NEW YORK CITY BAR

October 26, 2023

David Nocenti, Esq., Counsel
Office of Court Administration
New York State Unified Court System
25 Beaver St., 10th Floor
New York, NY 10004

Re: Support for Proposed Amendments to 22 NYCRR § 202.12 Concerning Procedures for Preliminary Conferences

Dear Mr. Nocenti:

We write on behalf of the New York City Bar Association in response to your memorandum of August 21, 2023 to express further support for the proposed amendments to the Preliminary Conference Rule set forth in 22 NYCRR § 202.12, which we believe would promote greater efficiency in litigation and encourage the use of alternative dispute resolution. These proposed amendments were developed jointly by the New York City Bar Association and the New York State Bar Association. We offer these comments to provide explanatory background.

Background of the Proposal

Traditionally in New York, and in part because of crowded dockets, courts have afforded litigants a significant degree of latitude in shaping the scope and pace of their cases. As suggested by a President's Committee on the Efficient Resolution of Disputes of the City Bar, however, this latitude in many cases promotes delay and inefficiency, which inhibits access to justice and erodes the quality of justice. "Rather than keeping hands off and allowing the process to be self-executing, [the judiciary] should actively engage in promoting the negotiated resolution of disputes and their efficient management to affordable decision."[1] The proposed rule recognizes that a "preliminary conference will frequently be a useful and even critical tool for furthering these goals" of efficient, expeditious and cost-effective resolution of cases, and encourages a preliminary conference before the assigned judge soon after commencement of the case. Drawing on the approach for managing e-discovery disputes incorporated into § 202.12 in 2013, the framework of the proposed rule is to require litigants to meet and confer in advance of appearing before a judge for the preliminary

[1] N.Y. City Bar Ass'n, *Report and Recommendations by the President's Committee for the Efficient Resolution of Disputes*, June 26, 2018, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/recommendations-for-the-efficient-resolution-of-disputes-1 (All websites last accessed on Oct. 26, 2023).

conference, and by preparing for the conference possibly making it unnecessary by submitting a stipulation to be so-ordered.

This proposal grew out of Chief Judge DiFiore's Excellence Initiative, which called for greater efficiency in managing litigation, and the Presumptive ADR Initiative, rules for which are being promulgated by courts throughout the State encouraging parties to engage in ADR. A working group of members of the City Bar's Council on Judicial Administration, Litigation Committee, and the Committee on State Courts of Superior Jurisdiction prepared amendments to § 202.12 with the goals of promoting efficiency by front-loading litigation planning, requiring lawyers and litigants to think through the risks, costs and likely duration of litigation, encouraging judges to "actively engage in promoting the negotiated resolution of disputes and their efficient management . . . ,"[2] and feeding into the Presumptive ADR initiative on the belief that ADR is more likely to be successful when litigants understand the risks of their case and the costs of pursuing it.

Structure Drawn from OCA's Amendments to § 202.12 in 2013

Uniform Rule 202.12 was last amended in 2013, on recommendations of an E-Discovery Working Group of the Office of Court Administration appointed in 2011 by Chief Administrative Judge Ann T. Pfau. A central reform incorporated into Rule 202.12(b) at that time requires counsel to discuss with their clients the scope (and expense) of e-discovery and come to a preliminary conference "sufficiently versed . . . to discuss competently all issues relating to electronic discovery." (§ 202.12(b), shifted to § 202.12(c) in the proposed rule.)

The proposed rule builds on that approach by expanding on what lawyers must do to be "sufficiently versed" to discuss other issues at the preliminary conference. Attorneys would be required to discuss with their clients and their adversaries discovery issues, ADR, voluntary information exchanges and settlement (under the new § 202.11 promulgated in 2021), and insurance coverage (under the new CPLR 3103(f) effective in 2022). The approach should enhance case management by making the preliminary conference more efficient, comprehensive, and productive.

The proposed rule also is intended to complement implementation of the "Presumptive Early Alternative Dispute Resolution for Civil Cases," as announced by OCA in May 2019,[3] and as now being implemented statewide for a broad range of civil cases. The amendments to Rule 202.12 proposed here would enhance the chances for success of any mandatory ADR by making sure that the litigants understand the process, recognize how it can get their dispute resolved efficiently, and appreciate that litigation costs may be reduced.

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[2] *See* n. 1 above.

[3] NYS Office of Court Administration, Press Release, May 14, 2019, http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

Modifications Due to Changes in Governing Law and Consultations with Bar Groups

The City Bar's work on this proposal began in 2019. Intervening events encouraged modifications to our initial proposal.

Initially we wanted Rule 202.12 to set forth a number of subjects, drawn from Commercial Division Rule 8(a), that we thought should be discussed at litigants' meet and confer prior to the preliminary conference. While there was some opposition to that proposal, OCA saw the same need and promulgated § 202.11 in early 2021, with language substantially similar to that in our initial draft.

Some members of the working group believed that the preliminary conference rules should provide for required initial disclosures comparable to those in Rule 26(a) of the Federal Rules of Civil Procedure, and our earlier draft incorporated elements of that rule. Other lawyers argued strongly, however, that any such required initial disclosures should be incorporated into New York practice by legislative amendment to the CPLR and not rules promulgation by OCA, and the working group ultimately found that argument persuasive. By coincidence, on a separate track the legislature found that this required initial disclosure was appropriate, and enacted CPLR 3101(f) to require initial disclosure of insurance information at the outset of litigation.

Both of these changes to governing law are incorporated by reference into the proposed rule as subjects for the litigants' meet and confer before the preliminary conference.

In the course of developing the proposed rule and meeting with numerous bar association committees, we have not encountered any group arguing that the existing § 202.12 works well. Some lawyers have suggested that preliminary conference practice could be eliminated by e-filing a bare-bones stipulation. The Second Judicial District has experimented with this approach.[4] We understand there have been other local variances, and some lawyers have suggested that rules for preliminary conferences should be left entirely to local rules. Section 202.12 is essentially a default rule that does not limit the authority of local Districts or individual courts to develop rules suitable for local conditions, and the proposed rule would not limit that authority.

After several years of discussions with bar committees, however, we believe there is a support for amending § 202.12 to promote greater efficiency in the preliminary conference procedures and to serve as a better model for any local procedures that may be developed. Under the proposed rule, the principal lawyers for litigants will be required to meet and confer, and to confirm in their proposed Preliminary Conference Order that they have done so. The conference itself should be more efficient because of the attorneys' preparation, and where it is found unnecessary, the attorneys will have prepared a Preliminary Conference Order more

[4] Hon. Lawrence Knipel, Admin. Judge for Civil Matters, *Notice of Revised Pre-Note Procedures* (March 4, 2020) ("Kings Civil Term is planning to eliminate Intake/Preliminary Conferences, and instead issue a Uniform PC Order . . . .").

comprehensive than a bare-bones stipulation. Further, the proposed rule encourages active judicial participation at the conference and, if the parties come prepared, an informed discussion of how to streamline the case and reduce the attendant costs.

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The City Bar unequivocally endorses these proposed amendments to Rule 202.12.

Respectfully,

Susan J. Kohlman, President
New York City Bar Association

Fran Hoffinger, Chair
Council on Judicial Administration

Richard J. Schager, Jr., Chair
Rule 202.12 Working Group

Cc: Maria Cilenti
Senior Policy Counsel, New York City Bar Association