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The Honorable Judith S. Kaye
Chief Judge, State of New York
New York State of Appeals
20 Eagle Street
Albany, NY 12207

Dear Chief Judge Kaye:

The July 2006 Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups suggests that a number of current practices of the Commercial Division should be exported to the larger court system. The Association, and in particular its Committee on State Courts of Superior Jurisdiction, has studied the Report and has the following thoughts to offer.

The Association agrees with the general conclusion underlying the Report, i.e., that numerous aspects of Commercial Division practice have worked well and would be wise to adopt in non-commercial parts. We address particular proposals in turn.

Use of TROs on Notice Except in Extraordinary Circumstances

The Focus Group's recommendation that notice be given of applications for temporary restraining orders except in extraordinary circumstances appears to be moot, in light of 22 NYCRR § 202.7(f), which requires an application for a TRO to be accompanied by an affirmation demonstrating an effort to give notice or showing that significant prejudice will result from notice.

Address Electronic Discovery Issues Before They Become Problems

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.

Issue of Stays of Discovery Upon Dispositive Motions on a Case-by-Case Basis

CPLR 3214(b) provides that a dispositive motion stays discovery pending resolution of the motion "unless the court orders otherwise". The current Commercial Division Rule 11(d) gives the court discretion in each case to decide whether or not to stay discovery. The consensus

in the Focus Groups was in favor of adopting the case-by-case approach of the Commercial Division rule in non-commercial parts.

We respectfully disagree. We believe that there should be some presumption, either for a stay, as per the current CPLR, or against it, as was formerly the downstate Commercial Division practice, to guide practitioners in the absence of judicial action. We also believe that adoption of a case-by-case approach would effectively revoke Rule 3214(b) and, therefore, can only be effectuated properly by amendment to the CPLR.

Proactive Involvement of Judges in Settlement and Creative Use of ADR

The Association shares the Focus Group's general enthusiasm for ADR and believes that the court system as a whole should promote its use and should support creativity in the ways ADR can be employed. We do share the concern of the Focus Groups about the potential problems that can emerge when judges get actively involved in the settlement of their own cases. Any mediation system should be set up, in terms of timing of the mediation and flexibility, to foster settlement.

Proactive, Hands On But Adaptable Case Management

The Association agrees with the Focus Group's view that proactive, and flexible, case management procedures employed in the Commercial Division have worked very well and deserve to be exported to other parts. Practitioners often encounter difficulty in non-commercial parts when litigating cases arising out of complex commercial or financial matters that, for one reason or another, cannot or do not get assigned to the Commercial Division (such as the presence of an insurance company as a party). Among other things, preliminary conference forms are designed for the personal injury or other negligence cases which form the bulk of those parts' dockets, and make inadequate provision for the kinds of discovery and motion practice that more complex matters require. Additionally, judges and court personnel are often unaccustomed to dealing with such matters and resist departing from their normal practice to accommodate such needs.

We believe these problems could be allayed in part, and the rest of the court system made more hospitable to complex cases, if Preliminary Conference Orders were revised to address the kinds of factual and legal issues they involve. Additional forms should be promulgated, which could all be made available online so that litigants could choose the one most suitable to a particular case. Furthermore, conferences or telephone conferences should be required between counsel for all parties in advance of preliminary conferences to hammer out agreement on anything they can.

Optional Statements of Material Fact on Summary Judgment Motions

The Association does not believe that giving litigants the option of submitting Statements of Material Fact on summary judgment motions would enhance practice in non-commercial parts. In our view, such a practice would simply place increased burdens and expenses on both the court and the parties, without offsetting benefit.

Require Page Limitations on Motion Papers

The Association generally favors reasonable page limits on motion papers. Where a single party is faced with multiple motions from opposing parties and chooses to respond with a single, omnibus set of papers, courts have been reasonable in allowing an increase in the page

limit. Therefore, the Association agrees with the current system of requesting permission to increase the limit pursuant to the rules of the particular judge.

Increased Use of In Limine Motions

The Association shares the view of the Focus Group that increased use of in limine motions should be encouraged, but believes they should normally be due by a date in advance of trial, not the pre-trial conference. The term "pre-trial conference" means different things to different judges. For some the term means the date on which the trial date is set with a later conference prior to the trial to attempt to settle the matter and address motions in limine and other pre-trial issues. For other judges the term refers to the later settlement conference.

Increased Use of E-Filing

The Association agrees with the Focus Group's endorsement of increased use of e-filing ("FBEM"). Our position is detailed in our March 5, 2007 Comments on the Report and Recommendations of the Task Force on electronic Filing of Court Documents of the New York State Bar Association. In summary, (1) FBEM should be launched on a county-by-county basis as soon as the court equipment in that county is installed and court personnel are trained; (2) FBEM should be installed in Supreme, County and Surrogate's Courts; (3) FBEM should be mandatory 120 days after FBEM is operational in a county as training and costs to practitioners is minimal; (4) courthouse internet access is unnecessary as practitioners and pro se litigants may use third-party vendors; (5) FBEM should allow but not require filing of excerpts of documentary exhibits; (6) where cases are consolidated for discovery purposes or pre-trial, and the same motions are made in each case by each party, one case should be designated as the central file, one set of documents should be filed, and the caption should clearly refer to the one or more cases in which cases are filed; and (7) certified pro se litigants should be permitted to use the FBEM system.

Pre-Motion Conferences for Discovery Motions

We also believe that pre-motion conferences for discovery motions might well be helpful, as far as they go, although we have some concern that a statewide rule requiring them in non-commercial parts might generate more paperwork than it would eliminate if pre-conference letters are required. Nonetheless, it is our sense that this added burden would be more than offset by the likelihood that many discovery disputes could be narrowed or eliminated if they were brought into focus concisely before full-blown motion practice occurs.

We also believe, however, that such conferences would serve this purpose well only if orders resulting from them were promptly and effectively enforced – if they had "real teeth". Indeed, this particular proposal of the Focus Group should be part of a larger effort to address discovery abuse in non-commercial parts generally. Dereliction in, and willful obstruction of, discovery is commonplace, even pervasive, in some non-commercial parts, and the problem is sometimes exacerbated by indifference on the part of judges and court personnel. We believe the root of the problem is a widespread culture among participants in the court system, in which discovery abuse is expected and basically tolerated. Thus, while individual rule changes can always be proposed to address particular forms or instances of abuse, it may be that what is really required is a fundamental reform in the attitudes of judges, law clerks and practitioners, about what is inappropriate and what is intolerable.

We appreciate the opportunity to express, and thank you for considering, the Association's views on these important questions.

Respectfully,

Barry Kamins