

TO: Commercial and Federal Litigation Section Executive Committee

FROM: Commercial Division Committee

DATE: February 3, 2016

RE: Proposes amendment to Commercial Division Rules (22 NYCRR 202.70(g))
Regarding Settlement Conferences Before a Justice Other Than the Justice
Assigned to Hear the Case

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 6, 2016, proposing an amendment of Section 202.70(g) of the Rules of the Commercial Division regarding settlement conferences before a justice other than the justice assigned to hear the case (the “*Proposal*”).

I. EXECUTIVE SUMMARY

The Committee agrees that an elective procedure for conducting settlement conferences before a justice not assigned to the commercial dispute, upon consent of counsel, the assigned justice and the justice to whom the settlement conference is assigned, will promote candid settlement negotiations and increase efficiency in the resolution of commercial disputes. The Committee, therefore, encourages adoption of the proposed new Rule.

II. SUMMARY OF PROPOSAL

As set forth in the Proposal, the proposed new Rule of the Commercial Division seeks to “establish[] a procedure for settlement conferences before a Commercial Division justice other than the justice assigned to the case” (Proposal at 1, Ex. A). The proposed new Rule “is designed to encourage candid settlement negotiations between parties without risk of telegraphing weaknesses in a case to the presiding judge” (Proposal at 1). The proposed new Rule is not mandatory, and requires that counsel make a joint request for a settlement conference before another justice. The new Rule, as proposed, provides the justice assigned to the commercial dispute discretion in granting the joint request, upon a finding that (1) such a conference will be beneficial to the parties and the court, and (2) the justice to whom the settlement conference is assigned has consented to serve in that capacity.

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

The Committee concurs with the Proposal’s rationale, that a settlement conference before a justice other than the justice assigned to the case may “encourage candid settlement negotiations between the parties,” and avoid the “risk of telegraphing weaknesses in a case to the presiding judge” (Proposal at 1), and also notes that the similar rules have been successfully administered in federal and state courts, including the Commercial Division in New York

County. The Committee notes that the proposed new Rule is not mandatory, and requires the consent of all parties, the presiding judge and the judge to whom the settlement conference is assigned. Therefore, the Committee concurs that, in the appropriate case, the option of conducting a settlement conference before a justice other than the justice assigned to the commercial dispute may advance the Commercial Division's mantra, "faster, cheaper smarter."

The Committee also notes that, in some instances, counsel may be hesitant to express reluctance about participating in settlement conferences before the justice assigned to the case, even where counsel may privately doubt the advisability of so proceeding. With that observation in mind, the Committee is especially hopeful that the Proposal may promote not only candid settlement discussions but also greater comfort with the continuing role of the assigned justice in the event (hopefully rare) in which settlement talks fail to fully resolve a matter.