NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 29[1]

SUMMARY

The Administrative Board of the New York Courts (the "Administrative Board") has requested comments on a proposed amendment to Commercial Division Rule 29 proffered by the Commercial Division Advisory Council ("CDAC") (the "Amendment"). The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") recommends that the proposed rule amendments be adopted, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who litigate both civil and criminal bench and jury trials in state and federal courts in New York and throughout the country. Thus, in offering the following comments, the Section is drawing upon a broad range of experience.

II. PROPOSED AMENDMENT

A. Current Version of Rule 29

Rule 29. 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 thedeposition testimony is offered. Each party shall prepare 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. At least ten days prior to trial or such other time as the court may set, each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which objection has been made. The court will rule upon the objections at the earliest possible time after consultation with counsel.

B. Proposed Version of Rule 29

Rule 29. 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**, and to resolve any objections regarding the use of any corresponding video recording of such deposition testimony.** The parties shall delete from the

[1] Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association's House of Delegates or Executive Committee.

testimony to be read questions and answers that are irrelevant to the point for which the deposition testimony is offered. Each party shall prepare 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 **to the introduction of the testimony or corresponding video. recording of the deposition testimony**. At least ten days prior to trial, **or such other time as the court may set,** each party shall submit its list to the court and other counsel, together with a copy of the portions of the deposition testimony as to which no objection has been made **and, if applicable, the corresponding video recording of the portions of deposition testimony as to which no objection has been made**. ~~The court will rule upon the objections at the earliest possible time after consultation with counsel.~~ **This Rule does not apply to portions of deposition testimony and corresponding video recording to be used solely for impeachment or credibility purposes.**

C. **CDAC Rational for Revision**

The use of remote, videotaped depositions soared during the pandemic and it is likely that the use of videotaped depositions at trial will also increase in the post-pandemic world. As to be expected, there were occasional technological glitches during depositions that may affect the quality or accuracy of the videotaped testimony. There were also new and different objections lodged, including (by way of example) to the use of "sharing screens" to show a witness only a portion of an exhibit. The Advisory Council recommends Rule 29 be modified to clarify that the objection process should include presentation and consideration of any objections to the introduction of the relevant portion of the videotape of the deposition testimony to be introduced. The Local Rules of the U.S. District Court for the District of New Hampshire also acknowledge the potential for objections specific to the introduction of videotaped testimony.

The Advisory Council also thought it prudent to add a provision stating that the Rule does not apply to deposition testimony and video recordings that will be used solely for impeachment or for purposes of witness credibility.

Lastly, the Advisory Council recommends deleting the requirement that the court rule upon the objections at the earliest possible time as unnecessary.

D. **Section's Position**

The Section supports the proposed amendments as there is a need in Rule 29 to acknowledge that corresponding video recording of deposition testimony of a witness may be offered at trial and that concomitantly there may be objections that need to be identified and addressed that are inherent to the use and means of memorializing video deposition testimony at trial. In addition, the proposed amendment properly makes explicit what had been implicit—that deposition testimony that may be used for impeachment or credibility purposes at trial is not subject to Rule 29.

Respectfully Submitted,

New York State Bar Association
Commercial and Federal Litigation Section
Ignatius A. Grande, Section Chair December 30, 2022

Approved by the NYSBA Commercial & Federal Litigation Section Executive Committee, December 14, 2022

Commercial Division Committee
Mark A. Berman,* Co-Chair
Ralph Carter, Co-Chair

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January 25, 2023

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Re: New York City Bar Association Response to Request for Public Comment on Proposal to Amend Commercial Division Rules 28, 29, and 32

Dear Mr. Perri:

We write to provide comments with respect to the Request for Public Comment on Amending Commercial Division Rules 28, 29, and 32.

The New York City Bar Association's Council on Judicial Administration, State Courts of Superior Jurisdiction, and Litigation Committees have considered and discussed the proposed rule changes. We support the proposed revisions to Rule 29 and propose minor revisions to Rules 28 and 32.

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.

We are in favor of the proposed amendment to Rule 28. However, we would like to address two concerns with the Rule (one of which is not caused by the proposed change). The proposed Rule 28 states that "[e]xhibits not previously identified which are to be used solely for credibility or rebuttal need not be premarked." The proposed Rule 29 states that it does not apply to deposition testimony "to be used solely for impeachment or credibility purposes." We think these rules should be made consistent, such that Rule 28 should add "impeachment" to the purposes for which exhibits need not be pre-marked. We also believe that only exhibits actually offered at trial should be deemed marked into evidence. Accordingly, we propose the modifications set forth below.

> Counsel for the parties shall consult prior to the pre-trial conference and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection and shall premark all exhibits as to which no objection has been made for introduction into evidence. Counsel shall also mark all exhibits not consented to for identification only. Counsel asserting objections to the introduction of any proposed exhibit shall be prepared to state the objection with specificity at the pretrial conference or such other time as the court directs. The premarked exhibits as to which there is no dispute and which are offered at trial shall be marked into evidence, unless the court directs otherwise. If the trial exhibits are voluminous or in a digital or other format that creates practical marking issues, counsel shall consult the clerk of the part for guidance. Exhibits not previously identified which are to be used solely for impeachment, credibility or rebuttal need not be premarked.

With respect to the proposed amendment to Commercial Division Rule 32, we propose one modification set forth below.

> Rule 32. Scheduling of witnesses. At the pre-trial conference 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 whether the witness will testify in person or, if permitted and subject to objection, through the use of video technology, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only (and not to be exchanged with other counsel) a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

We propose this addition so that the rule does not imply that witnesses may *automatically* be permitted to testify virtually, given the conditions set forth in Commercial Division Rule 36.

Although we support these three rule changes, with the aforementioned minor modifications, we must express many of our committee members' concerns 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 has complicated the practice of law and is increasingly a burden on practitioners. Although we adopt the proposed rule changes discussed herein, we invite stakeholders in the Court System to consider ways to minimize this burden – by reducing the frequency of new rules and amendments and by creating uniformity in rules across the Court System wherever possible.

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.

Respectfully submitted,

Fran Hoffinger, Chair
Council on Judicial Administration

Seth D. Allen, Chair
Litigation Committee

Amy D. Carlin, Chair
State Courts of Superior Jurisdiction