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REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION AND COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

COMMENT ON PROPOSED AMENDMENT OF 22 NYCRR § 202.70(g) (COMMERCIAL DIVISION RULE 8(a)), RELATING TO SETTLEMENT-RELATED DISCLOSURE

THE PROPOSED RULE AMENDMENT IS OPPOSED

The New York City Bar Association (the "City Bar") is grateful for the opportunity to provide comments on the April 11, 2014 proposal (the "Proposal") by the Unified Court System's Commercial Division Advisory Council to amend Rule 8(a) of the Rules of the Commercial Division to add settlement-related disclosure to the list of topics that counsel are required to discuss prior to the preliminary conference. These comments reflect the input of the City Bar's Council on Judicial Administration and Committee on State Courts of Superior Jurisdiction.[1]

The City Bar is not in favor of the Proposal. We recognize that in some cases limited-issue discovery may indeed help to facilitate settlement. But Commercial Division Rule 8(a) already provides that, "prior to a preliminary conference," counsel "shall consult" about (and "shall make a good faith effort to reach agreement on") various matters, including "discovery and any other issues to be discussed at the conference." Commercial Division Rule 11(a) specifies that such issues include, "where appropriate," "a schedule of limited-issue discovery in aid of . . . settlement." We therefore believe that the Commercial Division Rules already make clear that disclosure in aid of settlement is among the subjects about which the parties should consult in advance of the preliminary conference if either party believes that such disclosure might be appropriate or helpful.

The proposed amendment would instead *require* the parties to discuss this subject in advance of the preliminary conference (and to "make a good faith effort to reach agreement on" it), even though there would be no parallel requirement that the subject be covered at the conference itself.[2] The reason given for imposing this requirement only at the pre-conference stage is a view that such discussions should remain voluntary and informal in order to avoid

[1] These entities collectively include practitioners, academics and judges, and the Council also includes chairs of other court-related committees of the City Bar.

[2] The Proposal specifically rejects a suggestion that Commercial Division Rule 7 be separately amended to require discussion of settlement-related discovery during the preliminary conference.

disputes and motion practice. It is precisely because we agree with this view, however, that we oppose the amendment set forth in the Proposal.

We concur with the observation, set forth in the January 23, 2014 memorandum from the ADR Committee of the Commercial Division Advisory Council, that an early exchange of information for the purpose of promoting more cost-effective settlement discussions and/or mediation "should be informal and voluntary because of the potential that early 'settlement-related' discovery can lead to (a) disputes over what truly would be required for settlement and (b) attempts by parties to change the leverage and negotiating dynamics by forcing early disclosure of particularly sensitive documents or costly document production and depositions of high-ranking personnel under the guise that such disclosure if 'settlement-related.'" We believe these possibilities militate against imposing *any* mandates with respect to settlement-related discovery – even a mandate to confer about it at any specified time.

We are concerned in particular that even a mandate that narrow in scope will invite disputes, including disputes over issues such as whether a party violated the rule by simply refusing to have as thoroughgoing a discussion about settlement-related discovery as its adversary would have liked. Conversely, if there is to be no consequence imposed for failing to engage in such a discussion (that is, if the discussions are to remain truly voluntary), then to amend the rules to provide that such a discussion "shall" occur before the preliminary conference seems to demean the rules.

Commercial Division Rule 11(a) already informs parties that settlement-related disclosure is a subject that the Court will address at the preliminary conference if the parties so desire. Commercial Division Rule 8(a) already makes clear that, in that event, the parties should discuss this subject prior to the conference. As there does not appear to be any evidence that parties are not sufficiently aware of this possibility or are not making optimum use of it, we see no need for the rules to do anything more in this regard.

We hope our observations prove to be helpful. We stand ready to provide further comments upon request.

Thank you for your consideration.

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