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Expert Analysis

NY Commercial Division Rule Changes Promote ADR Use

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As part of ongoing efforts to ensure that the Commercial Division of the Supreme Court of New York remains an attractive and efficient forum for businesses to resolve their disputes, New York's Chief Administrative Judge Lawrence K. Marks recently took steps to require parties and counsel to consider alternative dispute resolution, including the possibility of mediation, early and often.

On Oct. 11, 2017, Judge Marks signed an administrative order amending Rules 10 and 11 of the Rules of Practice of the Commercial Division.[1] The amendment to Rule 10 requires attorneys in New York's Commercial Division courts to submit to the court at the preliminary conference and each subsequent compliance or status conference, and separately serve and file, a statement, in a form prescribed by the Office of Court Administration, certifying that they have discussed the availability of ADR options — through the Commercial Division ADR programs or otherwise — with their clients. The amended Rule 10 also requires attorneys to advise the court whether their client is willing to pursue mediation at some point during the litigation. If the parties certify their willingness to mediate, the amendment to Rule 11 requires the parties to propose a specific date in the preliminary conference order by which the mediator would be identified. The Chief Administrative Judge also issued a prescribed form statement, to be submitted to the court pursuant to amended Rule 10, certifying that attorneys have discussed with their client the availability of ADR mechanisms. The amendments to Rules 10 and 11 become effective on Jan. 1, 2018.

The rule changes were proposed by the Commercial Division Advisory Council, comprised of judges, in-house counsel and commercial litigators, which was created to advise the chief judge on matters concerning the Commercial Division and to consider how the Commercial Division can best serve the needs of the business community, as well as to implement the recommendations of former Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century.[2]

The objective of the most recent rule changes was to promote earlier settlement efforts, and reduce the time, expense and disruption of litigating business disputes. In recommending the changes to the state court system's administrative board, the Advisory Council was mindful of the Task Force's strong desire to encourage early resolution of business disputes and its recognition that while "[m]ore than 90% of business disputes end in a settlement," businesses frequently complain that "far too often the costs of getting to that point are excessive."[3]

Business clients and their in-house counsel overwhelmingly support early dispute resolution efforts, including early mediation, because they recognize it makes very good business sense. They can do the math and appreciate that early case assessment and dispute resolution can save time and money by accelerating settlement discussions, particularly in commercial cases which are highly likely to ultimately settle. They also appreciate that early settlement efforts can help maintain ongoing business relationships with opposing parties that could be severely damaged by litigating through trial. They recognize that even where early mediation does not result in overall settlement, it can often help narrow or resolve issues and enable the parties to assess their litigation risk.

Despite the clear benefits of ADR, the Task Force believed that mediation is "substantially underutilized in New York" because of "the inherent adversarial nature of litigation and because there is a broad disparity in the degree to which judges refer matters to mediation."[4] Litigation matters can sometimes take on a life of their own, with parties and their counsel doing battle in the trenches, but at times losing sight of the larger business objective of putting the dispute behind them as quickly and efficiently as possible.

In a memorandum recommending the rule amendments, the Advisory Council described them as:

> an appropriate next step that will help further institutionalize the use of ADR in Commercial Division cases, and ensure that ADR options are specifically considered early on, before substantial legal fees have been incurred in discovery and motion practice, and clients' positions have further hardened.[5]

Outside counsel are often reluctant to be the first to propose mediation, fearing it may be perceived as a sign of weakness. The rule changes remove that concern by requiring the lawyer, at a relatively early stage in the case (and again later on), to give the client the specific opportunity to decide whether (and if so, when) to mediate. The rule changes provide a mechanism to introduce a parallel ADR track without signaling weakness by requiring the parties to set a deadline in the preliminary conference order by which they will identify a proposed mediator. They do not require that a deadline be set for mediation to commence, and the parties remain free to defer engaging the mediator until they believe their chosen mediator will be most useful.

These changes mirror ADR initiatives in several federal courts. A number of federal courts require attorneys to discuss ADR with their clients and adversaries, to address ADR in their case management plan and to be prepared to discuss ADR at the Federal Rule 16 scheduling conference.[6] Several federal courts require certifications broadly similar to the certification required in the Commercial Division under New York's new rules.[7]

Prior to their adoption, the Administrative Board requested public comment on the proposed amendments, and they received overwhelming support from the New York legal community. The Commercial and Federal Litigation Section of the New York State Bar Association ("NYSBA") agreed that "the early identification of a mediator, even in the event that the parties are not inclined to mediate, can provide a number of benefits during the litigation process, including facilitation of settlement, limitation of issues, claims and defenses, and assistance in discovery disputes." The NYSBA Dispute Resolution Section likewise "wholeheartedly support[ed]" the rule change, recognizing early mediation as an effective way of reducing the cost to the parties inherent in litigation. So, too, the City Bar agreed that "encouraging greater use of ADR is critically important" and supported both the rule changes and their goals. Notwithstanding the widespread support for increased use of ADR, certain organizations expressed concerns about the potential administrative burdens of the rule changes. In response, the Advisory Council revised the certification form to make clear that the certification requirement applies only at the major court conferences — the Preliminary Conference, Status Conference and Compliance Conference — and not at each discovery conference, thereby minimizing any burden associated with the certification requirement while ensuring that ADR is considered at key stages of a case.

The recent rule changes are the latest of several efforts made to foster greater use of mediation and to institutionalize ADR in the Commercial Division. Rule 8 of the Commercial Division Rules requires counsel for all parties to consult prior to a preliminary or compliance conference about: "(i) resolution of the case, in whole or in part, … (iii) the use of alternative dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree will help aid early settlement of the case." The Revised New Model Preliminary Conference Order, adopted for optional use by Commercial Division justices, asks the parties to identify in Section VI when they believe ADR will be most effective (e.g., within 60 days of the Preliminary Conference, within 30 days after interrogatory and document discovery have been completed, etc.).[8] The Model Compliance Conference Order, also adopted for optional use, requires counsel to justify why settlement discussions or ADR have not commenced by the Compliance Conference stage.[9] Taken together, these efforts essentially create a presumption favoring the use of ADR at some point in Commercial Division cases, reflecting the Task Force's belief that increased use of mediation and ADR will further enhance the Commercial Division's reputation in the business community as an attractive venue where disputes can be resolved expeditiously and efficiently.

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[1] For the full text of the administrative order, see http://nycourts.gov/rules/comments/orders/AO%20202.pdf.

[2] The Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the "Task Force Report") can be found at http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

[3] Task Force Report at 25.

[4] Task Force Report at 26.

[5] The Advisory Council's memorandum supporting the proposed amendments to Rules 10 and 11 can be found at http://nycourts.gov/rules/comments/PDF/CommDiv-ADR-A.pdf.

[6] See, e.g., S.D.N.Y. Local Rule 83.9(d) (requiring parties to report at the initial Rule 16(b) case management conference, or subsequently, whether they believe mediation or a judicial settlement conference may facilitate resolution of the litigation); D.D.C. Local Rule 16.3(c) (requiring discussion of ADR at Rule 16 conference).

[7] See, e.g., D.S.C. Local Rule 16.03.

[8] For the full text of the administrative order approving the Revised New Model Preliminary Conference Order for optional use in the Commercial Division, see http://nycourts.gov/rules/comments/orders/AO-132-2016.pdf.

[9] For the full text of the administrative order approving the Model Compliance Conference Order for optional use in the Commercial Division, see http://www.nycourts.gov/rules/comments/orders/AO-35-15.pdf.