

**THE ASSOCIATION OF THE BAR  
OF THE CITY OF NEW YORK  
42 WEST 44TH STREET  
NEW YORK, NY 10036-6689**

**COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION**

TOBY M.J. BUTTERFIELD  
CHAIR  
41 MADISON AVENUE, FLOOR 34  
NEW YORK, NY 10010  
(212) 974-7474  
FAX # (212) 974-8474  
tbutterfield@cdas.com

LANCE H. KOONCE, III  
SECRETARY  
1740 BROADWAY, FLOOR 25  
NEW YORK, NY 10019-4315  
(212) 603-6467  
FAX # (212) 489-8340  
lancekoonce@dwt.com

December 20, 2004

Hon. Jacqueline Silberman  
Administrative Justice, Supreme Court of  
the First Judicial District, Civil Term  
60 Centre Street  
New York, New York 10007

Dear Justice Silberman:

On behalf of the Association of the Bar of the City of New York (“ABCNY”), we hereby submit the following comments on the current draft of proposed rules for justices of the Commercial Division, which we received with a request for comment from the Commercial Division Advisory Committee. ABCNY’s comments were prepared by the Committee on State Courts of Superior Jurisdiction (the “Committee”), and address only those rules that the members of the Committee believed should be revised. Otherwise ABCNY endorses the proposed rules.

Generally, the Committee is concerned that several of the proposed rules would require judges to rule that a party has waived rights, even in situations where such waiver would be too harsh, or where the party or the party’s attorney has committed only a very minor infraction, leaving the penalty of waiver too extreme and falling unduly on the party, rather than the attorney.

**Proposed Rule 13**

Committee members believe that the waiver provisions of Proposed Rule 13 are too severe, and involve too drastic a shift of the burden to a party seeking an examination before trial or documents when the cause for the delay may rest entirely with the other party. Members also believe that requiring the party seeking an examination before trial to submit to the Court an affidavit of non-appearance where the other party fails to submit to the examination places the burden on the non-offending party, and may increase rather than decrease the workload for the Commercial Division Parts.

As a result, the Committee recommends that the entirety of Proposed Rule 13 following the third sentence (ending with "...pursuant to CPLR 3126) should be stricken."

### **Proposed Rule 24**

Many members of the Committee are concerned that Proposed Rule 24 will create a two-tiered motion process that will create more effort and expense for all parties and a greater burden on the Commercial Division. However, a substantial number of Committee members are strongly in favor of requiring advance notice of motions.

The Committee was in agreement, however, that the final sentence of Proposed Rule 24(a) should be revised to clarify that the pre-motion correspondence shall not be considered by the Court in reaching its decision *on the requested motion*.

### **Proposed Rule 25**

The Committee is concerned about the language in Proposed Rule 25 that requires trials to begin at a certain time and punishes the parties with an automatic waiver in the event of even a slight variance from this time by their attorneys. The Committee is concerned that the tone of the rule does not reflect the reality in the courtroom, or unexpected and unavoidable delays, for example, due to unusually bad conditions on mass transit. The Committee understands the need to reduce delay, but feels that individual judges are better situated to address flagrant violations as they occur, and opposes implementation of a bright-line rule.

Consequently the Committee recommends striking sentences six and seven, beginning with the words "Trial will commence . . ." and concluding with the words ". . . period of counsel's absence."

### **Proposed Rule 31**

The Committee noted a typographical error in Proposed Rule 31(a). The reference to Rule 16 should instead be a reference to Rule 6.

### **Proposed Rule 32**

The Committee believes that the rules should include a scheduling device rather than a rigid disclosure requirement that may not be practicable in many types of cases. The Committee would like to see more flexible language either requiring the parties to make "best efforts" to identify witnesses and their schedule, or perhaps language allowing the court to require scheduling in advance in appropriate cases.

### **Appendix A**

In general, the Committee was in favor of the certification process as defined in Appendix A, paragraph (d), and found it a welcome improvement to the process of assigning

cases to the Commercial Division Parts.

Committee members expressed some concern that a certification that an action relates to “Internal affairs of business organizations” as set forth in subparagraph (b)(7) could be problematic for some types of organizations. The Committee suggests altering the language in subparagraph (b)(7) to read “Internal affairs of business organizations (whether for-profit or not-for-profit) or liability to third parties or officials thereof.”

We thank the Commercial Division Advisory Committee for the opportunity to comment on the proposed rules.

Very Truly Yours,



Toby Butterfield  
Chair

Committee on State Courts of Superior Jurisdiction

cc: Justice Louis C. Benza  
Justice Ariel E. Belen  
Justice Carolyn E. Demarest  
Justice Thomas A. Stander  
Justice Leonard B. Austin  
Justice Ira B. Warshawsky  
Justice Herman Cahn  
Justice Helen E. Freedman  
Justice Bernard J. Fried  
Justice Ira Gammerman  
Justice Richard B. Lowe III  
Justice Karla Moskowitz  
Justice Charles E. Ramos  
Justice Elizabeth Hazlitt Emerson  
Justice Kenneth W. Rudolph  
Mr. John Werner  
Mr. Pablo Rivera  
Mr. Bob Mead  
Alan Rothstein, Esq.  
ABC General Counsel (via e-mail)  
Lance Koonce, Esq. Committee Secretary  
Committee Members (List Attached)

David Black, Esq.  
Jeffrey M. Eilender, Esq.  
Diana M. Murray, Esq.  
David H. Sculnick Esq.  
Howard I. Trepp, Esq.  
Lauren J. Wachtler, Esq.  
Leo T. Crowley, Esq.  
Hon. Paul G. Feinman  
Lance J. Gotko, Esq.  
Terry J. Gushner, Esq.  
Gary N. Horowitz, Esq.  
Gary D. Levenson, Esq.  
Paul H. Levinson, Esq.  
Andrea Masley, Esq.  
Preston Ricardo, Esq.  
Stephen M. Sinaiko, Esq.  
Honorable Lewis B. Stone  
Ronald Berson, Esq.  
Robert M. Blum, Esq.  
Tracee E. Davis, Esq.  
Michael P. Graff, Esq.  
Sheilah Kane, Esq.  
Mr. Howard B. Levi, Esq.  
Ambrose M. Richardson, III, Esq.  
Irvin H. Rosenthal, Esq.  
Marguerite S. Dougherty, Esq.  
Jeffrey A. Fuisz, Esq.  
Bertrand C. Sellier, Jr., Esq.  
Frederick Siegmund, Esq.  
Steven B. Telzak, Esq.  
Christopher Gette, Esq.  
Honorable Betty Weinberg Ellerin  
Honorable Joan B. Lobis