



# NEW YORK STATE BAR ASSOCIATION

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February 12, 2016

John W. McConnell, Esq., Counsel  
Office of Court Administration  
25 Beaver Street, 11<sup>th</sup> Floor  
New York, New York 10004

Re: Comments to Proposed Amendments  
to Commercial Division Rules

Dear Mr. McConnell:

On behalf of the New York State Bar Association's Commercial and Federal Litigation Section, I enclose the attached reports with our Section's comments on the Commercial Division Advisory Council's three proposals on proposed amendments to Commercial Division Rules (22 NYCRR 202.70(g)) regarding: (1) Memorialization of Rulings in Disclosure Conferences; (2) Settlement Conferences before a Justice Other Than the Justice Assigned to Hear the Case; and (3) Proposed Revised Model Preliminary Conference Form for Use in the Commercial Division.

If you have any questions about the Section's comments, please let me know.

Sincerely,

*/s/ James M. Wicks*

James M. Wicks  
Chair

Enclosure

**TO:** Office of Court Administration  
**FROM:** New York State Bar Association's Commercial and Federal Litigation Section  
**DATE:** February 12, 2016  
**RE:** Proposed Revised Model Preliminary Conference Form for Use in the Commercial Division

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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 11, 2016, seeking public comment on the proposed Revised Model Preliminary Conference Form for use in the Commercial Division (the "**Proposal**").

**I. EXECUTIVE SUMMARY**

The Section concurs with the Subcommittee of the Advisory Council on Best Practices for Judicial Case Management that the proposed Revised Preliminary Conference form may "inform the Bench and the Bar of all the new Discovery Rules that should impact practice in the Commercial Division" (Proposal at 2). The Section makes certain recommendations on revisions to the proposed Revised Model Preliminary Conference form, as set forth in Point III below.

**II. SUMMARY OF PROPOSAL**

As set forth in the Proposal, the current form "does not reflect numerous rule and practice changes adopted by the Administrative Board since" May of 2014, when the current Model Preliminary Conference form was adopted. The Subcommittee of the Advisory Council on Best Practices for Judicial Case Management has proposed the following revisions to the current Model Preliminary Conference Order: (1) the addition of a new section on Pre-Answer Motion Practice; (2) revisions to the section for the Description of the Case; (3) revisions pertaining to discovery, including document production, interrogatories, depositions, discovery disputes, e-discovery, expert disclosures and privilege logs; (4) revisions to the section on Alternative Dispute Resolution; and (5) the addition of a new section concerning Additional Directives requiring parties to inform the court of the disposition of cases.

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

The Section concurs with the Subcommittee Advisory Council on Best Practices for Judicial Case Management that the current Model Preliminary Conference form for use in the Commercial Division does not reflect rule and practice changes adopted by the Administrative Board since May of 2014. The Section also concurs with the Subcommittee of the Advisory Council on Best Practices for Judicial Case Management, that the Revised Model Preliminary

Conference form may “inform the Bench and the Bar of all the new Discovery Rules that should impact practice in the Commercial Division” (Proposal at 2). Given that the proposed Revised Model Preliminary Conference form is not mandatory, and many of the Commercial Division justices have rejected the current Model Preliminary Conference form, we provide the following recommended suggestions and/or revisions to the proposed Revised Model Preliminary Conference form:

1. A corresponding amendment to Commercial Division Rule 8 (22 NYCRR 202.70(g)) or recommendation that justices adopting the Revised Model Preliminary Conference form require the plaintiff to serve the Revised Model Preliminary Conference form on all parties upon being notified that a Preliminary Conference has been scheduled pursuant to Commercial Division Rule 7.
2. In Part III, the Section suggests that the Revised Model Preliminary Conference form include a subsection (g) setting forth any counterclaims asserted by the defendants.
3. In practice, the Section notes a persistent deficiency in responses to demands for discovery and inspection—general objections with no corresponding production of non-objectionable documents. Part V(2) makes reference to the requirement found in Rule 11-e(a), that objections be stated with reasonable particularity. However, there is no reference to Rule 11-e(b)’s requirement that non-objectionable responsive documents be delivered, and that objectionable documents be categorized, noting which objection(s) form the basis for the responding party’s decision to withhold otherwise responsive documents. The Section recommends further revision to include the requirements of Commercial Division Rule 11-e(b).
4. Part V(3) suggests that contention interrogatories may never be served, and omits reference to a parties’ right to serve contention interrogatories at the conclusion of all other discovery, but not later than thirty (30) days prior to the discovery cut-off date.
5. The Section suggests that Part V(13) be revised to eliminate references to “dispositive motions” and to include references to “summary judgment motions.”

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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

**-MEMORANDUM**

**TO: COMMERCIAL DIVISION ADVISORY COUNCIL**

**FROM: Subcommittee on Best Practices for Judicial Case Management**

**RE: Comments on the Revised New Preliminary Conference Order**

**DATE: March 21, 2016**

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The Subcommittee on Best Practices for Judicial Case Management in the Court System (“The Best Practices Subcommittee”) is tasked with addressing a number of varied issues including “creating standard forms/procedures for optional use in Commercial Division litigation.” (Report at 18.)

The Best Practices Subcommittee prepared a Revised New Model Preliminary Conference (“New Revised Model PC”) form in September, 2015. The Advisory Council approved the proposed New Revised Model PC form, which was then released by the Office of Court Administration for public comment. The Public Comment period ended at the close of business on Tuesday, March 11, 2016. The Office of Court Administration received only **TWO** comments, one from the New York City Bar, and the other from the Commercial and Federal Litigation Committee of the New York State Bar Association.

The Subcommittee on Best Practices was heartened to read the City Bar’s comments. The Subcommittee believes that the comments are of such moment that it is including them in this memo:

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 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.

Despite the generally favorable comments concerning the reason and the purpose of the New Revised Model PC form, the Commercial and Federal Litigation Section of the New York State Bar suggested five possible amendments to the proposed Order. The Best Practices Subcommittee will take each of these proposals in order:

1. *A corresponding amendment to Commercial Division Rule 8 (22 NYCRR 202.70(g) or recommendation that justices adopting the Revised Model Preliminary Conference form require the plaintiff to serve the Revised Model Preliminary Conference form on all parties upon being notified that a Preliminary Conference has been scheduled pursuant to Commercial Division Rule 7.*
  - The Best Practices Subcommittee does not believe that this provision is necessary. Once the Rule is promulgated the New Revised Model PC form will be available on the OCA website. If a Judge wishes, he or she could include the link in his or her Part Rules so that a practitioner can have easy access to the new form. To put the burden of distributing the New Revised Model PC form on the plaintiff is unnecessary. A better use of a litigant's time is to arrange for the parties to meet and confer prior to the Preliminary Conference date.
  
2. *In Part III, the Section suggests that the Revised Model Preliminary Conference form include a subsection (g) setting forth any counterclaims asserted by the defendants.*
  - The Best Practices Subcommittee does not believe that a new section (g) is necessary on this Pre-Answer Motion section. This section is to determine whether the defendant(s) made Motion(s) to Dismiss; whether the Court has decided the motion; whether the parties had filed a Notice of Appeal on the Court's decision; and what causes of



action remained in the Complaint after the Court's decision. Section IV (on the next page) includes a description of the case, a description of defendant(s) defenses, counterclaims and Third Party Claims.

3. *In practice, the Section notes a persistent deficiency in responses to demands for discovery and inspection – general objections with no corresponding production of non-objectionable documents. Part V(2) makes reference to the requirement found in Rule 11-e(a), that objections be stated with reasonable particularity. However, there is no reference to Rule 11-e(b)'s requirement that non-objectionable responsive documents be delivered, and that objectionable documents be categorized, noting which objection(s) form the basis for the responding party's decision to withhold otherwise responsive documents. The Section recommends further revision to include the requirements of Commercial Division Rule 11-e(b).*
  - Rule 11-e(b) further expounds on Rule 11-e(a)(ii), namely the section requires the party objecting to the demand for discovery to outline with specificity the reasons for the responding parties' objection. It is important to remember the New Revised Model PCform is but one of three forms concerning discovery. (The Compliance Form and the Status Conference Form are the other two forms.) Rule 11-e(b) presupposes difficulties in document production that may be premature at the Preliminary Conference stage. The Best Practices Subcommittee believes that this portion of the Rule 11-e is better included in an upcoming Revised Compliance Conference Form.
  
4. *Part V(3) suggests that contention interrogatories may never be served, and omits reference to parties' right to serve contention interrogatories at the conclusion of all other discovery, but not later than (30) days prior to the discovery cut-off date.*
  - At the Preliminary Conference Stage, the only interrogatories permitted would be pursuant to 22 NYCRR 202.70(g)(11-a). Rule 11-a outlines the number of interrogatories and the information that can be requested in those interrogatories. The Best Practices Subcommittee believes that a reference to the end-of-discovery interrogatories proposed in the Federal and Commercial Litigation comments is best included in a Revised Status Conference Form at a later date.

5. *The Section suggests that Part V(13) be revised to eliminate references to “dispositive motions” and to include references to “summary judgment motions.”*

- The Best Practices Subcommittee agrees that a post Note of Issue dispositive motion could be called a CPLR 3212 Summary Judgment Motion(s). However, Black Law’s Dictionary defines a dispositive motion as “a motion for a trial-court order to decide a claim or case in favor of the movant without further proceedings.” Black's Law Dictionary (10th ed. 2014). This appears to be a broader definition and therefore the Best Practice Subcommittee recommends keeping the broader definition.

The Best Practices Subcommittee recommends that the proposed Revised New Model Preliminary Conference Form be adopted without any revisions.

Respectfully submitted,

Best Practices Subcommittee