

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULES 2, 5, 15, 16 and 19¹**

SUMMARY

The Administrative Board of the Courts has requested comments on proposed amendments to Commercial Division Rules 2, 5, 15, 16 and 19 proffered by the Commercial Division Advisory Council (“CDAC”) (the “Amendment”). The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the proposed rule amendments be adopted, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. Thus, in offering the following comments, the Section is drawing on a broad range of experience.

II. THE PROPOSED AMENDMENTS

A. Rule 2

1. Proposed Revision to Rule 2

Rule 2. Settlements and Discontinuances. If an action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the court by ~~submission of~~ **efiling** a copy of the stipulation ~~or~~ **and** by a letter directed to the clerk of the part along with notice to chambers via telephone or e-mail. This notification shall be made in addition to the filing of a stipulation with the County Clerk. **The parties need not reveal the terms of a settlement, but must notify the court that a resolution has been reached and that both sides have agreed to discontinue the case. In addition to notifying the court of a settlement or discontinuance, counsel shall withdraw any pending motions and any pending appeals.**

¹ Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

2. CDAC Rational for Revision

The Advisory Council recommends Rule 2 be modified to provide that notice of settlements or discontinuances be e-filed in addition to being sent to the clerk of the part and chambers. To protect any confidential information in these settlements, the parties may summarize the fact of the resolution rather than disclosing the terms of the settlement. Further, the Advisory Council recommends counsel be required to withdraw pending motions and appeals so that the clerk can clear the case docket and take the motions and appeals off the court's calendar.

3. ComFed Position

The Section recommends in significant part the adoption of the proposed amendment as it provides for the court to be timely and appropriately notified of an action's resolution and provides for the court to be able to better manage its docket and report on resolved matters which would permit court administrators to be better able to allocate workload among its Commercial Division Justices knowing the number of open cases and motion each judge has. The Section agrees with the Advisory Council that, consistent with C.P.L.R. Rules 3217 and 2104, confidential settlement information should not be disclosed under the proposed revision to Rule 2. The Section, however, suggests that the new sentence added at the end of Rule 2 be modified to state "[t]he parties need not reveal the terms of a settlement, but must notify the court that a resolution has been reached and that both sides have agreed to discontinue the case. In addition to notifying the court of a settlement or discontinuance, unless the court orders otherwise, counsel shall withdraw any pending motions and any pending appeals."

B. Rule 5

1. Proposed Revision to Rule 5

Rule 5. (~~This rule shall apply only in the First and Second Judicial Departments~~) Information on Cases. Information on future court appearances can be found at the court system's future appearance site (www.nycourts.gov/ecourts). **Neither the court nor the court clerk will be responsible for notifying the parties of scheduled court appearances, although the court or the court clerk may do so at their discretion.** Decisions can be found on the Commercial Division home page of the Unified Court System's internet website: www.courts.state.ny.us/comdiv ~~or in the New York Law Journal. The clerk of the part can also provide information about scheduling in the part (trials, conferences, and arguments on motions). Where circumstances require exceptional notice, it will be furnished directly by chambers.~~

2. CDAC Rational for Revision

The Advisory Council recommends Rule 5 be revised to reflect current practice by (a) deleting the distinction among Departments, as the Third and Fourth Departments also use e-courts for information on future appearances, and (b) removing references to the New York Law Journal, as lawyers do not rely on it for recent court decisions. The Advisory Council also recommends (a) inserting language to emphasize that it is not the responsibility of the court or court clerk to notify counsel of scheduled court appearances, although they may do so at their discretion and (b)

deleting the language about part clerks and chambers providing information about scheduling so that counsel do not point to and rely on those sentences as an alternative means of receiving notice.

3. ComFed Position

The Section recommends the adoption of the proposed amendment as it is counsel's obligation to calendar his or her own cases and to keep abreast of court appearances by monitoring the Unified Court System's website. The Section further suggests that the proposed amendment should be modified to add that counsel should use eTrack (<https://iapps.courts.state.ny.us/webcivil/etrackLogin>) to monitor court developments in all cases where counsel represents a party and in which it may have an interest

C. Rule 15

1. Proposed Revision to Rule 15

Adjournments of Conferences. **By leave of court as provided by Rule 1(d), attorneys are encouraged to use remote appearance technology in order to avoid adjournments of conferences.** Adjournments on consent are permitted with the approval of the court for good cause where notice of the request is given to all parties. Adjournment of a conference will not change any subsequent date in the preliminary conference order, unless otherwise directed by the court.

2. CDAC Rational for Revision

The Advisory Council recommends Rule 15 be modified to encourage attorneys to use remote appearance technology rather than seek adjournments when they are unable to attend in person. This will assist with avoiding unnecessary delay of proceedings.

3. ComFed Position

The Section recommends the adoption of the proposed amendment where unless counsel has a conflict or is ill, there are few bases why a remote conference cannot take place.

D. Rule 16

1. Proposed Revision to Rule 16

Rule 16. Motions in General.

(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Counsel must attach copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should ~~use tabs when submitting papers containing~~ **clearly separate exhibits from each other by using divider pages with the exhibit number. Counsel shall follow Rule 6 with respect to hyperlinking.** Copies must be legible. If a document to be annexed to an affidavit or

affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be properly translated. CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, **the court may direct counsel to submit a copy and counsel shall otherwise follow Rule 6 with respect to hyperlinking** ~~copy of the case or of to pertinent portions of the authority shall be submitted with the motion papers.~~

2. CDAC Rational for Revision

The Advisory Council recommends the language in subpart (a) of Rule 16 be modernized to reflect the widespread use of electronic filing. Instead of referring to “tabs” for exhibits, we refer to using divider pages to separate exhibits. Further, the Advisory Council recommends an addition to have Rule 16 reflect the hyperlinking guidance in Rule 6. Last, we suggest modifying the last sentence of subpart (a) to provide courts with discretion to obtain copies of less-available case decisions and authorities (rather than having hard copy submission be mandatory) and to otherwise incorporate the hyperlinking guidance of Rule 6.

3. ComFed Position

The Section recommends the adoption of the proposed amendment and further suggest that the rule also require an electronically filed document to be labeled with a name that describes its contents, which will make it easier for the court and all counsel to identify an electronically filed document.

E. Rule 19

1. Proposed Revision to Rule 19

Rule 19. Orders to Show Cause. Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. ~~See Rule 20~~ Absent advance permission, reply papers shall not be submitted on orders to show cause.

2. CDAC Rational for Revision

The Advisory Council recommends Rule 19 be modified to delete the reference to Rule 20. The reference is unclear and appears to relate to the language in Rule 20 that an “applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application.” The Advisory Council believes that this language does not necessarily apply to all circumstances where an order to show cause is appropriately used. We therefore suggest deleting the cross-reference.

3. ComFed Position

The Section recommends the adoption of the proposed amendment.

New York State Bar Association March 23, 2022

Commercial and Federal Litigation Section
Daniel K. Wiig, Section Chair

Approved by the Commercial & Federal Litigation Section Executive Committee, March 22, 2022

Mark Berman, Esq. *, Co-Chair, Commercial Division Committee
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