
From: Sanderson, Joseph <josanderson@Steptoe.com>
Sent: Wednesday, November 1, 2023 2:33 PM
To: rulecomments
Subject: Request for Public Comment Regarding a New Commercial Division Rule to Encourage Use of Lawyers as Referees on Consent

I strongly support the concept of encouraging use of private attorneys as referees on consent in the Commercial Division. It permits lightening the load of court attorney-referees and JHOs, and has the added benefit of encouraging private attorneys to test the waters and may thus encourage qualified private attorneys to seek judgeships. However, this rule, as drafted, is purely precatory and has no substantive rules within it. It would be good to take this opportunity to set some presumptive rules for private attorney-referees in the Commercial Division.

Specifically, I would suggest the following:

- Using referees, particularly for discovery motions, should be strongly encouraged in complex cases.
- The rule should consider a presumption that the parties split the referee's fees 50-50 in the first instance, subject to reallocation for good cause or at the end of the case.
- To encourage service as a referee, the rule should consider accelerated procedures for entering the referee's fees as a judgment or provision for the court to enter an order directing payment under penalty of contempt. Parties dissatisfied with a referee's ruling unfortunately sometimes refuse to pay the referee, and that can make it hard to find qualified referees willing to serve.
- The rule should explicitly remind judges and parties that a referee in litigation is not an arbitrator and is subject to all of the rules governing the presumption of open courts. The rule should specify that (a) the same principles of public access apply as for a hearing before a judge and (b) if motion papers are emailed to the referee rather than filed on NYSCEF, that does not relieve the prevailing party of its duty under CPLR 2220 to file the order and the papers upon which it was made with the County Clerk in a timely manner after an order is signed.
- The rule should also remind referees of their duty to disclose any conflicts of interest they or their firms may have, and, similar to arbitrator disclosure rules, might also remind them to disclose whether they have previously had cases where they have been appointed by the firms in the case.

Sincerely,

Joseph Myer Sanderson

Associate

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From: David Nocenti
Sent: Friday, November 17, 2023 1:47 PM
To: rulecomments
Subject: FW: Request for Public Comment -- Proposed Commercial Division rule on use of referees

From: Hon. Julia M Brouillette <jbrouill@nycourts.gov>
Sent: Friday, October 27, 2023 2:53 PM
To: David Nocenti <[REDACTED]>
Subject: RE: Request for Public Comment -- Proposed Commercial Division rule on use of referees

Dear Mr. Nocenti:

The NYS Family Court Judges Association takes no position.

Sincerely,

Julia M. Brouillette
President NYSFCJA

From: David Nocenti <[REDACTED]>
Sent: Friday, October 27, 2023 1:19 PM
To: David Nocenti <[REDACTED]>
Subject: Request for Public Comment -- Proposed Commercial Division rule on use of referees

To: Heads of Judicial Associations

Attached please find a Request for Public Comment regarding a proposal to create a new Commercial Division Rule 9-b to encourage the use of referees in the adjudication of disputes.

This request will be posted on the OCA website at <https://ww2.nycourts.gov/rules/comments/index.shtml> in the next few days, and comments are due by December 15.

Thanks so much, and please feel free to contact me if you have any questions.

David Nocenti
Counsel
NYS Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
[REDACTED]
[REDACTED]

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Via Email Only:

David Nocenti, Esq.

(rulecomments@nycourts.gov)

Counsel

NYS Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004

RE: Request for Public Comment on Proposal for a New Commercial Division
Rule to Encourage use of Lawyers as Referees on Consent

Dear Mr. Nocenti:

The Association of Justices of the Supreme Court of the State of New York supports adoption of proposed Rule 9-b at 22 NYCRR §202.70(g). The rule highlights the availability of NY CPLR 4301 and 4317 which, upon consent of the parties and agreement of the court, provides for a referee to hear and determine any issue(s). This process operates completely within the existing judicial system and gives the presiding judge the ability to determine the scope of the Referee's role and the issue(s) to be decided.

Very truly yours,

Mary M. Farley
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By Email

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rulecomments@nycourts.gov

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

Dear Mr. Nocenti:

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

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

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

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has over 23,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

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

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

[W]e must express many members' concern with the proliferation of rules across the Court system. In a Commercial Division case, a practitioner needs to consider, at minimum: (i) the CPLR; (ii) the Uniform Rules for the Supreme Court and County Court; (iii) the Commercial Division Rules; and (iv) the Part Rules of the assigned Justice. In recent years, it appears that there are both more rules and that the rules are constantly changing. For example, prior to February 2021, a litigant in the non-commercial part would not need to submit a statement of material undisputed facts in support of a summary judgment motion. In February 2021, Uniform Rule 202.8-g was amended to require such a statement. Subsequently, in July of 2022, Administrative Order 141/22 ("AO 141/22"), eliminated the requirement for such a statement unless the Court so-directs. As such, litigants must now look to the Part Rules to determine whether such a statement is required. This is but one example.

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

Thank you for considering our comments. If you believe that it would be beneficial, we would be happy to discuss these comments with you further.

Sincerely,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction

Contact

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



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December 15, 2023

VIA EMAIL

David Nocenti, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
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rulecomments@nycourts.gov

Re: Proposed new Commercial Division Rule 9-b

Dear Mr. Nocenti:

We write on behalf of the Managing Attorneys and Clerks Association, Inc. (“MACA”) in response to your memorandum dated October 26, 2023 requesting comment on a proposed new Commercial Division Rule 9-b to encourage the use of lawyers as referees in Commercial Division proceedings (the “Referee Amendment”).

MACA is comprised of more than 120 law firms with litigation practices (primarily large and mid-sized firms) as well as the New York State Attorney General’s Office. Our members’ representatives’ positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of court rules and procedures, clerk’s office operations, and the needs of attorneys and litigants. In particular, our members’ attorneys litigate frequently in the New York Commercial Division, and as a result, we are well acquainted with practice and procedure there.

We advise the Administrative Board against adopting the Referee Amendment. Since Article 43 of the CPLR already applies to Commercial Division actions, the proposed amendment is superfluous. Moreover, as currently drafted, it may restrict, rather than promote, the parties' ability to stipulate to a referee of their choosing. Instead, we would recommend the Administrative Board consider other, potentially more effective means of promoting the use of referees in Commercial Division actions specifically, and promoting the efficient disposition of Commercial Division actions more generally.

In its memorandum supporting the Referee Amendment ("Memo"), the Commercial Division Advisory Council ("CDAC") does not suggest that CPLR Section 4301 or Rule 4317(a) do not already apply to Commercial Division cases, or that the Referee Amendment is otherwise necessary to enable parties in Commercial Division actions to stipulate to the appointment of referees. Rather, both the text of the Referee Amendment itself and the Memo make clear the rule is intended merely to remind attorneys and judges of procedures already available to them under the CPLR ("Counsel *should be aware* that in accordance with CPLR 4301 and 4317(a)...") (Referee Amendment (emphasis added)); "We believe that practitioners, as well as many judges, *may not be aware of the availability* of this alternative. The proposed rule would *bring attention* to its utility" (Memo at 3 (emphasis added)). We submit that a rule which does not create new procedures or requirements or modify existing ones—and whose only function is to remind attorneys and judges of the existence of other already-existing applicable rules—is superfluous, and its adoption would unnecessarily complicate the Commercial Division rules and impede counsel's ability to comply with required procedures under them.

Moreover, the Referee Amendment seems likely to have the opposite of its intended effect as currently drafted. CPLR Rule 4317(a) provides that the parties may generally stipulate to the appointment of a referee to hear and determine an issue, and only requires leave of court for certain limited circumstances. It also provides that the Court will designate a referee only when the parties' stipulation does not already name a specific referee. The text of the Referee Amendment, in contrast, suggests that parties in the Commercial Division may stipulate to the appointment of a referee only "with the agreement of the Court" and further suggests that a specific referee "may be appointed by the Court," instead of being selected by the parties' stipulation. This language could easily be construed to require that any reference in a Commercial Division case must be approved by the assigned judge, even when the parties have already stipulated to the reference, and to give the judge, not the stipulating parties, the authority to determine the identity of the referee. Notwithstanding the CDAC's stated goal of encouraging the use of referees in the Commercial Division, the Referee Amendment may in fact restrict their use by introducing requirements that do not exist in CPLR Rule 4317(a). If the Administrative Board decides to adopt the Referee Amendment, notwithstanding its fundamental defect of not creating or modifying a procedure, we recommend revising it so that the text of the final rule would read "Counsel should be aware that, in accordance with CPLR 4301 and 4317(a), on stipulation of the parties, any person may be appointed to act in place of the assigned Supreme Court Justice to determine any or all issues or to perform any act, with all the powers of the Supreme Court."

While MACA appreciates that the referees may currently be underused in the Commercial Division, we respectfully submit that there are other ways of promoting their use that would be more effective than a rule that simply reminds parties of the existence of Article

43. For instance, the Office of Court Administration could offer continuing legal education programs to Commercial Division practitioners on the rules and procedures governing referee appointments under Article 43 of the CPLR. Comparable training programs could be offered to Commercial Division justices, with an emphasis on encouraging parties to consider the use of referees in their actions. Rosters of experienced referees who specialize in commercial matters could be published on the Commercial Division websites, similar to the roster of ADR neutrals the New York County Commercial Division currently maintains on its website, with periodic announcements to remind the public of their availability.

Moreover, as we have previously commented, ensuring that the various County Clerk and Clerk of Court offices that support the Commercial Division courts are adequately staffed and resourced would be one of the most effective measures the Administrative Board could take to “enhance the efficiency in the disposition of [Commercial Division] cases” (Memo at 1), much more so than further amending the Commercial Division rules. Members of our organization know and appreciate, perhaps more than most, that the various clerks’ offices that support the Commercial Division courts are made up of dedicated, hard-working individuals who are as integral in the efficient operation of the Commercial Division as the judges assigned to it and the attorneys who practice before it. However, we are also aware that recent budget cuts and attrition have left these clerks’ offices woefully understaffed and under-resourced, and that despite their best efforts, the resulting backlog of work means that even routine matters—such as assignment of index numbers, assignment of judges, and entries of orders and judgments—can take weeks or months. Providing the clerks’ offices with the resources they need to perform the essential work they do in a timely fashion would, we submit, be one of the most effective ways to improve the efficiency of adjudications and operations in the Commercial Division.

We are grateful for the opportunity to offer MACA’s views on the Proposed Amendments. If we can elaborate further on our comments or assist the Administrative Board in any way, please let us know.

Respectfully,

s/Peter McGowan
MACA President
Managing Attorney
Sidley Austin LLP

s/Timothy K. Beeken
MACA Rules Committee Chair
Counsel & Managing Attorney
Debevoise & Plimpton LLP

s/Bradley Small
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s/Brendan Cyr
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s/James Rossetti
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