



STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2150
FAX: (212) 428-2155

A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

October 6, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of Commercial Division Rule 14 (22 NYCRR § 202.70(g)), relating to disclosure disputes.

=====

The Commercial Division Advisory Council has recommended an amendment of Commercial Division Rule 14 that would set forth a new procedure for resolving discovery disputes (Exh. A). Presently, Rule 14 provides that counsel must consult in good faith to resolve discovery disputes; if counsel are unable to resolve a dispute the aggrieved party shall contact the court to arrange a conference as soon as practicable. The proposed amendment provides that if the court's Part Rules address discovery disputes, those Part Rules will govern. If the court's Part Rules are silent with respect to discovery disputes, the following procedures would apply. If counsel are unable to resolve a dispute after consulting in good faith, counsel for the moving party would be required to submit to the court a letter not exceeding three single-spaced pages in length outlining the nature of the dispute and requesting a telephone conference. The opposing party would have four business days to submit a responsive letter, after which the court would schedule a telephone or in-court conference with counsel. The proposal provides that failure to comply with this procedure may result in a motion being held in abeyance until the court has the opportunity to conference the matter. If the parties need to make a record, they would still have the opportunity to submit a formal motion.

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 November 25, 2014.**

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 Best Practices for Judicial Case Management

RE: Proposed New Version of Rule 14 of the Commercial Division

DATE: April 29, 2014

The Subcommittee on Best Practices for Judicial Case Management in the Court System has prepared a new version of Rule 14 of the Rules of the Commercial Division of the Supreme Court. The new version of the Rule was drafted to address two of the recommendations of the Chief Judge's Task Force on Commercial Litigation in the 21st Century: (a) the recommendation for using letter submissions for discovery disputes, and (b) the recommendation for conducting discovery conferences by telephone when appropriate. The text of these two recommendations is attached.

Current Rule 14 regarding Disclosure Disputes is brief and directs counsel to contact the court if a discovery dispute cannot be resolved through good faith discussions. The Proposed Rule 14 sets forth a new procedure directing counsel to provide the court with three-page letter briefs regarding unresolved discovery disputes and states that the court will attempt to address the matter through a telephone conference where possible. The text of the Current Rule 14 and Proposed Rule 14 are set forth below.

Existing Rule 14:

Rule 14. Disclosure Disputes. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See section 202.7. Except as provided in Rule 24 hereof, if counsel are unable to resolve any disclosure dispute in this fashion, the aggrieved party shall contact the court to arrange a conference as soon as practicable to avoid exceeding the discovery cutoff date. Counsel should request a conference by telephone if that would be more convenient and efficient than an appearance in court.

Proposed Rule 14:

Rule 14. Disclosure Disputes. If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule will apply.

Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the

moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference. Such a letter must include a representation that the party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter or shall indicate good cause why no such consultation occurred. Not later than four business days after receiving such a letter, any opposing affected party or non-party shall submit a responsive letter not exceeding three single-spaced pages. After the submission of letters, the court will schedule a telephone or in-court conference with counsel. The court or the court's law clerks will attempt to address the matter through a telephone conference where possible. The failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter. If the parties need to make a record, they will still have the opportunity to submit a formal motion.

To address the preferences of individual judges, the Subcommittee has formulated the proposed new Rule 14 to serve as a default protocol where an individual judge does not have Part Rules that address discovery disputes. Individual judges who wish to tailor the discovery dispute mechanism to be even more streamlined may do so in their Part Rules. At the same time, we believe that a framework for providing three-page letter briefs followed by a telephone conference will help practitioners and judges who would prefer to have a written outline of the issues that will be addressed prior to the start of a conference call. Such letter briefs will also allow the parties a chance to set forth their positions in writing (including case citations) and obtain an indication from the judge regarding how the dispute will be resolved. The overall expectation is that the letter-briefing process will assist both the court and the parties in filtering out unnecessary or inefficient motions.

We note that the proposed Rule 14 also emphasizes that discovery disputes will be addressed through a telephone conference where possible. This provision responds to the Task Force's recommendation that telephone conferences be employed more widely to reduce costs and attorneys' fees. The current version of Rule 14 states that telephone conferences can be requested but does not have the same emphasis favoring them over an in-person conference.

Overall, we believe that the proposed Rule 14 will provide a welcome protocol to litigants for addressing discovery disputes in an economical fashion. This default protocol will advise users of the Commercial Division and their counsel that the Commercial Division has a streamlined process in place for efficiently resolving discovery disputes. We ask the Commercial Division Advisory Council to consider the Proposed Rule 14 for approval at the May 5, 2014 meeting.

Appendix to Memorandum Regarding Proposed Rule 14

Two relevant recommendations of the Chief Judge's Task Force on Commercial Litigation in the 21st Century:

Recommendation 6.b: *Using Letter Submissions for Discovery Motions.*

Although letter submissions are encouraged in many Commercial Division Parts, they are not universally permitted. Experience, however, shows that letter submissions are often the most effective way to present discovery disputes: they are cheaper and more efficient than formal motions, and more balanced and less subject to "ambush" than oral presentations at conferences. We recognize that letter submissions, unless e-filed, often do not become part of the official court record, and this may be something that needs to be changed. For now, letters frequently remain the best way to address discovery disputes in the first instance.

Recommendation 6.c: *Conducting Discovery Conferences By Telephone.*

We encourage judges to conduct at least routine discovery and status conferences by telephone rather than requiring the attorneys to travel to court. We recognize that some conferences (for example, the initial discovery conference and post-Note of Issue conferences) should be handled in person, but most others need not be. This is particularly true when the discovery process is proceeding smoothly, or an open issue has already been fully presented through letters to the court. Allowing telephone conferences in these circumstances will increase efficiency and reduce costs and attorneys' fees.