlements and less cases clogging the dockets, Commerical Division Justices' resources can better be devoted to substantive issues and the development of New York commercial and business law the Task Force found "they are particularly suited to address." In addition, the proposal has an 18 month sunset provision, which will allow the efficacy of the pilot program to be assessed and, if the circumstances warrant, cancelled or modified in light of actual experience and data.

Second, and particularly in view of the conservative nature of the Task Force's proposal, to amend the proposal by making it less mandatory would be to largely ignore the Task Force's key findings as to the efficacy of mandatory mediation programs in other jurisdictions and the "substantial underutilization" of mediation in the Commercial Division. As the Task Force noted, this underutilization is caused both by the "inherent adversarial nature" of litigation and the "broad disparity in the degree to which judges refer matters to mediation" – factors which, in the ADR Committee's view, can only be substantially overcome through a process that requires parties who might not otherwise be inclined to mediate to give the process a chance and at a relatively early stage in the case, before battle lines are drawn and significant expenses incurred. In this regard, the ADR Committee proposes the addition of some clarifying language at the end

of the second paragraph to underscore that regardless of the timing of the selection of the mediator and timetables set forth in the Rules of the Alternative Dispute Resolution Program of New York County, the mediation must be completed within 180 days of assignment of the case to a Commercial Division Justice.[2]

Third, the ADR Committee was moved by the extent to which its in-house counsel members supported the concept of mandatory mediation and, based on their substantial experience with mediation, believed in its potential to increase the amount of cases resolved earlier on and with less expense. Given the Task Force Report's focus on the extent to which the Commercial Division is perceived by businesses as a forum for the efficient, fair and cost-effective resolution of disputes, the ADR Committee found the views of its inhouse counsel members on this matter to be particularly relevant.

Notwithstanding its enthusiastic support for the first two paragraphs of the Task Force proposal regarding mandatory mediation, the ADR Committee does not recommend that the other aspects of the proposal, pertaining to "limited discovery" in connection with required mediations, be approved at this time. While the Committee certainly understands and endorses the idea that an early exchange of key information can facilitate mediation, it is concerned that the language of the Task Force proposal requiring that "counsel and the court" identify at the Preliminary Conference any limited discovery that would be necessary for a successful mediation (and further stating that such discovery would be given priority over other discovery) runs the risk of forcing parties to produce documents or witnesses at the very outset of the case they are otherwise unwilling to produce, potentially giving one side a tactical advantage it would not have had absent this new rule. At a minimum, this language may produce the very type of protracted discovery disputes over sensitive issues that the mandatory mediation requirement is designed to avoid. It is preferable, in the ADR Committee's view, to leave to the parties the task of discussing and agreeing on what information is necessary to exchange in order to have a productive mediation. The ADR Committee, therefore, will continue to review this aspect of the Task Force Report and will keep the Advisory Council apprised of its progress in this regard.

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[2] The Rules of the Alternative Dispute Resolution Program provide for the mediation to be completed within 45 days of the appointment of the mediator (extended to 75 days if the parties and mediator agree). This Committee proposes that for mediations conducted pursuant to the pilot program, the controlling time period be "within 180 days of assignment of the case to a Commercial Division Justice," regardless of when the mediator is appointed. Thus, the parties and the mediator may find that they have more or fewer than 45 days, depending upon when the mediator is selected/appointed, to conduct the mediation within the 180-day period. Parties are advised to act promptly to identify the mediator (or seek the assistance of the ADR Administrator) so as to maximize the amount of time available to mediate the dispute.

With respect to the Pilot Mandatory Mediation aspect of the Task Force proposal, the ADR Committee will monitor its impact during the 18-month term of the program and keep the Advisory Council apprised of the results.

EXHIBIT B

DRAFT

SUPREME COURT, CIVIL BRANCH
NEW YORK COUNTY

DRAFT

STATEMENT OF THE ADMINISTRATIVE JUDGE REGARDING IMPLEMENTATION OF A RULE OF THE COMMERCIAL DIVISION

This Statement is issued to inform the Bar about the way in which certain Rules of the Commercial Division (Section 202.70 of the Uniform Rules for the Trial Courts) will be implemented in this county until 18 months after the date set forth below.

Rule 3 (Alternative Dispute Resolution): In addition to cases that are directed to mediation pursuant to Rule 3 of the Uniform Rules of the Commercial Division, every fifth newly assigned case to the New York County Commercial Division shall be mediated within 180 days of assignment to a Commercial Division Justice unless (a) all parties stipulate that they do not want the case to be mediated or (b) a party makes a showing of "good cause" as to why mediation would be ineffective or otherwise unjust.

By no later than 90 days after assignment of the case to a Commercial Division Justice, the parties shall jointly inform the ADR Administrator that they either (a) have engaged a mediator or (b) request assignment of a mediator. If the parties request assignment of a mediator, the ADR Administrator shall identify no more than five possible mediators from the list of ADR Neutrals. Within seven days of receiving the list of neutrals, the parties shall either advise the ADR Administrator that they have agreed upon a neutral or provide the ADR Administrator of their rankings of the ADR Neutrals. For example, the first choice "1", the second choice "2", the third choice "3" and so on. The ADR Administrator will select the mediator who gets the lowest number on the combined lists of preferences. Once the mediator is selected, the parties shall comply with the Rules of the Alternative Dispute Resolution Program of New York County; **provided, however,** that the mediation shall proceed so as to be completed within 180 days of assignment of the case to a Commercial Division Justice.

Dated: September __, 2013

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Hon. Sherry Klein Heitler
Administrative Judge