January 25, 2023

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Re: New York City Bar Association Response to Request for Public Comment on Proposal to Amend Commercial Division Rules 28, 29, and 32

Dear Mr. Perri:

We write to provide comments with respect to the Request for Public Comment on Amending Commercial Division Rules 28, 29, and 32.

The New York City Bar Association's Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the proposed rule changes. We support the proposed revisions to Rule 29 and propose minor revisions to Rules 28 and 32.

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

We are in favor of the proposed amendment to Rule 28. However, we would like to address two concerns with the Rule (one of which is not caused by the proposed change). The proposed Rule 28 states that "[e]xhibits not previously identified which are to be used solely for credibility or rebuttal need not be premarked." The proposed Rule 29 states that it does not apply to deposition testimony "to be used solely for impeachment or credibility purposes." We think these rules should be made consistent, such that Rule 28 should add "impeachment" to the purposes for which exhibits need not be pre-marked. We also believe that only exhibits actually offered at trial should be deemed marked into evidence. Accordingly, we propose the modifications set forth below.

> Counsel for the parties shall consult prior to the pre-trial conference and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection and shall premark all exhibits as to which no objection has been made for introduction into evidence. Counsel shall also mark all exhibits not consented to for identification only. Counsel asserting objections to the introduction of any proposed exhibit shall be prepared to state the objection with specificity at the pretrial conference or such other time as the court directs. The premarked exhibits as to which there is no dispute and which are offered at trial shall be marked into evidence, unless the court directs otherwise. If the trial exhibits are voluminous or in a digital or other format that creates practical marking issues, counsel shall consult the clerk of the part for guidance. Exhibits not previously identified which are to be used solely for impeachment, credibility or rebuttal need not be premarked.

With respect to the proposed amendment to Commercial Division Rule 32, we propose one modification set forth below.

> Rule 32. Scheduling of witnesses. At the pre-trial conference or at such time as the court may direct, each party shall identify in writing for the court the witnesses it intends to call, the order in which they shall testify, and the estimated length of their testimony and whether the witness will testify in person or, if permitted and subject to objection, through the use of video technology, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only (and not to be exchanged with other counsel) a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

We propose this addition so that the rule does not imply that witnesses may *automatically* be permitted to testify virtually, given the conditions set forth in Commercial Division Rule 36.

Although we support these three rule changes, with the aforementioned minor modifications, we must express many of our committee members' concerns with the proliferation of rules across the Court system. In a Commercial Division case, a practitioner needs to consider, at minimum: (i) the CPLR; (ii) the Uniform Rules for the Supreme Court and County Court; (iii) the Commercial Division Rules; and (iv) the Part Rules of the assigned Justice. In recent years, it appears that there are both more rules and that the rules are constantly changing. For example, prior to February 2021, a litigant in the non-commercial part would not need to submit a statement of material undisputed facts in support of a summary judgment motion. In February 2021, Uniform

Rule 202.8-g was amended to require such a statement. Subsequently, in July of 2022, Administrative Order 141/22 ("AO 141/22"), eliminated the requirement for such a statement unless the Court so-directs. As such, litigants must now look to the Part Rules to determine whether such a statement is required. This is but one example.

The frequent rule changes and propagation of rules by various authorities has complicated the practice of law and is increasingly a burden on practitioners. Although we adopt the proposed rule changes discussed herein, we invite stakeholders in the Court System to consider ways to minimize this burden – by reducing the frequency of new rules and amendments and by creating uniformity in rules across the Court System wherever possible.

Thank you for considering our comments. If you believe that it would be beneficial, we would be happy to discuss these comments with you further.

Respectfully submitted,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction