



**NEW YORK STATE**  
**Unified Court System**

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

**MEMORANDUM**

November 14, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposal to Enhance Attorney Certification Concerning Mediation in the Commercial Division

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The Administrative Board of the Courts is seeking public comment on a proposal to amend Rule 10 of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 10), to enhance the certification that attorneys serve and file at each preliminary, status, and compliance conference, in a form prescribed by the Office of Court Administration, that they have discussed with their clients the availability of alternative dispute resolution options (Exh. A). Proffered by the Commercial Division Advisory Council, the proposal would require that the OCA form “contain categories of information about the case prescribed by the Office of Court Administration which may assist the court, counsel and the parties in considering the roles mediation might play in the resolution of the case” (Exh. A, p. 9). The Council has included a draft form with its proposal (Exh. B).

As discussed in a supporting memorandum, the amended rule and form are designed to promote early resolution of business disputes through mediation, in a manner consistent with and supportive of the Excellence Initiative (Exh. A, pp. 3-8).

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Persons wishing to comment on the 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, 11<sup>th</sup> Fl., New York, New York, 10004. Comments must be received no later than January 18, 2019.

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**

**M E M O R A N D U M**

**TO: The Administrative Board of the Courts**  
**FROM: Commercial Division Advisory Council**  
**DATE: October 9, 2018**  
**RE: Proposal to Enhance Attorney Certification Concerning Mediation**

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On October 11, 2017, the Chief Administrative Judge of the Courts issued an Administrative Order amending Rules 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. In his Administrative Order, dated October 11, 2017, the Chief Administrative Judge also promulgated a form statement to be submitted by counsel to the court certifying counsel’s discussion of the availability of ADR mechanisms.

These amendments to Commercial Division Rules 10 and 11 were adopted after the proposed amendments had been released for public comment. A number of bar associations supported the proposed amendments and none of the 180 bar associations in New York State opposed the proposed amendments.

The amendments to Commercial Division Rules 10 and 11 became effective on January 1, 2018 and have now been in place for nine months. Particularly in light of the bar’s support for the amendments, and the various constructive and helpful suggestions which those amendments generated during the public comment process in 2017, the Commercial Division Advisory Council now proposes an enhancement of the new procedure which will assist the courts, clients, and lawyers in determining which cases may be best suited for resolution by mediation. In particular, the Advisory Council proposes that the certification form to be submitted by counsel

should list a number of categories of cases which the Advisory Council believes may be particularly well-suited to mediation. When counsel completes the form, as they are now already required to do, they will simply check on the form each category applicable to their case. The information in the form will be useful to clients and counsel in discussing the role mediation might play in the case.

The proposed enhancement of the certification form builds on the prior certification requirement, and further promotes early resolution of business disputes through mediation, by identifying and highlighting for the parties the types of cases that are often successfully resolved through mediation. The information will also be useful to the court system in tracking the types of cases where mediation proves to be especially effective in helping to resolve cases. The Advisory Council believes that the proposed change is a constructive next step which should be implemented now to enhance the value of the current form, both for parties litigating in the Commercial Division and for the court system.

The Commercial Division Advisory Council believes that implementing this proposed enhancement of the certification form at this time is fully consistent with and supportive of Chief Judge DiFiore's Excellence Initiative, which has already resulted in numerous "measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public." (The State of Our Judiciary 2018 Excellence Initiative: Year Two, February 2018, page i.) In addition, the Commercial Division continues to serve as a laboratory for innovation in the court system; after new rules and procedures have been introduced in the Commercial Division, other parts in the court system have had an opportunity to evaluate whether these innovations might be valuable to them as well. Finally, it is particularly appropriate that the Commercial Division adopt this enhancement of the certification form because mediation has been embraced by many members of the business community as a means

to improve the efficiency and productivity of the dispute resolution process, and this proposal will increase the information available to the participants in that process.

### **BACKGROUND**

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”) 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).)

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 recommended in January 2017 that a requirement that counsel certify to the court that they have discussed ADR options with their client was an appropriate next step that will help 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.

During 2016, the Commercial Division Advisory Council had informally surveyed the practices of other courts, and 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.

The Commercial Division Advisory Council was of the view that the certification requirement would 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 received feedback supporting the proposed amendments to Rules 10 and 11 both from in-house counsel, who have indicated a desire to signal an interest in mediation to the court without appearing weak, and from Commercial Division Justices, who wanted to know whether, notwithstanding clients' litigation positions, they would be willing to pursue mediation. Nothing in the proposed amendments altered 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.

After the Advisory Council's proposed amendments to Commercial Division Rules 10 and 11 had been released for public comment on April 10, 2017, the Office of Court Administration received comments supportive of the proposal from the Commercial and Federal Litigation Section of the New York State Bar Association (the "Commercial and Federal Litigation Section"), the Dispute Resolution Section of the New York State Bar Association (the "Dispute Resolution Section"), the ADR in the Courts Committee of the Dispute Resolution Section (the "ADR Courts Committee"), the New York City Bar Association (the "City Bar") and the co-chairs of the Westchester County Bar Association's Alternative Dispute Resolution Committee (the "WCBA"), and also received comments from an individual court attorney referee in the Suffolk County Commercial Division. Several of the organizations that supported

the proposal provided suggested amendments. None of the 180 bar associations in New York State opposed the proposal.

Some of the comments provided to the Office of Court Administration in response to its request for public comment suggested that additional information should be provided to clients and/or attorneys about the benefits of mediation. For example, the ADR Courts Committee in its comments “wholeheartedly support[ed]” the proposed amendments but suggested that the certification form “be modified to provide for the delivery to the client of a copy of a Notice of Mediation Alternative” that explains the benefits of mediation and how and why it works. The ADR Courts Committee provided a proposed “Notice of Mediation Alternative” form, which would include sections addressing “What Mediation Is and How It Works” and “Selecting a Mediator.” Similarly, the Dispute Resolution Section suggested that “[b]ecause not all attorneys fully understand the benefits of mediation and how and why it works, they might additionally benefit from a reminder that helpful information is available on the Office of Court Administration’s website.”

In light of these and other similar constructive comments which the Advisory Council has subsequently received, the Advisory Council believes that it would be helpful to attempt to identify the types of cases that might be most likely to settle if referred to the court’s mediation program.

Currently, the Rules and Procedures of the Alternative Dispute Resolution Program in New York County provide no guidance to Commercial Division Justices about the types of cases in which they should order ADR other than to state:

Rule 3. Determination of Suitability; Order of Reference. Except as provided in Rule 15, cases are referred to alternative dispute resolution (“ADR”) in the Program by the Justice assigned to the case. The assigned Justice may order parties to undergo ADR in the Program where the Justice finds that it would be in the interest of the just and efficient processing of the case to do so or upon

consent of the parties. The suitability of an action for ADR shall be determined by the assigned Justice after considering the views of the parties insofar as practicable. If a case is referred to ADR, the Justice shall issue an Order of Reference. Such Order shall not stay court proceedings in the case unless otherwise specified therein.

While experience has shown that mediation can be effective in almost any kind of case, the Commercial Division Advisory Council has concluded that certain types of cases have proved to be particularly amenable to resolution by mediation because of the nature of the dispute, the types of parties involved or the relationship of the parties. These conclusions are based in part on the collective experiences with mediation of the members of the Advisory Council as well as on the literature relating to the use of mediation in connection with commercial litigation. See, for example, Section 60:6, “Cases best suited for mediation” of Chapter 60 on “Mediation and Other Nonbinding ADR” written by John S. Kiernan and William H. Taft V in the treatise entitled *Commercial Litigation in New York State Courts* as well as Section 51:8, “Cases best suited for mediation” of Chapter 51 on “Mediation” written by Hon. Daniel H. Weinstein and Cedric C. Chao in the treatise entitled *Business and Commercial Litigation in Federal Courts*.

One type of case which might be particularly likely to benefit from mediation is a case involving an ongoing business or personal relationship among the parties, such as a case involving joint ventures, closely held corporations, business partnerships, and certain commercial contracts.<sup>1</sup> Because mediation is more streamlined and informal than litigation, the

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<sup>1</sup> See, e.g., Eva M. Soeka, Adult Guardianship Mediation, Experience, Spring 1999, at 10 (“Cases that have ongoing relationships between the parties, whether business or personal, are often the most suitable for mediation. This statement is premised on the fact that while the dispute may be settled, the relationship may not terminate at the conclusion of the dispute.”); Lawrence H. Cooke, Mediation: A Boon or a Bust, 28 N.Y.L. Sch. L. Rev. 3, 26 n.63 (1983-84) (“[M]ost studies and experts tend to agree that the cases best facilitated by mediation are those involving civil or criminal disputes where the parties are involved in on-going relationships.”); American Bar Association, How Courts Work, Mediation: In What Cases Might Mediation Be Used?, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/mediation\\_whenuse.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/mediation_whenuse.html).



parties often can resolve their dispute more quickly and can then continue their business relationship.<sup>2</sup>

Another type of case susceptible to resolution by mediation in the Commercial Division might include cases in which the amount in issue is less than double the jurisdictional threshold amount in that Commercial Division because of the need to minimize client costs and achieve cost-effective resolutions of such cases. Thus, in New York County, where the jurisdictional threshold amount in the Commercial Division is \$500,000, cases in which the amount in issue is less than \$1,000,000 might receive particular attention as candidates for mediation. Of course, mediation has often proved successful to resolve disputes involving tens and hundreds of millions of dollars. However, mediation's ability to define and address issues in an expedited fashion can be particularly attractive when the costs of litigation can quickly exceed the amount in dispute.

Other types of cases that might be particularly susceptible to resolution by mediation are cases involving employment agreements (particularly because confidentiality is often important in employment cases); business transactions involving commercial banks and other financial institutions (particularly because counsel for such institutions usually understand and appreciate the benefits of mediation); commercial insurance coverage and environmental insurance coverage cases (insurance company counsel are often experienced and sophisticated about mediation); and construction cases (because they are often factually complicated and therefore expensive to litigate in comparison to the amount in issue). Finally, cases which may be

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<sup>2</sup> See, e.g., Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 Nev. L.J. 196, 213-14 (2002-03) ("Corporate and defense lawyers have come to embrace mediation as a method of cutting client costs and reducing friction among companies that desire to keep doing business with each other.").

particularly appropriate for mediation may include cases which appear to require creative and flexible solutions.<sup>3</sup>

The Commercial Division Advisory Council does not believe that the categories of cases listed above are the only cases susceptible to resolution by mediation or that its articulation of these categories should be viewed as necessarily definitive or final. We anticipate that as the courts compile data from the certification forms submitted by counsel and compare that data to the results achieved in mediation, additional insights about the efficacy of mediation in particular type of cases will become available. We also anticipate that the new data and additional insights can be used to fine-tune the categories of cases listed on the certification form. However, despite the potential for future refinement of these categories, we believe that we currently have access to more than enough information, experience and expertise to enable valuable forward progress to be made at this time. In particular, we believe that the new information to be provided by counsel on the certification form will materially assist the parties, their counsel, and the courts in making decisions about which cases to mediate.

We would like to explicitly note that this new amendment to Commercial Division Rule 10 does not actually require anyone to do anything other than to possibly check one or more boxes on the certification form which counsel are now already required to submit. More specifically, this proposed amendment does not require the court to refer cases to mediation or to take any other action based on the additional information which will be provided in the new form. The additional information is provided only for the court's consideration to be used (or not used) as the court deems appropriate in evaluating whether to discuss mediation with counsel and for the court system to track the success of mediation in particular types of cases. Similarly,

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<sup>3</sup> See Soeka, *Adult Guardianship Mediation*, 9 *Experience* 10 (1998-1999); see also Paula Young, *The "What" of Mediation: When Is Mediation the Right Process Choice?* (Oct. 2006), <http://www.mediate.com/articles/young18.cfm> (mediation is appropriate where the parties "need more than an award of damages or an injunction" or "seek some sort of compromise solution rather than a win-lose outcome").

neither counsel nor their clients are required to take any action other than to check boxes on the form. The Advisory Council of course hopes that if one or more boxes on the form are checked, counsel and their clients will give particular consideration to the potential value of mediation in that case, but the proposed amendment does not require them to mediate.

### **PROPOSAL**

For the reasons set forth above, the Commercial Division Advisory Council recommends that Rule 10 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. In addition, the statement to be submitted by counsel shall contain categories of information about the case prescribed by the Office of Court Administration which may assist the court, counsel and the parties in considering the role mediation might play in the resolution of the case.

As noted above, the Administrative Order, dated October 11, 2017, promulgated a form statement to be submitted by counsel to the court certifying counsel's discussion of the availability of ADR mechanisms. Commercial Division Rule 10 now provides that counsel for each party shall submit this statement to the court "at the preliminary conference and each subsequent compliance or status conference." The Advisory Council now proposes that the form

to be submitted by counsel shall contain a list of categories of cases which may be particularly susceptible to resolution by mediation. Thus, the Advisory Council recommends that the form to be submitted which was Exhibit A to the Administrative Order dated October 17, 2017 should be amended to add the following underlined language:

## **EXHIBIT B**

**EXHIBIT A**

SUPREME COURT OF THE STATE OF NEW  
YORK, COUNTY OF \_\_\_\_\_

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Plaintiff(s),

Part: \_\_\_\_\_

Index No.: \_\_\_\_\_

- against -

**ALTERNATIVE DISPUTE RESOLUTION  
("ADR") ATTORNEY CERTIFICATION**

Defendant(s).

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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.

This case involves the following (check all that are applicable):

- an ongoing business or personal relationship among the parties
- an employment agreement
- a business transaction involving a commercial bank or other financial institution
- commercial insurance coverage or environmental insurance coverage
- construction litigation
- the amount in issue is less than double the jurisdictional threshold amount for the Commercial Division in this County or Judicial District
- issues that appear to require creative or flexible solutions

Dated: \_\_\_\_\_

Signature: \_\_\_\_\_

Attorney Name and Address:

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ATTORNEY FOR:

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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 the Preliminary Conference and each subsequent Compliance or Status Conference. A separate certification is required for each party represented.