MEMORANDUM

October 15, 2018

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

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Earlier this year, at the request of the Administrative Board, the Unified Court System's Advisory Committee on Civil Practice conducted a detailed examination of the practice rules of the Commercial Division of Supreme Court (22 NYCRR 202.70[g]), to assess the suitability of those rules for broader promulgation in other courts of civil jurisdiction. In its July 2018 report to the Chief Judge on this subject (Exh. A), the Advisory Committee recommended the broader application of nine Commercial Division rules:

Rule 3(a) - Appointment of a court-annexed mediator (as amended).
Rule 3(b) - Settlement conference before a judge not assigned to the case.
Rule 11-a - Limitations on interrogatories.
Rule 11-b - Privilege logs (in part).
Rule 11-d - Limitations on depositions.
Rule 11-e - Responses and objections to document requests (as amended).
Rule 19-a - Statement of material facts for summary judgment motions.
Rule 20 - Temporary restraining orders.
Rule 34 - Staggered court appearances.

The Committee concluded that other rules, though highly suitable for Commercial Division practice, were less appropriate for statewide adoption for one of various reasons: they were duplicative of existing rules or would lead to added litigation costs or administrative burdens, or addressed issues exclusively relevant to Commercial Division practice (Exh. A, p. 1-2).

The Administrative Board is now seeking public comment on the recommendations set forth in the Advisory Committee's Report.

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Persons wishing to comment on the Report should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court

Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than January 15, 2019.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

Report of the Advisory Committee on Civil Practice on the Commercial Division Rules

to the Chief Judge of the
Courts of the State of New York

July 2018

Introduction

This Committee has been charged with evaluating the Commercial Division Rules and Amendments and recommending which should be adopted broadly throughout our civil courts, with the goal of streamlining civil litigation, improving efficiency, and reducing litigation costs.

The Committee's recommendations are based on the members' broad collective experience in practicing throughout the State representing clients in all types of civil litigation including administrative, commercial disputes, civil rights, class actions, construction, consumer debt, contracts, employment, foreclosures, insurance coverage, landlords and tenants, land-use, property disputes, medical malpractice, personal injury, and other types of intentional and negligent tort litigation.

Additionally, Committee members met with a number of judges and court personnel to gain the courts' perspective.

After careful consideration, the Committee recommends adopting broadly, or in principle, the following Commercial Division Rules:

Rule 3(a) Appointment of a court-annexed mediator, as amended.

Rule 3(b) Availability of a settlement conference before a judge not assigned to the case.

Rule 11-a Limitations on interrogatories.

Rule 11-b Privilege logs, in part.

Rule 11-d Limitations on depositions.

Rule 11-e Responses and objections to document requests, as amended.

Rule 19-a Statement of material facts for summary judgment motions.

Rule 20 Temporary restraining orders.

Rule 34 Staggered Court Appearances

The Commercial Division Rules were thoughtfully drafted and have continually evolved to help streamline litigation and reduce costs in a complex area of practice.

As effective as the rules have been in the commercial parts, it is the sense of the Committee that wholesale adoption of the rules statewide is not warranted. Many of the general rules are already in place in one form or another. Some of the specific rules do not lend themselves to broader application as they may well add to the costs of litigation and/or place an added burden on

the already strained resources of the courts. Further, statewide application of some rules would be inappropriate given the disparate caseloads among the various courts.

In addition, the Committee believes that some of the rules, however effective they are in the commercial divisions, would be unworkable in the many cases where the amount at issue may not justify the more attorney-intensive efforts that are expended in large commercial cases.

A general recommendation of the Committee, as noted under Rule 7, is that the court consider making greater use of the New York State Courts Electronic Filing System (NYSCEF) to decrease in-court appearances for pro-forma matters, thus allowing the resources of the courts to be directed toward matters in dispute or instances of non-compliance. The Committee also urges the adoption of mandatory e-filing in all cases throughout the State.

The Committee believes that adoption of some of its proposals would require amendments to the CPLR. In most instances, however, adoption of new or revised uniform rules or a change in administrative practice would be sufficient to implement the proposed rule.

Finally, even though many of the Commercial Division rules have not been recommended for adoption, the Committee has found that a thorough analysis of those rules has been a useful way of reviewing the litigation process as a whole and has generated reconsideration of many long-standing assumptions about how cases should be handled in the court system. This review has resulted in several recommendations that do not exactly parrot the Commercial Division Rules, but nonetheless follow the spirit of those Rules.

Below is the Committee's analysis of each Rule.

RULE 1 - Appearance by Counsel with Knowledge and Authority

This Rule requires counsel who appear at conferences to be fully familiar with the case and fully authorized to enter into substantive and procedural agreements on behalf of their clients.

The Committee agrees that counsel who appear at conferences should be familiar with the issues anticipated to be addressed at the conference, including pending motions, and that counsel should be on time for all scheduled appearances. No rule change is required since such language is already incorporated in most conference orders.

RULE 2 - Settlements and Discontinuances

This Rule requires attorneys to inform the court of the settlement or discontinuance of an action. It provides that notice must be given "immediately" to the clerk of the part and to the judge's chambers. The Committee does not recommend adoption of this rule.

The Committee agrees that attorneys should immediately notify the part clerk that a case has settled, or an issue is resolved, in instances where the matter is actively before the court such as a pending motion or a trial date.

In most other instances the filing of a stipulation of discontinuance is sufficient and no purpose would be served by routinely notifying a part clerk that a matter has settled.

RULE 3 - Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case

This Rule provides that a judge may direct, or counsel may request, the appointment of an uncompensated mediator. Similarly, it allows counsel for all parties to stipulate to having the case determined by a summary jury trial. The Committee recommends adoption of Paragraph (a), with a minor amendment, as follows:

(a) At any stage of the matter, the court may [direct] **advise** or counsel may seek the appointment of a court-annexed mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation. Additionally, counsel for all parties may stipulate to having the case determined by a summary jury trial pursuant to any applicable local rules or, in the absence of a controlling local rule, with permission of the court.

The Committee recommends adoption of Paragraph (b) of this rule, which states that counsel can request a settlement conference before another judge who is not the judge assigned to the case. If another judge is available, this does not seem to create serious problems, though in some downstate counties there may not be the resources available.

The Committee also recommends that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties.

RULE 4 – Electronic Submission of Papers

This Rule is divided into two parts. Subdivision (a) deals with papers sent by fax. The Committee favors use of electronic communications rather than facsimile and does not support the rule's adoption.

Subdivision (b) deals with methods of communication in cases where papers are not filed by electronic means. It gives the court discretion to permit electronic communications between counsel as well as between counsel and the court.

The Committee believes that counsel can decide for themselves how they communicate with each other. There is no need for judicial direction. As for communications with the court, the Committee believes that judges can direct the method or methods to be used without the necessity of a rule. Many state court judges already encourage counsel to communicate with the court through email. The Committee strongly supports greater use of electronic communications with the court and urges judges to voluntarily adopt that practice.

RULE 5 – Information on Cases

This Rule is applicable only in the First and Second Departments. It provides that the schedule of court appearances and decisions can be found on the court system's website. It concludes by providing that where circumstances require, notice will be furnished directly by the court's chambers. This last sentence implies that it is the responsibility of the attorneys to follow the case on the court's website, as notice of events requiring a court appearance will be given only in limited circumstances. However, the rule does not give any specific direction to attorneys.

The Committee does not recommend adoption of this rule, but the Committee nonetheless believes that an on-line notice of the status of the action, including the status of pending motions, would be useful to the practice.

RULE 6 – Form of Papers

This Rule deals with the form of papers. The Committee believes that there is no problem within the court system with regard to papers and their form, and it would not adopt this Rule. There already are rules that seem to work well (See, for example, CPLR 2101 and Section 130-1.1-a of the Rules of the Chief Administrator).

There is an additional requirement imposed by this rule - - electronically filed memoranda and “where appropriate” affidavits and affirmations must be bookmarked to help the court. This is useful in long, complex documents, which are often submitted in cases in the Commercial Division. However, documents submitted elsewhere in the court system are often simple and straightforward. Bookmarking would constitute a burden on the attorneys with little or no benefit. Thus, the requirement of bookmarking these documents should not be imposed beyond the Commercial Division.

RULE 7 - Preliminary Conference; Request

This Rule sets times within which to hold a preliminary conference. Many preliminary conferences throughout the State are held in hallways or packed courtrooms where forms are filled out by counsel and handed in to a clerk to be later "So Ordered.” Although courts often provide counsel with the opportunity to fill out a preliminary conference order ahead of time and file it with the court instead of appearing, it is our experience that most lawyers do not utilize that option.

It is our recommendation that the courts utilize NYSCEF and other technology to avoid in-court appearances for "pro forma” matters such as setting discovery dates or to report that discovery is proceeding on schedule.

As an example, in the Motor Vehicle Part in Manhattan, the preliminary conference order is issued via NYSCEF after a request for judicial intervention has been filed. The order sets forth discovery dates based on preset criteria. This process obviates the need for a court appearance except in those cases where there is a dispute requiring court intervention.

Similarly, counsel should be required to e-file a statement as to whether discovery is proceeding per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance.

It is further our recommendation that, in overseeing discovery, the resources of the court be directed toward those cases where there are disputes or noncompliance with a previous order.

RULE 8 - Consultation Prior to Preliminary and Compliance Conferences

This Rule requires counsel for all parties to confer prior to a preliminary or compliance conference about resolution of the case; discovery; alternative dispute resolution; voluntary, informal exchange of information; and issues of electronic discovery.

It is the opinion of the Committee that this rule is not necessary in the majority of civil cases where the issues can be addressed expeditiously at the conference, or through the adoption of a court-approved scheduling form that obviates the need for an in-person preliminary conference.

RULE 9 – Accelerated Adjudication Actions

Rule 9 incorporates a number of unrelated concepts into a package of accelerated adjudication procedures available on written consent of the parties in any action pending in the Commercial Division. As written, these procedures and practices must be adopted in their entirety, although there is no explicit prohibition on the parties by written consent adopting some part of these procedures.

Rule 9(a) provides for the adoption of the accelerated adjudication procedures by written consent in any action that qualifies for Commercial Division jurisdiction other than class actions brought under CPLR Article 9. Rule 9(b) sets a nine-month period for the action to be ready for trial, measured from the date of filing of a request for judicial intervention.

Rule 9(c) states that in any action governed by Rule 9, the parties are deemed to have "irrevocably waived" objections based on lack of personal jurisdiction or forum non conveniens, trial by jury, punitive or exemplary damages, interlocutory appeals, and discovery, except as agreed or as provided in Rule 9(c)(5). The discovery limitations are quantitative, such as seven interrogatories, five requests to admit, and seven depositions per side limited to seven hours each. Document discovery is limited to documents relevant to a claim or defense in the action and restricted by time frame and subject. Rule 9(d) sets forth procedures for electronic discovery that are applicable unless otherwise agreed. These include providing documents in searchable form and using a narrowly tailored list of custodians. Rule 9(d) also includes a proportionality limitation, stating that the court will deny disproportionate discovery or condition such discovery on the party seeking that discovery advancing its additional cost.

There is no express limitation in Rule 9 on when an agreement for accelerated adjudication may be entered into. Theoretically, such a provision could be a term unknowingly agreed to by one of the parties to a contract that is later the subject of litigation. Particularly where there is a large disparity in bargaining power, requiring acceptance of accelerated adjudication and consequent waiver of jury trial, jurisdictional defenses, punitive damages, and interlocutory appeal

can fundamentally change the opportunity of a party to retain historic and constitutional safeguards on their legal rights. To reduce this risk, the Committee recommends that the option to proceed on an accelerated adjudication track should only be made available after an action is commenced.

The Committee understands, from anecdotal evidence, that this procedure is rarely, if ever, used. A voluntary package of devices intended to simplify the judicial process and reduce costs is salutary but the risk is that important rights may be sacrificed if accelerated adjudication is imposed on a party from the outset, or before the disadvantages are fully appreciated. The Committee does not believe that general adoption of Rule 9 would be beneficial at this time.

RULE 10- Submission of Information; Certification Relating to Alternative Dispute Resolution

This Rule adds to the submissions at the preliminary conference, a certification that counsel have discussed with their client the ADR opportunities and a statement as to whether they are willing to purse mediation at some point in the litigation. The Committee believes that such a requirement invades the attorney-client relationship and therefore does not recommend adoption of the rule.

RULE 11 - Discovery

This Rule sets forth certain requirements for the contents of the preliminary conference order to be issued after the preliminary conference. In particular, the rule requires that the preliminary conference order contain specific provisions about the early disposition of the case; a comprehensive schedule for disclosure, motion practice, compliance conference, filing of note of issue, pretrial conference and trial; and any limitations on interrogatories and other discovery. The rule also requires the court to determine whether discovery will be stayed pending the determination of any dispositive motion.

The Committee does not recommend adoption of this rule. The Uniform Civil Rules already contain detailed requirements for preliminary conferences, *see* Uniform Rule § 202.12, which for the most part duplicate the provisions in this Commercial Division Rule. The Uniform Civil Rules also require the court to make a written order, or otherwise record the directions of the court and stipulations of counsel, following the conference. *See* § 202.12(d). Adoption of Commercial Division Rule 11 would therefore not significantly alter current practice in other

courts or promote efficiency. In addition, as the reference in the rule itself indicates, the court already determines, pursuant to CPLR 3214(b), whether discovery will be stayed pending the determination of any dispositive motion.

RULE 11-a – Interrogatories

This Rule sets forth presumptive limitations on interrogatories. Specifically, interrogatories are limited to twenty-five (25) in number, including subparts, "unless another limit is specified in the preliminary conference order." The rule also limits interrogatories to certain topics, such as the names of witnesses with knowledge of information material and necessary to the subject matter of the action; computation of each category of damage alleged; and the existence, custodian, location and general description of material and necessary documents. Interrogatories seeking information not specified in the rule are permitted only on consent of the parties or by order of the court, for good cause shown. Finally, the rule permits claims and contention interrogatories thirty (30) days before the close of discovery, unless the court orders otherwise.

The Committee believes that the presumptive limitations set forth in this rule on the number and content of interrogatories would result in increased efficiency and streamlined litigation, and should be adopted. There are currently no such limitations in CPLR 3103, which provides only that, except in matrimonial actions, a party cannot both serve interrogatories and demand a bill of particulars under CPLR 3041; and that, in personal injury, injury to property, and wrongful death actions, a party cannot pursue both interrogatories and a deposition of the same party without leave of court. Nor is there any limit on the scope of interrogatories in CPLR 3131, which permits interrogatories to relate to any matters embraced by the general discovery requirements of CPLR 3101, and allows answers to interrogatories to be used to the same extent as answers given at a deposition. Notably, the presumptive limitations in the Commercial Division rule are not absolute. If circumstances warrant, the preliminary conference order may provide for more or less than the twenty-five (25) interrogatories set forth in Commercial Division Rule 11-a(a), and likewise, if circumstances warrant, the parties may agree, or the court may order, for good cause shown, that the limits on the content of interrogatories set forth in 11-a(b), be changed. See 11-a(c). In the Committee's view, the presumptive boundaries set forth in the rule will serve as a useful guideline for limiting unnecessary, burdensome or abusive discovery practices in appropriate circumstances.

RULE 11-b – Privilege Logs

This Rule governs the review of documents for privilege and the creation of privilege logs. The rule, which requires the parties to meet and confer regarding the scope of privilege review, contains a heavy bias in favor of a categorical approach to privilege logs, whereby the parties are encouraged to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. Parties who refuse to permit a categorical approach, and who insist instead on a document-by-document listing on the privilege log, may be required, upon application of the producing party, to bear the costs, including attorneys' fees, of preparing the document-by-document log. The rule also details how uninterrupted e-mail chains are to be treated on privilege logs, and provides that the parties may engage a Special Master to help them efficiently generate privilege logs, with costs to be shared.

CPLR 3122 prescribes a document-by-document approach to privilege logs, whereby the producing party is required to state, for each document, the legal ground for withholding the document, along with the type of document, the general subject matter of the document, and such other information as is sufficient to identify the document. *See* CPLR § 3122(b). The Committee believes that the provisions of Commercial Division Rule 11-b, with its preference for a categorical approach to privilege logs, as opposed to the document-by-document approach in CPLR 3122, should generally be adopted, especially for cases with heavy document discovery. The categorical approach outlined in Section 11-b(b)(1) of the rule is more efficient and cost-effective for the parties, helps to streamline litigation and facilitates expeditious court review. Requiring the parties to meet and confer, see 11-b(a), to discuss privilege logs and related issues is also sensible. Likewise, the rule's provisions regarding email chains, which are treated as one document on a document-by-document privilege log, see 11-b(b)(3), are sound.

The Committee is not in favor, however, of the rule's provision regarding cost allocation, see 11-b(b)(2), which permits a party required to produce a document-by-document privilege log (because the other side refused to consent to the categorical approach) to apply to the court for costs associated with that log. The Committee instead recommends that, where the parties disagree about which approach to follow, the court should determine whether the categorical approach or CPLR 3122 will be used. The Committee also does not recommend adopting the rule's requirement that a "responsible attorney," that is, someone who has supervisory responsibility over the privilege review, be actively involved in establishing and monitoring privilege review

procedures, see 11-b(d), and then provide a "certification" that the review was properly conducted, see 11-b(1). In the Committee's view, this requirement is not necessary, as it goes without saying that privilege reviews must be conducted in a lawful, reasonable and good faith manner.

The Committee recommends the approach taken by some federal courts which, by local rule, eliminate the requirement that attorney-client communications and attorney work product created after the filing of the complaint be included in the privilege log, unless otherwise ordered by Court. *See e.g.* Local Rule 26.1(e)(2)(c) of the Southern District of Florida.

RULE 11-c – Discovery of Electronically Stored Information from Non-Parties

This Rule requires parties to adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information (ESI) from nonparties. The Committee does not recommend adopting this rule, as such discovery is already adequately governed by the CPLR and the Uniform Civil Rules and adopting this rule would not significantly promote efficiency or reduce the burdens of litigation.

RULE 11-d – Limitations on Depositions

This Rule sets forth limits on the number of depositions that may be taken by the parties. In particular, unless the parties stipulate or the court orders otherwise, the parties are limited to ten (10) depositions of seven (7) hours per deponent. The rule further provides that the deposition of an entity through one or more representatives shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf. Moreover, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), counts as a separate deposition. Finally, the deposition of an entity is treated as a single deposition, even though more than one person may be designated to testify on the entity's behalf, and the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of court, which is to be freely granted.

The Committee believe that this rule's limitations on the number of depositions, and length of each of those depositions, should be broadly adopted. Adopting such limitations, which mirror federal practice, will obviously lead to more efficient and streamlined discovery, and reduce the costs and burdens of litigation in appropriate circumstances. Notably, the presumptive limitations

in the rule can be altered "for good cause shown," see 11-d(f), so this Commercial Division Rule, while providing useful boundaries, does not serve as a straightjacket. Nevertheless, parties will need to consider carefully what depositions they actually need.

RULE 11-e - Responses and Objections to Document Requests

This Rule is similar to CPLR 3122 with an additional directive in subsection (d) for the responding party to state whether the production of documents is complete, that there are no responsive, non-privileged documents in its custody or explain why the production is not complete.

The Committee supports this requirement, with the amendment that the statement be made at the time of disclosure rather than at the close of discovery.

RULE 11-f - Deposition of Entities; Identification of Matters

This Rule sets forth specific proceedings for notices of depositions and subpoenas and specifically provides a procedure for noticing corporate representations for deposition. Depositions pursuant to subpoena and notice are adequately addressed in CPLR Articles 23 and 31, respectively. The Committee does not see the need to adopt further language.

RULE 11-g - Proposed Form of Confidentiality Order

This Rule requires that any proposed confidentiality agreement conform to the form in Appendix B of the rules unless the parties seek permission from the court to deviate from that form. The Committee does not see the need to adopt this rule for all confidentiality orders. However, the Committee has reviewed the form in Appendix B and commends it to practitioners seeking to draft such an order.

Rule 12 - Non-Appearance at Conferences

This Rule provides a sanction for failure to appear at a conference. It is duplicative of language already contained in the Uniform Rules and therefore the Committee does not recommend adoption of this rule.

RULE 13 – Adherence to Discovery Schedule, Expert Disclosure

This Rule contains three subdivisions, which address, respectively, adherence to discovery schedules, document production in advance of depositions, and expert disclosure. The Committee's view is that none of these subdivisions should be adopted beyond the Commercial Division.

Subdivision (a), which addresses compliance with discovery schedules, does not impose any significant or meaningful change over the current rules and requirements, which are codified in Rule 202.12(f), including the imposition of sanctions for failures to comply. Therefore, adoption of this subdivision could not be expected to result in any improvements in civil litigation.

Subdivision (b) would permit a party seeking documents in preparation for a deposition to seek preclusion of any such documents that are not timely produced. This appears to be an effort to address the situation of depositions being adjourned because the parties do not have all documents necessary to prepare for and conduct the deposition. While this remedy may be well suited to commercial litigation, it is view of the Committee that it is not suitable for personal injury cases. Unlike commercial litigation, which typically involves documents that are in the possession of the parties, documents pertinent to personal injury cases (i.e., medical and employment records) are often in the possession of non-parties and preclusion would be inappropriate in such circumstances. The Committee is of the view that CPLR 3126 provides a more flexible rule that is effective in addressing failures to comply with orders directing the production of documents, without requiring mandatory preclusion of evidence that could lead to unjust results.

Subdivision (c), addresses expert disclosure in three respects. First, it would require the parties to confer regarding the timing of expert disclosure within thirty (30) days of the completion of factual discovery and would require all expert disclosure to be completed before the Note of Issue is filed. The Committee finds that a state-wide "one size fits all" time requirement is neither warranted nor appropriate. Rather, courts should be free to fashion schedules most suited to their caseloads and the needs of each specific case. The Committee further notes that adoption of this timing requirement would lead to delays in filing Notes of Issue and increase litigation costs by forcing parties to retain experts in cases that would otherwise settle before such costs are incurred. The Committee is also concerned that rigid timing mandates without regard to prejudice would prevent cases from being decided on their merits. For these reasons, the Committee is of the view that the timing requirements of Rule 13(c) would be counterproductive. Finally, the Committee

does not recommend expanded expert disclosure beyond that currently required by CPLR 3103(d)(1)(i).

RULE 14- Disclosure Disputes

This Rule requires parties to send a letter to the court raising any existing discovery disputes before making a formal motion., and notes that discovery disputes are preferred to be resolved through court conferences as opposed to motion practice. Many judges have implemented such a procedure, but statewide application may not be feasible, depending on caseload volume.

The rules for noncommercial division cases already require that discovery disputes first be attempted to be resolved between the parties before any party makes a motion. An affidavit of a good faith attempt to resolve the matter must be attached to every motion for discovery (Rule 202.7). Therefore, the Committee does not recommend adoption of this rule.

RULE 14-a – Rulings at Disclosure Conferences

This Rule sets forth a procedure for the memorialization of decisions made at disclosure conferences. The Committee does not recommend the procedures set forth in this rule. However, the Committee recommends that all decisions or agreements at disclosure conferences be reduced to writing and either stipulated to or so ordered by the court.

RULE 15- Adjournments of Conferences

This Rule provides that adjournments on consent are permitted with the approval of the court for good cause and that adjournment of a conference will not change any subsequent date in the preliminary conference order unless directed by the court. There is no comparable provision in the Uniform Rules. Nonetheless, granting of adjournments is solely within each judge's discretion. The Committee believes it should remain within judicial discretion and therefore does not recommend adoption of this rule.

RULE 16 - Motions in General

This Rule specifies the content and form for notices of motion and orders to show cause, requires that proposed orders accompany any dispositive motion, and sets forth criteria for

adjournments of both dispositive and non-dispositive motions. Current CPLR and Uniform Rule provisions substantially address the items in this rule and an additional rule is not needed. See CPLR 2214 (a); 3212(b); and Uniform Rule 22 NYCRR 202.8 (e)(1).

RULE 17 - Length of Papers

This Rule limits to twenty-five (25) pages the length of memoranda of law, affidavits, and affirmations and to fifteen (15) pages any reply memoranda. The Committee does not recommend adoption of this rule because there are some cases that simply require more extensive analysis, and justice would not be served by making parties move for permission to present that analysis.

RULE 18 - Sur-Reply and Post-Submission Papers

This Rule, absent express permission in advance of the motion, bars sur-replies and post-motion-submission papers, except permits a letter that notes any post-submission court decision relevant to the pending issues. The Committee does not recommend adoption of this rule because it should be left to judicial discretion whether to allow sur-reply and post-submission papers. When counsel includes new arguments or cases in reply papers, justice would not be served by having a presumption of no response.

RULE 19 - Orders to Show Cause

This Rule allows orders to show cause only when there is a genuine urgency and further bars the submission of reply papers on orders to show cause. The Committee does not recommend adoption of this rule because, currently, different judges and courts have practices that make a uniform rule difficult to apply. Additionally, a general prohibition of reply papers would not further the resolution of motions on the merits.

RULE 19-a. - Motions for Summary Judgement; Statements of Material Facts

This Rule sets forth that in summary judgment motions, the court may direct that the movant annex to the papers a short and concise numbered list of the material facts with respect to which there is no genuine issue of fact. The opponent must respond to each numbered fact and state whether there is a disputed question. Both movant and opponent must provide record citations. The Committee recommends this rule, as it is likely to greatly assist in narrowing and

clearly setting forth the material issues. Indeed, the Committee recommends that a statement of material facts not in dispute should be required in all cases and not just where the court directs. The rule is also consistent with federal practice and may curtail summary judgment motions where there are material issues of fact.

RULE 20 - Temporary Restraining Orders

This Rule requires notice to an adverse party of any application for a temporary restraining order, unless the moving party can demonstrate that significant prejudice would ensue from such notice. The Committee recommends adoption of this rule because it advances a just result by giving all parties notice of the issues and an opportunity to comment. This rule expands the requirements of Uniform Rule 202.7(f) in that it specifically requires the moving party to provide copies of the papers to the opposing parties unless prior notice would prejudice the moving party's rights.

RULE 21 – Courtesy Copies

This Rule bars courtesy copies to the court on motions submitted in hard copy and requires courtesy copies on motions submitted via electronic filing. This rule states that courtesy copies of pleadings shall not be submitted unless requested but goes on to state that such copies shall be submitted in electronically filed cases. The Committee does not recommend this rule, as it is contrary to the goals of paperless electronic litigation.

RULE 22- Oral Argument

This Rule permits any party to a motion to request oral argument by letter or by so stating on the face of the motion or opposition papers. The rule goes on to state that the judge will have the discretion whether to hear oral argument and to set the timeframe for such argument with notice of the date being given, if practicable, at least 14 days in advance. Many judges outside of the Commercial Part have specific rules regarding oral argument that are governed by their caseloads and case types. Therefore, the Committee does not recommend adoption of this rule except for the language: "Any party may request oral argument on the face of its papers," which has the salutary effect of avoiding additional letters and applications.

RULE 23- 60-Day Rule

This Rule provides that, if there is no decision on a motion within 60 days of submission, movant's counsel is required to send a letter to the court alerting it to that fact. The Committee does not recommend adoption of this rule. Judges are presumed to be aware of standards and goals.

RULE 24- Advance Notice of Motions

This Rule provides that, except for discovery motions, or motions to dismiss, or motions for summary judgment, including summary judgment motions in lieu of a complaint, or motions to be relieved as counsel, or motions for pro hac vice admission, or motions for reargument, or motions in limine, parties must file a motion notice letter in advance of making any other type of motion that will be followed by a motion conference. The Committee does not recommend the adoption of this rule.

RULE 25 - Scheduling of Trial

This Rule provides, *inter alia*, that where a party seeks adjournment of the trial date "for any reason," the application must be made in the absence of "extraordinary circumstances" within ten days of the setting of the trial date.

The Committee does not recommend adoption of this rule, as it may result in substantial injustice.

RULE 26 - Length of Trial

This Rule requires that "[a]t least ten days prior to trial or such other time as the court may set, the parties … shall furnish the court with a realistic estimate of the length of the trial."

The Rule is silent as to what may occur when the trial exceeds its anticipated length. Also, in many counties, a judge is not assigned until after jury selection is completed. At that time, a judge may inquire as to the estimated length of the trial.

The Committee does not recommend the adoption of this rule.

RULE 27 - Motions In Limine

This Rule requires that "parties shall make motions in limine no later than ten days prior to the scheduled pre-trial conference date … unless otherwise directed by the court." The Committee does not recommend adoption of this rule.

This rule would constitute a drastic change from current practice. Presently, while making such motions later rather than sooner carries its own inherent penalty (*i.e.*, the court is less likely to view the motion with favor), there is no deadline per se. More than that, the case law holds that a motion *in limine* need not be made in writing absent a court rule that provides to the contrary. *Wilkinson v Br. Airways*, 292 AD2d 263, 264 [1st Dept 2002] ("Contrary to plaintiff's contentions, there is no requirement that an *in limine* motion be made in writing and be in accordance with CPLR 2214. The court, therefore, properly considered defendant's oral application").

Good practice usually dictates that motions in limine be made in writing and that they be early enough so as to afford the adversary adequate time to respond and the court adequate time to make a careful ruling. Nonetheless, there may be parties who find it cost-prohibitive to make such motions in writing in every instance. There may also be instances in which the application is made orally because the right to the ruling is so clear that the movant does not anticipate opposition. Additionally, there may be instances where the need for a motion in limine cannot be anticipated until the offer of proof is made.

Further, the rule does not indicate what consequence, if any, should follow when a party fails to timely move for preclusion of proof. The Committee is concerned that the rule could lead to admission of proof that would otherwise be clearly inadmissible, in some instances altering the substantive result of the trial.

RULE 28 - Pre-Marking of Exhibits

This Rule requires that the exhibits each side intends to offer in evidence be marked for identification at the pre-trial conference. The rule further requires that the objections, if any, to the adversary's proof be lodged at that time. The Committee does not recommend adoption of this rule. In many courts there is no pre-trial conference that would allow for this practice.

RULE 29 - Identification of Deposition Testimony

This Rule requires that each party furnish "[a]t least ten days prior to trial or such other time as the court may set" "a list of deposition testimony to be offered by it as to which objection has not been made and, identified separately, a list of deposition testimony as to which objection has been made." The Committee does not recommend adoption of this rule.

This rule would arguably be inconsistent with CPLR 3117, governing use of depositions at trial. For example, CPLR 3117(a)(1) provides that "any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness," not that the deposition may be used only if the proponent notifies the court of the proposed use at least ten days prior to trial. Similarly, CPLR 3117(a)(3)(i) permits use in certain circumstances of the deposition of a deponent who has died, again without any caveat concerning pre-trial notification of the proponent's intent. Additionally, this rule would add to the cost of litigation, without furthering judicial economy.

RULE 30- Settlement and Pretrial Conferences

Rule 30(a) provides that the court may schedule a settlement conference at any time after the discovery cutoff date. The Committee recommends adoption of this rule.

Rule 30(b) provides that counsel shall confer prior to a pre-trial conference, and be prepared to discuss uncontested and contested facts. The Committee does not recommend adoption of this portion of the rule to the extent that it assumes that the trial court judge will be known prior to trial.

Rule 30(c) provides that prior to a pre-trial conference, counsel for the parties to consult in good faith regarding their respective experts' anticipated testimony that is in dispute. The Committee does not recommend adoption of this rule because the requirements in CPLR 3101(d) adequately address areas where there are no disputes between experts.

RULE 31 - Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions

Rule 31(a) provides that "[c]ounsel shall submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set" and that "[a] single memorandum no longer than 25 pages shall be submitted by each side." Under the current rules, section 202.35[c] of the

Uniform Rules provides that when ordered to do so, the parties "shall submit to the court, before the commencement of trial, trial memoranda which shall be exchanged among counsel." The Committee does not recommend adoption of this portion of the rule beyond what is currently provided in the uniform rules.

Rule 31(b) requires that counsel "submit an indexed binder or notebook of trial exhibits for the court's use," and, in addition, an extra copy "for each attorney on trial" and for the use of the witnesses. The Committee does not recommend adoption of this portion of the rule for all trials, as it is with the discretion of the trial judge to manage such matters as warranted by the case.

Rule 31(c) requires, where the trial is by jury, that the parties submit "case-specific requests to charge and proposed jury interrogatories" either "on the pre-trial conference date or such other time as the court may set." The Committee does not recommend adoption of this portion of the rule for all trials, as it is within the discretion of the trial judge to determine the timing of the submission of the request to charge and the jury interrogatories.

RULE 32- Scheduling of Witnesses

This Rule would require each party to "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." The list would have to be provided "[a]t the pre-trial conference or at such time as the court may direct …", with a copy to the adversary.

This rule would greatly alter New York practice. There is currently no requirement that each side provide the other with a list of all the witnesses that will be called. Siegel, N.Y. Prac. § 349 [5th ed., January 2017 Update] ("The caselaw under the CPLR has confirmed that parties must reveal the name of anyone they know of who witnessed the event at issue. This does not mean that upon demand each party must serve on the other a list of all witnesses she intends to use at the trial").

The Committee does not recommend adoption of this rule. First, while one could argue that pre-trial disclosure of all witnesses would better serve to combat "trial by ambush," the Committee believes that the added requirements are unnecessary to achieve that end and are more likely to frustrate disposition on the merits. As matters now stand, the case law already requires disclosure of those witnesses (including eyewitnesses and notice witnesses) whose testimony could otherwise unfairly surprise the adversary. To the extent that this rule could be used to preclude

calling of a witness whose testimony would not be surprising, the rule achieves no end except for frustration of the merits.

The Committee is also concerned with what could occur when, for example, the trial reaches the third hour of the testimony of a fully disclosed witness whose testimony was estimated to last only two hours. Again, the concern is that procedure could trump merits.

RULE 32-a - Direct Testimony by Affidavit

This Rule states, "The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony."

Although the rule is not mandatory (the operative word is "may") and would not impair the parties' right to conduct "live" cross-examination and re-direct examination of the witnesses, the Committee does not recommend adoption of this rule.

Even assuming that the provision makes sense in a large commercial case in which teams of lawyers will have ample opportunity to carefully draft the "direct testimony" affidavits of all the witnesses — and one can argue that such mechanism is even in that setting more likely to result in counsel's version of the witness's testimony than that of the witness — the same quantum of legal resources will not necessarily be available in other kinds of actions involving lesser sums of money.

RULE 33 - Preclusion

This Rule provides that "[f]ailure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126." The Committee believes that this rule is vague and, depending on how it is construed, could lead to substantial injustice, and does not recommend its adoption.

Currently, preclusion is only one of the penalties authorized by CPLR § 3126. The statute also authorizes "striking out of pleadings or parts thereof," staying of proceedings, and "an order that the issues to which the information is relevant shall be deemed resolved" in the adversary's favor. This gives rise to the question of whether the rule's mention of only one of the statutorily listed sanctions, preclusion, means that the others cannot be appropriately imposed. If that is so and the only, or even primary, penalty is preclusion, such may unfairly impact the party with the

burden of proof. Beyond that, the Committee questions whether it makes sense to posit that preclusion is the only possible sanction for such transgressions as calling a disclosed witness out of order, miscalculating the duration of the witness' testimony, or failing to pre-mark an exhibit.

More fundamentally, the Committee believes that the current rules adequately deal with the non-compliance of pre-trial and trial procedures and orders.

RULE 34- Staggered Court Appearances

This Rule is intended to encourage court staggered appearances by providing specific time slots for parties to appear whatever the nature of the appearance. For example, judges generally have specific motion and conference days and, in accordance with this rule, each judge on such a motion or conference day would schedule a specific time slot in which each motion or conference would proceed, including the length of time allotted for each. It has not been unusual for courts to schedule all appearances on any given day at, for example, 9:30 AM, only to have very crowded courtrooms at that time and parties often waiting hours to be heard.

The preamble to this Rule notes the need for cooperation among the members of the bar and parties if the rule is to succeed in accomplishing its goal of reducing congestion among cases, attorneys and parties in courtrooms and eliminating inordinate wait time to be heard. Our committee believes that the efficiencies to be gained with staggered court appearances are significant and accordingly the Committee recommends expanding the application of this rule to all action types.

Respectfully submitted,

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