

**TO:** Commercial and Federal Litigation Section Executive Committee

**FROM:** Commercial Division Committee

**DATE:** February 3, 2016

**RE:** Proposed Revised Model Preliminary Conference Form for Use in the Commercial Division

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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 11, 2016, seeking public comment on the proposed Revised Model Preliminary Conference Form for use in the Commercial Division (the “*Proposal*”).

**I. EXECUTIVE SUMMARY**

The Committee concurs with the Subcommittee of the Advisory Council on Best Practices for Judicial Case Management that the proposed Revised Preliminary Conference form may “inform the Bench and the Bar of all the new Discovery Rules that should impact practice in the Commercial Division” (Proposal at 2). However, because the proposed Revised Preliminary Conference form is not mandatory but suggestive, the Committee takes no position on whether it should be adopted. The Committee makes certain recommendations on revisions to the proposed Revised Model Preliminary Conference form, as set forth in Point III below.

**II. SUMMARY OF PROPOSAL**

As set forth in the Proposal, the current form “does not reflect numerous rule and practice changes adopted by the Administrative Board since” May of 2014, when the current Model Preliminary Conference form was adopted. The Subcommittee of the Advisory Council on Best Practices for Judicial Case Management has proposed the following revisions to the current Model Preliminary Conference Order: (1) the addition of a new section on Pre-Answer Motion Practice; (2) revisions to the section for the Description of the Case; (3) revisions pertaining to discovery, including document production, interrogatories, depositions, discovery disputes, e-discovery, expert disclosures and privilege logs; (4) revisions to the section on Alternative Dispute Resolution; and (5) the addition of a new section concerning Additional Directives requiring parties to inform the court of the disposition of cases.

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

The Committee concurs with the Subcommittee Advisory Council on Best Practices for Judicial Case Management that the current Model Preliminary Conference form for use in the Commercial Division does not reflect rule and practice changes adopted by the Administrative Board since May of 2014. The Committee also concurs with the Subcommittee of the Advisory

Council on Best Practices for Judicial Case Management, that the Revised Model Preliminary Conference form may “inform the Bench and the Bar of all the new Discovery Rules that should impact practice in the Commercial Division” (Proposal at 2). Given that the proposed Revised Model Preliminary Conference form is not mandatory, and many of the Commercial Division justices have rejected the current Model Preliminary Conference form, we provide the following recommended suggestions and/or revisions to the proposed Revised Model Preliminary Conference form, without taking further position on whether it should be adopted:

1. A corresponding amendment to Commercial Division Rule 8 (22 NYCRR 202.70(g)) or recommendation that justices adopting the Revised Model Preliminary Conference form require the plaintiff to serve the Revised Model Preliminary Conference form on all parties upon being notified that a Preliminary Conference has been scheduled pursuant to Commercial Division Rule 7.
2. In Part III, the Committee suggests that the Revised Model Preliminary Conference form include a subsection (g) setting forth any counterclaims asserted by the defendants.
3. In practice, the Committee notes a persistent deficiency in responses to demands for discovery and inspection—general objections with no corresponding production of non-objectionable documents. Part V(2) makes reference to the requirement found in Rule 11-e(a), that objections be stated with reasonable particularity. However, there is no reference to Rule 11-e(b)’s requirement that non-objectionable responsive documents be delivered, and that objectionable documents be categorized, noting which objection(s) form the basis for the responding party’s decision to withhold otherwise responsive documents. The Committee recommends further revision to include the requirements of Commercial Division Rule 11-e(b).
4. Part V(3) suggests that contention interrogatories may never be served, and omits reference to a parties’ right to serve contention interrogatories at the conclusion of all other discovery, but not later than thirty (30) days prior to the discovery cut-off date.
5. The Committee suggests that Part V(13) be revised to eliminate references to “dispositive motions” and to include references to “summary judgment motions.”