



NEW YORK  
CITY BAR

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John W. McConnell, Esq.  
Counsel  
Office of Court Administration  
25 Beaver Street, 11th Floor  
New York, New York 10004  
Via Email: [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov)

**Re: Commercial Division Mediator Selection Proposals:**  
<https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/CommDivMediation.pdf>

Dear Mr. McConnell:

The New York City Bar Association's President's Committee for the Efficient Resolution of Disputes and its Committee on Alternative Dispute Resolution and Council on Judicial Administration (the "Committees") submit this statement in response to your June 22, 2018 Request for Public Comment. We applaud the Commercial Division Advisory Council's ("Advisory Council") continued commitment to enhancing the effective use of mediation as a way to reduce both the cost and duration of litigation. We write in general support of the proposal, with the following comments for consideration.

## **I. PROPOSED CHANGE TO RULE 3**

The first part of the solicitation of public comment would add this language into Rule 3(a) of the Commercial Division Rules: "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."

Although we do not know of a statistical basis for it, we agree that a trusted mediator can increase the parties' faith in the mediation process and we know that many practitioners believe that the parties having the choice of a mediator enhances the likelihood of success. In the view of many experienced practitioners, changing the current rule to afford the parties a reasonable time to agree on a mediator would be likely to promote greater confidence in mediation.

We agree with the Advisory Council's reliance on New Jersey's mediation rules as potential models for mediator selection. They provide a flexible process for selecting mediators and afford the parties a reasonable time to consider the best mediators for their dispute. They also helpfully provide a process for appointing a mediator when the parties want to select a mediator themselves but cannot agree on the best mediator for their case.

We support the placement of the proposed language in the paragraph about appointment of mediators. While some may view this change as a codification of current procedures, since parties and counsel are always free to pursue mediation, the new language serves as an important reminder by the court system that proactive consideration of mediation should be a natural component of litigation. Choosing a mediator who best meets parties' collective needs encourages cooperation between and among the litigants and their counsel. The process of working collaboratively to *begin* the mediation sets the stage for the collaborative work that happens *within* the mediation. Moreover, depending on the process actually implemented, if the parties choose their own mediator at the outset, it could save the work of several steps that the ADR coordinator would otherwise have to expend.

## **II. PROPOSED OUTREACH TO ADR COORDINATORS**

The second part of the proposal on which comments are sought is an invitation by the Advisory Council's ADR Committee that OCA "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."

We strongly endorse OCA including the local administrators in determining the local variants in rules that make the most sense in their locales and best serve that Court's constituencies. The goal of streamlining the work of the administrators is laudable on its own, in addition to it placing the selection process in the hands of the people closest to the mediation.

We suggest that the window of time for litigants to select a mediator be considered an open question to be discussed with local administrators. Some of our members think that five business days is too short, unnecessarily rushing the thorough analyses and cooperation that are expected by the rule change. One alternative that OCA and local administrators could consider is a 14-calendar day opportunity in which litigants would agree on a mediator.

## **III. RELATED SUPPORTIVE COMMENTS**

The issues of mediator selection are complex and nuanced. Those raised by the current proposals, and commented on here, are only a subset of the many factors that go into the mediator selection process. The issues include, among others, increasing the diversity of backgrounds of the members of panels of neutrals, of neutrals receiving appointment, and of ADR practitioners generally.

We believe that in setting rules and designing ADR programs, the courts should have as one of their important goals the widening and deepening of the pool of neutrals who are actually selected or assigned in court-annexed mediations, not least so that qualified but less experienced mediators can grow and hone their skills and become known to the bench, bar and litigation parties as talented neutrals.

We would welcome the opportunity to discuss the issues of mediator selection that go beyond, but are consistent with, the current proposals.

Thank you for the opportunity to comment on this proposed change. We stand ready to assist OCA and local administrators in any way that would be helpful.

President's Committee for the Efficient Resolution of Disputes<sup>1</sup>  
Erin Gleason Alvarez  
Daniel F. Kolb  
Co-Chairs

Committee on Alternative Dispute Resolution  
Charles M. Newman, Chair

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

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<sup>1</sup> The President's Committee was formed in 2017 by then-City Bar President John S. Kiernan. The Committee now continues its mission of encouraging efficiency and economy in New York dispute resolution practice under the sponsorship of the City Bar's current President, Roger Juan Maldonado. Our Committee is comprised of a cross-section of City Bar standing committees, including the Alternative Dispute Resolution Committee, Arbitration Committee, Cooperative & Condominium Law Committee, Council on Judicial Administration, Council on the Profession, In-House Counsel Committee, In-House/Outside Litigation Counsel Working Group, International Commercial Disputes Committee, Litigation Committee, and State Courts of Superior Jurisdiction Committee. Members include lawyers in private practice, arbitrators and mediators, acting and retired judges, court administrators, and in-house counsel.