November 25, 2014

By Email

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: New York City Bar Comments on Proposed Commercial Division Rule Changes and New Model Compliance Conference Form

Dear Mr. McConnell:

The New York City Bar Association (the "City Bar") is grateful for the opportunity to provide comments on the following recent proposals by the Unified Court System's Commercial Division Advisory Council (the "Advisory Council"):

(1) A proposed amendment of Commercial Division Rule 14 relating to discovery disputes;

(2) A proposed new Commercial Division rule relating to responses and objections to document requests; and

(3) A proposed new model compliance conference order form for use in the Commercial Division.

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.[1]

(1) Letter Briefs and Telephone Conferences For Disclosure Disputes

The City Bar enthusiastically supports the proposed rule change and, as discussed below, would suggest that the Advisory Council consider a recommendation that would go even a bit further in enabling letter submissions to substitute for formal disclosure motions and disclosure conferences. We urge all Commercial Division judges to adopt the proposed Rule as part of their individual rules and practices.

We agree with all three of what we perceive to be the goals of the proposed Rule: to (1) speedily and efficiently resolve disputes over disclosure and other procedural matters, (2) avoid the expense, to both the court system and litigants, of engaging in formal motion practice whenever possible and (3) favor conferences by telephone rather than requiring in-person appearances.

We offer the following suggestions for the Advisory Council's consideration. First, the proposed Rule explicitly allows letter submissions only for disclosure disputes. We see no reason why letters cannot also be permitted to seek court assistance for other procedural and non-substantive disputes. Second, the proposed Rule appears to contemplate that, following the letter submissions, a court conference will always be required before the dispute at issue can be decided. We believe that whether to hold a conference should be in the court's discretion and that it may be appropriate in some situations for the court to "memo endorse" a ruling on the letters – as is the common practice in New York federal courts - or issue a ruling on an appropriate separate form, when the court determines that the issues in a particular dispute are sufficiently clear and no conference is required. Similarly, the proposed Rule appears to treat the letter submissions as preliminary to a formal motion while, in at least many cases, no formal motion will ever be made and none will be needed.

(2) The Proposed Rule Relating To Responses And Objections To Document Requests

The City Bar supports the objective of promoting specificity in responses and objections to document requests but has significant concerns regarding the complexity of the proposed Rule. The City Bar also questions whether an amendment of the Commercial Division Rules is necessary to achieve the ends sought. Should a new rule be promulgated, the City Bar offers the simplified rule set forth at the conclusion of this section for the consideration of the Advisory Council.

[1] The committees include practitioners, academics and judges, and the Council also includes chairs of other court-related committees of the City Bar. In addition to those signing this letter, the following individual members of the committees contributed to these comments: Mitchell Berns, Donald Corbett, Peter M. Levine, Milton E. Otto, Michael Regan and Susan Turk.

As explained by the Advisory Council, the proposed Rule is intended to revitalize the specificity requirement set forth in CPLR 3122(a), which governs parties' objections to disclosure. The City Bar notes, however, that CPLR 3122(a) already requires the parties to state objections with "reasonable particularity" and that the proposed Rule leaves room for debate as to the level of specificity required.

The proposed rule also sets forth, in subsections (a) and (b), timeframes and disclosure requirements that may be viewed to conflict with, rather than complement, those of CPLR 3122(a). It is not apparent to the City Bar that the proposed Rule clearly provides litigants with the option to indicate that they have not yet determined whether they are withholding responsive documents (as is contemplated in the Advisory Council's comments) or the flexibility to omit detailed disclosures required under subsection (b) when document requests are vague or ambiguous. The proposed Rule also may arguably be interpreted to shift to the responding party the burden of refining and clarifying poorly drafted requests. The City Bar envisions that conflicts among litigants could arise with respect to these issues.

The Advisory Council's comments do not specifically address subsections (c) through (e) of the proposed Rule. The City Bar views these subsections as unnecessary in light of the existing Commercial Division rules addressing conferences and discovery (e.g., Rules 8, 11 and 13) and the authority of individual Commercial Division judges to require disclosures and set and enforce deadlines as the circumstances of an individual case merit. Furthermore, the implicit default requirement that a responding party agree to finish document production no later than the commencement of depositions, as set forth in subsection (c), and the meaning of "possession, custody or control," as used in subsection (d), may create new points of contention among litigants.

The City Bar agrees with the Advisory Council's decision not to recommend presumptive numerical limits on document demands.

Simplified Rule

"Any party or person responding to a document request pursuant to CPLR 3122(a) shall, for each document request propounded, specify the extent to which production of responsive, non-privileged documents will be refused or limited, and the basis for each such refusal or limitation."

(3) The Model Compliance Conference Form

The City Bar applauds the hard work that went into creating the model compliance conference form (the "CC Form"), and we appreciate and support the use of model forms as a way to simplify and expedite the litigation process. We also understand that the CC Form is intended to serve as a model form and that each Commercial Division judge will be free to use the form, in whole or in part, or not use it. With the goal of offering suggestions to make the CC Form more useful to litigants and judges (and therefore more likely to be used by them), we offer these comments.

We appreciate that the CC Form is intended to track the expanded Model Preliminary Conference Order ("PC Form"). However, we believe that the CC Form should primarily serve the purpose of identifying and focusing on the outstanding discovery issues between the parties, rather than simply cataloging the parties' progress as to each facet of the PC Form. We believe it would best serve that purpose if it took the form of a "checklist" of considerations, such that each compliance conference order need only focus on the outstanding issues in that particular case. This will greatly simplify the CC Form, and increase the likelihood that it will be adopted and used. Further, in this way, the compliance conference order and all subsequent status conference orders will get shorter and shorter as the discovery issues are narrowed or totally eliminated. We are concerned that the court and litigants may otherwise view the CC Form (particularly the Confidentiality Agreement and ADR sections) as too inclusive and burdensome to be useful at successive conferences.

We also recommend a small modification to section IV(b) (the "Defendant(s)" sub-section of the section entitled "Description of the Case"). We believe that the language of this section should more closely track the language applicable to plaintiffs rather than imposing a heavier burden on defendants. While it is reasonable to expect a defendant to describe the "factual and legal issues" raised by any counterclaims and third-party claims, it may be premature or implicate work-product protections to ask a defendant to describe the "legal theory and salient facts in support of defenses."

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

Thank you for your consideration.

Respectfully submitted,

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Chair, Council on Judicial Administration

Adrienne B. Koch
Chair, Committee on State Courts of Superior Jurisdiction

Cary B. Samowitz
Chair, Committee on Litigation