



MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on a Proposal to Amend Commercial Division Rule 30 to Provide for a Mandatory Settlement Conference

Date: December 10, 2020

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to amend Commercial Division Rule 30 to mandate participation in a settlement conference following the filing of a Note of Issue and to require the parties to submit a joint request or separate requests for the type of neutral who will oversee the settlement conference (the assigned judge, another judge in the Commercial Division, JHO or Special Referee, neutral or mediator from the roster under Part 146, or a private neutral) (Exhibit A).

The current Rule 30(a) of the Commercial Division permits a court to schedule a settlement conference at the time a case is certified ready for trial but there is no rule that mandates a settlement conference before the court or any other neutral. The CDAC states that the proposed amendment to Rule 30 will assist the parties in reaching a voluntary resolution of disputes and conserve party and court resources (Ex. A, p. 1). Since a high number of cases in the Commercial Division are resolved via settlement, the CDAC believes that business clients will find attractive the institutionalization of the settlement process.

The proposed rule provides parties the options to request for different types of neutrals to conduct the mandatory settlement conference and provides the assigned justice with the authority to make the ultimate decision on who will conduct it. Under the proposed rule, the assigned justice retains the authority to require parties to participate in a settlement conference at any time. The assigned justice will also have discretion to exempt cases from the mandatory settlement conference, and the neutral will determine what type of submissions will be provided to the neutral.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than February 12, 2021.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules

DATE: September 25, 2020

RE: Proposal to amend Commercial Division Rule 30 to provide for a mandatory settlement conference

Introduction

There are multiple opportunities during the course of litigations where the parties may engage in settlement negotiations. However, parties often do not utilize such opportunities. Many Commercial Division justices proactively ask the parties if they have engaged in settlement discussions and/or will conduct a settlement conference. Rule 30(a) of the Commercial Division Rules permits a court to schedule a settlement conference at the time a case is certified as ready for trial, but there is no rule mandating a settlement conference before the court or any other neutral. After the Note of Issue is filed, the parties expend substantial time and other resources to prepare for trial. Moreover, judges often spend substantial time addressing pre-trial motions, including dispositive motions and motions in limine.

Additionally, a high percentages of cases are ultimately disposed of by settlement in the Commercial Division. In order to assist the parties in reaching a voluntary resolution of their disputes and conserve both party and court resources, we propose to amend Rule 30 to provide for a mandatory post-note of issue settlement conference. This proposal facilitates a more cost-effective timing of settlements for clients. Moreover, one of the principal goals of the Commercial Rules is to make the business litigation process in New York more cost-effective, predictable, and expeditious, and to thereby provide a more hospitable and attractive environment for business

litigation in New York State. We believe that business clients will find attractive the improvement, enhancement, and institutionalization of the settlement process and that this new rule has been designed to be responsive to the needs and concerns of the business community.

We know that there are times when parties are reluctant to initiate a settlement conference based on their concern that a settlement overture may signal “weakness” with respect to the strength of their case or their ability to fund the costs of a trial and possible appeals thereafter, or the willingness to endure a public trial that may illuminate facts and/or issues that may give rise to other business or regulatory problems. Parties may also be disinclined to participate in voluntary ADR as they perceive it as a waste of time because of their perception that the parties are unlikely to settle or as an additional cost or because they want a trial for some business or personal reason, or a perceived need for a judicial precedent. Moreover, based on posturing by the parties, or other reasons, parties may simply be unaware that settlement is possible. A mandatory settlement conference eliminates excuses for not participating in a settlement discussion, and that is what is proposed here.

The proposed rule recognizes that some parties may be hesitant to conduct settlement discussions with the direct involvement of the assigned justice. They may be concerned that a position taken with respect to a suggestion from the justice and a refusal to settle might annoy the assigned justice to their detriment in further proceedings in the case. Although it may be completely unfounded, such concern by a client or counsel is understandable. Additionally, given the power of the assigned justice, especially in a non-jury case, and the fact that judges, like lawyers and everyone else have different personalities and temperaments, some parties may have concerns that they may be pressured into a settlement. A judge who is truly trying to further the

best interests of the parties may be perceived as trying to “strong arm” the parties. Some clients are intimidated merely because the assigned justice is a judge and is their assigned judge.

A settlement conference at the time a Note of Issue is filed may be particularly beneficial because discovery will be complete and the parties and their counsel are more knowledgeable as to the strengths and weaknesses of their case. A neutral could play an important role at this stage in initiating and enhancing communication between the parties and their counsel and in helping the parties to better assess how a trier of fact may view the case should it proceed.

The proposed rule recognizes that the justice assigned to the case, who is generally knowledgeable about the case, should retain authority over the mandatory settlement conference (MSC) process.

It should also be noted that Commercial Division Rules 3, 8, 10 and 30 embody provisions that involve Alternative Dispute Resolution and settlement. Rule 3(a) permits the court to direct the appointment of an unpaid mediator at any time during the litigation. Rule 3(b) permits the parties to ask that a justice other than the assigned justice conduct a settlement conference. Rule 8(a) requires counsel to confer prior to a preliminary or compliance conference regarding, *inter alia*, settlement or employing ADR. The rule also requires counsel to make a good faith effort to reach an agreement on the matters described in the rule prior to the conference. Rule 10 requires counsel to submit a form at each conference, be it preliminary, compliance or status, certifying that counsel has discussed the availability of ADR with his or her client.

The current Rule 30 provides for settlement conferences during the course of the litigation. Rule 30(a) permits, rather than mandates, the court to order a settlement conference at any time after filing a Note of Issue. Rule 30(b) requires counsel to confer about settling or limiting issues

prior to a pre-trial conference. Finally, Rule 12 provides for sanctions for failure to appear at any conference. Sanctions may include dismissal, striking an answer or other appropriate action.

Of course, an assigned justice may require parties to participate in a settlement conference at any time, and the rule proposed here does not diminish the assigned justice's authority to order such conference. Some assigned justices will require a settlement conference without the participation of a neutral. Assigned justices, especially in jury cases, may also offer to participate in a settlement conference.

The proposed rule recognizes:

- (a) the need to respect the authority and discretion of the justice assigned to each case;
- (b) the benefit of allowing the parties and counsel to provide input to the assigned justice as to which settlement conference procedure they think will be best suited to their particular matter; and
- (c) OCA budget constraints that preclude the hiring of additional settlement neutrals.

The Current Rule

Rule 30. Settlement and Pretrial Conferences.

- (a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

The Proposed Rule

We propose a new Section (b) to Rule 30 with current Sections 30(b) and (c) becoming 30(c) and (d):

- (b) Mandatory Settlement Conference. Unless exempted as set forth herein, the parties in every case pending in the Commercial Division must participate in a court-ordered mandatory settlement conference (MSC) following the filing of a Note of Issue.

1. Referral to MSC. Following the filing of a Note of Issue, the parties must confer and file a request to proceed to a MSC pursuant to one of the following four tracks. If all parties have agreed upon the settlement conference track that they prefer, they may file a joint request with a statement of preferred procedure for MSC. If the parties do not agree, they must file separate requests with statements as to their preference for a MSC track. The parties' preferences would ordinarily be given presumptive weight.

A. A settlement conference before the assigned justice or another judge pursuant to Commercial Division Rule 3(b).

B. The court will refer the case to the Judicial Hearing Officer/Special Referee office for assignment of a Judicial Hearing Officer or Special Referee to conduct the MSC.

C. The assigned justice will refer the case to the ADR coordinator or other designated court official in the judicial district where the case is pending for assignment, at no charge to the parties, of a neutral selected from the roster of neutrals or mediators under Part 146 of the Rules of the Chief Administrative Judge. If the parties wish to continue talks with the neutral beyond the initial conference, an arrangement will have to be made to retain such neutral at terms agreed to by the neutral and the parties.

D. The parties may agree to engage a private neutral.

2. Attendance at MSC.

(a) The MSC shall be attended with a person with knowledge of the case and authority to settle the case.

3. Submissions to the neutral conducting the MSC.

The neutral shall determine whether a submission should be provided to the neutral and the service thereof.

4. Exemptions from MSC.

MSC is mandatory for all cases in the Commercial Division unless the assigned justice to the case, for good cause shown, exempts the case from MSC under this Rule.

5. Confidentiality.

All attendees of the MSC, including the assigned neutral, shall treat as confidential information any settlement submission created

expressly for use in the MSC, anything that happened or was said during the course of or pursuant to the MSC, and any positions taken or offers made during the MSC. Such material cannot be disclosed to anyone not involved in the litigation or to the court, and may not be used in any fashion in the litigation of the case.

6. Report.

Following the MSC, the parties will advise the assigned justice whether a settlement was reached, and if a settlement was reached, a date by which the parties expect to complete documentation of the settlement. The parties shall not discuss any reasons why a settlement was not reached.

7. Scheduling and Procedures.

Any scheduling and procedural issues shall be determined by the justice assigned to the case. If it is determined that the MSC is to be held before a neutral other than the assigned justice, scheduling and procedural issues with respect to the MSC shall be determined by the neutral.

8. Non-exclusive. Nothing in the rule shall preclude or replace any settlement practices used by the court, by any individual justice, or as agreed to by the parties and the assigned justice shall retain ultimate authority with respect to each aspect of the MSC.

Consideration of Issues

Timing and Exemptions

All parties should be aware of the timing for both dispositive motions and MSC and may be able to prepare for both. In certain cases, the preparation for a dispositive motion and a decision on such motion may aid in the preparation for MSC. Thus, the timing of the MSC shall be left to the discretion of the assigned justice. Moreover, the proposed rule vests the assigned justice with discretion to exempt a case from a MSC.

Who is the neutral

A very important aspect of a MSC is who conducts it. This proposal provides the assigned justice with authority to make that decision. The idea of hiring new personnel to act as “settlement judges” was rejected, based on OCA budgetary constraints.

This proposal recognizes that there may not be one best solution for all cases. Also, although the assigned justices retain the power to determine the MSC process, the proposed rule provides the litigants with an opportunity to request a track for MSC that they believe will be most suitable.

Submissions

Since each case is different, a determination as to whether a settlement submission should be made to the neutral and the scope thereof is left to the discretion of the neutral.