New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Partial Support

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #1 January 11, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

The Committee on Civil Practice Law and Rules studied the proposal of the Unified Court System's Advisory Committee of Civil Practice to adopt certain rules of the Commercial Division in other courts of civil jurisdiction. The proposal included adoption of the following rules of the Commercial Division:

Rule 3(a) – Appointment of a court-annexed mediator (as amended)
Rule 3(b) – Settlement conference before a judge not assigned to the case
Rule 11-a – Limitations on interrogatories
Rule 11-b – Privilege log (in part)
Rule 11-d – Limitation on depositions
Rule 11-e – Responses and objections to document requests (as amended)
Rule 19-a – Statement of material facts for summary judgment motions
Rule 20 – Temporary restraining orders
Rule 34 – Staggered court appearances

With the exception of Rule 19-a, the Committee unanimously approved the proposal at its November 16, 2018.

As to Rule 19-a, a subcommittee was formed to further study the rule and its findings will presented at the full committee meeting on January 18, 2019, which is after the January 15, 2018 deadline for comment. We, therefore, kindly request that the committee be given until January 28, 2019 to submit its comment concerning Rule 19-a. Kindly advise whether the CPLR Committee could have until January 28, 2019 to submit its comment concerning Rule 19-a. Your professional courtesy is appreciated.

Co-Chairs of the Committee

Souren A. Israelyan Domenick Napoletano

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #2 January 24, 2019

Via Email: rulecomments@nycourts.gov

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Subject: Recommendation by the Unified Court System's Advisory Committee on Civil Practice as to Rule 19-a of the practice rules of the Commercial Division of Supreme Court

We thank the OCA for extending the time for comment to January 28, 2019, which allowed the NYSBA CPLR Committee to meet and discuss its concerns about the proposal to extend Rule 19-a of the practice rules of the Commercial Division of Supreme Court to all civil cases in all New York State civil courts and make the service of the statements specified in the rule mandatory.

Rule 19-a of the practice rules of the Commercial Division of Supreme Court provides that Commercial Division justices may direct a party moving for summary judgment to provide a paragraph by paragraph statement of the material facts as to which there are no genuine issues to be tried (with citations to the record) and the party opposing the motion to provide a paragraph by paragraph response thereto (admitting or controverting the "facts" cited by the movant and citing to the record where a fact listed by the movant is disputed). At subsection (c), the Rule provides that

> 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.

In its recommendations to adopt certain Commercial Division Rules throughout the civil courts (July 2018), the Unified Court System's Advisory Committee on Civil Practice ("Advisory Committee") recommends that Rule 19-a apply to any motion for summary judgment in all types of civil cases in all of New York's civil courts but that the submission of the movant's statement and the responding statement by the party opposing the motion, as specified in the rule, be mandatory rather at the direction of the court.

After report and discussion, and upon vote by its members at its January 18, 2019 meeting, the NYSBA Committee on the Civil Practice Law and Rules ("CPLR Committee") opposes the Advisory Committee recommendation as to Rule 19-a.

Considerations raised in the CPLR's meeting included the following.

The recommendation of the Advisory Committee would engraft on CPLR 3212 an additional document to be submitted in support of a motion for summary judgment. CPLR 3212 provides what are the necessary factual documents to be served by the movant. Specifically, 3212 (b) provides:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.

Nowhere does CPLR 3212 mention any of the documents described in Rule 19-a. Only the State legislature with the approval of the Governor can amend the CPLR to provide another document that must be filed in support of, and in opposition to a motion for summary judgment.

Additionally, if the recommendation of the Advisory Committee was accepted, the party opposing a motion for summary judgment may be unfairly prejudiced as follows: the party opposing the motion (a) provides by affidavit facts which dispute a purported fact which the movant contends in its Rule 19-a is a material fact as which there is no genuine issue to be tried, but (b) inadvertently fails to dispute the "fact" in its Rule 19-a response. Under Rule 19-a, the purported fact is deemed admitted by the party opposing the motion, despite its affidavit disputing the "fact."

Such a result would contradict the following terms of CPLR 3212(b):

> the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

While the possibility of such an inadvertent failure is unlikely where the movant serves a simple, straightforward Rule 19-a statement, the risk is heightened where the movant has served a long and complex statement under Rule 19-a.

Additionally, if Rule 19-a is extended to all civil cases as the Advisory Committee proposes, such would add undue and costly burdens to summary judgment motions which already require care in preparing affidavits in support and opposition and supporting, opposing, and reply memoranda of law.

Finally, while the CPLR Committee opposes any extension of Rule 19-a beyond the Commercial Division, if the Advisory Committee decides to promote such extension, the CPLR Committee urges that any such extension does not include making the service of the statement and responding statement described in the rule mandatory but, as Rule 19-a currently reads, only upon instruction of the court handling the case. The judge handling a case should have the flexibility of deciding that he or she would not benefit from the filing of the statements described in Rule 19-a.

Co-Chairs of the Committee

Souren A. Israelyan Domenick Napoletano

COUNCIL ON JUDICIAL ADMINISTRATION

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

MICHAEL P. REGAN
CHAIR
1301 AVE OF THE AMERICAS
NEW YORK, NY 10019
PHONE: (212) 907-9700
FAX: (212) 907-9800
MREGAN@SGRLAW.COM

LITIGATION COMMITTEE

BARBARA L. SENIAWSKI
CHAIR
1460 BROADWAY, FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

By Email
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

January 28, 2019

Re: New York City Bar Association Comments on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

Dear Mr. McConnell:

Thank you for the opportunity to comment on the proposed adoption of certain rules of the Commercial Division in other courts of civil jurisdiction.

The New York City Bar Association (the "Association") commends the Advisory Committee on Civil Practice (the "Advisory Committee") for undertaking this analysis and for its thoughtful discussion of each of the rules of the Commercial Division, upon which it bases its recommendations – both with respect to those rules that the Advisory Committee recommends adopting and those that it does not.

The Association supports the adoption of Rules 3(b), 11-a, 11-d, 20, and 34 of the Commercial Division in other courts of civil jurisdiction as proposed by the Advisory Committee. In the interest of brevity, we do not further comment on these rules. The Association also supports the Advisory Committee's recommendations with respect to Rules 22 and 30(a), which the Advisory Committee recommends the adoption of (at least in part), but which do not appear in the Advisory Committee's covering memorandum listing the rules that it recommends adopting.

With respect to several other Commercial Division rules, however, the Association disagrees in some respect with the recommendation of the Advisory Committee. Specifically, the

Association opposes the adoption of several rules that the Advisory Committee recommended adopting, recommends the adoption of certain rules that were *not* recommended for adoption by the Advisory Committee, or otherwise has comments on the recommendations made by the Advisory Committee. The Association's comments on these rules are as follows:

I. RULE 3(a)

The Association agrees with the Advisory Committee's recommendation that Rule 3(a) of the Commercial Division be adopted. However, we do not believe that changing the word "direct" to "advise," is consistent with or furthers the recommendation expressed by the Advisory Committee in the last paragraph of its comment, "that greater use be made of experienced attorneys as court-approved mediators who would be modestly compensated for their time by the parties." If the goal is to take steps that result in the greater use of mediation, we believe that can be best achieved by allowing a court to *direct* the parties to mediation where appropriate. Moreover, the Advisory Committee's reason for its proposed amendment is not explained in its report.

Further, although the Commercial Division rule refers to an "uncompensated" mediator, as correctly noted by the Advisory Committee, we agree with the Advisory Committee's recommendation, which refers to the appointment of a "court-annexed mediator," leaving out the word "uncompensated." This recommendation is in fact consistent with the practice of the Commercial Division in some counties, where mediators are compensated after the first few hours of a mediation.

While we support the increased use of mediation in cases that the court deems appropriate, we reiterate and adopt here an important recommendation made in the June 2018 report of the City Bar's Committee for the Efficient Resolution of Disputes: "[I]f mediation is to be an important factor in changing the litigation culture, administrators of court-annexed mediation programs and dispute resolution providers will need to take significant steps to assure that capable mediators are available in sufficient numbers. To increase the number of effective mediators, it should become accepted practice – encouraged by the courts – for advocates to serve regularly as mediators throughout their careers. Among other things, that would increase advocate experience with the mediation process and awareness of the benefits of early case evaluation and the informal exchange of facts."

II. RULE 5

The Association agrees with the Advisory Committee's recommendation *not* to adopt Rule 5. We also agree that on-line notices of the status of actions and motions would be useful and note that the e-courts notices received by counsel who have appeared in an action provide that information.

III. RULE 7

The Advisory Committee does not recommend the adoption of Rule 7, but instead makes certain recommendations, without proposing a specific rule, concerning improvements of the

methods by which "pro forma" court conferences, especially concerning discovery, can be conducted.

The Association notes that one of the most common complaints raised by counsel and the courts is the inefficiencies attendant to "pro-forma" court conferences, such as preliminary and compliance conferences, often resulting from the volume of cases that appear on a court's conference calendar. Accordingly, the Association agrees with the Advisory Committee's recommendation that the courts utilize NYSCEF and other technology to avoid in court appearances for "pro-forma" matters, such as setting discovery dates or to report on discovery. We also agree that counsel should be required to e-file a statement as to whether discovery is proceeding as per the scheduling order, to obviate the need for an in-court conference where there is no dispute or non-compliance. Conferences can then be reserved for instances where there are active discovery disputes or non-compliance issues to address. We recommend that the Advisory Committee consider whether this approach can be implemented as a matter of practice or whether, instead, a rule would be advisable.

IV. RULE 8

The Association respectfully disagrees with the Advisory Committee's opinion that Rule 8 should not be adopted.

The Advisory Committee correctly describes Rule 8 as requiring counsel for all parties to confer prior to a preliminary or compliance conference about such matters as the resolution of the case, discovery, alternative dispute resolution, voluntary informal exchange of information, and issues of electronic discovery. However, the Advisory Committee opines that the "rule is not necessary in the majority of civil cases where the issues can be addressed expeditiously at the conference, or through the adoption of a court-approved scheduling form that obviates the need for an in-person preliminary conference."

We note that, at present, the rules do not provide for the electronic submission of preliminary and compliance conference orders in lieu of attendance by counsel at court conferences. Accordingly, we believe that the rules should address the procedures extant.

The experience of many attorneys is that, all too often, issues are not addressed or resolved expeditiously at court conferences. Moreover, some law firms have a practice of sending people to attend court conferences who may not be working on or familiar with the case, which often makes it difficult for counsel to address outstanding issues or agree upon a scheduling order that makes sense given the facts of the case. Presumably, the counsel that would take part in a required pre-hearing consultation, which is usually conducted by telephone, would be knowledgeable about the case and the issues. Accordingly, the Association believes that consultation between counsel prior to court conferences would result in greater efficiency at those conferences and, therefore, recommends the adoption of Rule 8 of the Commercial Division in other courts of civil jurisdiction. Rule 8 should, however, be harmonized with Uniform Rule 202.12(b) and (c), which govern preliminary conferences in all civil courts.

V. RULE 11-b

The Advisory Committee recommends the adoption of Commercial Division Rule 11-b, except that (i) instead of providing that a party who insists on a document-by-document privilege log may be required (upon application of the opposing party, with "good cause" shown) to reimburse the costs associated with producing it, the Advisory Committee recommends that in the event of a disagreement the court should determine "whether the categorical approach or CPLR 3122 will be used"; (ii) the Advisory Committee does not recommend adopting the rule's requirement that a "responsible attorney" (as defined in the rule) certify that the privilege review was properly conducted; and (iii) the Advisory Committee recommends the addition of a specification that attorney-client communications and attorney work product created after the filing of the complaint need not be included in the log unless otherwise ordered by the court. The Association has the following comments on these aspects of the Advisory Committee's recommendation.

On the question of how to handle a dispute over whether a categorical approach should be used, while we agree that it might be most efficient to allow the court to direct that approach in proper cases, we question whether a rule providing as much would require an amendment to the CPLR. Under CPLR 3122(b), a party who has requested documents that are being withheld on any ground is entitled to certain information on a document-by-document basis unless the requirements for a protective order under CPLR 3103 are met. An agreement between the parties to instead produce categorical logs constitutes a waiver of that right. The rule attempts to provide an incentive for parties to enter into such an agreement by providing that, "unless the court deems it appropriate to issue a protective order under CPLR 3103," a party who insists on a document-by-document log will receive one but acts at its own peril in terms of possible cost-shifting. To the extent that the Advisory Committee's recommendation would allow a court to require a party to waive its right to a document-by-document log under circumstances that do not otherwise warrant a protective order, the Association questions whether this can be done by court rule.

Regarding certification by a "Responsible Attorney," it is not clear how much of the rule's certification provision the Advisory Committee would delete. The Association agrees that the definition of "Responsible Attorney" contained in the rule seems unnecessarily narrow, and that it would be enough to provide that a certification signed by any attorney acting on behalf of the producing party's law firm binds both the attorney and the firm. We also note that when this rule was originally proposed, the Association's Council on Judicial Administration expressed the view that the representations of specific facts set forth in the rule's certification were necessary to provide the type of information that a receiving party would want to review before accepting the categories designated by the producing party. The Association stands by that view.

Finally, the Association agrees that in most cases there is little or no purpose to be served by logging work product prepared after the commencement of litigation or communications with litigation counsel after such commencement. We believe, however, that this is generally addressed through objections and/or agreed-upon limitations, such that as a practical matter parties usually can avoid that burden in appropriate circumstances. We suggest that a blanket rule exempting all post-commencement attorney-client communications and work product from the logging

requirement may sweep too broadly, particularly insofar as such an exemption would appear to apply to communications with counsel other than litigation counsel.

VI. RULE 11-c

The Advisory Committee does not recommend the adoption of this Rule, which provides that where electronically stored information ("ESI") is requested from non-parties, the parties should adhere to certain Guidelines that have been promulgated for such discovery. The Advisory Committee cites the existence of adequate rules in the CPLR and the Uniform Civil Rules as its reason for declining to recommend such adoption, but does not specify which rules it views as adequately covering the matters that the Guidelines address. The Association is of the view that the Guidelines promote efficiency and reduce the burden of litigation, particularly on non-parties. Among other things, they help to settle expectations about what should and should not be required of non-parties, and may thereby reduce the need for court intervention. Moreover, given that the Guidelines are just that – Guidelines, to which the rule specifies that the parties "should" adhere – the Association believes that the rule contains enough flexibility to allow the Guidelines to be bypassed in whole or in part in cases where they would not serve their intended purposes.

Accordingly, the Association respectfully disagrees with the Advisory Committee's conclusion and suggests that it be reconsidered.

VII. RULE 11-e

The Advisory Committee recommends the adoption of this rule, except that it proposes one modification to subsection (d), which requires each party to state, no less than one month prior to the close of fact discovery or at such other date as the court directs, (i) whether production of responsive documents in its possession, custody, or control is complete, or (ii) that there are no responsive documents in its possession, custody, or control. Specifically, the Advisory Committee would require the statement to be made at the time of disclosure rather than at or near the close of fact discovery.

The Association respectfully disagrees with the Advisory Committee's proposed modification of this rule and believes it should be adopted as is.

The disclosure obligation is ongoing, and requires a party to supplement its disclosures if, as, and when new material becomes available to it. Requiring a statement of completeness to be made (or reconfirmed) at or near the end of fact discovery ensures that disclosure is complete at the most critical point: when the period provided for it is ending.

Accordingly, the Association believes that if such a statement is to be required only once (as both the rule and the Advisory Committee's proposed amendment seem to contemplate), requiring it to be made near the close of fact discovery is more appropriate than requiring it to be made sooner. The Association notes, however, that counsel, throughout the discovery process, including at the time document productions are made, should be advising each other (whether orally or in writing) of the status of their document productions, including as to completeness, as part of the overall obligation to confer in good faith.

VIII. RULE 11-g

The Advisory Committee does not recommend adopting this rule, which requires the parties, "in those parts of the Commercial Division where the presiding justice so elects," to use a particular form for any proposed confidentiality order and to provide an explanation for any proposed deviations from that form. The Advisory Committee does, however, commend the form to practitioners seeking to draft such an order. The Association respectfully suggests that, given the Advisory Committee's expressed view about the form, it reconsider its position about the rule. The rule itself gives every individual judge the flexibility to elect to use the form or not. It also gives practitioners the flexibility to agree to variations where the circumstances so warrant; the requirement that the variation be explained is reasonable and not onerous. And it gives parties a baseline that will likely streamline the process of drafting proposed confidentiality orders. For these reasons, the Association believes that the rule should be adopted.

IX. RULE 14-a

Although the Advisory Committee recommended that all decisions or agreements at disclosure conferences be reduced to writing, the Advisory Committee nevertheless does not recommend the procedure set forth in Rule 14-a. The Advisory Committee did not provide any reasoning as to why the Commercial Division's procedure was not recommended. The Association agrees with the Advisory Committee that all decisions should be memorialized and believes that the Rule 14-a procedures are sufficient to accomplish this goal. The Association therefore believes that Rule 14-a should be adopted.

X. RULE 17

The Advisory Committee does not recommend the adoption of Rule 17, which sets limits on the length of memoranda of law, affidavits, and affirmations.[1]

The Association disagrees with the reasoning of the Advisory Committee in recommending that Rule 17 not be adopted. The Advisory Committee reasons that there are some cases "that simply require more extensive analysis," and that the parties in those cases should not be arbitrarily limited in terms of the length of their papers. But that is surely also the case in the Commercial Division, in which cases are often complex, both legally and factually, and may be document intensive. Moreover, the Advisory Committee recommends against the adoption of certain other rules outside of the Commercial Division specifically because those rules were deemed unnecessary, and potentially burdensome, for what are often *less* complex cases. Accordingly, the Association recommends the adoption of Rule 17.

XI. RULE 19-a

[1] The Association notes that Rule 17 no longer sets a page limit, but rather has been amended to set word limits. Specifically, Rule 17 limits briefs, memoranda of law, affirmations, and affidavits to 7,000 words, with reply briefs limited to 4,200 words.

In the case of Rule 19-a, the Advisory Committee not only recommended the adoption of Rule 19-a, but in fact recommended that it be mandatory in all cases rather than only those where the court directs. Rule 19-a requires that a numbered list of undisputed material facts be annexed to all summary judgment motions, to which the opposing party can then respond.

Although the Association believes that such statements can be helpful to the parties and the judge in certain cases, the Association also recognizes that there are certain cases in which requiring a statement of undisputed facts will add an additional cost and burden without adding any value. Further, as some Commercial Division judges over the years have not required the submission of a Rule 19-a statement, it is clear that the preparation and submission of such a statement, in certain cases, before certain judges, would serve no purpose. The Association therefore recommends that Rule 19-a be adopted in its original form, such that a Rule 19-a statement of undisputed facts would be required only where the court believes that it will genuinely increase efficiency.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Council on Judicial Administration, Chair

Michael P. Regan
State Courts of Superior Jurisdiction Committee, Chair

Barbara L. Seniawski
Litigation Committee, Chair

<u>Primary Drafters</u>
Bart J. Eagle
Kara D. Ford
Adrienne B. Koch

STATE OF NEW YORK
UNIFIED COURT SYSTEM
360 ADAMS STREET
BROOKLYN, NY 11201
(347) 296-1527

LAWRENCE K. MARKS
Chief Administrative Judge

JEFFREY S. SUNSHINE
Statewide Coordinating Judge for
Matrimonial Cases

John W. McConnell, Esq
Counsel
Office of Court Administration
25 Beaver Street
New York, NY 10004

December 11, 2018,

Re: Matrimonial Practice and Rules Committee Response to Request for Comment on the Proposed Adoption of Certain Rules of the Commercial Division in other Courts of Civil Jurisdiction

Dear Mr. McConnell:

The Matrimonial Practices Advisory and Rules Committee (the "Committee") has concerns about the adoption of certain rules and recommendations of the Commercial Division of the Supreme Court to matrimonial cases.

After a discussion and analysis of the recommendations, the Committee has concluded that many of these rules are inapplicable and inappropriate in matrimonial litigation, and that matrimonial cases should continue to be governed by the provisions of 22 NYCRR Sections 202.16 and 202.16-a and 202.16-b. We have the following comments regarding specific rules:

Rules 3(a) and 3(b) Appointment of a court-annexed mediator and settlement conference before a judge not assigned to the case

Matrimonial cases have their own protocols for mediation which must consider issues of allegations or findings of domestic violence or power imbalances. There are no (summary) jury trials in matrimonial cases. In fact, with the enactment of DRL 170 (7), most divorces are resolved on the grounds of an irretrievable breakdown in the marital relationship for a period more than 6 month. The only issue that a jury can be demanded on is the issue of grounds, and there are few if any jury trials statewide. Certainly, trials on the issues of custody, parenting time, orders of protection, child support and maintenance would not be appropriate for summary jury trials.

Referring cases to a different Judge in a matrimonial action for a conference would defeat the one judge/one family concept, especially in a non-jury case where the Judge has handled the matter from inception to trial. The additional strain on judicial resources would make the rule impracticable in matrimonial actions.

Rule 7 Preliminary Conferences
There are specific rules contained in 22 NYCRR Section 202.16(f)(1) regarding attendance at Preliminary Conferences. As required by said court rule, many judges in matrimonial actions require the parties to appear given the emotional, personal nature of the litigation and the need for the parties to participate in the conference and hear from the Judge.

Rules 11-a and 11-d Limitations on interrogatories and depositions.
These rules are contrary to the fundamental principles of broad discovery in matrimonial actions governed by DRL Section 236(B)(4), where the goal is to obtain as much information as possible about the parties' financial circumstances. Additionally, interrogatories are particularly important in cases with self-represented litigants who are better able to access this discovery tool because it is easier and less expensive. In the First and Second Departments, there is no discovery on the issue of grounds, custody or orders of protection absent special circumstances. A limitation on depositions would lead to longer trials and fewer settlements. Certainly, trial judges should have the right to limit discovery if it is a fishing expedition, and for the most part, that has been successful.

Rule 11-b Privilege Logs
Privilege logs are rarely if ever used in matrimonial ligation.

Rule 11e- Responses and Objections to Document Requests
This rule is inapplicable to matrimonial discovery in that broad and complete disclosure is already mandated.

Rule 19-a Motions for Summary Judgment; Statement of Material Facts
Summary judgment motions for the most part are not utilized in contested matrimonial cases.

Rule 20 Temporary Restraining Orders- Copies of Papers
The Committee believes this rule can be useful in matrimonial ligation and recommends the application of this rule with a limitation that only the Order to Show cause portion of the application need be provided in advance and continuing the exception in Uniform Rule 202.7(f) for requests for Orders of Protection. Often in matrimonial litigation, the supporting affidavit is signed at the Courthouse when the papers are submitted. Pre-arranged times for these application with judges and parts where practicable should be encouraged.

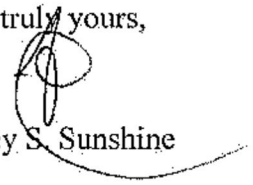
Rule 34 Staggered court appearances
The committee notes that most matrimonial judges allow for staggered court appearances as the needs of any case or attorneys dictate. However, given that many

matrimonial practitioners also practice in the Family Courts, where in some Counties the cases have specific time requirements and cannot be delayed, the efficacy of this rule would be lost in a matrimonial part. Family Court cases are often scheduled on short notice due to a 1028 or 1029 application or the arrest of a juvenile and take precedence over a divorce case We believe this calendar management tool should be left to the sound discretion of the judges and local practice.

Rule 21 – Courtesy Copies

Lastly, contrary to the recommendation of the Advisory Committee on Civil Practice, the Committee agrees with Commercial Division's Rule 21 which bars courtesy copies on motions submitted in hard copy and requires courtesy copies on motions submitted by electronic filing. This rule is consistent with the needs and practices of the matrimonial bar and judges generally, but additionally, the Committee believes this can also be left to the discretion of the judge.

Very truly yours,



Jeffrey S. Sunshine

cc: Susan Kaufman, Esq.

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

ZACHARY W. CARTER
Corporation Counsel

(212) 356-0800
FAX: (212) 356-0809
zcarter@law.nyc.gov

January 14, 2019

By Email

John W. McConnell
Counsel
Office of Court Administration
25 Beaver Street, 11th Fl.
New York, NY 10004
rulecomments@nycourts.gov

Re: Proposed Adoption of Commercial Division Rule 11-b in Other Courts of Civil Jurisdiction

Mr. McConnell:

We write on behalf of the New York City Law Department (the "Law Department") in response to the Administrative Board's Request for Public Comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction. The Law Department strongly supports the Advisory Committee's recommendations to:

1. Adopt the provisions of Commercial Division Rule 11-b that encourage the use of a categorical approach rather than a document-by-document approach to privilege logs; and
2. Eliminate the requirement that attorney-client communications and attorney work product created after the filing of the complaint be included in the privilege log, unless otherwise ordered.

With the proliferation of email and other forms of electronically stored information ("ESI"), the volume of material that litigants must collect, review, and produce during discovery has increased dramatically. As a result, discovery costs in many cases have skyrocketed, particularly when it comes to reviewing documents and asserting privilege. The Sedona Conference recognizes that "[privilege] logging is arguably the most burdensome and time consuming task a litigant faces during the document production process." 17 Sedona Conf. J. 155, Commentary on Protection of Privileged ESI (2016).

A categorical privilege log permits common documents to be grouped in different classes rather than requiring all the details about each document to be separately logged. Our experience

substantially reduce the time and cost of preparing privilege logs in cases with large document productions while continuing to provide sufficient information to the litigants and the courts. The use of categorical logs allows for a more efficient document review process, letting the parties devote more of their resources to identifying and producing relevant documents and less to logging massive amounts of detail that is ordinarily unnecessary.

The Law Department also supports the Committee's recommendation that post-litigation attorney-client communications and attorney work product do not need to be logged unless otherwise ordered by the court. Too often requesting parties are unwilling to agree to limit discovery to documents that predate the complaint and insist that post-litigation attorney-client communications and work product continue to be logged. This, in our view, results in a great deal of inefficiency by forcing the responding party to either contest the issue before the court or undertake the burden and expense of logging an inordinate number of clearly privileged documents that ultimately provide no benefit to the requesting party. It not only wastes valuable court resources, but also interferes with the producing party's ability to quickly and efficiently review and produce documents.

In sum, these two proposals, if enacted, will significantly reduce the costs and burdens of large e-discovery cases without diminishing the utility of the discovery process.

We thank the Administrative Board for this opportunity to comment.

Respectfully submitted,

Zachary W. Carter

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

January 28, 2019

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th floor
New York, NY 10004

Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the Proposed Adoption of Certain Rules of the Commercial Division in Other Courts of Civil Jurisdiction, published October 15, 2018. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of more than 125 law firms with litigation practices (primarily large and mid-sized firms) as well as the Attorney General's Office. Our members' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the Statewide Rules of the Commercial Division and as well as practice in non-commercial Parts of the New York Supreme Court.

Agreement with Advisory Committee Recommendations

We generally support consideration of rules that have been tested in the Commercial Division for application in other civil cases, and we agree with the recommendations of

the Advisory Committee on Civil Practice to adopt Rules 2 (to the extent of requiring counsel immediately to inform the Court of settlements when a motion is pending or trial date has been set), 3(a) (with the amendment proposed by the Advisory Committee), 3(b), 11-b, 14-a (to the extent of requiring that all decisions or agreements at conferences be reduced to writing and either stipulated to or so ordered), 19-a, 20, 22 (to the extent of its authorization of parties to request oral argument on the face of their motion papers) and 34, substantially for the reasons articulated by the Advisory Committee in its July 2018 Report. We note, however, that we do not support the Advisory Committee's suggestion that Rule 19-a statements be made mandatory for summary judgment motions in all actions; not all judges find them useful and the costs to the parties of preparing such statements may be disproportionate to their value and to the amount in controversy.

Com. Div. Rule 6: Bookmarking

The Advisory Committee declined to recommend adoption of Rule 6 for civil cases outside of the Commercial Division, including its provision for filing bookmarked memoranda and affidavits, on the ground that bookmarking is too burdensome. In our experience, filing an affidavit with its exhibits as a single, bookmarked PDF often is more efficient than filing the affidavit and each exhibit as a separate PDF, as is required for NYSCEF filings outside of the Commercial Division, *see* NYSCEF User Manual at 16. Accordingly, we recommend that parties in all types of civil actions have the option—but not be required—to file a bookmarked PDF.

Com. Div. Rule 8: Consultation Before Conferences

The Advisory Committee also declined to recommend Rule 8 for application to civil cases outside the Commercial Division. Rule 8 requires counsel to consult about settlement, disclosure, ADR and e-discovery issues prior to conferences. Notably, while Uniform Rule 202.12 specifies that such issues are to be addressed at the preliminary conference, it does not require advance consultation. We recommend that Rule 8's advance consultation requirement be incorporated into Uniform Rule 202.12 because we believe that in all case types the conference process is more efficient when the parties already have conferred to identify points of agreement and what they disagree about—and in some instances, parties can come to agreement through that procedure and end up not having to take up the Court's time with a conference. We note that Fed. R. Civ. P. 26(f) requires parties to confer prior to the federal equivalent of the preliminary conference, and in our experience that requirement makes the process of establishing a plan for discovery and other steps in the pre-trial process more efficient.

Com. Div. Rule 11-a: Limitations on Interrogatories

We agree with the Advisory Committee's recommendation that Rule 11-a be adopted for use outside the Commercial Division, but we note that subsection (b) needs to be amended by adding to the list of permitted topics expert disclosure pursuant to CPLR 3101(d)(1). The Advisory Committee has recommended against adoption of Com. Div.

Rule 13(c)'s expert disclosure provisions, and without them a party needs to be able to propound interrogatories pursuant to CPLR 3101(d)(1) in order to be able to prepare for an expert's testimony at trial.

Com. Div. Rule 11-e: Responses & Objections to Document Requests

We also support the adoption of Rule 11-e to apply in other civil cases, but without subsections (c) or (d) of the rule. Subsection (c) requires that the parties agree to a date by which document discovery will be completed, and that they reach such agreement by the commencement of depositions; subsection (d) requires that the producing party certify—for each individual document request—either that production is complete or that the party has no responsive documents. These provisions are widely regarded as unduly burdensome and in our experience parties tend either to stipulate around them or simply to ignore them. We believe that subsection (c) has not appreciably improved the timeliness or orderliness with which pretrial disclosure proceeds in Commercial Division cases. And outside of the Commercial Division, Uniform Rule 202.12(c)(2) already provides for the establishment of a timetable for the completion of various aspects of disclosure, which can be revisited in the course of compliance conferences scheduled pursuant to Uniform Rule 202.12(j).

Subsection (d) of Rule 11-e is disfavored among practitioners because in essence it requires the producing party to prove a negative fact: that there are no more responsive documents. A witness can only represent with personal knowledge what he or she knows, but in the case of negative facts any representation always is subject to the limits of the witness's knowledge. The risks of representing that a document production is complete were famously illustrated by a Florida court in *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, CA 03-5045 AI (Fla. 15th Jud. Cir. Mar. 23, 2005). In *Coleman*, when a representation that document production was complete was rendered inaccurate by the subsequent identification of additional responsive records that had not been produced, the court granted a default judgment as a sanction (later vacated on appeal). Just as the Advisory Committee concluded that the certification requirement stated in Com. Div. Rule 11-b(d) was unnecessary, given counsel's obligation to conduct privilege reviews in a lawful, reasonable and good faith manner, so too is the certification requirement in Rule 11-e(d) unnecessary to parties' proper performance of their obligations to object or produce under CPLR 3122.

Com. Div. Rule 12: Non-Appearance at Conference

The Advisory Committee found Rule 12 to be duplicative of existing rules and did not recommend its adoption for that reason. We note that Com. Div. Rule 12 goes beyond other rules in its express authorization of the Court to impose an appropriate non-monetary sanction other than those itemized in Uniform Rule 202.27, and that Rule 130–2.1 provides only for monetary sanctions. We believe Justices are best able to enforce compliance with rules when they have flexibility to determine what is likely to be the

most effective yet fair sanction in a given situation. Accordingly, we support a rule that recognizes that power in Justices outside of the Commercial Division, and note that amendment of Rule 130–2.1 is likely the most expedient means to that end.

Com. Div. Rule 13(b): Documents Sought as Condition Precedent to Deposition

The Advisory Committee recommends against adoption of this provision for sanctions when records are requested in advance of a deposition but not timely produced, on the ground that CPLR 3127 adequately empowers the Court to address such compliance failures. We disagree. We frequently see litigation delayed when a party unjustifiably fails to produce its documents in advance of its deposition and Rule 13(b) is unique in specifically addressing the problem. The Advisory Committee also saw a potential for problems that could result from application of the rule when the required documents are in the possession of non-parties. The introductory clause of Rule 13(b) could be revised to address that concern: "If a party seeks documents from another party as a condition precedent to a deposition, the documents are not produced by the date fixed and the party of whom they are requested is later determined to have had such documents in its custody or control, the party seeking disclosure may ask . . . ."

Com. Div. Rule 29: Identification of Deposition Testimony

The Advisory Committee did not recommend adoption of this rule because it saw inconsistencies between the rule and CPLR 3117, particularly with regard to use of deposition testimony for impeachment purposes. We agree that deposition testimony should be available to use for impeachment purposes without having to be identified prior to trial, but believe this defect in Rule 29 can easily be remedied with the addition of a sentence to the end of the rule: "The rule shall not be construed in a manner that affects the ability of a party to use deposition testimony at trial in accordance with CPLR 3117(a)." We recommend adoption of Rule 29, with that amendment, for use in other civil matters.

Com. Div. Rule 32: Scheduling of Witnesses

The Advisory Committee did not recommend adoption of this rule on grounds that it would greatly alter New York practice by introducing a pre-trial witness list when the "trial by ambush" it guards against already is adequately regulated. We disagree. We believe that the device of a pre-trial witness list better enables the assigned Justice to manage the trial as well as the rest of his or her court schedule, and similarly assists the parties and their witnesses. We do not see a danger that the Court would cut off a witness's testimony when it exceeds the estimated length disclosed on the witness list, contrary to the Advisory Committee's concerns. We recommend adoption of Rule 32 for use in other civil matters.

Revisiting Other Com. Div. Rules

The Advisory Committee observed that a number of the Commercial Division Rules are unnecessary. We believe these findings should prompt a re-evaluation of the burdens associated with those rules and the benefits they confer, because in our experience some of the Commercial Division rules have been more burdensome and/or less beneficial in practice than originally may have been believed; and because, in our experience, extra rules tend to complicate procedure rather than make it more efficient. We believe the following rules are worthy of such review:

- Rule 1: Uniform Rule 202.12(b) already requires counsel to appear at conferences "thoroughly familiar with the action and authorized to act." It would be more efficient to eliminate from Rule 202.70(g) the language that makes Uniform Rule 202.12 inapplicable to the Commercial Division.

- Rule 2: The Advisory Committee aptly observed that "no purpose would be served" by taking a step in addition to filing discontinuance papers to notify the Part, except when a motion is pending or trial scheduled.

- Rule 4: The Advisory Committee suggested that sending papers by fax is inconsistent with the increasingly prevalent e-filing, and we would note that Uniform Rule 202.5-a is adequate for use in the Commercial Division in cases that are not e-filed; accordingly, Rule 4(a) is superfluous. The Advisory Committee also opined that counsel generally don't need a rule or other judicial direction to decide among them how to communicate and we agree; Rule 4(b) thus may also be unneeded.

- Rule 6: The Advisory Committee "believe[d] that there is no problem within the court system with regard to papers and their form . . . . There are already rules that seem to work well." Apart from the issue of bookmarking PDFs discussed above, we agree. We note, moreover, that an OCA rule that purports to supersede a statute, such as CPLR 2101's provision setting the minimum type size for documents other than the summons at ten point, is of uncertain legal effect. We also believe that Rule 130 is sufficient authority on its own to govern the conduct of parties and their counsel, and that a separate court rule that says Rule 130 applies is superfluous.

- Rule 7: The Advisory Committee believed conferences can be wasteful of parties' resources, and opposed making this rule applicable outside the Commercial Division. We believe that Rule 7 does not sufficiently differ from Uniform Rule 202.12(b) to warrant a separate rule.

- Rule 10: The Advisory Committee believed that Rule 10's requirement that counsel file certification that he or she has discussed ADR with the client invades the attorney-client relationship. We believe that the certification is make-work and have observed that the Justices in New York County's Commercial Division appear to be

uninterested in the certification or whether or not it has been made. As for the other information Rule 10 requires, we are not aware of any Commercial Division Justice asking for any of it other than what motions are anticipated. We do not believe that a separate rule is necessary for that purpose; Uniform Rule 202.12(c) can be amended to include anticipated motions and Com. Div. Rule 10 can be eliminated.

- Rules 11, 11-c, 11-f: The Advisory Committee believed each of these rules is superfluous in the face of the CPLR and other provisions of the Uniform Rules. We agree.

- Rule 15: The Advisory Committee believed judicial discretion as to adjourning conferences should remain unfettered. We do not believe Rule 15 articulates a standard that is not already inherent in the assigned Justice's power to manage his or her docket.

- Rule 16: The Advisory Committee did not recommend adoption of this rule governing motion procedures, deeming it superfluous in the face of CPLR 2214 and 3212 and Uniform Rule 202.8. We agree that, if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 16 would be unnecessary.

- Rule 18: The Advisory Committee did not recommend adoption of this rule governing sur-replies and post-submission papers on the ground that such matters should be left to the judge's discretion. We note in addition that we have not experienced problems with these matters outside of the Commercial Division, which are governed by Uniform Rule 202.8; and that if Uniform Rule 202.70(g) did not make Uniform Rule 202.8 inapplicable to Commercial Division matters, Rule 18 would be unnecessary.

- Rule 21: The Advisory Committee recommended against adoption of this rule on courtesy copies because it viewed the rule as contrary to the goals of paperless e-filing. We find the topic ill-suited to a statewide rule because the requirement of courtesy copies tends to be addressed in local rules in accordance with local preferences and in Part Rules in accordance with the assigned Justice's preferences. Accordingly, Rule 21 seems superfluous.

- Rule 23: The Advisory Committee recommended against adoption of this rule on counsel reminding the Court when it fails to decide a motion within 60 days on grounds that Justices are presumed to know the standards and goals they work against. We agree and add that Rule 23 has been dead letter ever since Uniform Rule 202.8(h) was amended to eliminate its parallel requirement in favor of periodic reports to Justices by the Chief Administrator, effective October 1, 2006. We are not aware that Rule 23 is ever complied with or enforced.

- Rule 25: The Advisory Committee rejected this rule on the scheduling of trial as having the potential to "result in substantial injustice."

- Rule 32-a: The Advisory Committee highlighted the weakness of direct testimony by affidavit: it is "more likely to result in counsel's version of the witness's testimony than that of the witness." For that reason, we believe presentation of direct testimony by affidavit should be at the discretion of the parties, not the Court.

- Rule 33: The Advisory Committee did not recommend adoption of this rule authorizing the Court to preclude evidence for failure to comply with four other Commercial Division rules because it "is vague and, depending on how it is construed, could lead to substantial injustice." We note as well that CPLR 3126, upon which Rule 33 purports to be grounded, provides penalties for "fail[ure] to disclose information . . . pursuant to [Article 31 of the CPLR]." The Commercial Division rules to which Rule 33 applies that penalty are not among the matters addressed by Article 31 of the CPLR, however; they are instead rules governing trial exhibits (Rule 28), the presentation to the Court of deposition testimony to be used at trial (Rule 29), pre-trial memoranda, exhibit books and jury questionnaires (Rule 31); and trial witness lists (Rule 32). That legal defect in Rule 33 and the drastic penalties it purports to provide for procedural missteps lead us to question whether the rule should remain in place.

* * *

Again, we are grateful for the opportunity to comment on the proposal to adopt some of the Commercial Division Rules for use in other types of civil cases. If the OCA would like elaboration on any of the foregoing, please let us know.

Respectfully submitted,

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

s/John D. Bové
MACA President
Managing Clerk
Mound Cotton Wollan
& Greengrass LLP