To: John W. McConnell
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: October 23, 2019

Re: Proposal to Repeal Commercial Division Rule 23, Relating to the "60-Day Rule"

The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated September 3, 2019, ("Memorandum"), proposing the repeal of Rule 23 ("Rule 23") of the Rules of the Commercial Division (the "Rules"), which all requires movant's counsel to notify the court and other parties whenever a motion has not been decided within 60 days of its being fully submitted or oral argument.

The proposal of the Commercial Division Advisory Council ("Advisory Committee") seeks to repeal Rule 23 not only to conform with the prior repeal of a similar rule which had applied to *all* cases pending in New York's Supreme, but also because of the perceived reluctance of practitioners to utilize thus rule. The formal proposal by the AC ("CDAC Memorandum") is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Advisory Committee's proposal seeks to repeal Commercial Division Rule 23, which states as follows

> If 60 days have elapsed after a motion has been finally submitted or oral argument held, whichever was later, and no decision has been issued by the court, counsel for the movant shall send the court a letter alerting it to this fact with copies to all parties to the motion.

As stated in the Memorandum, the Advisory Committee believes that "[b]y all accounts, practitioners seldom follow [Rule 23]" and "[f]rom [their] [] standpoint, there is understandable reluctance about complying with a rule that might be perceived by the presiding justice in a pending matter as a presumptuous, not-so-subtle, reminder that he or she is out of compliance with 'Standards and Goals'." *Memorandum* at 1. The Advisory Committee goes on to state that members of the judiciary may feel that receiving Rule 23 letters "creates undue pressure and generates no small amount of irritation." *Id.*

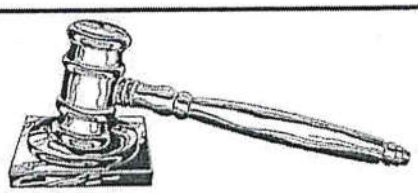
Furthermore, the Advisory Committee seeks to repeal Rule 23 to conform with the prior removal over a decade ago of a similar rule which directed that a movant contact the court if a motion had not been decided within 60 days of submission which applied to all cases pending in New York's Supreme Courts.

II. COMMENTS

The Section views favorably the positions taken by the Advisory Committee and endorses its proposal to repeal Rule 23. See Attachment A.

EXHIBIT A

Updates on Rules



The End of the 60-Day Rule or, at Least, So We Thought!

By Vincent J. Syracuse

October 1, 2006, marked the end of the so-called 60-day rule, which imposed an obligation on counsel for a moving party to notify the court by letter that a motion had remained undecided for 60 days, at least, so we thought. The end of this controversial and unpopular rule took the form of repeal of Section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts and its replacement with a new rule that requires court administrators to issue a computer-generated notice indicating that 60 days have elapsed since the motion was submitted and that the motion remains undecided. The rule also allows a Justice of the Supreme Court to make an application to have a motion designated as complex, which will result in giving the court 120 days to decide the motion.

The problem is that there is a separate 60-day rule that applies in the Commercial Division that was not repealed. The Rules of the Commercial Division became effective on January 11, 2006, with the enactment of Section 202.70 of the Uniform Civil Rules for the Supreme and County Courts. Section 202.70 includes Rule 23, which is the Commercial Division's own 60-day rule and "technically" has not been repealed, an obvious oversight.

The Commercial and Federal Litigation Section supports the immediate repeal of Rule 23 and hopes that this will take place as quickly as possible. In the interim, "to write, or not to write, that is the question."

New Rule for Conduct of Depositions in New York State Courts

Effective October 1, 2006, the Chief Administrative Judge of the Courts for the State of New York, with the advice and consent of the Administrative Board of the Courts, adopted a new Part 221 of the Uniform Rules for the Trial Courts, relating to the conduct of depositions. The new Part, consisting of three sections, thus applies to depositions taken in all trial courts of the State.

The first rule, 22 N.Y.C.R.R. § 221.1, regulates objections at depositions. Under the rule, no objections may be made at a deposition except those which, pursuant to CPLR 3115(b), (c), or (d), would be waived if not interposed or, in the case of objections to the form of written questions, except in compliance with CPLR 3115(e). All objections made at a deposition must be noted by the officer before whom the deposition is taken, and the answer must be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to CPLR Article 31.

Rule 221.1 also requires that every objection raised during a deposition must be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, must include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by this rule or by CPLR 3115, during the course of the examination persons in attendance may not make statements or comments that interfere with the questioning.

The second rule, 22 N.Y.C.R.R. § 221.2, addresses refusals to answer when an objection is made. Under this rule, a deponent must answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney may not direct a deponent not to answer, except as provided by this rule or by CPLR Rule 3115. Any refusal to answer or direction not to answer must be accompanied by a succinct and clear statement of the basis for the refusal or direction. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

Finally, the third rule, 22 N.Y.C.R.R. § 221.3, regulates communication with the deponent. An attorney may not interrupt the deposition for the purpose of communicating with the deponent, unless all parties consent or unless the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 and, in that event, the reason for the communication must be stated for the record succinctly and clearly.

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November 1, 2019

Re: New York City Bar Association Comments on Proposal to Repeal Commercial Division Rule 23 ("60-day Rule")

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposal to repeal Commercial Division Rule 23 which requires movant's counsel to notify the court whenever a motion has not been decided within 60 days of its submission or oral argument. The New York City Bar Association (the "City Bar") commends the Commercial Division Advisory Council (the "Advisory Council") for undertaking this analysis and for recommending the repeal of this rule.

The City Bar favors the repeal of Commercial Division Rule 23 (22 NYCRR § 202.70[g], Rule 23) for the reasons stated in the Advisory Council's memorandum in support of repeal.

Very truly yours,

Michael P. Regan
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