



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

January 14, 2016

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed amendment of Commercial Division Rules (22 NYCRR 202.70(g))
Regarding Memorialization of Rulings in Disclosure Conferences.

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The Administrative Board of the Courts is seeking public comment on a new rule, proposed by the Commercial Division Advisory Council, for disclosure conferences in the Commercial Division (Exh. A). As described in a supporting memorandum by the Council (Exh. B), the proposed rule calls for the written memorialization by the parties of resolutions reached at disclosure conferences (or the dictation of such resolutions in to the record), for submission to and approval by the presiding judge. The new rule is designed to make more efficient the already expedited practice of resolving disclosure disputes through informal conferences.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than March 14, 2016.**

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

EXHIBIT A

PROPOSED RULE

The Commercial Division Rules shall be amended to add the following:

“Rule X Rulings at Disclosure Conferences

The following procedures shall govern all disclosure conferences conducted by nonjudicial personnel:

(a) At the request of any party:

 i. prior to the conclusion of the conference, the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the court for approval and signature by the presiding justice; or

 ii. prior to the conclusion of the conference, all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be “ordered,” or the court shall otherwise enter an order incorporating the resolutions reached.

(b) The foregoing procedures shall not apply to telephone conferences.”

EXHIBIT B

MEMORANDUM

TO: New York State Office of Court Administration
FROM: Commercial Division Advisory Council (the “Council”)
DATE: December 8, 2015
RE: **Proposed Rule Regarding Memorialization and Effectuation of Rulings Issued During Conferences**

INTRODUCTION

Subsequent to its establishment in 2013 by Chief Judge Jonathan Lippman, the Commercial Division Advisory Council proposed a number of amendments to the Division’s Statewide Rules of Practice (the “Division’s Rules”). Through a series of administrative orders, former Chief Administrative Judge Gail Prudenti promulgated these amendments, which have since become fully integrated into the Division’s Rules.

The integrated amendments, which implement changes proposed by the Task Force on Commercial Litigation in the 21st Century (the “Task Force”) and range from enhanced expert disclosure to presumptive limitations on depositions, all share two common goals: (a) to make more efficient and cost-effective the adjudication of commercial disputes in the New York State Commercial Division; and (b) to burnish the Division’s reputation as the premier forum in the United States for the resolution of the most complex business disputes.

Having now given effect to the Task Force’s recommendations, the Advisory Council’s mandate has shifted to the next phase—“[the] further periodic review of the needs and goals of the Commercial Division” (Task Force Report at 31). Towards that end, the Council’s Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the “Subcommittee”) recommends the adoption of a new rule to make more efficient the already expedient practice of resolving disclosure disputes through informal conferences.

The precise issue to be addressed is the memorialization and endorsement of rulings issued at conferences conducted before nonjudicial personnel. While in many cases, including at preliminary conferences and formal compliance conferences, court directives and deadlines are embodied in written orders (either using the sample conference forms recommended by this Council or customized forms prepared by the individual justices), in others, conferences held before a member of chambers often result in the issuance of oral rulings that are not reduced to writing. The difficulties created by oral “rulings” are clear – memories fade and disputes arise after-the-fact among the parties regarding the precise ruling(s) issued and its (their) scope. The resulting disputes can and often do result in costly, protracted and unnecessary motion practice, which would have not been needed had the “rulings” been reduced to writing. Moreover, the reshuffling of a retired or elevated justice’s case inventory to another justice – one who is not steeped in the case history – only magnifies the problem; oral “rulings” cannot be confirmed by a review of the record.

There are two relatively simple ways to address this problem and simultaneously insure that “rulings” made by nonjudicial personnel secure the appropriate judicial imprimatur:

1. Requiring, at the request of any of the parties, that all resolutions reached at conferences held before nonjudicial personal be reduced to writing by counsel and presented to the presiding justice to be “so ordered”; or
2. Requiring, at the request of any of the parties, that the resolutions reached be dictated into the record before the court reporter, with the transcript either to be “so ordered” or the resolutions otherwise incorporated into an order of the court.

PROPOSED RULE

“The following procedures shall govern all disclosure conferences conducted by nonjudicial personnel:

- (a) At the request of any party:

- i. prior to the conclusion of the conference, the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the Court for approval and signature by the presiding justice; or
- ii. prior to the conclusion of the conference, all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be “ordered,” or the court shall otherwise enter an order incorporating the resolutions reached.

(b) The foregoing procedures shall not apply to telephone conferences.”

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the proposed rule and its incorporation into the Statewide Rules of the Commercial Division.

JDL