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

**COMMENTS ON PROPOSED COMMERCIAL DIVISION RULE CHANGES  
AND PROPOSED AMENDMENTS TO THE  
MODEL PRELIMINARY CONFERENCE FORM**

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 new Commercial Division rule regarding settlement conferences before another Justice of the Commercial Division;
2. A proposed new Commercial Division rule relating to the memorialization of rulings by “non-judicial personnel” to resolve discovery disputes; and
3. A proposed amended model preliminary conference 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.<sup>1</sup>

**1. Settlement Conferences Before a Justice Other Than the Assigned Justice**

The City Bar supports the overriding goal of the proposed Rule and we believe that it can provide another useful tool for justices and parties attempting to settle commercial cases. Below we propose a clarifying amendment and we urge, should the Rule be promulgated, that it be alongside a commitment to enhance the use of currently available alternative dispute resolution mechanisms.

As an initial matter, if the proposed Rule is enacted, we believe that the procedure set forth therein should be modified. Specifically, we are concerned that the prong of the test stating

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<sup>1</sup> 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 the committee chairs listed at the end of this report, the following individual members of the committees contributed to these comments: Ronald C. Minkoff, Michael P. Regan, Andrew M. Cali-Vasquez and Leah Friedman. Michael Regan, a member of the State Courts Committee, chaired the working group and was the principal author of this report.

that “the justice who will conduct the conference has agreed to serve in that capacity” may be read as a prerequisite to submitting the parties’ joint settlement conference request to the assigned justice. As it is currently written, the proposed Rule arguably encourages attorneys to “cold call” the Justices of the Commercial Division to find a Justice willing to preside over a settlement conference even before the assigned Justice has determined that such a settlement conference should be conducted. We suggest that the Rule be modified to clarify that if the assigned justice determines that a settlement conference should occur under the auspices of another justice, then the assigned justice should be involved in the process of identifying and procuring the assistance of the “settlement judge.” That modification will bring the Rule more in line with the informal system of collaboration among the Justices of the Commercial Division as it currently exists.

Moreover, in order to support the overall goal of settling commercial cases, we believe that greater effort should be made to promote or expand the Commercial Division Alternative Dispute Resolution Program (the “ADR Program”). Indeed, some might perceive the promulgation of this Rule as a signal that the ADR Program is ineffective or that it lacks vigorous support. In addition, in many Commercial Division cases, the litigants have sufficient financial resources to take advantage of private mediation service providers. Rather than relying on the judiciary to settle complex commercial cases, more effort should be made to promote these other alternative dispute resolution options.

## **2. The Memorialization of Rulings in Discovery Conferences**

The City Bar supports the aim of the proposed Rule to promote efficiency and certainty in the resolution of discovery disputes before non-judicial personnel but, as discussed below, suggests that certain changes be made to the Rule. Most importantly, telephonic discovery conferences should not be excluded from the Rule, because the Rule is designed to eliminate the uncertainty and confusion that arises from failing to properly memorialize the resolution of discovery disputes. It logically follows, therefore, that telephonic discovery conferences ought to be covered, not excluded, by this Rule. Further, the term “non-judicial personnel” should be clarified by listing the various personnel who are encompassed by that term.

The Advisory Council explains that this proposed Rule is appropriate because, in some instances, discovery disputes are being resolved informally, by non-judicial personnel, in such a manner that the parties must rely on an oral ruling instead of a clear written order from the Court. The absence of a written order can lead to confusion and disagreements between the parties regarding the terms of the oral ruling resolving the dispute. In response to that problem, the Rule establishes a procedure to allow the parties to obtain a written order from the Court.

Based on the Rule’s objective of promoting certainty in the resolution of discovery disputes, we urge the elimination of section (b), as currently drafted, which states that “[t]he foregoing procedures shall not apply to telephone conferences.” Indeed, if the Rule seeks to eliminate oral resolutions of discovery disputes, then telephone conferences should be included in the Rule, because those conferences often result in oral rulings. We recommend using the following language for section (b): “With respect to telephone conferences, the parties shall agree on and jointly submit to the Court a stipulation or order memorializing the resolution of

their discovery dispute and, if they are unable to do so, shall submit separate proposed orders, on notice to all parties, for the Court’s consideration.”

Further, we believe that the term “non-judicial personnel” should be clarified in the Rule. It is our understanding that the Advisory Council is referring primarily to court attorneys and law clerks. However, discovery disputes are sometimes referred to Special Masters. Since the goal of the Rule is to promote transparency and certainty, we believe that the term should be clarified by adding a non-exclusive list of court staff fitting the definition of “non-judicial personnel.”

### **3. Amendments to The Model Preliminary Conference Form**

The City Bar applauds the hard work that went into creating the model preliminary conference form, as amended (the “PC Form”), and we appreciate and support the use of model forms as a “best practices” tool to educate counsel and simplify the litigation process. Indeed, it is our understanding that the PC Form seeks to incorporate the current Commercial Division Rules with respect to, *inter alia*, electronic discovery and the parties’ obligation to confer before the Preliminary Conference, two areas in which counsel sometimes need to be reminded of their duties and obligations.

Given that many changes have been made to the Commercial Division Rules in recent years with respect to electronic discovery, we believe that a model form alerting counsel to all of the applicable rules and requirements of the Commercial Division is an invaluable resource. We also understand that each Commercial Division Justice will be free to use the form, in whole or in part, or not use it at all. Indeed, given that it is a model form, we recommend that the PC Form be re-evaluated from time to time to determine whether judges and attorneys believe that it should be amended or altered in some respect in order to greater enhance its utility.

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We hope our observations prove to be helpful. We stand ready to provide further comments upon request or to assist in any other way we can.

Steven M. Kayman  
Chair, Council on Judicial Administration

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

Cary B. Samowitz  
Chair, Committee on Litigation

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