



NEW YORK STATE  
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS  
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL  
COUNSEL

MEMORANDUM

October 27, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed New Rule of the Commercial Division Addressing Consultation on Expert Testimony in Advance of Trial

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The Administrative Board of the Courts is seeking public comment on a proposed new rule of the Commercial Division (22 NYCRR §202.70[g]), proffered by the Commercial Division Advisory Council, to make clear the court's power to require counsel to consult in good faith on expert testimony in advance of trial of Commercial Division matters. The text of the proposed rule is as follows:

\_\_\_\_\_. **Consultation Regarding Expert Testimony.**

**The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.**

As discussed in the Council's memorandum supporting the proposal (Exh. A), such consultation is expected to narrow areas of disagreement between experts, streamline the trial process, and reduce the volume of technical testimony at trial.

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Persons wishing to comment on the proposed rule should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 20, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

**EXHIBIT A**

## MEMORANDUM

**TO:** Commercial Division Advisory Council  
**FROM:** Subcommittee on Procedural Rules to Promote Efficient Case Resolution  
**DATE:** September 12, 2016  
**RE:** **Proposal for Streamlining Expert Testimony at Trial**

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### INTRODUCTION AND EXECUTIVE SUMMARY

The year 2013 marked a watershed event in the history of commercial litigation in the New York State Court System. By administrative order issued in September of that year, then-Chief Administrative Judge A. Gail Prudenti promulgated Statewide Commercial Division Rule 13, creating for Commercial Division litigants and their counsel a presumption in favor of fulsome expert disclosure. Among the justifications provided for this enhanced expert disclosure were the centrality of expert testimony to most commercial disputes and the concomitant importance to the litigants of fleshing out fully the scope of the expert testimony being offered and testing its strengths and weaknesses. The hope was that parties would have a fuller understanding of their respective cases for the purposes of assessing settlement options and, if necessary, preparing for trial. As was true with the numerous other amendments to the Commercial Division Rules promulgated subsequently, the overarching goal of Rule 13 was to promote efficiency and predictability in the adjudication of commercial disputes in the New York State Courts. Enhanced expert disclosure has now been a staple of Commercial Division practice for three years, and by all accounts, it has been a welcome change, furthering the twin goals of predictability and efficiency in resolving commercial cases.

Given the success with which Rule 13 has met since its enactment, it is only natural to consider whether further expert-centric enhancements could streamline the adjudicative process

even further. The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the “Subcommittee”) respectfully submits that expert testimony could be rendered that much more useful, not to mention digestible, by attempting to narrow disagreement among competing experts. Doing so could well reduce the volume of technical testimony through which the fact finder will be forced to sift, thereby reducing trial time and enhancing efficiencies.

The process of narrowing down areas of dispute among experts can be achieved through a court-mandated addition to the processes attendant to trial preparation. Currently, the Statewide Rules of the Commercial Division impose several pretrial obligations upon the litigants, all of which are designed to facilitate the orderly presentation of proofs at trial. *See* Rule 27 (motions *in limine*); Rule 28 (exchange of trial exhibits and consultation among counsel to narrow evidentiary issues); Rule 29 (deposition designation and consultation among counsel to narrow evidentiary issues); Rule 30 (at or before pre-trial conference, court may require the parties to prepare a written stipulation of undisputed facts).

In a similar vein, the Subcommittee recommends a proposed rule that would permit the presiding justice, at his or her discretion, to direct counsel for the parties to consult regarding the opinions to be offered by their respective experts at trial. Through this process, and with the benefit of reviewing the experts’ reports and deposition testimony, counsel would endeavor to reach agreement with regard to one or more of the opinions being offered. Any agreement reached, which could be memorialized in an appropriate stipulation, would necessarily reduce the amount of expert testimony necessary at trial.

## CONCLUSION

For the foregoing reasons, the Subcommittee recommends that:

- (1) the Council forward to the Chief Administrative Judge the proposed rule set forth in Exhibit A (the "Proposed Rule"); and
- (2) the Proposed Rule be incorporated into the Commercial Division Rules.

**EXHIBIT A**

**PROPOSED RULE**

**AMENDMENT #1**

The Commercial Division Rules shall be amended to add the following:

**“Rule X      Consultation Regarding Expert Testimony**

The court may direct that prior to the pre-trial conference, counsel for the parties consult in good faith to identify those aspects of their respective experts’ anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.