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Mandatory Mediation and Settlement-Related Disclosure Adopted for New York Commercial Division to Encourage Early Settlement

The Commercial Division Advisory Council was created in 2013 as a follow up to Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century.¹ The Council's goal is to advise the Chief Judge on an ongoing basis about matters concerning the Commercial Division of the Supreme Court of New York, to consider how the Commercial Division can better serve the needs of the business community and the changing economy, and to implement the recommendations of the Task Force's 2012 comprehensive report.² Roberta Kaplan, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, serves on the Advisory Council and as the Co-Chair of the Advisory Council's Subcommittee on Best Practices for Judicial Case Management.

This memorandum is the second in a series of client memoranda explaining changes to the rules that apply to cases in the New York Commercial Division.³ This memorandum will address two new rules that seek to encourage early settlement of business disputes in the Commercial Division: (a) a new rule sending one out of every five cases in the Commercial Division in Manhattan to mandatory mediation, subject to an opt out provision and (b) an amendment encouraging voluntary, limited settlement-related information exchange at the very beginning of a case, prior to preliminary and compliance conferences. In the future, we will be issuing memoranda on additional pending or contemplated changes to the Commercial Division Rules, including changes to the discovery rules and modifications to the rules regarding court appearances and sanctions.

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¹ For more information on the Task Force, see http://www.nycourts.gov/press/PDFs/PR13_05.pdf.

² The Task Force's report can be found at <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf>.

³ The first memorandum in the series addressed (a) a new rule offering parties in the Commercial Division accelerated adjudication procedures and (b) amendments limiting the amount of time that parties have to request that their litigation be assigned or transferred to the Commercial Division.

Mandatory Mediation

On June 23, 2014, New York State Administrative Judge for Civil Matters for the First Judicial District Sherry Klein Heitler signed an administrative order,⁴ which went into effect on July 28, establishing a mandatory mediation pilot project in the Commercial Division. These procedures were adopted as part of the Commercial Division Advisory Council's efforts to update and improve practice in the Commercial Division, to seek to streamline and reduce the costs of litigation, and to ensure that New York courts remain an attractive forum for the resolution of business disputes.

Under the pilot project⁵, every fifth newly-assigned case⁶ to the New York County Commercial Division (i.e., assigned to a Commercial Division Justice after the filing of a Request for Judicial Intervention),⁷ must be mediated within 180 days of assignment to a Commercial Division Justice unless (a) all parties stipulate that the case is not suitable for mediation or (b) the assigned Justice exempts the case from mediation upon one party's showing of good cause that mediation would be "ineffective, unduly burdensome, or unjust."⁸ If a case is designated for mediation under the pilot program, the parties are informed via notice through the New York State Courts Electronic Filing System, or by other means. If an attorney receives such notice and is aware that counsel for other parties in the proceeding have not yet appeared or that the notice will not reach all the attorneys, he or she must inform the other attorneys as soon as possible. Mediation under this program will be subject to the Rules and Procedures of the Alternative Dispute Resolution Program, except Rules 6 (a), (b), and (c).⁹

This pilot project, which only applies to Commercial Division cases in Manhattan, will last eighteen months, during which the Advisory Council will assess its success and gather data on the amount of discovery needed for a successful mediation, the time necessary to select a mediator and complete

⁴ For the full text of the administrative order, see <http://www.nycourts.gov/courts/comdiv/NY/PDFs/AO-ADR62014.pdf>.

⁵ The pilot project will run in addition to the existing Alternative Dispute Resolution program in the Commercial Division, which allows Commercial Division Justices to refer cases to mediation on a discretionary basis pursuant to Rule 3 of the Rules of the Alternative Dispute Resolution Program. These Rules can be found at <https://www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment1.pdf>.

⁶ Cases where a party is unrepresented will not be referred to mediation under the pilot program.

⁷ The Commercial Division recently adopted a new amendment on the assignment of cases, which can be found at http://pdfserver.amlaw.com/cli_editorial/CaseAssignmentRule.pdf.

⁸ See Rule 15, <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

⁹ For the Rules and Procedures of the Alternative Dispute Resolution Program, see <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

mediation, and the parties' overall satisfaction with the process. After the eighteen month period, the Commercial Division may choose to expand or modify the program, or not to renew it at all.

Because the pilot program is limited to one out of five cases, includes an opt-out provision, and allows for party control in mediator selection (as discussed further below), the Advisory Council has described it as "fairly conservative."¹⁰

Process to Select a Mediator

In developing the pilot program, the Task Force and Advisory Council were very concerned about party choice in mediator selection.¹¹ As a result, parties will have the right in the first instance to select their own mediator. After a matter is designated for mediation, parties should promptly confer and attempt in good faith to pick a mediator. The mediator can be one of the mediators ("Neutrals") listed on the Panel's roster¹², or the parties can instead select another mediator, subject to the procedures in the Rule.¹³ If the parties select a mediator from the Panel, counsel must reach out to the mediator and confirm that he or she is willing and available to take the case.¹⁴

Mediators are compensated as provided in Rule 7(a)(1), or on such terms as counsel agree upon in writing. Rule 7(a)(1)¹⁵ designates that when a Neutral is selected as a mediator, he or she will not be compensated for the preparation for mediation (e.g., scheduling conferences and review of documents in preparation for mediation) or for a total of four hours of mediation sessions. However, if the parties decide to continue with mediation beyond four hours, the Neutral will be compensated at a rate of \$300 per hour.

¹⁰ See <http://www.nycourts.gov/rules/comments/PDF/PC-PacketCommDivMedPilot.pdf>.

¹¹ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 27 ("In developing this program, we have given careful consideration to party choice in selection of mediators and timing of mediation, ensuring that the increased volume of cases to be mediated can be supported by qualified, experienced and effective mediators, and providing for parties to opt-out of mediation in those rare situations where mediation would be ineffective or otherwise unjust").

¹² The Roster of Neutrals is available at http://www.nycourts.gov/courts/comdiv/ADR_overview.shtml.

¹³ The procedures can be found at <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

¹⁴ The mediator must be able to comply with the deadlines of the pilot program and must not have conflicts of interest, in accordance with the Rules, available at <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

¹⁵ Rule 7(a)(1) can be found at <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

Within 120 days of filing a Request for Judicial Intervention, parties to a case in mandatory mediation under the pilot program must either jointly inform the ADR Coordinator that they have agreed on a mediator¹⁶ or request that the ADR Coordinator assign a mediator. If the parties fail to do so, the Coordinator will select a mediator from the roster of Neutrals on the Panel.

If the parties request that the ADR Coordinator assign a mediator, the ADR Coordinator will provide counsel with a list of three prospective mediators from the roster of Neutrals on the Panel who are available and have passed at least a preliminary conflicts check. Counsel must immediately consult and attempt in good faith to select one of the three mediators. If counsel are unable to agree, each counsel may agree upon a mediator or rank his or her preference of the three mediators (with one reflecting the first preference). Within seven days of receiving the list from the Coordinator, counsel must respond with either the name of their chosen mediator or a ranked list. If counsel use the ranked list approach, the Coordinator will choose the mediator based on the combined rankings.¹⁷

Why Mandatory Mediation?

The proposal, which was originally recommended by Chief Judge Lippman's Task Force on Commercial Litigation in the 21st Century, is intended to "aid parties in reaching early resolution of their business disputes."¹⁸ In mediation, an impartial neutral facilitates communication among the litigants, encouraging them to evaluate the case more efficiently and come to a mutually agreeable resolution prior to incurring the expense of litigation. While the Commercial Division already allows its Justices to direct cases to mediation "where the Justice deems it useful. . . after considering the views of the parties insofar as practicable"¹⁹ and parties in the Commercial Division can always consent to enter mediation, these opportunities for mediation remain, in the opinion of the Task Force, "substantially underutilized."²⁰ As commentators have observed, Justices do not widely refer cases and, when they have done so, it has only been after the parties have completed discovery, such that the mediation has not sufficiently reduced the

¹⁶ Parties should inform the ADR Coordinator of their selection by submitting a completed Pilot Project Notification Regarding Selection of Mediator by e-mail. The form is available at http://www.nycourts.gov/courts/comdiv/ADR_overview.shtml.

¹⁷ For a full description of this process, see Rule 15(e) at <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

¹⁸ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 25.

¹⁹ See Rule 3, <http://www.nycourts.gov/courts/comdiv/ny/PDFs/ADRRulesPros62014.pdf>.

²⁰ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 26.

time and cost of litigation.²¹ Furthermore, parties are often reluctant to propose entering into mediation voluntarily for fear of what it might signal to the other side.²²

As the Task Force noted, although more than 90% of business disputes end in a settlement prior to trial, the litigation process leading up to settlement can be long, expensive, and disruptive to the businesses of the parties involved.²³ By encouraging mediation, the Commercial Division seeks to encourage earlier settlement, and thus reduce the time and costs of litigation, including discovery costs. This program will also have the added benefit of allowing Commercial Division Justices “to focus more of their resources on the substantive legal and factual issues that parties need them to resolve and the development of New York commercial and business law that they are particularly suited to address.”²⁴

In adopting this proposal, the Commercial Division was inspired by the positive track record of the courts that already require parties to enter mediation.²⁵ Similar programs have been piloted in Florida, Texas, California, and New Jersey.²⁶ The United States District Court for the Western District of New York, which implemented a similar system in 2005²⁷, reports that 60% of cases in mediation are settled and

²¹ Public Comment, John Wilkinson, Chair, Dispute Resolution Section, *available at*

<https://www.nycourts.gov/rules/comments/PDF/received/CommDivMediationPC-Recvd.pdf>.

²² See Suevon Lee, *Will Litigators Embrace Proposed Pilot Mandatory Mediation Program?*, N.Y. Commercial Litg. Insider (Dec. 12, 2013), *available at*

http://www.litinsider.com/PubArticleCLI.jsp?id=1202632036077&Will_Litigators_Embrace_Proposed_Pilot_Mandatory_Mediation_Program&slreturn=20140621110336 (quoting Bernard Fried, a retired New York County Commercial Division judge who is now an arbitrator and mediator at JAMS New York Resolution Center, “Quite often, neither side will request mediation because if they do so, they’ll see it as a sign of weakness. The original rule which allowed judges to [refer mediation] allowed neither party to look weak, but the [Task Force] commission felt it wasn’t being done enough”).

²³ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 25.

²⁴ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 25.

²⁵ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 26.

²⁶ For more information on New Jersey’s program, see Laura A. Kaster and N. Janine Dickey, *Progress on the N.J. Mediation Front*, N.J. L.J. (Mar. 14, 2013), *available at* <http://www.njlawjournal.com/id=1202592121978/Progress-on-the-NJ-Mediation-Front%3Fmcode=0&curindex=0&curpage=ALL>.

²⁷ For more information on the mandatory mediation program in the Western District of New York, see <http://www.nywd.uscourts.gov/alternative-dispute-resolution>.

that a party files a motion to opt out only about once every four to six weeks.²⁸ In the Western District of New York, the bar for granting such a motion is “very high.”²⁹

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Voluntary Settlement-Related Discovery

The Commercial Division has also adopted a rule to encourage early settlement via voluntary discovery. On July 16, 2014, New York State Chief Administrative Judge Gail Prudenti signed an amendment to Rule 8(a) of section 202.70(g) of the Uniform Rules for the Supreme and County Courts, titled Consultation prior to Preliminary and Compliance Conferences. The amended Rule³⁰ dictates that, in addition to discussing the resolution of the case, discovery, expert disclosure, and the use of alternative dispute resolution, counsel must consult prior to a preliminary or compliance conference about “any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case.” Counsel must “make a good faith effort to reach agreement on these matters in advance of the conference.” This limited disclosure could take the form of, for example, document exchange, interrogatories, or partial depositions of one or two key witnesses or party representatives.³¹

Like the mandatory mediation program, this amended rule is intended to promote earlier settlement, and thus reduce the time, cost, and disruption of litigating business disputes. The disclosure is voluntary and informal, so as to avoid additional motion practice.³² This rule is also intended to facilitate the mandatory mediation program by encouraging parties to share limited information that may be helpful for settlement during mediation.

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²⁸ Suevon Lee, *With Few Exceptions, Proposed Pilot Mediation Program Draws Support*, N.Y. Commercial Litg. Insider (Feb. 26, 2014), available at <http://www.litinsider.com/PubArticleCLI.jsp?id=1202644396857>.

²⁹ *Id.*

³⁰ See http://pdfserver.amlaw.com/cli_editorial/SettlementDisclosure.pdf.

³¹ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 28.

³² See <http://www.nycourts.gov/rules/comments/PDF/PC-PacketCommDivRule8a.pdf>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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