

TO: The Administrative Board of the Courts

FROM: Commercial and Federal Litigation Section of the New York State Bar Association

DATE: May 11, 2017

RE: Proposed Revised Model Compliance Conference Stipulation and Order Form for Use in the Commercial Division

The Commercial and Federal Litigation Section of the New York State Bar Association (“*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 March 30, 2017, proposing the adoption of a revised Model Compliance Conference Stipulation and Order Form for use in the Commercial Division (the “*Proposal*”). A copy of the Proposal is attached hereto as Exhibit “A.”

I. EXECUTIVE SUMMARY

Effective April 1, 2015, the Administrative Board of the Courts approved a Model Compliance Conference Order form for use in the Commercial Divisions of the New York State Supreme Court (“Current CCO”). The Section agrees with the Advisory Council’s Subcommittee on Best Practices for Judicial Case Management (“Advisory Council”) that recent substantive rule changes have been adopted by the Administrative Board of the Courts which necessitate revisions to the Current CCO. The Section therefore recommends that the proposed revised Model Compliance Conference Stipulation and Order (“Proposed Model CCO”) be adopted, with the additional suggested revisions described in Point III.

II. SUMMARY OF PROPOSAL

As set forth in the Proposal, effective April 1, 2015, the Administrative Board of the Courts approved the Current CCO. However, since that time, the Administrative Board of the Courts has adopted new Rules affecting practice in the Commercial Division. Those substantive rule changes resulted in a revised New Model Preliminary Conference Order for optional use in the Commercial Division of the Supreme Court, which became effective on August 1, 2016. The Advisory Council is seeking to make similar revisions to the Current CCO. The Proposal seeks to implement the Proposed Model CCO to replace the Current CCO. The following is a list of substantive changes identified by the Advisory Council:

1. The Proposed Model CCO would be by Stipulation, with a requirement that the lawyers for all parties sign the Proposed Model CCO before the Court “So Orders” the same, thereby noting their agreement to the deadlines outlined therein;
2. A revised section for noting Appearances on behalf of each party, with the intention to “streamline[] the mechanism to report changes in representation[,]” and to require

the parties to disclose the attorney appearing for the compliance conference, with the hope that this disclosure will encourage uniformity in appearances at future conferences;

3. A revision to the section “Confidentiality Agreement” to cite to the new Confidentiality Order;
4. Enlargement of the “Description of the Case” field to include additional information about any appeal of an Order on a Motion to Dismiss and the results thereof, and revision and expansion of the section requesting a summary of the Defendant’s legal theory and current status of the case;
5. Reference in the section titled “Discovery” to the preamble to the Commercial Division Rules to encourage proportionality in discovery, and to specific Commercial Division Rules governing discovery;
6. Differentiation between the requirements for depositions of individuals and depositions of entities, requiring expanded information concerning the depositions of entities, including the date on which a party served a notice or subpoena, whether the individual consents to representing the entity, and the identity of counsel representing the entity;
7. Inclusion in the section for “Discovery” a new subsection for addressing Discovery Disputes, and requiring the parties to disclose the dates the parties engaged in the letter writing mechanism;
8. Expansion of the “Impleader” section to include when the impleading party expects discovery to be complete with respect to the third party, and shortening the time for Impleader to fifteen (15) days after the end of the last deposition of a named party;
9. Revision to the section on “Electronic Discovery” to include the dates of completion of electronic discovery, and expansion of the section to include requirements and deadlines for the completion of Privilege Logs; and
10. Addition to the section on “Dispositive Motions” to include instructions on making a motion for a Sealing Order.

As set forth in the Proposal, and similar to the Current CCO and the New Model Preliminary Conference Order, the Proposed Model CCO is not mandatory, and Justices of the Commercial Division are free to adopt all or part of the Proposed Model CCO.

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

The Section concurs with the Proposal's objective, which is two-fold: (1) to incorporate new rules approved by the Administrative Board of the Courts, and to conform the Current CCO to the New Model Preliminary Conference Order that took effect on August 1, 2016; and (2) to "encourage the Court and litigants to review and update their Compliance Forms." However, the Section suggests the following revisions to the Proposed Model CCO:

In Section II ("Confidentiality Agreements"), the Section raises the issue, given the general practice in New York of maintaining open court records and the disinclination to grant sealing orders, that parties who have chosen not to enter into a Confidentiality Agreement are asked to explain or justify that decision. Therefore, the Section suggests that the last item on page 3 of 31 be modified to apply only in the event that there is disagreement amongst the parties as to whether a Confidentiality Agreement is necessary or as to the language therein:

"If there is a disagreement amongst the parties ~~HAVE NOT~~ entered into concerning the necessity or language of a Confidentiality Agreement, please provide the Court with an explanation of the nature of the disagreement as to the reason(s) the parties decided not to enter into a Confidentiality Agreement."

In Section IV.2 ("Document Production"), the Section suggests that the requirement that "[a]ll documents produced by any and all parties and non-parties must be Bates Stamped[.]" be limited to non-native format documents and that electronically stored information contain a unique identifier. The Section also suggests that the term "control numbers" be used instead of "Bates Stamped." Therefore, the Section suggests that the provision be amended as follows:

*"All non-native format documents produced by any and all parties and non-parties **MUST be identified and stamped with control numbers** ~~Bates Stamped.~~"*