

Comments on Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), Relating to Selection of Mediators

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #6

August 17, 2018

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 John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated June 22, 2018, proposing an amendment to Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), relating to the selection of mediators (the "Memorandum"). A copy of the Proposal is attached hereto as Exhibit "A."

I. EXECUTIVE SUMMARY

Rule 3(a) of the Rules of the Commercial Division currently permits the court to direct or counsel to seek appointment of a mediator to resolve all or some of the issues presented, at any stage of the litigation. The ADR Committee of the Commercial Division Advisory Council (the "Advisory Council") has made two recommendations: (1) that the language of Rule 3(a) be amended to include the following language: "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"; and (2) that the Office of Court Administration ("OCA") and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether applicable ADR rules should be revised to provide a uniform five (5) business day deadline for the parties to agree upon a mediator before assignment by the court.

II. SUMMARY OF PROPOSAL

Rule 3(a) provides in part: "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" (22 NYCRR § 202.70[g], Rule 3[a] (emphasis added)). Rule 3(a) refers to the "appointment" of a mediator, and the Advisory Council notes that various Commercial Divisions have implemented programs whereby mediators are appointed by the court from a roster of qualified neutrals, rather than by agreement between the parties.

Citing feedback from Bar Associations, the Advisory Council suggests that mediation may be more successful when parties are given the opportunity to agree upon a mediator. According to the Memorandum, statistically, where parties are permitted to first agree upon a mediator, agreement on a mediator is reached in approximately 70% of cases. In federal district courts, where the parties are first given the opportunity to agree upon a mediator, statistics show a settlement rate of around 70%.

The rationale asserted by the Advisory Council is that allowing the parties to agree upon a mediator facilitates greater trust in the competence of the mediator and greater party satisfaction, thereby increasing the settlement rate:

"Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur – or at least will not be impeded by concerns about the competence, effectiveness and trustworthiness of the mediator."

(Proposal at 3).

While the Advisory Council believes a uniform five (5) business day rule is ideal, the Advisory Council recognizes that local concerns may weigh against adopting formal rule dictating a specific time period for party-selection of a mediator. Therefore, the Advisory Council has suggested an amendment to Rule 3(a) without any specific deadline, as follows:

"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 agreeable, 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."

(Proposal at 4).

In addition, the Advisory Council suggests that the OCA and State ADR Coordinator coordinate with local ADR Administrators in each Commercial Division to determine whether the local ADR rules can be revised to provide a five (5) business day deadline to agree upon a mediator before one is appointed by the court.

COMMENTS:

The Section strongly agrees that confidence in the competence and experience of a mediator is essential to the mediation process, and that allowing party-selection of a mediator facilitates that confidence. The proposed amendment does not provide a firm deadline for party-selection of a mediator, thereby allowing each Commercial Division in the State to adopt its own rule to facilitate party-selection. Therefore, the Section recommends that the proposed amendment to Rule 3(a) be adopted, and agrees that the OCA and State ADR Coordinator should coordinate with local ADR Administrators to determine whether a five (5) business day deadline for party-selection of a mediator can be implemented.

New York State Bar Association

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EXHIBIT A



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. MCCONNELL
COUNSEL

June 22, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), Relating to Selection of Mediators

The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 3 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 3[a]), proffered by the Commercial Division Advisory Council, to provide that litigating parties engaged in mediation in the Commercial Division be encouraged to select a mutually acceptable mediator to assist in the resolution of their disputes. In support of this proposal, the Council cites, *inter alia*, statistics demonstrating that parties are far more likely to settle matters before a jointly approved mediator than before a mediator appointed by another method (Exh. A. pp. 2-3).

The Board also seeks comment on the Council's proposal that the Office of Court Administration take steps to assess whether local ADR rules should be amended to provide that parties be given five (5) business days to agree upon a mediator in Commercial Division matters (Exh. A, p. 3).

Persons wishing to comment on these proposals should e-mail their submissions to 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 August 20, 2018.**

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 Selection of a Mediator Under the Commercial Division Rules**

May 23, 2018

In response to the various proposed new rules made by the Commercial Division Advisory Council to enhance the effective use of mediation in Commercial Division cases, numerous Bar Associations have shared their views as to the characteristics that help promote success. One such factor consistently cited by the Bar Associations has been that mediation tends to succeed when the parties and their counsel not only agree to pursue mediation, but also agree on the particular mediator. However, in reviewing court-annexed ADR programs throughout the state, not all programs are structured to place a priority on efforts to encourage agreement on the selection of the mediator. Thus, in light of the feedback that has been received and to help educate parties about this critical step to make the mediation process work, the ADR Committee recommends that Rule 3(a) of the Commercial Division Rules be modified to include the following language: "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." The ADR Committee further recommends that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator *before* the ADR Administrator takes additional steps to assign a mediator for the case.

Current ADR Rules Governing Mediator Selection

Commercial Division Rule 3(a) currently provides, "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." The rule does not specify how a mediator is to be appointed. However, because of the reference to the "appointment" of a mediator, some court-annexed programs have designed a process for appointing a mediator from a roster of neutrals instead of first asking the parties to agree upon a neutral.

For example, in Queens County, the ADR Rules provide, "Upon receipt of the Order of Reference, the Program Administrator will randomly assign a Mediator chose from the Roster [of neutrals maintained by the court]." In Suffolk County, the Referring Justice appoints a mediator and the parties have fifteen (15) days to object to the individual appointed. In New York County, the applicable ADR Rules provide, "The Coordinator, in her discretion, may: (i) allow counsel to agree upon a Neutral from the Panel; (ii) provide counsel with the names of not fewer than three Neutrals from the Panel from among whom counsel shall select; or (iii) assign a Neutral from the Panel."

In contrast, in Nassau and Westchester Counties, the parties are given five (5) business days to attempt to agree upon a mediator *before* a process for appointment by the court proceeds. Similarly, in the 8th Judicial District, the parties are also first asked to agree upon a mediator; if they are unable to agree, each party submits three names to the Court and an ADR Administrator or the Judge selects one.

Bar Association Feedback on the Importance of Party Choice in Mediator Selection

In response to prior mediation proposals Bar groups have written that efforts to make court-annexed mediation more successful would be enhanced if parties were first given the opportunity to agree on a mediator – instead of having the court make its own selection. The New York State Bar Association Dispute Resolution Section has written, “We believe that this method of mediator selection is preferable to the present method by which the ADR Coordinator [in NY County] selects the mediator unless the parties agree to override that selection. Affording the parties more choice in the mediator selection process should improve the Commercial Division’s current settlement rate and thus result in greater party satisfaction.” The former chair of the New Jersey State Bar Association Dispute Resolution Section noted in an article in the New Jersey Law Journal that “[t]rusting the competence of a mediator is an important factor that enables the parties and counsel to use the full range of a mediator’s skills and services” and that the New Jersey mediation rules foster this trust by encouraging attorneys to “party-select” their mediator within 14 days after entry of the Mediation Referral Order. (Laura A. Kaster and N. Janine Dickey, “Progress on the N.J. Mediation Front”, New Jersey Law Journal (March 18, 2013).)

The former Co-Chairs of the NYSBA’s Dispute Resolution Section’s Committee on ADR in the Courts provided extensive analysis of the benefit of party-appointed mediators in submissions to the court system:

When the parties are first given the opportunity to choose their mediator instead of being required to accept a mediator who they did not choose, we know from experience that the parties agree on the selection of a mediator in approximately 70% of the cases. When the [New York County’s Commercial Division ADR Program was first established . . . , the parties were first given 5 business days within which to select a mediator, and if they failed to mutually agree on a mediator within that 5-day period, the ADR Coordinator would give them a list of potential mediators from which to choose

Unfortunately, the mediator selection procedure in the Court’s ADR Program changed some years ago to where the ADR Coordinator, instead of the parties, selected the mediator in the first instance. However, in only a small percentage of those cases do the parties override the default selection

procedure. In the federal district courts where the parties are first given the opportunity to choose their mediator, the settlement rates have historically ranged from 67% (in the EDNY) to 72% (in the WDNY). However, after the mediation selection procedure in our [NY County] Commercial Division changed to the present system where the ADR Coordinator first makes the selection . . . the settlement rate has historically been less than 34%. . . .

The ADR Committee agrees with this analysis. Experienced counsel recognize that identifying a mediator that all parties and counsel can trust will facilitate information exchange and help create a climate where settlement is more likely to occur – or at least will not be impeded by concerns about the competence, effectiveness or trustworthiness of the mediator. The ADR Committee believes that a modification to Rule 3 to encourage parties to agree on the selection of the mediator will help guide less experience counsel to take this critical step and further help set the stage for cooperation that will be necessary for settlement.

Furthermore, the ADR Committee believes that changing the ADR Rules in each Commercial Division ADR program to provide for party choice and party agreement on mediators in the first instance will enhance settlement rates and effectiveness. While we believe that a formal rule providing for the parties and counsel to have five (5) business days to agree on a mediator would be optimal, we are mindful of the fact that there are local rules governing ADR administration that may address local concerns about which our committee may not be aware. Consequently, instead of proposing a statewide change in the Commercial Division Rules to effect that result in the first instance, the ADR Committee recommends that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case.

PROPOSAL

For the reasons set forth above, the Commercial Division Advisory Council recommends that Rule 3(a) of the Commercial Division Rules be amended to add the following underlined language:

Rule 3. Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case.

- 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.

* * *

The ADR Committee further proposes that the OCA and Statewide ADR Coordinator coordinate with the ADR Administrators in each Commercial Division location to determine if it would be possible to revise their applicable ADR Rules to provide that parties be given five (5) business days to agree upon a mediator before the ADR Administrator takes additional steps to assign a mediator for the case.