

**TO:** Office of Court Administration  
**FROM:** New York State Bar Association's Commercial and Federal Litigation Section  
**DATE:** February 12, 2016  
**RE:** Proposed Amendment of Commercial Division Rules (22 NYCRR 202.70(g))  
Regarding Memorialization of Rulings in Disclosure Conferences

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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 14, 2016, proposing an amendment of Section 202.70(g) of the Rules of the Commercial Division regarding memorialization of rulings in informal disclosure conferences (the "**Proposal**").

**I. EXECUTIVE SUMMARY**

The Section agrees with the Subcommittee of the Advisory Council on Procedural Rules to Promote Efficient Case Resolution that a rule requiring, at the request of a party, memorialization in the form of an Order all resolutions reached at a disclosure conference will further the resolution of discovery disputes through informal conferences and avoid protracted and costly discovery motions. The Section also believes that telephonic conferences form an integral part of discovery management in the Commercial Division. The Section therefore recommends that the proposed new Rule regarding memorialization of rulings in disclosure conferences be adopted with the modification that sub-section (b) be revised to state "The foregoing procedures shall not apply to telephone conferences unless otherwise ordered by the Court."

**II. SUMMARY OF PROPOSAL**

As set forth in the Proposal, the proposed new Rule of the Commercial Division seeks to impose, at the request of any party, a mandatory obligation on the parties to a disclosure conference to memorialize all resolutions reached at the disclosure conference in either (1) a writing submitted to the court for approval and signature by the presiding justice; or (2) dictated into the record, with either the transcript or an order incorporating such resolutions submitted to the court to be "ordered" by the presiding justice.

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

The Section concurs with the Proposal's rationale, that disputes often arise among parties with respect to "the precise ruling(s) issued and its (their) scope" when oral rulings at disclosure conferences are not reduced to writing, resulting in unnecessary motion practice. The Section notes that courts have routinely alleviated concern of this nature by often times permitting or

acquiescing in a parties' request to have resolutions of disclosure and other disputes discussed in chambers reduced to an Order on consent or placed on the record. However, the proposed new Rule would require that all resolutions be memorialized in a writing and Ordered by the presiding justice at the request of a party. The Section believes that such a rule will promote a clear understanding of the parties' obligations in discovery, avoid repetitive disputes concerning discovery, and avoid protracted and costly discovery motions.

The Section has given consideration to the exclusion of telephonic conferences from the ambit of the Proposal. Telephonic discovery conferences are a routine and integral part of discovery management for many cases, and the Section feels that it may often be advantageous to memorialize rulings issued in the course of such conferences for much the same reasons that motivate the Proposal. That being said, the Section also recognizes that such a procedure may at times impose an additional administrative burden upon court personnel. The Committee's proposed amended language represents an effort to balance those considerations.

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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.<sup>1</sup>

**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

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<sup>1</sup> 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. The Memorialization of Rulings in Discovery Conferences**

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.

\* \* \*

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

## **John W. McConnell**

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**From:** Judge Carolyn Demarest  
**Sent:** Wednesday, January 20, 2016 2:36 PM  
**To:** rulecomments  
**Subject:** Memorializing discovery agreements/orders.

As the Presiding Justice of the Commercial Division in Kings County, it has long been my practice to implement the proposed rule regarding discovery. A stipulation drafted by counsel can be so ordered by the court or the judge's law clerk will draft a short form order reflecting the agreement reached in conference or a ruling by the court following argument, which is then signed by myself. Such orders not only clarify what is expected, but also provide an enforceable order as a basis for sanctions, or even contempt. I would strongly urge the implementation of this proposal.

Carolyn E. Demarest  
Justice of the Supreme Court

## John W. McConnell

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**From:** Eli Uncyk <euncyk@kusklaw.com>  
**Sent:** Wednesday, January 20, 2016 10:10 AM  
**To:** rulecomments  
**Subject:** Comments on New Rule

Honorable Members of the Office of Court Administration-

I agree that oral agreements regarding discovery create more motion practice. However, even "So Ordered" stipulations of the parties are too often vague and, even when explicit, are cavalierly ignored.

In addition to the suggested rule, the Court should announce and enforce rules which impose automatic consequences for failure to comply with any ordered discovery. The rules should be announced sufficiently in advance of their strict enforcement so that no attorney can claim ignorance.

These automatic consequences should be aimed at both the attorneys and the clients who disregard the orders, unless good cause is shown. The consequences should include, but not be limited to, financial payments to a fund to compensate mediators or "discovery masters" assigned to cases which call for such ancillary services.

Cases which are diligently monitored and supervised are resolved in far less time than unmonitored or unsupervised matters.

This is no criticism of the judges whose case loads and staff cannot keep up with the increasing volume of litigation, or the attorneys who need to undertake more cases than they can handle productively. These issues are the results of an overburdened and underfunded system.

Many counties have court panels of qualified alternative dispute resolution volunteers whose services are underused and whose offers of service are insufficiently acknowledged. Use these services; acknowledge their positive contributions to helping the courts become Halls of Justice, and not arenas of conflict.

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## MEMORANDUM

**TO:** Office of Court Administration  
**FROM:** Commercial Division Advisory Council  
**DATE:** March 30, 2016  
**RE:** **Response to Public Comments Regarding Proposed Amendments for Memorialization of Discovery Conferences**

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### EXECUTIVE SUMMARY

On January 14, 2016, the Office of Court Administration (“OCA”) put out for public comment the Commercial Division Advisory Council’s (“Council”) recommendation that the Commercial Division Rules be amended to add a provision, requiring the memorialization of discovery conferences. In response, OCA received comments from: (a) the Commercial and Federal Litigation Section of the New York State Bar Association (“CFLS”); (b) the New York City Bar’s Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation (collectively “NYC Bar”); (c) the Honorable Carolyn Demarest; and (d) Eli Uncyk, Esq. Each set of comments endorses the proposed rule wholeheartedly. See CFLS Comments at 1; NYC Bar Comments at 2-3; Comments by Justice Demarest at 1; Comments by Eli Uncyk at 1. For example, Justice Demarest notes that:

“As the Presiding Justice of the Commercial Division in Kings County, it has long been my practice to implement the proposed rule regarding discovery. A stipulation drafted by counsel can be so ordered by the court[,] or the judge’s law clerk will draft a short form order reflecting the agreement reached in the conference or ruling by the court following argument, which is then signed by myself. Such orders not only clarify what is expected, but also provide an enforceable order as a basis for sanctions, or even contempt. I would strongly urge the implementation of this proposal.”

Similarly, CFLS states in its comments that:

[t]he Section believes that such a rule will promote a clear understanding of the parties' obligations in discovery, avoid repetitive disputes concerning discovery, and avoid protracted and costly discovery motions." CFLS Comments at 2

Support for the proposed rule is so enthusiastic that two of the groups -- NYC Bar and CFLS -- suggest that it should encompass telephonic discovery conferences. *See* NYC Bar Comments at 2-3; CFLS Comments 1-2. As currently drafted, the proposed rule expressly excludes telephone conferences. During the discussions leading up to recommending the proposed rule, several members of the Council expressed concern that making telephonic discovery conferences subject to mandatory memorialization would create logistical and mechanical challenges, including the potential unavailability of court reporters to reduce the telephonic rulings to writing.

In connection with their positions, the NYC Bar and CFLS offer differing suggestions as to how to bring telephonic discovery conferences within the ambit of the proposed rule. The NYC Bar Comments suggest replacing the proposal's current subdivision (b) -- the subdivision that presently and expressly excludes telephone conferences -- with the following:

"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." NYC Bar Comments at 1-2.

In the CFLS Comments, the Section suggests the following alternative formulation of subdivision (b):

"The foregoing procedures shall not apply to telephone conferences unless otherwise ordered by the Court." CFLS Comments at 1.

In its considered view, the Council believes that apart from mechanical challenges that may be associated with implementation, there is no principled reason to treat telephonic discovery conferences differently from in-person discovery conferences held in the courtroom or annexed robing room. As CFLS observes:

“Telephonic discovery conferences are a routine and integral part of discovery management for many cases, and the Section feels that it may often be advantageous to memorialize rulings issued in the course of such conferences for much the same reasons that motivate the Proposal.” *See* CFLS Comments at 2.

To reflect the importance of telephonic discovery conferences, but acknowledge that from a mechanical standpoint, the memorialization of rulings made over the telephone poses certain challenges, the Council recommends that subdivision (b), as currently drafted, be stricken and replaced with the following:

“(b) With respect to telephone conferences, upon request of a party and if the court so directs, the parties shall agree upon and jointly submit to the court within one (1) business day of the telephone conference a stipulated proposed order, memorializing the resolution of their discovery dispute. If the parties are unable to agree upon the appropriate form of proposed order, they shall so advise the court so that the court can direct an alternative course of action.”

The public comments received also make two additional suggestions: (a) that the term “non-judicial” personnel be clarified so as to add “a non-exclusive list of court staff fitting the definition.” NYC Bar Comments at 3; and (b) that the proposed rule be augmented by requiring that the issued rulings include a decretal provision that “impose[s] automatic consequences for the failure to comply with any ordered discovery.” *See* Uncyk Comments at 1. The Council believes that these two additional suggestions create unnecessary complications and raise issues that are beyond those that the proposed rule was intended to address.

## CONCLUSION

For the reasons set forth above, the Council respectfully requests that the proposed rule be adopted, with the current subdivision (b) deleted and replaced with the following:

“(b) With respect to telephone conferences, upon request of a party and if the court so directs, the parties shall agree upon and jointly submit to the court within one (1) business day of the telephone conference a stipulated proposed order, memorializing the resolution of their discovery dispute. If the parties are unable to agree upon an appropriate form of proposed order, they shall so advise the court so that the court can direct an alternative course of action.”

JDL