NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUN SEL

MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on Proposal to Amend the Uniform Civil Rules for the Supreme Court and the County Court

Date: October 1, 2021

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The Administrative Board of the Courts is seeking public comment on a proposal to amend the Uniform Civil Rules for the Supreme and County Courts (Exhibit A). Since recent revisions to the Uniform Civil Rules went into effect on February 1, 2021 (See AO/270/20), the New York State Office of Court Administration (OCA) has received feedback from the New York State Bar Association and others concerning the amendments. In response to this feedback, OCA has compiled a table of suggested amendments to the Uniform Civil Rules that is under consideration (See Ex. A). These include changes to:

- Section 202.5(a)(2) – Papers filed in court
- Section 202.8-b – Length of papers
- Section 202.8-g(a), (c), (e) – Motions for Summary Judgment; Statements of Material Facts
- Section 202.20-a – Privilege Logs
- Section 202.20-c(c) – Requests for Documents
- Section 202.20-h – Pre-Trial Memoranda, Exhibit Book, and Requests for Jury Instructions
- Section 202.20-i – Direct Testimony by Affidavit
- Section 202.20-j – Parties and nonparties should adhere to the Electronically Stored Information ("ESI") guidelines set forth in Appendix hereto
- Section 202.26(c) – Settlement and Pretrial Conferences
- Section 202.34 – Pre-Marking of Exhibits
- Section 202.37 – Scheduling of Witnesses

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than December 1, 2021.

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

EXHIBIT A

POTENTIAL REVISIONS AND AMENDMENTS TO THE NEW UNIFORM RULES TO FACILITATE IMPLEMENTATION

Rule for Consideration	Summary of Rule	Rationale for Amendment	Proposed Amendment
Rule § 202.5(a)(2) *Form of Papers* *(Commercial Division Rule 6[a]).*	Documents in excess of 4500 words submitted electronically must be "bookmarked" (have a list of the contents to facilitate easy navigation).	The proposed amendment addresses concerns about access and familiarity with technology by emphasizing the court's ability to dispense with the requirement and limiting applicability to computer-generated documents.	*(2)* ***Unless otherwise directed by the court, e~~E~~ach*** *memorandum of law, affidavit and affirmation, exceeding 4500 words****, which was prepared with the use of a computer software program,*** *shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document.*[1]
Rule § 202.8-b *Length of Papers* *(Commercial Division Rule 17)*	The rule provides that, unless otherwise permitted by the court, affidavits, affirmations, briefs and memoranda of law "in chief" are limited to 7,000 words each, while reply affidavits, affirmations and memoranda are limited to 4,200 words each. The limitations are enforced through the requirement that a certificate of compliance be submitted.	No provision was made in the new rules for limitations in terms of number of pages for documents that are type- or handwritten. Additionally, the proposed amendment clarifies that a memorandum both in opposition to a motion and in support of a cross-motion is a single brief in chief.	*(a)* ***Where prepared by use of a computer, u~~U~~nless*** *otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7.000 words each: (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.* ***(b)*** *For purposes of paragraph (a) above, the word count shall exclude the caption, table of contents, table of authorities, and signature block.* ***(c)*** *Every brief, memorandum, affirmation, and affidavit* ***which was prepared by use of a computer*** *shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in*

[1] Note: Underlining signifies additions, whereas ~~strikethrough~~ signifies deletions, to current rule text.

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			the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document. ***(d) Where typewritten or handwritten, affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 20 pages each; and reply affidavits, affirmations, and memoranda shall be limited to 10 pages each and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.*** ***(e) Where the opponent of a motion has made a cross-motion, the word or page limitations set forth above govern both the opposition to the main motion and the support of the cross-motion.*** ***(f) ~~(d)~~****The court may, upon oral or letter application on notice to all parties permit the submission of affidavits, affirmations, briefs or memoranda which exceed the limitations set forth* ***above ~~in paragraph (a)~~.*** *In the event that the court grants permission for an oversize submission, the certification required by paragraph (b) above shall set forth the number of words in the document and certify compliance with the limit, if any set forth by the court.*
Rule § 202.8-g(a) *Motions for Summary Judgment:*	As part of a motion for summary judgment, the moving party must include a short and concise	Since the purpose of the rule is to aid the court in its disposition of the motion, it should be left to the individual court/part to decide	*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*

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Statements of Material Fact *(Commercial Division Rule 19-a)*	statement of the material facts claimed to be undisputed. The purpose of such statement is to assist the court in identifying what facts are genuinely in dispute.	whether to require such statements, either in general or in a particular case.	*concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.*
Rule § 202.8-g(c) *Motions for Summary Judgment: Statements of Material Fact* *(Commercial Division Rule 19-a)*	A party opposing a motion for summary judgment is required to submit a counterstatement of facts. Any uncontroverted fact is to be deemed admitted by the opposing party.	First, the proposed amendment makes clear that any fact deemed admitted is to be deemed admitted solely for the purposes of the motion and not for the entirety of the case. Also, the proposed amendment clarifies that the court may permit an admission to be amended or withdrawn in the interests of justice.	*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.* ***The court may allow any such admission to be amended or withdrawn on such terms as may be just.***
Rule § 202.8-g *Motions for Summary Judgment: Statements of Material Fact* *(Commercial Division Rule 19-a)*	Currently, unless specifically controverted in the relevant counterstatement, upon the filing of an opposition, uncontroverted facts are deemed admitted.	To prevent abuse or misapplication of the presumption of admission for a failure to controvert, the following proposed new subdivision (e) provides the court with additional options, such as offering an opportunity to cure to the opposing party, to ensure that admissions are not inadvertent.	***(e) In the event that the proponent of a motion for summary judgment fails to provide a statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may deny the motion without prejudice to renewal upon compliance, or may take such other action as may be just and appropriate. In the event that the opponent of a motion for summary judgment fails to provide any counter statement of undisputed facts though required to do so, the court may order compliance and adjourn the motion, may, after notice to the opponent and opportunity to cure, deem the assertions contained in the proponent's statement to be admitted for purposes of the motion, or may***

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			take such other action as may be just and appropriate.
Rule § 202.20 *Interrogatories* *(Commercial Division Rule 11-a)*	The number of interrogatories is limited to 25, including subparts, unless the court orders otherwise.	If counsel agree that the number of interrogatories should be increased, the proposed amendment permits such a stipulation without further application to or intervention by the court.	*Interrogatories are limited to 25 in number, including subparts, unless* ***the parties agree*** *or the court orders otherwise. This limit applies to consolidated actions as well.*
Rule § 202.20-a *Privilege Logs* *(Commercial Division Rule 11-b)*	Requires any agreement between counsel as to privilege log protocols be entered as an order of the court.	The proposed amendment would allow the parties to have the stipulation "so ordered" but also to refrain from doing so if an order is not desired.	Court Order. Agreements and protocols agreed upon by parties ~~**shall**~~ **may** 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.
Rule § 202.20-c(c) *Responses and Objections to Document Requests* *(Commercial Division Rule 11-e)*	A party must clearly state whether production is being made as requested and raise any objections. Each response is to indicate whether the objection relates to only a part of the request or to all of it, whether any documents are being withheld, whether any withheld documents are so	By requiring a verification statement under oath from the party, the rule ensures that a party has searched for responsive documents, while also protecting counsel from claims by parties that counsel did not properly represent them.	~~***In each Response,***~~ ***The Response shall contain, at the conclusion of thereof, the affidavit of the responding party stating*** ~~***shall, verify, for each individual requests***~~*: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request**s**,* ~~***as propounded or modified,***~~ *is complete; or (ii) that there are no documents in its possession, custody or control that are*

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	withheld on the basis of stated objections, and the manner in which the producing party has limited its production. Subdivision (c) requires that a party verify whether it has provided all responsive documents.	Regardless, the rule need not insist upon a "verification," as the technical term "verification" is not necessary to assure a statement under oath is provided. The amendment, therefore, substitutes use of an affidavit for "verification."	*responsive to* ~~***the***~~ *any individual request***s** ~~***as propounded or modified***~~*.*
Rule §202.20-h *Pre-Trial Memoranda, Exhibit Book, and Requests for Jury Instructions* ***(Commercial Division Rule 31).***	At or before the commencement of trial, the rule requires counsel to submit pre-trial memoranda, exhibit binders, and jury instructions.	The proposed amendment acknowledges that many civil cases present straightforward issues with few exhibits. Accordingly, the default is adjusted so that pre-trial memoranda and exhibit binders are required only where the court has asked for them.	*a)* ***The court may direct that c***~~***C***~~*ounsel* ~~***shall***~~ *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).* ***Unless otherwise directed by the court, a*** ~~*A*~~ *single memorandum no longer than 25 pages shall be submitted by each side.* ~~*.*~~ ***and n***~~***N o***~~ *memoranda in response shall be submitted.* *(b)* ***The court may direct that o***~~***O***~~*n 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.* ***Such submission shall include a***~~***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.*
Rule § 202.20-i *Direct Testimony by Affidavit* *(Commercial Division Rule 32).*	The court may require that an affidavit be used in lieu of direct testimony over the objection of the offering party.	The proposed amendment acknowledges the reality that the rule as originally adopted is impractical where counsel is wholly resistant to court-imposed testimony-by-affidavit of their witness.	***Upon request of a party, t***~~***T***~~*he court may* ***permit*** ~~***require***~~ *that direct testimony of* ***that***~~***a***~~ *party's own witness in a non-jury trial or evidentiary hearing* ~~***shall***~~ *be submitted in affidavit form, provided, however,* ~~***(a) 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***~~

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		To remedy this, the amendment requires the party to request testimony-by-affidavit, which the court may then permit.	~~***(b)***~~ ***that*** *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.*
Rule § 202.20-j *Discovery of Electronically Stored Information from Non-Parties* *(Commercial Division Rule 11-c)*	The purpose of this rule was to make a revised "Appendix A" to the Commercial Division Rules (referred to as the "Guideline for Discovery of Electronically Stored Information ("ESI") from Non-parties") applicable to the Uniform Rules to make clear when a party requesting ESI is required to defray the producing non-party's expenses.	Although the new "Appendix A" was intended to apply to the Supreme/County Court generally (as the caption of the rule so states), the rule does not explicitly state this. This amendment would rectify this oversight.	~~***Parties and Nonparties should***~~ ***Adherence*** *to the Electronically Stored Information ("ESI") Guidelines Set Forth in Appendix Hereto* ~~***Section V of Appendix A of the Uniform Civil Rules for the Supreme Court and the County Courts is hereby amended as follows:***~~ ~~***V. The requesting party shall defray the nonparty's reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR.***~~ ***Parties and nonparties should adhere to the Electronically Stored Information ("ESI") Guidelines set forth in Appendix A hereto.***
Rule § 202.26(c) *Settlement and Pretrial Conference* *(Commercial Division Rule 30[a]).*	Authorizes the court to direct that prior, or during trial, counsel consult to try to identify aspects of expert testimony that are not in dispute and, if agreements are reached, to have them incorporated in a stipulation.	Reducing the length of expert testimony is a cost-savings to the parties and conserves judicial resources. To these ends, the rule simply permits the court to require counsel meet and determine if there are areas of agreement regarding their experts.	*(c) Consultation Regarding Expert Testimony. The court* ***presiding over a non-jury trial or hearing*** *may direct that prior, or during, the trial* ***or hearing****, 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.*

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		Were the Board to wish to limit the applicability of this rule, it could be refocused on non-jury trials where simplification of issues is clearly in the interest of the court and the parties.	
Rule § 202.34 *Pre-Marking of Exhibits* *(Commercial Division Rule 28).*	This rule requires counsel for the parties to consult prior to trial and try in good faith to agree upon the exhibits to be offered into evidence without objection. The rule further provides for the pre-marking of the exhibits subject to court approval.	Given the potential conservation of judicial resources that compliance with the rule's procedures likely would yield, it should be the norm. The proposed amendment simply makes explicit the reality that a judge is free to relieve the parties of their obligation where appropriate.	*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 objection.* ***Unless otherwise directed by the court, p****~~P~~rior to the commencement of the trial, 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* ***should*** ***~~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.*
Rule § 202.37 *Scheduling of Witnesses* *(Commercial Division Rule 32).*	At the commencement of trial, counsel must identify in writing the witnesses they intend to call, the order in which they will testify, and the length of time estimated for each witness' testimony.	The rule states that the time estimates are advisory but does not state that the order of witnesses are also advisory. The proposed amendment clarifies that the court always has the authority to take witnesses out of turn when appropriate.	*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 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*

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			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 length of testimony ***and the order of witnesses*** *provided by counsel are advisory* ***only*** *and the court* ***may permit witnesses to be called in a different order and*** *may permit further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded.*

Additional Holistic Reforms for Future Consideration

- The Board may wish to review the rules governing preliminary conferences and compliance conferences with the goal of adopting amendments that would require that parties discuss with the court and receive direction from the court in the preliminary conference, orders and compliance orders on pertinent issues arising under the new rules in hopes of providing an expeditious means of addressing them in individual cases.

- The Board may wish to consider the value of adding a new Uniform Rule providing that trial of a civil case shall not commence if a timely made summary judgment motion is pending without decision.

- The Board may wish to consider whether creation of specialized Complex Case parts in each county or judicial district would assist in supervising such cases, both as to the new rules and as to pre-trial procedures in general.

- The Board may wish to consider forming a select committee of judges to monitor the application of the rules to assure the Bar that issues arising during implementation will be expeditiously addressed.