March 27, 2006

Hon. Jonathan Lippman
Chief Administrative Judge of the Courts
25 Beaver Street
New York, NY 10004

Dear Judge Lippman:

The Committee on State Courts of Superior Jurisdiction writes to raise concerns about Section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts which mandates that lawyers remind judges in writing when a submitted motion has not been decided within 60 days (“ Rule 23"). Our concerns relate to both the defects in the procedure under which the rule was adopted, as well as the substance of the rule itself. For the reasons set forth below, we respectfully request that the rule be stayed for 60 days to allow for comments and reconsideration.

This new statewide rule was adopted without any opportunity for comment. Although the Committee commented on the Commercial Division rules, which included Rule 23, the considerations for other parts of the court, e.g. matrimonial, are vastly different. Therefore, non-commercial practitioners should have had the opportunity to review and comment. We maintain that before the New York State Administrative Board of the Courts adopts rules that affect practitioners, there should be an opportunity for comment.

“The stated purpose of the rule is to provide lawyers with a procedure to notify judges of outstanding pending motions, serving as a reminder to judges of the existence of such motions.” While preventing motions from slipping through cracks is a laudable purpose, prior to this rule, nothing precluded attorneys from sending such letters when in their professional judgment it was appropriate. The rule also shifts responsibility to attorneys for something over which they truly have no control.

We believe the rule creates a Catch-22 for practitioners. We are concerned that if we do not write the letter we expose ourselves to sanctions or client claims of malpractice. At the same time, practitioners risk annoying judges, before whom we regularly appear, with Rule 23 letters. It is annoying, even if mandated, because the rule presumes judges lose their motions and are unaware of their inventories when in fact they review the inventory at least quarterly in order to submit the “Sixty Day Report” to administrative judges.

Attorneys are also concerned with client costs including the time

explaining to clients why a letter, which is intended to press a judge to decide a motion sooner, but will not accomplish that purpose, must be sent. The cost of sending the letter simply outweighs any benefit, except in extreme situations. We maintain that it should be left to professional judgment when such a situation exists. Indeed, with a complicated motion, parties may prefer for a judge to take her time in deciding the motion. Accordingly, the rule should be modified to substitute "may" for "shall."

We wholeheartedly endorse your efforts to address the real problem of delayed decisions on motions. However, we maintain that the more productive way of addressing any delay would be to address the under-funding of the judiciary. This situation cannot be remedied simply with a letter to a judge. Indeed, this Committee is on record with its report on the New York State Supreme Court Law Department, 59 *The Record 394* (2004), that more judges or staff are necessary to keep up with the increasing number and complexity of motions. In the Summer of 2004, we met with OCA's Lawrence Marks to discuss our Law Department report and we suggested an expansion of OCA's Fellowship program. In September 2005, OCA established the Commercial Division law clerks program. We maintain that OCA's efforts should concentrate on similar solutions. Another suggestion is to allow judges to hire lawyers instead of administrative assistants. However, this again raises financial concerns; supplementing the secretarial salary budget line.

If the budgetary issues are not addressed, then we are concerned the rule has the potential of creating new and confusing hierarchies of priority for judges -- e.g., motions with letters versus those without. Certain motions must be decided before other earlier filed motions. CPLR 6301 (preliminary injunction); Rules of the Chief Judge §4.1 (30 days to decide interim maintenance or child support). While the first motion in and first decision out method would seem most fair, judges must consider other factors in deciding which motion should be decided next, e.g., exigencies such as final trial date set or waiting for a decision when identical motions are first filed in related federal actions.

The Committee is also concerned that judges who use the law department have no control over the time it takes to assign motions to court attorneys and for an analysis to be drafted. Indeed, we are aware of a backlog, created years ago by a hiring freeze, which has yet to be addressed and is perpetuated by turnover in the law department and the excessively long period of time it takes to hire new court attorneys.

It is this Committee's experience that most judges work hard at timely deciding motions. If a particular judge is flagrantly violating CPLR 2219, then an administrative problem exists and should be addressed.

In conclusion, we believe that the rule should be stayed for 60 days, effective immediately, to permit comment from those affected.

Sincerely,

Andrea Masley, Esq.

cc: Chief Judge Judith S. Kaye

Presiding Justice of the Appellate Division, First Department, John T. Buckley

Presiding Justice of the Appellate Division, Second Department, A. Gail Prudenti

Presiding Justice of the Appellate Division, Third Department, Anthony V. Cardona

Presiding Justice of the Appellate Division, Fourth Department, Eugene F. Piggott, Jr.