

# STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

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### By Email

John W. McConnell, Esq. Counsel Office of Court Administration 25 Beaver Street, 11<sup>th</sup> Floor New York, NY 10004

**Re:** New York City Bar Comments on Proposed Commercial Division Rule Changes Relating to Alternative Dispute Resolution

Dear Mr. McConnell:

The New York City Bar Association appreciates the opportunity to provide comments on the proposal by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council") to amend Rules 10 and 11 of the Commercial Division to require attorneys to certify that they have discussed with their clients the availability of alternative dispute resolution ("ADR") options. We applaud the Advisory Council for its ongoing efforts to enhance the Commercial Division's status as a preeminent forum for national and international business disputes. We also agree that encouraging greater use of ADR is critically important and support both the proposed amendment and its goals. We offer below, however, some suggestions aimed at affording courts and litigants greater flexibility with respect to use of ADR.

We also urge the Office of Court Administration to adopt an ADR certification requirement, with the modifications we are proposing, in all civil cases. There is no reason it should apply only to Commercial Division cases.

Although we agree that all parties should certify at the Preliminary Conference whether they are willing to engage in ADR, the same requirement should not be imposed for every subsequent conference. If the parties are required to state their intentions with respect to use of

ADR at the initial conference, the court can rest assured that the parties have been apprised of the availability of ADR at the outset of the case. Thereafter, instead of adhering to a strict system where the attorneys must continually re-certify their clients' intentions at subsequent conferences, the court can raise the subject, as appropriate, on a case-by-case basis. Under this approach, the possible use of ADR can be raised (either by the court or by the parties) at the most appropriate stages of the case, such as after the close of fact discovery or after oral argument on a dispositive motion. We also note that, under Commercial Division Rule 3, the court can direct the parties to mediate and the parties can stipulate to mediation or other forms of ADR.

Moreover, a requirement that attorneys discuss ADR with their clients before every conference could be unduly burdensome, particularly in active matters involving numerous parties, which might require numerous conferences during the course of discovery. In such cases, attorneys would be required to contact *each* client before *each* conference to discuss the possibility of ADR, even though neither the parties nor, perhaps, the court believes that ADR would be effective at that stage. The parties' consideration of whether to use ADR should be the product of careful, well-considered and context-sensitive analysis in a particular case, as opposed to merely "checking the box" before every conference.

Accordingly, we recommend amending the language of the proposed change to Rule 10 as follows:

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 at any other time as directed by the court, 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.

We support the proposed change to Rule 11 as drafted by the Advisory Council, which when read together with our amendment to Rule 10, will require the parties to identify a mediator only after certifying that they *presently* wish to engage in ADR.

Finally, we propose a small change to the Alternative Dispute Resolution Attorney Certification (the "Certification Form"), as shown by the redline attached hereto as **Exhibit A**. The words "at an appropriate time" do not require the parties to clearly declare their willingness (or unwillingness) to engage in ADR, which is what the court needs to know. Our proposed change—removing the words "at an appropriate time" from the Certification Form's two

options—would inform the court about parties' views on the efficacy of ADR at the time the certification is made.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.) Chair, Council on Judicial Administration

Adrienne B. Koch Chair, Committee on State Courts of Superior Jurisdiction

Barbara Seniawski Chair, Committee on Litigation

### **EXHIBIT A**

SUPREME COURT OF THE STATE OF	F NEW YORK
COUNTYOF	: COMMERCIAL DIVISION
	) C/A No.
	) C/A No.:
Plaintiff(s),	)
	)
Defendant(s).	)
Defendant(3).	
ALTERNATIVE D	DISPUTE RESOLUTION ("ADR") NEY CERTIFICATION
ATTOR	NET CERTIFICATION
Durguent to Pule 10 of the Comp	nercial Division Rules, I certify that I have discussed with
Pulsuant to Rule 10 of the Conn	neiciai Division Rules, i certify that i have discussed with
my client any Alternative Dispute Resolu	tion options available through the Commercial Division and
those offered by private entities. My clie	nt:
( ) massantly wishes to injutly on some a m	adiatan at an annuanista tima ta aid aattlamant
( ) presently wisnes to jointly engage a m	nediator at an appropriate time to aid settlement.
( ) does not presently wish to jointly engage	age a mediator at an appropriate time to aid settlement.
Dated:	Signature:
Printed Name and Address:	
	ATTORNEY FOR:

Note: This certification must be served and filed pursuant to Rule 10 of the Commercial Division Rules, with a copy submitted to the court. A separate certification is required for each party represented.