

TO: Commercial and Federal Litigation Section Executive Committee

FROM: Commercial Division Committee

DATE: February 3, 2016

RE: Proposed Amendment of Commercial Division Rules (22 NYCRR 202.70(g))
Regarding Memorialization of Rulings in Disclosure Conferences

The Commercial Division Committee (“*Committee*”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated January 14, 2016, proposing an amendment of Section 202.70(g) of the Rules of the Commercial Division regarding memorialization of rulings in informal disclosure conferences (the “*Proposal*”).

I. EXECUTIVE SUMMARY

The Committee agrees with the Subcommittee of the Advisory Council on Procedural Rules to Promote Efficient Case Resolution that a rule requiring, at the request of a party, memorialization in the form of an Order all resolutions reached at a disclosure conference will further the resolution of discovery disputes through informal conferences and avoid protracted and costly discovery motions. The Committee also believes that telephonic conferences form an integral part of discovery management in the Commercial Division. The Committee therefore recommends that the proposed new Rule regarding memorialization of rulings in disclosure conferences be adopted with the modification that sub-section (b) be stricken.

II. SUMMARY OF PROPOSAL

As set forth in the Proposal, the proposed new Rule of the Commercial Division seeks to impose, at the request of any party, a mandatory obligation on the parties to a disclosure conference to memorialize all resolutions reached at the disclosure conference in either (1) a writing submitted to the court for approval and signature by the presiding justice; or (2) dictated into the record, with either the transcript or an order incorporating such resolutions submitted to the court to be “ordered” by the presiding justice.

III. RESPONSE AND SUGGESTS TO FURTHER THE GOALS OF THE PROPOSAL

The Committee concurs with the Proposal’s rationale, that disputes often arise among parties with respect to “the precise ruling(s) issued and its (their) scope” when oral rulings at disclosure conferences are not reduced to writing, resulting in unnecessary motion practice. The Committee notes that courts have routinely alleviated concern of this nature by often times permitting or acquiescing in a parties’ request to have resolutions of disclosure and other disputes discussed in chambers reduced to an Order on consent or placed on the record. However, the proposed new Rule would require that all resolutions be memorialized in a writing

and Ordered by the presiding justice at the request of a party. The Committee believes that such a rule will promote a clear understanding of the parties' obligations in discovery, avoid repetitive disputes concerning discovery, and avoid protracted and costly discovery motions.

The Committee is concerned, however, by the exclusion of telephonic conferences from the ambit of the Proposal. Telephonic discovery conferences are a routine and integral part of discovery management for many cases, and the Committee feels that the same logic motivating the Proposal with respect to in-person conferences should also govern conferences held by phone.