NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUN SEL

MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on an Amendment to Commercial Division Rule 3(a) (22 NYCRR § 202.70(g), Rule 3(a)) to Permit the Use of Neutral Evaluation as an ADR Mechanism and to Allow for the Inclusion of Neutral Evaluators in Rosters of Court-Appointed Neutrals

Date: December 4, 2020

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council ("CDAC") to amend Commercial Division Rule 3(a) (22 NYCRR § 202.70(g), Rule 3(a)) "to permit the use of neutral evaluation as an ADR mechanism and to allow for the inclusion of neutral evaluators in rosters of court-approved neutrals" (Exhibit A, p. 1).

The CDAC notes that the expanded use of alternative dispute resolution (ADR) has been a hallmark of court reform and innovation and highlighted by the Chief Judge in her State of Our Judiciary remarks. The CDAC believes a rule change is warranted because currently, Part 146 requires that to be certified as a mediator for a court roster, an individual must have completed 40 hours of approved training (Ex. A, p. 4). The 40-hour training requirement for mediators limits the number of skilled neutrals available to resolve disputes in the Commercial Division and may also reduce diversity on those panels.

The CDAC's proposal is that neutral evaluators, who only have to undergo six hours of training and have five years of training as per Part 146, can be added to the roster of neutrals to help facilitate resolution of ongoing matters. The CDAC believes that the more manageable training requirements for neutral evaluators will increase diversity for those serving as neutrals on commercial panels. Judges and litigants will have access to information regarding who is certified as a "mediator" and who is certified as a "neutral evaluator" on the panel.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court

Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than January 29, 2021.

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: Administrative Board

FROM: Commercial Division Advisory Council

DATE: June 9, 2020

RE: Proposal to amend Commercial Division Rule 3(a) to provide for Neutral Evaluators on Rosters of Approved Neutrals

Overview

The Commercial Division Advisory Council proposes that Commercial Division Rule 3(a) be modified to permit the use of neutral evaluation as an ADR mechanism and to allow for the inclusion of neutral evaluators in rosters of court-approved neutrals. The Council believes that this rule modification will enable the Commercial Division to use the full range of ADR services contemplated by Part 146 of the Rules of the Chief Administrative Judge, which describes qualification guidelines for both mediators and neutral evaluators, and will help address the need for expanded alternative dispute resolution (ADR) services as the court system pursues expansion of presumptive ADR, particularly in light of the additional challenges posed by the coronavirus pandemic. The Commercial Division Advisory Council also believes that providing this additional alternative will not only provide more options to the businesses that rely on the Commercial Division for their disputes, but will also allow a greater number of experienced business litigators to offer their services to support the business community and court system. Finally, the field of alternative dispute resolution has suffered from a historical lack of diversity. The Council believes that by permitting attorneys to serve on court rosters as neutral evaluators (which requires six hours of training instead of the forty hours required for

mediators), a broader range of attorneys will be able to balance the training requirements with their other professional obligations.

Analysis

Even before the coronavirus posed incredible additional challenges on both the New York judicial and business communities, New York courts had already made the expanded use of alternative dispute resolution a hallmark of court reform and innovation. The Chief Judge had highlighted initiatives involving presumptive ADR in the State of the Judiciary Address and all of the judicial districts around the state were in the process of developing and implementing ADR plans and hiring District ADR Coordinators. Notably, the Chief Judge expressly identified "neutral evaluation" as one of the ADR mechanisms to be used as part of the transformational presumptive ADR process being rolled out in New York. ("Going forward, civil cases, with limited exceptions, will be automatically presumed eligible for early referral to court-sponsored ADR, including . . . "neutral evaluation" . . . ." State of Our Judiciary 2020, February 26, 2020, at 12. http://www.nycourts.gov/ctapps/news/20_SOJ-Speech.pdf.)

As we enter the post-COVID-19 era, the need for alternative dispute resolution to ensure the prompt and cost-effective resolution of disputes has been magnified. Businesses want to limit the costs and uncertainty of litigation as they struggle to survive in a radically reshaped landscape. As a recent article in *Forbes* noted, "The pain and uncertainty of the impact of the coronavirus on small business owners is staggering and likely to be substantial. Entrepreneurs are being forced to take drastic steps to continue operating and many are fearful about their futures. . . . A National Small Business Association member survey found that three in four small-business owners are very concerned about the economic impact of COVID-19."

https://www.forbes.com/sites/nextavenue/2020/03/23/how-the-coronavirus-is-impacting-small-business-owners/#2d2564af473a

Moreover, as the participating Justices from around New York noted in the May 11, 2020 video Town Hall with Commercial Division Justices, because of safety concerns and backlogs, jury trials will likely not be scheduled for some time, and bench trials may have to proceed virtually or require video testimony given travel restrictions.

The Justices, however, noted that counsel have been increasingly open to alternative dispute resolution – particularly non-binding, settlement-oriented approaches like mediation – to help resolve disputes. Indeed, counsel now frequently either ask for the opportunity to pursue private mediation or the Justices were increasingly encouraging parties to find a mediator or work with the ADR Coordinators to select approved neutrals from the rosters maintained by their judicial district.

With the anticipated increase in the need for dispute resolution services, the court system has been working diligently to update rosters of approved neutrals and has increased the number of training programs. In addition, the court system has expanded some of the rosters by provisionally approving the certification of mediators who are already approved to serve on the mediation panels in the United States District Courts for the Northern and Western Districts of New York.

Commercial Division cases often involve extraordinarily complex legal and financial issues and the stakes tend to be very high. As a result, many commercial litigants and their counsel feel more comfortable retaining as a neutral someone with substantial experience in commercial disputes. An experienced business lawyer or former judge can provide meaningful feedback on the strengths and weaknesses of potential arguments and a realistic assessment of

the risk, costs and delays inherent in the parties' dispute. Experienced business lawyers also have seen innumerable approaches taken by clients and adversaries over the years to craft creative and effective settlements – alternatives that these lawyers can offer to the parties and their counsel when they are serving as neutrals as options for resolution or to foster further brainstorming of potential solutions. Because of the value that these substantive experiences have to parties and their counsel, many of the most successful private mediators who business lawyers and their clients retain are ones who have this experience.

Business lawyers with a strong sense of public service may be willing to volunteer their time or work at a reduced rate to serve as neutrals as part of a Commercial Division roster. Yet, experienced commercial lawyers are often reluctant to serve as panel mediators because they do not believe they can juggle the extensive time commitment required by New York for mediator training with their other client responsibilities.

In New York, to be certified as a mediator for a court roster, a person must satisfy the criteria set forth in the Rules of the Chief Administrative Judge, Part 146 (Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters). In particular, the person "must have successfully completed at least 40 hours of approved training" including "[a]t least 24 hours of training in basic mediation skills and techniques; and . . . [a]t least 16 hours of additional training in the specific mediation techniques pertaining to the subject area of the types of cases referred to them. Part 146.4(b). This time commitment for training will be especially hard for lawyers to meet in the months following the COVID shutdown, as demand for business attorneys will likely increase, and attorneys will be seeking to complete work that could not be done remotely during the pandemic.

Diversity Concerns

In 2018 the ABA House of Delegates adopted Resolution 105 urging an increase in diversity among ADR providers. *See* https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf (the "ABA Report"). According to the ABA Report, ADR has been described as "arguably the least diverse corner of the profession" and "a stubborn enclave of homogeneity." Ben Hancock, *ADR Business Wakes Up to Glaring Deficit in Diversity,"* Law.com (Oct. 5, 2016), https://www.law.com/sites/almstaff/2016/10/05/adr-business-wakes-up-to-glaring-deficit-of-diversity/?kw=ADR%20Business%20Wakes%20Up%20to%20Glaring%20Deficit%20of%20Diversity&et=editorial&bu=Law.com&cn=20161005&src=EMC-Email&pt=AfternoonUpdate

With increased use of alternative dispute resolution as part of the judicial process, "it becomes an issue of fairness, public justice and public acceptance that the decision-makers or facilitators of private dispute resolution processes are representative of the individuals, institutions and communities that come before them." D.H. Burt and L.A. Kaster, "Why Bringing Diversity to ADR Is A Necessity (ACC)" (Sept. 30, 2013) (citations omitted), International Institute for Conflict Prevention & Resolution website, located at https://www.cpradr.org/news-publications/articles/2013-09-30-why-bringing-diversity-to-adr-is-a-necessity-acc.

The Commercial Division Advisory Council is concerned that the challenges posed by a forty-hour mediation training requirement on lawyers may have a disproportionately negative impact on women and minorities who might consider serving as neutrals on commercial panels. Many bar associations have observed, for example, that rates of partnership among women and people of color at law firms are embarrassingly low. Facing difficult odds, women lawyers and

lawyers of color may feel that taking the time away from client work and business development could potentially put their career prospects at risk. As the ABA House of Delegates noted in the ABA Report, "It simply may not be economically rational to invest in the requisite training and developing the experience to become a neutral in the face of reduced opportunity to build an economically viable practice." *See* https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf (ABA Report) at 6. Though the focus of the ABA Report was on building an alternative dispute resolution practice as opposed to a career as a lawyer in private practice, the risks remain the same.

Adding Neutral Evaluators as a Solution

Part 146 of the Rules of the Chief Administrative Judge, however, offers a solution that can help bridge the gap. In addition to setting the standard for mediator training and certification, Part 146 also provides standards for certifying neutral evaluators. A "neutral evaluation" is "a confidential, non-binding process in which a neutral third party (the neutral evaluator) with expertise in the subject matter relating to the dispute provides an assessment of likely court outcomes of a case or an issue in an effort to help parties reach a settlement." Part 146.2(c). Under Part 146.4(a), lawyers and judges admitted to practice law for at least five years who also have at least five years of substantial experience in the specific subject area of the cases that will be referred to them may be certified as "neutral evaluators". The instructional requirement is ***six hours*** of approved training in procedural and ethical matters related to neutral evaluation, not forty hours.

Once trained and certified, these neutral evaluators could be added to rosters of neutrals and, if Rule 3(a) permitted, could be selected by judges or parties to help facilitate the resolution

of complex commercial matters alongside the mediators already available. To clarify the level of training the particular neutral has and the expected services to be provided, the roster of neutrals should indicate the particular certification obtained by the neutral. (E.g., whether the neutral has been certified as a "mediator" or "neutral evaluator".)

Parties and judges, of course, would need to consider the skill sets that are most necessary to help achieve settlement. The mediation process is expected to be more comprehensive. According to Part 146, the mediator "helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome." Part 146.2(b). "The mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful when family members, neighbors, or business partners have a dispute." http://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml. To achieve these goals, New York certified mediators are specifically trained on communication skills and the emotional and relationship issues that are often impediments to resolution – such as in business divorce matters or employment-related disputes. The training addresses ways to overcome impasse, deal with difficult attorneys and tentative parties, and manage the parties and the process and act in a way that the court system deems appropriate for a mediator. The training involves supervised role plays where mediators experience the perspective of neutral, lawyer and client and feedback is provided from longtime mediators who share their own strategies and challenges they have faced. Mediators are also trained to be sensitive to power imbalances that need to be addressed to ensure fundamental fairness in any court-annexed resolution.

In other situations, however, the parties and counsel may believe that the most important skills needed in a neutral are the neutral's ability to evaluate the merits of each party's position and then "help parties reach a settlement" by, *inter alia*, suggesting a range of potential solutions.

We note that the neutral evaluator is not constrained to just providing an assessment as to how a case might wind up. Once engaged, if the parties so desire, neutral evaluators can offer the full range of settlement tools that they have. *See, e.g.*, http://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml ("The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.")

By adding neutral evaluators to rosters of neutrals, the Commercial Division would enhance the options and solutions that it provides to businesses that choose to bring their cases to New York courts – more diversity and experience in its neutrals and more types of alternative dispute resolution mechanisms.

Accordingly, the Commercial Division Advisory Council recommends the following amendment to Rule 3(a):

Existing Rule 3(a)

As currently written, Rule 3(a) provides:

> (a) At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. Counsel are encouraged to work together to select a mediator that is mutually acceptable and may wish to consult any list of approved neutrals in the county where the case is pending. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

Proposed Modification to Rule 3(a)

The Commercial Division Advisory Council proposes modifying Rule 3(a), as follows (additions are in italics, underlined and in bold):

> (a) At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator ***or neutral evaluator*** for the purpose of ***helping to achieve*** a resolution of all or some of the issues

presented in the litigation. Counsel are encouraged to work together to select a mediator ***or neutral evaluator*** that is mutually acceptable and may wish to consult any list of approved neutrals in the county where the case is pending. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.