ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COUNCIL ON JUDICIAL ADMINISTRATION

REPORT ON PRELIMINARY CONFERENCE ORDERS IN NEW YORK STATE COURTS

General Background

Based upon input from the bench and bar, the Council on Judicial Administration decided, more than a year ago, to explore why compliance with Preliminary Conference Orders ("PC Orders") in New York State Courts is lax, and to suggest possible remedies. In that regard, it appears to be universally acknowledged by the bench and bar that PC Orders are too often honored more in the breach than in the observance. This Report sets forth the result of our labors.

The Council drew on the experiences of its membership of attorneys and judges, which spans a broad variety of matters and practice areas, but also the input of Judges Anne Pfau (First Deputy Chief Administrative Judge for Management), John Buckley (Presiding Justice of the Appellate Division, First Department), A. Gail Prudenti (Presiding Justice of the Appellate Division, Second Department), Jacqueline Silbermann (Administrative Judge, Supreme Court, New York County, Civil Division) and Harold Baer (United States District Judge, Southern District of New York, and a

former justice of the New York State Supreme Court).[1] The Council is grateful to all of these busy jurists for their time, hospitality, and insightful comments.

The Preliminary Conference

At some point during its pendency, almost every action filed in state court becomes the subject of a preliminary conference. In accordance with Rule 202.12 of the Uniform Rules for the New York State Trial Courts, the matters to be considered at the preliminary conference include: a) where appropriate, simplification and limitation of factual and legal issues; b) establishment of a timetable for completion of disclosure consistent with the requirements of Differentiated Case Management (unless otherwise shortened or lengthened by the court); c) addition of other necessary parties; d) removal to a lower court where appropriate and e) other matters that the court may deem relevant such as a date for filing a note of issue, and a closure date for dispositive motions. Finally, a compliance conference will be scheduled.

A PC Order, reflecting the stipulations of counsel and any directions given by the court is prepared and executed by counsel (often on forms specifically provided for that purpose), "so ordered" by the court and duly entered. As an Order of the court, it is entitled to all of the weight and dignity of any other Order. In practice, it seems, it is just a piece of paper. Its time limits often are ignored, repeated Preliminary Conferences are held, new PC Orders are entered, and deadlines are reset and then extended. Not only does this waste the time of counsel and squander judicial resources, it undermines the integrity of the judicial system. *See Kihl v. Pfeffer*,94 N.Y. 2d118,123 (1999) ("If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.").

[1] As a former Supreme Court Justice, Judge Baer was able to contrast practice in the State and Federal Courts. Some of his thoughts can be found in an article written by him and published in the New York Law Journal on July 20, 2004.

The Office of Court Administration has established case management goals designed to reduce the amount of time that a case remains in the system until it is resolved. Ideally, efforts to achieve these goals should result in fewer, but more meaningful, court appearances. However, when PC Orders are as often as not disregarded, the amount of time that litigation remains in the system until resolution is extended, repeated appearances by counsel are required, and many of the appearances are not meaningful. Parties who are zealous in complying with PC Orders often are frustrated by the foot-dragging of adversaries, and the culture of laxity that tolerates it.

This is not to say that the problem of noncompliance is universal. It appears to be less a problem in federal courts and the commercial parts of the State Supreme Court, and more acute in those parts where the civil calendar predominately consists of personal injury actions. Lawyers and judges agree that this dichotomy is undesirable. All cases, and not just commercial cases, should move smoothly through the system, with deadlines honored, and the necessity for constant judicial intervention in discovery and calendar issues substantially reduced.

A number of factors contribute to the problem. There is a greater volume of cases pending in noncommercial parts of the Supreme Court, than before either federal judges or in state court commercial parts. Budgetary constraints exist in the Supreme Court that do not exist in the federal courts. Late afternoon conferencing is not an option because the Court must close at 5 p.m. as overtime cannot be paid to non-judicial personnel. The economics of personal injury practice on both the plaintiffs' and the defendants' side tend to encourage certain counterproductive case management practices, including, but not limited to, the widespread use of *per diem* counsel, who often are unfamiliar with the cases and unable to make binding commitments concerning discovery or settlement, which result in delays and inefficiencies at conferences. The problem can be addressed in part by some changes in the rules. Nevertheless, the root cause of the problem is a

courthouse culture that tolerates attorneys who are either unaware of, or insensitive to, the offense they give when they ignore the provisions of a court order.

We believe that the problem can best be addressed by a concerted effort by the bench and bar to change that culture. Offending lawyers must be educated to understand that their failure to treat PC Orders as orders of the court offends the judicial process. Also, the judiciary must not be so tolerant or understanding. Long before the need to consider the imposition of penalties or sanctions arises, judges must communicate that their PC Orders are to be taken seriously, and make clear their personal and institutional displeasure when parties ignore the provisions of a PC Order. Penalties or sanctions ought to be imposed on those attorneys who disrespect PC Orders and Preliminary Conference rules and thereby disrupt the process. Obviously, not all lawyers are culprits, and many make a concerted effort to comply. But, even one laggard can materially delay the litigation and unnecessarily tax judicial resources. We recognize that the styles of judges vary, and we have the greatest respect for the jurists in New York City who labor under a heavy case load with scarce resources. But we do believe that more zealous enforcement of the rules by the judiciary is needed.

Rules and Statutory Provisions

Uniform Rule 202.12 (22 NYCRR 202.12)

This Rule calls for the conduct of a Preliminary Conference, but only on request of a party. Local Rules, discussed below, alter this practice. The Rule expressly requires that an attorney "thoroughly familiar" with the case and "authorized to act," appear at the conference. The same requirement is echoed in the General and Commercial Rules of New York County. Under subdivision (f) of Rule 202.12, failure to comply with a PC Order, in the discretion of the court, "shall result in the imposition…of the costs or such other sanctions as are authorized by law."

Uniform Rule 202.19 (22 NYCRR 202.19)

Uniform Rule 202.19 is the differentiated case management rule which sets forth the time frames within which disclosure must be completed, tied to the filing of a Request for Judicial Intervention ("RJI"). Subdivision (b) (3) mandates a compliance conference no later than 60 days before the scheduled discovery completion date.

Uniform Rule 202.21 (22 NYCRR 202.21)

This is the rule which requires a Statement of Readiness at the time of filing of a Note of Issue. CPLR 3402 requires a Note of Issue to place a case on the trial calendar.

Uniform Rule 202.27 (22 NYCRR 202.27)

This Rule sets forth what happens if a party does not appear or proceed at a calendar call or conference, and provides for defaults, inquests, and dismissal.

Standards and Administrative Policies, Subpart 130-2.1 (22 NYCRR 130-2.1)

This provision is entitled "Imposition of Financial Sanctions or Costs For Unjustified Failure To Attend A Scheduled Court Appearance." This rule provides for reimbursement of expenses incurred and attorney's fees if counsel, without good cause, does not appear at a conference. It is limited to situations in which an attorney actually fails to attend.

New York County Commercial Rules [2]

Rule 1 Requires appearance by counsel with knowledge of the case and authority to enter into substantive and procedural agreements.

Rule 7 Requires that conferences be held within 45 days of assignment of the case to a justice of the Commercial Division. In New York County, commercial cases are assigned to a justice when the RJI is filed.

[2] We selected Rules of this Court as they are the ones most familiar to us.

Rule 11 Mandates that the Rule 7 Conference will result in a disclosure schedule.

Rule 12 Modifies the "no disclosure" default provision of CPLR 3214(b) so that the making of a CPLR 3211 or 3212 motion does not automatically stay all discovery. Such stays are left to the discretion of the court.

Rule 13 Provides penalties for failure to appear at a conference which are substantially the same as Uniform Rule 202.27.

Rule 14 Requires strict compliance with disclosure schedules and specifies penalties.

New York County General Rules

Rule 1 Requires counsel attending conferences to be familiar with the case and have authority to act.

Rule 7 Calls for a Preliminary Conference or case scheduling order within 45 days of assignment to a Justice. In New York County, assignment of a case covered by the General Rules occurs when the RJI is filed. The Court can order compliance conferences. The Rule also incorporates Uniform Rule 202.27 as to sanctions for failure to appear.

Rule 10 Contains provisions as to disclosure schedules and calls for strict compliance.

CPLR Provisions

CPLR 3126

The statute provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the Court finds ought to have been disclosed pursuant to…article [31], the court may make such orders with regard to the failure or refusal as are just. " The Court has a broad variety of options to remedy the violation, including: resolving orders, preclusion orders; orders striking pleadings or claims; conditional orders; or orders imposing monetary sanctions. See 6 Weinstein, Korn & Miller, New York Civ. Prac. ¶3126.14. It is clear that PC Orders may form the

basis for relief under CPLR 3126. John R. Souto Co., Inc. v. Coratolo, 293 A.D.2d 288, 739 N.Y.S.2d 708 (1st Dep't 2002).

CPLR 3214 (b)

This statute, with one exception, provides for an automatic stay of disclosure when a motion is made pursuant to CPLR 3211 or 3212 unless the Court orders otherwise.

CPLR 3216

CPLR 3216 provides a cumbersome and largely ineffective procedure for dismissal for want of prosecution. Efforts to "liberalize" the process have been uniformly unsuccessful.

The Subcommittee's Proposal

a) Attorneys Must Be Familiar With Their Cases And Have the Ability To Bind Their Clients

The preliminary conference is designed to be a significant event in the life of an action. At the conference, the action should be discussed in detail. If possible, issues should be narrowed; the necessity and time of impleading or otherwise adding parties and making dispositive motions discussed; and a discovery schedule fixed. In summary, a custom-made time line with performance bench marks for the completion of pretrial proceedings should be developed. Settlement discussions may also be held in conjunction with, or in addition to, the development of the time line.

An attorney who is prepared, and has the authority to legally bind the client and implement the PC Order is essential to the process. An attorney who is unprepared and not authorized to bind the client will neither be able to discuss intelligently the simplification or limitation of issues, the need or timing of third party practice and dispositive motions, nor meaningfully participate in the development of a case management plan tailored to the litigation at issue. The result is a "one size fits all" PC Order that may not relate to the realities of the case and be incapable of compliance.

An attorney who can neither legally bind the client, nor factually bind the firm which the attorney is representing, can only report the contents of a PC Order, but can take no steps to either implement it or see that it is implemented. If the PC Order is not implemented, no one is held accountable. Fed. R. Civ. P.16 requires that an attorney who is familiar with the facts and is authorized to make binding concessions on behalf of the client attend scheduling conferences.[3] Uniform Rule 202.12 and various local rules also require that an attorney thoroughly familiar with the case and authorized to act appear at the Preliminary Conference. However, unlike Fed. R. Civ. P. 16, none of the applicable Rules (130-2.1, 202.12, and 202.27) provides any penalty or sanction when an attorney who is unfamiliar with the facts or (even if familiar) is not authorized to act on behalf of the client attends the conference.[4] We recommend that these Rules be amended to include a provision that absent good cause shown, the appearance at a preliminary conference of a lawyer who is not familiar with the facts and authorized to bind the client will be the equivalent of a failure

[3] Rule 16(c) provides, in part: "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulation and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."

[4] Rule 16(f) provides: "Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the order provided in Rule 37 (b) (B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust."

The above-referenced subsections of Rule 37(b) provide that the federal court in which an action is pending may impose the following sanctions (among others) for failure to comply with a court order.

"(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination, ... "]

to appear. This would create an important case management tool obligating counsel to prepare for the conference, follow up and assure either that there is compliance with the PC Order or if good cause exists, that a timely application to amend is made.

Finally, the Court should ascertain the reason for noncompliance. Penalties or sanctions against counsel, the client or both should be imposed in appropriate cases. The Rules contain no provision for increasing the penalties imposed for repeat offenses. We recommend that the Rules be amended to set forth that repeated noncompliance with PC Orders in a case will justify increasing the amount of monetary sanctions against the non-complying lawyer(s), clients or both.[5]

b) Judges Must Enforce Their Orders

Judges should exercise more control over the process early in the action, and need to take firmer action to enforce PC Orders and disclosure schedules. In New York County, all discovery issues come before the IAS Part judge to whom the case is assigned. In other counties, there are Compliance Parts, where discovery disputes in all cases are handled by a single judge. We did not review this difference in detail, but it seems to us that having each judge handle his or her own cases is preferable. It allows the judge to become familiar with the case and identify problems at an earlier stage. When counsel know that they will always have to answer to the same judge, there are fewer attempts to play the system.

Case management and accountability are the keys. Active case management is labor intensive. It is a difficult task when a judge carries a large inventory of active cases.[6] The problem is exacerbated by the deplorable lack of funds and resources for court personnel to help. But, we also note that some judges evince a "what can you do approach" and are willing to grant counsel far too

[5] An analogy may be drawn to the situation where a prior history of disciplinary violations may justify increasing the discipline imposed when there is another instance of such misconduct.

[6] According to some of the judges we spoke to, case inventories can exceed 500.

much leeway. Our perception is that, at present, the major penalty imposed on counsel when a PC Order is disobeyed is that counsel have to appear in court and sign a new PC Order. That wastes the time of the court and makes every attorney on the case –and not just those attorneys who have failed to comply--return for a conference because one party has not complied.[7] More importantly, it undermines respect for the judiciary and the attempt by OCA to use case management goals to support the integrity of, and provide an effective model for managing the pre-trial judicial process.

c) A Time Limit On Third Party Practice Should Be Established

One oft-cited reason for delays was the need, in negligence cases, to identify third and fourth party defendants. We were told that sometimes it is not until well into the discovery process that the existence or identity of such defendants is discovered, and that even then, the impleading party often does not move expeditiously to implead the new party. In our view, it takes a long time to identify and implead third and fourth party defendants in most cases because counsel are allowed that time.

While PC Orders generally include deadlines for impleading other defendants, the dates may or may not be realistic or meaningful. If firmer deadlines were established at the PC Conference and all counsel knew that they would be strictly enforced via CPLR §1010, the problem would be eliminated. Discovery would proceed in accordance with the time line established in the PC Order. The proposed impleader-defendant would be identified and impleader would occur prior to the last date established for that purpose in the PC Order. If the adversary delayed discovery of the proposed impleader-defendant's identity or there was other good cause, the proposed impleader-plaintiff could timely ask the Court to set a new last date to implead.

[7] Some judges believe that by repeatedly conferencing cases, they obtain more opportunities to bring about settlements. We agree, but also firmly believe that judges should not have to use noncompliance with PC Orders as an excuse to conduct status conferences. Indeed a tight, binding discovery schedule, with a trial date not far behind, is extremely effective in focusing counsel's mind and enhancing a court's ability to settle proceedings.

d) Notes of Issue; Standards and Goals

Under present rules, a Note of Issue is to be filed when disclosure is complete. The Note of Issue must be accompanied by a Statement of Readiness which so certifies. [8]Technically, if a motion to vacate is not made within 20 days, no further discovery may be had, unless permitted by the court for good cause. In reality, this discovery closure rule is frequently ignored. Cases are placed on the calendar while routine discovery proceeds. This practice breeds disrespect for the system and should be eliminated.

Part of the problem results from the requirement that a Note of Issue be filed in a standard case within 12 months after the purchase of an RJI (22 NYCRR 202.19). Litigants, under pressure to comply, will file a Note of Issue and Statement of Readiness when a case is far from ready for trial. And some judges, it seems, simply act as if the discovery completion requirement did not exist.

Further, the one-year pretrial discovery deadline in a "standard" case is impracticable. For example, if a pre-answer motion to dismiss is filed, an RJI must be purchased. Under present practice, the motion stays discovery. But even if it did not, in the absence of an answer, the issues cannot be framed and comprehensive disclosure cannot even begin. It may take 60 days (or more) until the motion is briefed, moves from the Central Motion Part to the IAS Part and is heard by the court. Given the heavy workload placed on the justices, it is sometimes unrealistic to expect a decision within the 60 days, CPLR 2219(a) notwithstanding. Consequently, it may be as much as 9 months after an RJI is filed that issue is joined and disclosure can commence. The remaining time for discovery is therefore too short. Similarly, in negligence cases there may be delays in identifying and bringing in additional defendants. And, there are other good reasons why delays occur.

[8] In New York County, an affidavit is required which attaches all PC Orders and attests to full compliance.

In New York County, judges generally do not permit cases to be placed on the calendar until disclosure has been completed. As a result, many judges carry an inventory of out-of-compliance pretrial matters. However, once cases are placed on the calendar, they are rapidly reached for trial. In contrast, in Queens County, where pretrial standards and goals are strictly enforced, cases are placed on the calendar even if discovery has not been completed. The judges carry almost no out-of-compliance pretrial inventory, but it can take several years before post-note-of-issue discovery is completed and the matters are reached for trial.

We recommend that the Statement of Readiness Rule be abolished. Rather, the Court should certify when a case is ready for trial, at which time a Note of Issue can be filed. This would be revenue neutral as the same fee would be required.

e) The Automatic Stay

When either a party or an impleaded party moves to dismiss or for summary judgment, it may take months for the motion to be fully briefed and submitted. Until the motion actually gets to the part, the judge is unaware that the automatic stay has wreaked havoc with the discovery schedule it has previously approved. By requiring an application to stay disclosure, the Court rather than the moving party would decide whether, and to what extent discovery would be stayed while the motion is pending, thus enhancing the Court's ability to manage the case. This is the practice in the federal courts and to some extent, in the commercial parts in New York. Expansion to include all types of cases would result in cases moving more rapidly.

g) Sua Sponte Use of CPLR 3126 to Order Compliance

As noted above, CPLR 3126 is the statutory provision which enumerates the penalties that may be imposed for failure to comply with the disclosure obligations of the parties. In most cases, the statute is invoked when an aggrieved party files a motion. Conditional orders are not an

uncommon result of such motions. Pursuant to such order, a discovery sanction is imposed if the offending party does not cure its default within a specified period of time. The judges we spoke to, however, generally prefer to resolve discovery disputes by conference. Indeed, in New York County both the General Rules (Rule 11) and the Commercial Rules (Rule 15) call for a conference. Frequently letters are submitted.

Judges pointed out that motions seeking to resolve discovery disputes often do not even come to their attention for several weeks or months because they have to be fully submitted at the Motion Support Part before being placed on the judge's calendar. This, they said, delays the process. The conference mechanism usually brings the matter on more rapidly. In the event of noncompliance, sanctions may be in order, but the Court must choose the appropriate sanction.

Absent willful, contumacious, or bad faith conduct, courts are reluctant to impose a sanction that will affect the merits, such as dismissal of a claim or defense, preclusion of evidence or the drawing of an adverse inference. Likewise, imposition of a sanction requiring the sanctioned party to pay the aggrieved party's counsel fees can be a double-edged sword. It often invites additional litigation over the size of the fee. However, imposition of a monetary fine will generally not be disturbed.[9]

It is our view that the use of CPLR 3126 should be expanded. Although nothing in the wording of CPLR 3126 requires that an Order made pursuant to that section be triggered by a formal motion we recommend that CPLR 3126 be amended to expressly provide judges with the power to enter such orders sua sponte. (An aggrieved party can create a record for appellate purposes by moving to vacate.) Many such orders will be of a conditional nature as described above, but use of

[9] This generally is the case if the noncompliance was not outside the control of the attorney or the attorney's client.

this mechanism will shorten the motion process and indicate to counsel that there will be further adverse consequences for noncompliance.

Judges possess broad powers to issue a variety of orders to correct discovery abuse. We have no way of knowing in how many instances a motion made pursuant to CPLR 3126 also requests sanctions, or how many of those requests are granted. Our experiences indicate that sanctions are not imposed . Regrettably, we find it appropriate to suggest that the judges should exercise their powers to sanction counsel more frequently in order to emphasize that the courts are serious about the sanctity of P.C. Orders.

h) Expanded Use of CPLR 3216

Some judges noted that the court, sua sponte, may send out a failure to prosecute notice under the statute. The process is cumbersome, as it requires a "written demand" served by registered or certified mail. Further, after a demand has been served, the statute cannot be further invoked if the case is placed on the calendar. If the case is not placed on the calendar, the court may enter further appropriate Orders, but a second motion is required. We believe that the use of CPLR 3126 as outlined above would be a far more viable and flexible device.

i) Timing of Conference

We believe that the requirement for holding a Preliminary Conference should continue to be triggered by filing an RJI, rather than by filing the summons. A significant number of judicial proceedings are filed that are subsequently resolved without intervention by the court. There is no need to import these actions and proceedings into an already overburdened pre trial case management system. However, these judicial proceedings should not be permitted to remain pending indefinitely, often to the prejudice of the parties. We therefore suggest that in the absence of a filed RJI, on the first anniversary of the filing of the summons, the court should generate a notice to

plaintiff's counsel advising that absent proof that the judicial proceeding has either been settled or otherwise discontinued, or the filing of an RJI, the proceeding will be dismissed without prejudice by the Clerk of the Court.

j. Increase in the Amount of Monetary Sanctions

Under Rule 202.12(f), the court has discretion to impose costs or other sanctions allowed by law for a party's failure to comply with a PC Order or the making of an unnecessary or frivolous motion. Under CPLR 8201, pre-note of issue costs are set at $200; and motion costs may not exceed $100. By meaningfully increasing the amount of costs that could be imposed under Rule 202.12(f), and particularly, the costs to be imposed on repeat offenders, judges could deter noncompliance with PC Orders without the need to first determine the amount of an attorney's fee to be awarded to the adversary.

Conclusion

We believe that these suggestions can be implemented and, if adopted, will help alleviate the problem.

A concerted effort by bench and bar is the sine qua non for any true reform.

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