

**NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENT TO
COMMERCIAL DIVISION RULE 32¹**

SUMMARY

The Administrative Board of the New York Courts (the “Administrative Board”) has requested comments on a proposed amendment to Commercial Division Rule 32 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 32

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.

B. Proposed Version of Rule 32

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 whether the witness will testify in person or through the use of video technology**, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court **only (and not to be exchanged with other counsel)** a list of the witnesses who may be called solely for rebuttal or with regard to credibility.

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.

C. **CDAC Rational for Revision**

The Advisory Council recommends Rule 32 be modified to allow for the identification of witnesses whose testimony may be taken at trial by the use of video technology. The Advisory Council further recommends Rule 32 be modified to affirmatively state that rebuttal witnesses must only be identified to the court, not exchanged with other counsel.

D. **Section's Position**

The Section supports the proposed amendments as there is a need in Rule 32 to acknowledge that trial testimony of a witness may not always be in person, and that opposing counsel and the court need to be apprised in advance of such means of testimony. In addition, the proposed amendment properly makes explicit what had been implicit that the list of potential rebuttal witnesses need only be provided to the court and need not be exchanged with opposing counsel.

Respectfully submitted,

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

December 30, 2022

Approved by the 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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