DEFENSE ASSOCIATION
OF NEW YORK

EXECUTIVE OFFICES
BOWLING GREEN
STATION
P.O. BOX 950
NEW YORK, NY 10274

October 28, 2023

Via email: rulecomments@nycourts.gov
Office of Court Administration
25 Beaver Street, 10th FL
New York, New York 10004

Att: David Nocenti, Esq.

RE: Request for Public Comment on Proposed Amendments to Uniform Rule 202.12 on Preliminary Conferences

Dear Mr. Nocenti:

The Defense Association of New York (DANY) submits this letter in response to your request for public comments on OCA's proposal to amend Court Rule 22 NYCRR § 202.12 concerning Preliminary Conferences. DANY is the largest statewide specialty civil defense bar in New York State and advocates for the interests of civil defendants in personal injury and property damage lawsuits. Our members appear in every courthouse throughout the State of New York, and we regularly bring to the judiciary's attention areas of particular concern to the civil defense bar.

While DANY applauds OCA's efforts to streamline the litigation progress, certain aspects of the proposed changes, if implemented, would prejudice the rights of civil defendants. After consultation with our officers and Board of Directors at our October 24, 2023 meeting, we submit the following observations and proposals:

1. **PROPOSAL- Any amendment to the rules governing Preliminary Conferences must include a provision that defendants shall not be required to provide discovery responses until a reasonable time after the receipt of a plaintiff's Bill of Particulars that identifies with appropriate specificity the time and location of the incident and plaintiff's theories of liability. Upon receipt of a responsive Bill of Particulars, the defense bar should be accorded 90 days to gather reports and respond to plaintiff's discovery demands.**

   RATIONALE- Our membership is often confronted with cases in which plaintiff's counsel has not provided a Bill of Particulars or any discovery responses before a Preliminary Conference. This practice leaves defendants in the dark as to exactly when, where and how a plaintiff's claim arose. In such situations, it is patently prejudicial to

a defendant to enter into a stipulation, or to be subject to an Order, directing said defendant to provide discovery responses without knowing exactly where, when and how an accident occurred and plaintiff's specific liability claims arising therefrom. The failure of a plaintiff to identify the exact time and location of a loss and his or her theories of liability frustrates a defendant's ability to identify what documents are responsive to the blunderbuss discovery demands defendants regularly receive.

2. **PROPOSAL- Any amendment to the rules governing Preliminary Conferences must include a provision that depositions should be held within a reasonable time following the receipt of all necessary authorizations from the plaintiff but, in any event, no sooner than ninety (90) days after receipt of same.**

   RATIONAL - Along those same lines, there are many times where deposition dates are set in a Preliminary Conference Order despite the fact that a defendant has not yet received authorizations for the release of medical, employment and collateral source records. Unfortunately, a sizable number of plaintiff's firms throughout our State engage in sharp litigation practice whereby they provide either limited or improperly executed medical, employment and collateral source authorizations. These practices frustrate defense counsel's ability to timely obtain and review a plaintiff's medical, employment and collateral source records prior to the Court Ordered plaintiff's deposition dates.

   The majority of our clients forbid defense counsel from conducting depositions without having reviewed all of a plaintiff's medical, employment and collateral source records. The proposed amendments put defendants in the unenviable position of having to be the party to potentially run afoul of the Preliminary Conference Order by requesting an adjournment of the plaintiff's deposition in order to obtain the needed records.

   The OCA amendments as presently drafted are particularly unfair to defendants inasmuch as the authorizations exchanged are often times incomplete and the records are in the custody of third parties over whom the defendant exercises no control. As such, the defense bar is essentially at the mercy of the record keepers and plaintiff's counsel who cherry pick what they will and will not provide authorizations for. This problem has been compounded in our post COVID pandemic by the fact that requests for medical records for litigation purposes often end up at the bottom of the "to do" lists of hospitals and medical practitioners. In light of these issues, DANY respectfully requests OCA to revise its proposal to provide that plaintiff's depositions shall not be held until at least 90 days after the receipt of a complete and properly executed set of authorizations from plaintiff's counsel.

We appreciate your outreach and would be happy to discuss our "boots on the ground" experiences at any time. We thank you for including us in this important discussion and for taking the time to consider our concerns.

Very truly yours,

Thomas E. Liptak
President

Claire F. Rush
Legislative Chair

Steven Dyki
Legislative Chair

October 26, 2023

David Nocenti, Esq., Counsel
Office of Court Administration
New York State Unified Court System
25 Beaver St., 10th Floor
New York, NY 10004

Re: Support for Proposed Amendments to 22 NYCRR § 202.12 Concerning Procedures for Preliminary Conferences

Dear Mr. Nocenti:

We write on behalf of the New York City Bar Association in response to your memorandum of August 21, 2023 to express further support for the proposed amendments to the Preliminary Conference Rule set forth in 22 NYCRR § 202.12, which we believe would promote greater efficiency in litigation and encourage the use of alternative dispute resolution. These proposed amendments were developed jointly by the New York City Bar Association and the New York State Bar Association. We offer these comments to provide explanatory background.

Background of the Proposal

Traditionally in New York, and in part because of crowded dockets, courts have afforded litigants a significant degree of latitude in shaping the scope and pace of their cases. As suggested by a President's Committee on the Efficient Resolution of Disputes of the City Bar, however, this latitude in many cases promotes delay and inefficiency, which inhibits access to justice and erodes the quality of justice. "Rather than keeping hands off and allowing the process to be self-executing, [the judiciary] should actively engage in promoting the negotiated resolution of disputes and their efficient management to affordable decision."[1] The proposed rule recognizes that a "preliminary conference will frequently be a useful and even critical tool for furthering these goals" of efficient, expeditious and cost-effective resolution of cases, and encourages a preliminary conference before the assigned judge soon after commencement of the case. Drawing on the approach for managing e-discovery disputes incorporated into § 202.12 in 2013, the framework of the proposed rule is to require litigants to meet and confer in advance of appearing before a judge for the preliminary

[1] N.Y. City Bar Ass'n, *Report and Recommendations by the President's Committee for the Efficient Resolution of Disputes*, June 26, 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/recommendations-for-the-efficient-resolution-of-disputes-1 (All websites last accessed on Oct. 26, 2023).

conference, and by preparing for the conference possibly making it unnecessary by submitting a stipulation to be so-ordered.

This proposal grew out of Chief Judge DiFiore's Excellence Initiative, which called for greater efficiency in managing litigation, and the Presumptive ADR Initiative, rules for which are being promulgated by courts throughout the State encouraging parties to engage in ADR. A working group of members of the City Bar's Council on Judicial Administration, Litigation Committee, and the Committee on State Courts of Superior Jurisdiction prepared amendments to § 202.12 with the goals of promoting efficiency by front-loading litigation planning, requiring lawyers and litigants to think through the risks, costs and likely duration of litigation, encouraging judges to "actively engage in promoting the negotiated resolution of disputes and their efficient management . . . ,"[2] and feeding into the Presumptive ADR initiative on the belief that ADR is more likely to be successful when litigants understand the risks of their case and the costs of pursuing it.

Structure Drawn from OCA's Amendments to § 202.12 in 2013

Uniform Rule 202.12 was last amended in 2013, on recommendations of an E-Discovery Working Group of the Office of Court Administration appointed in 2011 by Chief Administrative Judge Ann T. Pfau. A central reform incorporated into Rule 202.12(b) at that time requires counsel to discuss with their clients the scope (and expense) of e-discovery and come to a preliminary conference "sufficiently versed . . . to discuss competently all issues relating to electronic discovery." (§ 202.12(b), shifted to § 202.12(c) in the proposed rule.)

The proposed rule builds on that approach by expanding on what lawyers must do to be "sufficiently versed" to discuss other issues at the preliminary conference. Attorneys would be required to discuss with their clients and their adversaries discovery issues, ADR, voluntary information exchanges and settlement (under the new § 202.11 promulgated in 2021), and insurance coverage (under the new CPLR 3103(f) effective in 2022). The approach should enhance case management by making the preliminary conference more efficient, comprehensive, and productive.

The proposed rule also is intended to complement implementation of the "Presumptive Early Alternative Dispute Resolution for Civil Cases," as announced by OCA in May 2019,[3] and as now being implemented statewide for a broad range of civil cases. The amendments to Rule 202.12 proposed here would enhance the chances for success of any mandatory ADR by making sure that the litigants understand the process, recognize how it can get their dispute resolved efficiently, and appreciate that litigation costs may be reduced.

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[2] *See* n. 1 above.

[3] NYS Office of Court Administration, Press Release, May 14, 2019, http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

Modifications Due to Changes in Governing Law and Consultations with Bar Groups

The City Bar's work on this proposal began in 2019. Intervening events encouraged modifications to our initial proposal.

Initially we wanted Rule 202.12 to set forth a number of subjects, drawn from Commercial Division Rule 8(a), that we thought should be discussed at litigants' meet and confer prior to the preliminary conference. While there was some opposition to that proposal, OCA saw the same need and promulgated § 202.11 in early 2021, with language substantially similar to that in our initial draft.

Some members of the working group believed that the preliminary conference rules should provide for required initial disclosures comparable to those in Rule 26(a) of the Federal Rules of Civil Procedure, and our earlier draft incorporated elements of that rule. Other lawyers argued strongly, however, that any such required initial disclosures should be incorporated into New York practice by legislative amendment to the CPLR and not rules promulgation by OCA, and the working group ultimately found that argument persuasive. By coincidence, on a separate track the legislature found that this required initial disclosure was appropriate, and enacted CPLR 3101(f) to require initial disclosure of insurance information at the outset of litigation.

Both of these changes to governing law are incorporated by reference into the proposed rule as subjects for the litigants' meet and confer before the preliminary conference.

In the course of developing the proposed rule and meeting with numerous bar association committees, we have not encountered any group arguing that the existing § 202.12 works well. Some lawyers have suggested that preliminary conference practice could be eliminated by e-filing a bare-bones stipulation. The Second Judicial District has experimented with this approach.[4] We understand there have been other local variances, and some lawyers have suggested that rules for preliminary conferences should be left entirely to local rules. Section 202.12 is essentially a default rule that does not limit the authority of local Districts or individual courts to develop rules suitable for local conditions, and the proposed rule would not limit that authority.

After several years of discussions with bar committees, however, we believe there is a support for amending § 202.12 to promote greater efficiency in the preliminary conference procedures and to serve as a better model for any local procedures that may be developed. Under the proposed rule, the principal lawyers for litigants will be required to meet and confer, and to confirm in their proposed Preliminary Conference Order that they have done so. The conference itself should be more efficient because of the attorneys' preparation, and where it is found unnecessary, the attorneys will have prepared a Preliminary Conference Order more

[4] Hon. Lawrence Knipel, Admin. Judge for Civil Matters, *Notice of Revised Pre-Note Procedures* (March 4, 2020) ("Kings Civil Term is planning to eliminate Intake/Preliminary Conferences, and instead issue a Uniform PC Order . . . .").

comprehensive than a bare-bones stipulation. Further, the proposed rule encourages active judicial participation at the conference and, if the parties come prepared, an informed discussion of how to streamline the case and reduce the attendant costs.

* * * * *

The City Bar unequivocally endorses these proposed amendments to Rule 202.12.

Respectfully,

Susan J. Kohlman, President
New York City Bar Association

Fran Hoffinger, Chair
Council on Judicial Administration

Richard J. Schager, Jr., Chair
Rule 202.12 Working Group

Cc: Maria Cilenti
Senior Policy Counsel, New York City Bar Association

NELA|NY
ADVOCATES FOR EMPLOYEE RIGHTS

David Nocenti, Esq.
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004

September 19, 2023

Re: *Proposed Amendments to Uniform Rule 202.12*

Dear Mr. Nocenti:

We submit this letter on behalf of NELA/NY, the National Employment Lawyers Association, New York Affiliate, a bar association for employment lawyers dedicated to the protection of individual employees' rights, and to the promotion of more effective legal protections for employees in the workplace. Our several hundred members represent, exclusively or primarily, individual employees in labor, employment, and civil rights matters and, over the 35 years of NELA/NY's existence, have, collectively, represented hundreds of thousands of New Yorkers in their employment matters.

NELA/NY enthusiastically supports the proposed changes to Uniform Rule 202.12. The changes, we believe, will ensure that preliminary conferences are a meaningful opportunity for the parties and the court to exchange information, and will encourage faster adjudications and a more efficient administration of justice. Our members are accustomed to the Federal practice, where the initial conference between the parties is required by rule to include a detailed discussion of discovery issues, and we believe a similar rule for the state courts would be beneficial.

Thank you for your consideration of our members' views on this matter.

Sincerely,

Laurie Morrison, Esq.

NELA/NY President, NELA/NY Board of Directors

Legal Services
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LSC America's Partner for Equal Justice
LEGAL SERVICES CORPORATION

September 15, 2023

Request for Public Comment on Amending 22 NYCRR 202.12

Legal Services of the Hudson Valley provides free legal services to low-income New Yorkers where basic human needs are at stake. We comment on the proposed rule as it affects the many pro se litigants who are sued in Supreme courts for alleged debts. In consumer matters, our resources are so limited that we generally can only provide advice or brief service. The bulk of consumer matters are brought in Supreme courts, as are cases brought by former landlords.

The amendment providing for the submission of a so-ordered stipulation in lieu of an initial preliminary conference will benefit our clients. The provision for a virtual conference when the so-ordered stipulation has not been returned is beneficial for those of our clients who have the necessary access to technology. Some of our clients have been confused by the so-ordered stipulation or the notice, or have not felt comfortable completing a stipulation without having a court employee as part of the process. A virtual proceeding is an efficient way to ensure a stipulation is completed. To accommodate those pro se litigants who do not have the technology to participate in a virtual proceeding, we recommend having the option to participate from the help center of a nearby court.

Often, months go by after our client answers with no progress towards resolution of the case, even where our client has served a discovery demand. It is not practical for our clients to submit a request for a preliminary conference due to requirement to include a request for judicial intervention. This costs $95. An application for a fee waiver requires the filing of a motion which is burdensome. We recommend a streamlined fee waiver process for pro se defendants filing an RJI for the purpose of moving towards resolution.

Respectfully submitted,

Marcie Kobak, Esq., Litigation Director
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30 S. Broadway, 6th Fl, Yonkers, NY 10701
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September 12, 2023

Via email: rulecomments@nycourts.gov
Office of Court Administration
25 Beaver Street, 10th FL
New York, New York 10004

Att: David Nocenti, Esq.

RE: Request for Public Comment on Amending
22 NYCRR § 202.12 Concerning Preliminary Conferences

Dear Mr. Nocenti:

Although we appreciate the effort to streamline the litigation progress, certain aspects of the proposed changes, if implemented, would be prejudicial to the rights of defendants. In order to try and prevent any such prejudice to our clients, we submit the following proposals:

1. There are many cases where the plaintiff has not provided any discovery responses, including a Bill of Particulars, prior to the Preliminary Conference. This very often leaves the defendant in the dark as to the true nature of the plaintiff's claim as well as the extent of the plaintiff's damages.

   In such situations, it is prejudicial to the defendant to enter into a stipulation, or to be subject to an Order, directing the defendant to provide discovery responses without the aforementioned discovery from the plaintiff. Indeed, how is a defendant expected to conduct a meaningful investigation and provide appropriate discovery responses without first being advised as to the details of the plaintiff's claim.

* Not a Partnership or Professional Corporation

Accordingly, we would request that any amendment to the rules governing Preliminary Conferences include a provision that the defendant shall not be required to provide discovery responses until a reasonable time after the receipt of the plaintiff's Bill of Particulars but, no sooner than ninety (90) days after receipt of same.

2. Along those same lines, there are many times where deposition dates are set in the Preliminary Conference Order despite the fact that the defendant has not yet received the plaintiff's discovery responses, including authorizations for the release of all medical, employment and collateral source records. This then often leads to the defendant having not received the necessary authorizations far enough in advance of the plaintiff's deposition to obtain all of the necessary records.

   This now puts the defendant in the unenviable position of having to be the party to potentially run afoul of the Preliminary Conference Order by requesting an adjournment of the plaintiff's deposition in order to allow time to obtain the needed records. This is particularly troublesome inasmuch as these records are in the custody of third parties, who are not under the control of the defendant. A such, the defendant is essentially at the mercy of the record keepers.

   Accordingly, we would request that any amendment to the rules governing Preliminary Conferences include a provision that depositions are to be held within a reasonable time following the receipt of all necessary authorizations from the plaintiff but, no sooner than ninety (90) days after receipt of same.

We thank you for your time and attention to this matter.

Very truly yours,
MARGARET G. KLEIN & ASSOCIATES

_____
Peter D. Lechleitner
E-Signature Pursuant to STL § 304(2)

From: Laurie Bell <lbell@southeast-ny.gov>
Sent: Thursday, September 7, 2023 3:11 PM
To: rulecomments
Subject: Proposed Change to Commercial Preliminary Conferences' Requirements

Categories: Prelim Conf

Hello,

I am in full support of the proposed change that would make the preliminary conferences more productive. It is my policy to request any and all valuation information relative to the requested reduction upon receipt of the filing of the Petition. In my 14+ years of attending and being involved in commercial real property litigation, it oftentimes seems the preliminary conferences tend to be calendar documentation that a case is proceeding, regardless of any actual progress in negotiations.

Thank you,

Laurie Bell
Assessor
Town of Southeast
1360 Route 22
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845-279-7336 phone
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southeast-ny.gov

From: 718abogado@gmail.com
Sent: Wednesday, August 23, 2023 2:03 PM
To: rulecomments
Subject: Preliminary conferences

Categories: Prelim Conf

To whom it may concern:

As a practicing attorney for 36 years, I have always thought that an in person, preliminary conference is not effective in ensuring that my clients receive justice in the court system. My main reason is that an in person conference results in an attorney from being away from their office, and expending unnecessary time on one file, which is essentially a simple administrative matter.

If the goal is to avail the general public to a system that is fair and just, precious time taken away from the office will dilute our clients access to the courts and a fair outcome in their cases.

Ironically, the Covid pandemic gave rise to remote conferences. I believe that it is in the best interest of the public to continue with this program. In fact, the public will be best served when attorneys can first attempt to resolve a discovery schedule, (and then a remote conference should be employed to resolve any differences).
Respectfully,

Charles destefano, Esquire

Sent from my iPhone

From: Duane Felton <dcfinsurance@gmail.com>
Sent: Wednesday, August 23, 2023 12:31 PM
To: rulecomments
Subject: Preliminary conference

Categories: Prelim Conf

Counselors
The way things have gotten, it may be necessary to pass a law requiring that an attorney who comes to court on behalf of a client know the case and be prepared to intelligently discuss the issues related to the case.
Sadly, it has gotten to the point where the attorney coming to court is only covering the matter for another attorney and has no knowledge and no authority to discuss the case and move it forward. So I would fully support a law which requires an attorney, who comes to court for a preliminary conference to have the basic information regarding insurance coverage and discovery.
The bottom line is however that's such a law would not be unnecessary if judges would sanction lawyers who come to court, with no knowledge of the case, or the underlying issues related to resolution of the matter.
Duane Felton

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From: Richard A. Rosenzweig, Esq. <richardarosenzweigesq@gmail.com>
Sent: Wednesday, August 23, 2023 12:15 PM
To: rulecomments
Subject: preliminary conference proposal

Categories: Prelim Conf

i have to say i am firmly against this proposal. there are already too many requirements on attorneys, too many procedures, and court rules.
the preliminary conference has never been a problem or a "dragged out "
proceedure. there is no need to expedite it. some parts just issue their own pc order. some parts take a five min call with both sides and issue an order. sometimes attorneys draft a proposed form and email it to the part or efile for court approval. this works fine. dont put more time pressure and tasks on attorneys. we are already overloaded with court rules and procedures.

--
Richard A. Rosenzweig, Esq. P.C.

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