



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

January 6, 2016

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of Commercial Division Rules (22 NYCRR 202.70(g))
Regarding Settlement Conferences Before a Justice Other Than the Justice
Assigned to Hear the Case.

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The Administrative Board of the Courts is seeking public comment on a proposed new Rule of the Commercial Division establishing a procedure for settlement conferences before a Commercial Division justice other than the justice assigned to the case (Exh. A). The rule, proposed by the Commercial Division Advisory Council, is designed to encourage candid settlement negotiations between parties without risk of telegraphing weaknesses in a case to the presiding trial judge. In its recommendation (Exh. B), the Council notes that the proposed practice is widespread in both state and federal courts, and has long been used successfully in the Commercial Division in New York County. The proposed rule would read as follows:

Rule __. Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that: (1) such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice; and (2) the justice who will conduct the conference has agreed to serve in that capacity.

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 7, 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 Rule Regarding Assignment of Settlement Judge

Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that: (1) such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice; and (2) the justice who will conduct the conference has agreed to serve in that capacity.”

EXHIBIT B

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution
("Subcommittee")

DATE: December 1, 2015

RE: **Proposed Rule Regarding Settlement Conferences Before A Justice Other
Than The Justice Assigned to Hear The Case**

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 facilitate settlement conferences before a Commercial

Division justice other than the justice assigned to the case—to give the parties a “settlement judge” if they wish to proceed in that fashion and if another judge is willing to serve in that capacity. The Subcommittee envisions a collaborative practice among judges that depends on the consent of both the referring and receiving judges. The proposed rule does not impose any obligation on the court to furnish a settlement judge upon the request of a party—this occurs only upon the consent of the judges involved.

Proposed Rule

Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that: (1) such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice; and (2) the justice who will conduct the conference has agreed to serve in that capacity.

DISCUSSION AND ANALYSIS

Many of the reforms implemented so far in the Commercial Division have been inspired by federal rules and practices that proved advantageous in business litigation. This proposal follows in that vein. In federal court, the bifurcated responsibilities of district judges and magistrate judges allow parties to readily obtain a settlement conference before the assigned magistrate judge rather than the district court judge who will hear the case. Proceeding before a separate settlement judge offers certain advantages that may be important to the parties, especially to those who do not wish to telegraph weaknesses in their case to the judge who will hear the case. Holding a settlement conference before a dedicated settlement judge permits the parties to disclose weaknesses in their case and otherwise be more forthcoming in negotiations. *See generally* Successful Partnering Between Inside and Outside Counsel, § 65.36 (Haig, 2015) (“If you have an unfavorable position in the case, and are looking for the best possible settlement, the trial judge could well destroy any chance of you getting a favorable settlement by

indicating those weaknesses to the other side, either by comments or the tenor of the negotiations, e.g., by proposing a higher or lower range of settlement than what was previously discussed.”)

The Commercial Division bench in Manhattan has a long history of collaborative referrals whereby one judge will send a case to another judge to conduct a settlement conference. Such practices are widespread in other courts, both state and federal.¹ The proposed rule is designed to translate the existing informal consent-based collegial practice in the Commercial Division into a recognizable rule that permits parties to request a dedicated settlement judge if they want one, and if one can be made available by agreement of the judges involved.

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.

¹ See, e.g., E.D. Cal. R. 16-270; S.D. Cal. Civ. LR 16.3; N.D. Cal. ADR R. 7-2; C.D. Ill. Local R. 16.1(B); Los Angeles Superior Court, Local Rule 8.21.