Alternative Dispute Resolution:
It's Time to Have That Conversation With Your Client

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As of January 1, 2018, two recent amendments to the Commercial Division Rules shall come into effect. These rules, amendments to Rules 10 and 11, are designed to encourage alternative dispute resolution of commercial cases. Specifically, the amendment to Rule 10, which is titled "Certification Relating to Alternative Dispute Resolution," states in relevant part that "counsel for each party shall also submit to the court at the preliminary conference and each subsequent compliance or status conference…a statement…certifying that counsel has discussed with the party the availability of alternative dispute resolution mechanisms…and stating whether the party is presently willing to pursue mediation at some point during the litigation." (emphasis added).

Clearly, the amendment to Rule 10 mandates that attorneys whose cases are or will be in the Commercial Division, discuss with their clients the availability/possibility of alternative dispute resolution mechanisms (collectively "ADR"). This amendment may have significant impact upon the commercial litigation landscape. No more is ADR something that "may" be discussed far into the offing in commercial cases, long after the discovery process, and possibly into the trial phase. Rather, ADR must now be discussed in the nascent phase of all commercial cases.

Because of the burgeoning costs of taking a commercial case from pleading to trial, it behooves counsel to enlighten their clients as to the possibilities of resolution -- long before they engage in protracted and costly litigation. This is all the more so with the exploding costs of electronic discovery.

The new rule amendment fosters communication between attorneys and clients about alternatives to the usual discovery and trial practice, and requires attorneys to certify that such discussion has been had. In the event that a party is willing to consider ADR at the preliminary conference stage, then the amendment to Rule 11 kicks in. Rule 11 entitled "Discovery" states in relevant part that the order will "include[] in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action." (emphasis added)

Because the parties are free to select a mediator and to specify a date to identify same in the preliminary conference order, attorneys are encouraged to consider utilizing the Nassau County Bar Association ("NCBA") panels of Mediators and Arbitrators. In order to access the panels, one need only log into the NCBA website at www.nassaubar.org, and go to the "Alternative Dispute Resolution" tab. The user will be able to view a listing of the approved Mediators and Arbitrators on the panels. If interested, one can then propose use of the panel(s)

in general and/or of specified panel members in particular in the preliminary conference order. Notably, the panel members have been screened by the NCBA Judiciary Committee, and have experience in particular practice areas as noted in the individual bios obtainable from the ADR Administrator. In addition, the fees of the NCBA ADR Panels are competitive, and may be found to be lower than many other private ADR providers offered elsewhere.

What is significant about the impact of the rule amendments is that it is no longer "taboo" for attorneys to discuss ADR with their clients at either the client intake or early stages of the case. Clearly, attorneys no longer have to be concerned that disclosure of the availability of ADR somehow telegraphs a weakness in the case to the client, or that she/she lacks confidence in the client's position, or is not willing or able to zealously represent them.

The amendments to Rules 10 and 11 comport with certain of the Federal Court Local Rules which similarly require counsel to discuss ADR with their clients and adversaries. *See, e.g.,* Southern District Local Rule 83.9 (by which the court can order or parties can consent to mediation or judicial settlement conference) and Eastern District New York Local Rules 83.7 and 83.8 (by which the Court can order or the parties can consent to arbitration or mediation). Further, Rule 3 of the Commercial Division Rules continues to permit the Court to direct, or counsel to seek, the appointment of a mediator at any stage of the litigation.

As Co-Chairs of the NCBA ADR Committee, we are very pleased that the amendments to Rules 10 and 11 will operate to implement the possibility of ADR early on in commercial cases; however, ADR should not be considered in commercial cases only. It is hoped that these rules will encourage wide-spread use of ADR, and will be similarly adopted and applied in other practice areas as well.

These ADR amendments to the Commercial Division Rules could ultimately save litigants significant time, money, and aggravation, and may help the already overburdened court system with its continued quest to administer swift justice.

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