December 28, 2007

Hon. Judith S. Kaye
Hon. Jonathan Lippman
Hon. A. Gail Prudenti
Hon. Anthony V. Cardona
Hon. Henry J. Scudder
Hon. Anne Pfau
Members of the New York State Administrative Board
New York State Office of Court Administration
25 Beaver St.
New York, N.Y. 10004

Re: Proposed Amendment to Uniform Rule 202.12, Electronic Discovery

Dear Honorable Members of the Administrative Board:

The New York City Bar Association Committee on State Courts of Superior Jurisdiction (the "Committee") recognizes that various and complex issues regularly arise in the context of electronic discovery ("e-discovery"). It is the Committee's view that e-discovery issues should be addressed as early as possible in a litigation to avoid costly and time consuming disputes later. Consequently, the Committee recommends that the Uniform Rules be amended to expressly include e-discovery as a subject at preliminary conferences and has drafted a proposed amendment to Uniform Rule 202.12 to that effect.

The Committee dedicated a significant amount of time to reviewing and considering the recent revisions to the Federal Rules of Civil Procedure (the "Federal Rules") with respect to e-discovery. One of the most striking revisions to the Federal Rules was the addition of meet and confer requirements on e-discovery prior to a Federal Rule 16 conference. The stated purpose of this amendment was to have the parties openly discuss and agree on as many e-discovery subjects as soon as possible at an early stage of litigation. The Committee believes this laudable purpose applies with equal force in the State system.

Although New York Civil Practice Law and Rules does not have an analog to Federal Rule 16, Uniform Rule 202.12 provides for preliminary conferences at the request of a party. The Committee hopes that adding e-discovery as an explicit subject at preliminary conferences will have the desired effect of inducing litigants to meet and confer on e-discovery issues at an early stage of litigation and contribute to the efficiency of the

legal process. Such early disclosure furthers the interest of justice by minimizing surprise at trial and ensuring wide-ranging discovery of relevant information.

We propose that the following language be inserted to Rule 202.12 as number (c)(3) and the balance of (c) be re-numbered:

> (3) establishment of the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic review, (c) form of electronic production, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation;

A similar rule exists in the Commercial Division which we believe works well. It provides:

> Rule 8. Consultation prior to Preliminary and Compliance Conferences.
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> (a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference; and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.
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> (b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

It is our collective experience that this rule has worked well in the Commercial Division and should be adopted state-wide. Electronic communication is not confined to business. Indeed, we see it in matrimonial cases, medical malpractice cases, employment and personal injury cases.

Our proposal is consistent with the New York State Bar Association focus group report which we endorsed by letter dated March 9, 2007. "In light of the growing centrality of electronically stored information in all manner of human affairs, the Association concurs with the Focus Group's recommendation that e-discovery issues should be

addressed at an early stage in litigation, including at the preliminary conference."

We hope that you will consider adopting our proposed rule and ask that you address this suggestion at your next conference.

Respectfully,

Andrea Masley
Chair, Committee on State
Courts of Superior Jurisdiction

Section 202.12 Preliminary conference.

(a) A party may request a preliminary conference at any time after service of process. The request shall state the title of the action; index number; names, addresses and telephone numbers of all attorneys appearing in the action; and the nature of the action. If the action has not been assigned to a judge, the party shall file a request for judicial intervention together with the request for a preliminary conference. The request shall be served on all other parties and filed with the clerk for transmittal to the assigned judge. The court shall order a preliminary conference in any action upon compliance with the requirements of this subdivision.

(b) The court shall notify all parties of the scheduled conference date, which shall be not more than 45 days from the date the request for judicial intervention is filed unless the court orders otherwise, and a form of a stipulation and order, prescribed by the Chief Administrator of the Courts, shall be made available which the parties may sign, agreeing to a timetable which shall provide for completion of disclosure within 12 months of the filing of the request for judicial intervention for a standard case, or within 15 months of such filing for a complex case. If all parties sign the form and return it to the court before the scheduled preliminary conference, such form shall be "so ordered" by the court, and, unless the court orders otherwise, the scheduled preliminary conference shall be cancelled. If such stipulation is not returned signed by all parties, the parties shall appear at the conference. Except where a party appears in the action pro se, an attorney thoroughly familiar with the action and authorized to act on behalf of the party shall appear at such conference.

(c) The matters to be considered at the preliminary conference shall include:

(1) simplification and limitation of factual and legal issues, where appropriate;

(2) establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed within the timeframes set forth in subdivision (b) of this section, unless otherwise shortened or extended by the court depending upon the circumstances of the case;

(3) addition of other necessary parties;

(4) settlement of the action;

(5) removal to a lower court pursuant to CPLR 325, where appropriate; and

(6) any other matters that the court may deem relevant.

(d) At the conclusion of the conference, the court shall make a written order including its directions to the parties as well as stipulations of counsel. Alternatively, in the court's discretion, all directions of the court and stipulations of counsel may be recorded by a reporter. Where the latter procedure is followed, the parties shall procure and share

equally the cost of a transcript thereof unless the court in its discretion otherwise provides. The transcript, corrected if necessary on motion or by stipulation of the parties approved by the court, shall have the force and effect of an order of the court. The transcript shall be filed by the plaintiff with the clerk of the court.

(e) The granting or continuation of a special preference shall be conditional upon full compliance by the party who has requested any such preference with the foregoing order or transcript. When a note of issue and certificate of readiness are filed pursuant to section 202.21 of this Part, in an action to which this section is applicable, the filing party, in addition to complying with all other applicable rules of the court, shall file with the note of issue and certificate of readiness an affirmation or affidavit, with proof of service on all parties who have appeared, showing specific compliance with the preliminary conference order or transcript.

(f) In the discretion of the court, failure by a party to comply with the order or transcript resulting from the preliminary conference, or with the so- ordered stipulation provided for in subdivision (b) of this section, or the making of unnecessary or frivolous motions by a party, shall result in the imposition upon such party of costs or such other sanctions as are authorized by law.

(g) A party may move to advance the date of a preliminary conference upon a showing of special circumstances.

(h) Motions in actions to which this section is applicable made after the preliminary conference has been scheduled, may be denied unless there is shown good cause why such relief is warranted before the preliminary conference is held.

(i) No action or proceeding to which this section is applicable shall be deemed ready for trial unless there is compliance with the provisions of this section and any order issued pursuant thereto.

(j) The court, in its discretion, at any time may order such conferences as the court may deem helpful or necessary in any matter before the court.

(k) The provisions of this section shall apply to preliminary conferences required in matrimonial actions and actions based upon a separation agreement, in medical malpractice actions, and in real property tax assessment review proceedings within the City of New York, only to the extent that these provisions are not inconsistent with the provisions of sections 202.16, 202.56 and 202.60 of this Part, respectively.

(l) The provisions of this section shall apply where a request is filed for a preliminary conference in an action involving a terminally ill party governed by CPLR 3407 only to the extent that the provisions of this section are not inconsistent with the provisions of CPLR 3407. In an action governed by CPLR 3407 the request for a preliminary conference may be filed at any time after commencement of the action, and shall be accompanied by the physician's affidavit required by that provision, but need not be accompanied by an

affirmation of good faith prescribed by subdivision (a) of this section.

Historical NoteSec. filed Jan. 9, 1986; amds. filed: Feb. 16, 1988; Nov. 19, 1992; Dec. 14, 1992; Feb. 12, 1996; Aug. 4, 1998; Jan. 6, 1999 eff. Dec. 21, 1998. Amended (a).