TO: Office of Court Administration

FROM: New York State Bar Association's Commercial and Federal Litigation Section

DATE: February 12, 2016

RE: Proposed amendment to 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 Commercial and Federal Litigation Section (***"Section"***) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated January 6, 2016, proposing an amendment of Section 202.70(g) of the Rules of the Commercial Division regarding settlement conferences before a justice other than the justice assigned to hear the case (the ***"Proposal"***).

I. EXECUTIVE SUMMARY

The Section agrees that an elective procedure for conducting settlement conferences before a justice not assigned to the commercial dispute, upon consent of counsel, the assigned justice and the justice to whom the settlement conference is assigned, will promote candid settlement negotiations and increase efficiency in the resolution of commercial disputes. The Section, therefore, encourages adoption of the proposed new Rule.

II. SUMMARY OF PROPOSAL

As set forth in the Proposal, the proposed new Rule of the Commercial Division seeks to "establish[] a procedure for settlement conferences before a Commercial Division justice other than the justice assigned to the case" (Proposal at 1, Ex. A). The proposed new Rule "is designed to encourage candid settlement negotiations between parties without risk of telegraphing weaknesses in a case to the presiding judge" (Proposal at 1). The proposed new Rule is not mandatory, and requires that counsel make a joint request for a settlement conference before another justice. The new Rule, as proposed, provides the justice assigned to the commercial dispute discretion in granting the joint request, upon a finding that (1) such a conference will be beneficial to the parties and the court, and (2) the justice to whom the settlement conference is assigned has consented to serve in that capacity.

III. RESPONSE AND SUGGESTIONS TO FURTHER THE GOALS OF THE PROPOSAL

The Section concurs with the Proposal's rationale, that a settlement conference before a justice other than the justice assigned to the case may "encourage candid settlement negotiations between the parties," and avoid the "risk of telegraphing weaknesses in a case to the presiding judge" (Proposal at 1), and also notes that the similar rules have been successfully administered in federal and state courts, including the Commercial Division in New York County. The

Section notes that the proposed new Rule is not mandatory, and requires the consent of all parties, the presiding judge and the judge to whom the settlement conference is assigned. Therefore, the Section concurs that, in the appropriate case, the option of conducting a settlement conference before a justice other than the justice assigned to the commercial dispute may advance the Commercial Division's mantra, "faster, cheaper, smarter."

The Section also notes that, in some instances, counsel may be hesitant to express reluctance about participating in settlement conferences before the justice assigned to the case, even where counsel may privately doubt the advisability of so proceeding. With that observation in mind, the Section is especially hopeful that the Proposal may promote not only candid settlement discussions but also greater comfort with the continuing role of the assigned justice in the event (hopefully rare) in which settlement talks fail to fully resolve a matter.

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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION, COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION AND COMMITTEE ON LITIGATION

COMMENTS ON PROPOSED COMMERCIAL DIVISION RULE CHANGES AND PROPOSED AMENDMENTS TO THE MODEL PRELIMINARY CONFERENCE FORM

The New York City Bar Association (the "City Bar") is grateful for the opportunity to provide comments on the following recent proposals by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council"):

1. A proposed new Commercial Division rule regarding settlement conferences before another Justice of the Commercial Division;

2. A proposed new Commercial Division rule relating to the memorialization of rulings by "non-judicial personnel" to resolve discovery disputes; and

3. A proposed amended model preliminary conference form for use in the Commercial Division.

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.[1]

1. Settlement Conferences Before a Justice Other Than the Assigned Justice

The City Bar supports the overriding goal of the proposed Rule and we believe that it can provide another useful tool for justices and parties attempting to settle commercial cases. Below we propose a clarifying amendment and we urge, should the Rule be promulgated, that it be alongside a commitment to enhance the use of currently available alternative dispute resolution mechanisms.

As an initial matter, if the proposed Rule is enacted, we believe that the procedure set forth therein should be modified. Specifically, we are concerned that the prong of the test stating

[1] The committees include practitioners, academics and judges, and the Council also includes chairs of other court-related committees of the City Bar. In addition to the committee chairs listed at the end of this report, the following individual members of the committees contributed to these comments: Ronald C. Minkoff, Michael P. Regan, Andrew M. Cali-Vasquez and Leah Friedman. Michael Regan, a member of the State Courts Committee, chaired the working group and was the principal author of this report.

that "the justice who will conduct the conference has agreed to serve in that capacity" may be read as a prerequisite to submitting the parties' joint settlement conference request to the assigned justice. As it is currently written, the proposed Rule arguably encourages attorneys to "cold call" the Justices of the Commercial Division to find a Justice willing to preside over a settlement conference even before the assigned Justice has determined that such a settlement conference should be conducted. We suggest that the Rule be modified to clarify that if the assigned justice determines that a settlement conference should occur under the auspices of another justice, then the assigned justice should be involved in the process of identifying and procuring the assistance of the "settlement judge." That modification will bring the Rule more in line with the informal system of collaboration among the Justices of the Commercial Division as it currently exists.

Moreover, in order to support the overall goal of settling commercial cases, we believe that greater effort should be made to promote or expand the Commercial Division Alternative Dispute Resolution Program (the "ADR Program"). Indeed, some might perceive the promulgation of this Rule as a signal that the ADR Program is ineffective or that it lacks vigorous support. In addition, in many Commercial Division cases, the litigants have sufficient financial resources to take advantage of private mediation service providers. Rather than relying on the judiciary to settle complex commercial cases, more effort should be made to promote these other alternative dispute resolution options.

2. <u>The Memorialization of Rulings in Discovery Conferences</u>

The City Bar supports the aim of the proposed Rule to promote efficiency and certainty in the resolution of discovery disputes before non-judicial personnel but, as discussed below, suggests that certain changes be made to the Rule. Most importantly, telephonic discovery conferences should not be excluded from the Rule, because the Rule is designed to eliminate the uncertainty and confusion that arises from failing to properly memorialize the resolution of discovery disputes. It logically follows, therefore, that telephonic discovery conferences ought to be covered, not excluded, by this Rule. Further, the term "non-judicial personnel" should be clarified by listing the various personnel who are encompassed by that term.

The Advisory Council explains that this proposed Rule is appropriate because, in some instances, discovery disputes are being resolved informally, by non-judicial personnel, in such a manner that the parties must rely on an oral ruling instead of a clear written order from the Court. The absence of a written order can lead to confusion and disagreements between the parties regarding the terms of the oral ruling resolving the dispute. In response to that problem, the Rule establishes a procedure to allow the parties to obtain a written order from the Court.

Based on the Rule's objective of promoting certainty in the resolution of discovery disputes, we urge the elimination of section (b), as currently drafted, which states that "[t]he foregoing procedures shall not apply to telephone conferences." Indeed, if the Rule seeks to eliminate oral resolutions of discovery disputes, then telephone conferences should be included in the Rule, because those conferences often result in oral rulings. We recommend using the following language for section (b): "With respect to telephone conferences, the parties shall agree on and jointly submit to the Court a stipulation or order memorializing the resolution of

their discovery dispute and, if they are unable to do so, shall submit separate proposed orders, on notice to all parties, for the Court's consideration."

Further, we believe that the term "non-judicial personnel" should be clarified in the Rule. It is our understanding that the Advisory Council is referring primarily to court attorneys and law clerks. However, discovery disputes are sometimes referred to Special Masters. Since the goal of the Rule is to promote transparency and certainty, we believe that the term should be clarified by adding a non-exclusive list of court staff fitting the definition of "non-judicial personnel."

3. Amendments to The Model Preliminary Conference Form

The City Bar applauds the hard work that went into creating the model preliminary conference form, as amended (the "PC Form"), and we appreciate and support the use of model forms as a "best practices" tool to educate counsel and simplify the litigation process. Indeed, it is our understanding that the PC Form seeks to incorporate the current Commercial Division Rules with respect to, *inter alia*, electronic discovery and the parties' obligation to confer before the Preliminary Conference, two areas in which counsel sometimes need to be reminded of their duties and obligations.

Given that many changes have been made to the Commercial Division Rules in recent years with respect to electronic discovery, we believe that a model form alerting counsel to all of the applicable rules and requirements of the Commercial Division is an invaluable resource. We also understand that each Commercial Division Justice will be free to use the form, in whole or in part, or not use it at all. Indeed, given that it is a model form, we recommend that the PC Form be re-evaluated from time to time to determine whether judges and attorneys believe that it should be amended or altered in some respect in order to greater enhance its utility.

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We hope our observations prove to be helpful. We stand ready to provide further comments upon request or to assist in any other way we can.

Steven M. Kayman
Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of Superior Jurisdiction

Cary B. Samowitz
Chair, Committee on Litigation

March 2016

MEMORANDUM

TO: Commercial Division Advisory Council

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

DATE: March 30, 2016

RE: **Response to Public Comments Submitted to OCA Concerning "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"**

The Office of Court Administration received written comments from the New York State Bar Association's Commercial and Federal Litigation Section ("State Bar") and the New York City Bar Association ("City Bar").

The State Bar's comments were universally positive and suggested no changes to the proposed rule. The State Bar's "Executive Summary" is quoted in full below:

> The Section agrees that an elective procedure for conducting settlement conferences before a justice not assigned to the commercial dispute, upon consent of counsel, the assigned justice and the justice to whom the settlement conference is assigned, will promote candid settlement negotiations and increase efficiency in the resolution of commercial disputes. The Section, therefore, encourages adoption of the proposed new Rule.

The City Bar supports the new proposed rule, believing "it can provide another useful tool for justices and parties attempting to settle commercial cases," but had two suggestions to improve it.

First, the City Bar would like to see the rule clarified to make sure it does not "encourage[] attorneys to 'cold call' the Justices of the Commercial Division to find a Justice willing to preside over a settlement conference even before the assigned Justice has determined that such a settlement conference should be conducted."

Second, the City Bar recommends that the proposed rule (as clarified) be promulgated alongside a "commitment to enhance the use of currently available alternative dispute resolution mechanisms." The City Bar is concerned that some people "might perceive the promulgation of this Rule as a signal that the ADR Program is ineffective or that it lacks vigorous support."

Before addressing these two suggested "friendly amendments," we set out the language of the proposed rule:

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.

1. Proposed Clarification to Avoid Parties "Cold Calling" Other Justices

We do not agree that the proposed rule "arguably encourages" attorneys to cold call potential settlement judges whether before or after the parties bring the matter to the attention of the assigned justice. On the other hand, in light of the fact that the City Bar believes such encouragement can be found in the language, and a few tweaks can expressly dispel that incorrect reading, we recommend the following changes:

Proposed Rule (REVISED)

> 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~~. <u>If the request is granted, the assigned justice shall make appropriate arrangements for the designation of a "settlement judge."</u>

2. Promulgation Alongside Commitment to Enhance Other ADR

The City Bar did not propose specific language to counter any possible perception that by promulgating this new rule, promoting judicial settlement conferences, OCA is implicitly criticizing or undermining other forms of ADR provided for in the Commercial Division ADR Program. As this new rule was conceived, articulated and put out for public comment, it is a modest endorsement of an informal practice extant in New York County. The proposed rule has many analogs in other state and federal courts, and represents just one of many options available to litigants looking to resolve a case. We do not perceive in the OCA's decision to adopt this new rule any implicit comment – positive or negative – on the effectiveness of the ADR Program. Thus, we do not accept this "friendly amendment."