NEW YORK STATE BAR ASSOCIATION

# Report and Recommendations of the **Uniform Rules Committee**

August 2021

Report approved by the New York State Bar Association's Executive Committee on August 6, 2021

# REPORT OF THE
# TASK FORCE ON UNIFORM RULES

July 19, 2021

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Opinions expressed are those of Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

## I. INTRODUCTION

On December 29, 2020, Chief Administrative Judge Lawrence Marks issued an order adopting 29 new rules into the Uniform Rules for the Supreme Court and the County Court, effective February 1, 2021, based upon rules of the Commercial Division. These new rules were not subject to a comment period, although in 2019, the OCA Advisory Committee on Civil Practice was asked to study all of the rules of the Commercial Division, and that Committee's report was posted for comment. (See Section II., below). Notice of these changes did not reach the leaders of the New York State Bar Association until mid-January, 2021. NYSBA immediately launched a series of CLE programs to familiarize the lawyers of the state with the new rules shortly after the rules became effective.

As lawyers became familiar with the new rules, NYSBA leaders began hearing comments about the unwelcome changes imposed by the new rules. In addition to complaints about the lack of substantial notice and opportunity to comment on proposed rules, there were specific comments regarding the difficulty of applying many of rules, which were created for large commercial cases, to the broad panoply of actions and proceedings in Supreme and County Courts.

On April 12, 2021, the first meeting of the NYSBA House of Delegates following the effective date of the new rules, the following resolution was passed by an overwhelming majority of the House:

> "Be it resolved that based upon the significant concern expressed by the membership of NYSBA, that the President, or his designees immediately reach out to the administrative judges, the OCA, or the Chief Judge as is appropriate, to request an immediate meeting to discuss the staying the rules adopted by the Administrative Order AO/270/2020 dated December 31, 2020 by Chief Administrative Judge Marks for a period of one year so that all stakeholders can adequately examine and comment on the rules as well as the impact that the rules will have on attorneys and their clients especially the underserved portion of our population and further to examine the cost and impact that

> these rules will have on access to justice by all segments of our population but especially amongst the underrepresented portions. It is further resolved that a copy of this resolution will be immediately delivered to the administrative board of the courts.

This resolution also had the support of a number of Sections of NYSBA, including the Judicial Section.

In accordance with the resolution, then President Scott Karson contacted Chief Administrative Judge Marks to urge the imposition of an immediate stay of enforcement of the new rules to permit NYSBA to comment fully upon them. Shortly thereafter, Mr. Karson created this Task Force to coordinate the efforts of NYSBA in furtherance of the resolution.

The Task Force elicited input regarding the rules in two major ways. First, all NYSBA Sections and Committees were invited to send comments to the Task Force by July 1, 2021. Second, the Task Force created four open forums on May 14 and 15, 2021, inviting all NYSBA members, all local and specialty bars, and any New York lawyer to attend in order for the Task Force to hear their comments. Despite relatively short notice, and the difficulties of finding time within work schedules to attend a two hour forum, approximately 400 lawyers registered for the forums. The Task Force heard many comments from them—some representing themselves, and some representing local bar associations—and many of them participated in a survey launched during the forum. The survey results are set forth in Section IV, below. The comments received from the forums are covered in the substantive sections of this report: Sections V – VIII, below.

On June 1, 2021, Chief Administrator Marks informed NYSBA leaders that the Administrative Board had declined to issue a stay, but was willing to make appropriate changes to the rules, and invited NYSBA to make any such recommendations. Despite further meetings between President T. Andrew Brown and the Chief Judge and Chief Administrative Judge, there has been no stay issued.

The Task Force received comments from a number of sections, committees and local bar associations. The written comments received are attached in the Appendix. The Task Force also sought input from the matrimonial bar regarding potential conflicts between the new rules and existing rules pertaining to matrimonial actions. The Family Law Section of NYSBA and the New York Chapter of the American Academy of Matrimonial Lawyers both noted that a number of their leaders are members of the OCA Advisory Committee on Matrimonial Law and did not wish to duplicate the efforts of that Committee. This report has included comments originally made by that Committee, and we urge the Administrative Board to consider additional comments which may be made directly by that Committee.

For most of the rules, we recommend that they be eliminated. However, for a number of these rules, we recognize that the rules may have some efficacy if only certain portions are eliminated or changed. For such rules, we have included recommended amending language, using the following format: strikethrough of provisions which are to be deleted, and capital letters within brackets for language which is to be added.

## II. HISTORY OF "NEW RULES"

In 2018, the Advisory Committee on Civil Practice ("Advisory Committee") was asked to evaluate the rules of the Commercial Division (§202.70) to discern which of the rules should be adopted for use in all civil cases. The Advisory Committee spent several months studying the rules and seeking input from judges and court personnel in addition to their members who have expertise in procedural laws and rules. In July, 2018, the Advisory Committee released its report. In the report, it made the following recommendations: 1) that "wholesale adoption of the

rules statewide is not warranted,"[1] 2) that some of the rules may "add to the costs of litigation and/or place an added burden on the already strained resources of the courts,"[2] 3) that "statewide application of some rules would be inappropriate given the disparate caseloads among the various courts,"[3] and 4) that some of the rules "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."[4]

The Advisory Committee then recommended adopting nine of the Commercial Division rules for general use and recommended against adopting the remaining Commercial Division rules. The report addresses each rule, setting forth the reasons for recommending either the adoption or rejection of the rule's application to all civil matters. The Advisory Committee's Report is attached as Appendix 1.

On October 15, 2018, John W. McConnell, then Counsel to OCA, disseminated the Report with a request for public comment. The request for public comment was titled "Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction." The memorandum seeking public comment states that the Advisory Committee recommended nine Commercial Part rules. The final sentence of the memorandum is "The Administrative Board is now seeking public comment on the recommendations set forth in the Advisory Committee's Report." A copy of the Memorandum is attached as Appendix 2.

[1] Report of the Advisory Committee on Civil Practice on the Commercial Division Rules [hereinafter Advisory Committee Report"], July 2018, p.1.
[2] Advisory Committee Report, p. 1-2.
[3] Advisory Committee Report, p. 2.
[4] Advisory Committee Report, p. 2.

It is not clear how the request for comment was disseminated, other than the posting on the New York Courts website. In November, 2018, the New York State Bar Association's CPLR Committee ("CPLR Committee") addressed the Request for Comment. It is not known how the CPLR Committee became aware of the Advisory Committee Report; it may have been through the now-retired staff liaison, Ron Kennedy, or it may have been through one of the members of the CPLR Committee who also serve on the Advisory Committee.[5] The CPLR Committee only addressed the nine rules recommended by the Advisory Committee, understanding that the request to comment related to the adoption of "certain rules of the Commercial Division" and the direction was to comment directly on the Advisory Committee's Report and its recommendations. The CPLR Committee did not understand the request for comment to require the evaluation of all of the rules of the Commercial Division.

The CPLR Committee issued two Memoranda. The first, on January 11, 2019, supported the Advisory Committee's recommendations with respect to 8 of the 9 provisions. With respect to Rule 19-a, concerning motions for summary judgment, the CPLR Committee requested additional time in order to receive a report from a subcommittee and then vote at a meeting on January 18, 2019. On January 24, 2019, the CPLR Committee issued its second Memorandum, which opposed the application of Rule 19-a to all civil cases. The CPLR Committee also urged that if such a rule were to be adopted, that the imposition of the requirement for a statement of undisputed facts be left to the discretion of the judge, as the Commercial Division rule provides, and not mandatorily imposed on all cases, as the Advisory Committee recommended. Both Memoranda were issued by NYSBA's Government Affairs Office on letterhead that clearly shows that the views are those of the CPLR Committee, and which includes the standard

[5] James Blair, Sharon Stern Gerstman and Thomas Gleason are active members of both the CPLR Committee and the Advisory Committee.

language for a report of a section or committee: "Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar association unless and until they have been adopted by its House of Delegates or Executive Committee." In accordance with NYSBA by-laws, and the usual practice of the Government Affairs Office, the memoranda would also have been sent to the Association president. A copy of the CPLR Committee's Memoranda are attached as Appendix 3.

Four other entities provided comments:

1. On January 28, 2019, the New York City Bar commented on some (but not all) of the nine rules recommended by the Advisory Committee, and also commented on seven rules which were rejected by the Advisory Committee for statewide application, but only sought adoption of two of them.
2. On December 11, 2018, the Matrimonial Practices Advisory and Rules Committee commented on the nine recommendations and indicated that a number of these rules were in conflict with existing rules concerning matrimonial actions.
3. On January 28, 2019, an organization, "Managing Attorneys and Clerks Association, Inc."[6] commented on some (but not all) of the nine rules recommended by the Advisory Committee, and also commented on several other provisions which were rejected by the Advisory Committee, seeking the adoption of five of them, and opposing the adoption of four of them.

[6] Managing Attorneys and Clerks Association, Inc. was incorporated in 2012, but may have been in existence for a longer period of time. According to a 2013 law.com article (https://www.law.com/corpcounsel/almID/1365753527511/New-Group-Brings-Together-Legal-Dept-Managing-Attorneys/), it is made up of Managing Attorneys and Managing Clerks of New York City law firms and legal departments. Many of their officers and directors are non-lawyers, who work as managing clerks, overseeing non-attorney staff at the constituent firms.

4. On January 14, 2019, the Corporation Counsel for the City of New York commented on one rule recommended by the Advisory Committee: Rule 11-b concerning privilege logs.

A copy of the comments of these four entities is attached as Appendix 4.

After the comment period in January 2019, there was no further request for comment or any notification to NYSBA or any other bar association that the Administrative Board was considering a broad adoption of 29 of the Commercial Division Rules, until January 2021, after the Administrative Board had acted, announcing that the rules would become effective February 1, 2021.

## III. CONFLICTS BETWEEN COURT RULES and the CPLR

When the CPLR was enacted in 1962, some of its provisions were designated with section numbers (laws) and some were designated with the letter "R" (rules). Amendment to the laws was reserved to the legislature, but amendment to the rules could be effected by either the legislature or by the Judicial Conference, established under the Judiciary Law, subject to legislative approval.[1] In 1978, the power of the Judicial Conference to so amend the rules was rescinded,[2] and amendment of both the laws and rules of the CPLR was made within the exclusive control of the legislature. There have been attempts to empower the Chief Administrator of the Courts with the ability to amend the rules of the CPLR, without success.[3]

[1] Judiciary Law §229(3).
[2] L. 1978, ch 156, *eff.* May 19, 1978
[3] *See, e.g.,* 1983 Legislative Program of the Office of Court Administration.

The Courts are empowered to adopt rules concerning the conduct of court proceedings, subject to the limitations of the Constitution, Article 6, §30.[4] Any rules adopted cannot impair substantive rights and must be consistent with existing legislation. Rules which enlarge or abridge rights, or which impose procedural burdens which impair statutory rights or remedies may be stricken or limited.[5] The rule-making authority of the Courts is not subject to the Administrative Procedure Act; it is thus limited only by these principles as set forth in the Constitution and the Judiciary Law, as delineated by the Court of Appeals.

Since the adoption of the first set of Uniform Rules for Trial Courts in 1986, there has been an increase in the number of rules, many of which have substantive effect. Some rules have become the only source of procedure for a significant aspect of the case.[6] This trend makes it increasingly difficult for practitioners, particularly those who do not litigate frequently or whose practice is primarily in another jurisdiction, who would likely turn to the CPLR for the source of procedure. This is particularly true where the relevant CPLR provision is extensive (e.g. CPLR 3212 on Summary Judgment) and includes a detailed list of the documents which must be included in any submission to the court (e.g. CPLR 3212(b) which sets forth all of the documents which are required to be attached to a motion for summary judgment; a "statement of material facts" is not included.).

A proliferation of rules adds cost to the proceeding. The time necessary to ensure compliance with all rules is either passed on as cost to the client or is to be borne by the lawyer.

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[4] *See,* Judiciary Law §211(1)(b), empowering the Chief Judge; Judiciary Law §212 empowering the Chief Administrator with respect to powers delegated by the Chief Judge, and Judiciary Law §213 establishing the requirement of advise and consent by the Administrative Board.

[5] *People v. Ramos*, 85 N.Y.2d 678, 687-8 (1995); *see also, A.G. Ship Maintenance Corp. v. Lezak,* 69 N.Y.2d 1 (1986).

[6] *See, e.g.,* 202.15 regarding the Videotaping of civil depositions; 202.21 (e) regarding striking the note of issue.

Unless additional rules are necessary in order to ensure that civil actions proceed efficiently and fairly, the additional rules are harmful to the process.

We recognize, however, that the Rules of the Commercial Division, contained under §202.70 of the Uniform Rules for Trial Courts, should not be subject to these comments, for several reasons. First, the Commercial Division was created and the rules adopted in order to create a procedural framework that rivaled the Federal Rules, and would provide the sort of framework that would be helpful in attracting legal disputes between multi-national or multi-state corporations to New York. Second, lawyers who have cases pending within Commercial parts are accustomed to practice under a framework of detailed rules, whether in federal court, or within the Commercial Part. We also recognize that such lawyers are likely to rely upon all of §202.70 in addition to the CPLR for such specialized practice, and look upon the rules as an amplification of the CPLR, even where they go beyond what is specified within the CPLR. Third, while the new rules are based upon the rules of the Commercial Part, many of the new rules differ significantly from the Commercial Part rules. In some cases, the new rules may be in conflict with the CPLR, while the Commercial Part rules do not present such a conflict.

The following new rules go beyond what is specified within the CPLR, and in certain cases may create an actual conflict.

A. **§202.20-a. Privilege Logs (based upon Commercial Division Rule 11-b(a))**[7] This rule allows the party requesting documents to specify whether the privilege log may cover categories of documents or must provide for a document by document review. If the party insists upon a document by document privilege log, the rule provides for cost-shifting. CPLR 3122(b)

[7] This will be covered in greater depth within Section V below.

clearly provides for a document by document privilege log, without any additional burden to be placed upon the party seeking disclosure. While the court may already have this power pursuant to CPLR 3103, the cost-shifting provisions of §202.20-a, if applied automatically in all document by document cases, may encroach upon a party's rights as set forth in CPLR 3122(b).

B. **§202.20-f. Disclosure Disputes (based upon Commercial Division Rule 14)[8].** This rule limits the ability of a party to make a motion regarding a discovery dispute. It requires the movant to first consult with other counsel to resolve the dispute, and the failure to so consult, "may result in the denial of a discovery motion….or in such motion being held in abeyance until the informal resolution procedures of the court are conducted." It should be noted that §202.7(a) and (c) require the moving party in a discovery dispute to include an affirmation that either a good faith effort to resolve the dispute was made, or an indication of "good cause why no such conferral with counsel for opposing parties was held." In contrast, §202.20-f relieves the moving party from conferral only in "exigent circumstances." While a motion may be denied without the requisite affirmation,[9] a strict requirement to "meet and confer" before a motion may be heard, has been held to be tantamount to seeking permission from the court to calendar the motion.[10] The rule in §202.7, allowing the movant to state reasons why conferral was not held, is a fairer limitation on discovery motions than providing that a motion cannot be heard, absent "exigent circumstances."

[8] This will be covered in greater depth within Section V below.
[9] *Barnes v. NYNEX, Inc.,* 274 AD2d 368 (2d Dept. 2000).
[10] *See, Costigan & Co., P.C. v. Costigan,* 304 AD2d 464 (1st Dept. 2003) which found the enforcement of prior Commercial Division Rule 24(a), requiring the parties to "meet and confer" improper. The Commercial Division Rule has since been revised.

C. **§202.8-d. Orders to Show Cause (based upon Commercial Rule 19).**[11] This rule limits Orders to Show Cause to instances where "there is a genuine urgency, ….a stay is required or a statute mandates so proceeding." This standard differs from the provision of the CPLR governing Orders to Show Cause (CPLR 2214(d)), which permits an order to show cause in any "proper case." Perhaps, in the Commercial Division, this rule is merely an explanation of what constitutes a "proper case," but in other disputes, where Orders to Show Cause are used much more frequently (e.g. in matrimonial cases, in cases where service must be specified), "genuine urgency" is not such a clarification.

D. **§202.8-g. Motions for Summary Judgment: Statements of Material Facts (based upon Commercial Rule 19-a).**[12] This rule, which goes far beyond the Commercial Division Rule upon which it is based, requires the inclusion by the moving party of a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." It also requires the opposing party to include "a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party." The rule specifies what must be included in both the statement and response to the statement, and also provides in subsection c: "Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party." This particular provision is contrary to the CPLR in a number of ways. First, the statement of material facts acts very much like a "Notice to Admit," the procedure for which is covered in CPLR 3123. Among other provisions, CPLR 3123(b) allows for a limitation on any deemed admission, and an opportunity to reverse the admission. §202.8-g

[11] This will be covered in greater depth within Section VI below
[12] This will be covered in greater depth within Section VII below

does not provide for any mechanism to reverse the admission which results from the application of subsection c..

There is also a very significant conflict between §202.8-g and the CPLR whenever the opposing party seeks to oppose the motion on grounds of timeliness, the failure of the movant to meet its burden, or CPLR 3212(f). In each of these cases, the rule insists that the opposing party oppose the motion on its merits by a response to the statement of material facts, despite CPLR 3212 and case law to the contrary. This conflict would not exist in the Commercial Part version of the rule, as presumably in the exercise of its discretion, the court would not seek the statement of material facts and its response is a case where the motion is untimely, where the movant failed to meet its burden, or where the opposing party has not yet had an opportunity to discover the facts necessary to oppose the motion.

Finally, the effect of the admission provided for in subsection (c) may result in the grant of summary judgment despite the fact that the opponent of the motion has "shown facts sufficient to require a trial of [an] issue of fact." CPLR 3212(b) provides that in such a case, summary judgment is to be denied.

### E. §202.8-e Temporary Restraining Orders (based on Commercial Rule 20).[13]

This rule provides that a temporary restraining order cannot be made ex parte, without a showing of "significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort." This rule goes beyond the previous rule in §202.7(f), which excepted cases involving domestic violence or RPAPL Article 7; no such exceptions are present here. This may be in conflict with CPLR 6313, which provides that in a motion for preliminary injunction, upon

[13] This will be covered in greater depth within Section VI below.

a showing of immediate and irreparable injury, a temporary restraining order may be granted without notice.

F. **§202.20-c(f) Responses and Objections to Document Requests (not included in any Commercial Rule).**[14] This rule which is based, in part, on Commercial Rule 11-e, adds a subsection which awards the party seeking the discovery the relief set forth in CPLR 3126(2), without requiring such a motion and without requiring the showing required by CPLR 3126, to wit, willful failure to disclose the document. This subsection is in direct conflict with CPLR 3126.

When there is a possible or actual conflict with the CPLR, not only must the practitioner be aware of the CPLR and the Uniform Rules, but also the application of the case law pertaining to the conflict, as it develops. While the law is clear that a direct conflict must be resolved in favor of the existing statute,[15] practitioners are put in a no-man's land if there is not yet case law particular to the CPLR provision and the rule in potential conflict. For this reason, it is important that the rules avoid any possibility of such a conflict or encroachment. Perhaps, it is reason alone to rescind each the rules which potentially conflict with the CPLR.

## IV. GENERAL COMMENTS TO THE NEW RULES

The Committee received comments from a variety of attorneys including those in solo or small firms and those in large firms and practitioners from rural areas of the state as well as the large metropolitan areas. Comments were received from practitioners who were familiar with the Commercial Division Rules and those whose practices (ex. Legal aid, matrimonial, personal

[14] This will be covered in great depth in Section V below.
[15] People v. Ramos, 85 N.Y.2d 678 (1995); A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1 (1986).

injury) had not previously dealt with Commercial Division Rules. We also received comments from court attorneys and judges.

While there were a few comments which were either wholly in favor of all the new rules or wholly against all the new rules, the majority of comments received were directed against certain rules. While some of the comments against some of the rules were very specific, many of the comments raised similar concerns. These general concerns included:

1) Time and cost involved in compliance with the new rules;

2) Unnecessary sanctions;

3) Tone of rules; and

4) General comments on rules.

**A. TIME AND COST ISSUES**

With regard to time and cost issues, commenters noted the inability to take on smaller cases due to the added time required to handle the case and the added cost to the client occasioned by the additional hours of attorney time necessary to complete the task. By way of example, a practitioner in Westchester County commented he would now be reluctant to represent a client whose case may have a value of $30,000. Whereas the rules previous applied only to cases in the commercial part, where the monetary threshold for Westchester County is $100,000, the application of these rules to all cases renders the smaller cases "not worth the time and effort" for the amount the client may ultimately recover after attorney's fees and added costs.

Similar comments were received from practitioners in the matrimonial field who commented that their clients are "people not corporations" on whom the new rules have a significant monetary impact. Commenters also indicated their inability to take on the number of

pro bono cases they would typically accept due to added time and cost issues. Legal services providers commented on their inability to obtain the services of outside attorneys to assist their indigent clients as a result of the new rule requirements. One rural commenter stated that due to his inability to take on smaller cases for clients who could not afford added costs, he was considering early retirement. This must be viewed in conjunction with the NYSBA Report and Recommendations of the Task Force on Rural Justice (April 2020) which addressed the access to justice issues prevalent in rural areas of the state (existing before the advent of the new rules). A copy of the Report of the Task Force on Rural Justice is annexed as Appendix 5. See also Section D, below, for survey results on the cost of the new rules.

### B. UNNECESSARY SANCTIONS

Comments on sanctions primarily concerned **§202.1 – Appearance by counsel with knowledge and authority (based upon Commercial Division Rule 1(a) and (c)).** Comments supported the provision requiring that counsel be familiar with the case and be fully prepared and authorized to discuss and resolve the issues which are "scheduled to be the subject of the appearance," although most felt that it need not be reduced to a "rule." Most commenters, however, felt the sanctions, granting a default judgment under Uniform Rule §202.27, or the imposition of financial sanctions under §130.21 were unduly harsh and unnecessary.

Concerns were raised from small practitioners who use the services of a per diem attorney who, although provided with case information, may not be fully prepared if the judge decides to discuss issues which were not anticipated to be the subject of the appearance (i.e., settlement demand or settlement authority at a discovery conference). For the same reason, experienced counsel felt this rule would inhibit sending new, less experienced attorneys to

discovery (or status) conferences to gain experience appearing before the Court. Notably Rule 202.1 was not recommended by either the OCA Advisory Committee on Civil Practice and was never commented upon by NYSBA's CPLR Committee, or any other entity providing comments. For these reasons, §202.1 is unnecessary, but at very least should be revised as follows to remove the sanction provisions:

> **Section 202.1 Uniform Civil Rules for the Supreme Court and the County Court are amended to create new subdivisions (f) and (g) as follows:**
>
> **(f) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared an authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. ~~Failure to comply with this rule may be treated as a default for purposes of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130.2.1.~~**
>
> **~~(g) It is important that counsel be on time for all scheduled appearances.~~**

Sanction concerns were also raised in connection with **§202.20-e Discovery Schedules[16] (based upon Commercial Division Rule 13(a) and (b))** which requires strict compliance with discovery orders. Noncompliance may result in imposition of "an appropriate sanction" or other relief under CPLR 3126.

Comments on **§202.23[17] Consultation Prior to Preliminary and Compliance Conferences (based upon Commercial Division Rule 8(a))**, included concerns as to whether the sanctions found in Section 202.21 would be applicable due to the language of the rule stating counsel "shall" consult on a variety of issues prior to each conference.

[16] See Section V, below.
[17] There are two new §202.23s. The one mentioned here is covered in section VIII below.

Overly harsh sanctions were also raised in connection with **§202.20-c [18]– Responses and Objections to Document Requests (based upon Commercial Division Rule 11-e).**

## C. TONE OF RULES

Language used in some Rules was seen as unnecessary and even demeaning to experienced practitioners. One example is §202.1 which advises counsel that it is important to be on time for scheduled appearances.

Comments also addressed §202.20-f and the requirement that counsel attest to the date, time and length of the in-person or telephonic conference held to discuss discovery disputes before resorting to court intervention. The rule requiring attorneys to actually time phone calls or personal discussions with opposing counsel was seen as unnecessary since attorneys are already required to attest to good faith efforts to resolve a discovery dispute in connection with a Motion to Preclude or Compel (CPLR 3105 and §202.7). Additional comments on §202.20-f included the inability to attempt discovery dispute resolution using email, a common practice when opposing counsel is not available for a phone call or personal meeting. One commenter indicated the inability to sign an affirmation of good faith as the new section requires attestation to the length of time and date of the phone call or personal meeting and does not permit attempts at resolution by email.

## D. COMMENTS ON THE RULES, IN GENERAL

In addition to the above, some general comments included:

[18] See Section V, below.

1. Lack of necessity for the rules in certain geographic areas of the state. These rules appear to be a statewide resolution to problems primarily encountered in the downstate metropolitan counties

2. Issues facing rural practitioners including lack of access to broadband and cell phone service, the limited number of practicing attorneys and the number of aging attorneys with limited knowledge of or access to technology were also addressed.

3. The necessity of certain rules was also questioned as commenters felt they could work out their own discovery schedules and issues by communicating with other counsel and that they could do so on a timely basis without the threat of harsh sanctions for lack of strict compliance.

Finally, a series of general questions was posed in a poll administered during four forums conducted by this Committee. Not everyone who participated in the forum necessarily took part in the poll. The results of that poll are as follows:

a) Overall, are you in favor of the Administrative Board's adoption of the New Rules?

| | |
|---|---|
| Yes | 16% (24 votes) |
| No | 71% (105 votes) |
| No Opinion | 13% (19 votes) |

b) What impact do you feel the New Rules will have on the efficient adjudication of cases?

| | |
|---|---|
| Positive | 14% (19 votes) |
| Negative | 67% (92 votes) |
| No Impact | 4% (7 votes) |
| Unsure | 15% (20 votes) |

c) What impact do you think the New Rules will have on the cost of litigation in New York Civil Courts?

| | | |
|---|---|---|
| Reduce | 5% | (7 votes) |
| Increase | 86% | (126 votes) |
| No Change | 3% | (5 votes) |
| Unsure | 6% | (9 votes) |

d) What impact do you think the New Rules will have on access to justice for underserved populations?

| | | |
|---|---|---|
| Positive | 3% | (4 votes) |
| Negative | 76% | (113 votes) |
| No Impact | 10% | (15 votes) |
| Unsure | 11% | (16 votes) |

e) What impact do you think the New Rules will have on the practice of law in New York Civil Courts?

| | | |
|---|---|---|
| Positive | 14% | (21 votes) |
| Negative | 66% | (98 votes) |
| No Impact | 3% | (4 votes) |
| Unsure | 17% | (25 votes) |

## V. DISCOVERY RULES

The New Rules impose a number of changes concerning discovery. The Committee heard many comments on these rules. The clear feeling of numerous commenters on the subject is that these changes are not necessary and are frequently overly burdensome and costly. In

addition, the "one size fits all" approach is seen as being extremely disconcerting to practitioners in areas of law where these rules were previously inapplicable and in cases where the claims are not large enough to warrant the additional costs.

One of the difficulties that was frequently brought up was that even though the application of these rules is frequently left to the discretion of the Court, discretion in procedural issues, unlike substantive issues, is frequently applied unevenly, and frankly often works to the disadvantage of the more vulnerable party.[1] While substantive discretion is very much needed in our system of justice, having discretion in procedural issues creates a lack of uniformity, and leaves attorneys and pro se litigants without a clear understanding of what is expected of them on a consistent basis. In the cited study, it is found that by applying discretion, which creates a lack of uniformity, the underrepresented are actually put at a greater disadvantage, and that clearly results in an impediment to access to justice. Procedural discretion is a "vulnerability amplifier."

Another issue that constantly came up from the commenters was the issue of superfluousness. Throughout this discussion of discovery, it will be observed that a number of the new rules are already covered by the CPLR, and are therefore unnecessary, or are in conflict with the CPLR. In those situations, the practitioner is put in a position requiring extra steps which results in extra costs to clients and further uncertainty.

The general feeling with regard to these various rules is that a great deal of additional work needs to be done to refine them in a way that will not create an adverse impact upon underrepresented litigants, and further will not act to increase the work required by lawyers and additional expense to clients which would, by its very nature, increase the number of people who will be financially excluded from our justice system.

[1] See "The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals" 27 Social and Legal Studies 49-78, 2018.

A. **§202.20 – INTERROGATORIES (based upon Commercial Division Rule 11-a)**

The amendment to §202.20 creates a limitation of interrogatories "to 25 in number, including sub-parts, unless the Court orders otherwise." In addition, this limitation applies to not only sub-parts but also to consolidated actions.

The intent of this Rule seems to be to mimic Federal Rule 33. In receiving comments from an extraordinary number of NYSBA members, it is clear that a general criticism of the rules is that Federal Rules are not appropriate in State Court cases. In addition, in this particular situation, the Federal Rules are not imitated because the Federal Rules differentiate between "discreet" sub-parts rather than just "sub-parts." In Federal cases, follow up questions are permitted without counting them towards the number of interrogatories permitted, so long as the sub-parts are not "discreet." In New York under the amended rules, that does not appear to be the case.[2]

While the purported purpose of this rule is to streamline litigation, making it more efficient, the limitations that are created may be unduly restrictive as they are in addition to the limitations in CPLR 3130 which indicates that, except in matrimonial actions, a party cannot serve Interrogatories and a Demand for Bill of Particulars under CPLR 3041. The CPLR already limits the scope of use of Interrogatories. Further, the rules under DRL §236(b)(4), the law governing matrimonial actions, may create a further contradiction. For these reasons, this rule may be totally inappropriate in matrimonial actions.

In order to expand the number of interrogatories, one would require a Court Order. The Members and Sections that commented believe that it would be more appropriate to go to Court only in the event that there was a concern that the number of interrogatories was excessive, or

[2] See Perez v. AirCom Management Corp., Inc., US Dist. Lexus 136140 (SDFLA September 24, 2012, No. 12-60322 Civ. 2012).

that the content of information requested was not germane, or was intended to be abusive. In most cases, that is not going to be the case, and thus this rule would essentially create an additional step where the parties can usually agree without Court involvement. In the event that interrogatories are seen as being abusive, an attorney would certainly have the recourse of involving the Courts under CPLR 3103 by seeking a protective order.

The various commenters felt that the amendment created a limitation deviating from the concept of broad discovery called for under CPLR 3101, and further created the additional burdens indicated above. The general tone was that these limitations were not necessary and would create additional work for lawyers and greater expense to their clients. It was felt that the extra steps called for would add, in many cases, to the time necessary to prepare discovery and thus to the cost passed down to clients. Because CPLR 3130 already imposes an adequate limitation on interrogatories in non-commercial cases, it is recommended that §202.20 be eliminated.

B. **§202.20-a PRIVILEGE LOGS (based upon Commercial Division Rule 11-b)**

The amendments to the provisions regarding privilege logs was also commented upon by the Membership. The general belief was that these amendments are superfluous as the provisions therein are generally covered by the CPLR. These new steps create an increase in additional burdens and uncertainties resulting in increased costs.

Sub-section (a) calls for the parties to "meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document by document logging, whether any categories of information may be excluded from the logging requirement….". From

the outset, there is a concern that this section is potentially in conflict with CPLR 3122(a) and (b) which essentially prescribes a document by document approach to privilege logs as opposed to this categorical approach. The rule calls for the shifting of costs to the party requiring a document by document log rather than a categorical one which clearly conflicts with CPLR 3122(b) and impinges on the rights of the party seeking the document by document log as called for by the CPLR. This penalty discourages the very activities called for by the CPLR. The new rule also calls for legal grounds for withholding documents, etc., all of which are stated in the CPLR as well. In order to withhold the document, it is already clear that there needs to be a showing of a legal reason for withholding the documents.

While §202.20-a purports to create greater efficiency in the litigation process, these amendments actually call for meetings between the parties. It is hard to expect that there would not be regular communication between litigating attorneys, and a determination as to whether they agree and/or disagree as to what will be logged and what should be deemed privileged. The commenters were clearly of the opinion that the sub-section was superfluous and increased lawyers' workloads and expenses which inure to the clients.

§202.20-b calls for an agreement to be reached, and then to convert this into an Order rather than just a stipulation of the parties. This rule may create efficiency in the complex, document-intensive cases filed in the Commercial Division, but would appear to be unnecessary outside of the Commercial Division. In non-commercial cases, any stipulation should not require the involvement of the Courts, unless of course there is disagreement, at which point it is very easy to involve the Courts by motion or otherwise. Thus, outside of the Commercial Division, counsel and the courts can resolve issues regarding privilege logs without this rule.

In addition, the reference to certification by a "responsible attorney" was thought to be vague and overly narrow. Another comment was that there is no clear definition as to what is privileged, and there needed to be greater clarity relating thereto. Lastly, the necessity of logging work product after commencement of litigation or communications with litigation counsel after such comment was seen by many of the commenters as having no practical use. Essentially, the amendments to the rules with regard to privilege logs is superfluous and burdensome.

> **Section 202.20-a Privilege Logs.**
> **(a) Meet and Confer. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review [AND] the amount of information to be set out in the privilege log.[T]~~t~~he use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order [MAY BE STIPULATED TO BY THE PARTIES SUBJECT TO THE APPROVAL OF THE COURT. LACKING UNANIMOUS APPROVAL, THE PARTIES MUST ADHERE TO THE DOCUMENT-BY-DOCUMENT STANDARD OF THE CPLR.] To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.**
> **(b) Court Order[/STIPULATION]. Agreements and protocols agreed upon by [THE] parties shall be memorialized [BY WRITTEN STIPULATION OR, BY] ~~in a~~ court order. In the event the parties are unable to enter into an agreement or protocol, the court shall by order provide for the scope of the privilege review, the amount of information to be set out in the privilege log, ~~the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging, whether any categories of~~ [AND WHETHER ANY] information may be excluded from the logging ~~requirement~~ and other issues pertinent to privilege review, including the entry of an appropriate non-waiver order ~~and the allocation of costs and expenses as between the parties~~.**

C. **§202.11 DISCOVERY OF ELECTRONICALLY STORED INFORMATION FROM NON-PARTIES (based on Commercial Division Rule 11-c)**

This rule appears to be an almost direct restatement of rules 3111 and 3122(d) of the CPLR. The appendix sets forth a number of suggestions, using the word "should". It is not that

these suggestions are bad, but they seem to be covered by CPLR 3122(d) and 3111. The additional rules are superfluous and burdensome.

CPLR 3122(d) indicates that absent a demand for original documents, copies can be provided and "the reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery". This clearly obviates the necessity of an additional rule with regard to this.

The general consensus was that this is a burdensome and superfluous rule, and it is recommended that it be deleted in its entirety.

D. **§202.20-b - LIMITATIONS OF DEPOSITIONS (based upon Commercial Division Rule 11-d)** The limitations of depositions again were an issue of significant concern to members and Sections commenting. The amendment calls for a limitation to 10 depositions by a defendant or by third-party defendants and that the depositions are limited to 7 hours per deponent. The rule goes on to distinguish between fact witnesses as opposed to entity witnesses and further explains in sub-section (f) that, "for good cause the Court may alter the limits on the number of depositions or the duration of examination."

Since there is a lack of clarity as to the standards as to what is "good cause," the result may be anything but uniform, and considering the broad standards of CPLR 3101, may be prejudicial to the person seeking discovery. In addition, sub-paragraph (g) calls for a fall back to the CPLR. Clearly, it appears that the intent would be that the CPLR be followed, and it doesn't appear that there is a necessity for an additional rule indicating that.

One of the concerns is that this limitation of depositions can be highly prejudicial in cases that are heavily document dependent, in employment cases where there is a need for vast

quantities of information, or in cases where there are multiple parties, such as medical malpractice cases, where dividing up 7 hours among the various defendants, each of whom may have different concerns or questions, it unfair. Putting the onus on multiple defendants to seek court permission, in order to avoid the limits, is also unfair. The necessity of having to consult a Judge to ask for his or her blessing to expand on the depositions would create an additional expense. In contrast, in the event that a party feels that the number of depositions or the length of depositions is becoming abusive, a protective order can surely be sought. The result of having to go to Court every time you would like to have lengthier depositions or a greater number of depositions will create an additional burden on the Court as well as the litigants.

Traditionally, where broad discovery is called for, it would seem contradictory to have to go to a Judge to obtain an Order allowing you to discover information that is essential to your ability to litigate a claim. It also appears that the affected population may include a vulnerable population, and it is clear that they would not have the abilities nor the wherewithal to afford the extra steps. It was the position of most commenters that this limitation is uncalled for in the State Courts and the Rule was generally opposed.

**Section 202.20-b Limitations on Depositions.**

**(a) Unless otherwise stipulated to by the parties or ordered by the court;**

**(1) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10 [OR THE NUMBER OF PARTIES TO THE ACTION, WHICHEVER IS GREATER]; and**

**(2) depositions [WHICH ARE NOTICED BY ONE PARTY] shall be limited to 7 hours per deponent[; DEPOSITIONS WHICH ARE NOTICED BY MORE THAN ONE PARTY SHALL BE LIMITED TO 7 HOURS PER NOTICING PARTY PER DEPONENT].**

**(b) Notwithstanding subsection (a)(1) of this Rule, the propriety of and timing for depositions of non-parties shall be subject to any restrictions imposed by applicable law.**

**(c) For the purposes of subsection (a)(1) of this Rule, the deposition of an entity through one of 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.**

**(d) For the purposes of this Rule, 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), shall constitute a separate deposition.**

**(e) For the purposes of subsection (a)(2) of this Rule, the deposition of an entity shall be treated as a single deposition even though more than one ~~person~~ [ENTITY REPRESENTATIVE] may be designated to testify on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted.**

**(f) ~~For good cause shown, t~~ [T]he court[, IN ITS DISCRETION,] may alter the limits on the number of depositions or the duration of an examination.**

**(g) Nothing in this Rule shall be construed to alter the right of any party to seek any relief that it deems appropriate under the CPLR or other applicable law.**

E. **§202.20-e ADHERENCE TO DISCOVERY SCHEDULE (based upon Commercial Division Rule 13(a) and (b))** This particular rule calls for the strict compliance with discovery obligations by the date set forth in a Scheduling Order. This is not unlike what is required by any Order. Upon the issuance of an Order, which in the case of Scheduling Orders, is normally stipulated to, the parties are required to abide by said Order unless an extension is granted.

In the case of the new rules, the discovery deadlines shall be made as soon as practical. Sometimes those deadlines cannot be met because of exigent circumstances. However, the new rule indicates that "non-compliance with the Order may result in imposition of appropriate

sanction against the party, or for relief pursuant to CPLR 3126." It is thought that these sanctions could be overly harsh, and unevenly imposed.

In addition, §202.20-e(b) provision of preclusion for failure to produce certain documents is a penalty that the Court can already impose under CPLR 3126. This is again nothing new. Based upon the comments made, this section appears to be superfluous, and its sanctions overly harsh. It is recommended that the rule either be eliminated, or amended as follows:

> **Section 202.20-e Adherence to Discovery Schedule.**
> **(a) Parties shall ~~strictly~~ comply with discovery obligations by the dates set forth in all case scheduling orders. Applications for extension of a discovery deadline shall be [GRANTED BY THE COURT UPON STIPULATION OF THE PARTIES, OR UPON APPLICATION TO THE COURT FOR AN EXTENSION OF SUCH DEADLINE FOR GOOD CAUSE].~~ ~~made as soon as practicable and prior to the expiration of such deadline. Non-compliance with such an order may result in the imposition of an appropriate sanction against that party or for other relief pursuant to CPLR 3126~~(b) If a party seeks documents from an adverse party as a condition precedent to a deposition of such party and the documents are not produced by the date fixed, the party seeking disclosure may ~~ask the court~~ [SEEK AN ORDER REQUIRING PRODUCTION OF SAID DOCUMENTS, OR ANY OTHER REMEDY UNDER CPLR 3124 OR 3126] ~~to preclude the non-producing party from introducing such demanded documents at trial.~~**

F. **§202.20-c – RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS (based upon Commercial Division Rule 11-e)** §202.20-c (a) and (b) certainly have merit; however, these provisions are already covered under the CPLR. A quick review of CPLR 3122a indicates what is required in the event that a party or a person is served with a notice or Subpoena Duces Tecum if there is an objection to the demand. CPLR 3122a (2) becomes more specific with regard to medical providers. It would appear that sub-sections (a) and (b) of the new rule are superfluous, as the requirements set forth are already covered under CPLR 3122a.

Subsection (c) of the rule states that "In <u>each</u> response, the responding party shall verify, for <u>each individual request</u>: (i) whether the production of documents in its possession, custody or

control and that are responsive to the individual requests, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified." Verification is a specific term within the CPLR, with its requirements set forth in CPLR 3020. It is specified for certain types of pleadings, but until the adoption of this rule, there has never been a requirement of verification of responses to discovery. Clearly, to be required to prepare a separate verification for each individual request will create a significant burden. This is especially true considering the continuing obligation to provide modifications or supplements as is necessary and will presumably call for even more verifications.

The encouragement to use efficient means to review documents set forth in subsection (e) is clearly superfluous.

The addition of subsection (f) is particularly troublesome. This subsection is not included in §202.70 Rule 11-e upon which §202.20-c is based. This subsection obviates the need for a motion currently required under CPLR 3126, and instead imposes the relief set forth in CPLR 3126(2) automatically, without requiring the showing of "willful failure" to comply with the discovery request. Instead, it imposes the drastic remedy of "preclusion," even for inadvertent failures to provide documents, and puts the burden upon the responding party to demonstrate "good cause," which is not yet defined for purposes of this section. Other impositions of the standard of "good cause," require a significant showing (see., e.g., CPLR 3212(a)), and inadvertence alone will not meet such a standard. This is a significant conflict with CPLR 3126.

**Section 202.20-c Requests for Documents**

**(a) For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Response"), either:**

**(1) state that the production is made as requested; or**

**(2) state with reasonable particularity the grounds for any objection to production.**

**(b) Each Response shall state: (i) whether the objection(s) interposed pertains to all or part of the request being challenged; (ii) whether any documents or categories of documents are being withheld, and if so, which of the stated objection(s) forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents; and (iii) the manner in which the responding party intends to limit the scope of its production.**

**(c) In each Response, the responding party shall [STATE] ~~verify~~, for each individual request~~s~~; (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.**

**(d) Nothing contained herein is intended to conflict with a party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).**

**(e) The parties are encouraged to use the most efficient means to review documents, including electronically stored information ("ESI"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases. The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.**

**~~(f) Absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to or, if objected to, such objection was overruled by the court.~~**

G. **§202.20-d DEPOSITIONS OF ENTITIES IDENTIFICATION OF MATTERS**

**(based upon Commercial Division Rule 11-f)** This rule sets out provisions with regard to notices to take depositions or subpoenas. The rule essentially reiterates much of what is addressed by the CPLR throughout Article 23. There are requirements of particularity, and one

of the concerns would be that this particularity may in fact limit questioning on a broad scale as is encouraged by the CPLR.

Based upon all of the information that is provided in Article 23, it would appear that this rule is superfluous and liable to create confusion. For this reason its recommended that the rule be eliminated or amended as follows:

> **Section 202.20-d Depositions of Entities; Identification of Matters.**
>
> **(a) A notice or subpoena [DIRECTED TO]** ~~**may name as a deponent**~~ **a corporation, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.**
> ~~**(b) Notices and subpoenas directed to an entity**~~ **may [EITHER (I)] enumerate the matters upon which the [ENTITY]** ~~**person**~~ **is to be examined,**~~**and if so enumerated, the matters must be described with reasonable particularity**~~
> **[OR (II)]** ~~**(c) If the notice or subpoena to an entity does not**~~**identify a particular officer, director, member or employee of the entity [TO BE EXAMINED].**~~**but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition:**~~
>
> ~~**(1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;**~~
>
> ~~**(2) such designation must include the identity, description or title of such individual(s); and**~~
>
> ~~**(3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.**~~
>
> **([B]**~~**d**~~**)(i) If the notice or subpoena to an entity [IDENTIFIES]** ~~**does identify**~~ **a particular officer, director, member or employee of the entity,** ~~**but elects to set forth the matters for examination as contemplated in section (b) of this Rule,**~~ **then** ~~**: (1)**~~ **pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.**
>
> ~~**(2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice**~~

**~~or subpoena served upon such entity the identity, description or title of such individual; and~~**

**(ii) [IF THE NOTICE OR SUBPOENA TO AN ENTITY ENUMERATES THE MATTERS UPON WHICH THE ENTITY IS TO BE EXAMINED, THEN THE NAMED ENTITY MUST DESIGNATE ONE OR MORE OFFICERS, DIRECTORS, MEMBERS, EMPLOYEES, OR INDIVIDUALS PREPARED TO TESTIFY ON ITS BEHALF ON THE ENUMERATED MATTERS NO LATER THAN TEN DAYS PRIOR TO THE SCHEDULED DEPOSITION.]**

**(iii) if the named entity ~~pursuant to subsection (d)(1) of this Rule, cross~~designates more than one individual [TO TESTIFY], it must set out the matters on which each individual will testify.**

**([C]~~e~~) A subpoena must advise a nonparty entity of its duty to make the designations [REQUIRED BY]~~discussed in~~ this Rule.**

**([D])~~f~~) The individual(s) designated must testify about information known or reasonably available to the entity.**

**([E]~~g~~) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.**

**([F]~~h~~) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.**

H. **§202.20-f DISCLOSURE DISPUTES (based upon Commercial Division Rule 14)**

In this rule, the Court again encourages parties to resolve their disputes informally. However, the concern is that there is a limitation that conflicts with both the CPLR and longstanding Uniform Rule §202.7(a) and (c). That rule already requires for all disclosure motions that the movant provide an affirmation "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion," and that the affirmation state "the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held."

There is no indication that §202.7(a) and (c) are insufficient to encourage the parties to attempt to resolve discovery disputes informally. Furthermore, §202.20-f does not supplant §202.7. Instead, it poses a requirement different from that imposed in §202.7(a) and (c). It inappropriately requires that the conferral by in person or by telephone, rather than other electronic methods of communication, including e-mail, that most practitioners find more effective and efficient. It also allows an exception only "in exigent circumstances," while §202.7(c) allows that the consultation may be excused for "good cause."

Without such a showing of exigent circumstances, the moving party in a discovery dispute may be deprived of the opportunity to have his or her motion heard. Subsection (c) provides that the motion may be denied without prejudice or held in abeyance pending conferral between the parties in accordance with the rule. This appears to be directly contrary to the CPLR. While motions should always have a clear basis in law, to require the Court's blessing to bring the motion based upon interactions between the parties is a clear limitation of the moving party's rights under the CPLR. [3]

**Section 202.20-f Disclosure Disputes**

**(a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.**

**(b) ~~Absent exigent circumstances~~, [IN ACCORDANCE WITH §202.7(a) AND (c),]prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve [THE ISSUES RAISED BY THE MOTION, AND PROVIDE THE AFFIRMATION AS SET FORTH IN §202.7(c).] ~~all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and~~**

[3] *See, Costigan & Co., P.C. v. Costigan,* 304 AD2d 464 (1st Dept. 2003) which found the enforcement of prior Commercial Division Rule 24(a), requiring the parties to "meet and confer" improper.

~~**time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.**~~

~~**(c) The failure of counsel to comply with this rule may result in the denial of a discovery motion without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.**~~

I. **§202.20-g RULINGS AT DISLOSURE CONFERENCES (based upon Commercial Division Rule 14-a)** Rule 14-a sets forth a procedure for all resolutions at a Judicial Conference to be reduced to an Order. While it is good practice to reduce all of the determinations, stipulations and rulings at a disclosure conference to writing, it would seem that a simple stipulation, or a less formalized procedure could be followed very effectively as it has been followed for many years in the State Courts. It would appear that based upon a lack of need to so formalize the procedure, that this rule is superfluous. It is recommended that the rule be eliminated, or amended to provide a more reasonable time frame for the presentation of an order.

**Section 202.20-g Rulings at Disclosure Conferences.**
**The following procedures shall govern all disclosure conferences conducted by non-judicial personnel.**
**Prior to the conclusion of the conference, at the request of any party**
**(1) all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be "so ordered," or the court shall otherwise enter an order incorporating the resolutions reached;**
**(2) the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the court for approval and signature by the justice presiding; or**
**(3) prior to the conclusion of the conference, the parties shall prepare an outline of the material terms of any resolution and shall thereafter agree upon and jointly submit to the court within ~~one (1)~~[SEVEN (7)] business**

**days of the conference a stipulated proposed order, memorializing the resolution of their discovery dispute. If the parties are unable to agree upon an appropriate form of proposed order, they shall so advise the court so that the court can direct an alternative course of action.**

## VI. MOTION PAPERS

The New Rules contain a number of provisions affecting motion practice. It should be noted that none of these rules, based upon Commercial Division Rules 16-19, was recommended by the OCA Advisory Committee on Civil Practice. We heard a number of comments regarding the difficulty that these rules present for all practitioners, but especially for those in small or solo practices and those in rural areas.

### A. §202.8-a Motions in General (based upon Commercial Division Rule 16)

This motion rule requires that the movant must submit "copies of all pleadings and other documents as required by the CPLR and as necessary for any informed decision on the motion". The Rule also requires that the proponent set forth "the exact relief sought." CPLR 2214(a) currently addresses the notice of motion. The CPLR does not require a description of "the exact relief sought" but just sets forth that the notice shall specify "the relief demanded and the grounds therefor."

This particular section unnecessarily expands the requirements of CPLR 2214(a) in three ways. First, it requires the notice of motion to specify the "exact relief sought," even where the motion papers are explicit as to all relief. Second, it describes additional papers "as necessary for an informed decision on the motion." That elastic language seems to support the submission of all sorts of documentation, in addition to all of the pleadings for each and every motion. Where the court requires hard copies, this means including what could be voluminous papers,

despite the availability of these documents in the electronic file. This does not seem to be an amendment that will make things more efficient.

This rule addresses an additional requirement for attorneys. It requires proposed orders to be submitted with motions "when appropriate," and even describes the type of motion for which the order should be supplied as "etc." (§202.8-a(b)). Except in the case of ex parte motions or motions that are known to be unopposed (and attorneys routinely submit proposed orders with such motions without the necessity of a rule), preparing a proposed order at the outset of a motion is usually superfluous. Proposed orders, after decision, will be aired with all parties, and will recite papers submitted in support and in opposition, and the appearance of parties. This cannot be known at the time the motion is made. Requiring a proposed order at the outset is extremely inefficient.

This rule also limits adjournments. (§202.8-a(c)) Adjournments, of course, are sought frequently by parties who have time constraints on other matters, unrelated personnel or personal issues that require adjournments, and negotiations that have begun to hold promise. All of these are a genuine and good reasons to adjourn motions, without having any limitations on them. If adjournments become too cumbersome for the court, the court may limit them on a case by case basis.

**Section 202.8-a Motion in General.**

**(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Regardless of whether the papers are filed electronically or in hard copy or as working copies, counsel must submit as part of the motion papers copies of all pleadings and other documents as required by the CPLR ~~and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212)~~. Counsel should use tabs on hard or working copies when submitting papers containing exhibits. Copies must be legible. If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are**

**relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be translated as required by CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, a copy of the case or of pertinent portions of the authority shall be submitted with the motion papers.**

~~**(b) Proposed orders. When appropriate, proposed orders should be submitted with motions, e.g., motions to be relieved, pro hac vice admissions, open commissions, etc. No proposed order should be submitted with motion papers on a dispositive motion.**~~

~~**(c) Adjournment of Motions. Unless the court orders otherwise, no motion may be adjourned on consent more than three times or for a cumulative total of more than 60 days.**~~

### B. §202.8-b Length of Papers (based upon Commercial Division Rule 17)

This rule limits papers to certain word counts. The rule limits submissions to 7,000 words and reply affidavits to 4,200 words. We heard comments that the rule itself creates confusion in that it is not always clear whether papers are "in chief" or "in response," in the case of, for example, a cross-motion. In addition, not all word processing programs count words in the same way. The rule does not specify whether captions, tables of cases, tables of contents, etc. are included in the word count. The rule also does not specify what happens to papers which exceed the word count. Are they dismissed in their entirety, or are they truncated after the word count.

We also heard comments regarding the efficacy of a page count or word limit in some complicated motions. Lawyers are cognizant of the rule "less is more," and will not seek to burden the court needlessly with overly long papers. However, some motions, involving multiple causes of action or multiple parties may clearly require more pages and words, in order to do justice to a full recitation of the facts, the law and appropriate argument. The lawyers are in the best position to determine when this is the case.

We also heard that the time (and money) it takes to either seek permission for a longer submission or to cut the document down to the appropriate size, may be extensive, and does not advance the assistance to the court or be fair to the client.

For these reasons, we recommend that the rule be eliminated in its entirety. There is no portion of the rule that increases efficiency and every portion of the rule creates a greater burden than the burden which the rule seeks to address.

C. **§202.8-c Sur-Reply and Post Submission Papers (based upon Commercial Division Rule 18)** This rule is a new addition to civil practice and it is debatable as to whether it resolves an issue or creates one. CPLR 2214 creates no right to sur-reply, and such a submission would be considered only if the court so rules. Thus, the rule should be unnecessary, but does not appear to create harm.

D. **§202.8-d Orders to Show Cause (based upon Commercial Division Rule 19)** This rule establishes a new standard indicating that orders to show cause can only be brought when there is "genuine urgency, a stay is required or a statute mandates so proceeding." This of course, would limit the grounds upon which orders to show cause can be brought. CPLR 2214(d) says that "The Court in a proper case may grant an order to show cause." This rule would infringe upon that statutory grant, as to a proper case and requires that the proper case have genuine urgency. This rule ignores those circumstances where an order to show cause is appropriate: e.g., at the beginning of a matrimonial action where the defendant may still be unrepresented, where an order to show cause is necessary because of the manner of service must be addressed (Election Law), etc., . There are many instances where an Order to Show Cause is

proper and yet there may not be "genuine urgency." For this reason, the rule should be eliminated in its entirety.

E. **§202.8-e Temporary Restraining Orders (based upon Commercial Division Rule 20)** This rule adds a new requirement regarding notice when seeking temporary relief. §202.7(f) already provides for effort to give notice when seeking any type of temporary relief, or a showing that giving notice would result in "significant prejudice." While Commercial Division Rule 20 may make sense in a setting involving litigation among major corporations, outside of the commercial sphere, temporary relief may be provided in a variety of forms and cases. Such relief is routine in matrimonial cases as well as in many additional circumstances. In addition, §202.7(f) excepts the application of the rule to RPAPL Article 7 proceedings or applications for orders of protection under DRL §240. No such exception has been made in §202.8-e, probably because the rule was written for the Commercial Part where such cases are not possible. For these reasons, the rule should be eliminated in its entirety. §202.7(f) is sufficient to cover temporary relief in non-commercial cases.

F. **§202.5(a)(1) and (2) Form of Papers (based upon Commercial Division Rule 6(a)).** This rule imposes "bookmarking" ("providing a listing of the document's contents and facilitating easy navigation by the reader within the document") on all electronic documents in excess of 4500 words. It is true that "bookmarking" may make navigation for the reader easier, and for those attorneys and litigants that use pdf creation software and have either staff or attorney facility with bookmarking, bookmarking may not be onerous. However, it ignores the fact that many attorneys, as well as pro se litigants, do not use pdf software. Instead, they create

the fileable documents by use of a scanner. For these attorneys and litigants, bookmarking is impossible. Even some attorneys who do have pdf creation software, may have neither the staff nor the attorney ability to provide bookmarking. This rule creates a hardship for many solo and small firm attorneys as well as rural attorneys.

**Section 202.5(a)(1) and (2) Form of Papers**

**(a)(1) The party filing the first paper in an action, upon payment of the proper fee, shall obtain from the county clerk an index number, which shall be affixed to the paper. The party causing the first paper to be filed shall communicate in writing the county clerk's index number forthwith to all other parties to the action. Thereafter such number shall appear on the outside cover and first page to the right of the caption of every paper tendered for filing in the action. Each such cover and first page also shall contain an indication of the county of venue and a brief description of the nature of the paper and, where the case has been assigned to an individual judge, shall contain the name of the assigned judge to the right of the caption. In addition to complying with the provisions of CPLR 2101, every paper filed in court shall have annexed thereto appropriate proof of service on all parties where required, and if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins. In addition, every paper filed in court, other than an exhibit or printed form, shall contain writing on one side only, except that papers that are fastened on the side may contain writing on both sides, and shall contain print no smaller than 12-point, or 8 ½ x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than 10 point. Papers that are stapled or bound securely shall not be rejected for filing simply because they are not bound with a backer of any kind.**

~~**(2) Each electronically-submitted memorandum of law, affidavit and affirmation, exceeding 4500 words, shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document.**~~

F. **§202.5-a Electronic Submission of Papers (based upon Commercial Division Rule 6(a)).** This rule replaces the provision which provided for filing by facsimile, and is a proper update of the rule encouraging electronic submission over facsimile submission. No change is necessary.

## VII. SUMMARY JUDGMENT: STATEMENT OF MATERIAL FACTS

New rule §202.8-g, based upon Commercial Division Rule 19-a, imposes additional requirements upon the movant in any motion for summary judgment (other than a motion under CPLR 3213 where the motion is in lieu of complaint) and also imposes additional requirements upon any party opposing the motion for summary judgment. Specifically, the movant is required to annex to the notice of motion a "separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue of fact," and each such numbered paragraph must be followed "by citation to evidence submitted in support of…that motion." [1] The opponent is required to include a "correspondingly numbered paragraph" for each of the movant's numbered paragraphs, and "additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Each such paragraph or statement must also be followed by "citation to evidence submitted in…opposition to the motion."[2] Failure of the opponent to do so is severe: Any numbered paragraph which is not "specifically controverted" is deemed admitted, presumably for the entire action, not just the motion.[3]

It should be noted at the outset that §202.8-g differs from Commercial Division Rule 19-a in an important respect: Rule 19-a provides that the requirements of the rule are imposed only when "the court may direct." §202.8-g applies to all summary judgment motions. The only entities which commented on Rule 19-a, the New York City Bar Association and the New York

[1] §202.8-g(a) and (d).
[2] §202.8-g(b) and (d).
[3] §202.8-g(c).

State Bar Association CPLR Committee, both commented that any such provision should not be mandatory, but instead should be limited to the judge's discretion.

During the four forums conducted by the New York State Bar Association, there were a considerable number of comments regarding §202.8-g. Most of the comments were in opposition to the rule based upon the additional attorney time (and client cost) that compliance would impose. Even where some comments were in favor of having a "statement of material facts," they were always prefaced by "in the right case." In fact, one commenter, perhaps unaware of the mandatory nature of §202.8-g, spoke about how well the rule worked in the Commercial Division (where his practice was based) because the rule left whether or not to require it to the judge's discretion. The New York City Bar Association's comments also included that in the experience of its members within the Commercial Division, the rule was rarely imposed by some of the judges, recognizing that the rule may have limited benefit to the judges while adding substantial cost.

Imposition of this rule, in addition to requiring papers other than those specified in CPLR 3212(b), will have a significant impact on the law of summary judgment as set forth in CPLR 3212 and relevant case law. The rule's impact is set explained below.

### A. **Effect on opponent's defense based upon timeliness**

Where the motion for summary judgment is beyond the time limit provided by CPLR 3212(a), because the motion is made after the expiration of the period 120 days after the filing of the note of issue, or some other time period set by the court, the opponent may oppose the motion on timeliness grounds, without opposing the motion on the merits. Nonetheless, under a strict reading of §202.8-g(c), such opposing party would have been deemed to have admitted

each and every numbered statement made by the movant. Unlike Commercial Division Rule 19-a, §202.8-g(c) does not limit the imposition of such admission to the motion. Thus, the rule would require the opponent to also respond on the merits, not only by responding to the statement of material facts, but also with all admissible proof, in that the opposing statement must cite to the proof submitted by the opposing party. By failing to do so, the opposing party, even if prevailing by the denial of summary judgment on timeliness grounds, would suffer an admission of each and every fact set forth in the movant's statement of material facts. The time limit imposed by CPLR 3212(a) was to prevent the heavy burden of opposing a motion for summary judgment while preparing for trial. §202.8-g(b), (c) and (d) would negate that.

### B. **Effect on opponent's defense based upon failure of movant to meet its burden**

The party moving for summary judgment bears a burden to demonstrate a prima facie showing entitling a judgment as a matter of law. If the movant fails to do so, summary judgment must be denied.[4] An opponent may choose not to put in any proof in opposition, and still prevail based upon the movant's failure to meet its burden.[5] However, under §202.8-g(c), such opposing party would have been deemed to have admitted each and every numbered statement made by the movant. §202.8-g(c) does not limit such admission to the motion. Thus, the rule would require the opponent to respond on the merits, not only by responding to the statement of material facts, but also with all admissible proof, in that the opposing statement must cite to the proof submitted by the opposing party. By failing to do so, the opposing party, even if prevailing

[4] *See, Holtz v. Niagara Mohawk Power Corp.*, 147 AD2d 857 (3d Dept. 1989); *Lacagnino v. Gonzalez,* 306 AD2d 250 (2d Dept. 2003).
[5] *Stelick v. Gangl*, 47 AD2d 789 (3d Dept. 1975).

by the denial of summary judgment on movant's failure to meet its burden, would suffer an admission of each and every fact set forth in the movant's statement of material facts.

The effect of such a rule may be to unfairly shift the burden. Under CPLR 3212, if a movant has not met its burden, the burden of coming forward with facts in admissible form to oppose the motion does not shift to the opposing party. However, under §202.8-g, the burden will shift and the opposing party is obligated to come forward both with an enumerated response to the statement of material facts and facts in admissible form, because §202.8-g(d) requires the response to cite to evidence submitted in opposition to the motion. This is not only in direct conflict with CPLR 3212 and the case law thereunder, but patently unfair..

### C. **Effect on opposition based upon CPLR 3212(f)**

Where facts to oppose a motion for summary judgment are in the control of the moving party, and the opposing party has not had a fair opportunity to discover the facts, the court may either deny summary judgment or may order a continuance to permit disclosure under CPLR 3212(f). However, the granting of relief under CPLR 3212(f) does not address the deemed admission contained in §202.8-g(c). §202.8-g(c) provides for deemed admission as to each and every paragraph in the movant's statement of material facts unanswered by the opponent. There is no stated exception where summary judgment is denied based upon a CPLR 3212(f) defense.

### D. **Issues regarding materiality**

In order to meet its burden, the movant must demonstrate the lack of a genuine issue of material regarding each element of the claim or defense, or must demonstrate that the opponent

lacks an element of its claim or defense as a matter of law. Motions for summary judgment often concern disputes over what constitutes the material facts necessary for the claim or defense.[6] Nowhere in §202.8-g is this addressed. For example, suppose that the movant's statement of material facts leaves out one of the elements of the defense which is the basis for the summary judgment motion. Adequate papers in opposition to the motion under CPLR 3212 would simply point out the missing element, and would include, perhaps, some proof in evidentiary form that there is a dispute as to the missing element. It would not be necessary for the opposing party to introduce proof to show a dispute as to other material facts, the absence of one element is fatal. Yet §202.8-g(c) would militate in favor of a longer set of opposition papers, opposing each and every paragraph in the movant's statement of material facts, as the absence of such proof and response would be deemed an admission. Similarly, if some of the facts listed by the movant are not material, the opposing party may not wish to go to the expense of demonstrating an issue of fact, yet does not wish to admit them either. §202.8-g would not streamline the process, in such a case, but would instead make it more complicated and confusing.

### E. **Issues regarding expert opinion and other testimony**

Some motions for summary judgment require reliance upon expert affidavits to support and oppose the motion. In such cases, the opinions of the experts speak for themselves. Translating them into statements of material facts in any manner other than by using the expert opinions verbatim can often result in disputes over whether the resulting statement is a fair representation of what the expert has stated. Even where the affiant or deponent is not an expert, the statement of facts concerning their affidavit or testimony may deviate from what is actually

[6] *See, e.g., Devlin v. Sony Corp. of America,* 237 AD2d 216 (1st Dept. 1995).

said. The statements contemplated by §202.8-g are written by attorneys who have neither the expertise (in the case of experts) nor first-hand knowledge; they are hearsay. The statements by the lawyers may be supported by actual evidence, but the statements as worded by the lawyers are not admissible evidence. To give them evidentiary value by having them "deemed admitted" as is required by §202.8-g(c) is contrary to the rules of evidence.

CPLR 3212(b) and hundreds of cases[7] make it quite clear that affidavits must be from persons with actual knowledge of the matter presented, not lawyers. Yet the statements in §202.8-g are from lawyers, and they are elevated to admissible evidence as a deemed admission whenever they are not properly responded to by the opponent.

### F. **Evidence related to physical injuries**

The injuries in personal injury actions are often the subject of summary judgment motions. For example, there are summary judgment motions on "serious injury threshold" in many (if not most) motor vehicle cases. There may be hundreds of facts concerning prior injuries and conditions, treatment immediately given, treatment given at a later time, prognosis, limitations on the plaintiff's ability to engage in normal daily functions, etc. Each of these facts is material to the question of threshold and setting them forth in numbered paragraphs in addition to medical records, medical reports and physician affidavits, is difficult, cumbersome and burdensome. The court will have to review all of the records, reports and affidavits in order to determine whether there is a serious injury as a result of the accident, in any event. It is questionable whether the required statements are helpful at all, but it is unquestionable that they

[7] *See, e.g., Zuckerman v. City of New York*, 49 N.Y.2d 595 (1980).

will be time consuming and expensive. Applying this rule to all cases involving personal injuries is not beneficial to the court, and it is an undue burden to the attorneys.

### G. **Inadvertence and abuse**

A party opposing the motion for summary judgment may inadvertently fail to address one or more numbered paragraphs in the movant's statement of material fact, while submitting adequate proof in admissible form to contradict the fact stated. Nonetheless, under §202.8-g(c) that fact is deemed admitted. Even if such admission does not result in the granting of the motion, the admission remains throughout the case and may be of serious consequence. And, there is no escape hatch. While CPLR 3123, governing Notices to Admit, allows for the correction of any admission,[8] §202.8-g does not.

This seemingly invites abuse. While §202.8-g(a) contemplates "a short and concise" statement, there is no limit to the number of "numbered paragraphs" included, and each such statement must be followed by citation to evidence submitted. Conclusory statements are not appropriately the basis for summary judgment[9]; it is likely that the statements of material fact will be more specific and detailed than "short and concise." The more detailed and lengthy the statement of material fact, the greater burden placed on the opponent and the greater opportunity of inadvertent failure to properly address each numbered paragraph. The rule invites gamesmanship.

**********

The one instance where §202.8-g could be effective is where the movant or the opponent seeks relief under CPLR 3212(g). This section permits the court, when denying or granting in

[8] CPLR 3123(b)
[9] *See, e.g., Mobley v. Riportella*, 241 AD2d 443 (2d Dept. 1997).

part the motion for summary judgment, to limit the issues for trial. The use of CPLR 3212(g) is entirely discretionary; initiative by one of the parties is helpful, but not required.[10] In cases where one of the parties has requested relief under CPLR 3212(g) or where the court is denying or granting in part summary judgment and is contemplating granting relief under CPLR 3212(g), the use of the rule in §202.8-g may be effective and appropriate. Its use should be limited to that circumstance. It should not be required in every motion for summary judgment.

> **Section 202.8-g Motions for Summary Judgment; Statements of Material Facts**
>
> **(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, [IN AN ACTION FOR MEDICAL, DENTAL OR PODIATRIC MALPRACTICE, OR IN ANY OTHER ACTION WHERE EXPERT PROOF IN SUPPORT OF OR IN OPPOSITION TO A MOTION FOR SUMMARY JUDGMENT IS REQUIRED, THE COURT MAY DIRECT THAT] there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.**
>
> **(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried[; HOWEVER, NO SUCH RESPONDING NUMBERED PARAGRAPHS SHALL BE REQUIRED WHERE THE MOTION IS OPPOSED SOLELY ON ONE OR MORE OF THE FOLLOWING GROUNDS: (i) THAT THE MOTION IS UNTIMELY UNDER CPLR 3212(a); (ii) THAT THE MOVANT HAS NOT MET ITS BURDEN; (iii) THAT FACTS ARE UNAVAILABLE TO THE OPPOSING PARTY UNDER CPLR 3212(f). THE OPPONENT MAY ALSO CONTEND THAT ANY OF THE FACTS SET FORTH IN THE MOVANT'S NUMBERED PARAGRAPHS ARE NOT MATERIAL TO THE SUBJECT CLAIM OR DEFENSE OR ARE NOT ADMISSIBLE].**
>
> **(c) Each numbered paragraph in the statement of material facts required to be served by the moving party[, WHICH IS FOUND TO BE MATERIAL AND ADMISSIBLE,] will be deemed to be admitted [FOR PURPOSES OF THE MOTION, ONLY] unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served**

[10] *Launt v.Lopasic,* 189 AD3d 1740 (3d Dept. 2020).

**by the opposing party. [THE COURT MAY ALLOW AN OPPOSING PARTY TO AMEND OPPOSITION PAPERS IN ORDER TO WITHDRAW SUCH AN ADMISSION, ON SUCH TERMS AS MAY BE JUST.]**

**(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.**

## VIII. TRIAL AND SETTLEMENT

### A. §202.34 PRE MARKING EXHIBITS (based upon Commercial Division Rule 28).

This Rule provides for the pre-marking of exhibits at trial. Counsel are required to consult prior to trial and attempt to agree upon exhibits that will be admitted on consent. All exhibits then must be pre-marked. Exhibits not consented to are marked for identification only.

Commercial division cases normally involve a great number of exhibits, particularly documentary exhibits (contracts, correspondence, emails, etc.). In light of the number of exhibits normally involved in such cases, Commercial Division Rule 28, requiring the attorneys to consult and take affirmative steps to pre-mark exhibits, makes sense.

In most other types of civil cases, there are normally fewer exhibits. In routine civil trials (slip and fall, automobile accident cases, etc.) the handling, marking and introduction of exhibits is handled relatively seamlessly at trial. Of course, the parties are always free to consult and consent to the introduction of certain exhibits. And trial judges have the inherent authority to direct the pre-marking of exhibits in appropriate cases involving significant numbers of exhibits. But in light of the lack of evidence that marking exhibits at trial interferes with the efficient administration of most civil trials, there does not seem to be a need to enact a rule that requires counsel to do extra work in every civil trial. The requirements of this Rule, especially

considered in connection with the requirements of Section 202.20-h(b) (requirement of submission of a indexed binder of the trial exhibits before trial), seems unnecessary. It is recommended that the rule be eliminated, or amended as follows:

> **Section 202.34 Pre-Marking Exhibits.**
>
> **[THE COURT MAY ORDER C]~~c~~ounsel for the parties ~~shall~~ [TO] consult prior to trial and ~~shall in good faith~~ attempt to agree upon the exhibits that will be offered into evidence without objection. ~~Prior to the commencement of the trial~~[IF SO ORDERED], each side shall then mark its exhibits into evidence, subject to court approval, as to those to which no objection has been made. All exhibits not consented to shall be marked for identification only. If the trial exhibits are voluminous, counsel shall consult the clerk of the part for guidance. The court will rule upon the objections to the contested exhibits at the earliest possible time. Exhibits not previously demanded which are to be used solely for credibility or rebuttal need not be pre-marked.**

B. **§202.20-h PRE TRIAL MEMOS (based upon Commercial Division Rule 31(a), (b) and (c)).** This Rule requires each party to submit a pre-trial memorandum, exhibit book and request for jury instructions before or at the beginning of every civil trial. Subdivision (a) requires counsel to submit a pre-trial memorandum no longer than 25 pages at the pre-trial conference. Subdivision (b) requires that counsel submit an indexed binder of trial exhibits for the court's use, with copies for each other attorney and a binder of the originals for witnesses to use. Subdivision (c) requires that counsel submit requests to charge on the first day of trial.

The requirement that counsel submit a pre-trial memorandum is new. The prior civil Rule (§ 202.35(c)) allowed the court to order trial memoranda, but did not mandate them as the new Rule does. In the majority of civil trials such memoranda are not requested or provided. By the time of trial, the trial judge has often presided over the case for years, through multiple conferences and motions. In light of the fact that pre-trial memorandum are rarely requested, it

appears that trial judges believe themselves to be sufficiently knowledgeable about the cases without the need for memorandum. A rule which requires such memorandum simply requires lawyers to do unnecessary work at their clients' expense.

As discussed above, the requirements that exhibits be pre-marked and an indexed binder be provided to the court, other counsel and the witnesses is, again, generating additional work for attorneys that seems unnecessary in the vast majority of civil cases. It is recommended that the rule be eliminated, or amended as follows:

> **Section 202.20-h Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions.**
>
> **(a) [THE COURT MAY ORDER C]ounsel ~~shall~~ [TO] submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set. Counsel shall comply with CPLR 2103(e). ~~A~~ [IF SO ORDERED, A] single memorandum no longer than 25 pages shall be submitted by each side. No memoranda in response shall be submitted.**
>
> **(b) ~~On~~ [THE COURT MAY ORDER THAT ON] the first day of trial or at such other time as the court may set, counsel shall submit an indexed binder or notebook, or the electronic equivalent, of trial exhibits for the court's use. ~~A~~ [IF SO ORDERED, A] copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses shall be prepared and submitted. Plaintiff's exhibits shall be numerically tabbed, and defendant's exhibits shall be tabbed alphabetically.**
>
> **(c) Where the trial is by jury, [THE COURT MAY REQUIRE] counsel ~~shall~~ [TO PROVIDE], on the first day of the trial or such other time as the court may set, ~~provide the court~~ with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions- Civil, a reference to the PJI number will suffice. Submissions should be by hard copy and electronically, as directed by the court.**

C. **§202.37 SCHEDULING OF WITNESSES (based upon Commercial Division Rule 32).** This Rule requires that at the commencement of the trial the attorneys must identify in writing the witnesses they intend to call, the order in which they shall testify, and the estimated

length of their testimony. The Rule provides that a court may permit testimony from a witness who is not identified on the witness list, but only "for good cause shown and in the absence of substantial prejudice." The Rule further provides that the estimates of the length of testimony provided are advisory only, and that the court may permit testimony beyond the time. The Rule does not address whether the party may call witnesses in an order different than that listed in the schedule.

Through the discovery process in civil cases, the parties are obligated to identify potential witnesses. Where a case a tried in front of a jury, the normal voir dire process includes announcing the names of the witnesses to the jurors. Thus, the identity of the witnesses is well-known to the parties before most trials begin. Nothing in the CPLR requires the parties to identify the specific witnesses who will be called at trial and in what order. The witnesses an attorney will call, and their order, is not always known by that attorney at the beginning of the trial. Sometimes a particular witness's testimony is deemed to be unnecessary by the lawyer based on the testimony that has preceded it. Some witnesses testify longer or shorter than expected. Some witnesses have limited windows of availability. Thus, a mandatory Rule requiring parties to identify in writing the witnesses they intend to call, and the order in which they testify, may pose some issues in application, particularly where that Rule does not explicitly provide that the court may excuse a change in the order of the witnesses. It is recommended that the rule be eliminated or amended as follows:

> **Section 202.37 Scheduling Witnesses.**
>
> **[IF REQUESTED BY THE COURT A]~~At~~ the commencement of the trial 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 shall provide a copy of such witness list to opposing counsel. Counsel ~~shall~~ [MAY BE ASKED TO] separately identify for the court only a list of the witnesses who may be called**

**solely for rebuttal or with regard to credibility. The court may permit for good cause shown and in the absence of substantial prejudice, a party to call a witness to testify who was not identified on the witness list submitted by that party. The estimates of the [ORDER OF THE WITNESSES, AND THE] length of testimony provided by counsel are advisory and the court may permit [WITNESSES OUT OF ORDER AND/OR] further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded.**

D. **§202.20-i TESTIMONY BY AFFIDAVIT (based upon Commercial Division Rule 32-a).** This Rule provides that in a non-jury trial, a court may "require" that a party submit the direct testimony of its witnesses in affidavit form. The Rule provides that the opposing party shall have the right to object to statements in the affidavit as if the statements had been made orally in open court. The Rule further provides that the submission of direct testimony in affidavit form "shall not affect any right to conduct cross-examination or re-direct examination of the witness."

Although there are times when the submission of direct testimony in a non-jury trial or hearing by affidavit may make sense, the Rule provides that it is at the court's direction, without input of the offering attorney. In other words, the Rule allows the court to require the submission of testimony by affidavit, even over the objection of the offering party. There are times when the offering party may want the judge to see and hear from the witness directly in order to aid in its assessment of credibility. In addition, live testimony by a witness seems more likely to reflect the witness's own recollections and testimony than an affidavit, which naturally will be crafted with counsel's input. A Rule that allows the court to request the testimony be submitted in affidavit form, but gives the ultimate decision to the party offering the testimony, would be preferable. It is recommended that the rule be amended as follows:

**Section 202.20-i Direct Testimony by Affidavit.**

**The court may ~~require~~ [REQUEST] 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: [(A) THE COURT MAY NOT REQUIRE THE SUBMISSION OF A DIRECT TESTIMONY AFFIDAVIT OVER THE OBJECTION OF THE PARTY CALLING THE WITNESS;] (~~a~~[B]) 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; and, (~~b~~[C]) the opposing party shall have the right to object to statements in the direct testimony affidavit, and the court shall rule on such objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that such portion be stricken. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.**

E. **§202.28 SETTLEMENTS AND DISCONTINUANCES (based upon Commercial Division Rule 2).** This rule requires that the parties inform the assigned judge or part clerk when a case has settled or is discontinued. In accordance with the suggestions of the OCA Advisory Committee, this should be limited to actions which are active with the assigned judge. For this reason, it is recommended that this rule be amended to so provide:

**Section 202.28 Discontinuance of Civil Actions and Notice to the Court.**

**(a) [IN MATTERS IN WHICH A MOTION IS PENDING, CONFERENCE OR TRIAL IS SCHEDULED, I]~~-~~if the action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the assigned judge or court part by submission of a copy of the stipulation or a letter directed to the clerk of the part along with notice to the chambers of the assigned judge via telephone, or email. This notification shall be made in addition to the filing of a stipulation with the county clerk.**

**(b) Counsel, including self-represented litigants, are under a continuing obligation to notify the court as promptly as possible in the event that an action is settled, discontinued or otherwise disposed of or if a case or motion has become wholly or partially moot, or if a part has died or filed a petition in bankruptcy. Such notification shall be made to the assigned judge in writing.**

F. **§202.29 ALTERNATIVE DISPUTE RESOLUTION (based upon Commercial Division Rule 3(b)).** This rule provides for the parties to request a settlement conference before a judge other than the assigned judge. This rule was recommended both by the OCA Advisory Committee and the CPLR Committee. No change is necessary.

G. **§202.23[11] CONSULTATION PRIOR TO PTC (based upon Commercial Division Rule 8(a)).** This rule provides for additional requirements of consultation prior to preliminary and compliance conferences. This rule is unnecessary and imposes unnecessary requirements on practitioners. The requirement for consultation prior to a preliminary conference is unnecessary and duplicative because the Uniform Rules already contain a detailed rule regarding preliminary conferences in §202.12. §202.12 contains provisions regarding preparation of a scheduling order which inherently requires consultation between counsel. §202.12 also includes a requirement that counsel confer prior to the preliminary conference regarding electronic discovery issues.

The requirement that counsel confer prior to any compliance conference is likewise unnecessary. The court that schedules a compliance conference may direct in the scheduling order that counsel confer prior to the conference if the court believes such consultation would be productive. Compliance conferences typically relate to the status of disclosure. §202.7(a) already requires that the moving party in a motion related to disclosure submit an affirmation of good faith efforts to resolve the disclosure dispute. Accordingly, there is no need for this rule, and it should be eliminated in its entirety.

[11] There are two sections denoted §202.23. The other one is addressed in J. below.

H. **§202.26 SETTLEMENT AND PTC (based upon Commercial Division Rule 30a).** This rule substitutes a more flexible rule regarding settlement conferences for the former §202.26, and §202.26(a) and (b) are a major improvement. However, §202.26(c) is unnecessary and may create an unnecessary and unproductive burden upon the parties and their experts. The court already has discretion to direct that counsel confer regarding trial issues, including issues relating to expert testimony. The requirement for consultation regarding the actual expert testimony may be productive in large commercial cases heard in the Commercial Division, but in most cases in other trial parts the testimony of the respective experts for the parties is opposed, and both parties will want to present their expert's full opinion to the finder of fact. Nor is there a need for a rule which could require consultation about expert testimony during trial. Trial judges have the ability to confer with counsel throughout the trial, and if appropriate, order further conferences between counsel. The Uniform Rule is, therefore, unnecessary and burdensome in cases outside of the Commercial Division.

**Section 202.26 Settlement and Pretrial Conferences.**

**(a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.**

**(b) Pre-Trial Conference. Prior to Trial, counsel shall confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. Where a pre-trial conference is scheduled, or otherwise prior to the commencement of opening statements, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties and settlement of the matter, and the court may require the parties to prepare a written stipulation of undisputed facts.**

~~**(c) Consultation Regarding Expert Testimony. The court may direct that prior, or during, trial, counsel for the parties consult in good faith to identify**~~

~~those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.~~

I. **§202.10(b) Appearances at Conferences (based upon Commercial Division Rule 15)** This rule adds a new subsection (b) which provides that adjournments of conferences "shall be granted upon a showing of good cause," and provides that the adjournment of a conference should have no effect on any scheduling order unless the court so directs. This rule ignores the practice in many parts of the state, where conferences are held before non-judicial staff (usually law clerks or court attorneys), and adjournments are often freely granted, recognizing that for many retail practitioners, the practice of law often requires multiple appearances in a day, which sometimes extend longer than anticipated, requiring alternate arrangements. Courts have, to date, been capable of managing their own adjournments, and the effect that any adjournment may have on the schedule of pretrial process in a case. Taking this discretion away from the judges and their staff will not necessarily result in more timely conferences, but will require a lot more input from attorneys and chambers staff. For these reasons, we recommend the elimination of this rule.

J. §**202.23**[12] **Staggered Court Appearances (based upon Commercial Division Rule 34).** This rule adds a mechanism for efficient appearances and may have positive effect on the minimization of waiting time at the court. It was recommended by the OCA Advisory Committee and the CPLR Committee.

One provision, however, seems to be wasteful and onerous to attorneys. Subsection c requires every party to inform every other party by email of the receipt of a notification from the

[12] There are two sections denoted §202.23. The other is addressed in G. above.

court. On cases with multiple attorneys, this requirement will produce a plethora of needless emails, with the cost passed onto the client. It is recommended that the rule be amended as follows:

> **Section 202.23 Staggered Court Appearances.**
> **Staggered court appearances are a mechanism to increase efficiency in the courts and to decrease lawyers' time waiting for a matter to be called by the courts. While this rule is intended to streamline the litigation process, it will be ineffectual without the cooperation and participation of litigants. Improving the process of litigation by instituting staggered court appearances, for example, requires not only the promulgation of rules such as this one, but also, and more importantly, the proactive and earnest adherence to such rules by parties and their counsel and the court.**
> **(a) Each court appearance for oral argument on a motion shall be assigned either a set time or a time interval during which the appearance is expected to be held. The assignment of time or time interval, and the length of time allotted to a case is solely in the discretion of the court[AFTER RECEIPT OF INPUT BY THE PARTIES AS TO THEIR ESTIMATES OF THE TIME REQUIRED, AND THE COMPLEXITY OF THE ISSUES.]**
> **(b) In order for the court to be able to address any and all matters of concern to the court and in order for the court to avoid the appearance of holding ex parte communications with one or more parties in the case, even those parties who believe that they are not directly involved in the matter before the court must appear at the appointed date and time assigned by the court unless specifically excused by the court.**
> **(c) ~~Since the court is setting aside a specific time or time interval for the case and since there are occasions when the court's electronic or other notification system fails or occasions when a party fails to receive the court generated notification, each attorney who receives notification of an appearance on a specific date and time is responsible for notifying all other parties by e-mail that the matter is scheduled to be heard on that assigned date and time. All parties are directed to exchange e-mail addresses with each other at the commencement of the case and to keep these e-mail addresses current, in order to facilitate notification by the person(s) receiving the court notification.~~**
> **~~(d)~~ Requests for adjournments shall be transmitted in writing to the court and to all parties, in such manner as the court may direct, so as to be received no later than 48 hours before the hearing and shall set forth whether the other parties consent to the adjournment.**

K. **§202.8-f Oral Argument (based upon Commercial Division Rule 22)** This rule bears no resemblance to Rule 22, and tells the court to create a procedure for oral argument and

for practitioners to consult local rules. There is no need for a Uniform Rule that only tells practitioners they need to check on local procedures for requesting oral argument. Nor is subpart (b) necessary. It only states that a party making a motion may request oral argument. Counsel for a moving party are able to request that the assigned judge hear oral argument without a Uniform Rule. For this reason it is recommended that the rule be eliminated.

## IX. CONCLUSION

It is recommended that significant changes to the rules be made, with recommendations that most of the rules be either eliminated or significantly amended. As a summary of these recommendations, we have prepared the following chart which also refers to the page numbers within the report for each subject, with the pages containing the proposed amendment (where applicable) underlined. We ask that each of the changes to the rules that are thus recommended be adopted.

| New Rule | Commercial Division Rule | Recommendation | Secondary Recommendation | Page number in report |
|---|---|---|---|---|
| §202.1 | 1 | eliminate | N/A | 15, 16 |
| §202.28 | 2 | amend | N/A | 54 |
| §202.29 | 3 | no change | N/A | 55 |
| §202.5-a | 4 | no change | N/A | 40 |
| §202.5 | 6 | eliminate | amend | 39, 40 |
| §202.23 | 8 | eliminate | N/A | 55 |
| §202.20 | 11-a | eliminate | N/A | 21, 22 |
| §202.20-a | 11-b | eliminate | amend | 22, 23, 24 |

| New Rule | Commercial Division Rule | Recommendation | Secondary Recommendation | Page number in report |
|---|---|---|---|---|
| §202.11 | 11-c | eliminate | N/A | 24, 25 |
| §202.20-b | 11-d | eliminate | amend | 25, 26-27 |
| §202.20-c | 11-e | eliminate | amend | 28, 29-30 |
| §202.20-d | 11-f | eliminate | amend | 30, 31-32 |
| §202.20-e | 13 | eliminate | amend | 27, 28 |
| §202.20-f | 14 | eliminate | amend | 32, 33-34 |
| §202.20-g | 14-a | eliminate | amend | 34-35 |
| §202.10 | 15 | eliminate | N/A | 57 |
| §202.8-a | 16 | eliminate | amend | 35, 36-37 |
| §202.8-b | 17 | eliminate | N/A | 37, 38 |
| §202.8-c | 18 | eliminate | N/A | 38 |
| §202.8-d | 19 | eliminate | N/A | 38, 39 |
| §202.8-g | 19-a | eliminate | amend | 41-47, 48-49 |
| §202.8-e | 20 | eliminate | N/A | 39 |
| §202.8-f | 22 | eliminate | N/A | 58, 59 |
| §202.34 | 28 | eliminate | amend | 49, 50 |
| §202.26 | 30 | amend | N/A | 56-57 |
| §202.20-h | 31 | eliminate | amend | 50, 51 |
| §202.37 | 32 | eliminate | amend | 51, 52-53 |
| §202.20-i | 32-a | amend | N/A | 53, 54 |
| §202.23 | 34 | amend | N/A | 57, 58 |

Respectfully submitted,

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**Appendix 1 – Report of the Advisory Committee on Civil Practice on the Commercial Division Rules, July 2018**

# 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,**

**George F. Carpinello, Esq., Chair**

Prof. Vincent C. Alexander, Esq.

James N. Blair, Esq.

Helene E. Blank, Esq.

Robert M. Blum, Esq.

Hon. James M. Catterson (ret.)

Lance D. Clarke, Esq.

Kathryn C. Cole, Esq.

Prof. Patrick M. Connors, Esq.

Edward C. Cosgrove, Esq.

Hon. Betty Weinberg Ellerin (ret.)

Myrna Felder, Esq.

Lucille A. Fontana, Esq.

Matthew Gaier, Esq.

Sharon Stern Gerstman, Esq.

Thomas F. Gleason, Esq.

Jeffrey E. Glen, Esq.

Barbara DeCrow Goldberg, Esq.

Philip M. Halpern, Esq.

Hon. John R. Higgitt

David Paul Horowitz, Esq.

Lawrence S. Kahn, Esq.

Celeste L. M. Koeleveld, Esq.

Lenore Kramer, Esq.

Harold A. Kurland, Esq.

Fay Leoussis, Esq.

Burton N. Lipshie, Esq.

Richard B. Long, Esq.

Holly Nelson Lütz, Esq.

Catherine Nagel, Esq.

Thomas R. Newman, Esq.

James E. Reid, Esq.

Richard Rifkin, Esq.

Jay G. Safer, Esq.

Robert J. Smith, Esq.

Brian Shoot, Esq.

Richard M. Steigman, Esq.

John F. Werner, Esq.

Mark C. Zauderer, Esq.

Oren L. Zeve, Esq.

Jessica M. Cherry, Esq., Counsel

**Appendix 2 -**
**Memorandum – Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction - October 15, 2018**

**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

==========

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.**

==========

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.

**Appendix 3 -**
**Public Comments –**
**Memoranda of the New York State Bar Association Committee on Civil Practice Law and Rules**

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

# Memorandum in Partial Support

## COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #1 January 11, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

The Committee on Civil Practice Law and Rules studied the proposal of the Unified Court System's Advisory Committee of Civil Practice to adopt certain rules of the Commercial Division in other courts of civil jurisdiction. The proposal included adoption of the following rules of the Commercial Division:

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 log (in part)
Rule 11-d – Limitation 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

With the exception of Rule 19-a, the Committee unanimously approved the proposal at its November 16, 2018.

As to Rule 19-a, a subcommittee was formed to further study the rule and its findings will presented at the full committee meeting on January 18, 2019, which is after the January 15, 2018 deadline for comment. We, therefore, kindly request that the committee be given until January 28, 2019 to submit its comment concerning Rule 19-a. Kindly advise whether the CPLR Committee could have until January 28, 2019 to submit its comment concerning Rule 19-a. Your professional courtesy is appreciated.

Co-Chairs of the Committee

Souren A. Israelyan Domenick Napoletano

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

# Memorandum

## COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2 January 24, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Subject: Recommendation by the Unified Court System's Advisory Committee on Civil Practice as to Rule 19-a of the practice rules of the Commercial Division of Supreme Court

We thank the OCA for extending the time for comment to January 28, 2019, which allowed the NYSBA CPLR Committee to meet and discuss its concerns about the proposal to extend Rule 19-a of the practice rules of the Commercial Division of Supreme Court to all civil cases in all New York State civil courts and make the service of the statements specified in the rule mandatory.

Rule 19-a of the practice rules of the Commercial Division of Supreme Court provides that Commercial Division justices may direct a party moving for summary judgment to provide a paragraph by paragraph statement of the material facts as to which there are no genuine issues to be tried (with citations to the record) and the party opposing the motion to provide a paragraph by paragraph response thereto (admitting or controverting the "facts" cited by the movant and citing to the record where a fact listed by the movant is disputed). At subsection (c), the Rule provides that

> Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

In its recommendations to adopt certain Commercial Division Rules throughout the civil courts (July 2018), the Unified Court System's Advisory Committee on Civil Practice ("Advisory Committee") recommends that Rule 19-a apply to any motion for summary judgment in all types of civil cases in all of New York's civil courts but that the submission of the movant's statement and the responding statement by the party opposing the motion, as specified in the rule, be mandatory rather at the direction of the court.

After report and discussion, and upon vote by its members at its January 18, 2019 meeting, the NYSBA Committee on the Civil Practice Law and Rules ("CPLR Committee") opposes the Advisory Committee recommendation as to Rule 19-a.

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Considerations raised in the CPLR's meeting included the following.

The recommendation of the Advisory Committee would engraft on CPLR 3212 an additional document to be submitted in support of a motion for summary judgment. CPLR 3212 provides what are the necessary factual documents to be served by the movant. Specifically, 3212 (b) provides:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

Nowhere does CPLR 3212 mention any of the documents described in Rule 19-a. Only the State legislature with the approval of the Governor can amend the CPLR to provide another document that must be filed in support of, and in opposition to a motion for summary judgment.

Additionally, if the recommendation of the Advisory Committee was accepted, the party opposing a motion for summary judgment may be unfairly prejudiced as follows: the party opposing the motion (a) provides by affidavit facts which dispute a purported fact which the movant contends in its Rule 19-a is a material fact as which there is no genuine issue to be tried, but (b) inadvertently fails to dispute the "fact" in its Rule 19-a response. Under Rule 19-a, the purported fact is deemed admitted by the party opposing the motion, despite its affidavit disputing the "fact."

Such a result would contradict the following terms of CPLR 3212(b):

> the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

While the possibility of such an inadvertent failure is unlikely where the movant serves a simple, straightforward Rule 19-a statement, the risk is heightened where the movant has served a long and complex statement under Rule 19-a.

Additionally, if Rule 19-a is extended to all civil cases as the Advisory Committee proposes, such would add undue and costly burdens to summary judgment motions which already require care in preparing affidavits in support and opposition and supporting, opposing, and reply memoranda of law.

Finally, while the CPLR Committee opposes any extension of Rule 19-a beyond the Commercial Division, if the Advisory Committee decides to promote such extension, the CPLR Committee urges that any such extension does not include making the service of the statement and responding statement described in the rule mandatory but, as Rule 19-a currently reads, only upon instruction of the court handling the case. The judge handling a case should have the flexibility of deciding that he or she would not benefit from the filing of the statements described in Rule 19-a.

Co-Chairs of the Committee

Souren A. Israelyan Domenick Napoletano

**Appendix 4 -**
**Public Comments –**
**New York City Bar, Matrimonial Practices Advisory and Rules Committee, Managing Attorneys and Clerks Association, Inc., and the Corporation Counsel for the City of New York**

**COUNCIL ON JUDICIAL ADMINISTRATION**

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**CHAIR**
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**STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE**

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By Email
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

January 28, 2019

**Re: New York City Bar Association Comments on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction**

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed adoption of certain rules of the Commercial Division in other courts of civil jurisdiction.

The New York City Bar Association (the "Association") commends the Advisory Committee on Civil Practice (the "Advisory Committee") for undertaking this analysis and for its thoughtful discussion of each of the rules of the Commercial Division, upon which it bases its recommendations – both with respect to those rules that the Advisory Committee recommends adopting and those that it does not.

The Association supports the adoption of Rules 3(b), 11-a, 11-d, 20, and 34 of the Commercial Division in other courts of civil jurisdiction as proposed by the Advisory Committee. In the interest of brevity, we do not further comment on these rules. The Association also supports the Advisory Committee's recommendations with respect to Rules 22 and 30(a), which the Advisory Committee recommends the adoption of (at least in part), but which do not appear in the Advisory Committee's covering memorandum listing the rules that it recommends adopting.

With respect to several other Commercial Division rules, however, the Association disagrees in some respect with the recommendation of the Advisory Committee. Specifically, the

Association opposes the adoption of several rules that the Advisory Committee recommended adopting, recommends the adoption of certain rules that were *not* recommended for adoption by the Advisory Committee, or otherwise has comments on the recommendations made by the Advisory Committee. The Association's comments on these rules are as follows:

## I. RULE 3(a)

The Association agrees with the Advisory Committee's recommendation that Rule 3(a) of the Commercial Division be adopted. However, we do not believe that changing the word "direct" to "advise," is consistent with or furthers the recommendation expressed by the Advisory Committee in the last paragraph of its comment, "that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties." If the goal is to take steps that result in the greater use of mediation, we believe that can be best achieved by allowing a court to *direct* the parties to mediation where appropriate. Moreover, the Advisory Committee's reason for its proposed amendment is not explained in its report.

Further, although the Commercial Division rule refers to an "uncompensated" mediator, as correctly noted by the Advisory Committee, we agree with the Advisory Committee's recommendation, which refers to the appointment of a "court-annexed mediator," leaving out the word "uncompensated." This recommendation is in fact consistent with the practice of the Commercial Division in some counties, where mediators are compensated after the first few hours of a mediation.

While we support the increased use of mediation in cases that the court deems appropriate, we reiterate and adopt here an important recommendation made in the June 2018 report of the City Bar's Committee for the Efficient Resolution of Disputes: "[I]f mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers. To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts."

## II. RULE 5

The Association agrees with the Advisory Committee's recommendation *not* to adopt Rule 5. We also agree that on-line notices of the status of actions and motions would be useful and note that the e-courts notices received by counsel who have appeared in an action provide that information.

## III. RULE 7

The Advisory Committee does not recommend the adoption of Rule 7, but instead makes certain recommendations, without proposing a specific rule, concerning improvements of the

methods by which "pro forma" court conferences, especially concerning discovery, can be conducted.

The Association notes that one of the most common complaints raised by counsel and the courts is the inefficiencies attendant to "pro-forma" court conferences, such as preliminary and compliance conferences, often resulting from the volume of cases that appear on a court's conference calendar. Accordingly, the Association agrees with the Advisory Committee's 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 on discovery. We also agree that counsel should be required to e-file a statement as to whether discovery is proceeding as per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance. Conferences can then be reserved for instances where there are active discovery disputes or non-compliance issues to address. We recommend that the Advisory Committee consider whether this approach can be implemented as a matter of practice or whether, instead, a rule would be advisable.

## IV. RULE 8

The Association respectfully disagrees with the Advisory Committee's opinion that Rule 8 should not be adopted.

The Advisory Committee correctly describes Rule 8 as requiring counsel for all parties to confer prior to a preliminary or compliance conference about such matters as the resolution of the case, discovery, alternative dispute resolution, voluntary informal exchange of information, and issues of electronic discovery. However, the Advisory Committee opines that the "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."

We note that, at present, the rules do not provide for the electronic submission of preliminary and compliance conference orders in lieu of attendance by counsel at court conferences. Accordingly, we believe that the rules should address the procedures extant.

The experience of many attorneys is that, all too often, issues are not addressed or resolved expeditiously at court conferences. Moreover, some law firms have a practice of sending people to attend court conferences who may not be working on or familiar with the case, which often makes it difficult for counsel to address outstanding issues or agree upon a scheduling order that makes sense given the facts of the case. Presumably, the counsel that would take part in a required pre-hearing consultation, which is usually conducted by telephone, would be knowledgeable about the case and the issues. Accordingly, the Association believes that consultation between counsel prior to court conferences would result in greater efficiency at those conferences and, therefore, recommends the adoption of Rule 8 of the Commercial Division in other courts of civil jurisdiction. Rule 8 should, however, be harmonized with Uniform Rule 202.12(b) and (c), which govern preliminary conferences in all civil courts.

## V. RULE 11-b

The Advisory Committee recommends the adoption of Commercial Division Rule 11-b, except that (i) instead of providing that a party who insists on a document-by-document privilege log may be required (upon application of the opposing party, with "good cause" shown) to reimburse the costs associated with producing it, the Advisory Committee recommends that in the event of a disagreement the court should determine "whether the categorical approach or CPLR 3122 will be used"; (ii) the Advisory Committee does not recommend adopting the rule's requirement that a "responsible attorney" (as defined in the rule) certify that the privilege review was properly conducted; and (iii) the Advisory Committee recommends the addition of a specification that attorney-client communications and attorney work product created after the filing of the complaint need not be included in the log unless otherwise ordered by the court. The Association has the following comments on these aspects of the Advisory Committee's recommendation.

On the question of how to handle a dispute over whether a categorical approach should be used, while we agree that it might be most efficient to allow the court to direct that approach in proper cases, we question whether a rule providing as much would require an amendment to the CPLR. Under CPLR 3122(b), a party who has requested documents that are being withheld on any ground is entitled to certain information on a document-by-document basis unless the requirements for a protective order under CPLR 3103 are met. An agreement between the parties to instead produce categorical logs constitutes a waiver of that right. The rule attempts to provide an incentive for parties to enter into such an agreement by providing that, "unless the court deems it appropriate to issue a protective order under CPLR 3103," a party who insists on a document-by-document log will receive one but acts at its own peril in terms of possible cost-shifting. To the extent that the Advisory Committee's recommendation would allow a court to require a party to waive its right to a document-by-document log under circumstances that do not otherwise warrant a protective order, the Association questions whether this can be done by court rule.

Regarding certification by a "Responsible Attorney," it is not clear how much of the rule's certification provision the Advisory Committee would delete. The Association agrees that the definition of "Responsible Attorney" contained in the rule seems unnecessarily narrow, and that it would be enough to provide that a certification signed by any attorney acting on behalf of the producing party's law firm binds both the attorney and the firm. We also note that when this rule was originally proposed, the Association's Council on Judicial Administration expressed the view that the representations of specific facts set forth in the rule's certification were necessary to provide the type of information that a receiving party would want to review before accepting the categories designated by the producing party. The Association stands by that view.

Finally, the Association agrees that in most cases there is little or no purpose to be served by logging work product prepared after the commencement of litigation or communications with litigation counsel after such commencement. We believe, however, that this is generally addressed through objections and/or agreed-upon limitations, such that as a practical matter parties usually can avoid that burden in appropriate circumstances. We suggest that a blanket rule exempting all post-commencement attorney-client communications and work product from the logging

requirement may sweep too broadly, particularly insofar as such an exemption would appear to apply to communications with counsel other than litigation counsel.

## VI. RULE 11-c

The Advisory Committee does not recommend the adoption of this Rule, which provides that where electronically stored information ("ESI") is requested from non-parties, the parties should adhere to certain Guidelines that have been promulgated for such discovery. The Advisory Committee cites the existence of adequate rules in the CPLR and the Uniform Civil Rules as its reason for declining to recommend such adoption, but does not specify which rules it views as adequately covering the matters that the Guidelines address. The Association is of the view that the Guidelines promote efficiency and reduce the burden of litigation, particularly on non-parties. Among other things, they help to settle expectations about what should and should not be required of non-parties, and may thereby reduce the need for court intervention. Moreover, given that the Guidelines are just that – Guidelines, to which the rule specifies that the parties "should" adhere – the Association believes that the rule contains enough flexibility to allow the Guidelines to be bypassed in whole or in part in cases where they would not serve their intended purposes.

Accordingly, the Association respectfully disagrees with the Advisory Committee's conclusion and suggests that it be reconsidered.

## VII. RULE 11-e

The Advisory Committee recommends the adoption of this rule, except that it proposes one modification to subsection (d), which requires each party to state, no less than one month prior to the close of fact discovery or at such other date as the court directs, (i) whether production of responsive documents in its possession, custody, or control is complete, or (ii) that there are no responsive documents in its possession, custody, or control. Specifically, the Advisory Committee would require the statement to be made at the time of disclosure rather than at or near the close of fact discovery.

The Association respectfully disagrees with the Advisory Committee's proposed modification of this rule and believes it should be adopted as is.

The disclosure obligation is ongoing, and requires a party to supplement its disclosures if, as, and when new material becomes available to it. Requiring a statement of completeness to be made (or reconfirmed) at or near the end of fact discovery ensures that disclosure is complete at the most critical point: when the period provided for it is ending.

Accordingly, the Association believes that if such a statement is to be required only once (as both the rule and the Advisory Committee's proposed amendment seem to contemplate), requiring it to be made near the close of fact discovery is more appropriate than requiring it to be made sooner. The Association notes, however, that counsel, throughout the discovery process, including at the time document productions are made, should be advising each other (whether orally or in writing) of the status of their document productions, including as to completeness, as part of the overall obligation to confer in good faith.

## VIII. RULE 11-g

The Advisory Committee does not recommend adopting this rule, which requires the parties, "in those parts of the Commercial Division where the presiding justice so elects," to use a particular form for any proposed confidentiality order and to provide an explanation for any proposed deviations from that form. The Advisory Committee does, however, commend the form to practitioners seeking to draft such an order. The Association respectfully suggests that, given the Advisory Committee's expressed view about the form, it reconsider its position about the rule. The rule itself gives every individual judge the flexibility to elect to use the form or not. It also gives practitioners the flexibility to agree to variations where the circumstances so warrant; the requirement that the variation be explained is reasonable and not onerous. And it gives parties a baseline that will likely streamline the process of drafting proposed confidentiality orders. For these reasons, the Association believes that the rule should be adopted.

## IX. RULE 14-a

Although the Advisory Committee recommended that all decisions or agreements at disclosure conferences be reduced to writing, the Advisory Committee nevertheless does not recommend the procedure set forth in Rule 14-a. The Advisory Committee did not provide any reasoning as to why the Commercial Division's procedure was not recommended. The Association agrees with the Advisory Committee that all decisions should be memorialized and believes that the Rule 14-a procedures are sufficient to accomplish this goal. The Association therefore believes that Rule 14-a should be adopted.

## X. RULE 17

The Advisory Committee does not recommend the adoption of Rule 17, which sets limits on the length of memoranda of law, affidavits, and affirmations.[1]

The Association disagrees with the reasoning of the Advisory Committee in recommending that Rule 17 not be adopted. The Advisory Committee reasons that there are some cases "that simply require more extensive analysis," and that the parties in those cases should not be arbitrarily limited in terms of the length of their papers. But that is surely also the case in the Commercial Division, in which cases are often complex, both legally and factually, and may be document intensive. Moreover, the Advisory Committee recommends against the adoption of certain other rules outside of the Commercial Division specifically because those rules were deemed unnecessary, and potentially burdensome, for what are often *less* complex cases. Accordingly, the Association recommends the adoption of Rule 17.

## XI. RULE 19-a

[1] The Association notes that Rule 17 no longer sets a page limit, but rather has been amended to set word limits. Specifically, Rule 17 limits briefs, memoranda of law, affirmations, and affidavits to 7,000 words, with reply briefs limited to 4,200 words.

In the case of Rule 19-a, the Advisory Committee not only recommended the adoption of Rule 19-a, but in fact recommended that it be mandatory in all cases rather than only those where the court directs. Rule 19-a requires that a numbered list of undisputed material facts be annexed to all summary judgment motions, to which the opposing party can then respond.

Although the Association believes that such statements can be helpful to the parties and the judge in certain cases, the Association also recognizes that there are certain cases in which requiring a statement of undisputed facts will add an additional cost and burden without adding any value. Further, as some Commercial Division judges over the years have not required the submission of a Rule 19-a statement, it is clear that the preparation and submission of such a statement, in certain cases, before certain judges, would serve no purpose. The Association therefore recommends that Rule 19-a be adopted in its original form, such that a Rule 19-a statement of undisputed facts would be required only where the court believes that it will genuinely increase efficiency.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Council on Judicial Administration, Chair

Michael P. Regan
State Courts of Superior Jurisdiction Committee, Chair

Barbara L. Seniawski
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Statewide Coordinating Judge for
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John W. McConnell, Esq
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December 11, 2018,

**Re: Matrimonial Practice and Rules Committee Response to Request for Comment on the Proposed Adoption of Certain Rules of the Commercial Division in other Courts of Civil Jurisdiction**

Dear Mr. McConnell:

The Matrimonial Practices Advisory and Rules Committee (the "Committee") has concerns about the adoption of certain rules and recommendations of the Commercial Division of the Supreme Court to matrimonial cases.

After a discussion and analysis of the recommendations, the Committee has concluded that many of these rules are inapplicable and inappropriate in matrimonial litigation, and that matrimonial cases should continue to be governed by the provisions of 22 NYCRR Sections 202.16 and 202.16-a and 202.16-b. We have the following comments regarding specific rules:

**Rules 3(a) and 3(b) Appointment of a court-annexed mediator and settlement conference before a judge not assigned to the case**

Matrimonial cases have their own protocols for mediation which must consider issues of allegations or findings of domestic violence or power imbalances. There are no (summary) jury trials in matrimonial cases. In fact, with the enactment of DRL 170 (7), most divorces are resolved on the grounds of an irretrievable breakdown in the marital relationship for a period more than 6 month. The only issue that a jury can be demanded on is the issue of grounds, and there are few if any jury trials statewide. Certainly, trials on the issues of custody, parenting time, orders of protection, child support and maintenance would not be appropriate for summary jury trials.

Referring cases to a different Judge in a matrimonial action for a conference would defeat the one judge/one family concept, especially in a non-jury case where the Judge has handled the matter from inception to trial. The additional strain on judicial resources would make the rule impracticable in matrimonial actions.

**Rule 7 Preliminary Conferences**
There are specific rules contained in 22 NYCRR Section 202.16(f)(1) regarding attendance at Preliminary Conferences. As required by said court rule, many judges in matrimonial actions require the parties to appear given the emotional, personal nature of the litigation and the need for the parties to participate in the conference and hear from the Judge.

**Rules 11-a and 11-d Limitations on interrogatories and depositions.**
These rules are contrary to the fundamental principles of broad discovery in matrimonial actions governed by DRL Section 236(B)(4), where the goal is to obtain as much information as possible about the parties' financial circumstances. Additionally, interrogatories are particularly important in cases with self-represented litigants who are better able to access this discovery tool because it is easier and less expensive. In the First and Second Departments, there is no discovery on the issue of grounds, custody or orders of protection absent special circumstances. A limitation on depositions would lead to longer trials and fewer settlements. Certainly, trial judges should have the right to limit discovery if it is a fishing expedition, and for the most part, that has been successful.

**Rule 11-b Privilege Logs**
Privilege logs are rarely if ever used in matrimonial ligation.

**Rule 11e- Responses and Objections to Document Requests**
This rule is inapplicable to matrimonial discovery in that broad and complete disclosure is already mandated.

**Rule 19-a Motions for Summary Judgment; Statement of Material Facts**
Summary judgment motions for the most part are not utilized in contested matrimonial cases.

**Rule 20 Temporary Restraining Orders- Copies of Papers**
The Committee believes this rule can be useful in matrimonial ligation and recommends the application of this rule with a limitation that only the Order to Show cause portion of the application need be provided in advance and continuing the exception in Uniform Rule 202.7(f) for requests for Orders of Protection. Often in matrimonial litigation, the supporting affidavit is signed at the Courthouse when the papers are submitted. Pre-arranged times for these application with judges and parts where practicable should be encouraged.

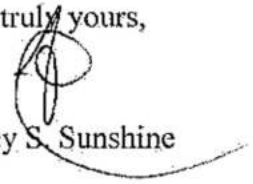
**Rule 34 Staggered court appearances**
The committee notes that most matrimonial judges allow for staggered court appearances as the needs of any case or attorneys dictate. However, given that many

matrimonial practitioners also practice in the Family Courts, where in some Counties the cases have specific time requirements and cannot be delayed, the efficacy of this rule would be lost in a matrimonial part. Family Court cases are often scheduled on short notice due to a 1028 or 1029 application or the arrest of a juvenile and take precedence over a divorce case We believe this calendar management tool should be left to the sound discretion of the judges and local practice.

**Rule 21 – Courtesy Copies**

Lastly, contrary to the recommendation of the Advisory Committee on Civil Practice, the Committee agrees with Commercial Division's Rule 21 which bars courtesy copies on motions submitted in hard copy and requires courtesy copies on motions submitted by electronic filing. This rule is consistent with the needs and practices of the matrimonial bar and judges generally, but additionally, the Committee believes this can also be left to the discretion of the judge.

Very truly yours,



Jeffrey S. Sunshine

cc: Susan Kaufman, Esq.

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January 14, 2019

*By Email*

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rulecomments@nycourts.gov

Re: Proposed Adoption of Commercial Division Rule 11-b in Other Courts of Civil Jurisdiction

Mr. McConnell:

We write on behalf of the New York City Law Department (the "Law Department") in response to the Administrative Board's Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction. The Law Department strongly supports the Advisory Committee's recommendations to:

1. Adopt the provisions of Commercial Division Rule 11-b that encourage the use of a categorical approach rather than a document-by-document approach to privilege logs; and
2. 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.

With the proliferation of email and other forms of electronically stored information ("ESI"), the volume of material that litigants must collect, review, and produce during discovery has increased dramatically. As a result, discovery costs in many cases have skyrocketed, particularly when it comes to reviewing documents and asserting privilege. The Sedona Conference recognizes that "[privilege] logging is arguably the most burdensome and time consuming task a litigant faces during the document production process." 17 Sedona Conf. J. 155, Commentary on Protection of Privileged ESI (2016).

A categorical privilege log permits common documents to be grouped in different classes rather than requiring all the details about each document to be separately logged. Our experience

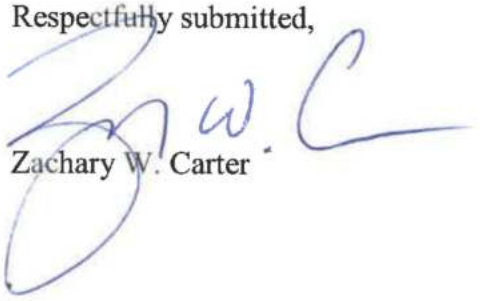
substantially reduce the time and cost of preparing privilege logs in cases with large document productions while continuing to provide sufficient information to the litigants and the courts. The use of categorical logs allows for a more efficient document review process, letting the parties devote more of their resources to identifying and producing relevant documents and less to logging massive amounts of detail that is ordinarily unnecessary.

The Law Department also supports the Committee's recommendation that post-litigation attorney-client communications and attorney work product do not need to be logged unless otherwise ordered by the court. Too often requesting parties are unwilling to agree to limit discovery to documents that predate the complaint and insist that post-litigation attorney-client communications and work product continue to be logged. This, in our view, results in a great deal of inefficiency by forcing the responding party to either contest the issue before the court or undertake the burden and expense of logging an inordinate number of clearly privileged documents that ultimately provide no benefit to the requesting party. It not only wastes valuable court resources, but also interferes with the producing party's ability to quickly and efficiently review and produce documents.

In sum, these two proposals, if enacted, will significantly reduce the costs and burdens of large e-discovery cases without diminishing the utility of the discovery process.

We thank the Administrative Board for this opportunity to comment.

Respectfully submitted,



Zachary W. Carter

# MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

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January 28, 2019

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

**Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction**

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction, published October 15, 2018. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of more than 125 law firms with litigation practices (primarily large and mid-sized firms) as well as the Attorney General's Office. Our members' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the Statewide Rules of the Commercial Division and as well as practice in non-commercial Parts of the New York Supreme Court.

Agreement with Advisory Committee Recommendations

We generally support consideration of rules that have been tested in the Commercial Division for application in other civil cases, and we agree with the recommendations of

the Advisory Committee on Civil Practice to adopt Rules 2 (to the extent of requiring counsel immediately to inform the Court of settlements when a motion is pending or trial date has been set), 3(a) (with the amendment proposed by the Advisory Committee), 3(b), 11-b, 14-a (to the extent of requiring that all decisions or agreements at conferences be reduced to writing and either stipulated to or so ordered), 19-a, 20, 22 (to the extent of its authorization of parties to request oral argument on the face of their motion papers) and 34, substantially for the reasons articulated by the Advisory Committee in its July 2018 Report. We note, however, that we do not support the Advisory Committee's suggestion that Rule 19-a statements be made mandatory for summary judgment motions in all actions; not all judges find them useful and the costs to the parties of preparing such statements may be disproportionate to their value and to the amount in controversy.

Com. Div. Rule 6: Bookmarking

The Advisory Committee declined to recommend adoption of Rule 6 for civil cases outside of the Commercial Division, including its provision for filing bookmarked memoranda and affidavits, on the ground that bookmarking is too burdensome. In our experience, filing an affidavit with its exhibits as a single, bookmarked PDF often is more efficient than filing the affidavit and each exhibit as a separate PDF, as is required for NYSCEF filings outside of the Commercial Division, *see* NYSCEF User Manual at 16. Accordingly, we recommend that parties in all types of civil actions have the option—but not be required—to file a bookmarked PDF.

Com. Div. Rule 8: Consultation Before Conferences

The Advisory Committee also declined to recommend Rule 8 for application to civil cases outside the Commercial Division. Rule 8 requires counsel to consult about settlement, disclosure, ADR and e-discovery issues prior to conferences. Notably, while Uniform Rule 202.12 specifies that such issues are to be addressed at the preliminary conference, it does not require advance consultation. We recommend that Rule 8's advance consultation requirement be incorporated into Uniform Rule 202.12 because we believe that in all case types the conference process is more efficient when the parties already have conferred to identify points of agreement and what they disagree about—and in some instances, parties can come to agreement through that procedure and end up not having to take up the Court's time with a conference. We note that Fed. R. Civ. P. 26(f) requires parties to confer prior to the federal equivalent of the preliminary conference, and in our experience that requirement makes the process of establishing a plan for discovery and other steps in the pre-trial process more efficient.

Com. Div. Rule 11-a: Limitations on Interrogatories

We agree with the Advisory Committee's recommendation that Rule 11-a be adopted for use outside the Commercial Division, but we note that subsection (b) needs to be amended by adding to the list of permitted topics expert disclosure pursuant to CPLR 3101(d)(1). The Advisory Committee has recommended against adoption of Com. Div.

Rule 13(c)'s expert disclosure provisions, and without them a party needs to be able to propound interrogatories pursuant to CPLR 3101(d)(1) in order to be able to prepare for an expert's testimony at trial.

Com. Div. Rule 11-e: Responses & Objections to Document Requests

We also support the adoption of Rule 11-e to apply in other civil cases, but without subsections (c) or (d) of the rule. Subsection (c) requires that the parties agree to a date by which document discovery will be completed, and that they reach such agreement by the commencement of depositions; subsection (d) requires that the producing party certify—for each individual document request—either that production is complete or that the party has no responsive documents. These provisions are widely regarded as unduly burdensome and in our experience parties tend either to stipulate around them or simply to ignore them. We believe that subsection (c) has not appreciably improved the timeliness or orderliness with which pretrial disclosure proceeds in Commercial Division cases. And outside of the Commercial Division, Uniform Rule 202.12(c)(2) already provides for the establishment of a timetable for the completion of various aspects of disclosure, which can be revisited in the course of compliance conferences scheduled pursuant to Uniform Rule 202.12(j).

Subsection (d) of Rule 11-e is disfavored among practitioners because in essence it requires the producing party to prove a negative fact: that there are no more responsive documents. A witness can only represent with personal knowledge what he or she knows, but in the case of negative facts any representation always is subject to the limits of the witness's knowledge. The risks of representing that a document production is complete were famously illustrated by a Florida court in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, CA 03-5045 AI (Fla. 15th Jud. Cir. Mar. 23, 2005). In *Coleman*, when a representation that document production was complete was rendered inaccurate by the subsequent identification of additional responsive records that had not been produced, the court granted a default judgment as a sanction (later vacated on appeal). Just as the Advisory Committee concluded that the certification requirement stated in Com. Div. Rule 11-b(d) was unnecessary, given counsel's obligation to conduct privilege reviews in a lawful, reasonable and good faith manner, so too is the certification requirement in Rule 11-e(d) unnecessary to parties' proper performance of their obligations to object or produce under CPLR 3122.

Com. Div. Rule 12: Non-Appearance at Conference

The Advisory Committee found Rule 12 to be duplicative of existing rules and did not recommend its adoption for that reason. We note that Com. Div. Rule 12 goes beyond other rules in its express authorization of the Court to impose an appropriate non-monetary sanction other than those itemized in Uniform Rule 202.27, and that Rule 130–2.1 provides only for monetary sanctions. We believe Justices are best able to enforce compliance with rules when they have flexibility to determine what is likely to be the

most effective yet fair sanction in a given situation. Accordingly, we support a rule that recognizes that power in Justices outside of the Commercial Division, and note that amendment of Rule 130–2.1 is likely the most expedient means to that end.

Com. Div. Rule 13(b): Documents Sought as Condition Precedent to Deposition

The Advisory Committee recommends against adoption of this provision for sanctions when records are requested in advance of a deposition but not timely produced, on the ground that CPLR 3127 adequately empowers the Court to address such compliance failures. We disagree. We frequently see litigation delayed when a party unjustifiably fails to produce its documents in advance of its deposition and Rule 13(b) is unique in specifically addressing the problem. The Advisory Committee also saw a potential for problems that could result from application of the rule when the required documents are in the possession of non-parties. The introductory clause of Rule 13(b) could be revised to address that concern: "If a party seeks documents from another party as a condition precedent to a deposition, the documents are not produced by the date fixed and the party of whom they are requested is later determined to have had such documents in its custody or control, the party seeking disclosure may ask . . . ."

Com. Div. Rule 29: Identification of Deposition Testimony

The Advisory Committee did not recommend adoption of this rule because it saw inconsistencies between the rule and CPLR 3117, particularly with regard to use of deposition testimony for impeachment purposes. We agree that deposition testimony should be available to use for impeachment purposes without having to be identified prior to trial, but believe this defect in Rule 29 can easily be remedied with the addition of a sentence to the end of the rule: "The rule shall not be construed in a manner that affects the ability of a party to use deposition testimony at trial in accordance with CPLR 3117(a)." We recommend adoption of Rule 29, with that amendment, for use in other civil matters.

Com. Div. Rule 32: Scheduling of Witnesses

The Advisory Committee did not recommend adoption of this rule on grounds that it would greatly alter New York practice by introducing a pre-trial witness list when the "trial by ambush" it guards against already is adequately regulated. We disagree. We believe that the device of a pre-trial witness list better enables the assigned Justice to manage the trial as well as the rest of his or her court schedule, and similarly assists the parties and their witnesses. We do not see a danger that the Court would cut off a witness's testimony when it exceeds the estimated length disclosed on the witness list, contrary to the Advisory Committee's concerns. We recommend adoption of Rule 32 for use in other civil matters.

Revisiting Other Com. Div. Rules

The Advisory Committee observed that a number of the Commercial Division Rules are unnecessary. We believe these findings should prompt a re-evaluation of the burdens associated with those rules and the benefits they confer, because in our experience some of the Commercial Division rules have been more burdensome and/or less beneficial in practice than originally may have been believed; and because, in our experience, extra rules tend to complicate procedure rather than make it more efficient. We believe the following rules are worthy of such review:

- Rule 1: Uniform Rule 202.12(b) already requires counsel to appear at conferences "thoroughly familiar with the action and authorized to act." It would be more efficient to eliminate from Rule 202.70(g) the language that makes Uniform Rule 202.12 inapplicable to the Commercial Division.

- Rule 2: The Advisory Committee aptly observed that "no purpose would be served" by taking a step in addition to filing discontinuance papers to notify the Part, except when a motion is pending or trial scheduled.

- Rule 4: The Advisory Committee suggested that sending papers by fax is inconsistent with the increasingly prevalent e-filing, and we would note that Uniform Rule 202.5-a is adequate for use in the Commercial Division in cases that are not e-filed; accordingly, Rule 4(a) is superfluous. The Advisory Committee also opined that counsel generally don't need a rule or other judicial direction to decide among them how to communicate and we agree; Rule 4(b) thus may also be unneeded.

- Rule 6: The Advisory Committee "believe[d] that there is no problem within the court system with regard to papers and their form . . . . There are already rules that seem to work well." Apart from the issue of bookmarking PDFs discussed above, we agree. We note, moreover, that an OCA rule that purports to supersede a statute, such as CPLR 2101's provision setting the minimum type size for documents other than the summons at ten point, is of uncertain legal effect. We also believe that Rule 130 is sufficient authority on its own to govern the conduct of parties and their counsel, and that a separate court rule that says Rule 130 applies is superfluous.

- Rule 7: The Advisory Committee believed conferences can be wasteful of parties' resources, and opposed making this rule applicable outside the Commercial Division. We believe that Rule 7 does not sufficiently differ from Uniform Rule 202.12(b) to warrant a separate rule.

- Rule 10: The Advisory Committee believed that Rule 10's requirement that counsel file certification that he or she has discussed ADR with the client invades the attorney-client relationship. We believe that the certification is make-work and have observed that the Justices in New York County's Commercial Division appear to be

uninterested in the certification or whether or not it has been made. As for the other information Rule 10 requires, we are not aware of any Commercial Division Justice asking for any of it other than what motions are anticipated. We do not believe that a separate rule is necessary for that purpose; Uniform Rule 202.12(c) can be amended to include anticipated motions and Com. Div. Rule 10 can be eliminated.

- Rules 11, 11-c, 11-f: The Advisory Committee believed each of these rules is superfluous in the face of the CPLR and other provisions of the Uniform Rules. We agree.

- Rule 15: The Advisory Committee believed judicial discretion as to adjourning conferences should remain unfettered. We do not believe Rule 15 articulates a standard that is not already inherent in the assigned Justice's power to manage his or her docket.

- Rule 16: The Advisory Committee did not recommend adoption of this rule governing motion procedures, deeming it superfluous in the face of CPLR 2214 and 3212 and Uniform Rule 202.8. We agree that, if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 16 would be unnecessary.

- Rule 18: The Advisory Committee did not recommend adoption of this rule governing sur-replies and post-submission papers on the ground that such matters should be left to the judge's discretion. We note in addition that we have not experienced problems with these matters outside of the Commercial Division, which are governed by Uniform Rule 202.8; and that if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 18 would be unnecessary.

- Rule 21: The Advisory Committee recommended against adoption of this rule on courtesy copies because it viewed the rule as contrary to the goals of paperless e-filing. We find the topic ill-suited to a statewide rule because the requirement of courtesy copies tends to be addressed in local rules in accordance with local preferences and in Part Rules in accordance with the assigned Justice's preferences. Accordingly, Rule 21 seems superfluous.

- Rule 23: The Advisory Committee recommended against adoption of this rule on counsel reminding the Court when it fails to decide a motion within 60 days on grounds that Justices are presumed to know the standards and goals they work against. We agree and add that Rule 23 has been dead letter ever since Uniform Rule 202.8(h) was amended to eliminate its parallel requirement in favor of periodic reports to Justices by the Chief Administrator, effective October 1, 2006. We are not aware that Rule 23 is ever complied with or enforced.

- Rule 25: The Advisory Committee rejected this rule on the scheduling of trial as having the potential to "result in substantial injustice."

- Rule 32-a: The Advisory Committee highlighted the weakness of direct testimony by affidavit: it is "more likely to result in counsel's version of the witness's testimony than that of the witness." For that reason, we believe presentation of direct testimony by affidavit should be at the discretion of the parties, not the Court.

- Rule 33: The Advisory Committee did not recommend adoption of this rule authorizing the Court to preclude evidence for failure to comply with four other Commercial Division rules because it "is vague and, depending on how it is construed, could lead to substantial injustice." We note as well that CPLR 3126, upon which Rule 33 purports to be grounded, provides penalties for "fail[ure] to disclose information . . . pursuant to [Article 31 of the CPLR]." The Commercial Division rules to which Rule 33 applies that penalty are not among the matters addressed by Article 31 of the CPLR, however; they are instead rules governing trial exhibits (Rule 28), the presentation to the Court of deposition testimony to be used at trial (Rule 29), pre-trial memoranda, exhibit books and jury questionnaires (Rule 31); and trial witness lists (Rule 32). That legal defect in Rule 33 and the drastic penalties it purports to provide for procedural missteps lead us to question whether the rule should remain in place.

* * *

Again, we are grateful for the opportunity to comment on the proposal to adopt some of the Commercial Division Rules for use in other types of civil cases. If the OCA would like elaboration on any of the foregoing, please let us know.

Respectfully submitted,

*s/Timothy K. Beeken*
MACA Rules Committee Chair
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**Appendix 5 - Report of the New York State Bar Association Task Force on Rural Justice, April 2020**

NEW YORK STATE BAR ASSOCIATION

# Report of the New York State Bar Association **Task Force on Rural Justice**

April 2020

# REPORT & RECOMMENDATIONS OF THE TASK FORCE ON RURAL JUSTICE

## INTERVENTIONS TO AMELIORATE THE ACCESS-TO-JUSTICE CRISIS IN RURAL NEW YORK

## APRIL 2020

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**APPENDIX**

# INTRODUCTION

Despite New York State having more licensed attorneys than any other jurisdiction in the United States, many New Yorkers do not have access to attorneys to assist with their legal problems. This lack of access is acutely felt within New York's rural communities, where the delivery of legal services presents both distinctive challenges and rewards that are largely uninvestigated by our metro-centric bar.

This metro-centrism is a symptom of the following reality: the great majority of New York's licensed attorneys practice in or around urban centers. According to the data, roughly 96% of attorneys practice in metropolitan areas, with the remaining 4% presumably serving New York's mostly rural geography. Compounding this inequitable distribution of attorneys, recent research has brought to light that nearly 75% of current rural practitioners will be retiring from practice in the next 10–30 years, with little to no new attorneys taking their stead. This alarming legal trend is exacerbating the access-to-justice gaps already faced by rural communities.

The Task Force on Rural Justice was formed to investigate these legal trends and to propose creative interventions to combat this imminent crisis.[1] We have taken insight from the other jurisdictions that have already been addressing their rural access-to-justice challenges, and now, as a united Task Force, endeavor to advance solutions crafted for New York's own unique jurisdictional needs. The report and recommendations that follow are the culmination of our collective effort to spotlight alarming legal trends, ameliorate the plight of New York's rural attorneys, encourage new attorneys to consider rural practice, and ensure greater access-to-justice for all New Yorkers.

We hope this Report inspires all invested stakeholders to take the necessary action required to avert the rural access-to-justice crisis upon us.

Co-Chairs

Honorable Stan L. Pritzker
Supreme Court, Appellate Division
Third Judicial Department

Taier Perlman, Esq.
Staff Attorney
Legal Services of the Hudson Valley

[1] A detailed description and background on the Task Force can be found in Appendix A and B.

# ACKNOWLEDGEMENTS

The Task Force on Rural Justice acknowledges Hank Greenberg, President of the New York State Bar Association (NYSBA), for his vision in spearheading the creation of this Task Force and assembling its diverse and knowledgeable members. Staying true to NYSBA's commitment to ensure access-to-justice for all New Yorkers, he created this task force to respond to the shrinking pool of attorneys serving rural communities across the state. Further, our work would not have been possible without our NYSBA liaisons—Katherine Suchocki and Tom Richards—who from start to finish supported us with great dedication to the cause. We would also like to thank the Honorable Elizabeth Garry, the Presiding Justice of the New York State Supreme Court, Appellate Division, Third Department, for her support of this initiative, and for championing the rural-justice cause long before this Task Force formed.

This report builds on an empirical study of lawyers in rural New York spearheaded by Taier Perlman for the Government Law Center at Albany Law School. The Task Force thanks the Government Law Center for sharing the underlying data on which its published study, *Rural Law Practice in New York State*, was based.

The Rural Justice Task Force also acknowledges the many invested stakeholders across the state who graciously and generously shared their time and insights. Special thanks goes to David Kay and Robin Blakely-Armitage from the Cornell Community & Regional Development Institute (CaRDI) who offered expertise in data science, rural demographic trends, and preliminary map-making. The Task Force also thanks ZevRoss Spatial Analysis for creation of the maps, infographics, and tables.

Finally, we acknowledge the many hard-working and dedicated rural practitioners from across the state that reached out to share their stories, comments, and proposals to support the Task Force. Without their tireless self-sacrifice, rural access to justice would just be a concept. These rural practitioners creatively maneuver through myriad challenges to deliver urgently needed legal services. They are justice warriors at the frontlines of the accelerating access-to-justice crisis affecting rural New York.

## CONCEPTUAL FRAMEWORK—A PACKAGE OF PROPOSALS

It must be clarified at the onset, that the rural access-to-justice challenges this Task Force was formed to address are largely due to forces beyond the scope of our work. The social, economic, and political circumstances that have brought about the decline of rural communities in New York and other states will not be addressed herein. Further, given that the diverse and complex challenges rural communities face implicate multiple stakeholders, including local and state governments, the Task Force had to take a creative approach when developing our recommendations.

Our recommended interventions fall under five categories—Rural Law Practice, Funding, Broadband and Technology, Law Schools and New Attorneys, and Law and Policy—which in totality make up a package of targeted proposals. These category specific interventions address the diverse and complex challenges rural communities face. Only through such a diversified approach can we meaningfully avert the justice gap crisis that will occur when nearly 75% of present-day rural practitioners retire.

This package of proposals is an invitation to any and all stakeholders invested in rural well-being and access to justice. Our diverse interventions call on the State Bar, the State Legislature, the New York Unified Court System, law schools, and others to take action where action is due. The interventions we discuss in this Report are not mutually exclusive. They each make up a piece of the bigger rural justice puzzle, and advancement of any one of them will make a difference for the rural access-to-justice problems our Task Force set out to address. In laying out these diverse recommendations, we invite the full panoply of stakeholders to help bring them to fruition. It will take the proverbial village to activate all of our recommendations, and the more recommendations we can advance, the better for all.[2]

## BACKGROUND & RESEARCH

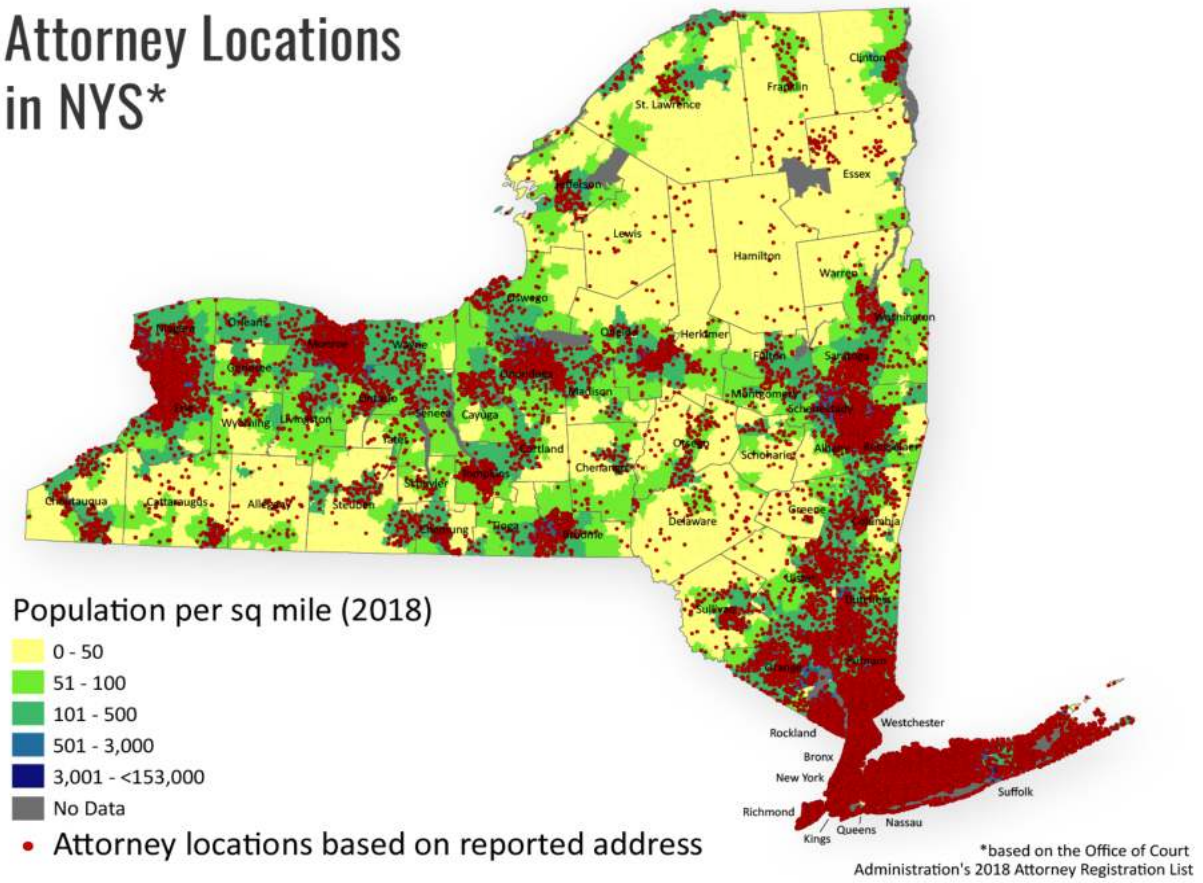
Readers familiar with the access-to-justice challenges experienced in rural New York may wish to skip this section and begin reading the Task Force recommendations which start at page 15.

### I. New York State Attorneys: Where Are They?

According to the *ABA National Lawyer Population Survey: Lawyer Population by State*, New York is home to the largest concentration of registered attorneys of any jurisdiction in the United States. As of 2018, New York had 179,600 registered attorneys, 155,369 of whom had in-state addresses. The majority of these registered attorneys are based in non-rural counties, so naturally, the organized bar focuses on meeting the needs of this great majority of practitioners. Accordingly, the needs of rural attorneys and access-to-justice challenges are not prioritized. This is documented across all jurisdictions.

[2] A summary of all the recommendations is located in Appendix F.

The urban clustering of New York attorneys is readily apparent when projected on a map:




Each dot represents a single attorney based on addresses reported to the Office of Court Administration.[3] The vast majority of New York State attorneys are located in urban centers of the state—Buffalo, Rochester, Syracuse, Utica, Albany (Capital Region), and the New York City metropolitan areas. Geographically, however, New York is primarily rural. Of the state's 62 counties, 44 are considered rural under New York State Executive Law § 481.

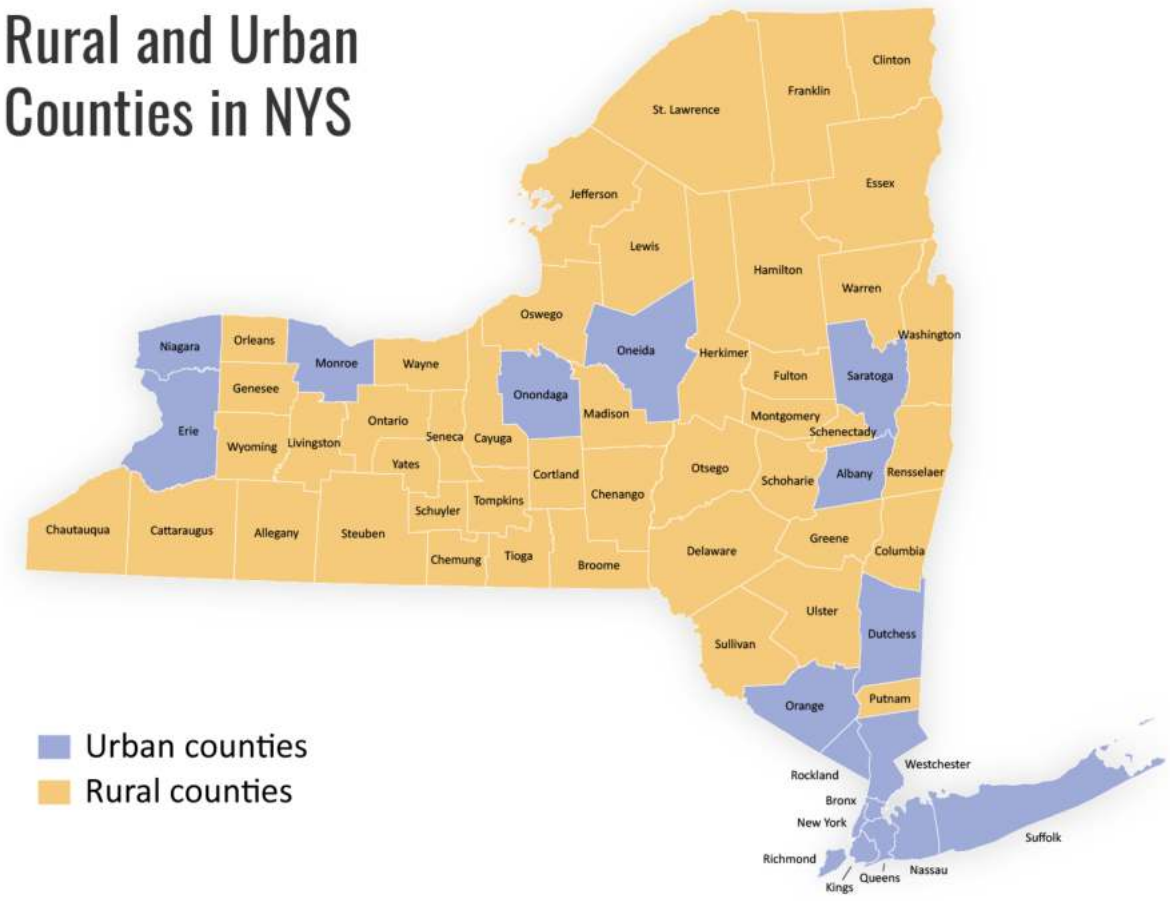
It should be briefly noted that defining "rural" is no simple task.[4] The definition shifts depending on the specific data sets being used, and what demographic factors or data units are being analyzed. State and federal agencies define rural differently from each other, and which definition of rural to use in a particular study depends on the context and purpose of the research. In a presentation to the Task Force, Robin Blakely-Armitage, Senior Extension Associate and

[3] The attorney registration list maintained by the Office of Court Administration's Attorney Registration Unit only publicly releases attorney work addresses, not their home addresses. Accordingly, attorneys that only report a home address, without including a work address, are not projected on this map. Additionally, attorneys in suspended status are not shown on this map.

[4] See Ruth Igielnik Wieder, Pew Research Center, "Evaluating what makes a U.S. community urban, suburban or rural" (Nov. 22, 2019), https://medium.com/pew-research-center-decoded/evaluating-what-makes-a-u-s-community-urban-suburban-or -rural-159f9d082842.

Program Manager at Cornell's Community and Regional Development Institute, explained that defining rural is largely contextual, and shifts depending on what you are studying. She said that the best general definition of rural is lower population density and limited proximity to a population center.

The Task Force deliberately decided not to get bogged down by the nuance involved in crafting a specific definition of "rural." For our purposes, we relied on the definition of "rural" in Executive Law § 481, which identifies a county as rural if its population is below 200,000 people. Relying on this definition, the following map visualizes just how rural New York State is:




Rural New York makes up approximately 80% of New York's land mass, and is home to approximately 17% of New Yorkers, or 3,260,008 people.[5] According to attorney-registration data, there are only 6,176 attorneys serving these vast rural territories. In reality, the number of rural attorneys that actually offer legal services to individual members of the public is much smaller than that statistic indicates, since it is unrealistic to presume that all 6,176 attorneys work

[5] This statistic was computed from the population data contained in the Table found in Appendix E. This Table, created by ZevRoss Spatial Analysis, used 2018 US Census population estimates.

in private law practices or legal services organizations. A sizable proportion of these attorneys are district attorneys, government lawyers, members of the judiciary, or employees of private businesses, government or public institutions, none of which offer legal services to the general public. This is corroborated by data from rural county bars. For example, the Delaware County Bar Association has a total of 71 members. However only 26 of them maintain a primary solo practice office in the county. Seventeen members are employed by the government, and the other 28 members are not offering legal services to the general public.[6] It is safe to conclude that less than 4% of New York licensed attorneys actually serve the access-to-justice gaps that exist in rural communities.[7]

Without a doubt, there are far fewer attorneys serving rural counties than urban ones. But are there too few? The uneven distribution of attorneys across New York State does not necessarily demonstrate an attorney shortage, particularly when we would expect there to be less attorneys in areas where there are less people. The question is whether there are enough attorneys per resident to meet the need, and in rural New York, there usually are not, as the following section shows.

## II. Evidence of Rural Attorney Shortages

### *Not Just a New York Problem*

Research across jurisdictions documents the growing shortage of attorneys throughout rural America. For instance, a recent publication titled *Legal Deserts: A Multi-State Perspective on Rural Access to Justice* summarized research on rural attorney shortages across five states—California, Georgia, Maine, Minnesota, South Dakota, and Wisconsin.[8] Data studies of rural attorney shortages have also been done in other jurisdictions including Arkansas, Montana, and Utah.[9]

---

[6] The Delaware County Bar Association statistics were shared with us by Task Force Member Gary A. Rosa on August 2, 2019. Similar figures come from other rural county bar associations. For example, the Madison County Bar Association has 86 members. 27 are court staff, agency attorneys, or lawyers who are members but do not practice law in the county. Of the 59 remaining, 5 are employed half time as government attorneys. Also, only 3 attorneys are under the age of 40. These figures were reported to us by Gemma Rossi Corbin on July 22, 2019. Corbin served as Madison County Bar Association President from 2016 to 2017.

[7] The facial inadequacy of the numbers in illuminating just how many rural practitioners actually serve rural legal needs was demonstrated in a rural practitioner survey that was conducted from August to October 2018 by Albany Law School's Government Law Center. Hundreds of survey responses had to be dropped from the analyzed data set because they were completed by rural practitioners who did not offer legal services to the general public. See Taier Perlman, *Rural Law Practice in New York State*, endnote 5 (Gov't Law Center, Apr. 16, 2019), available at https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative/Documents/rural-law-practice-in-new-york-state.pdf.

[8] Lisa R. Pruitt, et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15 (2018). https://harvardlpr.com/wp-content/uploads/sites/20/2019/04/4.-Legal-Deserts.pdf.

[9] Arkansas study: Lisa R. Pruitt, et al., Justice in the Hinterlands: *Arkansas as a Case Study of the Rural Lawyer Shortage and Evidence Based Solutions to Alleviate It*, 37 U. Ark. Little Rock L. Rev. 573 (2015); Montana study: Hilary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 Mont. L. Rev. 235 (Summer 2016); Utah study: David McNeill, *Measuring the Legal Services Market in Utah*, Vol. 30 No. 5 Utah Bar J. 22 (Sept/Oct 2017).

The California studies are especially relevant, because California is similar to New York. It has the largest population of any state; it has the second highest count of registered attorneys; and its attorneys practice mostly in large metro-areas, even though the state is predominately rural. The California Commission on Access to Justice published a report in July 2019 spotlighting attorney shortages in California's rural territories.[10] That study documented the same attorney distribution trends as New York, including the problematic attorney deserts that exist in rural communities.

***The New York Problem***

While many studies have been done examining workforce shortages across rural New York, no one entity has specifically studied legal workforce shortages until the Government Law Center at Albany Law School published its seminal *Rural Law Practice in New York State Report* in April 2019.[11] This detailed report, based on a three-month survey of rural practitioners, revealed a number of telling legal trends affecting rural communities. The report provided qualitative and quantitative data about what rural practice is like as well as the rewards and challenges of rural practice. Most significantly, it documented the growing shortage of rural attorneys based on several indicators—difficulties rural attorneys have making referrals in their geographic region, feeling overwhelmed by the volume of cases they are handling, and the greying of the rural bar due to a shortage of new attorneys. The below section focuses on the later indicator, which is what has prompted many jurisdictions to action.

**A. The Greying Rural Bar**

The Government Law Center's survey reported an alarming figure: 74.3% of respondents were 45 years or older, with 54% at or near retirement age. This means that within 10 to 30 years, the majority of current rural attorneys will be fully retired. The gravity of these figures was colored by comments from the respondents:

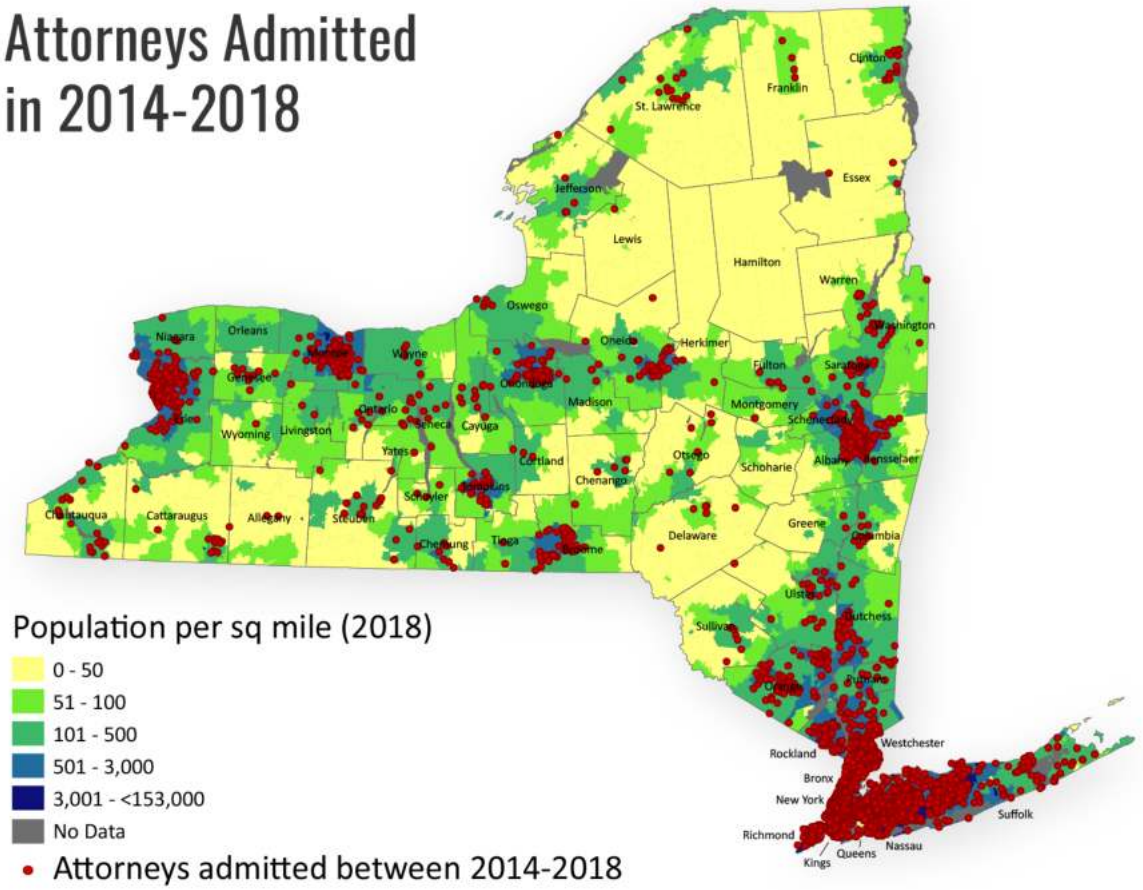
> *"I am the only lawyer handling complex business transactions. I am 69 years old and cannot retire because too many people rely on me."*
>
> *"While there are currently enough attorneys to go around, most are in their 60s, which means many will probably retire in 10-20 years. There may be a crisis in the future, just look at the age of the attorneys."*
>
> *"We are running out of lawyers! Something needs to be done to attract young attorneys to the rural areas . . . Our county is literally running out of lawyers."*

[10] CA Commission on Access to Justice, CALIFORNIA'S ATTORNEY DESERTS: ACCESS TO JUSTICE IMPLICATIONS OF THE RURAL LAWYER SHORTAGE (July 2019). http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Attorney-Desert-Policy-Brief.pdf

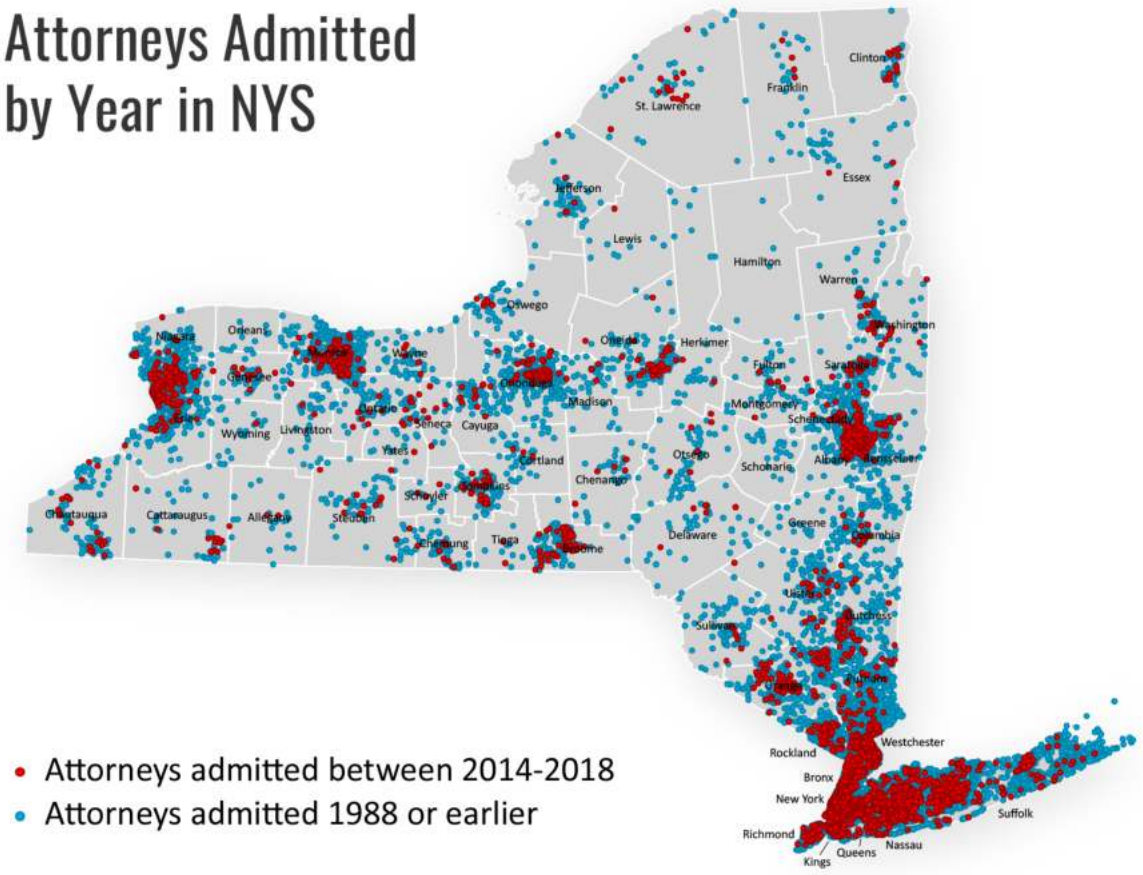
[11] See Perlman, *Rural Law Practice*, at https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative/Documents/rural-law-practice-in-new-york-state.pdf.

Based on these findings, the Task Force took a deeper look at the composition of rural practitioners. Using attorney registration data, we worked with data scientists to compare how many rural attorneys are newly admitted compared to those that have been in practice for quite some time.

The following map shows each attorney that was admitted to the bar between 2014 and 2018:




Like attorneys generally, newly admitted attorneys are heavily concentrated in New York's urban counties. An overlay of attorneys that have been admitted since 1988 or before—representing attorneys that have been in practice for 30 plus years—shows a remarkable effect:

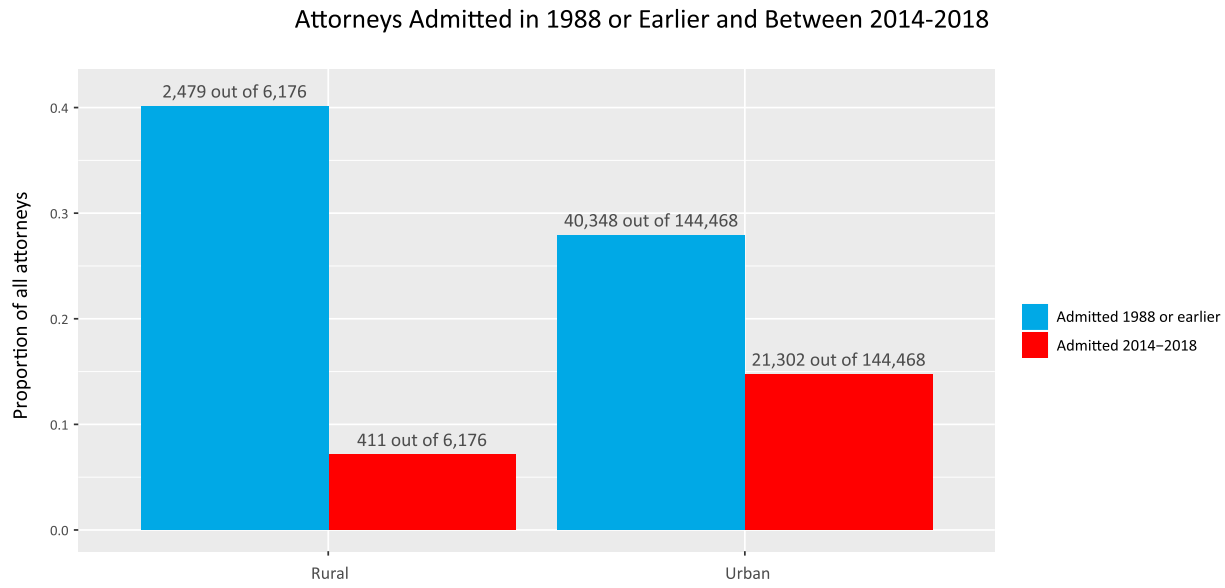



The older generation of attorneys are much more numerous and spread out across New York's rural territories. They also clearly outnumber the newly admitted attorneys that are settling in rural areas. This attorney age imbalance was also documented in the Government Law Center's survey, albeit qualitatively:

> *"This county has no public defender office; all indigent legal defense is 18-b. We are running out of defense attorneys who are willing/able to take cases because more attorneys are retiring or leaving the area than those coming in to replace them."*
>
> *"I get the impression sometimes that young attorneys are coming out of law school with so much debt that they do not feel they can come to our small villages."*
>
> *"Attracting and retaining young lawyers to work in rural areas is one of the biggest challenges I face as a rural practitioner."*

Many more commenters likewise expressed concern about the shortage of newer attorneys and the dim prospects once currently practicing attorneys retire.

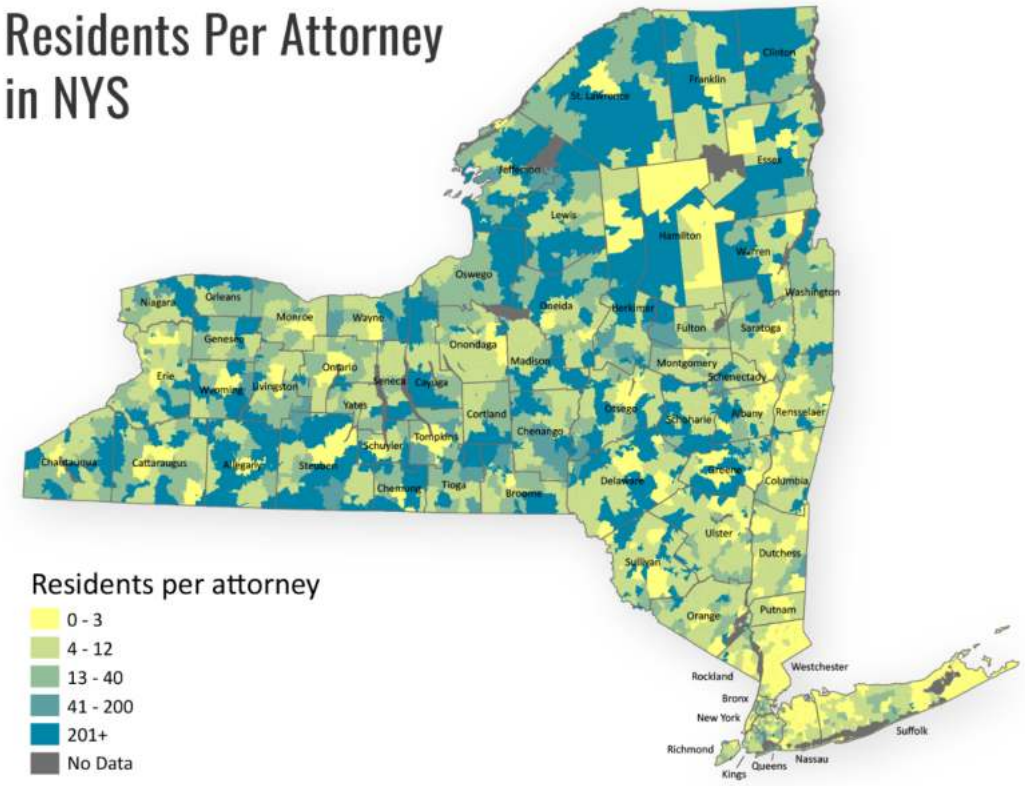
The following graph compares the proportions of older and newer attorneys in urban and rural counties and corroborates the anecdotal knowledge:




As the chart makes clear, newer attorneys in rural areas are much more heavily outnumbered by late-career attorneys than newer attorneys in urban areas.

### B. Attorney-to-Resident Ratios

When we compare resident-to-attorney ratios across the state, we see a significant imbalance of attorneys in rural areas compared to urban or suburban areas as measured on a per capita basis. The below map uses population data and attorney-registration data to compute the resident-to-attorney ratio, giving an average of how many people there are for each attorney in that area. The darker areas are where there are more residents per attorney.




As the map shows, rural areas across the state have higher resident-per-attorney ratios. This is in stark contrast to more urban areas of the state which have much better ratios—for each attorney there are 1 to 40 residents. In many rural areas, however, for each attorney there are 201+ residents. This explains the challenges rural practitioners reported about overwhelming volume of cases and difficulties making referrals to legal experts in their geographic region.[12]

### C. Challenges in Rural Practice

As noted above, rural law practice presents unique challenges (and rewards).[13] The rural-practitioner survey conducted by the Government Law Center at Albany Law School illuminated the following eight themes which make rural law practice difficult[14]:

---

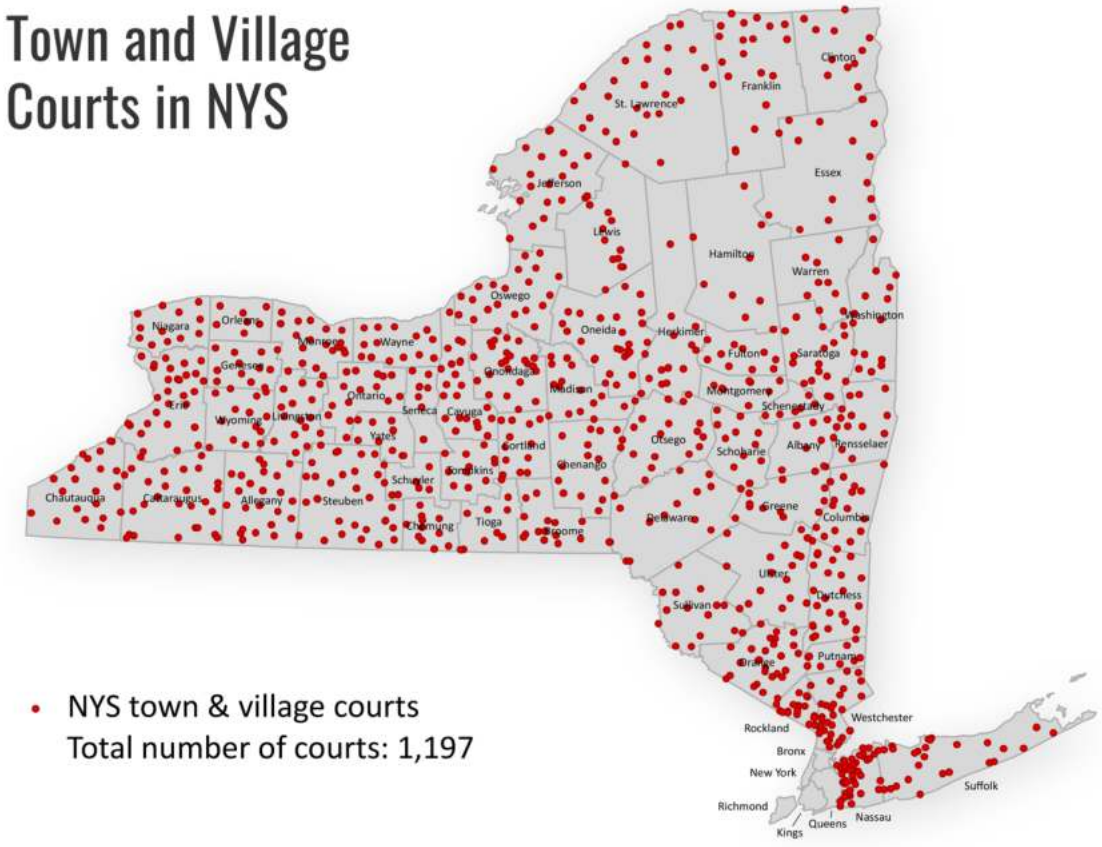
[12] The disparity in the rural and urban attorney-to-resident ratios is perhaps more clearly visualized by the infographic in Appendix C, which plots the attorney-to-resident ratios by county.

[13] The Government Law Center's survey also revealed a number of rewards to rural practice, which are important to appreciate for full understanding of rural law practice. The rewards survey respondents discussed include: love for an impact on their community; reward of helping their clients in meaningful ways; reward of helping underserved poor clients; quality of life in rural communities; and appreciation for type of practice, the local bar community, and relationships with the courts.

[14] *Id.* at 6. Readers are encouraged to refer to Government Law Center's report, which is available at https://www.albanylaw.edu/centers/government-law-center/the-rural-law-initiative, for more details.

1. Prevalence of indigent clients
2. Financial stress on lawyers
3. Professional isolation
4. Overwhelming caseload/not enough attorneys to assist
5. Systemic inefficiencies
6. Distance burdens
7. Technology issues
8. Conflicts of interest/knowing too many people in small communities

The Task Force considered these difficulties in devising its interventions, and several of our recommendations address these difficulties from multiple angles. For instance, one of the bigger challenges faced by rural practitioners relates to the non-uniform and scattered nature of the town and village court system in New York State, also known as justice courts. There are presently 1,197 active justice courts in New York State:[15]




[15] Data provided by the New York State Office of Justice Court Support. The Office of Justice Court Support was formed in 2007 as part of an initiative to improve the efficiency and quality of local town and village courts. The Office supports the work of the justice courts by delivering legal assistance, training, equipment, and services to the justices and court clerks.

Active rural practitioners have to travel tremendous distances to appear in these scattered courts, which typically only hold court during night hours one-to-several times a month. Steuben County in western New York, for example, has 34 justice courts, and Franklin County in northern New York has 20. *See* maps in Appendix D. The tally of justice courts in Steuben County does not account for the county's five state-run courts, which sit in three different cities, or the federal district court that has jurisdiction over Steuben County, which has its courthouse two counties away, in Rochester.[16] This overwhelming tapestry of courts, no doubt adds to the challenges that rural practitioners experience.

The Rural Justice Task Force did not go further in studying justice courts, especially since several NYSBA task forces have already done so.[17] However, the impact of this court system on rural practice could not be ignored, and accordingly, several of the proposed interventions address the challenges of practicing in these courts.

We now move on to the recommended interventions of the Task Force which begins on the following page.

[16] For a list of courts in Steuben County run by the state, see New York State Unified Court System, "Steuben County," http://ww2.nycourts.gov/courts/7jd/steuben/index.shtml. For information on the jurisdiction of the United States District Court for the Western District of New York, see https://www.nywd.uscourts.gov/accessing-court.

[17] Town & Village Courts Report, Report & Recommendations of the NYSBA Criminal Justice Section (2018), https://www.nysba.org/tvcourtsreport/.

# RECOMMENDATIONS OF THE NYSBA TASK FORCE ON RURAL JUSTICE

(A summary of all the recommendations is located in Appendix F)

## I. FUNDING-RELATED INTERVENTIONS

### A. Funding Is Crucial to Attract Rural Practitioners

As this report shows, the serious shortage of lawyers in rural New York is amply demonstrated not only through metrics, but also anecdotally. Therefore, one focus of this Task Force has been on ways to incentivize new attorneys to practice their skills in these underserved areas.

One concrete approach involves providing financial assistance in exchange for a certain time commitment to practice in a targeted rural area. There are a number of possible models, discussed below, to achieve this. The student-debt crisis is not only real, but growing. "Economists project an accumulated student loan debt of $2 trillion by 2021, and, at a growth rate of 7% a year, as much as $3 trillion or more by the end of the next decade."[18] Of course, this crisis has caused a wide range of pernicious impacts. "Studies show that many of those struggling to repay these mountainous student loans are also experiencing serious mental health problems, caused in large part by the crushing weight of these loans."[19] Indeed, this crisis has profoundly impacted the choice of where one chooses to practice law, as the benefits of rural practice are often far outweighed by financial concerns as urban practice is often far more lucrative. It is within this vexing context that we have considered and now recommend the following ameliorative economic strategies.

The Task Force considered several different programs before endorsing the following approaches, ranked in order from most to least preferred.

### B. Establish a Direct Pay Model

Our first proposal is that New York State adopt a program similar to the South Dakota Legal Education for Public Service and Rural Practice Loan Repayment Assistance Program.[20] The general idea of this model is to provide money to certain attorneys, making rural practice feasible and more appealing by removing, or at least diminishing, the specter of student-loan debt when establishing a practice or entering into governmental service in a rural area.
Direct-pay models are a preferred method to incentivize rural practice because, compared to other interventions such as tax relief and law school scholarships, the direct pay model affords the following benefits:

- By allowing flexibility, it is scalable and provides a tangible benefit.

[18] See Daniel Johnson, *What Will It Take to Solve the Student Loan Crisis?*, Harvard Business Review ( Sept. 23, 2019).

[19] *Id.*

[20] See *Rural Attorney Recruitment Program*, https://ujs.sd.gov/uploads/RuralAttorneyRecruitmentProgram.pdf)

- The ability to operate as a pilot program for a limited number of years.
- The ability to direct the benefit to the rural areas that are the focus of this report.
- Avoiding the criticism that tax policy is not the best place to implement social policy.

The South Dakota program provides direct payment to attorneys in certain defined rural communities. The attorneys are paid $12,500 per year for 5 years. The funding is provided as follows: 50% from the court system, 35% from the county (or the county and city combined) and 15% from the South Dakota Bar Association (a mandatory bar association).

The following proposals are based upon the South Dakota model but are somewhat different as the demographic landscape in New York differs significantly from South Dakota. Thus, the Task Force has modified the South Dakota model in significant ways to fit our needs in New York. Some of the details of our plan, which are highly flexible, are as follows:

### *1. New York State Direct Pay Model*

**Eligible Areas**: Counties with population densities less than 100 per square mile and outside of the corporate boundaries of a city.[21]

This would include the following counties, listed in order of decreasing population density: Cortland, Tioga, Columbia, Oswego, Cayuga, Seneca, Chautauqua, Sullivan, Washington, Greene, Clinton, Steuben, Warren, Wyoming, Yates, Wayne, Jefferson, Otsego, Cattaraugus, Chenango, Schuyler, Orleans, Schoharie, Allegany, Herkimer, St. Lawrence, Delaware, Franklin, Lewis, Essex, and Hamilton.

**Alternate Eligible Areas**: Counties with lawyer densities less than two lawyers per 1,000 population and outside the corporate boundaries of a city.[22]

This would include all of the counties described above, with the exception of Hamilton, Warren, Columbia, and Sullivan counties, and adding Oneida, Ontario, Genesee, Chemung, Montgomery, Livingston, Madison, and Fulton counties.

**Amount of annual benefit:** An amount equal to the average published annual in-state tuition rate and mandatory fees for the accredited SUNY law schools, CUNY School of Law, and School of Law at the University at Buffalo. Currently, that average is $22,148.

**Benefit Period:** We recommend a five-year benefit period and justify that period, as it is longer than a traditional three-year law school program, because this time period allows the attorney to:
- Become firmly established in the community.
- Helps to repay tuition of more expensive schools.

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[21] *New York Population Density County Rank,* http://www.usa.com/rank/new-york-state--population-density--county-rank.htm.

[22] *New York Lawyer Report: How many lawyers per resident in each county in New York State?*, Press Connects (May 14, 2018), https://www.pressconnects.com/story/news/local/2018/05/14/new-york-lawyer-report-how-many-lawyers-per-resident-each-county-new-york-state/545197002/.

- Helps to repay room and board.
- Helps to repay interest.

**Eligible Applicant:** We propose an Eligible Applicant would be any person not currently employed in an Eligible Area, who has not previously participated in the Direct Pay Model Program and who:

- Is admitted to practice law in the State of New York.
- Has never been disbarred, suspended, or publicly censured from the practice of law in any jurisdiction.
- Is willing to sign a contract to practice in the selected Eligible Area for the length of the Benefit Period.
- Will carry malpractice insurance during their involvement in the program and provide proof thereof.
- Has in excess of $100,000 in combined debt, including debt incurred in undergraduate and graduate programs.

**Method of Selection**: The application process will be designed, coordinated, and overseen by the New York State Bar Association (NYSBA). Applicants are to apply based upon their intended Eligible Area and selections per Eligible Area are to be made by way of a lottery. Final selections will be limited to the number of authorized awards each year. These awards will be made in rolling order from lowest population density/lawyer density (depending on definition of Eligible Area) to highest.

**Number of Annual Awards**: Seven awards annually over five years would potentially put 35 attorneys into the underserved rural counties, which we believe is enough to begin to make a significant difference.

**Funding**: State funding. To be made annually in a lump sum after the completion of each contract year.

#### *2. Direct Pay Loan Repayment Assistance for the Rural Lawyer*

We recommend this program as an alternative to the above, which is similar in scope and eligibility to the Direct Pay Model, but differs in that assistance would be directed to the attorneys' student loan payments, which would either be abated in whole or in part during the award period.

### C. Student Loan Repayment Programs

We recommend that NYSBA promote existing loan-repayment-assistance programs. First, the College Cost Reduction Act of 2007 created a federal program, administered by the U.S. Department of Education through subcontractors, which was designated to benefit both attorneys and non-attorneys in urban and rural areas. It provides for income-based repayment plans. And, for those with high debts and low incomes, federal loans qualifying for income-based repayments are structured so that payments are capped at a certain percentage of the borrower's income, with the remainder forgiven after 25 years.

The same Act created a program known as Public Service Loan Forgiveness, a more accelerated loan-forgiveness program for those who work in public service for a cumulative ten-year period. At the end of ten years, or after having made 120 qualifying payments while working in public service, the remainder of a federal direct-consolidation loan is forgiven.

There are significant problems with the administration of this program, and upwards of 90% of those applying for loan forgiveness following the ten-year period have had their applications for loan forgiveness denied. On April 3, 2019, six U.S. senators wrote to the Consumer Financial Protection Bureau and outlined problematic areas regarding the administration of the program. On October 28, 2019, 22 U.S. senators wrote to the Consumer Financial Protection Bureau requesting that it immediately open an enforcement investigation into the Pennsylvania Higher Education Assistance Agency's management of this program. The Pennsylvania agency is a U.S. Department of Education subcontractor.

In addition, in July 2019, the American Federation of Teachers (AFT) and individual plaintiffs filed a lawsuit in the United States District Court for the District of Columbia, *Weingarten v DeVos*, which challenges practices by the United States Department of Education that are contributing to the low rates of forgiveness currently being granted. These include claims of due process violations including the lack of notice regarding denials and processes for appealing denials.

Given this scenario, we further recommend that NYSBA engage in advocacy efforts to ensure proper administration of this program. NYSBA should do so through its Committee on Legal Aid and President's Committee on Access to Justice, both of which have subcommittees working on loan repayment issues and both of which have in the past recommended that this program be a federal legislative priority for NYSBA.

Second, the New York State District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program is administered by the New York State Higher Education Services Corporation and is designed to retain experienced attorneys employed as district attorneys, assistant district attorneys, or indigent legal services attorneys throughout New York State. Again, attorneys may apply for this program from both urban and rural areas of the state. This is a retention program designed to keep people in these positions longer term. To be eligible, attorneys must have worked in these positions for at least four years, but no more than nine years. Awards are in the amount of $3,400 each year with a cap of $20,400 for each attorney. We recommend that the amount of the award be raised to $5,500 per year and that the wait time to access this program be decreased from four years to two years, and that NYSBA advocate for pending bills on topic.[23] We further recommend that the program be more widely publicized by NYSBA.

Third, we also recommend that NYSBA publicize the Legal Services Corporation's Herbert S. Garten Loan Repayment Assistance Program which provides loan repayment assistance to select

[23] See pending Senate Bill S6668, which expands the eligibility period for indigent legal service attorneys to receive certain loan forgiveness and increases loan reimbursement for certain attorneys who work in legal services with indigent clients. https://www.nysenate.gov/legislation/bills/2019/s6668

attorneys who work full time for Legal Services Corporation (hereinafter LSC) grantees throughout the United States, regardless of whether a program serves urban or rural areas. Six LSC grantees serve the counties outside of the five New York City boroughs and are headquartered in Albany, Buffalo, Geneva, Hempstead, Utica, and White Plains. Selected attorneys receive up to $5,600 annually for a maximum period of three years.

### D. Tuition Assistance Programs

The Task Force also recommends that the Excelsior Program administered by the Higher Education Services Corporation be expanded to cover eligible students who wish to practice law in rural areas.

The Excelsior program, in combination with other student-financial-aid programs, allows students to attend a SUNY or CUNY college tuition-free, if they agree to work in New York State upon graduation. We recommend that consideration be given to establishing a similar program to develop a pipeline from high school to college to law school for rural high-school students who commit to return to their rural locations to work upon graduation from law school.

A model similar to this one has been established in Nebraska. In that program, students from certain Nebraska areas study at one of three Nebraska state colleges or universities, obtain their legal education at Nebraska College of Law, and then practice in rural areas throughout the state. Program benefits include full-tuition scholarships for undergraduate education, automatic acceptance into the law school, and eligibility for loan forgiveness after completion of law school. The high-school students must come from a rural section of Nebraska and must agree to return to that same rural area to practice law. Additionally, academic requirements must be met and maintained throughout college and law school. We envision that the establishment of a model such as this in New York would require partnership with University at Buffalo Law School and/or CUNY School of Law.

## II. LAW SCHOOLS AND NEW ATTORNEYS INTERVENTIONS

Law schools play an important role in ensuring access to legal services in rural communities. This section of the report identifies several strategies for law schools seeking to do more.

Law schools help rural communities obtain access to justice in two ways: directly, when law-school students, faculty, and staff provide legal services to people in rural communities; and indirectly, when law schools train the attorneys who will serve those communities. This section of the report recommends that law schools assess their programs in both areas in terms of their impact on rural justice.

### A. Assessment of Existing and Potential Programs

The first strategy available to law schools is to undertake an assessment of existing and potential programs in terms of their prospects for helping to promote rural access to justice. We

recommend that law schools assess how their current programs serve the interests of people in rural communities and students who might choose to practice in rural communities.

Such assessment could be done on a schoolwide basis, but could also be done program-by-program. For example, a specific clinic could assess how many of their clients live in rural communities and whether a future expansion could make more services available to those communities. A law-school office that hosts panel discussions about careers could assess how many of its guest speakers practice in rural communities.

Assessments of this kind could be built into other strategic-planning processes. For example, if a school is undertaking an institution-wide strategic-planning process, one committee or planning group could be tasked with focusing on rural justice. The same task could be assigned within a department that is undertaking a strategic-planning process. Law schools or departments within law schools can identify specific goals for programs that serve rural communities and/or students who are interested in rural practice.

There are also less formal opportunities to incorporate rural justice into strategic planning. For example, job vacancies can be an opportunity for thinking about priorities; hiring a new admissions director is an opportunity to ask candidates about how they would reach out to prospective students from rural communities.

It should be emphasized that assessments of this kind should not be aimed at ensuring "balance" between rural communities and urban or suburban communities. Some law schools, depending on factors like whether they are located near rural communities, have good reason to emphasize rural practice to a greater extent than other schools. Moreover, all communities have access-to-justice needs, and every law school has students who have the potential to do great things in rural, urban, and suburban communities. The goal of assessment and strategic planning, then, should be to identify opportunities for growing schools' capacity to serve rural communities and the students who might wish to serve them, not to take focus away from the needs of other communities.

Assessments of the kind recommended above depend on information, but at this point little information is available about the impact of law-school programs on rural communities and students who might wish to serve them. Thus, gathering data is an important part of the assessment process.

Again, departments within law schools can gather data separately or together: admissions offices can collect data about their own recruitment efforts in rural areas, and the outcome of those efforts; careers offices can collect data about employers and students to learn more about where jobs are located and how attitudes toward rural practice affect students' career choices; alumni offices can survey alums in rural communities about the skills needed to prepare for practice in those areas and schools' outreach to people in their communities; and so on. Gathering information about the impact of programs on rural communities and students who are interested in serving them is an important precursor to meaningful strategic planning.

### B. Law Schools' Role in Providing Services

The simplest way for law schools to address the shortage of legal services—although not necessarily the most effective in the long term—is for the law schools to provide legal services themselves. Every law school supports numerous programs in which students, sometimes with the help of significant faculty and school resources, directly provide services to people in their communities. These services fall into a number of overlapping categories.

One major category is services that students receive academic credit for providing. The rise in experiential education over the last few decades has created numerous ways for law students to provide services to their communities, including clinics, externships, internships, and other curricular options. One example of a rural-focused program of this kind is the Drake Agricultural Law Center.[24]

In addition, students participate in pro bono programs. Albany Law School students, for example, provided a total of 42,000 hours of pro bono work in 2018, with some students providing more than 750 hours, or nearly 19 weeks of full-time service.[25] (No data is available on how much of that service was provided to rural communities.)

Pro bono work is not optional in New York; the state court system requires that all students complete 50 hours of pro bono service before they are admitted to the bar.[26] The regulation defines "pro bono service" as "assist[ing] in the provision of legal services without charge," which allows students to count work for which they receive academic credit (such as clinical work) as pro bono service. Work that counts as pro bono service can thus be provided either as part of a curricular program, like a clinic, or as an extracurricular activity or part of an outside job.

Direct-services programs take many forms. Many law schools provide institutional support for students' pro bono work. Not all student pro bono work involves direct services; a different kind of service is provided by the Legislative Research Service of the Rural Law Center at the University of Wyoming College of Law, which involves student volunteers providing free legislative research and drafting services.

Another creative program is the Justice Bus program in Buffalo. This program is an initiative of Neighborhood Legal Services, joined by community partners including Volunteer Lawyers Project, the Western New York Law Center, and the University at Buffalo School of Law. The

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[24] See Drake University, *Agricultural Law Center*, https://www.drake.edu/law/clinics-centers/aglaw/.

[25] Albany Law School, *Students Commit to Pro Bono Work, Exceed 42,000 Hours* (Apr. 26, 2018), https://www.albanylaw.edu/about/news/2018/Pages/Graduating-Class-Drives-Public-Interest-Work-Far-Beyond-the-States-50-Hour-Requirement.aspx.

[26] Rule 520.16 of the Rules of the Court of Appeals, available at http://www.nycourts.gov/ctapps/520rules10.htm#B16. FAQs make clear that qualifying work includes clinical work, work under the supervision of a faculty member, and externships and internships. See http://ww2.nycourts.gov/sites/default/files/document/files/2018-07/FAQsBarAdmission_0.pdf, page 9.

project is a 12-passenger van that transports lawyers and law students to rural areas of Western New York to provide services to poor and disabled people.[27]

While some programs are supervised by law school staff and faculty—which is costly for the law schools—others involve outside placement of students. These programs are variously known as internships, externships, or field placements, and all of them involve primary supervision of the students providing services by attorneys in practice, rather than law school faculty or staff. There appear to be more programs of this kind supporting rural areas than faculty or staff-run programs.

Are law schools' direct-services programs an important way to address the shortage of legal services in rural communities? It is clear that service providers within law schools can become important resources within their communities. For example, the Farmworkers Clinic at Cornell and the Immigration Law Clinic at Albany Law School serve not only as significant providers of legal services but as hubs through which people in need of legal services are put in contact with attorneys who can provide those services. But their scope is limited in several ways: students spend longer on cases than experienced attorneys, and require supervision; clinics generally pick one kind of case (like immigration) and serve only clients with needs relating to that subject; and clinics are geographically limited because there are only four law schools in upstate New York (above Westchester County): Albany, Buffalo, Cornell, and Syracuse. Also, clinics are by far the most expensive educational program run by law schools, which makes it challenging to expand them.

One potential benefit of law students' direct-service work is that, in addition to helping the recipients of the services, it also exposes students to practice in rural communities. But there is good reason to be skeptical of experiential education's potential for motivating students to work in rural communities. Students' experiences in clinics involve working with very specific clienteles in narrow legal areas. This is very different from most rural law practice, in which a majority of lawyers are general practitioners working in solo practice or small firms. A farmworkers' clinic may give students excellent exposure to the life of farmworkers, but it will give them little insight into the life of rural lawyers. In this sense, direct-services programs' primary benefit is the services themselves.

One important consideration for programs that provide direct services is their relationship to other service providers. Ideally, the programs will complement and cooperate with existing service providers, rather than displacing them or competing for funding.

In sum, it is important for law schools to assess their direct-services programs with an open mind. While they have the potential to contribute significantly to the needs of their communities, law schools' role in producing future lawyers affects rural communities on a much greater scale.

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[27] See UBNow, *Justice Bus to offer on-site legal help to poor, disabled*, (Aug. 21, 2019), http://www.buffalo.edu/ubnow/stories/2019/08/justice-bus.html; see also Neighborhood Legal Services, *Beep Beep! The Justice Bus Is Coming to Western New York*, https://nls.org/justicebus/.

### C. Law Schools' Role in Providing Attorneys

Although law schools can usefully serve their communities by providing direct services, their greater impact is training the lawyers who will go on to serve rural communities.

Without wading into complex questions of curriculum design, the Task Force recommends that schools assess their curricula with an eye towards the needs of lawyers who will practice in rural communities. In the substantive legal training that law schools provide—that is, the courses they teach—the schools can (and many do) make an effort to give students the skills and training they need to succeed in rural practice. This includes both substantive courses and skills-based courses like practice management. And although there is much debate within law schools about the idea that graduates should be "practice-ready"—given the diversity of legal practices—there is a growing movement to teach classes on practice management and other classes that will be particularly useful for rural lawyers.[28]

It is also worth noting that law schools nationally are expanding online education.[29] This presents a potential opportunity for students who might consider rural practice, because prospective students in rural communities, especially those with limited resources, might find distance learning more manageable. Law schools considering such programs should assess their capacity for making law school more accessible to people in rural areas.

Outside of the curriculum training law schools provide, there are several important strategies for supporting students who might wish to practice in rural communities. Three of them include: increasing students' access to information about rural practice; working to challenge the prestige hierarchy which devalues rural practice; and growing the pipeline to rural practice by recruiting more students from rural communities.

#### *1. Increasing students' access to information about rural practice*

One important way law schools can support students who might wish to practice in rural communities is by helping them learn more about rural practice through mentoring, informational, and connection-building programs. Lack of information should not be a barrier to serving communities that need legal services.

Ideally, law students would never miss out on a possible career choice because they are unable to obtain information about it. But information about rural careers can be scarce. Every law school has an office responsible for helping students learn about careers, and those offices are

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[28] See Robert J. Condlin, "*Practice Ready Graduates": A Millennialist Fantasy*, 31 Touro L. Rev. 75 (2014); Martha Kanter and Grace Dodie, *Discarding the Fiction ofThe Practice-Ready Law Graduate to Reclaim Law As A Profession*, 17 W. Mich. Cooley J. Prac. & Clinical L. 265 (2015); Jason G. Dykstra, *Beyond The "Practice Ready" Buzz: Sifting Through The Disruption Of The Legal Industry To Divine The Skills Needed By New Attorneys*, 11 Drexel L. Rev. 149 (2018).

[29] See Mark Lieberman, *States Limit Spread of Online Legal Education*, Inside Higher Ed (Jan. 23, 2019), https://www.insidehighered.com/digital-learning/article/2019/01/23/new-york-maintains-restrictions-around-online-programs-amid

increasingly conceiving of their function in a broader way—hence the phrase "professional development" increasingly being incorporated into the names of those offices. As these offices help students build their professional identity and their career goals, they have an opportunity to introduce them to the significant opportunities that may exist in rural communities—or to reinforce the unfortunate message that such opportunities are not worth pursuing.

Professional Development offices can bring in guest speakers or organize informational sessions to help students learn about rural practice. They can engage in outreach to rural employers, who (lacking large human-resources offices) may be less knowledgeable about how to make their job openings known to law schools. One innovative program is the Iroquois "Take a Look" program—a healthcare-related program which takes downstate doctors on tours of upstate areas to entice them to move and work upstate.[30] To the extent that lack of information about upstate living is an obstacle to choosing rural practice, simple exposure can be very powerful.

Professional Development offices can also encourage students, during mentoring sessions, to consider rural options. Of course, many offices do just this; the Task Force's recommendation is simply that such offices assess their work to see whether their students are missing opportunities.

Professional Development offices are not the only offices within a law school that can help students learn more about rural practice. Alumni offices, for example, may sponsor mentoring programs that connect law students to attorneys in practice, and those offices can make sure to reach out to attorneys in rural communities for mentoring programs. Likewise, student-services offices can encourage students to form affinity groups on campus. Every office that works directly with students can assess their programs to determine whether they are serving students who might wish to practice in rural communities.

For each program in this category, questions for assessment should include:

- Whether the program helps eliminate informational barriers to rural practice (in other words, make sure that students do not eschew rural practice because of a lack of accurate information);

- Whether it makes it easier for students interested in rural practice to overcome the cultural devaluing of rural practice within law schools;

- Whether it helps students make connections with attorneys in rural practice who can help them establish a practice there.

***2. Perceived Prestige of Rural Jobs***

One important way law schools can make a long-term difference is by working to change the way rural practice is perceived by students. There is a perceived prestige hierarchy of jobs in law schools, and rural practice, because it involves small towns and small firms, can be seen as low in that hierarchy. Law schools could do more to change the cultural perception of rural work, to

[30] It is not clear there will be continued funding for this program.

spread the understanding that—as Professor Hannah Haksgaard has written—"Private practice legal work in rural areas is public interest work."[31]

Law professors and law-school staff frequently send implicit messages about the legal profession when they talk about successful lawyers (and identify certain lawyers as successful); when they talk about jobs (and identify certain jobs as desirable); and when they talk about the rewards they themselves find in their own work.

As many scholars have noted, prestige in the legal profession tends to be associated with urban practice, large firms, male lawyers, and representation of institutions rather than individuals.[32] It is important for professors and staff at law schools to challenge this prestige hierarchy and speak about the value of small-town and small-firm practice. The Government Law Center's data clearly shows that many lawyers thrive in rural practice because of benefits that are simply unavailable in large firms and large metropolitan practices, such as deep connections with close-knit communities. Professors and staff should endeavor to make clear to students that practice of this kind has more value than traditional prestige hierarchies acknowledge.

### *3. Growing the Pipeline to Rural Communities*

Finally, one of the most important ways law schools can help rural communities is by recruiting applicants from those communities. As the Task Force spoke to rural lawyers, we heard a strong consensus that the new lawyers most likely to stay in rural communities were those who had connections to those communities, particularly those who had grown up in them. That being the case, it is extremely important to make sure that college students in rural communities—and even high-school students—are fully aware of the availability of legal careers.

One exemplary program in this regard is Washburn School of Law's Rural Legal Practice Initiative, a partnership with undergraduate schools that helps pre-law students learn about legal career opportunities in rural communities.[33] Albany Law School, too, is reaching out to undergraduate students in rural communities through its partnership with SUNY Cobleskill. Many students who attend rural schools do not have family members who practice law and may never consider law school unless they encounter outreach or role models.

While there is no doubt that law schools in today's climate are aggressively recruiting students from all geographic regions, admissions offices can nonetheless usefully assess their own outreach efforts in rural communities. Faculty, too, can contribute to awareness of the possibility of legal careers by guest-teaching classes at rural schools, including high schools. Students in rural communities should not miss out on the possibility of a legal career simply because they are not exposed to that possibility.

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[31] Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 Me. L. Rev. 209, 210 (2019).

[32] See, e.g., John Heinz & Edward Laumann, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994).

[33] Washburn School of Law, *Rural Legal Practice Initiative*, http://washburnlaw.edu/news/2016/10/RuralInitiative.html.

## III. RURAL LAW PRACTICE INTERVENTIONS

### A. Introduction

The great majority of rural lawyers in New York are solo practitioners or members of small firms, are over age 45, serve clients of modest means, and there are not nearly enough lawyers in rural areas to meet residents' needs.[34] To achieve rural justice, the bar must find creative ways to lure lawyers and judges to come to, or remain in, rural communities. To this end, the Task Force makes six recommendations: (1) to relax residency requirements that compromise the ability of rural employers to find talent and of rural lawyers to thrive; (2) to increase rates for assigned counsel to fairly compensate attorneys; (3) to raise the low jurisdictional limits in small claims court, which can undermine the ability of rural New Yorkers to achieve justice; (4) to consider law school loan forgiveness programs that could enable more attorneys to settle in rural communities; (5) to eliminate will filing fees; and (6) for NYSBA to offer discounted CLE rates to rural attorneys and free consultations and/or expanded programming to support lawyers in transition.

### B. Legislative Action

#### *1. Raise 18-B rates*

Extensive advocacy has occurred around stagnant hourly rates paid to assigned counsel in criminal and Family Court cases. The Task Force does not recommend further study, but instead discusses the particular impact of the assigned counsel rates on rural attorneys, rural New Yorkers entitled to mandated representation, and rural justice. In 2018, the State Bar embraced a report of the Criminal Justice Section and Committee on Mandated Representation, calling for a rate increase. Most recently, this goal has been declared a 2020 legislative priority of the Association.[35]

An Interim Report to Chief Judge Janet DiFiore, issued by the Commission on Parental Legal Representation in February 2019, recommended that the rates for parental representation increase to $150 an hour.[36] In her State of the Judiciary Message in 2019, the Chief Judge advocated for an increase in assigned counsel rates for criminal defendants, parents, and children, and stated that she had transmitted a letter to Governor Cuomo and leaders of the Legislature urging action. She further explained:

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[34] Taier Perlman, *Rural Law Practice in New York State*, Albany Law School Gov't Law Center (April 2019), at 2, 4, 6, 8.

[35] The last increase in assigned counsel rates was in 2004, when rates went to $75 per hour regarding felonies and $60 per hour for representation of a person charged with a misdemeanor or lesser offense. After 16 years, these rates should be increased to prevent the further exodus of practitioners from the assigned counsel program across the state.

[36] *See* http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf.

> New York State has made great progress to strengthen its criminal indigent defense system thanks to the creation of the Office of Indigent Legal Services…and to increased state funding…However, our state continues to rely on the hundreds of private attorneys or assigned counsel who provide legal representation to indigent criminal defendants and family court litigants in many areas of the state. Without fair and adequate compensation for these attorneys, a vital component of the system is at risk.[37]

The success of the criminal defense reforms contemplated by the Legislature depends on the availability of enough qualified attorneys. A survey of assigned counsel plan administrators conducted by the Committee on Mandated Representation revealed that a significant number of programs do not have enough attorneys because the fees are too low. The impact of inadequate rates—and a resulting shortage of qualified private attorneys willing to accept assigned cases—is felt acutely in rural counties. In such areas, fewer institutional offices exist to handle mandated representation cases. Thus, assigned counsel attorneys play a particularly significant role in protecting the rights of New Yorkers accused of crimes, as well as Family Court litigants and children. Increased rates are vital to sustaining such representation. The key role played by assigned counsel in rural criminal defense was underscored by a report of the NYSBA Criminal Justice Section on Town and Village Justice Courts.[38]

A survey of rural attorneys revealed the importance of raising rates, as exemplified by these comments:

> *"My clients cannot afford my services, and I cannot sustain a practice on only 18-B representation, as those fees are too low."*
>
> *"Clients cannot afford lawyers for the criminal and family cases…and therefore lawyers often take on assigned cases to supplement income, but assigned cases do not pay well, and it is easy to become overloaded with assignments. We need to encourage more young people to move into rural counties, and mentors in diverse areas of law to dedicate time to teaching [these young lawyers]…We also need to increase pay for assigned counsel and allow practitioners to decline assignments once they've maxed out their caseload."*
>
> *"Clients are very poor, as this is an economically depressed area. It is rare to have private-pay clients, and unless attorneys are being appropriately compensated, we will not be able to attract qualified attorneys to serve our needs. I made my money doing other types of cases and can only afford to represent indigent clients because I am toward the end of my career and don't have the financial obligations most young lawyers do…[T]he hourly rate for assigned counsel needs to be increased in order to have attorneys available to handle these matters."*

[37] http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf.

[38] *See* https://www.nysba.org/tvcourtsreport/.

### *2. Relax residency requirements for public positions*

***Attorneys***

The idea that public employees who live where they work are more invested in the community appears to underlie residency requirements set forth in State law. *See Matter of Dehond v Nyquist*, 65 Misc 2d 526 (Sup Ct, Albany Co 1971) (residency requirement aims to hire public officials who are knowledgeable and concerned about affairs of unit of government they seek to serve). Since 1829, New York has required public officers to be residents of the State, and local governments have required public officials to be residents of the locality by which they are employed. *See Winkler v Spinnato*, 72 NY2d 402, 405 (1988), *cert denied* 490 US 1005 (1989). Many things have changed in the last two centuries. Workers commute significant distances, and many work remotely. The notion that public officials will be less dedicated to their jobs absent residency mandates seems outdated and questionable.

Instead, rural communities are hurt by residency provisions. Rural justice is eroded by residency requirements, as communities cannot attract qualified talent due to such restrictions. The pool of attorneys to draw from locally is far too small in rural areas of the State. As noted previously in the Report, the vast majority (96%) of New York attorneys live and/or work in urban areas. For all these reasons, to advance rural justice, the concept of "community" should be broadened to encompass rural regions, and residency requirements found in State law and other relevant laws should be relaxed.

The primary residency statute for "public officers," is found in Public Officers Law § 3 (1), which provides that "[n]o person shall be capable of holding a civil office who shall not***[be] a resident of the political subdivision***of the state for which he shall be chosen." Section 30 (1) (d) further provides that "[e]very office shall be vacant upon***[the incumbent's] ceasing to be an inhabitant***of the political subdivision***of which he is required to be a resident when chosen." The terms "resident" and "inhabitant" are understood to be synonymous with "domicile." *See Matter of Hosley v Curry*, 85 NY2d 447, 451 (1995).

Section 3 contains a patchwork of numerous special laws that provide for more flexible residency requirements as to certain attorney or judge positions in individual villages, towns, cities, or counties. *See e.g.* subdivisions (37), (38), (40), (44), (46), (64), (69). Typical exceptions declare that a specified town or city official need only reside in the county in which the city is located, or the specified county official may reside in an adjoining county. Specific positions covered include Town and Village Court Justices, City Court Judges, Assistant District Attorneys, Assistant Public Defenders, Deputy County Attorneys, and City Attorneys. Some exceptions are broad, such as subdivision (28), providing that all public officers employed in Westchester County may reside anywhere in the State of New York. Other State laws that impose residency mandates on officials, and thus are implicated by this analysis and recommendation, include Town Law § 23 (1) and Village Law § 3-300.

Insight into why some localities sought special residency laws can be gleaned from one Memorandum of Support of an Assembly bill that resulted in such a special law—Public

Officers Law § 3 (64) (Wyoming County Assistant District Attorneys, except the Chief or First ADA, may reside in adjoining county). The justification in the memo explained:

> The Assistant District Attorney position requires a set of unique skills and specialized experiences…This bill has been introduced at the request of the Wyoming County District Attorney. It is essential that predominantly rural counties…have the same ability as…[other] counties with a higher population to recruit practitioners with the necessary skills and experience…Exceptions for the residency requirement…have typically been granted to counties with smaller populations…Adoption of this legislation will provide the Wyoming District Attorney with a more flexible recruiting process by allowing the District Attorney to hire from adjoining rural counties…[that] share many of the same characteristics as Wyoming County, ensuring that the interests of Wyoming County are adequately represented.

As the memo indicates, strict residency requirements work against localities' ability to find skilled attorneys to fill public positions; and since adjoining rural counties share many of the same characteristics, nothing is lost by imposing a less parochial approach to hiring talent.

In addition to the state law, some local laws impose residency mandates. As to some positions, localities have the authority to enact local laws providing for stricter or more liberal residency requirements than Public Officers Law § 3, and many have exercised that authority. *See generally Matter of Ricket v Mahan*, 97 AD3d 1062 (3rd Dept 2012) (discussing Public Officers Law residency provisions and localities' home-rule powers). The result of the current State requirements and exemptions and the local laws is an inconsistent mélange of residency provisions that do not serve New York well and that undermine the consistent administration of rural justice. To overcome the challenges faced by under-resourced municipalities and to attract qualified employees, the State law on residency requirements should be reformed. Further, rural localities should be discouraged from enacting local provisions providing for stricter requirements.

Relaxing state law residency requirements for the public positions set forth above, as well as for attorney officials at County Departments of Social Services, would make it more practicable for a larger pool of attorneys to work in rural areas. Opportunities regarding where attorneys may hold public office, while also engaging in private practice, would be broadened. The desired flexibility could be achieved as to county positions by removing any residency requirement, except for requiring New York state residence, or by providing that the officials could reside in a county adjacent to the county in which the positions are held.

In the area of public defense, flexibility as to residency could have a particularly profound impact. The case of *Hurrell-Harring v State of NY* brought attention to the State's failure to provide for effective representation to criminal defendants. A settlement in that case resulted in significant State funding to the five named counties to improve the quality of criminal defense by

public defenders and assigned private attorneys.[39] The reforms embodied in the settlement are now being implemented throughout the State, pursuant to Executive Law § 832 (4) and State Legislature budget plans for incremental implementation of the State funding of public defense.

Hundreds of public defense positions have been added in rural counties across New York. Moreover, assigned counsel programs are expanding, becoming more structured,[40] and receiving significant resources. To recruit qualified applicants to serve in rural public defender offices and as administrators and supervising attorneys at assigned counsel programs, greater flexibility in State laws as to the county of residence will be needed. Further, by allowing private attorneys from adjoining counties to participate on assigned counsel panels, counties will be able to attract more talent. These attorneys can help deliver quality representation to criminal defendants and Family Court litigants, while achieving professional growth via the mentoring, second-chair, training, and other resources that are being provided, or will soon be provided, to such programs via State funding. The importance of also increasing assigned counsel rates to achieve the public defense reforms contemplated by the Legislature was already discussed above.

### *3. Raise small-claims-court caps*

Small-claims courts are special parts in justice, city, and district courts where litigants can sue for money damages. Uniform Justice Court Act § 202 provides that, where justice courts handle small claims actions for money damages, the amount sought to be recovered, or the value of the property at issue, must not exceed $3,000. The statute was last amended more than four decades ago (L 1977, ch 685, § 2). Uniform City Court Act § 1801 and Uniform District Court Act § 1801 have a cap of $5,000—an amount set in 2003 (L 2003, ch 601, § 3).[41]

The decades-old jurisdictional limits are too low, and the Task Force recommends that they be raised to a uniform amount of at least $10,000 for all Town, Village, City, and District Courts. This change could close a justice gap and allow for proper representation of rural clients, while bolstering the practices of rural attorneys and advancing judicial economy. Often litigants with disputes involving relatively small matters cannot afford the attorney fees and court expenses, multiple appearances, and delays associated with initiating a civil case in Supreme Court. In contrast, small claims in rural areas can be brought in front of an appropriate Town or Village Court.[42] While litigants can represent themselves in these small claims courts, many are reluctant to do so and, in fact, cannot do so effectively. Increasing the monetary maximum will mean that more cases could be handled in small claims courts, where the filing fees are nominal. Rural practitioners could potentially expand their practice by obtaining fees in a large volume of such matters, while helping their neighbors favorably resolve their disputes.

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[39] See New York State Office of Indigent Legal Services*, Hurrell-Harring Settlement and Implementation Information,* https://www.ils.ny.gov/content/hurrell-harring-settlement-and-implementation-information.

[40] *See* https://www.ils.ny.gov/files/ACP/ACP%20Standards%20with%20Commentary%20070119.pdf.

[41] Under Chief Judge Janet DiFiore's proposal to consolidate New York's trial courts, District Courts and upstate City Courts would be abolished and would become part of a new statewide municipal court. *See* https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/PR19_22.pdf.

[42] http://www.rurallawcenter.org/docs/Guide%20to%20Small%20Claims%20Court.pdf.

### *4. Eliminate will-filing fees*

SCPA 2402 (9) (v) regarding Surrogate's Court filing fees states that a $45 fee applies as to "a will for safekeeping pursuant to section 2507 of this act except that the court in any county may reduce or dispense with such fee." The fees are discretionary, but should be eliminated entirely. This could benefit rural solo lawyers whose practices includes estate planning and administration and the filing of a large volume of wills. Such an amendment would also benefit the estates by encouraging the best practice of filing of wills with the court. Given the prevalence of indigent clients in rural communities and the tremendous amount of pro bono or low bono services offered by rural lawyers, this filing fee is unnecessarily cost-prohibitive.

## C. NYSBA Action

**Offer assistance and consultation for lawyers in transition**

NYSBA's 2020 legislative priorities declare that a core mission of the Association is to represent the interests of the legal profession, and that the Association thus works to ensure that attorneys are able to protect their clients' interests and effectively engage in the practice of law.[43] The creation of the Rural Justice Task Force was an important step toward helping attorneys to engage in the practice of law in rural New York.

In this regard, the NYSBA Law Practice Management Committee has published an invaluable Planning Ahead Guide, including information regarding succession planning and the sale of a law practice. Further, the State Bar's Committee on Lawyers in Transition provides excellent, free programs to members regarding transitioning or retiring.[44] The Task Force suggests that an additional service be offered by the State Bar: free, individualized consultations on succession planning and the sale of a law practice. Such a service is provided by the North Carolina Bar Association Transitioning Lawyers Commission.[45] As many rural New York attorneys are approaching retirement age, they could benefit greatly from particularized, expert guidance and assistance regarding transition plans.

Further, services could be expanded to include a mentoring program to connect transitioning attorneys with new attorneys interested in taking over an established practice. Also, rural attorneys could be encouraged to use www.lawyerexchange.com to post announcements regarding the sale of their practices. This could serve two purposes: first, it could facilitate the sale of the practices to the advantage of the selling attorneys; and second, it could help draw more attorneys to rural communities by making them aware of the attractive opportunities that exist.

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[43] *See* n 2, *supra*.

[44] *See* https://www.nysba.org/SellingYourPractice/.

[45] *See* https://www.ncbar.org/members/committees/transitioning-lawyers-commission/.

## IV. BROADBAND & TECHOLOGY INTERVENTIONS

The practice of law has transformed over time, given the rise in technology. Many solo and small-firm practitioners adopt technology in order to streamline their practice, as well as to handle firm business outside of a standard office space. However, such technology adoption is reliant on the infrastructure available in their office, home, business, or courthouse. A number of rural attorneys who responded to the Government Law Center's survey complained about technological shortcomings.[46] We have discovered in our research that such technological shortcomings arise from the lack of technology infrastructure in many instances. In fact, the American Bar Association has recognized that lack of access to highspeed broadband is a hurdle for access-to-justice efforts. Recognizing this, the American Bar Association passed a resolution in August 2019 urging "federal, state, local, territorial, and tribal legislatures to enact legislation and appropriate adequate funding to ensure equal access to justice for Americans living in rural communities by deploying, to at least 98% of the population, broadband infrastructure with a download speed of at least 100 megabits per second [Mbps], and an upload speed of at least 30 Mbps."[47]

To that end, New York State has a program in place presently called "Broadband for All"[48] which calls for investment in the state's broadband capacity with the ultimate goal of 99.9% of New Yorkers having access to broadband. This plan was created in 2015, to be handled in three phases. The last phase, "Round III," awarded 43 projects $209.7 million dollars to handle "last mile" connectivity.[49] However, that last round was announced on January 31, 2018, with the effect of it being the end of this multi-year program. As is well understood, such connectivity is hindered by geography, distances between connection points, tower placements, as well as costs involved with laying miles of cabling, whether fiber optic or otherwise. To put it in perspective, one CEO of a broadband company that we spoke with quoted a basic cost of $20,000-$25,000 per mile for infrastructure. This does not include the cost to connect from the pole to the individual home(s), which is dependent upon pole location. Depending on the distance from the closest pole, that cost may double. So, by whom should the costs be borne, and will the end users be able to afford the service if finally made available?

Satellite internet is often the only other option you have available should you be too far away from a pole for broadband to be economically feasible. There are only two residential satellite internet providers available in the entire United States, Viasat and HughesNet.[50] HughesNet

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[46] Taier Perlman, *Rural Law Practice in New York State*, Albany Law School Gov't Law Center (April 2019), at 11.

[47] ABA House of Delegates Resolution 10B, Adopted August 12–13, 2019.

[48] https://www.ny.gov/programs/broadband-all.

[49] https://www.governor.ny.gov/news/governor-cuomo-announces-round-iii-nation-leading-new-ny-broadband-program-bring-high-speed.

[50] https://www.satelliteinternet.com/.

download speeds top out at 25Mbps[51], or a quarter of what's considered standard broadband speeds, and Viasat offers speeds of "up to 25Mbps."[52] In the case of HughesNet, they throttle the speed once users reach 50GB of usage in a month, meaning that it will be considerably slower for the remainder of the period. Both plans cost between $60 and $150 a month. By comparison, nationwide average download speed of a Verizon cellphone on their LTE network is 53.3 Mbps.[53]

In effect you have two issues, not just one. If you have broadband service at your home or office, you may be able to do work and service clients. But if you leave your home or office, what then? The instant always-on connectivity that so many of us take for granted may end once you are out of the radius of your router. That is because your cellphone, probably the most important article in an attorney's bag, becomes a worthless brick without a cell phone signal to back it up. Travel through upstate New York with some of your colleagues to find out how important that fickle signal can be. The following anecdotes demonstrate the challenge:

> *"Providing colleagues or family members with name and address of court along with the route you will be traveling in the event something was to happen to you i.e. car breaking down or getting lost because you are traveling in areas where there is no cell phone reception and often times the GPS signal on direction apps gets lost."*
>
> *"Serving process on someone in the middle of nowhere with no ability to access public safety without reception."*
>
> *"Trying to broker a stipulation when you are trying and failing to get a signal in a courthouse to call an out-of-area client, and hoping you don't have to ask for the judge's landline in order to do so."*

At the same time, technology has changed and will continue to change during the rollout of these plans. In the newest iteration of cellular technology, 5G, the fastest signals are created with many small cell sites, which need to be much closer together than today's standard technologies. Even so, each cell site must be connected to a network backbone, whether through a wired or wireless connection.[54] That implies that a network backbone is present, but in many rural areas it is not.

While this is certainly problematic for legal providers, it is also troublesome for legal clients. Trying to contact and do work with clients who also live rurally can be abnormally challenging. Distance and technology combine to be a strong issue when it comes to getting documents to and

[51] https://www.satelliteinternet.com/providers/hughesnet/internet/.

[52] https://www.viasatspecials.com/lp/internet.

[53] https://www.tomsguide.com/us/best-mobile-network,review-2942.html.

[54] https://www.pcmag.com/news/what-is-5g.

from clients, getting those documents filed with courts, and service of process are just some of the challenges faced by rural practitioners. Many upstate county courts, not including town and village courts, have been slow to implement e-filing, if they have at all. As of December 2019, 52 of 62 counties have some sort of e-filing, but current legislation does not authorize town and village courts to do so. If you have no internet, you cannot e-file or implement any technology at all into the court system. Given the distances involved in the larger counties, it makes sense to offer such opportunities to file even at the basic county level. Some of these counties have no cities, which makes the county courthouse the only point of service for purposes of any civil actions. To that end, the lack of scanned documents in real time can make for additional travel for practitioners. By either e-filing or at least providing real time access to non-electronic documents would allow attorneys to access the documents without bothering the court staff and not have to rely upon clients to transport copies of these documents to them. Many of these clients have transportation issues, lack of access to scanners or fax machines, forcing actual paper copies to become the only viable record available for review.

Currently, Monroe County has a Justice for All Initiative which includes the county's village and town justice courts, where they are collecting data on the number of filings, defaults, representations, and dispositions as well as surveying litigants about their experiences. Part of the initiative may be further expanded into working on transportation issues. Litigants have been found to have a lack of transportation in far-flung areas, making physical access to justice an ongoing issue, given the requirements for in-person appearances and lack of telephonic/video conference opportunities.

With all this as background to the many technological challenges for rural legal practice, we make the following recommendations:

1. NYSBA should adopt a resolution that urges New York State to enact further legislation and adequate funding to expand and continue the Broadband for All program with a Phase 4 round of funding. The goal of Phase 4 should be further deployment of reliable broadband infrastructure with a download speed of at least 100 Mbps and an upload speed of at least 30 Mbps for 100% of New Yorkers with a specific focus on the rural areas that were not served by Phase 3 of the program. We recommend the following steps:

    a. New York State should require the creation of a granular database of all broadband serviceable locations at the completion of Phase 3 to "map the gap" which will allow policymakers to target where funds should be allocated. (Using the same methods as was used in the US Telecom broadband initiative pilot project in Virginia and Missouri or those suggested by the FCC granular mapping initiative).

    b. Specifically target additional funding to those "gap" areas where the Broadband for All program did not extend access to broadband at speeds of 100/30 Mbps.

2. Monitor and track the Monroe County Justice for All pilot project. This project includes initiatives around real-time access to filings in civil matters, transportation to court in civil matters, uniform data collection and a court monitoring project in the town and village justice courts. Assuming that this program will be successful in breaking down these particular barriers to accessing justice, NYSBA should advocate for its expansion throughout the state.

3. The Office of Court Administration should promulgate guidelines to encourage and promote remote video conference appearances in town and village justice courts (and across all New York courts) by attorneys and litigants for civil matters using the available Skype technology already provided to town and village courts, or other similar technology.

4. The Office of Court Administration should continue to expand e-filing initiatives across the state as these important initiatives provide easier access to the courts for both practitioners and litigants alike. Legislation should be passed to authorize e-filing expansion into town and village justice courts.

5. NYSBA should again recommend the repeal of Judiciary Law §470 requiring a physical office in New York State. (This recommendation was previously adopted by the NYSBA Working Group on Judiciary Law §470, October 8, 2018.)

## V. LAW AND POLICY INTERVENTION

The Committee on Law and Policy examined other laws and rules that affected rural practice. In particular, the Committee examined New York Court Rule §100.6(B)(2), which provides:

> (B) **Part-Time Judge**. A part-time judge:
>
> (2) shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

The Committee examined this rule particularly in light of the longstanding NYSBA policy against non-lawyer judges. In 2009, the House of Delegates adopted the Report of the Committee on Court Structure and Judicial Selection, which was charged with reviewing the 2008 Report of the Chief Judge's Commission on the Future of the State Courts. The Commission Report had concluded that lawyer judges were desirable, but because of claims of feasibility, it had stopped short of seeking a constitutional amendment to require that all justices be lawyers. The NYSBA report in response reiterated the NYSBA position that all justices should be lawyers. The report also included the history of the NYSBA position, noting that such a position had been taken on numerous occasions going back to 1979.

The part-time judge rule in §100.6(B)(2) has been in effect for many decades, previously as Rule 100.5(f), and before that as Rule 33.5(f). There are three different extra-judicial activities prohibited: (1) The practice of law by the part-time judge in his/her own court, (2) the practice of law by the part-time judge in another court within the same county, if that judge is also permitted to practice law, and (3) the participation as a lawyer in any proceeding in which the judge has acted as a judge, or in any proceeding related to one in which the judge acted as judge. The Committee recommends maintaining the first and third of these prohibitions in their current form, and removing the second prohibition.

The rationale for the second prohibition has been stated in several opinions and disciplinary proceedings as to avoid the appearance of impropriety in the nature of a quid pro quo between part-time lawyer judges. Interestingly, where discipline is sought for violation of 100.6(B)(2), there are usually other provisions violated, particularly where the judge has participated in a case that truly creates a conflict or other improper activity. In the one reported case where the lawyer judge was subject to the disciplinary commission, the commission unanimously imposed an admonition only.[55]

The rule has produced several opinions allowing the part-time lawyer judge to appear before an OCA employee who is a part-time judge,[56] a lawyer licensed to practice only in another state,[57] and a lawyer who is retired from the practice of law.[58] There have also been opinions regarding engineering the part-time judge's client cases before full-time, rather than part-time, judges in city, town and village courts. This is not permitted by transferring cases assigned to part-time judges to full-time judges[59], but it is permitted in a prospective way by an administrative judge,[60] and is permitted upon transfer down from Supreme Court by CPLR 325.[61] In addition, because Rule 100.6(B)(3) provides that the prohibition of practice of a part-time judge before other part-time judges does not extend to the judge's associates and partners (although the prohibition of practice in the judge's own court does extend to any lawyer associated in any way with the judge), there have also been opinions allowing the associates to use a letterhead which includes the lawyer/judge's name as long as there is no indication on the letterhead that the lawyer is a judge.[62]

The Committee concluded that the rule has a limited benefit. This is because the lawyer judge is governed by both the Rules of Judicial Conduct and the Rules of Professional Conduct which

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[55] *In re Brian D. Mercy* (N.Y.S. Comm'n on Jud. Conduct, June 22, 2012), 2012 WL 2786179, available at http://cjc.ny.gov/Determinations/M/Mercy.Brian.D.2012.06.22.DET.pdf.

[56] NY Jud. Adv. Op. 10-73, 10-167.

[57] NY Jud Adv. Op. 10-100.

[58] NY Jud. Adv. Op. 90-199.

[59] NY Jud. Adv. Op. 02-87 and opinions cited therein.

[60] NY Jud. Adv. Op. 08-132.

[61] NY Jud. Adv. Op. 08-96.

[62] NY Jud. Adv. Op 08-210.

would otherwise prohibit any sort of quid pro quo between part-time lawyer judges. In addition, where an associate of a part-time judge appears before a part-time judge of another court in the same county, that associate may use a law firm name and stationery which uses the name of the part-time judge. Thus, the judge who the associate appears before may know full well that the associate has a relationship with the part-time judge. It should be noted that non-lawyer judges are not subject to Rules of Professional Conduct and have no specific rule regarding conflicts akin to Rule 100.6(B)(2). Accordingly, this rule effects only attorney part-time judges, and creates an unfair chilling effect on them, while part-time non-attorney judges continue to serve on the bench freely, even where appearances of impropriety exist. For instance, where a non-attorney part-time judge works in law enforcement within the county, but presides over criminal cases with county prosecutors appearing before them.

The presence of the rule is a considerable deterrent to lawyers in rural areas to seek positions as part-time judges. While there may be a substantial number of part-time judges who are lawyers in suburban settings, there are relatively few in rural areas. For example, in the 20 justice courts in Franklin County there is only one practicing lawyer and one retired lawyer; all of the rest are non-lawyers.

The Task Force believes that the modification of this rule will result in more lawyer judges, in furtherance of the longstanding NYSBA policy that justices should be lawyers, and recommends that the Chief Administrative Judge amend the rule to partially eliminate the second prohibition as it relates to non-contiguous town and village courts as follows:

> (B) Part-Time Judge. A part-time judge:
>
> (2) shall not practice law in the court on which the judge serves, or in any other contiguous town or village court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

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A minority of the Task Force did not support the amendment, concluding that lawyer judges often have substantial practices and can appear before full-time judges and part-time non-lawyer judges. This is true only because presently there are so few part-time lawyer judges in rural settings. If NYSBA's policy to have all attorney justices were to come to fruition, this rule would have a significant effect on a lawyer judge's practice, and is, in fact, a deterrent to fulfilling this NYSBA policy.

## CONCLUSION

As amply demonstrated in this Report, we face formidable challenges in ensuring that rural legal services are adequately delivered and administered with a fair and even hand. To be sure, a great society—a just society—is judged not on the success of the successful, but upon its response to those in need. The time has come to recognize that those in need include the many families and individuals who reside in rural New York. We hope that our diverse proposed interventions ameliorate some of these critical issues and that the full panoply of stakeholders who need to be involved to initiate these interventions step up, as we must do something about the imminent crisis before us. Thank you for your careful consideration.

# APPENDIX

# APPENDIX A

## BACKGROUND TO TASK FORCE ON RURAL JUSTICE

### I. Date of Formation & Composition

The Task Force on Rural Justice was formed on June 1, 2019. It is comprised of 32 members from across New York State with diverse expertise. Members are rural and urban practitioners, members of the judiciary, policymakers, academics, legal services organization leaders, and state officers. *See* member roster in Appendix 2.

### II. Mission Statement

The Task Force organized its work in pursuit of the following mission statement:

> The Task Force on Rural Justice shall examine the current state of rural law practice in New York. Topics of investigation will include the impact of rural attorney shortages on access-to-justice, challenges in delivering legal services in rural areas, and the unique practice needs of rural practitioners. The Task Force will make recommendations for potential changes in law and public policy, and will identify viable solutions to support rural law practice and greater access-to-justice in New York's rural communities.

### III. Meetings & Expert Presenters

The Task Force met a total of ten (10) times between June 24, 2019 and March 5, 2020. A total of six (6) experts presented to the Task Force on the following dates and topics:

| | | |
|---|---|---|
| August 21, 2019 | Hon. Elizabeth Garry, Presiding Justice of the Appellate Division, 3rd Department | Remarks on the unique challenges and rewards of rural practice and the administration of justice |
| | Jim Sandman, President of Legal Services Corporation | Overview of federal legal services funding streams with a focus on rural legal services |
| September 25, 2019 | Robin Blakely-Armitage, Senior Extension Associate and Project Manager at Cornell's Community and Regional Development Institute (CaRDI) | Rural demographics and data trends in NYS. |
| October 15, 2019 | Nancy Sunukjian, Director of the Office of Town Justice Support | Town & Village Court system and administration—opportunities and challenges |
| October 30, 2019 | Bill Leahy, Executive Director of the Office of Indigent Legal Services (ILS) | On ILS efforts to address shortage of public defenders across NYS |

| | | |
|---|---|---|
| | Donna Kissane, Franklin County Manager | Difficulties recruiting new attorneys to fill legal positions in Franklin County government, a rural county in the North Country. |

The co-chairs carefully selected those experts that could educate members on specialized categories of knowledge most relevant to our work. The entire Task Force is tremendously grateful to all the illustrious experts that offered their time and resources to educate our members. It was an invaluable public service that informed the development of the recommendations contained herein.

## IV. Task Force Sub-Committees

The "Rural Package" approach to our work compelled dividing our members across five sub-committees which focused on a discrete subject-matter that would then feed into our diversified interventions. Each member selected one-to-two sub-committees to serve on, and each sub-committee had 1-2 chairs to facilitate the work. The five sub-committees and the members that served on them were:

| Rural Law Practice | Broadband & Technology | Funding | Law Schools & New Attorneys | Law & Policy |
|---|---|---|---|---|
| Scott Clippinger | Scott Clippinger | Taalib Horton | Sarah Gold | Gary A. Rosa |
| Chris Denton | Sarah Gold | Hon. Molly Reynolds Fitzgerald | Leah Nowotarski | Cynthia Feathers |
| Richard Lewis | Richard Lewis | Heidi Dennis | Hon. Molly Reynolds Fitzgerald | Leah Nowotarski |
| Daniel J. Fitzsimmons | Hon. Julie A. Campell | Richard Rifkin | Joanne Macri | Scott Fein |
| Marcy Flores | Taier Perlman | Brian Stewart | Tucker Stanclift | Hon. lloyd G. Grandy II |
| Tucker Stanclift | Robert M. Winn | | Timothy Fennell | Heidi Dennis |
| John Ferrara | | Ken Perri | | Hon. Thomas Mercure |
| Hon. Mary M. Tarantelli | Willa Payne | | Andy Ayers | |
| Hon. Stan L. Pritzker | | | | Sharon Stern Gertsmann |
| | | | | Richard Rifkin |
| Hon. Thomas Mercure | | | | |
| Brian S. Stewart | | | | |
| | | | | |
| Sub-Committee Chairs | | | | |

These smaller working groups spent several weeks discussing their subject-matter in numerous remote conferences. They conferred with experts, researched, and worked collaboratively to devise recommendations for consideration by the entire Task Force. These recommendations were submitted to the co-chairs on November 1, 2019. The Task Force then convened three times to substantively discuss the recommendations put forth by each sub-committee. During these discussions, the Task Force collectively decided which recommendations to advance forward into the final report, subject to final approval by the co-chairs, and the entire Task Force in later editions of the Report.

The co-chairs are deeply thankful to all the sub-committees for their outstanding efforts in meeting our accelerated timeline. The quality and thoughtfulness of the recommendations that came from the sub-committees was truly impressive, and is a testament to the dedication and passion the sub-committee chairs and members brought to their work. The organic production of the sub-committee reports laid the foundation of our package of proposals.

# APPENDIX B

## COMPOSITION OF THE TASK FORCE ON RURAL JUSTICE

**Co-Chairs**

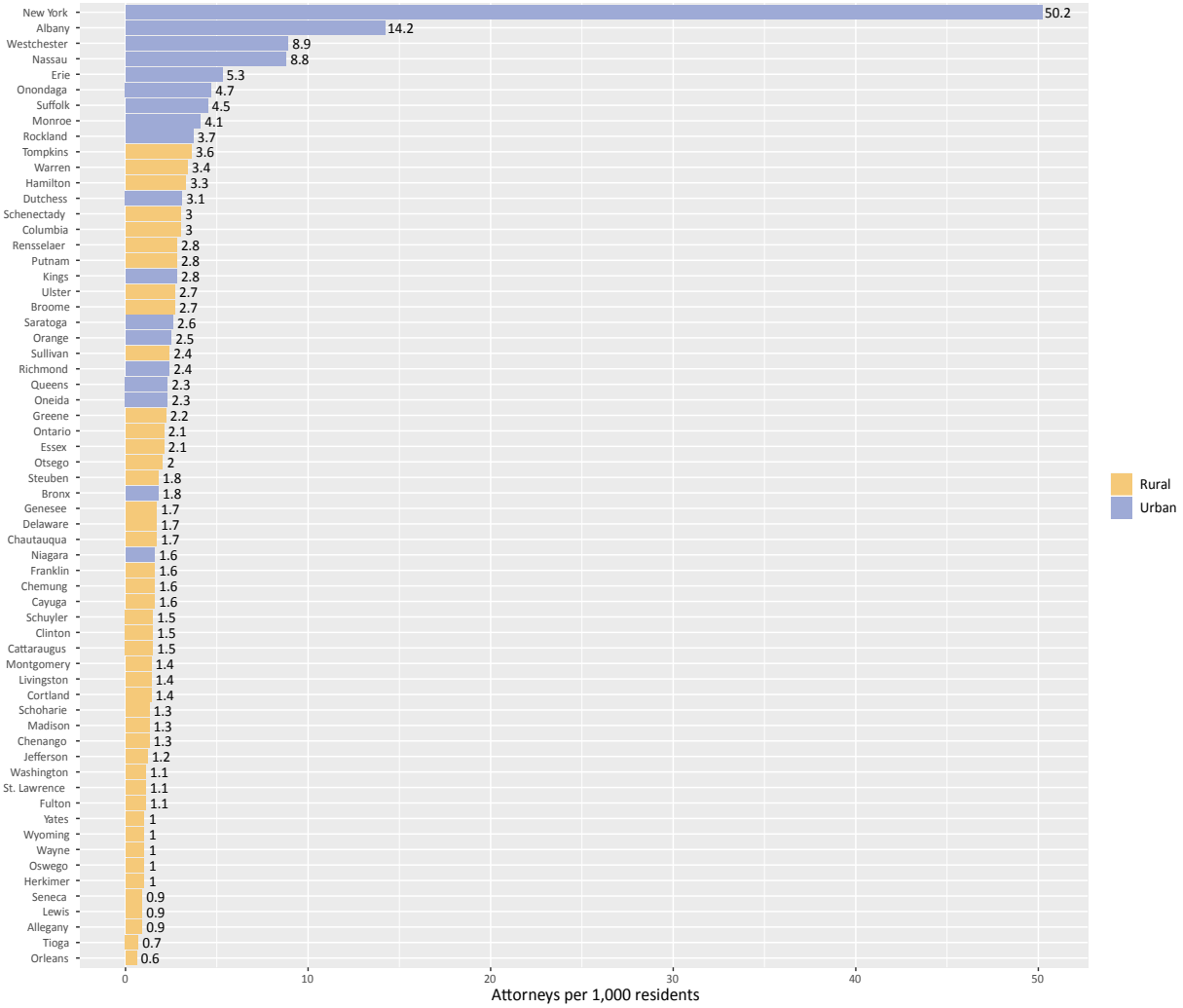
Taier Perlman, Esq.
Hon. Stan L. Pritzker

**Members**

Ava B. Ayers, Esq.
Hon. Julie A. Campbell
Scott Joseph Clippinger, Esq.
Heidi Dennis, Esq.
Christopher Denton, Esq.
Cynthia F. Feathers, Esq.
Scott N. Fein, Esq.
Timothy Fennell, Esq.
John Ferrara, Esq.
Hon. Molly Reynolds Fitzgerald
Daniel J. Fitzsimmons, Esq.
Marcy I. Flores, Esq.
Sharon Stern Gerstman, Esq.
Sarah E. Gold, Esq.
Lloyd G. Grandy, II, Esq.
Henry M. Greenberg, Esq.
Taalib T. Horton, Esq.
Hon. James F. Hughes
Richard C. Lewis, Esq.
Joanne Macri, Esq.
Hon. Thomas E. Mercure
Leah Rene Nowotarski, Esq.
Willa Skye Payne, Esq.
C. Kenneth Perri, Esq.
Richard Rifkin, Esq.
Hon. Gary A. Rosa
Robert M. Shafer, Esq.
Tucker C. Stanclift, Esq.
Brian S. Stewart, Esq.
Hon. Mary M. Tarantelli
Robert M. Winn, Esq.

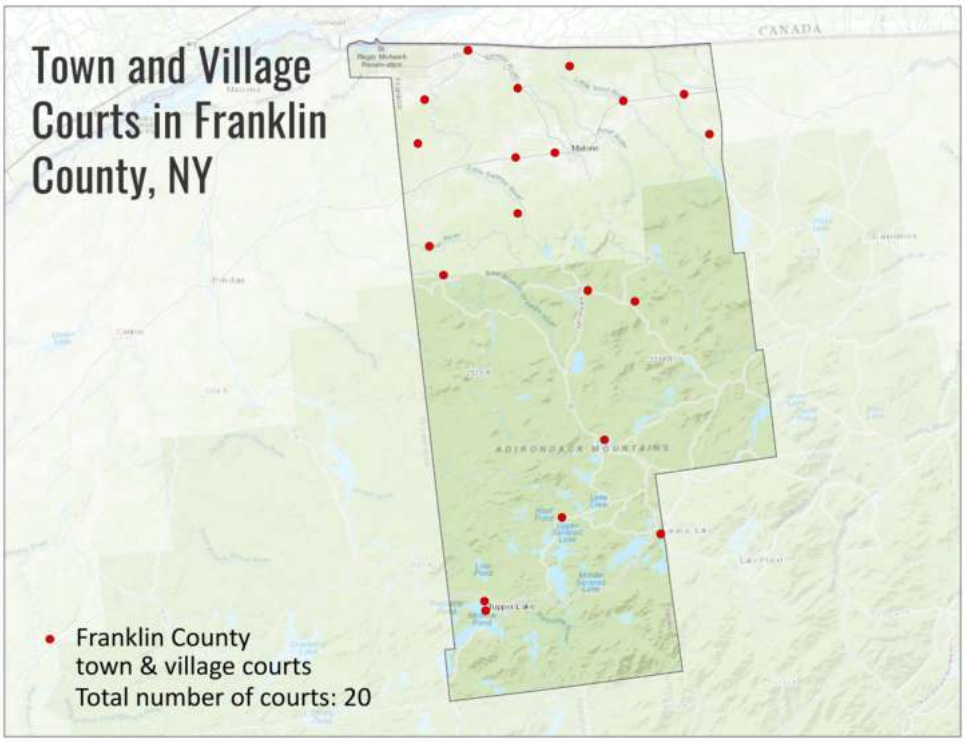
# APPENDIX C

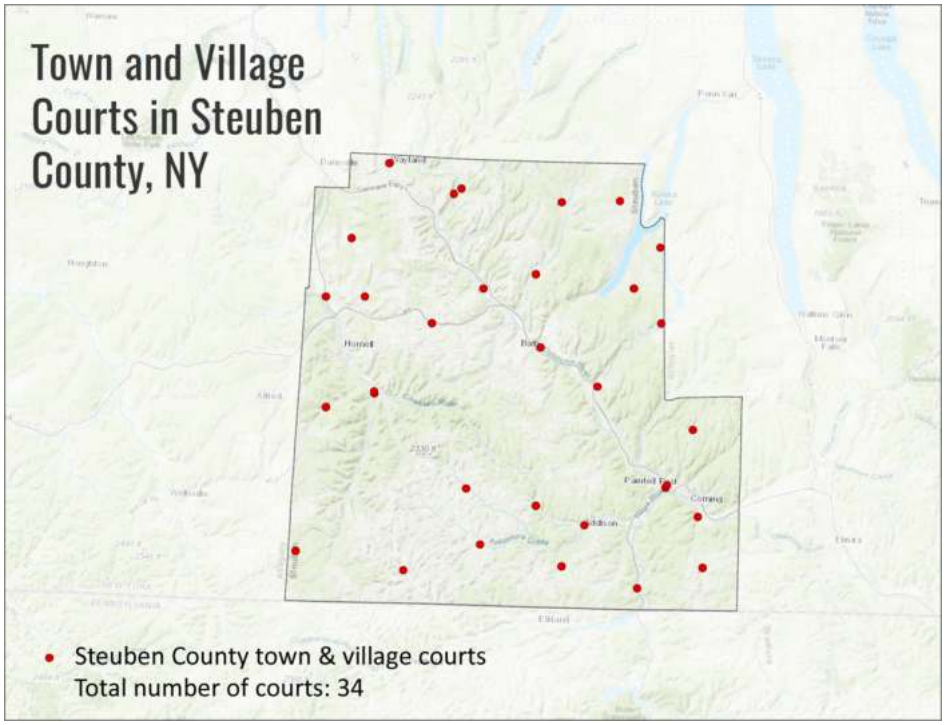
## ATTORNEY-TO-RESIDENT RATIOS BY COUNTY



# APPENDIX D

## JUSTICE COURT MAPS—FRANKLIN & STEUBEN COUNTIES



# APPENDIX E – COUNTY DATA

| County Name | Attorney Count | Total Population 2018 | Residents per Attorney | Poverty Rate (families 2018) | Area in Sq. Miles | Attorneys per sq mile | Attorneys per 1,000 Residents |
|---|---|---|---|---|---|---|---|
| Albany | 4,361 | 307,426 | 70 | 7 | 533 | 8.18 | 14.19 |
| Allegany | 44 | 47,025 | 1,069 | 11.9 | 1,034 | 0.04 | 0.94 |
| Bronx | 2,589 | 1,437,872 | 555 | 26.1 | 48 | 53.66 | 1.8 |
| Broome | 524 | 194,402 | 371 | 10.7 | 715 | 0.73 | 2.7 |
| Cattaraugus | 120 | 77,686 | 647 | 10.9 | 1,323 | 0.09 | 1.54 |
| Cayuga | 124 | 77,868 | 628 | 8.2 | 735 | 0.17 | 1.59 |
| Chautauqua | 220 | 129,656 | 589 | 13.3 | 1,085 | 0.2 | 1.7 |
| Chemung | 141 | 85,740 | 608 | 10.8 | 411 | 0.34 | 1.64 |
| Chenango | 63 | 48,348 | 767 | 9.8 | 899 | 0.07 | 1.3 |
| Clinton | 122 | 80,794 | 662 | 10.2 | 1,117 | 0.11 | 1.51 |
| Columbia | 181 | 60,919 | 337 | 6.9 | 649 | 0.28 | 2.97 |
| Cortland | 69 | 48,123 | 697 | 8.3 | 502 | 0.14 | 1.43 |
| Delaware | 76 | 45,502 | 599 | 11.9 | 1,467 | 0.05 | 1.67 |
| Dutchess | 909 | 293,894 | 323 | 6.1 | 825 | 1.1 | 3.09 |
| Erie | 4,860 | 919,866 | 189 | 10.2 | 1,054 | 4.61 | 5.28 |
| Essex | 80 | 37,751 | 472 | 5.9 | 1,916 | 0.04 | 2.12 |
| Franklin | 80 | 50,692 | 634 | 13.1 | 1,698 | 0.05 | 1.58 |
| Fulton | 59 | 53,743 | 911 | 10.9 | 533 | 0.11 | 1.1 |
| Genesee | 98 | 58,112 | 593 | 7.7 | 495 | 0.2 | 1.69 |
| Greene | 107 | 47,617 | 445 | 9 | 658 | 0.16 | 2.25 |
| Hamilton | 15 | 4,575 | 305 | 4.3 | 1,808 | 0.01 | 3.28 |
| Herkimer | 60 | 62,505 | 1,042 | 9.5 | 1,458 | 0.04 | 0.96 |

| County Name | Attorney Count | Total Population 2018 | Residents per Attorney | Poverty Rate (families 2018) | Area in Sq. Miles | Attorneys per sq mile | Attorneys per 1,000 Residents |
|---|---|---|---|---|---|---|---|
| Jefferson | 132 | 114,448 | 867 | 9.9 | 1,346 | 0.1 | 1.15 |
| Kings | 7,309 | 2,600,747 | 356 | 17.1 | 83 | 88.5 | 2.81 |
| Lewis | 24 | 26,719 | 1,113 | 10.3 | 1,290 | 0.02 | 0.9 |
| Livingston | 90 | 63,907 | 710 | 8.1 | 640 | 0.14 | 1.41 |
| Madison | 92 | 71,359 | 776 | 6.7 | 661 | 0.14 | 1.29 |
| Monroe | 3,087 | 744,248 | 241 | 10.4 | 667 | 4.63 | 4.15 |
| Montgomery | 71 | 49,426 | 696 | 15.3 | 410 | 0.17 | 1.44 |
| Nassau | 11,935 | 1,356,564 | 114 | 4 | 315 | 37.85 | 8.8 |
| New York | 81,994 | 1,632,480 | 20 | 12.7 | 32 | 2,559.94 | 50.23 |
| Niagara | 330 | 211,704 | 642 | 9.8 | 532 | 0.62 | 1.56 |
| Oneida | 520 | 230,782 | 444 | 12.1 | 1,258 | 0.41 | 2.25 |
| Onondaga | 2,202 | 464,242 | 211 | 9.9 | 806 | 2.73 | 4.74 |
| Ontario | 232 | 109,472 | 472 | 6.6 | 663 | 0.35 | 2.12 |
| Orange | 956 | 378,227 | 396 | 8.5 | 839 | 1.14 | 2.53 |
| Orleans | 24 | 41,175 | 1,716 | 11.4 | 393 | 0.06 | 0.58 |
| Oswego | 122 | 119,104 | 976 | 12.9 | 1,018 | 0.12 | 1.02 |
| Otsego | 119 | 60,244 | 506 | 8.8 | 1,016 | 0.12 | 1.98 |
| Putnam | 281 | 99,070 | 353 | 2.8 | 246 | 1.14 | 2.84 |
| Queens | 5,189 | 2,298,513 | 443 | 10.5 | 125 | 41.44 | 2.26 |
| Rensselaer | 449 | 159,431 | 355 | 8.1 | 665 | 0.67 | 2.82 |
| Richmond | 1,129 | 474,101 | 420 | 10.6 | 59 | 19.07 | 2.38 |
| Rockland | 1,211 | 323,686 | 267 | 9.9 | 199 | 6.07 | 3.74 |

| County Name | Attorney Count | Total Population 2018 | Residents per Attorney | Poverty Rate (families 2018) | Area in Sq. Miles | Attorneys per sq mile | Attorneys per 1,000 Residents |
|---|---|---|---|---|---|---|---|
| St. Lawrence | 117 | 109,558 | 936 | 12.6 | 2,821 | 0.04 | 1.07 |
| Saratoga | 588 | 227,377 | 387 | 4 | 844 | 0.7 | 2.59 |
| Schenectady | 466 | 154,883 | 332 | 7.1 | 209 | 2.23 | 3.01 |
| Schoharie | 42 | 31,364 | 747 | 8.8 | 626 | 0.07 | 1.34 |
| Schuyler | 27 | 17,992 | 666 | 8.1 | 342 | 0.08 | 1.5 |
| Seneca | 30 | 34,612 | 1,154 | 7.4 | 390 | 0.08 | 0.87 |
| Steuben | 171 | 96,927 | 567 | 9.4 | 1,404 | 0.12 | 1.76 |
| Suffolk | 6,680 | 1,487,901 | 223 | 4.7 | 1,153 | 5.79 | 4.49 |
| Sullivan | 183 | 75,211 | 411 | 10.6 | 997 | 0.18 | 2.43 |
| Tioga | 34 | 49,045 | 1,442 | 7.1 | 523 | 0.07 | 0.69 |
| Tompkins | 369 | 102,962 | 279 | 8.3 | 492 | 0.75 | 3.58 |
| Ulster | 483 | 179,303 | 371 | 8 | 1,161 | 0.42 | 2.69 |
| Warren | 217 | 64,480 | 297 | 7 | 932 | 0.23 | 3.37 |
| Washington | 67 | 61,828 | 923 | 8.1 | 846 | 0.08 | 1.08 |
| Wayne | 87 | 90,856 | 1,044 | 8.2 | 612 | 0.14 | 0.96 |
| Westchester | 8,619 | 968,815 | 112 | 6.2 | 477 | 18.06 | 8.9 |
| Wyoming | 39 | 40,565 | 1,040 | 7.4 | 596 | 0.07 | 0.96 |
| Yates | 25 | 25,009 | 1,000 | 7.9 | 376 | 0.07 | 1 |
| **Totals and averages (median)** | 150,644 | 19,618,453 | 561 | 8.9 | 664 | 0.18 | 1.78 |

# APPENDIX F

## Summary of Recommendations of the NYSBA Task Force on Rural Justice

The Task Force devised a number of interventions across five distinct categories, which in totality, make up a package of targeted proposals to ameliorate the access-to-justice crisis in rural New York. Herein is a summary of the recommended interventions. Full discussion of them can be found in the Report, pages 15-37.

### I. Funding Related Interventions

- New York Direct Pay Model-Furnish eligible applicants a 5-year direct payment of $22,148 per year provided they agree to, among other things, practice in defined rural areas throughout the state during the benefit period.
- Student Loan Repayment Programs-(i) Promotion and advocacy by NYSBA of existing loan-repayment-assistance programs; and (ii) Raise the amount of annual award in NYS District Attorney and Indigent Legal Services Attorney Loan Forgiveness Program from $3,400 per year to $5,500 per year and reduce to wait time to access the program.
- Tuition Assistance Program-Expand the NYS Excelsior program to cover eligible students who wish to practice in rural areas.

### II. Law School and New Attorney Interventions

- Assessment of Existing and potential programs-Gather data and assess how existing and potential law school programs promote rural access to justice.
- The Law Schools' Role in providing direct-services-Law schools should assess their ability to provide direct clinical services, in conjunction with other existing service providers, in the context of significant financial challenges these programs present.
- The Law Schools' role in training and providing attorneys who wish to practice in rural areas-(i) Assess the curricular with an eye towards the needs of rural attorneys, including substantive and skill-based training and increase access to on-line learning; (ii) increase students' access to information about rural practice; (iii) change the way rural practice is perceived by negating the perception that earning big bucks defines success; and (iii) foster an employment pipeline to jobs in rural communities.

### III. Rural Law Practice Interventions

- Raise 18-B rates.
- Relax certain residency requirements for attorneys who wish to become public officers in rural areas to increase the talent pool.
- Raise the cap on small claims cases to at least $10,000.
- Eliminate will filing fees.

- NYSBA should offer further assistance and consultation for lawyers in transition. Mentoring younger attorneys and connecting them with retiring attorneys should be pursued.

## IV. Broadband and Technology Interventions

- NYSBA should adopt a resolution that urges New York State to enact further legislation and adequate funding to expand and continue the Broadband for All program with a Phase 4 round of funding. The goal of Phase 4 should be further deployment of reliable broadband infrastructure with a download speed of at least 100 megabits per second and an upload speed of at least 30 megabits per second for 100% of New Yorkers with a specific focus on the rural areas that were not served by Phase 3 of the program.
- Monitor and track the Monroe County Justice for All pilot project which includes initiatives around real-time access to filings in civil matters, transportation to court in civil matters, uniform data collection and a court monitoring project in the town and village justice courts. If successful, NYSBA should advocate for its expansion throughout the state.
- The Office of Court Administration should promulgate guidelines to encourage and promote remote video conference appearances in town and village justice courts (and across all New York courts) by attorneys and litigants for civil matters using the available SKYPE technology already provided to town and village courts, or other similar technology.
- The Office of Court Administration should continue to expand e-filing initiatives across the state. Legislation should be passed to authorize e-filing expansion into town and village justice courts.
- NYSBA should again recommend the repeal of Judiciary Law §470 requiring a physical office in New York State.

## V. Law and Policy Intervention

- Amend Court Rule 100.6 (B) (2) to allow part-time attorney judges to practice in courts where other part-time attorney judges preside within the same county as follows:

  *(B) Part-Time Judge. A part-time judge:*

  *(2) shall not practice law in the court on which the judge serves, or in any other contiguous town or village court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;*

NEW YORK STATE BAR ASSOCIATION
One Elk Street
Albany, NY 12207

Appendix 6 – Written Comments Submitted to the Uniform Rules Committee

1. Comments from Attorney Brent Kimmel – July 17, 2021
2. Letter from NYSBA Task Force on Rural Justice – July 1, 2021
3. Comments from NYSBA Commercial and Federal Litigation Section – July 1, 2021
4. Memorandum from Commercial Division Advisory Council – June 30, 2021
5. Memo from NYCLA Supreme Court Committee – June 30, 2021
6. Comments from Attorney Michael Schultz – June 23, 2021
7. Comments from Attorney Joseph Catania – June 21, 2021
8. Comments from Attorney Hannah Whiteker Mojica – May 31, 2021
9. Comments from Attorney Peter Walsh – May 24, 2021
10. Comments from Attorney Michael Chartan – May 21, 2021
11. Letter from the Defense Association of New York – May 14, 2021
12. Note from the NYSBA Trial Lawyers Section – May 5, 2021

-----Original Message-----
From: Brett Kimmel <bk@brettkimmel.com>
Sent: Saturday, July 17, 2021 12:45 AM
To: Uniform Rules <uniformrules@nysba.org>
Subject: Question and Comment

From a prior news release dated May 14, 2021, "Chief Administrative Judge Lawrence K. Marks indicated that the Administrative Board would consider the association's request for a pause in the enforcement of the new rules pending the outcome of a review and comment period." Can you tell me where this stands? There has been no reporting on any stay. That said, I have yet to have a judge even mention the new rules let along enforce them. I write tonight with my question only because, for the first time since Feb 1st, I received an affidavit with a 202.8-b word count certification attached. Finally, while I know the comment period has closed, I stand in opposition to the changes, as a whole. I have always been a lawyer who follows rules, complies with deadlines, goes out of his way to avoid asking for adjournments, etc.. Nevertheless, I find the tone and impact of the Rules to be offensive and unnecessarily stress-provoking. The Rules are written in a manner that seems to view lawyers as a problem that needs to be handled. The first time I read the Rules, I felt like I was being lectured to and scolded for no reason other than that I went to law school and make my living as a litigator. It makes me question, "do I need this in my life?"

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July 1, 2021

To: Task Force on the Uniform Rules
New York State Bar Association (NYSBA)
One Elk Street
Albany, NY 12207

Dear Members of the Uniform Rules Task Force,

As you may be aware, in 2020, the NYSBA Task Force on Rural Justice underwent an extensive review of the practice of law and the provision of legal services in rural areas of New York State, as well as throughout the country. Taier Perlman and myself co-chaired the Task Force and we now write this letter to share our generalized concerns about how the new Uniform Rules may negatively impact rural practice.

As enumerated in the final report by the Task Force, we confronted several issues which demonstrate the unique challenges of rural practice. These issues include the disadvantageous ratio of attorneys to clients; the aging of attorneys in rural areas and the disinterest of younger attorneys to take their place; the limited to no broadband coverage in rural communities; and the difficulties rural practitioners experience obtaining CLE programs, support, and other assistance from members of the bar.

It is these challenges that would make the new Uniform Rules which call for numerous new steps, some form of computer proficiency, and access to internet, difficult to implement for rural practitioners. Further, that portion of the Uniform Rules which provides that failure to implement these new rules can lead to severe sanctions and exposure to malpractice is highly concerning for rural practitioners who are already facing burdens by virtue of practicing in rural areas. Please note that we are not opposed to new uniform rules per se, and certainly appreciate the efforts expended in drafting them. However, we also believe that such rules should be sensitive to and informed by the realities of rural practice.

Although many of our Task Force members have numerous concerns with the new rules, we will narrow them to just a few examples and how it could affect a rural practitioner.

Specifically, Rule 4 calls for the electronic submission of papers without providing any clear alternative. However, attorneys in rural areas often lack the capacity to submit electronically. In fact, the majority of the town and village justice courts, which are most numerous in rural areas, do not have the administrative capacity to accept e-filing, nor is e-filing mandatory for these courts the way it is for many of the other courts within the Unified Court System. Based upon that, rural attorneys would be exposed to potential malpractice claims in situations where there is no option to e-file. Or, in the alternative, it may be necessary for rural practitioners to decline to accept cases in these courts due to the burden of an electronic filing requirement.

Rule 6 which requires bookmarking, also presents an issue for rural practitioners. Bookmarking is a process that the typical rural attorney is unlikely to be familiar with. Moreover, rural attorneys rarely have significant support staff, and most likely lack any technical support. The majority of rural practitioners are either solo practitioners or small law firms. Many are seasoned practitioners who have been operating their offices since long before the internet era and the infiltration of tech platforms. The proposed rules would require these practitioners to learn a very particular feature of a tech platform, which they likely will not even use often, and may be tremendously burdensome, especially in instances where rural practitioners are already very over-extended because there are so few lawyers in their communities.

Rule 11.e, which calls for responses and objections to document requests, with verifications for each document, presents more difficulties. For the reasons enumerated above, the use of technology assisted review mechanisms and predictive coding will in many cases be unduly burdensome and probably unachievable for many rural attorneys. In addition, Rule 11.e (c) requiring calls for verification of each request would create a tremendous burden to both the attorney and to the client.

Rule 15 excludes the ability to have conferences by telephonic means. With the unreliability of internet connection, complete lack of broadband infrastructure in rural areas, the uncertainty of weather and the obvious travel distances, telephone conferences must be included as an option for rural attorneys and their clients to meet their obligations.

Rule 19 regarding orders to show cause creates extra steps to simply file reply papers, and if denied, the moving party is unable to respond to allegations made by the respondent. In order to be able to file moving papers, permission of the court is required, which means additional filings (by e-filing), thus creating more of a burden on already overworked and underpaid rural attorneys. Seeking permission from the court to proceed in the litigation may also lead to a disparate impact in a rural setting where many courts are not open daily, but rather only operate once a week for a few hours, or one to two days a month. Such a scenario would prolong litigation matters in rural courts.

Rule 19-a regarding summary judgment motions would require the statement of material facts which necessitates specific citations to evidence in the record. Without going into full detail on the burdens that this creates, there is no question that additional attorney time may be required, which clients in rural areas are generally unable to afford.

Rule 31, which addresses pre-trial memoranda and the use of index exhibit binders is unduly burdensome and costly and will also take additional attorney time and create additional expense to clients. This is simply not economically feasible in the rural setting.

In addition, Rules 11-a, 11-c, and 11-d are all limitations on discovery in litigated matters, which impacts effective representation to rural clients.

There are numerous other issues that need to be examined by the Uniform Rules Task Force, and hopefully by the Administrative Board. Clearly, some of the difficulties that we raised are applicable in both urban and rural settings, but with regard to limitations that already confront the rural population and rural lawyers, we suggest that these rules be reexamined in that context. Rural access to justice and the plight of rural practitioners is already hard enough. There is no need to make things harder.

Very Truly Yours,

Honorable Stan L. Pritzker
Supreme Court, Appellate Division
Third Judicial Department

Taier Perlman, Esq.
Staff Attorney
Legal Services of the Hudson Valley

**To: Task Force on Uniform Rules**

**From: Commercial and Federal Litigation Section**

**Re: Preliminary Report of the Task Force on Uniform Rules Dated June 7, 2021**

**Date: July 1, 2021**

The Commercial and Federal Litigation Section (the "Section") appreciates the opportunity to submit comments on the Preliminary Report of the Task Force on Uniform Rules (the "Task Force"). The Section was, of course, aware of the December 29, 2020, order of the Chief Administrative Judge adopting new Uniform Rules. The Section was also aware of the resolution adopted by the NYSBA House of Delegates on April 12, 2021, expressing concern about the adoption of the new Uniform Rules and resolving that the President of the NYSBA request a stay of one year of the implementation of the new Uniform Rules.

The Section has been closely involved with the Commercial Division of New York Supreme Court since its establishment in 1995 and has participated in the development of the Rules of the Commercial Division. The Preamble to the Rules of the Commercial Division acknowledge the "strong cooperative spirit of the bar practicing before it." In fact, NYSBA played an integral part in the creation of the Commercial Division. The Commercial Division was created in recognition of the undisputed fact that New York is the center of world commerce and international finance. The Commercial Division, and its rules, has been recognized in restoring the role of the New York State Courts as a center for the adjudication of major commercial disputes.

Although the Section believes the Commercial Division and its rules have been a success story for the New York State Courts and the practitioners and judges in the Commercial Division, the Section did not advocate for the extension of the Commercial Division Rules to other State civil courts. The Section understands the concerns of practitioners that led to the adoption of the

Resolution of the House of Delegates on April 12, 2021, and later the appointment of the Task Force. However, that resolution did not resolve that the Commercial Division Rules were invalid as violative of the CPLR. According to the Task Force Preliminary Report, the Task Force is "to coordinate the efforts of NYSBA in furtherance of the resolution," which the Section does not believe encompasses a review of the validity of the Commercial Division rules.

The Section firmly disagrees with the sections of the Preliminary Report that assert that the Commercial Division rules violate the CPLR.

The Commercial Division was established in 1995, and the current rules represent a quarter-century of cooperation between the bench and bar. Many of the Commercial Division rules are intended to make litigation swifter and cheaper.

The Section requests that the Task Force confine itself to the issue of whether the new Uniform Rules will work well in other Parts or courts. The Task Force should not undermine the valuable work to develop the Commercial Division rules and the Commercial Division as "an efficient, sophisticated, up-to-date court dealing with challenging commercial cases." Preamble to the Rules of the Commercial Division of the Supreme Court.

The Preliminary Report states: "Even worse is when the rules either encroach or conflict with rules within the CPLR. At least five of the 'new rules' do so." Preliminary Report, p. 8. They do not conflict with the CPLR.

**A. Privilege Logs.** New Uniform Rule 202.20-a is a significantly modified version of Commercial Division Rule 11-b. New Uniform Rule 202.20-a provides:

**Section 202.20-a Privilege Logs.**

(a) Meet and Confer. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging

requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Court Order. Agreements and protocols agreed upon by parties shall be memorialized in a court order. In the event the parties are unable to enter into an agreement or protocol, the court shall by order provide for the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order, and the allocation of costs and expenses as between the parties.

Commercial Division Rule 11-b provides:

**Rule 11-b. Privilege Logs.**

(a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Categorical Approach or Document-By-Document Review.

1. The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.

2. In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.

3. To the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients - together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.

The Preliminary Report asserts that Uniform Rule 202.20(a) violates CPLR 3122(b) because the cost-shifting provisions encroach upon a party's rights under CPLR 3122(b). Preliminary Report, p. 8. The Preliminary Report ignores CPLR 3103.

CPLR 3122(b) provides that a party responding to a document response must provide information "for each document withheld."

Commercial Division Rule 11-b allows a party to insist on a document-by-document privilege log, subject to the Court's authority to enter a protective order under CPLR 3103

"denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3103 provides that protective orders should "prevent unreasonable ….expense."

Uniform Rule 202.20-a does not require the party seeking disclosure to agree to a categorical privilege log.[1] Nor does it require that the party seeking a detailed privilege log bear the expense. It merely provides that the Court may allocate "costs and expenses as between the parties."

Commercial Division Rule 11-b was promulgated in response to the proliferation of email in the commercial world, and the concomitant proliferation of privileged documents, resulting in the need to generate massive privilege logs in order to preserve the attorney/client privilege, thereby generating unnecessary legal expenses for parties.

Both Commercial Division Rule 11-b and the significantly modified version of it promulgated as Uniform Rule 202.20-a appear to be appropriate amplifications of the authority of the court under CPLR 3103 to grant protective orders "to prevent unreasonable … expense."

Certain portions of the Preliminary Report address the burdens on small practitioners and the consequences of the new Uniform Rules in small dollar amount cases. However, the use of categorical privilege logs is intended to make litigation easier for the attorneys and less expensive for the clients so the Section is at a loss to understand the concerns of the Task Force. Rather than burdening small practitioners, Uniform Rule 202.20-a may relieve practitioners of the onerous task of preparing document-by-document privilege logs. And if a document-by-document privilege log is inappropriate due to the small volume of documents in the case, that is allowed and will undoubtedly be without an allocation of expense.

[1] In adopting on June 26, 2012, the Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, the NYSBA previously indicated its support for the practice of using categorical privilege logs. *See* archive.nysba.org/discoveryreport/ at 82-83 (last visited June 30, 2021).

Likewise, the requirement to meet and confer regarding privilege issues prior to generating a privilege log serves to reduce the expense of discovery, not to exacerbate it. The rules requiring counsel to meet and confer are further discussed below.

**B. <u>Duty to Meet and Confer</u>**. New Uniform Rule 202.20-f requires that counsel "consult with one another in a good faith effort to resolve all disputes about disclosure." New Uniform Rule 202.20-f provides:

**Section 202.20-f Disclosure Disputes.**

(a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.

(b) Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.

(c) The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.

Uniform Rule 202.20-f is again a significantly modified version of Commercial Division Rule 14. Commercial Division Rule 14 provides:

**Rule 14. Disclosure Disputes.**

If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule will apply. Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith

effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference. Such a letter must include a representation that the party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter or shall indicate good cause why no such consultation occurred. Not later than four business days after receiving such a letter, any affected opposing party or non-party shall submit a responsive letter not exceeding three single-spaced pages. After the submission of letters, the court will schedule a telephone or in-court conference with counsel. The court or the court's law clerks will attempt to address the matter through a telephone conference where possible. The failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter. If the parties need to make a record, they will still have the opportunity to submit a formal motion.

The Preliminary Report, p. 7 cites *Costigan & Co. v. Andrew J. Costigan*, 304 A.D.2d 464 (2d Dep't 2003), in support of the assertion that "meet and confer" requirements violate the CPLR. *Costigan* involved a prior version of Commercial Division Rule 24, which the First Department stated "purports to bar a motion unless a prior conference has been held on the issue raised by the motion." *Costigan* in no way indicates that a "meet-and-confer" requirement for discovery disputes violates the CPLR.

Commercial Division Rule 24 has been revised since *Costigan* to clarify that "[n]othing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interest." Further, Commercial Division Rule 24 does not apply to discovery disputes and *Costigan* did not involve a motion arising out of a discovery dispute. The new Uniform Rules do not include a Rule based on Commercial Division Rule 24, and Uniform Rule 14 is limited to discovery disputes. A requirement that attorneys confer regarding discovery disputes does not violate the CPLR.

In addition, Uniform Rule 202.20-f does not bar a party from making a motion. It only requires attorneys to meet and confer about discovery disputes. Uniform Rule 202.20-f provides

that the failure to meet and confer "may result in a denial of a discovery motion, without prejudice to renewal once the provisions have been complied with." (Emphasis added).

The Uniform Civil Rules for the Supreme Court and the County Court ("Uniform Civil Rules") have required for decades that motions related to disclosure be accompanied by "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Uniform Civil Rules § 202.7(a). As the Preliminary Report recognizes, the requirement to meet and confer prior to a discovery motion has been enforced by the Appellate Division. *See Barnes v. NYNEX, Inc.,* 274 A.D.2d 368 (2d Dep't 2000).

The Preliminary Report, p. 9, recognizes the authority of the Chief Administrative Judge to promulgate rules for the courts, but the analysis in the Preliminary Report gives too little weight to the rulemaking authority of the Chief Administrative Judge. New York Constitution, Article 6, § 30, authorizes the Chief Administrative Judge to issue rules "to regulate practice and procedure in the courts," and the legislature has authorized the rulemaking authority in Judiciary Law § 212-2(d). The requirement that attorneys meet and confer regarding discovery disputes is an appropriate regulation of practice in the courts. It is also salutary for both the bench and the bar, and has been part of New York practice for decades. The NYSBA should not oppose a requirement that attorneys cooperate on discovery, and the position of the Preliminary Report is a step backwards in New York practice. And the NYSBA should certainly not take the erroneous position that Uniform Rule 202.20-f and by extension Commercial Division Rule 14 violate the CPLR.

### C. Orders to Show Cause.

Uniform Rule 202.8-d provides:

**Section 202.8-d Orders to Show Cause.**

Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. See Section 202.8-e. Absent advance permission of the court, reply papers shall not be submitted on orders to show cause.

Commercial Division Rule 19 provides:

**Rule 19**. **Orders to Show Cause.**

Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. See Rule 20. Absent advance permission, reply papers shall not be submitted on orders to show cause.

The Preliminary Report, p. 9, asserts that Uniform Rule 202.8-d violates CPLR 2214(d), which provides that a motion may be brought by order to show cause "in a proper case," whereas the Uniform Rule requires "genuine urgency."

The language that an order to show cause should be presented only in a case of "genuine urgency" appears to be an appropriate elucidation of what constitutes "a proper case" to not follow the provisions of the CPLR 2214 for notice of a motion. In addition to the general rulemaking authority of the Chief Administrative Judge, CPLR 3401 expressly authorizes the Chief Administrative Judge to adopt "rules regulating the hearing of causes." Further, "genuine urgency" is consistent with how courts have applied the "proper case" standard of CPLR 2214(d). It is not clear why the NYSBA would advocate that attorneys should be able to avoid the notice requirements of CPLR 2214 for a motion other than in a case of "genuine urgency."

The Preliminary Report also asserts that Uniform Rule 202.8-d violates CPLR 2214(d) because it makes no allowance for an order to show cause in cases involving unrepresented parties or where relief sought is not opposed. Preliminary Report, p. 28. But there is nothing in CPLR

2214(d) that requires those applications to be made by order to show cause. The provisions of CPLR 2214 allowing a party to file a motion on notice are perfectly appropriate, even if the application is unopposed or the adversary is not represented by counsel.

**D. Motions for Summary Judgment.**

Uniform Rule 202.8-g provides:

**Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.**

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

Commercial Division Rule 19-a provides:

**Rule 19-a. Motions for Summary Judgment; Statements of Material Facts.**

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

There is a difference between Uniform Rule 202.8-g and Commercial Division Rule 19-a. Under the Commercial Division rule, the court "may" direct that the motion be accompanied by the statement of material facts, whereas the Uniform Rule now requires them.

Irrespective of the usefulness of this device, and whether its use should be required in all summary judgment motions in the courts of New York, the Section submits that the Uniform Rule and certainly Commercial Division Rule 19-a does not violate the CPLR. Again, the Uniform Rule is an appropriate elucidation of the provisions of CPLR 3212. The Uniform Rules are replete with requirements regarding the form of papers submitted in the courts that go far beyond what is specified in the CPLR.

The Preliminary Report expressed concern that the Uniform Rule, which can act as a notice to admit under CPLR 3123, contains no limitations on any deemed admission and no opportunity to reverse that admission. There is nothing in the Uniform Rule, however, that precludes a judge from taking notice that a statement of material fact was modified or withdrawn. Thus, the Uniform Rule is not inconsistent with the requirements of CPLR 3123.

The case law is clear that the court's review of a motion for summary judgment is a search for a material question of fact. The Statement of Material Facts, and the response thereto, is an effort to assist the court in that analysis. It does not violate the CPLR.

**E. Temporary Restraining Orders.**

Uniform Rule 202.8-e provides:

**Section 202.8-e Temporary Restraining Orders.**

Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, a temporary restraining order should not be issued ex parte. Unless excused by the court, the applicant must give notice of the time, date and place that the application will be made in a manner, and provide copies of all supporting papers, to the opposing parties sufficiently in advance to permit them an opportunity to appear and contest the application. Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating either that: (a) notice has been given; or (b) notice could not be given despite a good faith effort to provide it or (c) there will be significant prejudice to the party seeking the restraining order by giving of notice. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.

Commercial Division Rule 20 provides:

**Rule 20. Temporary Restraining Orders**.

Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued *ex parte*. The applicant must give notice, including copies of all supporting papers, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

The Preliminary Report, pp. 10-11. asserts that Uniform Rule 202.8-e "is in direct conflict with CPLR 6313, which provides that in a motion for preliminary injunction, upon a showing of immediate and irreparable injury, a temporary restraining order may be granted without notice."

The Task Force's assertion that Uniform Rule 202.8-e violates CPLR 6313 ignores the word "may" in CPLR 6313. Obviously, whether relief should be granted ex parte is a matter of the court's discretion under CPLR 6313. Uniform Rule 202.8-e provides guidance to the bench and bar as to when that discretion to grant ex parte should be exercised. It does not change the standard of "immediate and irreparable injury" set forth in CPLR 6313. Requiring that a party seeking ex parte relief demonstrate why they could not give notice of the application is not an improper standard and does not violate the CPLR.

What's more, comparable requirements have been in effect since 2007. Uniform Rule 202.7(f) requires each applicant for a TRO to affirm that: (i) "there will be significant

prejudice to the party seeking the restraining order by giving of notice"; or (ii) "a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application." 22 NYCRR 202.7(f). Courts have long recognized that Rule 202.7(f) is appropriate and enforceable. *See Tesone v. Hoffman*, 84 A.D.3d 1219, 1221 (2d Dep't 2011). It is unclear why NYSBA would advocate that it should be easier to make ex parte applications for temporary relief, or how a long-standing requirement places an improper burden on practitioners.

## CONCLUSION

The Preliminary Report questions the number of rules a practitioner must consult in order to litigate cases in the courts of New York. However, practitioners have needed to familiarize themselves with the Uniform Civil Rules since 1986. Those rules have been promulgated by the Chief Administrative Judge through constitutional and statutory authority.

The Section did not advocate for the new Uniform Rules adopted by order of the Chief Administrative Judge effective February 1, 2020. The Section does not object to the NYSBA seeking a stay of the effect of those rules. However, the Uniform Rules and by implication the Commercial Division Rules do not violate the CPLR, and the NYSBA should not adopt a report that undermines the innovative and collaborative approach that has made the Commercial Division a success.

Respectfully submitted,

/s/Daniel K. Wiig
Daniel K. Wiig
Section Chair, Commercial and Federal Litigation Section

Approved by resolution of the Executive Committee, June 30, 2021.

# MEMORANDUM

**TO:** NYSBA Task Force on Uniform Rules

**FROM:** Commercial Division Advisory Council

**DATE:** June 30, 2021

**RE:** Response to the Preliminary Report of the New York State Bar Association's Task Force on Uniform Rules

On December 29, 2020, the Chief Administrative Judge issued Administrative Order 270/2020 ("**AO/270/2020**"), "incorporat[ing] certain rules, and variations thereof, of the Commercial Division into the Uniform Rules for the Supreme Court and the County Court." The Commercial Division Advisory Council has not taken a position, and does not take a position, on the Chief Administrative Judge's decision to "export" these Commercial Division Rules into other New York courts.

On June 7, 2021, the New York State Bar Association's Task Force on Uniform Rules (the "**Task Force**") released a Preliminary Report (the "**Report**") commenting on the newly-adopted rules, and expressing (among other things) a view that five of the newly-adopted rules are inconsistent with the CPLR. Specifically, the Task Force challenges:

(1) **Rule 202.20-a**, relating to privilege logs;

(2) **Rule 202.20-f**, relating to disclosure disputes;

(3) **Rule 202.8-d**, relating to orders to show cause;

(4) **Rule 202.8-g**, relating to summary judgment motions; and

(5) **Rule 202.8-e**, relating to temporary restraining orders.

*See* Preliminary Report at 7-11.

The Commercial Division Advisory Council has prepared this memorandum to respond to the Task Force's suggestion that the Rules contravene the CPLR. The precursors of these Rules

have been in effect in the Commercial Division for many years. The Commercial Division is recognized as a world-class forum for efficient, fair, and predictable resolution of disputes. *See, e.g.*, New York City Council Proclamation Honoring the New York Supreme Court Commercial Division dated Dec. 20, 2018 (annexed hereto as Exhibit A). The suggestion that the Commercial Division Rules contravene the CPLR would tend to undermine this reputation, if left unaddressed. It is, however, beyond the mandate of the Commercial Division Advisory Council to respond to the Task Force's other comments on the newly-adopted rules.

## I. Rule 202.20-a (Privilege Logs)

Rule 202.20-a provides:

> (a) Meet and Confer. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, **the use of categories to reduce document-by-document logging**, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.
>
> (b) Court Order. Agreements and protocols agreed upon by parties shall be memorialized in a court order. **In the event the parties are unable to enter into an agreement or protocol, the court shall by order provide** for the scope of the privilege review, the amount of information to be set out in the privilege log, **the use of categories to reduce document-by-document logging**, whether any categories of information may be excluded from the logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order, **and the allocation of costs and expenses as between the parties**.

AO/270/2020 Ex H (emphasis added).

Rule 202.20-a is modeled on Commercial Division Rule 11-b, which was adopted in 2014. *See* AO/114/14 (July 8, 2014), and which provides that "[t]he preference in the Commercial

Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." Commercial Division Rule 11-b also expressly states that, on good cause, the court may allocate fees to the extent one of the parties insists on document-by-document privilege logging.

The Task Force contends (Report at 8) that Rule 202.20-a's contemplation of categorical privilege logs is inconsistent with CPLR 3122(b), which specifies that the notice provided by a person withholding "one or more such documents" shall "indicate the legal ground for withholding ***each such document***, and shall provide . . . information as to ***each such document***." (emphasis added).

No inconsistency exists: Rule 202.20-a does not mandate categorical privilege logging. Sub-part (a) merely directs the parties to meet-and-confer to discuss "the use of categories to reduce document-by-document logging," and sub-part (b) directs the court to issue an order setting forth the protocol for the privilege review only if the parties cannot agree following their meet-and-confer. Neither provision requires the use of categorical privilege logs.

In addition, Rule 202.20-a does not require cost-shifting in the event that the parties cannot agree on categorical privilege logging. Instead, Rule 202.20-a merely directs the Court to consider, in issuing any order concerning the protocol for privilege logging, "the allocation of costs and expenses as between the parties." This mandate is consistent with CPLR 3122(b), and within the scope of the Court's power to supervise discovery under the CPLR. CPLR 3103 permits the court "at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order . . . conditioning or regulating the use of any disclosure device." In these terms, CPLR 3103 already gives Courts the discretion to issue cost-shifting orders as

necessary to "prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." Rule 202.20-a is only a specific instance of the use of that power.

## II. Rule 202.20-f (Disclosure Disputes)

Rule 202.20-f(b) provides:

> (b) **Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure**. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.
>
> (c) **The failure of counsel to comply with this rule may result in the denial of a discovery motion without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted**.

AO 270/2020 Ex. N (emphasis added).

Rule 202.20-f is modeled on Commercial Division Rule 14, which provides that "[c]ounsel must consult with one another in a good faith effort to resolve all disputes about disclosure," that the "failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter," and that "[i]f the parties need to make a record, they will still have the opportunity to submit a formal motion."

Even before the adoption of Rule 202.20-f, the Uniform Rules contained a meet-and-confer requirement relating to discovery disputes, from which movants could only be excused upon demonstrating "good cause." *See* Uniform Rule 202.7(a) and (c). Accordingly, the Task Force's objection appears to be that "exigent circumstances" is an impermissibly narrow carve-out, as compared to "good cause." It is not clear what persuasive grounds for being excused from meet-and-conferring would constitute "good cause," but not "exigent circumstances."

Rule 202.20-f does not preclude a party from making a motion. A party may make its motion even without complying with the rule. Rule 202.20-f states that the only sanction for such non-compliance is that the court may hold the motion in abeyance or deny it without prejudice pending compliance. A party is not prevented from making a motion and the court is free to decide the motion without regard to the provisions of the rule.

Moreover, any event, even if "exigent circumstances" differs from "good cause," Rule 202.20-f(b) does not deprive litigants of their right to present motions. All it requires is that the movant attempt to consult with the non-movant in good faith "absent exigent circumstances." Nothing that happens in that conference with the non-movant can prevent the movant from presenting its motion to the Court. And, if the non-movant refuses to participate in a conference, the movant can immediately file its motion. *See* Rule 202.20-f(b) ("The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130.").

Because Rule 202.20-f(b) does not deprive a movant of the right to be heard, the Task Force's cite to *Costigan & Co. v. Costigan*, 304 A.D.2d 464 (1st Dep't 2003) is inapposite. *See* Report at 9. In *Costigan*, the Appellate Division held "void" a court rule which purported to "bar

a motion unless a prior conference has been held on the issue raised by the motion," because it "effectively conditions the making of a motion on prior judicial approval." *Id.* at 304. The meet-and-confer requirement of Rule 202.20-f(b) is distinguishable from the pre-motion conference requirement held void in *Costigan* because Rule 202.20-f(b) does not require the movant to preview the motion with the court, but rather only to consult in good faith with the non-movant concerning the subject of the motion in an effort to try to obviate the need for the motion. Even if the non-movant expresses the view during the meet-and-confer that the motion will be baseless, frivolous, or a waste of time, the non-movant cannot prevent the movant from filing the motion following the conference. And, as previously stated, neither the court nor the rule prevents the motion from being made in the absence of compliance.

## III. Rule 202.8-d (Orders to Show Cause)

Rule 202.8-d provides:

> Motions shall be brought on by order to show cause **only when there is genuine urgency** (e.g. applications for provisional relief), a stay is required or a statute mandates so proceeding. *See* Section 202.8-e. Absent advance permission of the court, reply papers shall not be submitted on orders to show cause.

AO 270/2020 Ex. T (emphasis added). Rule 202.8-d is modeled on Commercial Division Rule 19.

The Task Force asserts that Rule 202.8-d's limitation of Orders to Show Cause to instances where "there is genuine urgency, . . . a stay is required or a statute mandates so proceeding" is contrary to CPLR 2214(d), which permits orders to show cause in any "proper case." But situations involving genuine urgency–such as applications for temporary restraining orders–are precisely the cases in which orders to show cause make more sense than notices of motion, because the Court has flexibility to order the motion heard on an abbreviated schedule, and to order the motion served in a pragmatic way.

In any event, even under Rule 202.8-d, the decision whether to grant or deny a particular order to show cause remains a matter of discretion for the Court, and is reviewable by the appellate division. *See Griffith v. Atkins Glenmore Realty, LLC*, 172 A.D.3d 1182 (2d Dep't 2019) ("Whether the circumstances constitute a 'proper case' for the use of an order to show cause instead of a notice of motion is a matter within the discretion of the court to which the proposed order is presented."); *see also* CPLR 5704(a).

## IV. Rule 202.8-g (Summary Judgment – Statements of Material Fact)

Rule 202.8-g provides:

> (a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, **there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried**.
>
> (b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.
>
> (c) **Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party**.
>
> (d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

AO 270/2020 Ex. U (emphasis added). Rule 202.8-g is modeled on Commercial Division Rule 19-a.

The Task Force contends that Rule 202.8-g(c) narrow the circumstances in which a court could deny a motion for summary judgment, by directing the Court to deem uncontroverted factual statements admitted. Report at 10. But this deemed admission is a natural consequence of CPLR 3212 itself.

Under CPLR 3212, once the movant presents facts sufficient to establish a cause of action or defense "to warrant the court as a matter of law in directing judgment in favor of any party," then the burden shifts to the non-moving party to come forward and identify factual disputes "sufficient to require a trial of any issue of fact." The non-movant therefore cannot ignore the movant's evidentiary submission in support of summary judgment, and must respond and specifically identify the evidence establishing that material facts are in dispute. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980) ("We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or ***unsubstantiated allegations or assertions are insufficient***.") (emphasis added); *Chance v. Felder*, 33 A.D.3d 645, 645–646 (2d Dept. 2006) ("Once the [movant] has made a prima facie showing, the burden shifts to the [non-movant] to lay bare his or her proof and demonstrate the existence of a triable issue of fact."). The natural consequence of CPLR 3212(b)'s structure, as recognized by caselaw interpreting it, is that facts presented by the movant are admitted, unless controverted by the non-movant. *See, e.g.*, *Moonstone Judge, LLC v. Shainwald*, 38 A.D.3d 215 (1st Dep't 2007) ("[W]e would note that [the non-movant] failed to controvert many of the material facts alleged by plaintiff, and provided no citation to evidence submitted in opposition (Rule 19–a[d] ). Hence, there is no basis for disturbing the court's exercise of discretion

in deeming plaintiff's unopposed factual statements admitted."). Rule 202.8-g(c) merely makes this consequence explicit.[1]

## V. Rule 202.8-e (Temporary Restraining Orders)

Rule 202.8-e provides:

> **Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, a temporary restraining order should not be issued ex parte.** Unless excused by the court, the applicant must give notice of the time, date and place that the application will be made in a manner, and provide copies of all supporting papers, to the opposing parties sufficiently in advance to permit them an opportunity to appear and contest the application. Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating either that: (a) notice has been given; or (b) notice could not be given despite a good faith effort to provide it or (c) there will be significant prejudice to the party seeking the restraining order by giving of notice. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.

AO 270/2020 Ex. V. Rule 202.8-e is modeled on Commercial Division Rule 20.

The Task Force contends that Rule 202.8-e is contrary to CPLR 6313, which provides that "[a] temporary restraining order may be granted without notice." Report at 10-11. But Uniform Rule 202.7(f) has already been in effect since 2006, and already expresses a strong preference for notice. *See* Rule 202.7(f) ("An application for temporary injunctive relief . . . shall contain . . . an

[1] In any event, to the extent the Task Force contends that Rule 202.8-g(a) contravenes CPLR 3212 by making a statement of material facts mandatory, the Commercial Division Advisory Council notes that the analogous Commercial Division Rule (Rule 19-a) leaves this decision to the discretion of the judge. *See* Rule 19-a(a) ("Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, *the court may direct* that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.") (emphasis added). Therefore, the same challenge could not be levied against the Commercial Division Rule.

affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation **must demonstrate** that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.") (emphasis added). Rule 202.8-e, therefore, is only a modification to a rule that has already been in effect.

Rule 202.8-e permissibly expresses a judicial preference for notice to be given in cases where it is practicable and will not cause prejudice to the movant, while still leaving discretion to Courts to grant temporary restraining orders in other unexpected circumstances as allowed by CPLR 6313. Courts have long recognized the desirability of notice in cases where it will not prejudice the applicant, and Rule 202.8-e merely codifies this preference. *See, e.g.*, *Tesone v. Hoffman*, 84 A.D.3d 1219, 1221 (2d Dep't 2011) ("The initial temporary restraining order . . . should not have been granted ex parte since the plaintiffs failed to allege or demonstrate 'significant prejudice to the party seeking the restraining order by the giving of notice'"). In addition, as noted above, the decision whether to grant or deny a particular order to show cause, including one seeking a temporary restraining order, is within the discretion of the Court, and is reviewable by the appellate division. *See* CPLR 5704.

## CONCLUSION

None of the rules which the Task Force challenges in its Report conflict with the CPLR. Tellingly, the rules upon which they are based have been in effect in the Commercial Division for years, and yet the Task Force is unable to cite a single instance in which litigants have successfully challenged their application in a particular circumstance as conflicting with the CPLR.

THE NEW YORK CITY COUNCIL

# Proclamation

*The New York City Council is proud to honor the New York Supreme Court Commercial Division for its invaluable service to our businesses community and to our national economy; and*

*WHEREAS: In an era when the economy is largely a reflection of globalization and international trade, New York City remains the center of the business universe. In such a competitive environment, businesses often choose to locate their headquarters where they have access to efficient, fair, and predictable resolution of their commercial disputes. New York owes much of its world-class status as an economic engine to its world-class courts the Commercial Division of the New York Supreme Court; and*

*WHEREAS: The Commercial Division is a critically important forum for addressing complex commercial disputes. Litigants all over the world look to the Commercial Division's expertise across the broad and complex expanse of commercial law to reach successful and efficient resolutions; and*

*WHEREAS: The Commercial Division is uniquely qualified to increase taxable revenue for the City of New York while stimulating job growth. It strengthens New York City's ability to attract and retain businesses, which add jobs, fuel demand for real property, and increase tax revenue. The tax revenues from local businesses also provide financial support for the New York State judicial system; and*

*WHEREAS: Local businesses rely on the Commercial Division for efficient, fast resolution of complex commercial disputes, without which businesses would be less inclined to reside and conduct business in New York City. Leaders of national and global businesses located within our five boroughs recognize the significant role that specialized business courts play in their business decisions; and*

*WHEREAS: The New York Supreme Court Commercial Division has truly distinguished itself in its responsive, creative and adaptive approach, making it an influential model for other courts, both civil and criminal, and we wish it continued success in the years ahead; now, therefore*

*BE IT RESOLVED: That the New York City Council is proud to honor*

## *The New York Supreme Court Commercial Division*

*for its extraordinary service to New York City.*

*Signed this 20th day of December in the year Twenty Eighteen.*

*CORY JOHNSON*
*Speaker*
*For the Entire Council*

*RORY I. LANCMAN*
*Chair*
*Committee on the Justice System*

*PAUL A. VALLONE*
*Chair*
*Committee on Economic Development*

New York County Lawyers Association

**To:** NYSBA Task Force on Uniform Rules and NYSBA Secretary

**From:** NYCLA Supreme Court Committee

**Date:** June 30, 2021

**Re:** Comments on NYSBA Preliminary Report of the Task Force on Uniform Rules

This memorandum presents the positions of the NYCLA Supreme Court Committee ("the Committee") on the NYSBA Preliminary Report of the Task Force (the "Task Force") on Uniform Rules (the "Preliminary Report"). As set out below, the Committee takes the following positions;[1]

1. The Committee agrees with the Task Force that the process by which the Uniform Rules were adopted, as applied to all New York State courts, was less than optimal and that input from bar associations and other interested stakeholders should have been solicited. In addition, we agree that a longer transition period for the phase in of these Rules would be appropriate.

2. The Committee urges that the Task Force reaffirm that its Preliminary Report and any subsequent Reports on this issue do not seek to undermine or abrogate the rules of the Commercial Division. The Commercial Division is important to the resolution of commercial cases, the economy of the State, and the continuing role of the New York court system as a national leader. Regardless of whether these rules should be extended to other courts, the Committee believes that the current Rules of the Commercial Division implemented in 2014 have functioned well, have been carefully crafted to conform to the CPLR, and constitute an improvement over the rules that prevailed before those changes.

3. For that reason, the Committee urges that the Task Force refrain from taking the position that any Rules of the Commercial Division or any of the Uniform Rules violate the CPLR. We note, for reasons set out below,

[1] The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed here are those of the Supreme Court Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

that the purported discrepancy between those rules and the CPLR is not nearly as clear as the Preliminary Report contends.

4. The Committee recognizes that certain rules of the Commercial Division may present problems when they are extended to cases outside of the

   Commercial Division. The Committee supports NYSBA's efforts to study the effects of those rules on cases in various practice settings across the state.

5. Consistent with the unanimous position of the NYSBA Committee on Civil Practice Law and Rules in 2018 and the NYSBA Commercial and Federal Litigation Section in 2014[2], the Committee believes, subject to further review of the issue, that certain Rules of the Commercial Division should be extended to courts outside the Commercial Division because those rules, as a general matter, promote judicial efficiency. Those rules include Commercial Division Rules 11-a, 11-b, 11-d, and 11-e. Uniform Rules 202.20, 202.20-a, 202.20-b, 202.20-c (discussed in the Preliminary Report at 18-19, 21-24). These rules relate to interrogatories, depositions, privilege logs, and document requests. In addition, the Committee supports Uniform Rule 202.20-e, which requires adherence to scheduling orders.

6. The Committee reserves the right to interpose further comments in the event that the Task Force does not adopt its recommendations on any of the issues set out above. More generally, the Committee's work is ongoing, and it reserves the right to supplement or amend its conclusions.

## 1. Overview

NYSBA deserves commendation for its great work in addressing the issues presented by the sudden, state-wide implementation of the Uniform Rules and in presenting its preliminary views on those issues. We share the concern that not all of the Uniform Rules may be well-suited to all courts outside the Commercial Division.

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[2] The NYSBA CPLR Committee statement is attached as an exhibit to the Task Force Report. The Reports of the Commercial and Federal Litigation Section can be found at http://ww2.nycourts.gov/rules/comments/index.shtml

The Committee agrees that input from bar associations and other interested stakeholders should have been solicited before the Uniform Rules were adopted. In addition, we agree that a longer transition period for the phase in of these Rules would have been, and still is, appropriate.

At the same time, however, as set out below, we believe that some of the Uniform Rules would be appropriate for use in courts outside the Commercial Division. In addition, we urge the Task Force to carefully weigh whether any of its positions undermine the rules of the Commercial Division and carry the potential for disrupting the important work of the Commercial Division.

## 2. The Task Force Should Not Undermine the Rules of the Commercial Division

The Commercial Division was created "to maintain New York's status as the premier state for the conduct of business."[3] Business leaders agree with this assessment.[4] The Business Council of New York State applauded the work of the Commercial Division, describing the court as "the envy of businesses in other states."[5] The American Corporate Counsel Association has expressed its appreciation and support for the Commercial Division and urged other states to follow New York's lead.[6]

Indeed, in December 2018, the New York City Council issued a proclamation stating, among other things, that

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[3] *See* Eisenberg & Miller, The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly Held Company Contracts, 30 Cardozo L. Rev. 1475, 1478, 1485-86 (2009) (finding that 46% of contracts used New York law clauses, that New York law is "overwhelmingly favored" in financing contracts, and stating that "courts that are positively perceived by the commercial community obviously enhance a state's effort to be a contractually designated choice of law," and noting that the Commercial Division is perceived to be attaining "some success").

[4] NYS Courts, The Commercial Division: A 21st Century Forum for Commercial Litigation, Bing (Feb. 2, 2016), https://www.bing.com/videos/search?q=nys+commercial+division+video&&view=detail&mid=9BFD0DEE28E6250C6A629BFD0DEE28E6250C6A62&&FORM=VRDGAR&ru=%2Fvideos%2Fsearch%3Fq%3Dnys%2Bcommercial%2Bdivision%2Bvideo%26qpvt%3Dnys%2Bcommercial%2Bdivision%2Bvideo%26FORM%3DVDRE (last visited, June 28, 2021)

[5] N.Y. State Unified Court Sys., Commercial Division – NY Supreme Court History, http://ww2.nycourts.gov/courts/comdiv/history.shtml (last visited June 28, 2021).

[6] *Id.*

> New York owes much of its world-class status as an economic engine to its world-class court: the Commercial Division of the New York Supreme Court; and
>
> The Commercial Division is a critically important forum for addressing complex commercial disputes. Litigants all over the world look to the Commercial Division's expertise across the broad and complex expanse of commercial law to reach successful and efficient resolutions; and
>
> The Commercial Division is uniquely qualified to increase taxable revenue for the City of New York while stimulating job growth. It strengthens New York City's ability to attract and retain businesses, which add jobs, fuel demand/or real property, and increase tax revenue. The tax revenues from local businesses also provide financial support for the New York State judicial system; and
>
> Local businesses rely on the Commercial Division for efficient, just resolution of complex commercial disputes, without which businesses would be less inclined to reside and conduct business in New York City. Leaders of national and global businesses located within our five boroughs recognize the significant role that specialized business courts play in their business decisions.[7]

The Commercial Division is important to New York lawyers and the Task Force should not undermine the operation of the Commercial Division. We do not read the Preliminary Report as suggesting that the Commercial Division Rules are inappropriate for use in the Commercial Division itself. We urge that the Task Force insert a statement making clear that it does not seek to challenge the Commercial Division's Rules. It is the view of the Committee that the Rules of the Commercial Division have worked effectively and that the Rule changes implemented in 2014 have enhanced judicial efficiency and promoted the efficient resolution of commercial cases.

3. **<u>The Task Force Should Not Attack the Commercial Division Rules as Inconsistent with the CPLR</u>**

[7] New York City Council, Proclamation, Business Courts Blog (Dec. 20, 2018), https://www.businesscourtsblog.com/wp-content/uploads/2019/01/City-Council-Proclamation-01541344xB05D9.pdf (last visited, June 28, 2021).

To the extent that the Task Force attacks the Uniform Rules as inconsistent with the CPLR, such an attack would undermine the corresponding Rules of the Commercial Division, reducing the Commercial Division's efficiency.

Such an attack on the Rules of the Commercial Division lacks support in any case law. Indeed, although the most recent version of the Commercial Division Rules have operated for seven years, with some additions along the way, the Task Force does not cite a single case that has sustained an attack on any of those rules based on the CPLR, the state or federal constitutions, or any other law.

Moreover, it is far from clear that such an attack would be viable. For example, the Preliminary Report attacks the sanctions (cost shifting) in the privilege log rule, 202.20-a. Preliminary Report at 8. It contends that the court is without power to impose sanctions if a party insists upon a burdensome document-by-document log. But NYSBA's Commercial and Federal Litigation Section in May 2014 specifically wrote that "[t]he Section agrees that cost shifting is one sensible way of dealing with a party's insistence on a document-by-document log." The Commercial and Federal Litigation Section also stated that sanctions under the privilege log rules would be supported by a court's "well established power to limit any type of discovery under CPLR §3103 to avoid, in appropriate settings, the unreasonable expense, burden or prejudice associated with document-by-document logging." *Id.* (citing *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2013 WL 139560 (S.D.N.Y. Jan. 11, 2013) (holding that a party may move for a protective order to avoid needing to create a document-by-document privilege log)

The Commercial and Federal Litigation Section correctly looked to federal case law as guidance in determining the propriety of the Commercial Division's rules. In federal courts, litigants have attacked rules similar to those at issue here as inconsistent with the Federal Rules of Civil Procedure. For example, the Preliminary Report contends that the rule requiring a meet and confer before discovery disputes are heard violates the CPLR. Preliminary Report at 9 (discussing Uniform Rule 202.20-a). Meet and confer obligations are an established part of the legal landscape and have been held to be consistent with rules that are silent as to whether a meet and confer obligation is necessary. *See Mendoza v. Amalgamated Transit Union Int'l,* 2020 U.S. Dist. LEXIS 77722, *21-22 (D.Nev. 2020) (citing *DarbeeVision, Inc. v. C&A Mktg., Inc.*, No. CV 18-0725 AG (SSX), 2019 U.S. Dist. LEXIS 134914, 2019 WL 2902697, *5 (C.D. Cal. Jan. 28, 2019) (local meet and confer rule is not inconsistent with FRCP sanctions rule because "the Federal Rule is silent as to whether a party seeking sanctions based on the failure to appear at a deposition must meet and confer. There is no express statement in the Rule

affirmatively exempting a party from meeting and conferring in such circumstances.").

Likewise, the Preliminary Report condemns Rule 202.8-g as contrary to the summary judgment rules of the CPLR. Preliminary Report at 10. But federal courts have consistently upheld analogous local rules in the federal courts as consistent with the Federal Rules of Civil Procedure and if necessary have harmonized the application of those local rules to ensure consistency with the Federal Rules. *See e.g., Reese v. Herbert*, 527 F.3d 1253, 1269 (11th Cir. 2008) (local rule requiring statement of material fact). Local rules may validly place conditions upon the exercise of rights granted under Rule 56. *See Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1994) (local rule does not conflict with Rule 56 because it does not eliminate a hearing right under rule 56; it merely "places a condition on that right.").

We do not intend the discussion above to be a full compendium of the case law regarding whether the Uniform Rules are consistent with the CPLR. Rather, we present that discussion to illustrate that the issue is more complicated than the Preliminary Report acknowledges. Accordingly, we urge the Preliminary Report to reconsider its contention that these rules violate the CPLR, a contention which could have the effect of undermining the Rules of the Commercial Division in a way that would disrupt its operations. We reserve the right to supplement this analysis depending upon the content of the final Report issued by the Task Force.

4. **Certain Rules Appear to be Workable in Cases Outside the Commercial Division**

The Committee does not see any reason why the rules relating to adherence to discovery schedules (rule 202.20-e) should not be applied outside of the Commercial Division. The Preliminary Report states that the sanctions imposed by the rule "could be overly harsh." Preliminary Report at 23. However, no reason is provided for why the sanctions, which are entirely within the discretion of the presiding judge, are more likely to be harsh under this rule than under any other rule.

The Committee also supports the application of several discovery rules to courts outside the Commercial Division. As an appendix to the Preliminary Report indicates, the NYSBA Committee on Civil Practice Law and Rules in 2018 unanimously supported the extension of a number of Commercial Division Rules to non-Commercial Division cases. This Committee agrees that the application of certain of these rules outside the Commercial Division would promote judicial efficiency. These rules include Commercial Division Rules 11-a (limits on the number of interrogatories), 11-d (limits on depositions), and 11-e (document

requests). These are set out in the Uniform Rules as Rules 202.20, 202.20-b, and 202.20-c (discussed in the Preliminary Report at 18-19, 21-24). The Committee also supports the application of the privilege log rule outside the Commercial Division, Uniform Rule 202.20-a (discussed in the Preliminary Report at 19).

As a general matter, these rules, which impose presumptive limits upon the number of interrogatories and the time for depositions, are *better suited* for smaller cases outside the Commercial Division than they are for the often larger and more complex cases in the Commercial Division, which may require more discovery than the presumptive limits imposed by the rules. Yet, even in the Commercial Division context, these presumptive limits have worked well and have generally streamlined discovery and improved efficiency. In 2014, the NYSBA Commercial and Federal Litigation Section endorsed the limits on interrogatories in the Commercial Division "as a meaningful step towards greater efficiency of litigation in the Commercial Division." Our Committee also endorsed the interrogatory limit when it was considered for the Commercial Division in 2014. Experience has shown that parties and judges are willing to alter the discovery limits in the Rules when the occasion (and simple fairness) warrants it. We see no reason why this combination of presumptive rules and appropriate flexibility should not continue to work outside the Commercial Division.

The categorical privilege log rule (Rule 11-b) is also better suited to smaller cases where the avoidance of the expense associated with the preparation of voluminous privilege logs is especially necessary. This rule, too, has worked in the Commercial Division. As the NYSBA Commercial and Federal Litigation Section stated in May 2014: "There is growing recognition by courts and the organized bar that the substantial costs and burdens associated with document-by-document privilege logs often outweigh their benefits."

## SUMMARY

Our Committee thanks NYSBA for considering our comments, which are preliminary and as to which we reserve the right to amend. We appreciate NYSBA's work in bringing these issues to the attention of the legal community and we look forward to further dialogue on this important subject.

**From:** Michael Schultz
**To:** Uniform Rules
**Subject:** Comment re: New Rule 202.8-g, Statement of Material Facts
**Date:** Tuesday, June 22, 2021 5:51:08 PM

Good evening,

I hope all is well. First, I want to thank NYSBA for opening itself to comments on these new rules and the incredibly thorough, and well-prepared, Preliminary Report that was created.

Although I did not submit any comments prior to seeing the Preliminary Report in last night's email, after having dealt with some complications on a motion regarding the new rule requiring a "Statement of Material Facts," I wanted to submit a comment to NYSBA about the Rule and the issues I felt this new Rule created. I apologize in advance if the comment is lengthy; I had a lot of issues I wanted to address. The comments below pertain solely to Rule 202.8-g, as I felt NYSBA adequately conveyed my fears and concerns about all the other rules pretty perfectly.

One issue with Rule 202.8-g as drafted is that it complicates oppositions to summary judgment motions based on a movant's failure to make a prima facie showing of its entitlement to this relief. Under 202.8-g(b) "the papers opposing a motion for summary judgment shall include … if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Read literally, the rule contradicts decades of case law and requires an opponent to raise a triable issue of fact on *every* summary judgment motion, even if the movant failed to show, prima facie, its entitlement to summary judgment.

In the most literal sense, the rule requires *only* those facts which show that an issue requires a trial—or in the movant's case, no trial. But many motions for summary judgment fail to reach this "triable issue of fact stage" because the movant fails to make its prima facie showing of its entitlement to summary judgment, which then necessitates a trial on all the unaddressed issues.

Yet Rule 202.8-g provides no explanation for how to make this argument in a "Material Statement of Facts." To illustrate, in a personal injury action you may have a plaintiff who slips on water inside a supermarket. The defendant may move for summary judgment arguing that it had no notice of the spill, but failing to address whether it created the spill. The plaintiff would oppose the motion by arguing that the defendant failed to make its prima facie showing that it did not create the spill, and thus the burden never shifts to the plaintiff to raise a triable issue of fact in opposition. Is the plaintiff now obligated to plead facts that show a genuine issue needing to be tried exists since the defendant failed to address an entire theory of the case? Again, taking this rule in the most literal sense, the defendant will have failed to eliminate all triable issues of fact relating to its creation of the spill, but the plaintiff still needs to plead facts showing these triable issues of fact exist. So under a "plain meaning" reading, the plaintiff *should* be obligated to plead facts about the defendant's creating the condition to show the "genuine issue" requiring a trial.

This, in effect, presumes that every movant has made its prima facie showing and automatically—and improperly—shifts the burden to the opponent of a summary judgment motion to raise a triable issue of fact any time a summary judgment motion is made. This also

creates the potential for disastrous results for opponents of summary judgment motions. For instance, in a case where a plaintiff slips and falls on ice, and the defendant moves for summary judgment arguing that there was a storm-in-progress when the plaintiff fell, but fails to submit any meteorological records, is the plaintiff now required to submit meteorological records to show that a storm was not in progress? As one can imagine, this opens the door to allowing the Court to disagree with the plaintiff's interpretation of the meteorological records and actually find, based solely on the plaintiff's records—submitted *only* because Rule 202.8-g automatically required him to raise a triable issue of fact—that there was a storm in progress and the defendant is therefore entitled to summary judgment. Prior to rule 202.8-g shifting the burden onto this plaintiff to prove, by citing specific evidence, that genuine issues require a trial, the plaintiff could simply argue that the defendant failed to make its prima facie showing of its entitlement to summary judgment and thus failed to eliminate all triable issues of fact, without needing to submit the meteorological records and disproving the defendant's unproven allegations. This also unfairly shifts the financial burden onto the plaintiff, who now needs to pay for the meteorological records rather than the defendant who brought the motion.

Taking this a step further, premature motions made before discovery is complete become almost impossible for the opponent to oppose given that they will not have the evidence they need to refute the movant's arguments. Taking again the above-example of a plaintiff slipping on water inside the supermarket, the plaintiff may argue that the spill was created by the defendant's employee knocking over the mop bucket while trying to clean. If the defendant moves for summary judgment before the plaintiff has obtained all the discovery he needs, how would he respond to the defendant's statement of material facts with citations to evidence that he does not know exists? Would the counter-statement of facts require numbered paragraphs explaining that "there is no evidence in the record about the defendant's cleaning schedule for the date of incident"; "there is no evidence in the record about whether the defendant's employee spilled the water"; and "there is no evidence in the record about whether the defendant's employee spilled the water and then left it without cleaning it up"? Given that the argument is that there is no evidence in the record about these issues, the plaintiff would be unable to point to any evidence submitted on the motion. But the rule *requires* citations to evidence submitted in support, or opposition, of the motion, with no provision explaining for what to do if this task is impossible. Thus, the plaintiff's counter-statement of facts in this example would be defective and violate the rule.

This also raises the question about what the results of a defective counter-statement of material facts are: is the Court to ignore all allegations not followed by citations to evidence? And if the allegations are to be ignored by the Court, can the Court still deny this defendant's motion for failing to make a prima facie showing that it did not create the spill, even though, the Court will have ignored all the "facts" that the plaintiff pleaded to show that there is a genuine issue to be tried?

Thank you again for all the time, effort, and work you are all putting into this. If you have any questions or wish to discuss anything, please do not hesitate to contact me, either by email or telephone at (631) 543-2900 x 108.

Respectfully,

Michael Schultz, Esq.
Davis and Ferber
(631) 543-2900 x 108
1345 Motor Parkway
Islandia, NY 11749

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**From:** Joseph Catania
**To:** Uniform Rules
**Subject:** proposed amendments to "uniform rules"
**Date:** Monday, June 21, 2021 8:21:04 PM

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My observations:

1. The most glaring omission of the proposal is the failure to address the now commonplace practice of every judge to "tweak" existing CPLR and Uniform rules with their own, individual rules. It's absurd. It burdens every case with time and money. In the simplest to the most complex case practitioners must consult not only the CPLR, the so-called uniform rules but also every judges' individual rules. They all differ in some degree, and no one could possibly keep them all straight. Thus, much time is spent on almost every aspect of every case just to figure out procedure. This isn't fair nor productive.

2. It's not fair. Many have commented on this issue, but I must add my observations of 40+ years of practicing exclusively as a litigator. the system is breaking down under the weight of administrative minutiae. My office, indeed, almost all offices simply can't handle many of the cases that cross our thresholds every day. The teacher who paid a contractor to build an addition and is now faced with problems due to shoddy work, the small businessperson who can't resolve a dispute over the quality of goods from a vendor, or the two neighbors with a property line dispute are all examples of the kind of issues our legal system is supposed to address. The range and scope of these problems are endless. Please do not underestimate the extent of this problem: a civil justice system is essentially UNAVAILABLE to the average New York resident. People with legitimate disputes can't get them resolved. It costs too much. These proposed rules only add to the burden. (Recognizing it is beyond the reach of the present comment invitation I have to say, nevertheless, that by constitutional amendment something must be done to mandate a forum where discovery, proceedings and jury trials are very limited but at least litigants can get answers to disputes of the kind that involve everyday people with real problems without breaking the bank. The legal system has priced out working people from its benefits.)

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**From:** Han W
**To:** Uniform Rules
**Subject:** Comments
**Date:** Monday, May 31, 2021 4:40:04 PM

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Hello,

Below are my comments are in italics. I am a sole practitioner in the Bronx with an insurance defense background.

Disclosure Disputes - Section 202.20-f (b)
"Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute. counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation **must take place by an in person or telephonic conference**."

*Email is not included here and that is how I resolve many disputes. How this rule is written, I couldn't sign an Affirmation of Good Faith if a dispute is resolved by email.*

Adjournments of Conferences - Section 202.10 (b)
"Adjournments of conferences shall be granted upon a showing of **good cause**."

*It seems harsh that a judge is not permitted to grant a conference adjournment without a showing of good cause. It could be an adjournment of just one day, or something else that wouldn't substantially affect the discovery timeline of the case.*

Best,

Hannah Whiteker Mojica, Esq.

**From:** Peter Walsh
**To:** Uniform Rules
**Subject:** Comments
**Date:** Monday, May 24, 2021 11:52:44 AM

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Greetings:

In practice, enforcement of the Rules has often been in the discretion of each court.

As a practical matter, many of the Rules have been implemented or ignored as suggestions.

I take no issue with the discretion of each respective court in how they implement the rules and regulations. The problem is that the vigilant practitioners can be disadvantaged by taking the time to incorporate the rules into their practice, while a lackadaisical practitioner may suffer no disadvantage by ignoring the rules.
The billable hours of the client of the vigilant practitioner will increase, while the resources of the lackadaisical counsellors will remain undisturbed.

The judicial discretion applied in the implementation of the rules and regulations has been applied similarly as to each respective court's Part Rules.

Some type of policy statement at the beginning of the rules may overcome these problems. For example, *the application of these these rules and regulations are suggested methods of practice for the court and counsel. Practitioners must check with each respective Chambers they appear before to determine which rules, if any, shall be strictly applied.*

Likewise, the judiciary may be encouraged to incorporate which rules shall apply to their Chambers and include a policy statement indicating the relative degree of flexibility counsel can expect to encounter and the suggested methods of obtaining a variance if needed.

Given the caseloads of the courts following the pandemic, this codification of practice presented by the rules should be subject to a liberal timetable.

Thank you.

Peter C. Walsh

**From:** Michael Chartan
**To:** Uniform Rules
**Subject:** New Uniform Rules
**Date:** Friday, May 21, 2021 8:23:59 AM

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As one who practices in the commercial division, non-commercial division and federal courts, the rules are a welcome change to existing practice. To a large extent, the new rules will serve clients and attorneys well by replacing the hodge podge of litigation practices currently in use. There is too much wasted time and effort in discovery. Instead the rules focus attorneys on key issues. Where the lawsuit is complicated, the rules are flexible enough to allow for greater than what is allowed by the rules. Rather than postpone implementation, the better course is for the courts to establish a time period during which not following the rules will not result in sanctions. Instead lapses in following the rules should be handled by reminding lawyers to follow the rules.

Michael Chartan
Jericho, NY

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THE DEFENSE ASSOCIATION OF NEW YORK
Executive Offices
P.O. Box 350
New York, N.Y. 10274-0350
(212) 313-3637

May 14, 2021

Honorable Lawrence K. Marks
Chief Administrative Judge
Office of Court Administration
25 Beaver Street, Room 852
New York, New York 10004

Re: Amendment to Civil Court Rules

To Chief Administrative Judge Lawrence K. Marks:

On behalf of the Defense Association of New York ("DANY"), I am following up with our concerns regarding the recent amendments to the Uniform Civil Rules of the Supreme Court and the County Court (the "Rules"). On April 19, 2021, the New York State Bar Association adopted a resolution seeking a stay of the Rules so that all stakeholders can adequately examine and comment on the Rules and their potential impact. A copy of the New York State Bar Resolution is attached hereto. DANY agrees with the resolution promulgated by the New York State Bar Association and asks that DANY be involved in any meetings or proceedings that may be addressed to stay, tolling, or in any other way contemplating the Rules adopted.

We greatly appreciate your attention to this matter.

Respectfully Submitted,

Teresa A. Kleinin, President of DANY

NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

**New York State Bar Association**
**House of Delegates**

April 10, 2021

New Business – Uniform Rules Resolution

Be it resolved that based upon the significant concern expressed by the membership of NYSBA, that the President, or his designees immediately reach out to the administrative judges, the OCA, or the Chief Judge as is appropriate, to request an immediate meeting to discuss the staying the rules adopted by the Administrative Order AO/270/2020 dated December 31, 2020 by Chief Administrative Judge Marks for a period of one year so that all stakeholders can adequately examine and comment on the rules as well as the impact that the rules will have on attorneys and their clients especially the underserved portion of our population and further to examine the cost and impact that these rules will have on access to justice by all segments of our population but especially amongst the underrepresented portions. It is further resolved that a copy of this resolution will be immediately delivered to the administrative board of the courts.

| | |
|---|---|
| **From:** | Bartosiewicz, Gina |
| **To:** | Richards, Thomas |
| **Cc:** | William S. Friedlander |
| **Subject:** | The Uniform Rules Resolution, Administrative Order AO/270/2020 \| Trial Lawyers Section |
| **Date:** | Wednesday, May 5, 2021 9:19:01 AM |
| **Attachments:** | image003.png |

Good morning,

On behalf of the Chair of the Trial Lawyers Section, William Friedlander (copied) please note that at a special meeting of the Trial Lawyers Executive Committee on May 4th, 2021, a motion was made, seconded, and unanimously carried in favor of The Uniform Rules Resolution, Administrative Order AO/270/2020.
Thank you,

**Gina Bartosiewicz**, Sections and Meetings Liaison
New York State Bar Association
One Elk Street, Albany, NY 12207

**direct**: 518.487.5671 | **main**: 518.463.3200 | **email**: gbartosiewicz@nysba.org | www.nysba.org

Appendix 7 – Written Comments Submitted to the Executive Committee

1. Commercial and Federal Litigation Section,
2. New York County Lawyers' Association Supreme Court Committee,
3. Delegate Steven Richman,
4. Task Force member Matthew J. Kelly.

**To: Task Force on Uniform Rules**

**From: Commercial and Federal Litigation Section**

**Re: Report of the Task Force on Uniform Rules Dated July 19, 2021**

**Date: August 2, 2021**

The Commercial and Federal Litigation Section (the "Section") has reviewed the Report of the Task Force on Uniform Rules dated July 19, 2021.

The Section appreciated the opportunity to submit comments on the Preliminary Report of the Task Force dated June 7, 2021, and is appreciative that the final report of the Task Force has addressed many of the concerns of the Section.

The Section does wish to reiterate that:

1. The Section has actively participated in the development of the Commercial Division Rules, and believes that the Commercial Division Rules have been beneficial to the bench, and to counsel and their clients in the complex cases filed in the Commercial Division of Supreme Court, and that nothing in the Commercial Division Rules violates the CPLR;

2. The Section did not advocate for the adoption of the Commercial Division Rules in all New York State trial courts, and appreciates the concerns expressed by the Task Force about the new Uniform Rules;

3. The Section appreciates that the final Report of the Task Force makes clear that there are significant differences between the new Uniform Rules and the Commercial Division Rules, and that some of the most significant concerns expressed in the Final Report of the Task Force relate to Uniform Rules that differ from the Commercial Division Rules, and

4. The Section appreciates that the Final Report makes clear that the Task Force is in no way advocating that the current Commercial Division Rules should not continue to apply to all cases filed in the Commercial Division of Supreme Court.

Respectfully submitted,
The Commercial & Federal Litigation Section
Daniel K. Wiig, Chair

New York County Lawyers Association

**To:** NYSBA President, T. Andrew Brown

**From:** NYCLA Supreme Court Committee

**Date:** August 4, 2021

**Re:** Comments on NYSBA Task Force on Uniform Rules Report

On behalf of the Supreme Court Committee of the New York County Lawyers Association ("NYCLA"),[1] we thank the NYSBA Task Force on Uniform Rules ("the Task Force") for including the new paragraphs on page nine (9), recognizing that its criticisms of the new Uniform Rules expressed in its Report dated July 19, 2021 (the "Task Force Report") do not apply to the same rules in the Commercial Division. This paragraph appropriately recognizes the significance of the Commercial Division in resolving commercial disputes and causing parties to handle commercial disputes in New York. We refer to our initial comments to the interim task force report, contained as an appendix to the Task Force Report, for a more complete exposition of the Commercial Division's significance to the resolution of Commercial Disputes.

However, we believe that the Task Force Report, taken as a whole, contains points that would undermine the rules in the Commercial Division that have substantially similar phrasing as the new Uniform Rules. The Task Force condemns any Uniform Rule (and presumably any analogous Commercial Division Rule) if there is "any possibility" of a conflict or encroachment on the CPLR. Task Force Report at 13. As the Report recognizes on page 13, this standard goes well beyond the case law, which would invalidate Uniform Rules only if they pose a "direct and obvious conflict" with the CPLR. Task Force Report at 13 ("the law is clear that a direct conflict must be resolved in favor of the existing statute"); see Sciara v. Surgical Assocs. of W.N.Y., P.C., 104 A.D.3d 1256, 1260, 961 N.Y.S.2d 640, 643 (2d Dep't 2013) (upholding Uniform Rule: "we do not believe that there is a direct and obvious conflict between CPLR 3113 (c) and the Uniform Rules"); Dalrymple v. Martin Luther King Community Health Center, 127 A.D.2d 69, 72, 514 N.Y.S.2d 385, 386 (2d Dep't 1987) (despite an "apparent conflict" between the Uniform Rules and the CPLR, the court upheld Uniform Rule because the Uniform Rule and the CPLR rule "have the same goal" and the Uniform Rule is a "logical extension" of the CPLR).

Of course, we do not support all uniform rules that may be promulgated in the future, but we do not believe that uniform rules should be automatically invalidated if there is "any possibility" that they conflict with the CPLR. And because obtaining legislative revision of the CPLR is quite arduous, the standard that the Task Force advocates would have a chilling effect on procedural innovation and will essentially quell any meaningful change to the CPLR, a statute adopted in 1962.

If it were to be adopted by courts, the standard espoused in the Task Force Report could have the unintended consequence of destabilizing Uniform Rules in many areas of procedural law not

[1] The views expressed here are those of the NYCLA Supreme Court Committee only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

addressed by the Task Force Report. The Task Force Report fails to recognize that the courts, through the adoption of Uniform Rules, have already adopted many rules (quite apart from the rules adopted earlier this year) that could be said to be in tension with the CPLR. See Paul H. Aloe, 1996–97 Survey of New York Law Civil Practice, 48 Syracuse L. Review 427 (1998) ("Another significant change came in the form of the Uniform Rules which brought a major expansion of New York's sanctions rules and a requirement for the signing of pleadings. These rule changes were enacted by the Office of Court Administration (OCA) after more modest revisions failed in the legislature. The OCA took to the Uniform Rules as a means of major reform, presaging the growing importance of the Uniform Rules as a body of law every bit as important as the CPLR and, in some respects, in conflict with the CPLR.").

We reiterate the specific points in our earlier report. We continue to believe that such rules as the rule requiring adherence to discovery schedules, enhanced meet and confer requirements, limits on depositions, limits on interrogatories and limits on document requests (Uniform Rules 202.20, 202.20-b, and 202.20-c) have worked well in federal court and in the Commercial Division and are even better suited for smaller cases where it is even more important to streamline and enhance the efficiency of case management. We note that NYSBA has never objected to the adoption of these rules in any other court, and in fact, some committees of NYSBA have affirmatively supported some or all of these rules.

As an example of the types of changes that would be forbidden under the standard set out in the Task Force Report, we point to categorical privilege logs, a relatively recent innovation, for which the Uniform Rules and the Commercial Division Rules provide. *See* Uniform Rule §202.20-a. The Commercial and Federal Litigation Section of NYSBA strongly supported these rules in 2017, as do many commentators. Further, this rule is particularly well-suited for smaller cases outside the Commercial Division where the work of creating extensive privilege logs can be disproportionate to the amount at stake, as opposed to large scale cases where full privilege logs might be more warranted.

In sum, our Committee thanks the NYSBA for considering our comments, which are preliminary and which we reserve the right to amend. We appreciate NYSBA's work in bringing these issues to the attention of the legal community and we look forward to further dialogue on this important subject.

**From:** Steven Richman
**To:** reportsgroup
**Subject:** Uniform Rules Report
**Date:** Thursday, July 29, 2021 7:41:05 PM

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I commend the Committee for their diligent efforts.

However the Report fails to recommend effective immediate actions to address the unfair and in some instances unlawful actions taken by the Administrative Board and the Chief Administrator in promulgating these Rules.

Therefore, I would amend the report to include the following actions:

1. Commence a proceeding to stay the enforcement of those provisions of the Rules that conflict with the statutory provisions of the CPLR outlined in the Report;

2. Propose State Legislation that would repeal these Rules and call for its immediate enactment;

3. Propose State Legislation that mandates that the Notice and Opportunity to Comment provisions of the State Administrative Procedures Act are applicable to the Unified Court System's rule-making process;

4. Propose State Legislation that the Administrative Board of the Courts is subject to the NYS Open Meetings Law.

These actions would demonstrate to the NYSBA membership and the legal community, that we act in the best interests of our members (albeit late) and seek to prevent a repetition of this unresponsive and insular process by the Court bureaucracy and replace it with an open, transparent and deliberative process. The Judiciary should not and cannot be exempt from the fundamental obligations of democratic institutions of representative government.

Respectfully submitted,

Steven H. Richman
Member, House of Delegates
July 29, 2021

Sent from my iPhone
STEVEN H. RICHMAN

Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

*VIA ELECTRONIC TRANSMISSION* *TRICHARDS@NYSBA.ORG*

August 5, 2021

Tom Richards, Esq.
New York State Bar Association
1 Elm Street
Albany, New York 12207

**RE: Uniform Rules Order of December 29, 2020**

Dear Mr. Richards:

I submit this information for the consideration of the Executive Committee. The December 29, 2020 Order contends that the OCA has formulated these Rules "after input from a working group of judges and attorneys." In the public forums held in May by the Committee, no one identified themselves as being a member of the "working group."

I filed a formal request on June 11, 2021, to determine the identity of the "working group of judges and attorneys."

The OCA received my letter on June 15, 2021, and then responded to my request on June 30, 2021, with the following answer: "We will process the request and expect to respond within twenty business days."

That time frame has long expired and I have followed up without success with OCA generally and in particular, Shawn Kerby, Assistant Deputy Counsel. I have had no response to my repeated requests.

31 - failure to disclose public information sheet also considered by the Executive Committee in its deliberations on the report.

Very truly yours,

Roemer Wallens Gold & Mineaux LLP

Matthew J. Kelly
MJ Kemp
Enc.

[illegible] Albany, New York 12207
Ph: 518.464.1300 (ext. 313)
Fax: 518.464.1010
mkelly@rwgmlaw.com

Roemer Wallens Gold & Mineaux LLP
Counsel on Law

OCA #162
OFFICE OF COURT ADMINISTRATION
JUN 25 2021
ALBANY, N.Y.

June 11, 2021

Administrative Board of the Courts
Office of Court Administration
Agency Building 4
4 Empire State Plaza
Suite 2001
Albany, NY 12223-1450

RE: Uniform Rules – Order of December 29, 2020

Dear Sir or Madam:

Please provide the identity of the "working group of judges and attorneys" that is addressed in the third paragraph of this Administrative Order.

Thank you for your kind cooperation.

Very truly yours,

Roemer Wallens Gold & Mineaux LLP

Matthew J. Kelly
MJKeller

13 Columbia Circle
Albany, New York 12203
Ph. 518.464.1307 (ext. 3173)
F. 518.464.1010
mkelly@rwgmlaw.com

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

WHEREAS, the Commercial Division of New York State Supreme Court is an efficient, sophisticated, up-to-date court, dealing with challenging commercial cases, and has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases, and

WHEREAS, since its inception the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice, and through the work of the Commercial Division Advisory Council – a committee of commercial practitioners, corporate in-house counsel and jurists devoted to the Division's excellence – the Commercial Division has functioned as an incubator, becoming a recognized leader in court system innovation, and demonstrating an unparalleled creativity and flexibility in development of rules and practices, and

WHEREAS, the Administrative Board of the Courts (Board) requested public comments on the advisability of adopting Commercial Division Rules into general civil practice, and after review of public comments, including those received from the Advisory Committee on Civil Practice and the Advisory Committee on Matrimonial Practice, and after input from a working group of judges and attorneys, and recognizing that the COVID-19 pandemic has created unique opportunities for permanent reform, the Board approved adoption of certain Commercial Division Rules in other courts of civil jurisdiction, and

NOW THEREFORE, upon consultation with and approval of the Administrative Board of the Courts, pursuant to authority vested in me as Chief Administrative Judge of the State of New York under Article VI, section 28(b) of the State Constitution, I have determined to incorporate certain rules, and variations thereof, of the Commercial Division into the Uniform Rules for the Supreme Court and the County Court, effective February 1, 2021 until further order as per the attached Exhibits delineating each rule so adopted.

Chief Administrative Judge of the Courts

Dated: December 7, 2020

AO/270/20-00

Roemer Wallens
Gold & Mineaux LLP

OFFICE OF COURT
ADMINISTRATION

JUN 14 2021

ALBANY, N.Y.

Administrative Board of the Courts
Office of Court Administration
Agency Building 4
4 Empire State Plaza
Suite 2001
Albany, NY 12223-1450

## Matthew J. Kelly

**From:** [illegible]
**Sent:** Tuesday, June 29, 202[illegible] 10:12 AM
**To:** Matthew J. Kelly
**Subject:** [illegible]
**Attachments:** 202[illegible]

**ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.**

Dear Mr. Kelly:

We will process the request and expect to [illegible] within 20 business days.

Very truly yours,
Shawn Kirby
Assistant Deputy Counsel