



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

JOHN W. McCONNELL  
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## MEMORANDUM

April 11, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of 22 NYCRR § 202.70(g) (Commercial Division Rule 8(a)), relating to settlement-related disclosure.

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The Commercial Division Advisory Council has recommended an amendment of Commercial Division Rule 8(a) to add settlement-related disclosure to the list of topics that counsel are required to discuss prior to the preliminary conference (Exh. A). This proposal was originally advanced by the Chief Judge's Task Force on Commercial Litigation in the 21<sup>st</sup> Century ("Task Force"), which recommended amendment of Commercial Division Rules 7 and 8 to require discussion of settlement-related discovery both prior to and during the preliminary conference (Exh. B). The Advisory Council has endorsed the Task Force's proposal only insofar as it would require consultation by the parties before the preliminary conference. According to the Advisory Council's ADR Committee, early exchange of information would help promote more cost-effective settlement discussions and/or mediation in many cases. However, such exchanges should remain informal and voluntary in order to avoid disputes and motion practice.

Persons wishing to comment on this proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto: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 May 28, 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. 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**

**Proposal of the ADR Committee of the Commercial Division Advisory Council  
Concerning the Task Force Report's Proposal on Settlement-Related Discovery**

January 23, 2014

Section IV of the June 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21<sup>st</sup> Century (the "Task Force Report") recommends that Rules 7 and 8 of the Uniform Rules be amended to require the parties to discuss prior to the Preliminary Conference, and for the Court 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. The ADR Committee has considered this recommendation and agrees that the Uniform Rules should be amended to require the parties to discuss whether any particular limited disclosure would help facilitate settlement discussions, but does *not* recommend that the parties or the Court be required to address this issue at the Preliminary Conference.

**The Current Rules Relating to Settlement-Related Discovery**

Commercial Division Rule 8(a) provides "Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference, including the timing and scope of expert disclosure under Rule 13(c); and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference."

Commercial Division Rule 11(a) provides, "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; (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."

**The ADR Committee's Proposal on Settlement-Related Disclosures**

Consistent with the Task Force's proposal, the ADR Committee recommends that Commercial Division Rule 8(a) be amended as set forth below. The Committee does not recommend any change to Rule 11(a) with respect to settlement-related disclosure.

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference, including the timing and scope of expert disclosure under Rule 13(c); and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; **and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case.** Counsel shall make

a good faith effort to reach agreement on these matters in advance of the conference.

The ADR Committee agrees that in many cases an early exchange of information would help promote more cost-effective settlement discussions and/or mediation. However, the ADR Committee feels that such an exchange should be informal and voluntary because of the potential that early “settlement-related” discovery can lead to (a) disputes over what truly would be required for settlement and (b) attempts by parties to change the leverage and negotiating dynamics by forcing early disclosure of particularly sensitive documents or costly document production and depositions of high-ranking personnel under the guise that such disclosure is “settlement-related.”

To strike a balance of encouraging an informal, voluntary exchange while avoiding unnecessary motion practice, the ADR Committee recommends that Rule 8(a) – which only addresses pre-conference discussions among the parties – be amended to require the parties’ counsel to discuss prior to and in preparation for the Preliminary Conference a voluntary informal exchange (which could include both documents and limited witness examination, where the parties agree). However, the ADR does not recommend that the discovery provisions of Rule 11 be changed. The Court already may act, where appropriate (such as when the parties agree on ADR, early dispositive motions, etc.), to make orders that facilitate early resolution. Requiring more would not be appropriate at the initial stages of the case.

**EXHIBIT B**

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**THE CHIEF JUDGE'S TASK FORCE  
ON COMMERCIAL LITIGATION IN THE 21<sup>ST</sup> CENTURY**



*Report and Recommendations to the  
Chief Judge of the State of New York*

**June 2012**

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The Task Force makes the following proposal for a Pilot Mandatory Mediation Program:

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 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 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.

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.

***2. Establish procedures for early settlement-related discovery to facilitate mediation or other settlement efforts.***

The Preliminary Conference in any Commercial Division case provides a prime opportunity to encourage parties to identify the discovery that is most necessary for settlement discussions to be effective. To that end, the Task Force proposes that Rules 7 and 8 of the Uniform Rules be amended to require the parties to discuss prior to the Preliminary Conference, and for the court 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.