



NEW YORK
CITY BAR

December 13, 2023

**COUNCIL ON JUDICIAL
ADMINISTRATION**

FRAN HOFFINGER
CHAIR
150 EAST 58TH STREET, 16TH FLOOR
NEW YORK, NY 10155
Phone: (212) 421-4000
hoffinger@hoffingerlaw.com

LITIGATION COMMITTEE

SETH D. ALLEN
CHAIR
26 BROADWAY, 19TH FLOOR
NEW YORK, NY 10004
Phone : (212) 344-5400
sallen@schlamstone.com

**STATE COURTS OF SUPERIOR
JURISDICTION COMMITTEE**

AMY D. CARLIN
CHAIR
40 WALL STREET, 32ND FL.
NEW YORK, NY 10005
Phone : (212) 530-4835
acarlin@lhrbg.com

By Email

David Nocenti, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004
rulecomments@nycourts.gov

Re: New York City Bar Association Response to Request for Public Comment on Proposal for a New Commercial Division Rule to Encourage Use of Lawyers as Referees on Consent (“Proposed Rule”)

Dear Mr. Nocenti:

The City Bar’s Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the Proposed Rule and are opposed to its issuance for the following reasons.

While we are not fundamentally opposed to encouraging the use of referees on consent in the Commercial Division, we do not believe that the Proposed Rule is the appropriate means by which to do so. Specifically, the Proposed Rule is not appropriate as a rule insofar as it sets forth no requirement that any party or the court take any action, nor is there any ability to enforce it as a rule. Rather, it is merely a suggestion in the form of a rule.

If, as stated, the Commercial Division Advisory Council wishes to encourage the use of referees and amplify the availability of this alternative, we would suggest the use of a Court Notice, which could be disseminated to all current and future Commercial Division cases via NYSCEF,

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.

or other public announcement advertising the ability for parties to use referees on consent. Alternatively, if the Commercial Division Advisory Council believes a rule is necessary to meet its goals, then we believe that rule should, rather than merely advising parties of the availability of referees, require that parties, at or before the Preliminary Conference, discuss whether they will consent to the use of a referee, or require that the Commercial Division judges include this point at the Preliminary Conference or in their form Preliminary Conference Order.

To further illuminate our reasoning, we have copied below the statement contained in our January 25, 2023 letter providing comments on the proposed amendments to Commercial Division Rules 28, 29, and 32:

[W]e must express many members' concern 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, while sometimes necessary, can serve to complicate the practice of law and create an unnecessary burden on practitioners. That is even more true when those rules are muddled with the inclusion of mere suggestions or encouragements, as we believe is the case with the proposal here. Including a provision in the Commercial Division rules such as the one suggested by the Commercial Division Advisory Council will overly complicate Commercial Division practice and has the potential to confuse practitioners as to whether any actions are necessary in order to be compliant with the rule.

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.

Sincerely,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction

Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org