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**Re: Comments on Proposals Concerning Commercial Division Rules 9-a, 11-e, and 17**

Dear Mr. McConnell:

The New York City Bar Association (the “City Bar”) has reviewed the proposals of the Commercial Division Advisory Council to amend the following Commercial Division Rules:

- Rule 9-a, encouraging use of CPLR provisions permitting immediate trial or pretrial evidentiary hearings on material issues of fact;
- Rule 11-e, regarding technology-assisted review in discovery;
- Rule 17, regarding word limits in briefs, affidavits, and affirmations.

The City Bar generally supports the objectives of these revisions, subject to two observations and some more specific comments and suggestions, on two of the proposals, which are detailed below. First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts. We offer the following additional comments concerning the proposed amendments to Rules 11-e and 17.<sup>1</sup>

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<sup>1</sup> These comments reflect the input of the City Bar’s Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

Proposed Amendment to Rule 11-e

The City Bar supports the proposed amendment of Rule 11-e to address technology assisted review in discovery. The technological tools described in the Commercial Division Advisory Council’s supporting memorandum, including predictive coding, cannot and should not completely replace human judgment in the document review process (at least not yet), but they can make discovery more manageable and efficient in an increasing number of cases. The Advisory Council’s memorandum notes that it is important for parties to “confer and agree on an appropriate approach to document review,” and we believe that the rule should more explicitly encourage such cooperation. Accordingly, we suggest that the following sentence be added to the proposed rule: “The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.”

Proposed Amendment to Rule 17

The City Bar supports the proposed amendment of Commercial Division Rule 17 to the extent that it replaces the current Rule’s page limits with word limits. We also support the word count certification requirement for briefs. However, we believe that a requirement to certify a word count on the signature page of affirmations and affidavits would be unnecessary, unduly burdensome, and impractical.

The concerns expressed by the Commercial Division Advisory Council about attorneys’ formatting contortions, such as narrowing margins and squeezing arguments into footnotes, seem more pertinent to legal briefs than to affidavits or affirmations. Further, affiants may sometimes sign affirmations or affidavits without having themselves prepared the document on a word processing program. Counsel routinely draft and edit such documents in consultation with the affiant. Moreover, it is not uncommon in practice, after an affiant signs an affidavit or affirmation, for changes to be made to pages preceding the signature page with the affiant’s permission, without executing a new signature page. This is particularly the case when an affiant is geographically distant from counsel. Requiring a word count on affirmations and affidavits on the signature page therefore would needlessly complicate finalization of these documents. Given the relatively low risk of creative use of margins or footnotes to evade the word limit in such documents, we do not believe the benefit of the proposed certification requirement would outweigh the complications and inconvenience it is likely to cause.

For these reasons, the City Bar recommends revising the third sentence of the proposed revised rule to read: “The signature block of every brief, and memorandum shall include the phrase ‘Words’ followed by the number of words in the document.”

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)  
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