

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 27¹**

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 27 proffered by the Commercial Division Advisory Council (“CDAC”) (the “Amendment”). The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the proposed rule amendments be adopted, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who litigate both civil and criminal bench and jury trials in state and federal courts in New York and throughout the country. Thus, in offering the following comments, the Section is drawing upon a broad range of experience. The Section’s comments below and its approval of the proposed rule change applies only to Commercial Division bench trials.

II. PROPOSED AMENDMENT

A. Proposed Revision to Rule 27

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. Opposition papers, if any, shall be served and filed no later than two days before the return date of the motion, unless otherwise directed by the court. Objections to the admissibility of specific exhibits or specific deposition testimony based on basic threshold issues such as lack of foundation or hearsay shall be made under Rule 28 and Rule 29, respectively. Motions in limine should be used to address broader issues concerning, for example, (1) the receipt or exclusion of evidence, testimony, or arguments of a particular kind or concerning a particular subject matter, (2) challenges to the competence of a particular witness, or (3) challenges to the qualifications of experts or to the receipt of expert testimony on a particular subject matter. Motions in limine should not be used as vehicles for summary judgment motions.

¹ Opinions expressed in this Memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the Memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

B. CDAC Rationale for Revision

The Advisory Council recommends Rule 27 be modified to add a deadline for service of opposition papers to motions in limine and to provide guidance on the types of issues that motions in limine should address. The Advisory Council directs attorneys to sponsor their objections to exhibits and deposition testimony under Rules 28 and 29 and to use motions in limine to address broader case issues, such as challenging the competence of a witness, the propriety of expert testimony, or evidence related to a particular subject matter. Last, the Advisory Council thought it wise to include an admonition to parties and their counsel not to use a motion in limine as an application to bring an untimely motion for summary judgment as the courts will not be receptive to such an initiative.

C. Section's Position

The Section supports the proposed changes to Rule 27. The proposed changes eliminate there being no deadline when opposition to a motion in limine is due. The proposed change now provides for a date certain, two days before the pre-trial conference, and thereby prevents the movant from being “sandbagged” with opposition being filed the morning of the pre-trial conference. The proposed changes provide uniformity as to the opposition due date, which counsel can rely upon, resulting in fairness and appropriate notice to all sides. It also provides the court with an opportunity to review opposition papers in advance of the pre-trial conference, increasing the likelihood that the court may be able to rule at the pre-trial conference and not have to take the motion under submission, which could delay the commencement of trial. The proposed rule amendments also provide guidance as to the kinds of issues that are appropriate to raise in a motion in limine and that objections to contested exhibits and deposition testimony based on threshold issues are not appropriately made under Rule 27 and, instead, should be made under Commercial Division Rules 28 and 29, respectively.

Respectfully submitted,

New York State Bar Association
Commercial and Federal Litigation Section
Ignatius A. Grande, Section Chair

December 30, 2022

Approved by the NYSBA Commercial & Federal Litigation Section Executive Committee,
December 14, 2022

Commercial Division Committee
Mark A. Berman,* Co-Chair
Ralph Carter, Co-Chair

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