

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 28¹**

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 28 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.

II. PROPOSED AMENDMENT

A. Current Version of Rule 28

Pre-Marking of Exhibits. Counsel for the parties shall consult prior to the pretrial 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.

B. Proposed Version of Rule 28

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 and shall premark all exhibits as to which no objection has been made~~ **for introduction into evidence.** All exhibits Counsel shall also mark ~~All exhibits not consented shall be marked to~~ for identification only. **Counsel asserting objections to the introduction of any proposed exhibit shall be prepared to state the objection**

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.

with specificity at the pretrial conference or such other time as the court directs. The premarked exhibits as to which there is no dispute shall be marked into evidence, unless the court directs otherwise. If the trial exhibits are voluminous **or in a digital or other format that creates practical marking issues,** 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 **identified** ~~demanded~~ which are to be used solely for credibility or rebuttal need not be premarked.

C. **CDAC Rational for Revision**

The Advisory Council recommends Rule 28 be modified to streamline the process for marking and preparing to introduce exhibits into evidence, conserve and use the time with the Court more efficiently, and expand the process for objecting to proposed exhibits. To achieve this objective, the Advisory Council suggests that Rule 28 be modified to clarify that counsel should not be consuming time at the pretrial conference to mark exhibits. The current language of the Rule may create an issue for those Justices who conduct the pre-trial conference without the presence of a court reporter. Without a court reporter, the trial exhibits cannot be marked “into evidence” at the pre-trial conference and these Justices tend to accept the exhibits into evidence at the start of the trial.

The Advisory Council also recommends clarification of the process of asserting objections to exhibits, requiring counsel to be prepared to state the objection to any exhibit with specificity, and leaving it to the Court’s discretion whether to rule on objections at the pretrial, at the start of the trial, or as the trial progresses and the exhibit is introduced.

The Advisory Council further recommends that the Rule be modified to reflect that exhibits may be digital or in another format that does not lend itself easily to physical marking.

Lastly, the Advisory Council recommends deleting the language indicating that the court will rule upon the objections to exhibits at the earliest possible time, as it is unnecessary.

D. **Section’s Position**

Each of the proposed amendments to Rule 28 seeks to streamline what takes place at the pre-trial conference and seeks to remove uncertainty as to when and how to make objections to specific trial exhibits. Lastly, the proposed amendments appropriately address the situation where premarking of an exhibit may create practical marking issues such as when the exhibit is in digital format or another format. In conclusion, the Section supports the proposed changes to Rule 28.

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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