NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 28[1]

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 28 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 28

Pre-Marking of Exhibits. Counsel for the parties shall consult prior to the pretrial conference and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection. At the pre-trial conference date, each side shall then mark its exhibits into evidence 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. Proposed Version of Rule 28

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~~. At the pre-trial conference date, each side shall then mark its exhibits into evidence~~ and shall premark all exhibits as to which no objection has been made **for introduction into evidence**. ~~All exhibits~~ Counsel shall also mark ~~A~~all exhibits not consented ~~shall be marked~~ to for identification only. **Counsel asserting objections to the introduction of any proposed exhibit shall be prepared to state the objection**

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[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.

with specificity at the pretrial conference or such other time as the court directs. The premarked exhibits as to which there is no dispute 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. ~~The court will rule upon the objections to the contested exhibits at the earliest possible time.~~ Exhibits not previously **identified** ~~demanded~~ which are to be used solely for credibility or rebuttal need not be premarked.

C. CDAC Rational for Revision

The Advisory Council recommends Rule 28 be modified to streamline the process for marking and preparing to introduce exhibits into evidence, conserve and use the time with the Court more efficiently, and expand the process for objecting to proposed exhibits. To achieve this objective, the Advisory Council suggests that Rule 28 be modified to clarify that counsel should not be consuming time at the pretrial conference to mark exhibits. The current language of the Rule may create an issue for those Justices who conduct the pre-trial conference without the presence of a court reporter. Without a court reporter, the trial exhibits cannot be marked "into evidence" at the pre-trial conference and these Justices tend to accept the exhibits into evidence at the start of the trial.

The Advisory Council also recommends clarification of the process of asserting objections to exhibits, requiring counsel to be prepared to state the objection to any exhibit with specificity, and leaving it to the Court's discretion whether to rule on objections at the pretrial, at the start of the trial, or as the trial progresses and the exhibit is introduced.

The Advisory Council further recommends that the Rule be modified to reflect that exhibits may be digital or in another format that does not lend itself easily to physical marking.

Lastly, the Advisory Council recommends deleting the language indicating that the court will rule upon the objections to exhibits at the earliest possible time, as it is unnecessary.

D. Section's Position

Each of the proposed amendments to Rule 28 seeks to streamline what takes place at the pre-trial conference and seeks to remove uncertainty as to when and how to make objections to specific trial exhibits. Lastly, the proposed amendments appropriately address the situation where premarking of an exhibit may create practical marking issues such as when the exhibit is in digital format or another format. In conclusion, the Section supports the proposed changes to Rule 28.

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
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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