

**RULES AND PRACTICES FOR CASES ASSIGNED TO
THE COMMERCIAL DIVISION
SUPREME COURT, ERIE COUNTY**

**THE HONORABLE EUGENE M. FAHEY, J.S.C.
Presiding**

January 1, 2005

Having as its goal and mission the fair, expeditious and cost effective resolution of all designated "commercial" cases filed in Supreme Court, Erie County, New York, the Commercial Division of said Supreme Court does hereby establish the following rules to aid litigants, counsel and the Court in accomplishing our declared objectives.

I. COMMERCIAL COURT ASSIGNMENT PROCEDURES

A Request for Judicial Intervention (RJI) which is marked "Commercial" and is accompanied by a "Justification Checklist Form" will initially be assigned to the Commercial Division. Whether a matter shall be retained as a Commercial Division case shall be determined by the criteria set forth in these "Rules and Practices", and upon the facts and circumstances of each case.

A case which was initially assigned to the Commercial Division, and which is not found to have satisfied the criteria for assignment set forth herein shall be reassigned to an IAS Judge. An IAS Judge who believes that a matter initially assigned to him or her should be transferred to the Commercial Division may submit said matter to the Commercial Division for review. If reassignment is found to be appropriate, a transfer order and explanation for the reassignment shall be forwarded to the Administrative Judge for approval.

Any further objections to reassignment shall be reviewed by the Administrative Judge after a conference, if said conference is deemed necessary by the Administrative Judge. The determination of the Administrative Judge as to case assignment shall be final and is not subject to review or appeal by any party.

Any special proceeding under the CPLR which are clearly commercial in nature (including dissolution proceedings and applications relating to CPLR Article 75 in a commercial setting) should be marked as a special proceeding but should also indicate (on the form or by separate cover) that the matter is commercial in nature.

II. CRITERIA FOR COMMERCIAL COURT

The definition of a "commercial case," as determined by the Commercial Division of Supreme Court, is as follows:

All business and commercial disputes in which the amount at issue exceeds \$25,000,¹ exclusive of punitive damages, costs, and attorney fees; and exclusive of any non-commercial claims, non-commercial cross-claims, or non-commercial counterclaims.

¹ It should be noted that the dollar amount at issue to qualify a case as Commercial may be changed from time to time in order to adjust the workload of the Court.

If a commercial case does not meet the monetary threshold but may be especially suited to resolution in the Commercial Division, a motion may be made to the presiding Judge of the Division, on notice to opposing counsel, to waive said monetary threshold.

Such business and commercial disputes shall include the following types of cases:

CONTRACT

1. Breach of contract, fraud or misrepresentation actions involving:
 - (a) Purchase or sale of securities.
 - (b) Uniform Commercial Code transactions.
 - (c) Purchase or sale of the assets of a business, or merger, consolidation or recapitalization of a business.
 - (d) Providing of goods or services by or to a business entity.
 - (e) Purchase or sale or lease of, or security interest in, commercial real property or personal property.
 - (f) Partnership, shareholder or joint venture agreements.
 - (g) Franchise, distribution or licensing agreements.

BUSINESS CORPORATION LAW

2. Shareholder derivative actions.
3. Dissolution or liquidation of corporations.
4. Actions involving liability and indemnity of corporate directors and officers.
5. Actions involving the internal affairs of corporations, such as voting and inspection rights of shareholders or directors, authorization of corporate acts or interpretations of articles or by-laws.

PARTNERSHIP LAW

6. Actions involving general and limited partners and partnerships.

UNIFORM COMMERCIAL CODE

7. Commercial loans (including failures to make commercial loans), negotiable instruments, letters of credit and bank transactions.
8. Actions involving allegations of business torts, including unfair competition and interference with business advantage or contractual relations.

OTHER COMMERCIAL MATTERS

9. Actions involving employment agreements or employee incentive or retirement plans (not including qualified retirement plans) in which the business or commercial issues predominate.
10. Declaratory judgment actions and third party indemnification claims against insurance companies where the underlying cause of action is contract in nature or would otherwise fall within the guidelines set forth herein. (Specifically not included are Declaratory Judgment Actions and third party claims relating to fire loss, motor vehicle actions and tort claims.)
11. Commercial class actions.
12. Opening of default judgements where the underlying cause of action is commercial in nature and would otherwise fall within the monetary and jurisdictional guidelines set forth herein.

13. Professional malpractice other than legal or medical.
14. Actions may involve individuals, and business entities, as long as all other criteria are met.

MATTERS NOT INCLUDED AS COMMERCIAL COURT CASES:

- Non-commercial landlord/tenant disputes.
- Matrimonial disputes.
- Foreclosures, even if they involve commercial buildings and commercial parties.
- Matters falling under the provisions of the Real Property Actions and Proceedings Law.
- Proceedings to enforce a judgment, including applications for information subpoenas and contempt, without regard as to whether or not the underlying action is commercial in nature.
- Products liability claims, including merchantability and fitness for some particular purpose claims.
- Discharge, modification or foreclosure of mechanics' or other liens.
- Declaratory judgment actions involving indemnification claims under insurance policies relating to underlying actions which are not commercial in nature, including, but not limited to, underlying claims for fire loss, motor vehicle actions and tort claims.
- Opening/vacating or modifying default judgments on actions which are not commercial in nature, including all matters which do not fall within the monetary and jurisdictional guidelines set forth under these criteria.
- Actions by or against: Medicare, Medicaid, or the Department of Social Services or enforcement of legal rights under law.
- Discrimination cases (age, sex etc.) except when part of or under the terms of a contract.
- Collection matters involving the collection of legal, medical, accounting, or architectural fees.

III. GENERAL RULES

Rule 1. Appearances by Counsel with Knowledge and Authority.

Counsel who appear in the Commercial Division must be familiar with the case in regard to which they appear and are strongly encouraged to be fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Attorneys appearing of counsel to the attorney of record, and parties appearing pro se, shall be held to the same requirement. Failure to comply with this rule may be regarded as a default and dealt with appropriately. It is important that counsel be on time for all scheduled appearances.

Rule 2. Consultation Among Counsel and with the Client Prior to all Conferences.

Counsel for all parties shall consult prior to all conferences about (i) resolution of the case, in whole or in part, and (ii) discovery and any other issues to be discussed at the conference. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference. It is also suggested that counsel, prior to a conference, determine by consultation with the client the availability and schedules of witnesses where a hearing or trial will be scheduled.

Rule 3. Non-Appearance at a Conference.

The failure of counsel to appear for a conference may be dealt with by an order directing dismissal, the striking of an answer and an inquest or direction for judgment, or other appropriate sanction. Uniform Rule 202.27.

Rule 4. Alternative Dispute Resolution.

At any appropriate stage of the proceedings, the parties are encouraged to consider alternative dispute resolution (ADR) as a method to resolve their dispute, whether through mediation, arbitration, or some combination of ADR processes. The court will be available to assist the parties in coming to an agreement on ADR instrumentality which would be acceptable to all parties.

Rule 5. Settlements and Discontinuances.

If an action is settled, discontinued or otherwise disposed of, counsel shall immediately inform the court by submission of a copy of the stipulation or a letter directed to the Clerk of the Commercial Division. Filing a stipulation of discontinuance with the County Clerk shall not be sufficient.

Rule 6. Cases Marked Off Calendar.

Unless otherwise directed, a motion is required to restore to the trial calendar (for post-note-of-issue) or to active status (or pre-notes-of-issue cases) all cases that have been "marked off" the calendar.

Rule 7. Papers by FAX.

The Commercial Division does not accept papers of any sort by fax unless indicated otherwise by the Court in advance in a particular case. Copies of letters confirming an adjournment of a motion or a conference may be sent to the Court at its chambers. However, the original of all correspondence must be mailed to the Clerk of the Commercial Division.

IV. PRELIMINARY AND COMPLIANCE CONFERENCES

Rule 8.

A. Cases Initiated by RJJ without Motion

Cases initiated for purposes other than a motion shall be sent an Initial Commercial Division Letter outlining the Court's procedures and establishing a Preliminary Conference date within 45 days of the filing of the Request for Judicial Intervention.

B. Cases Initiated by Motion

Cases initiated by Notice of Motion or Order to Show Cause are assigned to the Commercial Division after they are filed with the Erie County Clerk's Office. The Court may schedule a Preliminary Conference of the matter prior to argument at Special Term in order to resolve the motion and/or the case. If not already held, a Preliminary Conference shall be held within thirty (30) days of the argument of an initial motion.

Rule 9. Preliminary Conference.

Before the Preliminary Conference, each counsel is to provide a brief (limited to one page) written statement as to the nature of their client's contentions, pending motions and any matters of law where they anticipate conflict. Prior to the Preliminary Conference, counsel for each party shall provide the Court with a copy of that party's pleadings which have been filed as of the conference date. At the Preliminary Conference an attempt will be made to resolve the disputes or narrow the issues in dispute. A Preliminary Conference Order will be issued by the Court which shall set forth a schedule for all aspects of pretrial discovery, a date to file a note of issue and a date for a Compliance Conference.

Rule 10. Compliance Conference.

Following the completion of discovery and the filing of the Note of Issue a conference shall be held to review settlement possibilities, ADR options, review any pending motions and/or place the case on the trial calendar or the standby calendar. The trial calendar will allocate a day certain date and period for matters expected to take five (5) or more court days. Matters expected to require one to two (1 - 2) days may be placed on a "standby" calendar where they may be called on 72 hours notice during a designated two (2) week period.

Rule 11. Final Pretrial Conference.

The Court will set a final pretrial conference. Prior to the conference, counsel shall confer in a good faith effort to identify issues not in contention, resolve all disputed questions without need for court intervention, and settle the case. At the conference, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties, and the possibility of settlement. The presence of parties or an individual with authority to settle the matter must attend the Final Pre-trial Conference, unless excused by the Court. All dispositive motions must be submitted thirty (30) days prior to the final pretrial conference.

Rule 12. Familiarity with Outstanding Motions.

Counsel must be prepared to discuss and/or orally argue at a conference appearance any motions that have been submitted and are outstanding.

Rule 13. Adjournment of Conferences.

Adjournments of conferences will not be granted except for good cause shown upon written request and notice to opposing counsel, at least three (3) days prior to the scheduled date.

Rule 14. Meeting with the Presiding Judge.

All conferences shall conclude where possible with a meeting with the Commercial Division Justice to review the cases' progress.

V. DISCOVERY AND SCHEDULING ORDERS

Rule 15. Establishing a Schedule.

Each case shall be designated as "expedited" (60 days to complete discovery), "standard" (3-6 months to complete discovery) or "complex" (6-12 months to complete discovery). The assigned Justice of the Commercial Division shall be the final authority in determining the appropriate designation of the case and discovery schedule.

Rule 16. Adherence to Discovery Schedule.

Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Extensions of such deadlines shall be allowed only in exceptional cases for good cause shown. Good cause may include, but is not limited to the facts or events unknown or not able to be known by counsel at the time the scheduling order was established. Non-compliance with such an order may have the following consequences; by way of illustration but not limitation: If any party fails to produce documents in timely fashion, an appropriate sanction may be imposed against that party pursuant to CPLR 3126. If a party seeking an examination before trial fails to proceed with it on the date or by the deadline fixed, that party may be held to have waived it. If a party fails to submit to an examination as scheduled, either that party may be precluded from introducing testimony at trial, or another sanction may be imposed, upon submission of an affidavit of non-appearance within ten (10) days of the non-appearance, with notice to opposing counsel. If no such submission is timely made, the party seeking the deposition may be held to have waived it. If a party seeks documents as a condition precedent to a deposition and the documents are not produced by the date fixed, the party seeking disclosure must ask the court to intervene on penalty of waiving the deposition.

Rule 17. Discovery Disputes.

Counsel must consult with one another in a good faith effort to resolve all disputes about discovery/disclosure. See Uniform rule 202.7. If counsel are unable to resolve a discovery dispute in this fashion, the aggrieved party shall contact the Commercial Division Part to arrange a conference with the Court's Law Clerk. Counsel should request a conference by telephone if that would be more convenient and efficient than an appearance in court. Counsel shall have the right to bring a formal motion to compel or for sanctions or other relief, but only after good faith efforts have been expended to resolve the dispute and only after a conference with the Court's Law Clerk has failed to resolve the issue.

VI. MOTION PRACTICE

Rule 18. Commercial Part Special Term.

A Commercial Part Special Term will be held on each Tuesday starting at 9:30 a.m., or as directed by the Presiding Justice, in the Commercial Part.

Rule 19. Filing of Papers.

Except with the express permission of the Court, all motion papers submitted to the Court, including Orders to Show Cause, must be typewritten and all exhibits must be labeled with tab markings and entirely legible. Motion papers and all correspondence must indicate the index number assigned to the action. Courtesy copies should not be submitted.

Rule 20. Form of Motion Papers.

So as to facilitate the framing of a decision and order, the movant shall specify, clearly and comprehensively, in the notice of motion, order to show cause, or in a concluding section of a memorandum of law, the exact relief counsel seeks. Counsel must attach copies of all pleadings and other documents as required by the CPLR and necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should always use tabs when submitting papers containing exhibits. Copies must be legible. If a document to be attached 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 properly translated (CPLR 2101(b)). Whenever reliance is placed upon a decision or other authority not readily available to this court, a copy of the case or of pertinent portions of the authority shall be submitted with the motion papers. Motion papers shall comply with Part 130 of the Rules of the Chief Administrator, be double-spaced and contain print no smaller than ten-point, on 8 ½ x 11 inch paper, bearing margins no smaller than one (1) inch. CPLR 2101; Uniform Rule 202.5(a).

Rule 21. Motion Return Date.

All motion papers must be submitted to the Court with the return date blank. All responding papers relating to the motion must be received at least three (3) days before the return date unless otherwise specified by the court.

The Court Clerk will set the return date and advise the moving party of the date so assigned. Only one set of motion papers need be presented to the Court with the return date blank. Please retain the "service copy" in your file. A specific return date may be requested in a cover letter to the Court but generally the return date will be within thirty (30) days of the service date on the motion. You will be advised by the return date and service requirements by the Judge's chambers so you may complete the "service copy" if a date and manner of service was not given at the time the papers were presented to the court clerk.

Rule 22. Appearances at Motion Calendar.

Appearances are required on all motions, unless 1) upon written request, the Court approves the waiver of oral argument, 2) the Court is notified in advance of a consent Order, 3) it is an uncontested motion or 4) the motion is withdrawn. Oral arguments of contested motions shall be limited to seven (7) minutes per side unless otherwise directed by the Court.

Rule 23. Adjournment of Motions.

Adjournment of motion dates may be requested upon notice and consent of opposing counsel and the Court forty-eight (48) hours prior to the scheduled motion date. If an adjournment is sought without consent of opposing counsel, application must be made 72 hours prior to the scheduled date on notice to opposing counsel.

Rule 24. Sur-Reply and Post-Submission Papers.

Counsel are reminded that the CPLR does not provide for sur-reply papers, however denominated. Nor is the presentation of papers or letters to the court after submission or argument of a motion permitted. Absent express permission of the Court in advance, such materials will be returned unread. Opposing counsel who receive a copy of materials submitted in violation of this Rule should not respond in kind.

Rule 25. Orders to Show Cause.

Motions should be brought on by Order to Show Cause only when there is genuine urgency (e.g., applications for provisional remedies), a stay is required, or a statute mandates so proceeding. Absent permission, reply papers should not be submitted on orders to show cause.

Rule 26. Requests for Temporary Restraining Orders.

When an order to show cause is to be presented to the Court which seeks a temporary restraining order, counsel for the moving party must first communicate by telephone or fax transmission with counsel for all adverse parties, or with any unrepresented adverse parties, to advise such counsel or parties that a request for a temporary restraining order shall be made to this Court and that such counsel or parties have the right to be heard on the application. A conference on the request for a temporary restraining order shall be conducted by the Court at the soonest available time. Following the conference, either by way of a bench decision or a written decision, the Court shall render its determination only on the request for a temporary restraining order. No request for a temporary restraining order shall be considered without a conference unless the moving party demonstrates to the Court that the conducting of such a conference will clearly cause the moving party immediate and irreparable injury.

Rule 27. Discovery Motions:

It is the policy of the Court to make itself and its staff available to resolve any disputes related to pretrial discovery. If a dispute arises which relates to discovery, counsel may seek a telephonic conference with the Court's Law Clerk. If the dispute cannot be resolved by the Law Clerk, a conference shall then be scheduled with the Court. No motions regarding discovery will be made without the express permission of the Court and only after a conference is held. Although counsel are strongly encouraged to resolve discovery disputes among themselves, under no circumstances shall counsel fail to bring to the Court's attention any discovery dispute which they cannot resolve within a reasonably brief period of time. If the time set for the completion of particular aspects of pretrial discovery passes without complete compliance by all parties, in determining what action to take the Court shall consider the responsibility of any counsel who failed to alert the Court of an ongoing discovery dispute.

Rule 28. Papers Required on Particular Motions

a.) On any motion seeking summary judgment, dismissal of a complaint, cross-claim or counterclaim, or the striking of a pleading, copies of all pleadings filed as of the date of the motion must be provided to the Court by the moving party. The failure to comply with this requirement shall result in the denial of the motion unless the pleadings are provided to the Court by another party or have been previously submitted to the Court. All Summary Judgment or Partial Summary Judgment motions must be made thirty (30) days prior to the pretrial conference or they will not be considered absent good cause.

b.) On any motion seeking leave to renew or reargue a prior motion, copies of all papers submitted on the prior motion must be provided to the Court by the moving party. The failure to comply with this requirement shall result in the denial of the motion unless the papers on the prior motion are provided to the Court by another party.

c.) When an order to show cause is to be presented to the Court which seeks a temporary restraining order or a preliminary injunction, copies of the summons and complaint commencing the underlying action must be provided to the Court by the moving party. No order to show cause seeking such relief will be considered by the Court if the moving party fails to comply with this requirement unless said pleadings have been previously submitted to the Court.

Rule 29 Reply Papers

Counsel shall not set forth factual claims or legal arguments in reply papers which were not set forth in the papers initiating the motion. New factual claims and legal arguments which are not directly in response to facts or arguments offered in the motion shall not be considered by the Court in its determination of the motion.

Rule 30. Motion Decisions and Orders

a.) **By Written Decision of the Court:** A written Decision and Order may be issued following the submission of the motion. This Decision and Order, with supporting papers, will be filed in the Erie County Clerk's Office by the Court. A copy of the Decision and Order shall be sent to counsel after filing.

b.) **By a Decision Dictated From the Bench:** In certain instances the Court may render a decision from the bench. A transcript of the Decision, paid for by counsel, will be attached to an Order prepared by counsel. The signed Order will be filed in the Erie County Clerk's Office.

VII. TRIALS

Rule 31. Compliance/Settlement Conference and/or Trial Order.

Following the completion of discovery and the filing of the Note of Issue a conference shall be held to review settlement possibilities, ADR options, review any pending motions and/or place the case on the trial calendar or the standby calendar. The trial calendar will allocate a day certain date and period for matters expected to take five (5) or more court days. Matters expected to require one to two (1 - 2) days may be placed on a "standby" calendar where they may be called on 72 hours notice during a designated two (2) week period.

Absent a preference or other good cause, cases will be scheduled in the order in which calendar numbers have been obtained.

Rule 32. Final Pretrial Conference.

The Court will set a final pretrial conference. Prior to the conference, counsel shall confer in a good faith effort to identify issues not in contention, resolve all disputed questions without need for court intervention, and settle the case. At the conference, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties, and the possibility of settlement. All dispositive motions must be submitted thirty (30) days prior to the final pretrial conference

Rule 33. Trial Order Requirements.

In most cases a Trial Order will be issued at, or after, the Compliance/Settlement Conference. The following specified items must be provided to the Court and to opposing counsel **ten (10) days prior** to the commencement of the Trial. Cases called from the "standby " calendar shall provide said items as soon as possible prior to trial.

a.) **Marked pleadings.**

b.) **Pre-Trial Memoranda of Law.**

c.) **A List of all witnesses** (parties, experts, or others) whom the party expects to call, except witnesses who may be called only for impeachment or rebuttal. The list shall identify those whom the party expects to call in person and those who shall be called through deposition.

Counsel is to submit a brief outline of proposed testimony from each witness to the Court. A courtesy copy of such deposition testimony for the Court is required. As to any experts, the list shall provide the information called for by CPLR §3101(d)(1)(i).

If any additional witnesses come to the attention of counsel prior to the trial, a supplemental list must be prepared for the Court as soon as possible, with notice to the opposing counsel. This supplemental list must include the reason why the witness' name was not disclosed earlier. Noncompliance with the intent and purpose of this Ordered paragraph may result in the exclusion of testimony and/or the imposition of sanctions.

d.) **A written stipulation** governing all facts that are not in dispute.

e.) **A list of all exhibits** to be offered by each party **and a written stipulation** as to the admissibility of each exhibit or a written statement setting forth the basis for each party's objection to the admission of any exhibit whose admissibility is not the subject of a stipulation. All agreed exhibits shall be pre-marked.

f.) **Identification of Deposition Testimony** Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the portions of deposition testimony to be offered into evidence without objection. The parties shall delete from the testimony to be read questions and answers that are irrelevant to the point for which the testimony is offered. Each party shall prepare a list of testimony to be offered by it as to which objection has not been made and, identified separately and clearly, a list of testimony to be offered by it as to which objection has been made. At least ten (10) days prior to trial, each party shall submit its list to the court and other counsel, together with a copy of the portions of testimony as to which objection has been made. The court will rule upon the objections at the earliest possible time after consultation with counsel.

g.) Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objections. With the court Reporter, each side shall then mark its exhibits with plaintiff using numbers for its exhibits and the defendant letters. the parties shall thereafter stipulate to those exhibits which may be received into evidence and the Court Reporter shall mark those items as received by stipulation (R/S).

h.) **Proposed jury instructions and jury verdict interrogatories.**

Rule 34. Motions in Limine.

At least ten (10) days prior to trial, the parties shall make all motions *in limine* that require rulings prior to trial, except for those not reasonably anticipated in advance.

Rule 35. Scheduling Conflicts with Another Court.

If counsel is involved in "actual engagement" in another court on a day a case is reached for trial, the Uniform rules for the Engagement of counsel (Section 125.1) will govern any requested

postponement or adjournment. The court reserves the right to receive an affidavit or affirmation proving such engagement, as provided by those rules.

VIII. EX PARTE

The Commercial Division sits "ex parte" at all times for matters assigned to it. All ex parte matters are filed with the Civil Calendar Office. The Clerk of the Supreme Court will review an ex parte application on an expedited basis to determine whether it is a Commercial Division matter. All ex parte applications will be forwarded to the Commercial Division, unless the Commercial Division Judge is not available. Under these circumstances, the regular IAS Duty Judge will act in his place. Following review and action, if any, by the regular IAS Duty Judge, the case will be returned to the Commercial Division.

IX. MISCELLANEOUS

The purpose of this Court is to help litigants resolve their disputes in a fair and equitable manner. Should the attorneys have need of the Court's services at any time, a conference with all parties present in person or by telephone can be arranged through the Court's staff. Attorneys are reminded, however, that ex parte communications to the Court are prohibited by the CPLR and the Code of Professional Conduct.

JUSTICE EUGENE M. FAHEY

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