

MEMORANDUM

TO: John W. McConnell, Esq.

FROM: Hon. Timothy S. Driscoll *TSD*
Co-Chair, Chief Administrative Judge's Working Group on Electronic Discovery
Maura R. Grossman, Esq. *MRG (by TSD)*
Co-Chair, Chief Administrative Judge's Working Group on Electronic Discovery

DATE: January 31, 2014

RE: Proposed new Preliminary Conference Form for use in the Commercial Division

The Chief Administrative Judge's Working Group on Electronic Discovery appreciates the opportunity to offer comments on the proposed new Preliminary Conference form for the Commercial Division that has been developed by the Commercial Division Advisory Council. The Working Group's comments are attached.

These are the comments of the New York State Unified Court System E-Discovery Working Group (“Working Group”) concerning the proposed new Preliminary Conference Form (the “Form”) for use in the Commercial Division of the Supreme Court of the State of New York, as proposed by the Commercial Division Advisory Council. The Working Group is comprised of approximately 30 individuals appointed by the Chief Administrative Judge in 2010 to address issues related to electronic discovery in the State Courts. The members were drawn from a cross section of members of the State judiciary, plaintiff’s and defense counsel, in-house counsel, and electronic discovery service providers. These comments reflect the consensus of the Working Group.

The proposed Form was published as an Acrobat file. To facilitate our comments, we have captured each portion of the proposed Form to which our comments are addressed and below this excerpt, we have provided our suggested modification.

Section I. Appearances

The Working Group proposes adding an additional section to the list to provide the party represented. Currently the proposed Form reads:

- I. APPEARANCES: Please include (1) your name; (2) your firm’s name and address; (3) your firm’s telephone number; (4) your direct telephone number and (5) your e-mail address.**

With the addition, this section would read:

- I. APPEARANCES: Please include (1) your name; (2) your firm’s name and address; (3) your firm’s telephone number; (4) your direct telephone number; (5) your e-mail address; and (6) the party you represent.

Section II. Confidentiality Order

The Working Group is concerned about referring to the City Bar Confidentiality Agreement in a court form because the language of the Agreement could be changed without the consent of the Commercial Part justices, and printed court forms have a long life. Thus, the Working Group recommends that, if possible, a model agreement satisfactory to the Commercial Part Judges be hosted by the Office of Court Administration on its web site so that OCA can modify the order as needed without recourse to an outside organization. The Working group is also concerned that some Justices have implemented their own version of a confidentiality agreement and that a common agreement may interfere with these judges efforts to manage their cases.

The current version of the Form is:

II. CONFIDENTIALITY ORDER:

The court recognizes that most cases in the Commercial Division involve facts that are highly sensitive. In such cases, the court, in order to proceed to proper discovery, orders the parties to enter into a Confidentiality Agreement which the court will "so order." The court recommends the City Bar Confidentiality Agreement found at: <http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf>.

If the parties need to change the City Bar Confidentiality Agreement, the parties are to submit a signed stipulation with the changes and a red line copy for the court to review.

The parties _____ HAVE or _____ HAVE NOT entered into a Confidentiality Agreement.

The Court _____ HAS or _____ HAS NOT so ordered the Confidentiality Agreement and, if the Court has so ordered it, on what date did the Court so order it: _____

To address the issue of customization by individual justices, we recommend altering the language to read as follows:

Most cases in the Commercial Division involve facts that are highly sensitive. In such cases, the Court, in order to proceed to proper discovery, may order the parties to enter into a Confidentiality Agreement, which the Court will "So Order." The parties are directed to use the model confidentiality agreement promulgated in the part before which they are appearing. If the Trial Part does not have a specific form it uses, the parties are referred to a model confidentiality agreement which can be found at: www.XXXXX.

If the parties need to change either Trial Part's model agreement or the one found at: www.XXXXX, the parties are to submit a signed Agreement with the changes and a red line copy for the Court to review.

To the extent it is determined that the reference to the City Bar's website will remain, we believe that OCA should recommend to the City Bar that it consider adding a claw back provision to this agreement to address inadvertent production of privileged documents. Such a claw back provision is, in our opinion, closely related to the issues addressed in the Confidentiality Agreement, and would promote efficiency through a single document to address both issues.

Section IV, 4-14 Use of Parentheses

In the proceeding sections, the Form surrounded the subsections 1-3 with parentheses, *i.e.*, (2). In sections 4 through 14, however, the parentheses were omitted. For consistency sake, we propose that one convention should be utilized throughout.

Section IV 7(a). Electronic Discovery

The Working Group believes that the parties should be directed to consider [22 NYCRR 202.12(b)(1)] before selecting “Not Sure,” when determining if the case involves electronic discovery. The current Form reads as follows:

7. ELECTRONIC DISCOVERY

(a) Will there be Electronic Discovery in the case:

YES NO NOT SURE

The Working Group proposes adding an asterisk or footnote to “Not Sure” which would direct the parties to the following provision: “If the parties are not sure about whether the case is reasonably likely to include electronically stored information (“ESI”), they should refer to the non-exhaustive list of considerations provided in [22 NYCRR 202.12(b)(1)].”

Section IV 7(b) Meet and Confer

The Working Group believes that in addition to citing to the portion of the rule that requires the parties to have previously met and conferred, this section should also site to the portion of Commercial Division Rule 1(b) that requires counsel to be sufficiently versed in matters relating to their clients’ technological systems, [22 NYCRR 202.70(g)(1)(b)]. The current Form reads:

(b) **Meet and Confer: Pursuant to Uniform Commercial Division Rule 8(b) [22 NYCRR 202.70(g)(8)(b)] counsel certify that they have fulfilled their requirement to have met and conferred regarding certain matters relating to electronic discovery, before the Preliminary Conference. Counsel hereby certify to the extent they believe this case is reasonably likely to include electronic discovery, they are sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery or have brought someone to address these issues on their behalf.**

The Working Group proposes that the additional language be added as follows:

(b) Meet and Confer: Pursuant to Uniform Commercial Division Rule 8(b) [22 NYCRR 202.70(g)(8)(b)] counsel certify that they have fulfilled their requirement to have met and conferred regarding certain matters relating to electronic discovery, before the Preliminary Conference. Pursuant to Uniform Commercial Division Rule 1(b) [22 NYCRR 202.70(g)(1)(b)], counsel hereby certify to the extent they believe this case is reasonably likely to include electronic discovery, they are sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery or have brought someone to address these issues on their behalf.

IV 7.(c) Other directives concerning electronic discovery

The working group believes that the use of the term “Other” in this heading is confusing as there do not appear to have been any directives prior to this subsection. We would recommend that the heading be changed to:

- (c) Directives concerning electronic discovery.

IV 7.(c)(i)-(v) General comments about citations to the Commercial Section of the NYCRR

Since this form is to be used in the Commercial Parts, the Working Group believes that it would be more appropriate to cite to the portion of the NYCRR that relates to the Commercial parts, *i.e.*, [22 NYCRR 202.70] rather than the current reference to [22 NYCRR 202.12]. We appreciate that the language in these two rules has recently been aligned, but to the extent case law diverges in the interpretation of these sections, and because the Form applies specifically to the Commercial Division, it would be less confusing to cite to the Commercial Part Rules. Further, elsewhere in the document citation to the applicable rule is bracketed in square brackets, but in section IV 7, the brackets are round. We propose that a single convention should be used throughout, and that perhaps square brackets are less confusing. In addition to these changes, the Working Group has some specific changes to each of these subsections that will be described below.

IV 7.(c)(i) Preservation

The current Form refers to custodians for the computer/servers. The Working Group believes that this is confusing and that e-discovery obligations, as well as the portion of [22 NYCRR 202.70] addressing preservation, are broader than identifying only custodians for certain computers. Here is the text of the current version of the Form:

- (i) Preservation (22 NYCRR 202.12(c)(3)(a), (c) and (g):**
Please identify for both the plaintiff and each of the defendant(s) the relevant custodians for the computer/servers

The Working Group suggests the following modification:

- (i) Preservation [22 NYCRR 202.70(g)(8)(b)(i)-(v)]. Please identify for both the plaintiff(s) and each of the defendant(s) the proposed preservation plan, including relevant custodians; sources of ESI; the relevant time frames; and the individual(s) responsible for preservation of relevant ESI.

The proposed change more closely tracks the sections of the rule concerning the duty to preserve. Here is a breakdown of the Working Group’s rationale:

- [22 NYCRR 202.70(g)(8)(b)(i)] requires the parties to address “identification of potentially relevant types or categories of electronically stored information (“ESI”) and the relevant time frames.
- [22 NYCRR 202.70(g)(8)(b)(ii)] requires the parties to address “disclosure of the applications and manner in which the ESI is maintained.”

- [22 NYCRR 202.70(g)(8)(b)(iii)] requires the parties to address “identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible.”
- [22 NYCRR 202.70(g)(8)(b)(iv)] requires the parties to address “implementation of a preservation plan for potentially relevant ESI.”
- [22 NYCRR 202.70(g)(8)(b)(v)] requires the “identification of the individual(s) responsible for the preservation of ESI.”

Preservation transcends elements of each of these five subsections. Romanette (i) of the rule speaks to identifying both the relevant time frame and types or categories of ESI, which the Working Group simplified to the term “sources.” Romanette (ii) addresses the applications and how ESI is maintained, which the Working Group believes is also embodied in the phrase “sources of ESI.” Romanette (iii), with the phrase “identification of potentially relevant sources of ESI,” also addresses “sources of ESI.” We believe that the portion of the rule focused on the accessibility of ESI is reasonably subsumed in the formation of the preservation plan. Romanette (iv) requires the parties to implement a preservation plan for relevant ESI and this requirement is now added to the proposed text of the form. Finally, romanette (v) requires the parties to identify the individual(s) responsible for preservation and this is now addressed in the suggested revision to the Form.

IV 7.(c)(ii) Production

In addition to citing to the Commercial Division rule, the Working Group believes that the reference to “search terms” unduly limits the methods of review available to litigants. For instance, technology-assisted review or “predictive coding” (and related advanced analytic tools) are effective and efficient methods for identifying relevant documents for production, particularly in large cases, and depending upon the case, are often superior to search terms, which can be both unduly narrow and overly inclusive.

In addition, while recognizing the Court’s desire to distinguish production of ESI from other discovery, and the need to schedule a date for the completion of ESI production, the Working Group believes that, at the time of the Preliminary Conference (before the volume and types of ESI are known), it is unlikely that most litigants in a commercial dispute could give a meaningful date for the completion of the production of ESI. The reasons for this are many, but some include: the evolving understanding of scope of disclosure; the education that counsel undergo about the terms used by their clients to define relevant documents – for instance code names for projects; the addition of custodians and sources of ESI as responsive documents are identified; and many more. Further, the Working Group believes that compliance hearing dates and the overall end date of fact disclosure set forth in item 14 of the Form will drive the production ESI in an orderly fashion.

With this as background, the current Form provides:

- (ii) **Production (22 NYCRR 202.12(c)(3)(e),(d)):**
Please identify relevant search terms and the general cut-off date of the discovery

The Working Group proposes modifying this to read as follows:

- (ii) **Production** [22 NYCRR 202.70(g)(8)(b)(vi) and (ix)]. Please identify: (1) the scope or method for searching and reviewing ESI (i.e., search terms or technology-assisted review); and (2) the scope, extent, order, and form of production.

The Working Group believes that this modification is more closely aligned to the Commercial Division rule related to the production of ESI.

While the Working Group does not believe it is feasible to have a meaningful cut-off date for ESI production at the time the Form is completed, if this recommendation is rejected, the Working Group proposes the following language instead:

- (ii) **Production** [22 NYCRR 202.70(g)(8)(b)(vi) and (ix)]. Please identify: (1) the scope or method for searching and reviewing ESI (i.e., search terms or technology-assisted review); (2) the scope, extent, order, and form of production; and (3) a projected production schedule.

IV 7.(c)(iii). Logs and Redactions.

The Working Group proposes that the Form be modified to change the wording of this section to more closely confirm to the text of the rule and to provide for the logging of confidential as well as privileged information, such as in cases involving intellectual property or HIPPA-protected information. In addition, the current version of the Form does not provide for a method to allow the parties to identify certain produced documents as confidential or for attorney eyes only. Currently the Form provides:

- (iii) **Identification and Redaction of Privileged Electronic Data (22 NYCRR 202.12(c)(3)(d)) including Creating Privilege Logs:**

The Working Group proposes changing this to read as follows:

- (iii) **Logs and Redactions** [22 NYCRR 202.70(g)(8)(b)(vii)]. Please identify how the parties will provide for the identification, redaction, and logging of privileged or otherwise confidential ESI.

IV 7.(c)(iv). Claw Back Provisions

As stated above, the Working Group proposes that the Confidentiality Agreement currently housed on the City Bar website be hosted on OCA's website and modified to contain a model clawback provision for inadvertently produced privileged information. If this were done, this

section of the Form would not be necessary. To the extent the parties wished to modify the claw back provision in the Agreement, that could be addressed in section II of the Form, which relates to the Confidentiality Order.

In the event the above suggestion is not adopted, the Working Group proposes that the section be modified to cite to the relevant portion of the Commercial Division rule to conform to the other subsections. Accordingly, we propose that the new rommenette read as follows:

- (iv) **Claw-Back or Other Provisions** [22 NYCRR 202.70(g)(8)(b)(viii)].

IV 7.(c)(v). Costs.

The Working Group believes that the Form should not cite to case law, as often forms outlive existing case law. In addition, the NYCRR has been amended since the First Department decided *U.S. Bank Nat'l Assoc v. Greenpoint Mtge Funding Inc.*, and no other Department has issued an opinion on this issue. The Working Group would thus recommend that the Form track the language of the Commercial Division rule. Accordingly we propose that this rommenette be modified to read as follows:

- (v) **Costs** [22 NYCRR 202.70(g)(8)(b)(x)]. Please set forth the anticipated cost and burden of data recovery and proposed initial allocation of such costs.

IV 7.(d) Judicial Intervention

The Working Group believes that this section of the Form is too narrow because it does not address the production of ESI. Accordingly, we propose modifying this section to read:

- (d) **Judicial Intervention**
The parties anticipate the need for judicial intervention regarding the following issues concerning the scope and methods of preserving and/or producing ESI:

IV 7.(e) Additional Directives.

The Working Group believes that there will be instances where parties may seek to make additional provisions for issues related to the preservation and production of ESI. To facilitate this, we propose adding a new section, IV 7.(e) (using the current numbering convention) to make this option apparent. We do not believe that the Form necessarily needs to reserve space for this if it disrupts the final formatting of the Form, but instead could refer counsel to Section 14 for these issues. Accordingly we propose language along the lines of:

- (e) **Additional ESI Directives.** Please set forth any additional directives or issues relating to ESI:

or

- (e) **Additional ESI Directives.** If there are any additional directives or issues relating to ESI, please identify them in Section 14.

Formatting Issues

Finally, the Working Group noticed that the numbering scheme changes throughout this Form and appreciates that word processing applications often have a mind of their own. For example, under Roman numeral III, the scheme is III.(a). In Roman numeral IV the scheme is varied, but is primarily IV.1.(a)(i). For the purposes of later citation to the Preliminary Conference Order in motion practice or correspondence, we propose that a consistent format be adopted throughout. For example, the format of the Rule is 1.1(a)(1)(a)(i). We would propose following the format of the Commercial Division rules for alignment purposes.

Thank you very much for your consideration of these proposed changes. We hope they are helpful.



Pamela L. Gallagher
Co-Chair
Brian D. Graifman
Co-Chair
Supreme Court Committee

January 23, 2014

**Proposed Adoption of New Preliminary Conference Form
for Use in the Commercial Division**

The Supreme Court Committee¹ of the New York County Lawyers' Association reviewed the Office of Court Administration ("OCA") proposal regarding the adoption of a new Preliminary Conference Form for use in the Commercial Division.

A majority of members of the Supreme Court Committee voted in favor of the proposal following a presentation by the Commercial Division Advisory Council, which also recommended adoption of the new Preliminary Conference Form in the Commercial Division.

The Committee supported a more thorough and uniform approach to the Preliminary Conference (PC) Order, which currently can vary by judge in New York County. The Committee observed that the new Preliminary Conference Form aligns with the form of PC Order used in the Commercial Division in Westchester and Nassau Counties. Finally, the Committee observed that the form encouraged increased preparedness with respect to discovery and reflected the requirements of the Federal Courts' Rule 26 statement.

¹ The views expressed are those of the Supreme Court Committee only, have not been approved by the New York County Lawyers' Association Board of Directors, and do not necessarily represent the views of the Board.



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VIA E-MAIL and MAIL

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
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Re: Proposed New Rules of the Commercial Division

Dear Mr. McConnell:

Enclosed for consideration by the Commercial Division Advisory Council are comments from the New York State Bar Association Commercial and Federal Litigation Section on proposed new rules relating to (i) accelerated adjudication procedures, (ii) interrogatories, (iii) a preliminary conference form, and (iv) a pilot mandatory mediation program. We hope that these comments will be helpful.

If you have any questions about the Section's comments, do not hesitate to contact me.

Respectfully yours,

Gregory K. Arenson
Chair

cc: CFLS Officers (via e-mail)

To: Office of Court Administration

From: New York State Bar Association Commercial and Federal Litigation Section

Re: Comments on Four Proposals from the Commercial Division Advisory Council¹

Date: January 22, 2014

This memo comments on four proposals for procedural innovations in the Commercial Division concerning accelerated adjudication, interrogatories, a uniform Preliminary Conference Order and a pilot mediation program.

Chief Judge Lippman created a permanent Commercial Division Advisory Council in March 2013 to assist in the implementation of recommendations contained in the 2012 report from the Task Force on Commercial Litigation in the 21st Century.

The Commercial Division Advisory Council recently made four recommendations concerning procedures in the Commercial Division, and counsel to the New York State Unified Court System has published those proposals for comment. Those proposals concern:

- 1) A proposed new rule relating to an optional accelerated adjudication process in the Commercial Division;
- 2) A proposed new rule relating to the number and scope of interrogatories allowed in Commercial Division practice;
- 3) A proposed uniform Preliminary Conference Order; and
- 4) A pilot mandatory mediation program for implementation in New York County's Commercial Division.

We describe the four proposals below, along with our recommended comments.

Accelerated Adjudication

The Commercial Division Advisory Council recommends adoption of a new rule concerning "Accelerated Adjudication Actions" for inclusion in the Rules of the Commercial Division of the Supreme Court. The rule sets forth a group of restrictions upon the complexity of any action falling within its purview, such that all parties to such actions would be deemed to have

¹ Opinions expressed are those of the Section preparing this report and do not represent opinions of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

irrevocably waived certain procedural rights. The purpose of the rule is to allow parties to **elect** a simpler, faster mode of litigation—including through specific election in pre-dispute contract negotiation. (That is, rather than a mandatory arbitration clause, contracting parties could consent in advance to “Accelerated Adjudication” treatment of any dispute arising from their contract.)

The rule states in general terms that all cases governed by it should be ready for trial by no later than nine months after filing of an RJJ, and then sets forth certain specific aspects of litigation under its auspices:

- Conclusive waiver of jurisdictional defenses and the doctrine of *forum non conveniens*;
- No jury trials;
- No punitive damages;
- No interlocutory appeals;
- Discovery limitations (for each side):
 - No more than 7 interrogatories;
 - No more than 5 RFAs;
 - No more than 7 depositions of 7 hours each;
 - Document requests limited to documents “relevant” to a claim or defense and generally to be “restricted in terms of time frame, subject matter and persons or entities to which the requests pertain;”
 - Electronic discovery to be done with “narrowly tailored” descriptions of custodians whose documents are to be searched, and subject to court order requiring that requesting party advance costs of e-discovery in the event that the costs and burdens of same “are disproportionate to the nature of the dispute or the amount in controversy,” subject to the allocation of costs in the final judgment.

* * *

We believe these simplified procedures are a potentially powerful tool for the simplification of litigation in the Commercial Division. We note, however, that without a specific enforcement mechanism, the nine-month deadline for trial-readiness is more aspirational than realistic.

The only substantive recommendations that the Section makes are the following:

1. In Section (i) under the heading of “Concerning electronic discovery,” the Section recommends that the term “on the basis of generally available technology” be omitted.

The term “generally available technology” is confusing, will change in unknown ways over time, and may be subject to inconsistent interpretations. By omitting this language, Section (i) will be, as follows: “the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents.”

2. We note that it is unclear what will happen in the event that parties agree to the Accelerated Adjudication procedures, but the case is not otherwise eligible for assignment to the Commercial Division (*e.g.*, because the case does not meet the monetary threshold in a particular county or because the case does not meet the subject matter criteria). Will the Commercial Division nonetheless accept the case? Will the Accelerated Adjudication provisions be applied by other IAS parts in the event that the case is not heard by the Commercial Division? Or, notwithstanding the agreement of the parties, will the parties otherwise be required to comply with all of the provisions of the CPLR if the case is not assigned to the Commercial Division and Rule 9 does not apply to the action? The Section urges the OCA to clarify this ambiguity so that (a) the Commercial Division will only be handling cases appropriate for Commercial Division adjudication and (b) parties have clarity when contractual provisions providing for Accelerated Adjudication will be applied by the courts.

Therefore, subject to the two recommendations set forth above, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a significant step towards more efficient resolution of those cases for which accelerated procedures are appropriate. We assume that the OCA will keep statistics with regard to the use of this procedure and its effect on case dispositions. The Section recommends that the proposed rule be adopted subject to the two recommendations set forth above.

Interrogatories

The Commercial Division Advisory Council recommends, in essence, that the Commercial Division adopt limitations on number and scope of interrogatories that closely parallel those in place in the Southern District. Under the proposal, each party would be limited to 25 interrogatories (without subparts). At the outset of discovery, interrogatories would be limited to those seeking witness identities, general logistical information about documents and physical evidence, and damages calculations. Contention interrogatories would be allowed at the conclusion of discovery. Other interrogatories would be permitted only by consent or by court order. The proposed text of the new rule follows:

- (a) Interrogatories are limited to 25 in number, without subparts, unless another limit is specified in the preliminary conference order. This limit applies to consolidated actions as well.

(b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.

(c) During discovery, interrogatories other than those seeking information described in paragraph (b) above may only be served (1) if the parties consent, or (2) if ordered by the court for good cause shown.

(d) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise.

The only material difference between the proposal and the analogous Southern District rule is that the proposed rule requires either consent or court order for any interrogatories outside the normal scope, whereas the Southern District rule nominally allows such interrogatories “if they are a more practical method of obtaining the information sought than a request for production or a deposition.” We believe the proposal represents an improvement over the Southern District rule, which frequently gives rise to disputes between parties as to which discovery method is “more practical”—disputes that generally require court resolution in any case.

For reference, here is the text of the Southern District’s Local Civil Rule 33.3:

(a) Unless otherwise ordered by the Court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.

(b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the Court.

(c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

* * *

We believe this proposal is a helpful incremental step in limiting the expense and burden of litigation in the commercial division, and we therefore recommend that this Committee endorse the proposal.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Uniform Preliminary Conference Order

The Commercial Division Advisory Council has recommended the use of a uniform Preliminary Conference (“PC”) Order for all Commercial Division matters. Rule 8 of the Uniform Rules for the Commercial Division specifies a range of issues to be discussed prior to the Preliminary Conference. Moreover, the Rules contemplate that the preliminary conference will serve as the forum where counsel – with the Court’s guidance and direction – will actively plan the litigation and address, at an initial stage, certain of the complications in discovery and motion practice the parties anticipate. However, because many of the standard PC Order forms used in Commercial Division parts around the state cover only a few of the topics specified in Rule 8, the level of active management of cases can vary from court to court and case to case.

The proposed uniform Preliminary Conference Order is designed to help the parties and the Court make sure that the key components of typical commercial litigation are addressed at the outset – much as a FRCP 26(f) discovery plan and FRCP 16 scheduling order gives structure to business litigation in the federal courts. Among the topics included in the proposed PC Order are:

- (1) A section concerning confidentiality forms typically used in business cases;
- (2) A section requiring the parties to summarize their key claims and defenses;
- (3) A section certifying that the parties have met concerning e-discovery and addressed document preservation, search terms, issues relating to privilege logs and claw back provisions for inadvertent disclosure;² and
- (4) A section concerning expert disclosure in light of new Rule 13(c).

* * *

² We have been advised that although the proposed PC Order requests that parties identify search terms and custodians, the Commercial Division Advisory Council is considering proposing that the language be modified to require only that the parties inform the Court that they have taken the step of identifying custodians and search terms. The Section agrees with the proposed modification; there is no need for a publicly filed Order to list the individual custodians in each case or all of the search terms the parties intend to use. So long as the parties confirm that they have undertaken the exercise of identifying this information, the essential planning/case management function will be achieved.

Although not all commercial cases statewide will require the level of detail in planning the proposed Preliminary Conference Order requires, we believe this proposal will generally help the preliminary conference achieve its important case management function.

The Section, however, does have two proposed modifications concerning the provisions on “Electronic Discovery”:

Section 7(b) of the proposed Preliminary Conference Order requires counsel to certify their competence as to matters relating to their clients’ technological systems or have brought someone to the conference who can address these issues. While the Section certainly agrees that counsel should be knowledgeable about e-discovery issues and the technological systems at issue in the particular case, the Section opposes a requirement that counsel make a certification. In the Section’s view, competence is an issue of professional responsibility, not an item that requires certification in the Preliminary Conference Order. Moreover, the Section is concerned that a certification requirement in the Order could embolden parties to seek contempt sanctions and unnecessarily increase motion practice.

The Section, therefore, recommends changing the second sentence of Section 7(b) from:

“Counsel hereby certify to the extent they believe this case is reasonably likely to include electronic discovery, they are sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery or have brought someone to address these issues on their behalf.”

to:

“Counsel are reminded that, if this case is reasonably likely to include electronic discovery, they should be familiar with their clients’ technological systems so as to discuss competently all issues relating to electronic discovery or bring someone to address these issues on their behalf.”

Section 7(c)(ii) [Production] asks the parties to identify relevant search terms and the general cut-off date of the discovery. Technology is constantly evolving and “search terms” may not be used in cases that employ Technologically Assisted Review (TAR), such as predictive coding. As an alternative, the Section recommends that the language require that the parties confirm they have discussed the “means, parameters, custodians, protocol and technology to be used for the culling and production of relevant electronically stored information and the dates by which production shall be made.” The general cut-off date of discovery is confusing. If it relates only to electronically stored information, it is encompassed by the Section’s recommended language. If it relates to all discovery, it should be subsumed in Section 8 for the cut-off of fact disclosure.

Therefore, subject to a minor modification to clarify that custodians and search terms will not be set forth in the proposed Preliminary Conference Order and the recommendations concerning Sections 7(b) and 7(c)(ii) of the proposed Preliminary Conference Order set forth above,, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Pilot Mediation Program

The Commercial Division Advisory Council has recommended the adoption of a pilot program in the New York County Commercial Division, to sunset after eighteen months unless renewed, under which one out of every five newly filed cases in the Commercial Division would be referred for mandatory mediation. Parties would be required to complete mediation within 180 days of assignment to an individual justice (i.e. normally upon filing of an RJI). Parties could opt out if all sides so stipulate, and any party would be permitted to apply for exclusion from the program on the basis that mediation would be ineffective or unjust.

The recommendation by the Commercial Division Advisory Council is based largely upon the recommendation of the ADR Committee of the Commercial and Federal Litigation Section, and is premised on the view that mediation is underutilized in Commercial Division matters and upon the experience of other courts to have implemented such systems, including the Western District of New York, which reports that 70% of cases that go to mediation there are settled.

Of course, the Supreme Court already maintains a panel of mediators; free mediation is available in all Commercial Division cases. However, the pilot program’s proponents believe that mediation remains underutilized. We agree, and recognize that (in the words of the Faster-Cheaper-Smarter Working Group of the Commercial and Federal Litigation Section, which made a similar proposal in June 2012) “[m]ediation will often succeed despite the skepticism of counsel and parties.” We also note the observation ADR Committee’s observation that their members who are in-house counsel were particularly vocal in urging adoption of this proposal.

The ADR Committee has indicated that it will monitor the implementation and results of the pilot program; we believe this is wise, and also that it might be logical for a representative of this Committee to liaise with the ADR Committee in that connection.

* * *

We believe this proposal may be helpful in achieving more optimal use of mediation to resolve Commercial Division cases at an early stage, and we think that this Committee could serve a potentially helpful role in evaluating the success of the proposal as it is implemented.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposed pilot program as a meaningful step towards the maximizing the early resolution of Commercial Division matters through mediation, where possible.

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January 25, 2014

CommDivPCForm@nycourts.gov
John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 1004

Dear Counsel:

I am an attorney practicing before the courts of this State now for over thirty years. Please accept my comments respecting the Preliminary Conference Form for use in the Commercial Division of the Supreme Court.

The argued-for need for proposed revisions to the preliminary conference form for use in the Commercial Division is not local to practice in the Commercial Division. For example, both electronic and expert discovery are features of practice also in the Supreme and Civil Courts as a general matter.

Accordingly, I recommend that our court administration take up a more universalized review of preliminary conference forms across the courts, and that it adopt a new preliminary conference order for use in the Supreme Court's Commercial Division only in those respects the practice is more particular there.

Respectfully submitted,

/s/ Mitchell B. Nisonoff
Mitchell B. Nisonoff