

To: Eileen D. Millet,
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: January 26, 2021

Re: Proposal to Amend Commercial Division Rule 3(a) to Permit Use of Neutral Evaluation as ADR Mechanism and to Allow for Inclusion of Neutral Evaluators in Rosters of Court-Appointed Neutrals

The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Memorandum of Eileen D. Millet, Counsel, Office of Court Administration, dated December 4, 2020 (“Memorandum”), seeking public comment on proposed revisions to Rule 3(a) (“Rule 3(a)”) of the Rules of the Commercial Division (the “Proposal”).

I. Executive Summary

The Proposal seeks to revise Commercial Division Rule 3(a) to expressly provide for the use of neutral evaluation as an alternative dispute resolution (“ADR”) mechanism in the Commercial Division and to expressly permit the inclusion of neutral evaluators in the rosters of court-appointed neutrals under Part 146. The Proposal is intended to expand the use of ADR mechanisms spurred by the statewide presumptive ADR initiative. Indeed, the increased need for ADR services has been exacerbated by the impact of the COVID-19 pandemic on the New York State Courts. The Proposal also is intended to address the need to increase diversity of background and perspective within the rosters of court-appointed neutrals in the Commercial Division.

The current Rule 3(a) of the Commercial Division contemplates that a court may direct or counsel may seek the appointment of an uncompensated mediator. The CDAC recommends

including neutral evaluators to assist the parties in reaching a voluntary resolution of disputes and conserve party and court resources.

The Proposal is attached as Exhibit A.

II. PROPOSED RULE

See Exhibit A at pages 8-9.

III. SECTION COMMENTS

The Section views favorably the suggestions proposed by the CDAC to modify Commercial Division Rule 3(a) and well appreciates all the reasons articulated by the CDAC in its memorandum to expand the rosters of neutrals under Commercial Division Rule 3(a), including the need to make available more lawyers who can facilitate out-of-court resolution of disputes and to increase diversity. In light of the difference in requirements for qualification under Part 146 as between neutral evaluators and mediators, the Section suggests that it may be useful to maintain separate rosters for each category. This would not prevent a neutral on a court-appointed mediation roster from also being included on a court-appointed neutral evaluator roster.

Further, as neutral evaluation is intended to be less comprehensive than mediation,¹ consideration should be given by the Commercial Division to the implementation of ADR protocols or procedures that would provide for an appropriate period to allow for party consent to engage in neutral evaluation, and, if such consent is not obtained, then the parties shall be directed to mediation by the court. The Section notes that the ADR Protocols in certain Commercial Division Courts presently permit the use of early neutral evaluation as an ADR mechanism. *See,*

¹ As noted in the Proposal, under Part 146, "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." Proposal at 6 (citing Part 146.2(c).) By contrast, Part 146.2(b) defined "mediation" as "a confidential dispute resolution process in which a neutral third party (the mediator) helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome."

e.g., Rule 2(a) & 7(d), *Rules and Procedures of the Alternative Dispute Resolution Program*, Commercial Division, Supreme Court, New York County, *available at* <https://www.nycourts.gov/LegacyPDFS/courts/comdiv/ny/PDFs/ADR-rules.pdf>; *see also Rules of the Alternative Dispute Resolution Program*, Commercial Division, Supreme Court, Nassau County, *available at* <https://www.nycourts.gov/LegacyPDFS/courts/10jd/nassau/pdf/Commercial-Divison-ADR-Rules.pdf>.

As to the need to increase diversity of background and experience of neutrals within the Commercial Division, the Section wholeheartedly embraces this goal and looks forward to proposing initiatives to foster measurable progress to ensure that the ranks of ADR practitioners, as well as within Commercial Division practice as a whole, better reflect the diversity within our state. One suggestion would be to increase periodic reporting on the background of neutrals to whom cases are referred on the court-appointed Commercial Division rosters.