COUNCIL ON JUDICIAL ADMINISTRATION

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

MICHAEL P. REGAN
CHAIR
1301 AVE OF THE AMERICAS
NEW YORK, NY 10019
PHONE: (212) 907-9700
FAX: (212) 907-9800
MREGAN@SGRLAW.COM

LITIGATION COMMITTEE

BARBARA L. SENIAWSKI
CHAIR
1460 BROADWAY, FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

By Email
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

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Re: New York City Bar Association Comments on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction[1]

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed adoption of certain rules of the Commercial Division[2] in other courts of civil jurisdiction.

The New York City Bar Association (the "Association") commends the Advisory Committee on Civil Practice (the "Advisory Committee") for undertaking this analysis and for its thoughtful discussion of each of the rules of the Commercial Division, upon which it bases its recommendations – both with respect to those rules that the Advisory Committee recommends adopting and those that it does not.

The Association supports the adoption of Rules 3(b), 11-a, 11-d, 20, and 34 of the Commercial Division in other courts of civil jurisdiction as proposed by the Advisory Committee. In the interest of brevity, we do not further comment on these rules. The Association also supports the Advisory Committee's recommendations with respect to Rules 22 and 30(a), which the

[1] http://ww2.nycourts.gov/sites/default/files/document/files/2018-10/UsingCommercialDivRulesOct15.pdf (All websites cited in this letter were last visited on January 29, 2019.)
[2] http://ww2.nycourts.gov/rules/trialcourts/202.shtml#70

Advisory Committee recommends the adoption of (at least in part), but which do not appear in the Advisory Committee's covering memorandum listing the rules that it recommends adopting.

With respect to several other Commercial Division rules, however, the Association disagrees in some respect with the recommendation of the Advisory Committee. Specifically, the Association opposes the adoption of several rules that the Advisory Committee recommended adopting, recommends the adoption of certain rules that were *not* recommended for adoption by the Advisory Committee, or otherwise has comments on the recommendations made by the Advisory Committee. The Association's comments on these rules are as follows:

I. RULE 3(a)

The Association agrees with the Advisory Committee's recommendation that Rule 3(a) of the Commercial Division be adopted. However, we do not believe that changing the word "direct" to "advise," is consistent with or furthers the recommendation expressed by the Advisory Committee in the last paragraph of its comment, "that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties." If the goal is to take steps that result in the greater use of mediation, we believe that can be best achieved by allowing a court to *direct* the parties to mediation where appropriate. Moreover, the Advisory Committee's reason for its proposed amendment is not explained in its report.

Further, although the Commercial Division rule refers to an "uncompensated" mediator, as correctly noted by the Advisory Committee, we agree with the Advisory Committee's recommendation, which refers to the appointment of a "court-annexed mediator," leaving out the word "uncompensated." This recommendation is in fact consistent with the practice of the Commercial Division in some counties, where mediators are compensated after the first few hours of a mediation.

While we support the increased use of mediation in cases that the court deems appropriate, we reiterate and adopt here an important recommendation made in the June 2018 report of the City Bar's Committee for the Efficient Resolution of Disputes[3]: "[I]f mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers. To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts."

II. RULE 5

The Association agrees with the Advisory Committee's recommendation *not* to adopt Rule 5. We also agree that on-line notices of the status of actions and motions would be useful and note that the e-courts notices received by counsel who have appeared in an action provide that information.

[3] https://s3.amazonaws.com/documents.nycbar.org/files/PresCom_Efficient_Dispute_Resolution_6.27.18.pdf

III. RULE 7

The Advisory Committee does not recommend the adoption of Rule 7, but instead makes certain recommendations, without proposing a specific rule, concerning improvements of the methods by which "pro forma" court conferences, especially concerning discovery, can be conducted.

The Association notes that one of the most common complaints raised by counsel and the courts is the inefficiencies attendant to "pro-forma" court conferences, such as preliminary and compliance conferences, often resulting from the volume of cases that appear on a court's conference calendar. Accordingly, the Association agrees with the Advisory Committee's recommendation that the courts utilize NYSCEF and other technology to avoid in court appearances for "pro-forma" matters, such as setting discovery dates or to report on discovery. We also agree that counsel should be required to e-file a statement as to whether discovery is proceeding as per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance. Conferences can then be reserved for instances where there are active discovery disputes or non-compliance issues to address. We recommend that the Advisory Committee consider whether this approach can be implemented as a matter of practice or whether, instead, a rule would be advisable.

IV. RULE 8

The Association respectfully disagrees with the Advisory Committee's opinion that Rule 8 should not be adopted.

The Advisory Committee correctly describes Rule 8 as requiring counsel for all parties to confer prior to a preliminary or compliance conference about such matters as the resolution of the case, discovery, alternative dispute resolution, voluntary informal exchange of information, and issues of electronic discovery. However, the Advisory Committee opines that the "rule is not necessary in the majority of civil cases where the issues can be addressed expeditiously at the conference, or through the adoption of a court-approved scheduling form that obviates the need for an in-person preliminary conference."

We note that, at present, the rules do not provide for the electronic submission of preliminary and compliance conference orders in lieu of attendance by counsel at court conferences. Accordingly, we believe that the rules should address the procedures extant.

The experience of many attorneys is that, all too often, issues are not addressed or resolved expeditiously at court conferences. Moreover, some law firms have a practice of sending people to attend court conferences who may not be working on or familiar with the case, which often makes it difficult for counsel to address outstanding issues or agree upon a scheduling order that makes sense given the facts of the case. Presumably, the counsel that would take part in a required pre-hearing consultation, which is usually conducted by telephone, would be knowledgeable about the case and the issues. Accordingly, the Association believes that consultation between counsel

prior to court conferences would result in greater efficiency at those conferences and, therefore, recommends the adoption of Rule 8 of the Commercial Division in other courts of civil jurisdiction. Rule 8 should, however, be harmonized with Uniform Rule 202.12(b) and (c), which govern preliminary conferences in all civil courts.

V. RULE 11-b

The Advisory Committee recommends the adoption of Commercial Division Rule 11-b, except that (i) instead of providing that a party who insists on a document-by-document privilege log may be required (upon application of the opposing party, with "good cause" shown) to reimburse the costs associated with producing it, the Advisory Committee recommends that in the event of a disagreement the court should determine "whether the categorical approach or CPLR 3122 will be used"; (ii) the Advisory Committee does not recommend adopting the rule's requirement that a "responsible attorney" (as defined in the rule) certify that the privilege review was properly conducted; and (iii) the Advisory Committee recommends the addition of a specification that attorney-client communications and attorney work product created after the filing of the complaint need not be included in the log unless otherwise ordered by the court. The Association has the following comments on these aspects of the Advisory Committee's recommendation.

On the question of how to handle a dispute over whether a categorical approach should be used, while we agree that it might be most efficient to allow the court to direct that approach in proper cases, we question whether a rule providing as much would require an amendment to the CPLR. Under CPLR 3122(b), a party who has requested documents that are being withheld on any ground is entitled to certain information on a document-by-document basis unless the requirements for a protective order under CPLR 3103 are met. An agreement between the parties to instead produce categorical logs constitutes a waiver of that right. The rule attempts to provide an incentive for parties to enter into such an agreement by providing that, "unless the court deems it appropriate to issue a protective order under CPLR 3103," a party who insists on a document-by-document log will receive one but acts at its own peril in terms of possible cost-shifting. To the extent that the Advisory Committee's recommendation would allow a court to require a party to waive its right to a document-by-document log under circumstances that do not otherwise warrant a protective order, the Association questions whether this can be done by court rule.

Regarding certification by a "Responsible Attorney," it is not clear how much of the rule's certification provision the Advisory Committee would delete. The Association agrees that the definition of "Responsible Attorney" contained in the rule seems unnecessarily narrow, and that it would be enough to provide that a certification signed by any attorney acting on behalf of the producing party's law firm binds both the attorney and the firm. We also note that when this rule was originally proposed, the Association's Council on Judicial Administration expressed the view that the representations of specific facts set forth in the rule's certification were necessary to provide the type of information that a receiving party would want to review before accepting the categories designated by the producing party. The Association stands by that view.

Finally, the Association agrees that in most cases there is little or no purpose to be served by logging work product prepared after the commencement of litigation or communications with

litigation counsel after such commencement. We believe, however, that this is generally addressed through objections and/or agreed-upon limitations, such that as a practical matter parties usually can avoid that burden in appropriate circumstances. We suggest that a blanket rule exempting all post-commencement attorney-client communications and work product from the logging requirement may sweep too broadly, particularly insofar as such an exemption would appear to apply to communications with counsel other than litigation counsel.

VI. RULE 11-c

The Advisory Committee does not recommend the adoption of this Rule, which provides that where electronically stored information ("ESI") is requested from non-parties, the parties should adhere to certain Guidelines that have been promulgated for such discovery. The Advisory Committee cites the existence of adequate rules in the CPLR and the Uniform Civil Rules as its reason for declining to recommend such adoption, but does not specify which rules it views as adequately covering the matters that the Guidelines address. The Association is of the view that the Guidelines promote efficiency and reduce the burden of litigation, particularly on non-parties. Among other things, they help to settle expectations about what should and should not be required of non-parties, and may thereby reduce the need for court intervention. Moreover, given that the Guidelines are just that – Guidelines, to which the rule specifies that the parties "should" adhere – the Association believes that the rule contains enough flexibility to allow the Guidelines to be bypassed in whole or in part in cases where they would not serve their intended purposes.

Accordingly, the Association respectfully disagrees with the Advisory Committee's conclusion and suggests that it be reconsidered.

VII. RULE 11-e

The Advisory Committee recommends the adoption of this rule, except that it proposes one modification to subsection (d), which requires each party to state, no less than one month prior to the close of fact discovery or at such other date as the court directs, (i) whether production of responsive documents in its possession, custody, or control is complete, or (ii) that there are no responsive documents in its possession, custody, or control. Specifically, the Advisory Committee would require the statement to be made at the time of disclosure rather than at or near the close of fact discovery.

The Association respectfully disagrees with the Advisory Committee's proposed modification of this rule and believes it should be adopted as is.

The disclosure obligation is ongoing, and requires a party to supplement its disclosures if, as, and when new material becomes available to it. Requiring a statement of completeness to be made (or reconfirmed) at or near the end of fact discovery ensures that disclosure is complete at the most critical point: when the period provided for it is ending.

Accordingly, the Association believes that if such a statement is to be required only once (as both the rule and the Advisory Committee's proposed amendment seem to contemplate), requiring it to be made near the close of fact discovery is more appropriate than requiring it to be

made sooner. The Association notes, however, that counsel, throughout the discovery process, including at the time document productions are made, should be advising each other (whether orally or in writing) of the status of their document productions, including as to completeness, as part of the overall obligation to confer in good faith.

VIII. RULE 11-g

The Advisory Committee does not recommend adopting this rule, which requires the parties, "in those parts of the Commercial Division where the presiding justice so elects," to use a particular form for any proposed confidentiality order and to provide an explanation for any proposed deviations from that form. The Advisory Committee does, however, commend the form to practitioners seeking to draft such an order. The Association respectfully suggests that, given the Advisory Committee's expressed view about the form, it reconsider its position about the rule. The rule itself gives every individual judge the flexibility to elect to use the form or not. It also gives practitioners the flexibility to agree to variations where the circumstances so warrant; the requirement that the variation be explained is reasonable and not onerous. And it gives parties a baseline that will likely streamline the process of drafting proposed confidentiality orders. For these reasons, the Association believes that the rule should be adopted.

IX. RULE 14-a

Although the Advisory Committee recommended that all decisions or agreements at disclosure conferences be reduced to writing, the Advisory Committee nevertheless does not recommend the procedure set forth in Rule 14-a. The Advisory Committee did not provide any reasoning as to why the Commercial Division's procedure was not recommended. The Association agrees with the Advisory Committee that all decisions should be memorialized and believes that the Rule 14-a procedures are sufficient to accomplish this goal. The Association therefore believes that Rule 14-a should be adopted.

X. RULE 17

The Advisory Committee does not recommend the adoption of Rule 17, which sets limits on the length of memoranda of law, affidavits, and affirmations.[4]

The Association disagrees with the reasoning of the Advisory Committee in recommending that Rule 17 not be adopted. The Advisory Committee reasons that there are some cases "that simply require more extensive analysis," and that the parties in those cases should not be arbitrarily limited in terms of the length of their papers. But that is surely also the case in the Commercial Division, in which cases are often complex, both legally and factually, and may be document intensive. Moreover, the Advisory Committee recommends against the adoption of certain other rules outside of the Commercial Division specifically because those rules were deemed unnecessary, and potentially burdensome, for what are often *less* complex cases. Accordingly, the Association recommends the adoption of Rule 17.

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[4] The Association notes that Rule 17 no longer sets a page limit, but rather has been amended to set word limits. Specifically, Rule 17 limits briefs, memoranda of law, affirmations, and affidavits to 7,000 words, with reply briefs limited to 4,200 words.

XI. RULE 19-a

In the case of Rule 19-a, the Advisory Committee not only recommended the adoption of Rule 19-a, but in fact recommended that it be mandatory in all cases rather than only those where the court directs. Rule 19-a requires that a numbered list of undisputed material facts be annexed to all summary judgment motions, to which the opposing party can then respond.

Although the Association believes that such statements can be helpful to the parties and the judge in certain cases, the Association also recognizes that there are certain cases in which requiring a statement of undisputed facts will add an additional cost and burden without adding any value. Further, as some Commercial Division judges over the years have not required the submission of a Rule 19-a statement, it is clear that the preparation and submission of such a statement, in certain cases, before certain judges, would serve no purpose. The Association therefore recommends that Rule 19-a be adopted in its original form, such that a Rule 19-a statement of undisputed facts would be required only where the court believes that it will genuinely increase efficiency.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Council on Judicial Administration, Chair

Michael P. Regan
State Courts of Superior Jurisdiction Committee, Chair

Barbara L. Seniawski
Litigation Committee, Chair

Primary Drafters
Bart J. Eagle
Kara D. Ford
Adrienne B. Koch