Report of the Office of Court Administration *to the* Chief Judge *on the* Commercial Division Focus Groups

JULY 2006

THE COMMERCIAL DIVISION *of the* SUPREME COURT
of the STATE *of* NEW YORK

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EXECUTIVE SUMMARY

The Commercial Division is functioning well and provides many practices and innovations worthy of consideration for use in other parts of the New York State court system. That is the clear-cut conclusion of this Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups.*

The Focus Groups, conducted in five locations throughout the State between December 2005 and February 2006, brought together current and retired judges, prominent commercial litigators and in-house counsel of major corporations for a meaningful dialogue about the Commercial Division. Their discussions generated a list of ideas that might work well elsewhere. This was not the only purpose of the Focus Groups. Consistent with their charge, they also identified areas of the Commercial Division and commercial practice in New York State that could be improved.

The Focus Groups additionally demonstrated that they are a good tool for the court system to gather and analyze information. Thus, one recommendation of this Report is to expand the focus group information-gathering model to other areas in the court system.

The Focus Groups identified a dozen features of the Commercial Division that might be useful in other courts, including:

- require notice of applications for temporary restraining orders ("TROs"), except in extraordinary circumstances;
- address electronic discovery issues at an early conference;
- encourage judges to exercise discretion whether or not to stay discovery, in whole or in part, on the making of a dispositive motion;
- encourage more proactive involvement of judges in settlement and alternative dispute resolution ("ADR");
- improve support for use of outside technology in courtrooms;
- encourage proactive, hands on, but adaptable case management;
- give courts discretion to require a statement of uncontroverted material facts in support of (or in opposition to) a motion for summary judgment;
- impose page limits on motion papers;
- establish uniform rules for other courts;
- increase the use of *in limine* motions;
- increase the use of e-filing; and
- require pre-motion conferences prior to the filing of discovery motions.

These twelve items are the subject of Part V of this Report. The Focus Groups' ideas targeted more specifically at improving the Commercial Division and commercial practice generally in New York State are treated in Part VI of this Report.

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* *For the preparation of this report we are especially grateful to Robert L. Haig, Esq. of Kelley Drye & Warren LLP, and Jeremy R. Feinberg, Esq. and Gretchen Walsh, Esq. of the Office of Court Administration.*

II

A BRIEF HISTORY OF THE COMMERCIAL DIVISION

The Commercial Division evolved from an experiment that began on January 1, 1993, when four Justices of the Supreme Court were assigned to hear commercial cases in New York County. Their courtrooms were called Commercial Parts and the Justices were assigned cases involving contracts, corporations, insurance, the Uniform Commercial Code, business torts, bank transactions, complex real estate matters and other commercial law issues.

This experiment involved significant collaboration between the Bench and Bar. Indeed, the idea behind a permanent Commercial Division came from the State Bar Association's Commercial and Federal Litigation Section. Its comprehensive 1995 report studied the Commercial Parts initiative, deemed it highly successful and recommended that it be institutionalized Statewide. The 1995 report advanced several reasons supporting the creation of a separate division to handle commercial matters, including New York's role as a center of commerce, which the Section believed a commercial court would enhance, and the unique attributes and complexity of commercial cases, which warrant specialized judicial treatment. Such a court could combat a disturbing trend: businesses were increasingly resorting to other forums such as Federal District Court, Delaware Chancery Court and private ADR methods to avoid what had been perceived as New York's overburdened state court system.

In response to the 1995 report, Chief Judge Judith S. Kaye created the Commercial Courts Task Force, co-chaired by Hon. E. Leo Milonas and Robert L. Haig, Esq., to examine the Section's report and develop a blueprint for its implementation. The Task Force called for establishing a Commercial Division of the Supreme Court in areas of the State with significant commercial litigation. On November 6, 1995, the Commercial Division officially opened its doors in New York and Monroe Counties. Since then, the Division has expanded to Albany, Erie, Kings, Nassau, Queens, Suffolk and Westchester Counties, and throughout the Seventh Judicial District. Current Justices of the Division are listed in Appendix A to this Report. The *Commercial Division Law Report*, issued four times per year in hard copy and electronically on the Commercial Division website, contains summaries of recent leading opinions of the Commercial Division Justices. The Commercial Division website can be found at www.nycourts.gov/comdiv.

The State's business community, the commercial bar as a whole, and the Commercial and Federal Litigation Section in particular, have all responded enthusiastically to the Commercial Division. The Section referred to the Division as "a case study in successful judicial administration." Business and legal publications throughout the United States have commented favorably on the Commercial Division. At the time of its inception, the Wall Street Journal stated "[w]hile several other States have been pushing for trial courts devoted exclusively to business litigation, New York is the first in which a general trial court has implemented such a program." The National Law Journal touted the Commercial Division Justices for their rigorous management of cases through "rapid disposition of motion practice, realistic and practical scheduling, and [the early setting of] trial dates…to promote efficiency." The Division has also received excellent reviews from business leaders and groups like the New York State Business Council. For example, in 1999, Peter I. Bijur, Chairman of The Business Council of New York State, remarked "We have now gone in four years' time from a court system that often evoked frustration among businesses, to a business court that is the envy of other states."

Ten and a half years after formally opening its doors, the Commercial Division has improved all aspects of commercial litigation, achieving several goals set by Chief Judge Kaye at the time of its creation: providing litigants with a justice system commensurate with New York's status as a world commercial and finance center and its historical role as an innovator in commercial law; enhancing the State's business climate; and creating a laboratory for new courtroom technologies and innovative practices that could be used elsewhere in the court system. All of the successes of the Commercial Division have led to a much greater volume of cases. In 2005, there were an estimated 6,657 cases filed or brought in the Commercial Division Statewide. That number grew nearly ten percent from an estimated 6,095 cases in 2004. Based on early returns from the first half of 2006, it appears that a similar rate of growth can be expected for this year as well. Further information about the Commercial Division as well as numerous other aspects of commercial litigation in state courts is available in the comprehensive five volume treatise entitled *Commercial Litigation in New York State Courts*, Second Edition (Robert L. Haig ed.) (West & New York County Lawyers' Association 2005).

III

THE COMMERCIAL DIVISION FOCUS GROUP PROJECT

A common strategic planning tool in the private sector, focus groups are unusual in our court system. Nonetheless, the Commercial Division Focus Groups were envisioned as a means of promoting candid dialogue among judges, lawyers and clients to generate new ideas, identify potential areas of improvement, and assess application of "best practices" that have evolved in the Commercial Division to the court system as a whole.

The Focus Groups were structured to ensure that the discussions would remain on point and key subjects would be addressed, while allowing for a range of views and frank discussion. Each session was limited to between twelve and eighteen participants, balanced among experienced litigators, in-house counsel from major corporations, and active and retired judges. Invitations – sent by letter by Chief Administrative Judge Jonathan Lippman – included a pre-set list of topics such as Commercial Division rules, the role of the judge and court staff, ADR, technology and general performance evaluation. A sample invitation letter is annexed as Appendix B, and the list of Focus Group topics is annexed as Appendix C.

Each session was moderated by an experienced commercial litigator, Robert L. Haig, who in addition to serving as Co-Chair of the Commercial Courts Task Force, has from the start had substantial involvement in the expansion and refinement of the Commercial Division. Participants were assured that commentary would be kept confidential; stenographic transcriptions of each Focus Group session referred to participants by number, rather than name.

The Focus Groups took place in five locations over three months. The first two sessions were held in December 2005 in New York and Nassau Counties. At the time, the Uniform Commercial Division Rules (22 NYCRR 202.70) had not yet been adopted, and discussion included the varied practices that were in effect at that time as well as the proposed uniform rules, which had already been the subject of public comment. The new rules, effective in January 2006, provided fertile ground for discussion at the subsequent sessions in Monroe in January, and in Albany and Onondaga Counties in February. A copy of the Uniform

Commercial Division Rules is annexed as Appendix D to this Report.

Onondaga County, the only location that did not have a Commercial Division, was chosen because it is a candidate for Commercial Division expansion. Indeed, as one attorney at the Onondaga Focus Group recognized, the Fifth Judicial District is the only one with a major metropolitan area (Syracuse) without a Commercial Division. Despite the presence of multiple Federal District and Magistrate Judges with courtrooms and chambers in Syracuse, in-house litigation counsel from the area indicated that they would be pleased to have a state court alternative for commercial disputes in Syracuse.

The use of the Focus Groups to gather feedback about the Commercial Division was a successful experiment that bodes well for the model's continued use throughout the court system. The Commercial Division was envisioned as only the first of several areas in which frank discussion through Focus Groups could lead to useful feedback. The New York court system had no past experience from which to draw upon in designing and implementing this new means of research, however, leading to a number of concerns that ultimately proved unfounded.

One concern had been whether people would actually attend and participate. In fact, they did, taking time out of their days, whether they were lawyers, clients or judges. Some even traveled substantial distances to participate in Focus Groups well outside their home counties. Including judges in the Focus Groups raised two other concerns: would other participants be intimidated, and would judges dominate the discussion? Neither concern proved to be a problem. All speakers appeared to be open and free with their comments. The moderator kept discussion flowing, and no particular speaker or group of speakers dominated. Another concern that did not materialize was that participants would simply air complaints rather than provide constructive feedback and comments. Although participants had ample opportunity, they did not criticize the Commercial Division significantly and their remarks were largely positive and constructive.

Clearly, the court system should embrace focus groups as an information-gathering tool for use in other areas.

IV

WHAT THE FOCUS GROUPS REVEALED

Many common themes emerged. Chief among these was that the Commercial Division has achieved a great deal of success and is viewed as a positive development in which the court system can and should take pride. Among many illustrative comments is this one from a commercial litigator participant:

> The only comment I would make is that, by and large, the members of the bar are very happy with the commercial parts. I think, by and large, people are very happy and appreciate the fact that OCA did establish it…. But I think the certainty and the regularity have been a real incentive just to bring cases in the Commercial Division.

Indeed, enhanced predictability has made the Commercial Division a popular choice. As another commercial litigator stated:

> It's two things. I think that, one, when you go in, the judges are going to be familiar with, say, the rules regarding restrictive covenants so you're not explaining something for the first time.
>
> I think the second thing is there is an expectation that the court is going to give you time, if you need it, to sit down and hammer through, say, a contested TRO or something where the business is being jeopardized.
>
> And so, while you can't predict the result, you can at least say to the client, "I'm going to go in and I'll be able to present the information and we should get a reasonable result," which is not necessarily the case in an ordinary IAS part, where there are a million things going on.
>
> So, when I look at predictability, it's that the judges are familiar with the general issues in commercial practice and they will give you the time if you need it.

A senior in-house litigation counsel noted that the Commercial Division is particularly sensitive to the difficulties of litigation involving business strategies, trade secrets and other confidential information, which if made public could cause more difficulty than the underlying litigation itself:

> The other factor that we appreciate in the Commercial Division is the appreciation or the perceived appreciation from the judges in that area of the proprietary nature of some of the issues that may come up, and there's some concern that absent a Commercial Division that those issues may not be appreciated across the board but particularly when you're dealing with sensitive business strategy issues and those sort of things that are not clearly IP issues but have some proprietary concerns that we want redacted from records and such.

Even participants who have taken a skeptical view of specialized courts had kind words for the Commercial Division. As a former judge stated:

> I have been opposed to specialized parts and specialized divisions as a matter of principle, because I really believe in the merger of the courts. But having said that I have to concede the Commercial Division seems to be working well where we have it. I'm not sure it is exportable to the smaller counties, but it certainly is working well where we have had it. So I have to put a little asterisk next to my "merge the court" in those specialized courts for this court here.

The Focus Groups were seeking not only feedback on the Commercial Division as a whole but also reaction to certain aspects of its operation and practice. The next section of this Report will address successes identified as worthy of consideration for use in other areas of the court system. These are not ranked in terms of priority or degree of consensus, because the participants were asked not to attempt any rankings. The output from the Focus Groups is exactly what was hoped for: a list of good ideas that may benefit other courts, judges, lawyers and litigants.

There seems to be no doubt that the recently adopted uniform rules will significantly change current practice in the Commercial Division. Indeed, much of the discussion in the final three Focus Groups centered on the new rules. Focus Group participants had many other suggestions as to how to improve the Commercial Division, which are addressed in Part VI of this Report.

V

IDEAS FOR EXPORTATION TO OTHER PARTS OF THE COURT SYSTEM

A. Use of TROs on Notice Except in Extraordinary Circumstances

The Focus Groups overwhelmingly supported wider usage of the Commercial Division Rule requiring notice to the adversary in applications seeking Temporary Restraining Orders, absent unusual circumstances. Although the Focus Groups generally did not "vote" on any of their suggestions, whenever the moderator asked if there was anyone opposed to this proposition, no one dissented.

Uniform Commercial Division Rule 20 requires that unless the moving party, "can demonstrate that there will be significant prejudice by reason of giving notice," applications for TROs should only be made with notice to the adversary. As one upstate practitioner noted, the "significant prejudice" required would be very rare, with the burden falling squarely on the moving party:

> [O]ne, it is impractical because you just don't have time. Literally, you just heard somebody is doing something and you have to run and get the judge and you can't take the time to try to track down the attorney, which is a very small number of cases. Two, when you tell your adversary that you are going to do something, your adversary takes the action in anticipation of the TRO. Other than those two circumstances, I can't imagine a situation in which you shouldn't give notice to your adversary.

Although Uniform Commercial Division Rule 20 codifies the practice that has long existed in the Commercial Division, and in many other courts, participants raised a variety of potential problems that could ensue unless the practice was followed in all courts. Some noted that litigants might engage in forum shopping, refuse to bring cases in the Commercial Division, or disguise commercial matters in the hope of litigating in other courts where they could seek TROs without notice.

Another major concern was incongruous results in the granting and denial of TROs. Participants shared "war stories" of different judges treating multiple TRO applications in the same case inconsistently and of procedural "nightmares" in which one losing party appealed and another losing party instead sought relief in the court that issued the TRO. These problems, it was agreed, could be avoided if TROs normally would be available only on notice, allowing the parties and the court to coordinate.

Requiring notice to the adversary on TRO applications would also have some positive side effects according to the Focus Groups. Several judges, relying on their experience, recognized that requiring notice might obviate the need for the TRO entirely. Appearing in chambers and working with the court, the parties might be able to resolve their differences sufficiently by stipulation and prepare for a preliminary injunction hearing. Another participant commented that requiring notice in all but the rarest of cases not only fosters fairness but also helps speed resolutions:

> That is particularly of interest to the business person who wants to get to the business courts, as some of our clients call it, because they believe they're going to get a more expeditious resolution, when we spend the first month and a half of the case dealing with whether or not notice should have been given or shouldn't have been given up to the Appellate Division, back down to the trial Court. Notice is fairness.

Accordingly, the Focus Groups' loud and clear recommendation is to export the requirement of notice for TRO applications to the rest of the New York court system.

B. Address Electronic Discovery Issues Before They Become Problems

The Focus Groups revealed that issues of electronic discovery are emerging throughout New York State courts, and in the Commercial Division in particular. Some jurisdictions have thus far had relatively little experience with electronic discovery, while others have seen electronic discovery issues become so hotly contested that they overshadow the entire case. That range of experience did not prevent the Focus Groups from reaching a general consensus that electronic discovery issues were only going to grow in magnitude and frequency and that they were not going to go away any time soon. Participants recognized that "everybody has a computer," that there has been "an exponential explosion of evidentiary material," and that there is a "delicious and wonderful feeling" to be able to get damning evidence from a computer that might otherwise not have been available. As one senior litigator from New York County lamented:

> It is going to affect every one of the rules. It is going to affect how you litigate and whether you can litigate any complex litigation; and, of course, it starts with the question of how do you handle discovery and then the next question is if you ever get [through] discovery, how do you handle trials.

In an attempt to address this powerful new force in litigation, Uniform Commercial Division Rule 8(b) requires the parties to consult about nine enumerated electronic discovery issues in advance of the preliminary conference, and then address them with the court at that conference. Even at Focus Group sessions preceding promulgation of Uniform Commercial Division Rule 8(b), participants generally favored its approach. They suggested that although some types of cases (*e.g.,* automobile accidents and medical malpractice) might not present the same magnitude of electronic discovery issues as commercial cases, it would be worth considering sharing this practice with other courts (particularly in those counties without Commercial Divisions, but with equally complex cases).

Those preliminary conferences can head off many electronic discovery issues. Spoliation motions have become tactical weapons in litigation, and electronic discovery a "gotcha game," where litigators are sometimes more interested in obtaining adverse inference instructions than in obtaining the documents demanded by their discovery requests. As participants noted, those scenarios can be minimized through preliminary conferences when the court can also address any unfair financial burdens of electronic discovery or even stay discovery (as discussed in the next section) pending a dispositive motion.

Although some participants were concerned that addressing electronic discovery issues at an initial conference risked filling every case with battles over electronic evidence, the consensus was that these issues were likely to arise anyway, with more disruptive effects, later in the litigation. The view was that the disruptions could be minimized if the parties and the court worked to resolve them early in the case. The rationale for addressing electronic discovery up front was neatly summarized by one upstate Commercial Division Justice, who commented:

> I guess it's here to stay and we are going to have to learn to deal with it and that's the way it is, and all of us judges are going to have to accommodate ourselves to it and everybody else. Electronic life is a fundamental reality and we have to learn to deal with it.

Using the preliminary conference to address electronic discovery issues is one way to "learn to deal with it." It should be among the Commercial Division practices considered for use elsewhere in the New York courts, particularly as these issues inevitably continue to grow in size and frequency.

C. Issue Stays of Discovery Upon Dispositive Motions on a Case-By-Case Basis

The effect of a dispositive motion on discovery also generated substantial discussion. Three different rules have existed in New York, along with a multitude of judicial opinions about them, many of which were addressed in the Focus Group sessions. Pursuant to CPLR 3214(b), discovery is stayed pending resolution of a dispositive motion "unless the court orders otherwise." Until recently, a rule of some downstate Division Justices had the practical effect of creating the opposite presumption – that discovery is not stayed "unless the Justice directs." Uniform Commercial Division Rule 11(d) eliminates any presumption and provides that the Justice has discretion in each case whether or not discovery should go forward.

With that backdrop, the participants recognized that a party's role as plaintiff or defendant would likely control its view of the stay. Plaintiffs seeking to get to trial as quickly as possible or gain settlement leverage would generally oppose the stay, while defense counsel, seeking to dispose of meritless or flawed cases as inexpensively as possible, would want the stay. Several participants commented that with the rising costs and burdens of electronic discovery, even a stay of only that type of disclosure could be of substantial benefit. As one practitioner explained:

> I'll say it, for the people who we are representing, our customers, who say they want to get to a courthouse where they believe there will be an ability to resolve the case across the courtroom table as though it was right across the board room table. That's the atmosphere we need to create. And I believe by staying discovery while the motion is pending, saving the business person money, and having the opportunity for the business person to see what the other side has to say about their case…will help us resolve the case.

Participants also recognized that different cases have different needs. To some upstate practitioners, stays should usually be ordered as they allow cases to "take a breath" and prevent disproportionate amounts of money from being spent by clients up front, especially in cases involving questionable merits. Due to the more limited litigation budgets of smaller corporations, practitioners expressed the concern that allowing discovery to proceed could have the detrimental effect of extracting premature settlements (or abandonment of otherwise viable cases) simply to avoid the huge expense associated with discovery. In contrast, other practitioners and judges recognized that limited discovery could be quite useful in some cases even with a motion pending. If there are questions of witness availability, or other evidence where timing is important, the court should have the ability to stay some, but not all, discovery. Similarly, if focused discovery would help resolve a pending motion, it should take place.

The consensus favored a case-by-case approach on stays. As one Division Justice stated:

> What concerns me about the stay of discovery is sometimes it's a very tactical motion to do just that, stay discovery. Not because you really think you have the likelihood of success on the merits. So having the discretion to evaluate that case and deal with that case appropriately I think would be very useful.

The Division Justices who addressed this approach commented that they believed it would not be difficult, from reading the motion papers and hearing argument, to determine whether and to what extent a stay should issue. Participants generally felt that getting the court involved, through early discussions of the motion and a potential stay, might have the additional benefit of helping the court resolve the motion faster (obviating the need for a stay), or establishing protocols to help the court and the parties jointly manage the case more efficiently if it proceeds.

Thus, participants were generally of the view that judges in other New York courts should be encour-

aged to exercise their discretion to decide whether or not to allow a stay upon a dispositive motion. Nevertheless, participants also noted two issues that should be weighed. First, although not inconsistent with CPLR 3214(b), which allows the court to direct that there shall be no stay, it may be necessary to consider legislative action to implement the discretionary rule on a broader basis. Second, participants recognized that deciding stays on a case-by-case basis places an added burden on the courts' already congested dockets.

D. Proactive Involvement of Judges in Settlement and Creative Use of ADR

Discussion of settlement approaches and ADR practices in the Commercial Division generated some particularly innovative ideas. Litigators and in-house counsel who spoke about settlement, although quite complimentary of the Commercial Division's ability to resolve matters, were eager to have the Justices more involved in settlement negotiations. They routinely commented that judicial involvement can make a huge difference in resolving matters or, at a minimum, precipitate further meaningful discussions between the parties that ultimately leads to settlement. For example, at the New York County Focus Group, an in-house counsel commented:

> Any time a judge will get involved, where we think a settlement makes sense and we get the help, we can usually settle it. It's an enormous savings for us, because when I was in private practice, I liked to litigate. When I went "in house," we're a back office expense and it makes no sense if you can be business-like. Also, plaintiff's counsel needs to feel that a judge has said what they did is reasonable, because they are worried about malpractice or they are worried about not being tough. And if the judge actually says that your case is not meritorious, or this part of it is not meritorious, or they say that "this witness is going to kill you," that actually makes a huge impact.

Although all of the Division Justices were willing to help settle matters, several expressed some concern that it might not be appropriate for the court to handle settlement talks in cases involving a bench trial. As one Justice explained:

> The first problem is that the judge says things in the course of the settlement discussion that may give the litigants a view of what the judge's thinking is, and that's not appropriate until you've heard all the case. I think that's wrong.
>
> You may say something that you might change your mind about, and that might influence the outcome of the settlement negotiations, and that's not fair.
>
> The second is that I'm trying a case in which there are different amounts involved and people make offers, and I have to determine what is a fair amount of compensation in a particular case. I've now determined what the defendant is prepared to pay. I'm certainly not going to – the tendency is that I'm not going to find less than that amount.

The participants also identified a related problem: although consent of the parties and their lawyers could cure much of the perceived difficulties in matters to be tried by the court, obtaining that consent could be "illusory." Lawyers might be reluctant to tell a judge that they do not want him or her to handle settlement talks, rendering their consent less than meaningful.

Recognizing that different judges might have different comfort levels, and indeed different levels of success in settling cases, the Focus Groups addressed other approaches of the Commercial Division that could be adapted and used in other New York courts. First, the courts could use a consent form for parties to prepare should they wish, at any time, to have the judge who is to preside over a bench trial oversee and

direct settlement talks. The judge would not need to ask for consent, and the parties could approve the judicial involvement without the risk of feeling pressured to do so. The consent form could also ensure that the parties would not use the judge's involvement in settlement as the basis for a later recusal motion.

Second, participants commented that additional resources should be available to judges in settling cases, such as other judicial or quasi-judicial officers or alternative dispute resolution methods. The Commercial Division has used such resources to varying degrees throughout the State. Although Division Justices had varying views of the effectiveness of each of those options, they generally agreed that being able to use any of them in a specific case would help. The Focus Groups agreed that individual cases might be more or less susceptible to resolution through various different means, but that having court attorney referees, Judicial Hearing Officers, lists of neutrals or even other judges from the same court available for referral, could make a big difference.

Third, the Focus Groups noted with approval the new Uniform Commercial Division Rule 3, permitting Justices to order that the parties attend free mediation through a court referral. The genesis of this rule was the ADR program implemented in New York County where Division Justices have had the ability to send cases to uncompensated mediators for the purpose of resolving all or some of the issues presented. These mediators are lawyers who have attended training sessions focused on mediating commercial matters and who have agreed to volunteer their time to mediate Commercial Division cases. The new Uniform Commercial Division Rule 3 provided a framework for discussion. Those in the New York County Focus Group, where the essence of the rule had been in practice for a long time, gave their practical views and suggestions on how other counties with Commercial Divisions, and indeed other courts, might take advantage of similar practices. Those participants in other Focus Groups, applauding the new rule, offered their respective experiences with ADR outside the New York courts, and offered similarly helpful suggestions on how to make use of this good idea such as (1) avoiding interruptions during mediation since there is a natural momentum that is lost if the parties are free to leave before the matter has been resolved, (2) requiring that the corporate executive responsible for approving the legal bills be present at the mediation, and (3) setting the proper mindset for the parties to a mediation (*i.e.,* each party should be prepared to make a major move and avoid trying to convince the other side of the weaknesses in its case).

Participants acknowledged that many cases, with the right mediator and involvement of the decision-making parties, could reach settlement quickly and effectively through mediation. For example, one in-house counsel at the New York County Focus Group commented "I believe if mediation is orderly and the discussion process begins early, we are more likely ultimately to get a settlement." He also commented that even failed mediations were a good thing because they "began the process." Other participants echoed this sentiment by stating that even if the matters did not settle immediately, mediation could open a fruitful dialogue between business people on each side.

With regard to timing, in response to a Division Justice's comment that he relies on counsel to advise him whether mediation would be most appropriate before or after discovery, an in-house counsel quipped:

> The only thing I would say…is that I wouldn't assume that outside lawyers are giving you fully accurate answers to those questions. I think if you talk to some of us on this side of the table, you would find that, as a general matter, we're ready sooner than the lawyers are.

The Focus Groups' approval of the new rule, however, was tempered by a recognition that mediation should not be forced on parties who are not ready. Some participants complained that even preparing for

mediation in a large complex matter could be costly. Others, including one participant who regularly serves as a mediator, noted that the process simply does not work if the parties are not willing to engage in the effort in good faith:

> People who have mediated I'm sure say the same thing that I have in the opening conference. I make it very clear that both sides are there with the idea of actively participating in settlement discussions and working with the mediator with the purpose of resolving the dispute. If they aren't, we might as well quit right now, go home. Because I'm not going to go any farther because you can't — you cannot force people into mediation. So I think compulsory mediation, basically, is difficult.

Other useful comments emanating from the discussions included providing consistently "user-friendly" mediator lists that would include, in addition to the mediators' names in alphabetical order, detailed information concerning the mediators' backgrounds (*e.g.,* admissions, education and professional experience) and permitting the parties to choose their mediator rather than having one selected for them by the judge. Some proposed encouraging the parties to agree in advance that after a certain time period of volunteer mediation, the parties will share the expense of compensating the mediator should they wish to continue the process. Additional suggestions included developing an anonymous method for parties to declare their desire to participate in mediation so that they do not appear weak in open court; limiting mandatory mediation to certain types of cases (*e.g.,* promissory notes) or monetary limits (*e.g.,* cases involving *ad damnum* clauses of $ X or less); and calling on the Bar to provide feedback on their experiences with the mediators so that ineffective mediators are taken off the list.

Expansion of the Commercial Division's settlement practices and ADR methods to other parts of the court system should bear these suggestions in mind.

E. Support the Use of Technology at Trial

The complex trials that have taken place in the Commercial Division have led to technological innovations as well. The establishment of Courtroom 2000 in New York County (later named the "Courtroom of the Future") allowed jurors to view documents on individual monitors and provided a degree of technological support then unparalleled in the New York courts. Use of the Courtroom's technology has decreased, however, in favor of litigants using their own technology and support teams.

The Focus Groups' discussions left no doubt that supporting litigants' use of technology at trial, and particularly a jury trial, was favored and should be considered for use outside the Commercial Division. Many participants related "war stories" about how trials could never have succeeded without the use of technology. As one practitioner noted:

> You don't need paper. In a commercial case it is death to have jurors try to read seven pieces of correspondence and put it up on the screen. So I think as a goal for our Division would be to look for those techniques which make it easier for those cases.

Being able to use PowerPoint presentations (which one upstate participant called "the toy of the present"), or employing large screens to place highlighted portions of key documents before the trier of fact, seems to make a big difference. Some participants suggested that the court decide in the early conferences whether use of technology at trial should be mandatory. In smaller cases, involving fewer documents, technology might still be helpful: having a large screen in the courtroom to display documents or play back portions of deposition videos could be of great benefit.

Focus Group participants were concerned, however, that the parties work together and not choose technological trial support vendors using conflicting systems. The immense benefits of avoiding a paper trial can quickly diminish if the court is required, at the eleventh hour, to resolve disputes about logistical issues in these situations. One possible solution is to have the parties choose their vendors and then have the vendors jointly select a third party to provide equipment they can all use.

F. Proactive, Hands On, But Adaptable Case Management

One of the hallmarks of the Commercial Division has been the involvement of the Justices in shaping the cases before them from the beginning. Through the use of proactive, hands on, adaptable case management, the Commercial Division has left litigants and their lawyers with a sense that they have had their day in court, and that they have received the judicial attention their matters needed.

Focus Group participants recognized that not every case in the New York state courts needs this degree of judicial involvement, and not every court within the system has the resources to provide it. But there was consensus that spending time at the beginning of a case, setting ground rules, demonstrating interest and energy in resolving a dispute, could pay great dividends for the parties and the court later in the case. There was also a strong consensus that certain aspects of the Commercial Division's flexible and adaptable approach ought to be emphasized, if this approach were to be shared with other parts of the court system.

First, participants noted that it is very important to allow lawyers to work together and agree on realistic deadlines for discovery, motion practice and other scheduling matters. If the court interferes with the lawyers' agreed-to reasonable timetables, hoping to move the case faster, the case can become overly compressed, making it even more expensive and difficult to litigate efficiently. As one lawyer explained, contrasting the Commercial Division with the "rocket docket" in the Eastern District of Virginia:

> I think the [Commercial Division] does a great job. There are some cases in the federal court in Virginia and I think it is a waste of money. The schedules are so tight they don't leave time for reflection or time for consideration. They don't leave time for settlement discussion. I think this court has it mixed pretty right.

Although the participants did not want their cases moved too quickly, they also did not want them to languish. Some judges and lawyers contrasted Commercial Division matters with cases that might never move forward without court involvement. Other participants lamented what happens when a case has a "hiatus." The lawyers, no longer focusing on the matter due to the lack of realistic deadlines they know will be enforced, have to "relearn" the matter quickly, often inefficiently and at great expense, once it restarts. Courts should do what they can to prevent such lulls.

Finally, a number of participants spoke about how useful telephone conferences could be. Division Justices observed that it is simply more cost-effective and efficient for certain conferences to be conducted by telephone rather than in person. This could help combat the inevitable delays in calendar calls, and attendant time waiting in courtrooms. Practitioners – particularly in upstate New York where some have significant travel burdens to reach the court – agreed that being able to "appear" by telephone would be beneficial.

G. Optional Statements of Material Fact on Summary Judgment Motions

New Uniform Commercial Division Rule 19-a permits, but does not require, Division Justices to

direct attorneys filing a motion for summary judgment to provide a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends that there is no genuine issue to be tried." The other party has the opportunity to submit a corresponding statement demonstrating how and why there are issues of fact that should lead to denial of the motion. When such statements of material fact ("SMF") are used, each side is to include citations to evidentiary materials that support (or counter) the assertions that the facts are undisputed.

Participants expressed a wide range of views about the use of SMFs. The general consensus supported the rule's making SMFs permissive rather than mandatory. Some recognized that not every case, and not every Division Justice, would benefit from using SMFs. There was recognition that SMFs are useful if the parties coordinate with each other, perhaps after a conference with the court. If they follow the same format in preparing their papers and ensure that supporting evidence is properly cited, SMFs can be a cost- and time-saving benefit, that can aid in analyzing complex factual matters. Additionally, as one judicial participant noted, an SMF can also force the attorneys to focus on issues, earlier in the case, that they might not ordinarily focus on until later, if at all.

The biggest benefit, however, may be to the clients whose interests are most directly affected by Commercial Division litigation. As one practitioner noted:

> And our customers, the people to whom we provide the service, they all say that to me "I thought you said summary judgment, you'd narrow the proof, and I cannot figure out what this guy's saying about my case." But if there was a statement of uncontested material facts to which the other side must deny and then provide the contrary statement of facts, that would go a long way to assist in the adjudication of justice and satisfy the folks we serve.

The Focus Groups also identified a number of reasons why the court should retain discretion not to use SMFs in a given case. Certain matters, as some judges noted, are simple enough that good questioning at oral argument can get to the heart of the issues without the need for added papers, time or expense. In other matters, where the parties have disparate resources, one party could misuse the SMF to force the other side to respond, paragraph by paragraph, to an unwieldy and lengthy SMF. And in some matters where the attorneys are already quite good at focusing their arguments and engaging each other (and the court) in their briefing, this added tool would not have the same benefit.

For all of these reasons, participants thought it was appropriate to consider SMFs in other parts of the court system, so long as the court has discretion to decide whether they are appropriate in a given case.

H. Require Page Limitations on Motion Papers

Another common theme of discussion in the Focus Groups was that finding ways to decrease the massive mountain of motion papers that passes through the Commercial Division would be a good thing. That volume of paper overburdens judicial resources and only underscores the benefit of new Uniform Commercial Division Rule 17, limiting main and reply briefs to 25 and 15 pages respectively, and affidavits to 25 pages.

Focus Group participants generally favored exporting this simple rule outside the Commercial Division, with two caveats. Among the benefits of the rule, participants commented that limitations protect judges and their staffs from loquacious litigants and unwieldy legal arguments and force attorneys to be more concise in their positions. As one Justice noted, if coupled with statements of material facts, attorneys could remove most or all of the facts from their briefs and use the saved space for additional legal arguments.

Participants did warn, however, of a potential risk of "sideshow" litigation over the length of briefs. A motion to strike the brief or affidavit for exceeding or circumventing space limitations could require more time and effort than would be saved by a shorter document. At a minimum, there might be an increase in applications seeking (and opposing) court approval to exceed the page limit. Elsewhere, a practitioner noted that *pro se* litigants present special problems for this type of rule since they may need greater latitude in presenting their arguments to the court.

Any consideration of page limits should keep these concerns in mind.

I. Use Uniform Rules to Enhance Predictability and Transparency

Particularly in those Focus Group sessions occurring after the January 17, 2006 adoption of the Uniform Commercial Division Rules, many participants weighed in on whether similar statewide uniform rules would be appropriate for other areas of the court system. It became clear that because of the nuances of practice in different geographic areas of the State not every rule can or should be uniform.

Nonetheless, the general consensus favored uniform rules. Some practitioners and in-house lawyers noted that attorneys should not have to relearn the rules applicable to each court where they practice. The resulting inefficiency, both in attorney time and client money, of having to adjust to each court's specific guidelines, could easily be avoided if uniform rules were established across types of courts to simplify practice in those forums. One Division Justice pointed out that uniformity – in instances where recusal of a Division Justice is necessary – makes clear that the rules of litigation are not going to drastically change because the case is being reassigned to another judge who does not ordinarily sit in the Commercial Division:

> [I]f the case is assigned to another jurist in [my] county, will the commercial rules apply? It was important to the practitioner to know that the commercial rules would apply in a case that was going to be transferred out of my part to another jurist because of recusal. That tells me that the bar can work with the rules, wants to work with the rules and wants to make sure when they litigate a case that those rules are going to be complied with no matter what jurist is handling the case. I thought that was a significant plus for the rules that we have in place.

Practitioners did offer a pair of caveats about adopting additional uniform rules, which are instructive, however. First, participants recognized that uniformity is particularly helpful because everyone knows where to find uniform rules. Thus, a uniform format would be a potential first step. Commenting on how easy it is to find the uniform rules, another practitioner stated:

> What I think the advantage is, as I look at these rules, is that if somebody needed to look them up, they would know where to find them. Where for the rest of the practice throughout the districts if you tried to look at the uniform rules in one district, summary judgment motions may be in 200, another one they might be under 540 so I guess you want uniform format of the rules….

But as one upstate practitioner noted, uniformity only works if all of the courts operating under the uniform rules embrace them:

> [U]niformity and uniform rules means uniform across the state. And if the court system can do anything to help the practitioner it would be to make sure that all the judges understand that uniform means uniform and that no one should have their own individual rules, to trump the uniform rules.

J. Increase Use of *In Limine* Motions

Perhaps more than any other trial court in New York, the Commercial Division receives *in limine* motions in which lawyers attempt to persuade the court to rule in advance of trial on evidence, expert witnesses and, in some matters, even theories of the case. There seem to be substantial reason, based on the discussions of the Focus Groups, why *in limine* motions should be encouraged throughout the New York courts.

Among other benefits, participants noted that judges appreciate the opportunity to resolve evidentiary issues before trial, rather than in the midst of testimony. This, of course, allows the court to give thoughtful consideration to the issues presented and, in a jury trial, prevents delay and waste of jurors' time. Other participants cited the potential benefit that resolving *in limine* motions early could have in aiding case resolution. Particularly under Uniform Commercial Division Rule 27, requiring *in limine* motions to be made at least 10 days in advance of the pre-trial conference, a court's ruling on a disputed evidentiary matter could, in appropriate cases, foster case resolution (or at least additional settlement talks). At a minimum, as still other participants noted, early resolution of *in limine* motions saves the court, lawyers and litigants time and resources, to the extent the motions can clarify (if not minimize) the dimensions of the case, and the need for proof.

K. Increase Use of E-Filing

The use of Filing By Electronic Means (or e-filing), has become a staple of Federal practice. New York State also has an e-filing program in the Commercial Division (as well as certain other types of matters) in selected counties throughout the State. Within the Focus Groups opinions differed on the use of e-filing in the Commercial Division and its potential expansion. Just as there were impassioned pleas not to make e-filing mandatory (as it is in Federal courts), there were practitioners who recognized that it needs to have a place in the court system. As one upstate lawyer remarked:

> The whole idea of New York as being the world's center of litigation, means we have to get with it. As attorneys get used to making the filings in federal court and as all other things get done electronically in the commercial world, you just can't justify not doing it if you are the world center of commercial litigation. You just can't justify it. It is a ridiculous anachronism. We might as well wear wigs.

In support of e-filing, participants from both the Bench and Bar cited the ease of handling materials containing trade secrets or other confidential information. They also noted that e-filing could spare attorneys the time and effort, and their clients the cost, of having to re-submit prior pleadings from the case referenced in later motion papers. Attorneys and clients who e-file would have the added benefit of easier tracking of court filings and case progress through the program's computerized docketing system.

Conversely, some participants raised concerns about the inability, or unwillingness, of practitioners to rely on computers to file papers. Some noted that small firm or solo practitioners, or those who are not computer savvy, would be at a distinct disadvantage to the extent that e-filings received preferential treatment, or were otherwise encouraged by the court. Others commented that if e-filing extended the deadline for filing papers from the close of business (*i.e.,* while the courthouse was open), until midnight of that day (*i.e.,* before the computer's time stamp changed to the next day), there would be potential for abuse. Attorneys would have to check for notification from the e-filing system well after normal business hours to see whether their adversary's papers had been filed and determine what response, if any, would be needed.

On balance, the Focus Groups suggested that e-filing be expanded, so long as it is not made mandatory and those concerns are kept in mind. At a minimum, legislative action will be necessary to make this a system-wide reality. Those cautioning against a rapid expansion also noted the need for additional training and lawyer assistance.

L. Pre-Motion Conferences for Discovery Motions

Among the most active and vigorous discussion in the Focus Groups was over new Uniform Commercial Division Rule 24, which generally requires parties seeking to make certain motions to file a two-page letter in support of a proposed motion or cross-motion, followed by a telephone or in-court conference with the judge. One of the benefits of this rule is to clarify or narrow the issues involved in the motion or, in appropriate cases, obviate the need for the motion, by addressing the merits and possibly narrowing the issues to be briefed. Although the rule was not promulgated to stop parties from making motions but instead to help the court control its docket and work with the attorneys to avoid unnecessary motions, numerous participants in the Focus Groups expressed concern over the new Rule's potential effects.

In some Focus Groups, judicial participants commented that, no matter how gently the court might suggest that a lawyer reconsider the merits of a proposed motion, the court could be perceived as signaling how the motion would be received (*i.e.,* an automatic denial regardless of the motion's merits). Numerous participants identified the added cost of pre-motion practice as an unfair burden on lawyers and clients. Practitioners noted that in smaller counties, with fewer judges and lawyers, reputation was a more effective deterrent to frivolous or wasteful motion practice than any pre-motion letter or conference. Finally, participants cited concerns about revealing their theory of the motion in advance, either causing the court to prejudge the issues on an incomplete record, or divulging more to their adversary than they would otherwise wish.

Time will tell what impact the rule will have on statewide practice. Participants generally expressed the view that, due to the experience of the Commercial Division judges and the complexity of the cases, the rule is more beneficial in the Division than elsewhere. Participants were virtually unanimous in suggesting that a Rule 24-like procedure, both in the Commercial Division and elsewhere, would be an effective way to limit the number of discovery motions. Even those expressing doubts about Rule 24 were supportive of its use in the discovery context. As one upstate participant noted:

> Discovery is different. Let me be clear on that. I am very much in favor of eliminating discovery motions altogether. I mean, I think the idea of writing a letter and asking for a conference with the Court on the discovery issue is the way to go because we waste way too much time on motions to compel.

Indeed, judicial participants said that the courts would benefit from a rule that would help curtail discovery motions, which are often counterproductive. One Division Justice said:

> They're very hard to decide on papers, because I'm going to boil it down to, I ask them for everything, they gave me nothing, we gave them everything they asked for. And that's not what we get. But for us to go through it and figure out exactly what it is will take hours or days, whereas I can say to counsel, refine it down, tell me what's missing, in a conversation. We can get through that far more quickly than if I sit there with the motion, the opposition, the reply, and I try and figure out what is it this interrogatory… that's why we would prefer to have the opportunity to deal with those discovery issues. And a lot of times the solution is not going to be the request or the opposition, it's going to be the middle ground that, you know, through the conversation we figured out.

A few participants noted that some counties, some parts and even some courts might lack sufficient support resources to successfully implement a rule like Uniform Commercial Division Rule 24 for discovery motions. Others noted that whatever the temporary strain on resources the rule would create, this burden would be easily outweighed by the ultimate time savings court staff would achieve through reduction of unnecessary motions.

VI

THE FOCUS GROUPS' RECOMMENDATIONS FOR THE COMMERCIAL DIVISION

One of the goals of the Focus Groups was to identify those areas of the Commercial Division's practices and procedures that might be exported for use elsewhere within the court system – the preceding sections identify many possible candidates. Another purpose of the Focus Groups was development of ideas for improvement of the Commercial Division itself, to which this Report next turns.

The newly-adopted Uniform Commercial Division Rules significantly changed practice within the Commercial Division and were themselves the subject of extensive discussion before they were adopted. The new rules ensure consistency regarding rules of practice throughout the State. They address key aspects of commercial litigation, including motion practice, electronic discovery, pre-trial conferences, temporary restraining orders and trial scheduling. They also delineate definitive requirements governing the cases that may be heard in the Commercial Division, including monetary thresholds throughout the State. While the new rules also generated substantial discussion within the Focus Groups, the suggestions below are independent of them. Needless to say, these suggestions for change within the Commercial Division may themselves also be candidates for later expansion to other areas of the New York State courts.

A. Permit Expert Discovery

In discussions about the costs and benefits of bringing and defending actions in the Commercial Division, the Federal courts or elsewhere, commercial litigators and in-house counsel consistently described their decision-making process as a balancing test. Some viewed the availability of interlocutory appeals in New York, and therefore the ability to appeal an adverse summary judgment or other ruling immediately, as a strong reason to choose the Commercial Division. Indeed, one practitioner referred to this as "one of [New York's] biggest attractions." On the other hand, several participants cited the lack of expert discovery as a reason to use other forums. Some practitioners commented that it was of interest to their clients to be able to conduct meaningful and appropriate expert discovery.

Article 31 of the CPLR does not provide nearly the same degree of expert disclosure that the Federal Rules of Civil Procedure contemplate. However, participants believed that Commercial Division cases could benefit from more expert discovery. By their nature, commercial cases tend to have complex issues that need particularly knowledgeable experts. Expert paper disclosure and even expert depositions may well assist the court, the lawyers and the parties to clarify and narrow the issues.

B. Provide Additional Judicial Support for the Commercial Division

Throughout the Focus Groups, participants agreed that it would be helpful to have additional judges involved in the Commercial Division, particularly in those counties with only one or two judges currently involved. Judges expressed the concern, echoing the comments regarding settlement practices described above, that they would like to have another judge to whom they could refer a case for settlement discussions (or trial) if the matter is a bench trial. They also recognized that there will be times when vacations or other scheduling conflicts would mean that a single judge (or even both judges in a two-judge county) may not be available. One judge noted that practitioners may be justified in their concern that the Commercial Division rules and practices might be disregarded by a substitute judge lacking knowledge and experience with them.

Practitioners raised the separate concern that reliance on a single judge to cover all Commercial Division matters in one Judicial District could be problematic for practitioners who have had a bad experience with that judge. As one lawyer stated:

> [I]t does seem that the concept of a commercial part would be more attractive to many practitioners if they knew that their fate in that Division would not rest in the hands, as its been touched upon, by a single judge with whom they get along, don't get along or whatever, but for many practitioners perhaps to have their role in the commercial system in the hands of one predesignated jurist might seem very formidable. It would be almost the difference between practicing in Supreme Court and Surrogate's Court….

Relatedly, other participants noted that limiting the Commercial Division to a single judge would have the unintended (if not undesirable) result of excluding excellent judges with both the interest and aptitude in commercial matters from helping resolve the cases and furthering the Commercial Division's mission.

The additional judicial support for the Commercial Division need not, however, be a judge assigned to the Division. It could be designating other Supreme Court Justices or even Judicial Hearing Officers, whether on an ongoing or one-time basis, to handle settlement discussions, trials or even overflow of motions, as the needs of the court require. This practice has informally developed in several counties (New York, Suffolk, and Kings), and it may be worthy of continuation and expansion to other counties in the future.

C. Implement Online Scheduling Orders

All Focus Group participants viewed the Commercial Division's proactive case management approaches as positive. Some participants, however, offered suggestions for making the conferencing system, and the preliminary conference in particular, even more efficient. Implementing online scheduling orders, which could be made available on the Commercial Division's website (www.nycourts.gov/comdiv), could have multiple benefits. It would allow attorneys and clients to have a realistic sense of the areas the court expected to cover and resolve in the conference. It would facilitate discussion, and perhaps even resolution, of some issues before the court even got involved. And, perhaps most importantly, it would provide an easy means for the parties to submit any agreed-upon terms to the court, allowing them to be "so ordered." This, in itself, could save both the court and attorneys the time spent conferencing certain scheduling matters in person.

D. Update Jury Instructions Applicable to Commercial Cases

More than one judge, as well as practitioners, noted that the jury instructions available for commercial matters, particularly contracts, needed updating. As one judge stated:

> If the goal is to make New York courts a nationwide model in commercial litigation, then we can't have [jury instructions] that are this outdated. It's just, you know, because that's the intellectual foundation for everything else you do, not just for judges, for lawyers. That's where it really all starts. We need to have them updated.

Focus Group participants specifically identified a need for attention to such topics as spoliation, electronic discovery and modern business transactions – subjects that have undergone great change recently. Several participants volunteered to serve as a resource for revising instructions.

E. Make Accommodations for Commercial Matters in the Appellate Process

New York's role as the business and commercial center of the United States is bolstered by the development of commercial law in its appellate courts as well as in its Commercial Division. Issues of vital interest to the community – including those relating to commercial disputes – should be winding their way through the intermediate appellate courts for final resolution in the New York Court of Appeals. Yet question has been raised regarding why so few commercial cases (as compared to vast number of commercial cases found at the trial court level) are appealed to the Appellate Division and the Court of Appeals.

Focus Group participants advanced several explanations for the relatively small number of commercial appeals, in addition to the obvious factor of the economics of settlement. First, there are times that the appeals have become mooted when the trial judge and the Appellate Division have refused to grant a stay of the trial pending appeal. This experience seems to be reflected in a comment made by one Commercial Division Justice that, although the number of appeals emanating from Commercial Divisions is equal to the number of appeals emanating from other parts, his experience was that a much lower number is actually perfected and argued. Second, a commercial litigator suggested that the reason so few cases make their way to the Court of Appeals is the concern that the Court will not grant leave; the statistics are discouraging.

A third factor weighing against appeals was the risk of broader consequences an appellate decision might have for the litigant, beyond the particular case. It was noted that the last thing a corporation wants is to be saddled with "bad law" from its perspective for collateral estoppel purposes. The decision whether to pursue an appeal rested both on "internal" factors (has the case been fully evaluated in-house?) and external factors (will the appeal receive the attention from the court it deserves?). There was a range of views about the current treatment of commercial appeals, particularly among the litigators and clients.

Despite the variety of opinions, the participants raised several constructive suggestions. Some said that because commercial matters, by their nature, tend to be more complex, the appellate courts should allow more time for oral argument and longer briefs. Others called upon the bar to be more active in educating the appellate courts about the more esoteric issues involved in commercial matters today, perhaps through amicus briefs or even CLE programs. Another suggestion was for bar associations to actively support commercially savvy appellate judges in judicial screening panels.

Finally, some expressed the concern that because of finite resources and a huge volume of appeals found in certain Appellate Division Departments, it is difficult, if not impossible, for those courts to play a vital role in developing commercial law. Overwhelmingly, cases are necessarily resolved by those courts

in memoranda, which are often one or two paragraphs in length, instead of full decisions. Greater resources directed at these cases could assist in the development of commercial law.

Several Commercial Division Justices expressed concern that, although interlocutory appeals were generally viewed as a positive feature by practitioners and clients, the passage of time while cases were on appeal still counted against the court's standards and goals statistics. They suggested that the Office of Court Administration include a tolling provision to address this. Other participants suggested that it might be worthwhile for OCA to study the percentage of Commercial Division cases that are reversed in the Appellate Division. Finally, there was a suggestion that the Commercial Division itself be expanded to other parts of the State – the more trial courts there are with a specialty in commercial matters, the more commercial law will develop.

Justices of the Commercial Division of the Supreme Court of the State of New York

ALBANY COUNTY
Hon. William E. McCarthy

ERIE COUNTY
Hon. Eugene M. Fahey

KINGS COUNTY
Hon. Carolyn E. Demarest
Hon. Ann T. Pfau

MONROE COUNTY and SEVENTH JUDICIAL DISTRICT
Hon. Kenneth R. Fisher

NASSAU COUNTY
Hon. Leonard B. Austin
Hon. Ira B. Warshawsky
Hon. Stephen A. Bucaria

NEW YORK COUNTY
Hon. Herman Cahn
Hon. Helen E. Freedman
Hon. Bernard J. Fried
Hon. Ira Gammerman
Hon. Richard B. Lowe III
Hon. Karla Moskowitz
Hon. Charles E. Ramos

QUEENS COUNTY
Hon. Marguerite A. Grays
Hon. Orin R. Kitzes

SUFFOLK COUNTY
Hon. Elizabeth Hazlitt Emerson
Hon. Sandra L. Sgroi

WESTCHESTER COUNTY
Hon. Kenneth W. Rudolph

State of New York

Jonathan Lippman
Chief Administrative Judge
and
Justice of the Supreme Court

140 Grand Street, Suite 704
White Plains, N.Y. 10601
(914) 997-7980

November 2, 2005

XXXXX
XXXXXXXXXX
XXXXXXXXXXXX

Dear _____:

As a regular practitioner of the Commercial Division, I am writing to request your participation in a focus group panel designed to identify areas in which the operations, rules and procedures of the Commercial Division can be improved. We hope to use the information obtained: (1) to identify gaps in services and generate ideas for future improvements; and (2)to assess the feasibility of transferring the "best practices" of the Commercial Division to other areas within our court system.

The focus group will consist of commercial litigators, Chief Litigation Counsel of major corporations, and justices from the Commercial Division, New York County. We believe your expertise and insights would be very beneficial to this project, which is of particular interest to Chief Judge Judith Kaye in the 10th Anniversary year of the establishment of the Commercial Division. The focus group will be facilitated by Robert Haig, Esq. of Kelley Drye & Warren, LLP, and Co-Chair of the Commercial Courts Task Force, which was established by Chief Judge Kaye to create and refine the Commercial Division.

During this session, which is expected to last 2 1/2 hours, Mr. Haig will be engaging you in a discussion concerning a variety of topics (a copy of the list of discussion topics is enclosed for your review). All focus group discussions will remain confidential. The session will be tape recorded and transcribed. All focus group participants' comments included in the final report will be reported anonymously.

The focus group is scheduled to take place on Thursday, December 1, 2005 at 2 p.m. at the New York County Supreme Court, 60 Centre Street, 7th Floor Conference Room. Please contact my Principal Law Clerk, Gretchen Walsh (914) 997-7980, **no later than November 14, 2005**, regarding your availability to attend the focus group session. I hope you will be able to participate in this important effort.

Very truly yours,

I. Rules

A. Should changes be made to the current Guidelines for assignment of cases to the Commercial Division? If so, what changes are needed most? These questions encompass the definition of a commercial case in the Guidelines as well as the procedures for assignment of a case to the Commercial Division at the inception of the case and for subsequently transferring cases into and out of the Commercial Division.

B. Should changes to be made to the current Rules of Practice in the Commercial Division? If so, what changes are needed most?

C. Should the Guidelines, Rules and procedures in the Commercial Division be uniform throughout New York State (or at least within particular counties or Judicial Departments)? Is uniformity appropriate for some Guidelines, Rules and procedures and inappropriate for others? If so, which ones?

D. Does the Commercial Division have appropriate procedures for requesting adjournments? Does the Commercial Division respond appropriately to such requests?

E. What are your views on the following Commercial Division innovations?

1. New York Rule 12 providing that a motion to dismiss or for summary judgment shall not stay disclosure unless the Justice directs.

2. The requirement of statements of undisputed facts in connection with summary judgment motions.

3. The requirement of notice to the opposing party prior to an application for a temporary restraining order.

4. The use of pre-motion conferences.

II. The Role of the Judge

A. Does the Commercial Division do a good job of facilitating settlement of cases? What improvements should be made in the Commercial Division's approach to settlement?

B. Should the Judges in the Commercial Division be more proactive or less proactive in case management? In what respects?

C. Does the Commercial Division make effective use of preliminary conferences? What improvements should be made?

D. What changes, if any, should be made in the way the Commercial Division handles motions? Why?

E. What changes, if any, should be made in the way the Commercial Division manages disclosure? Why?

F. What changes, if any, should be made to the Commercial Division's pre-trial conferences and other pre-trial procedures? This question focuses on conferences and procedures after disclosure is completed.

G. What improvements, if any, should be made to trials in the Commercial Division?

III. Alternative Dispute Resolution

A. What role should alternative dispute resolution play in the Commercial Division? Are improvements needed in the current use of ADR in the Commercial Division and, if so, what improvements are

needed most? Should use of ADR be mandatory in more cases or fewer? Why? What kinds of ADR should be used in Commercial Division cases under various circumstances?

IV. Technology

A. Is the Commercial Division using technology effectively to achieve its objectives? What improvements should be made in the Commercial Division's use of technology? In particular, please discuss electronic filing of cases and other papers as well as technology provided by the Commercial Division for use during trials, case management technology, and file storage and access technology.

V. General Evaluation

A. Does the Commercial Division dispose of cases too fast or too slow? What is the rationale for your answer?

B. If you had a choice in commencing a case either in the Commercial Division or in other courts or dispute resolution facilities, what would cause you to select an alternative to the Commercial Division? Please consider, in particular, federal courts, other state courts such as the Delaware Chancery Court, and private arbitration.

C. Are the decisions of the Commercial Division sufficiently predictable to enable businesses to develop reliable business and litigation strategies? If not, what can and should the Commercial Division do to increase predictability of its decisions?

D. Is the Commercial Division a cost-effective way to resolve commercial disputes? How can its cost-effectiveness be improved?

E. What are your feelings about the ways in which the Judges, non-judicial personnel, litigators, and clients interact and relate to each other in the Commercial Division?

F. Are any changes needed either in the non-judicial personnel assigned to the Commercial Division or in the jobs to which they are assigned or in the way they do their jobs? If so, what specific changes would you recommend?

G. Should the Commercial Division be doing more to educate the bar and the business community about the operations and procedures of the Commercial Division? If so, what specific types of education would be most effective and most useful?

§202.70 Rules of the Commercial Division of the Supreme Court

(a) Monetary thresholds

Except as set forth in subdivision (b), the monetary thresholds of the Commercial Division, exclusive of punitive damages, interests, costs, disbursements and counsel fees claimed, is established as follows:

Albany County $25,000

Erie County $25,000

Kings County $50,000

Nassau County $75,000

New York County $100,000

Queens County $50,000

Seventh Judicial District ..$25,000

Suffolk County $25,000

Westchester County $100,000

(b) Commercial cases

Actions in which the principal claims involve or consist of the following will be heard in the Commercial Division provided that the monetary threshold is met or equitable or declaratory relief is sought:

(1) Breach of contract or fiduciary duty, fraud, misrepresentation, business tort (e.g., unfair competition), or statutory and/or common law violation where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements; trade secrets; restrictive covenants; and employment agreements not including claims that principally involve alleged discriminatory practices);

(2) Transactions governed by the Uniform Commercial Code (exclusive of those concerning individual cooperative or condominium units);

(3) Transactions involving commercial real property, including Yellowstone injunctions and excluding actions for the payment of rent only;

(4) Shareholder derivative actions — without consideration of the monetary threshold;

(5) Commercial class actions — without consideration of the monetary threshold;

(6) Business transactions involving or arising out of dealings with commercial banks and other financial institutions;

(7) Internal affairs of business organizations;

(8) Malpractice by accountants or actuaries, and legal malpractice arising out of representation in commercial matters;

(9) Environmental insurance coverage;

(10) Commercial insurance coverage (e.g. directors and officers, errors and omissions, and business interruption coverage);

(11) Dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures — without consideration of the monetary threshold; and

(12) Applications to stay or compel arbitration and affirm or disaffirm arbitration awards and related injunctive relief pursuant to CPLR Article 75 involving any of the foregoing enumerated commercial issues — without consideration of the monetary threshold.

(c) Non-commercial cases

The following will not be heard in the Commercial Division even if the monetary threshold is met:

(1) Suits to collect professional fees;

(2) Cases seeking a declaratory judgment as to insurance coverage for personal injury or property damage;

(3) Residential real estate disputes, including landlord-tenant matters, and commercial real estate disputes involving the payment of rent only;

(4) Proceedings to enforce a judgment regardless of the nature of the underlying case;

(5) First-party insurance claims and actions by insurers to collect premiums or rescind non-commercial policies; and

(6) Attorney malpractice actions except as otherwise provided in paragraph (b)(8).

(d) Assignment to the Commercial Division

(1) A party seeking assignment of a case to the Commercial Division shall indicate on the Request for Judicial Intervention (RJI) that the case is "commercial." A party seeking a designation of a special proceeding as a commercial case shall check the "other commercial" box on the RJI, not the "special proceedings" box.

(2) The party shall submit with the RJI a brief signed statement justifying the Commercial Division designation, together with a copy of the proceedings.

(e) Transfer into the Commercial Division

If a case is assigned to a non-commercial part because the filing party did not designate the case as "com-

mercial" on the RJI, any other party may apply by letter application (with a copy to all parties) to the Administrative Judge, within ten days after receipt of a copy of the RJI, for a transfer of the case into the Commercial Division. The determination of the Administrative Judge shall be final and subject to no further administrative review or appeal.

(f) Transfer from the Commercial Division

(1) In the discretion of the Commercial Division justice assigned, if a case does not fall within the jurisdiction of the Commercial Division as set forth in this section, it shall be transferred to a non-commercial part of the court.

(2) Any party aggrieved by a transfer of a case to a non-commercial part may seek review by letter application (with a copy to all parties) to the Administrative Judge within ten days of receipt of the designation of the case to a non-commercial part. The determination of the Administrative Judge shall be final and subject to no further administrative review or appeal.

(g) Rules of practice for the Commercial Division

Unless these rules of practice for the Commercial Division provide specifically to the contrary, the rules of Part 202 also shall apply to the Commercial Division, except that Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference) and Rules 16 through 24 shall supersede section 202.8 (Motion Procedure).

Rule 1. Appearance by Counsel with Knowledge and Authority. Counsel who appear in the Commercial Division must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Counsel should also be prepared to discuss any motions that have been submitted and are outstanding. Failure to comply with this rule may be regarded as a default and dealt with appropriately. See Rule 12. It is important that counsel be on time for all scheduled appearances.

Rule 2. Settlements and Discontinuances. If an action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the court by submission of a copy of the stipulation or a letter directed to the clerk of the part along with notice to chambers via telephone or e-mail. This notification shall be made in addition to the filing of a stipulation with the County Clerk.

Rule 3. Alternative Dispute Resolution (ADR). At any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation.

Rule 4. Electronic Submission of Papers.

(a) Papers and correspondence by fax. Papers and correspondence filed by fax should comply with the requirements of section 202.5-a except that papers shall not be submitted to the court by fax without advance approval of the justice assigned. Correspondence sent by fax should not be followed by hard copy unless requested.

(b) Papers submitted in digital format. In cases not pending in the court's Filing by Electronic Means System, the court may permit counsel to communicate with the court and each other by e-mail. In the court's discretion, counsel may be requested to submit memoranda of law by e-mail or on a computer disk along with an original and courtesy copy.

Rule 5. (This rule shall apply only in the First and Second Judicial Departments) Information on Cases. Information on future court appearances can be found at the court system's future appearance site (www.nycourts.gov/ecourts). Decisions can be found on the Commercial Division home page of the Unified Court System's internet website: www.courts.state.ny.us/comdiv or in the New York Law Journal. The clerk of the part can also provide information about scheduling in the part (trials, conferences, and arguments on motions). Where circumstances require exceptional notice, it will be furnished directly by chambers.

Rule 6. Form of Papers. All papers submitted to the Commercial Division shall comply with CPLR 2101 and section 202.5(a). Papers shall be double-spaced and contain print no smaller than twelve-point, or 8 1/2 x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than ten-point. Papers also shall comply with Part 130 of the Rules of the Chief Administrator.

Rule 7. Preliminary Conference; Request. A preliminary conference shall be held within 45 days of assignment of the case to a Commercial Division justice, or as soon thereafter as is practicable. Except for good cause shown, no preliminary conference shall be adjourned more than once or for more than 30 days. If a Request for Judicial Intervention is accompanied by a dispositive motion, the preliminary conference shall take place within 30 days following the decision of such motion (if not rendered moot) or at such earlier date as scheduled by the justice presiding. Notice of the preliminary conference date will be sent by the court at least five days prior thereto.

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference; and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

Rule 9. (Reserved)

Rule 10. Submission of Information. At the preliminary conference, counsel shall be prepared to furnish the court with the following: (i) a complete caption, including the index number; (ii) the name, address, telephone number, e-mail address and fax number of all counsel; (iii) the dates the action was commenced and issue joined; (iv) a statement as to what motions, if any, are anticipated; and (v) copies of any decisions previously rendered in the case.

Rule 11. Discovery

(a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

(b) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.

(c) The preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case.

(d) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

Rule 12. Non-Appearance at Conference. The failure of counsel to appear for a conference may result in a sanction authorized by section 130.2.1 of the Rules of the Chief Administrator or section 202.27, including dismissal, the striking of an answer, an inquest or direction for judgment, or other appropriate sanction.

Rule 13. Adherence to Discovery Schedule

(a) Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Such deadlines, however, may be modified upon the consent of all parties, provided that all discovery shall be completed by the discovery cutoff date set forth in the preliminary conference order. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline. Non-compliance with such an order may result in the imposition of an appropriate sanction against that party pursuant to CPLR 3126.

(b) If a party seeks documents as a condition precedent to a deposition and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the non-producing party from introducing such demanded documents at trial.

Rule 14. Disclosure Disputes. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See section 202.7. Except as provided in Rule 24 hereof, if counsel are unable to resolve any disclosure dispute in this fashion, the aggrieved party shall contact the court to arrange a conference as soon as practicable to avoid exceeding the discovery cutoff date. Counsel should request a conference by telephone if that would be more convenient and efficient than an appearance in court.

Rule 15. Adjournments of Conferences. Adjournments on consent are permitted with the approval of the court for good cause where notice of the request is given to all parties. Adjournment of a conference will not change any subsequent date in the preliminary conference order, unless otherwise directed by the court.

Rule 16. Motions in General.

(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Counsel must attach copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should use tabs when submitting papers containing exhibits. Copies must be legible. If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be properly translated. CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, a copy of the case or of pertinent portions of the authority shall be submitted with the motion papers.

(b) Proposed Orders. When appropriate, proposed orders should be submitted with motions, e.g., motions to be relieved, pro hac vice admissions, open commissions, etc. No proposed order should be submitted with motion papers on a dispositive motion.

(c) Adjournment of Motions. Dispositive motions (made pursuant to CPLR 3211, 3212 or 3213) may be adjourned only with the court's consent. Non-dispositive motions may be adjourned on consent no more than three times for a total of no more than 60 days unless otherwise directed by the court.

Rule 17. Length of Papers. Unless otherwise permitted by the court: (i) briefs or memoranda of law shall be limited to 25 pages each; (ii) reply memoranda shall be no more than 15 pages and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief; (iii) affidavits and affirmations shall be limited to 25 pages each.

Rule 18. Sur-Reply and Post-Submission Papers. Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind.

Rule 19. Orders to Show Cause. Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding. See Rule 20. Absent advance permission, reply papers shall not be submitted on orders to show cause.

Rule 19-a. Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

(b) In such a case, the papers opposing a motion for summary judgment shall include a correspondingly numbered paragraph responding to each numbered paragraph in the statement of the moving party and, if necessary, additional paragraphs containing a separate short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

(c) 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.

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

Rule 20. Temporary Restraining Orders. Unless the moving party can demonstrate that there will be significant prejudice by reason of giving notice, a temporary restraining order will not be issued. The applicant must give notice to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

Rule 21. Courtesy Copies. Courtesy copies should not be submitted unless requested or as herein provided. However, courtesy copies of all motion papers and proposed orders shall be submitted in cases in the court's Filing by Electronic Means System.

Rule 22. Oral Argument. Any party may request oral argument on the face of its papers or in an accompanying letter. Except in cases before justices who require oral argument on all motions, the court will determine, on a case-by-case basis, whether oral argument will be heard and, if so, when counsel shall appear. Notice of the date selected by the court shall be given, if practicable, at least 14 days before the scheduled oral argument. At that time, counsel shall be prepared to argue the motion, discuss resolution of the issue(s) presented and/or schedule a trial or hearing.

Rule 23. 60-Day Rule. 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.

Rule 24. Advance Notice of Motions

(a) Nothing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interests. However, in order to permit the court the opportunity to resolve issues before motion practice ensues, and to control its calendar in the context of the discovery and trial schedule, pre-motion conferences in accordance herewith must be held. The failure of counsel to comply with this rule may result in the motion being held in abeyance until the court has an opportunity to conference the matter.

(b) This rule shall not apply to disclosure disputes covered by Rule 14 nor to dispositive motions pursuant to CPLR 3211, 3212 or 3213 made at the time of the filing of the Request for Judicial Intervention or after discovery is complete. Nor shall the rule apply to motions to be relieved as counsel, for pro hac vice admission, for reargument or in limine.

(c) Prior to the making or filing of a motion, counsel for the moving party shall advise the Court in writing (no more than two pages) on notice to opposing counsel outlining the issue(s) in dispute and requesting a telephone conference. If a cross-motion is contemplated, a similar motion notice letter shall be forwarded to the court and counsel. Such correspondence shall not be considered by the court in reaching its decision on the merits of the motion.

(d) Upon review of the motion notice letter, the court will schedule a telephone or in-court conference with counsel. Counsel fully familiar with the matter and with authority to bind their client must be available to participate in the conference. The unavailability of counsel for the scheduled conference, except for good cause shown, may result in granting of the application without opposition and/or the imposition of sanctions.

(e) If the matter can be resolved during the conference, an order consistent with such resolution may be issued or counsel will be directed to forward a letter confirming the resolution to be "so ordered." At the discretion of the court, the conference may be held on the record.

(f) If the matter cannot be resolved, the parties shall set a briefing schedule for the motion which shall be approved by the court. Except for good cause shown, the failure to comply with the briefing schedule may result in the submission of the motion unopposed or the dismissal of the motion, as may be appropriate.

(g) On the face of all notices of motion and orders to show cause, there shall be a statement that there has been compliance with this rule.

(h) Where a motion must be made within a certain time pursuant to the CPLR, the submission of a motion notice letter, as provided in subdivision (a), within the prescribed time shall be deemed the timely making of the motion. This subdivision shall not be construed to extend any jurisdictional limitations period.

Rule 25. Trial Schedule. Counsel are expected to be ready to proceed either to select a jury or to begin presentation of proof on the scheduled trial date. Once a trial date is set, counsel shall immediately determine the availability of witnesses. If, for any reason, counsel are not prepared to proceed on the scheduled date, the court is to be notified within ten days of the date on which counsel are given the

trial date or, in extraordinary circumstances, as soon as reasonably practicable. Failure of counsel to provide such notification will be deemed a waiver of any application to adjourn the trial because of the unavailability of a witness. Witnesses are to be scheduled so that trials proceed without interruption. Trials shall commence each court day promptly at such times as the court directs. Failure of counsel to attend the trial at the time scheduled without good cause shall constitute a waiver of the right of that attorney and his or her client to participate in the trial for the period of counsel's absence. There shall be no adjournment of a trial except for good cause shown. With respect to trials scheduled more than 60 days in advance, section 125.1(g) of the Rules of the Chief Administrator shall apply and the actual engagement of trial counsel in another matter will not be recognized as an acceptable basis for an adjournment of the trial.

Rule 26. Estimated Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial.

Rule 27. Motions in Limine. The parties shall make all motions in limine no later than ten days prior to the scheduled pre-trial conference date, and the motions shall be returnable on the date of the pre-trial conference, unless otherwise directed by the court.

Rule 28. Pre-Marking of Exhibits. 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 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.

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 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. 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.

Rule 30. Settlement and Pretrial Conferences.

(a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be

attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

(b) Pre-trial Conference. Prior to the pretrial conference, counsel shall confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. At the pre-trial conference, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties, including those identified in Rules 27-29, and settlement of the matter. At or before the pre-trial conference, the court may require the parties to prepare a written stipulation of undisputed facts.

Rule 31. Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions

(a) Counsel shall submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set. Counsel shall comply with CPLR 2103(e). A single memorandum no longer than 25 pages shall be submitted by each side. No memoranda in response shall be submitted.

(b) At the pre-trial conference or at such other time as the court may set, counsel shall submit an indexed binder or notebook of trial exhibits for the court's use. A copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses shall be prepared and submitted. Plaintiff's exhibits shall be numerically tabbed and defendant's exhibits shall be tabbed alphabetically.

(c) Where the trial is by jury, counsel shall, on the pre-trial conference date or such other time as the court may set, provide the court with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions - Civil, a reference to the PJI number will suffice. Submissions should be by hard copy and disk or e-mail attachment in WordPerfect 12 format, as directed by the court.

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 shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

Rule 33. Preclusion. Failure to comply with Rules 28, 29, 31 and 32 may result in preclusion pursuant to CPLR 3126.