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December 1, 2021

By Email

Eileen D. Millett, Esq.
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Re: New York City Bar Association Response to Request for Public Comment on Proposal to Amend Commercial Division Rule 19-a; and Request for Public Comment on Proposal to Amend the Uniform Civil Rules for the Supreme Court and the County Court

Dear Ms. Millett:

We write in response to your October 6, 2021: Request for Public Comment on Proposal to Amend Commercial Division Rule 19-a and October 1, 2021: Request for Public Comment on Proposal to Amend the Uniform Civil Rules for the Supreme Court and the County Court (the "Proposals").

The City Bar's Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the Proposals. As discussed below, we

support the Proposals with the changes discussed below that we view as furthering the purpose of the Proposals.[1]

First, we support the Proposal to Amend Commercial Division Rule 19-a and recommend that it be edited to add a requirement that the moving party provide its opponent a copy of the Rule 19-a statement as a Word file to facilitate the proposal's requirement that the responding party "shall recite the movant's paragraphs and then provide a response to that paragraph so the Court has all the materials in one document."

Second, we are mindful that the proposed changes to the recently-implemented application of certain Commercial Division Rules to the Supreme and County courts is a difficult issue that affects interests of litigants in many different contexts across the state. For the reasons set forth below, we have some concerns and suggestions regarding the current proposal to Amend the Uniform Civil Rules for the Supreme Court and the County Court described below:

Rule § 202.8-b – Length of Papers

The new subsection 202.8-b(e) should be clarified. OCA's rationale for the change was to clarify that a memorandum both in opposition to a motion and in support of a cross-motion constitutes a single memorandum of law. The proposal as written does not state this explicitly or address the related question of the word limit for the opposition to a cross-motion:

> (e) Where the opponent of a motion has made a cross-motion, the word or page limitations set forth above govern both the opposition to the main motion and the support of the cross-motion.

If the intention of the rule is that a single memorandum of law be submitted in reply and in response to a cross-motion (a proposition with which we agree), then that should be stated explicitly. For example:

> A memorandum both in opposition to a motion and in support of a cross-motion is a single memorandum of law limited to 7,000 words. Similarly, a memorandum both in opposition to a cross-motion and in reply to a motion is a single memorandum of law limited to 7,000 words.

Rule § 202.8-g(c) and new (e) - Motions for Summary Judgment: Statements of Material Facts

These changes to the Statement of Material Facts ("Statement") would make the rule too ambiguous, permissive and, in effect, a non-rule. If Section 202.8-g(a) is amended to make it discretionary for the court to order this Statement, which we support, then parties should have to

[1] The City Bar previously submitted comments on the proposed adoption of certain rules of the Commercial Division in other courts of civil jurisdiction. *See* https://s3.amazonaws.com/documents.nycbar.org/files/2019481-Commercial_Division_Rules.pdf.

adhere to the requirements, and filings of the Statement should have consequences in the litigation. Otherwise, we recommend deleting Rule § 202.8-g entirely.

Specifically, it was not clear why admissions made in the Statement are for the purposes of the motion only. Just like an answer or responses to notices for admissions under CPLR 3123, admissions in the Statement should be binding for the entirety of the case. Take, for example, an admission in a vehicular accident case that the light was red. A party, having admitted the light was red on summary judgment, should not be entitled to argue at trial that it was not red unless the party can make the showing necessary to permit amendment or withdrawal of such admission.

As for the new section 202.8-g(e), equating failure to provide a required Statement with, essentially, a "do-over", provides new opportunities for gamesmanship, abuse and bad lawyering. For instance, in a scenario where a moving party fails to include the requisite Statement with its papers, the opposing party would almost certainly have to oppose the defective motion due to time constraints of a briefing schedule. The moving party is then given the unfair advantage of refiling the papers with full knowledge of the opposition's papers via either a late Statement—in effect, a sur-reply—or a renewed motion for summary judgment. It would also constitute an unfair expense and delay to the complying parties to presumptively permit the "do-over".

Rule 202.20-c(c) – Responses to Objections and Document Requests

We do not agree with the proposed new language requiring "an affidavit of the responding party" as to the adequacy of the document production. Cases outside of the Commercial Division can also involve substantial electronic discovery, and it would be impractical and onerous to require an affidavit from a party representative certifying that electronic discovery is "complete." Pursuant to Commercial Division Rule 11-e(d), the parties are merely required to "state" whether document production is complete. Presumably, that representation would come from a lawyer who oversaw the discovery process, as opposed to a party representative who relies on the lawyer in the discovery process. Thus, we believe the concept of a party "affidavit" should be eliminated.

Further, the amendment does not account for rolling production of discovery, which is common. The rule should be amended to account for such a scenario.

Rule § 202.20-h - Pre-trial Memoranda, Exhibit Book, and Requests for Jury Instructions

We propose changing the beginning of the section to read from "the court may direct that" to "unless the court directs otherwise". Thus, the submission of pre-trial memoranda is provided as a default to reflect that, in many New York City cases, parties will not be assigned a trial judge until almost time of trial, and such late notice of whether submissions are required may pose difficulties to parties in the midst of trial preparation.

Rule § 202.26(c) – Settlement and Pretrial Conference

We disagree with the exclusion of jury trials from the requirements that parties may be directed to consult regarding expert testimony before trial. The rule requires the parties to confer and consult, so it is entirely optional if there is an agreement.

Respectfully,

Michael P. Regan, Chair
Council on Judicial Administration

Bart J. Eagle, Chair
State Courts of Superior Jurisdiction Committee

John M. Lundin, Chair
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