To: Task Force on Uniform Rules

From: Commercial and Federal Litigation Section

Re: Preliminary Report of the Task Force on Uniform Rules Dated June 7, 2021

Date: July 1, 2021

The Commercial and Federal Litigation Section (the "Section") appreciates the opportunity to submit comments on the Preliminary Report of the Task Force on Uniform Rules (the "Task Force"). The Section was, of course, aware of the December 29, 2020, order of the Chief Administrative Judge adopting new Uniform Rules. The Section was also aware of the resolution adopted by the NYSBA House of Delegates on April 12, 2021, expressing concern about the adoption of the new Uniform Rules and resolving that the President of the NYSBA request a stay of one year of the implementation of the new Uniform Rules.

The Section has been closely involved with the Commercial Division of New York Supreme Court since its establishment in 1995 and has participated in the development of the Rules of the Commercial Division. The Preamble to the Rules of the Commercial Division acknowledge the "strong cooperative spirit of the bar practicing before it." In fact, NYSBA played an integral part in the creation of the Commercial Division. The Commercial Division was created in recognition of the undisputed fact that New York is the center of world commerce and international finance. The Commercial Division, and its rules, has been recognized in restoring the role of the New York State Courts as a center for the adjudication of major commercial disputes.

Although the Section believes the Commercial Division and its rules have been a success story for the New York State Courts and the practitioners and judges in the Commercial Division, the Section did not advocate for the extension of the Commercial Division Rules to other State civil courts. The Section understands the concerns of practitioners that led to the adoption of the

Resolution of the House of Delegates on April 12, 2021, and later the appointment of the Task Force. However, that resolution did not resolve that the Commercial Division Rules were invalid as violative of the CPLR. According to the Task Force Preliminary Report, the Task Force is "to coordinate the efforts of NYSBA in furtherance of the resolution," which the Section does not believe encompasses a review of the validity of the Commercial Division rules.

The Section firmly disagrees with the sections of the Preliminary Report that assert that the Commercial Division rules violate the CPLR.

The Commercial Division was established in 1995, and the current rules represent a quarter-century of cooperation between the bench and bar. Many of the Commercial Division rules are intended to make litigation swifter and cheaper.

The Section requests that the Task Force confine itself to the issue of whether the new Uniform Rules will work well in other Parts or courts. The Task Force should not undermine the valuable work to develop the Commercial Division rules and the Commercial Division as "an efficient, sophisticated, up-to-date court dealing with challenging commercial cases." Preamble to the Rules of the Commercial Division of the Supreme Court.

The Preliminary Report states: "Even worse is when the rules either encroach or conflict with rules within the CPLR. At least five of the 'new rules' do so." Preliminary Report, p. 8. They do not conflict with the CPLR.

A. Privilege Logs. New Uniform Rule 202.20-a is a significantly modified version of Commercial Division Rule 11-b. New Uniform Rule 202.20-a provides:

Section 202.20-a Privilege Logs.

(a) Meet and Confer. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging

requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Court Order. Agreements and protocols agreed upon by parties shall be memorialized in a court order. In the event the parties are unable to enter into an agreement or protocol, the court shall by order provide for the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order, and the allocation of costs and expenses as between the parties.

Commercial Division Rule 11-b provides:

Rule 11-b. Privilege Logs.

(a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Categorical Approach or Document-By-Document Review.

1. The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.

2. In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.

3. To the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients - together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.

The Preliminary Report asserts that Uniform Rule 202.20(a) violates CPLR 3122(b) because the cost-shifting provisions encroach upon a party's rights under CPLR 3122(b). Preliminary Report, p. 8. The Preliminary Report ignores CPLR 3103.

CPLR 3122(b) provides that a party responding to a document response must provide information "for each document withheld."

Commercial Division Rule 11-b allows a party to insist on a document-by-document privilege log, subject to the Court's authority to enter a protective order under CPLR 3103

"denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3103 provides that protective orders should "prevent unreasonable ….expense."

Uniform Rule 202.20-a does not require the party seeking disclosure to agree to a categorical privilege log.[1] Nor does it require that the party seeking a detailed privilege log bear the expense. It merely provides that the Court may allocate "costs and expenses as between the parties."

Commercial Division Rule 11-b was promulgated in response to the proliferation of email in the commercial world, and the concomitant proliferation of privileged documents, resulting in the need to generate massive privilege logs in order to preserve the attorney/client privilege, thereby generating unnecessary legal expenses for parties.

Both Commercial Division Rule 11-b and the significantly modified version of it promulgated as Uniform Rule 202.20-a appear to be appropriate amplifications of the authority of the court under CPLR 3103 to grant protective orders "to prevent unreasonable … expense."

Certain portions of the Preliminary Report address the burdens on small practitioners and the consequences of the new Uniform Rules in small dollar amount cases. However, the use of categorical privilege logs is intended to make litigation easier for the attorneys and less expensive for the clients so the Section is at a loss to understand the concerns of the Task Force. Rather than burdening small practitioners, Uniform Rule 202.20-a may relieve practitioners of the onerous task of preparing document-by-document privilege logs. And if a document-by-document privilege log is inappropriate due to the small volume of documents in the case, that is allowed and will undoubtedly be without an allocation of expense.

[1] In adopting on June 26, 2012, the Report of the Special Committee on Discovery and Case Management in Federal Litigation of the New York State Bar Association, the NYSBA previously indicated its support for the practice of using categorical privilege logs. *See* archive.nysba.org/discoveryreport/ at 82-83 (last visited June 30, 2021).

Likewise, the requirement to meet and confer regarding privilege issues prior to generating a privilege log serves to reduce the expense of discovery, not to exacerbate it. The rules requiring counsel to meet and confer are further discussed below.

B. <u>Duty to Meet and Confer</u>. New Uniform Rule 202.20-f requires that counsel "consult with one another in a good faith effort to resolve all disputes about disclosure." New Uniform Rule 202.20-f provides:

Section 202.20-f Disclosure Disputes.

(a) To the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice.

(b) Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with this paragraph and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then such moving party shall, in an affidavit or affirmation, detail the efforts made by the moving party to obtain such a conference and set forth the responses received.

(c) The failure of counsel to comply with this rule may result in the denial of a discovery motion, without prejudice to renewal once the provisions of this rule have been complied with, or in such motion being held in abeyance until the informal resolution procedures of the court are conducted.

Uniform Rule 202.20-f is again a significantly modified version of Commercial Division Rule 14. Commercial Division Rule 14 provides:

Rule 14. Disclosure Disputes.

If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule will apply. Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith

effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the moving party shall submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute and requesting a telephone conference. Such a letter must include a representation that the party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter or shall indicate good cause why no such consultation occurred. Not later than four business days after receiving such a letter, any affected opposing party or non-party shall submit a responsive letter not exceeding three single-spaced pages. After the submission of letters, the court will schedule a telephone or in-court conference with counsel. The court or the court's law clerks will attempt to address the matter through a telephone conference where possible. The failure of counsel to comply with this rule may result in a motion being held in abeyance until the court has an opportunity to conference the matter. If the parties need to make a record, they will still have the opportunity to submit a formal motion.

The Preliminary Report, p. 7 cites *Costigan & Co. v. Andrew J. Costigan*, 304 A.D.2d 464 (2d Dep't 2003), in support of the assertion that "meet and confer" requirements violate the CPLR. *Costigan* involved a prior version of Commercial Division Rule 24, which the First Department stated "purports to bar a motion unless a prior conference has been held on the issue raised by the motion." *Costigan* in no way indicates that a "meet-and-confer" requirement for discovery disputes violates the CPLR.

Commercial Division Rule 24 has been revised since *Costigan* to clarify that "[n]othing in this rule shall be construed to prevent or limit counsel from making any motion deemed appropriate to best represent a party's interest." Further, Commercial Division Rule 24 does not apply to discovery disputes and *Costigan* did not involve a motion arising out of a discovery dispute. The new Uniform Rules do not include a Rule based on Commercial Division Rule 24, and Uniform Rule 14 is limited to discovery disputes. A requirement that attorneys confer regarding discovery disputes does not violate the CPLR.

In addition, Uniform Rule 202.20-f does not bar a party from making a motion. It only requires attorneys to meet and confer about discovery disputes. Uniform Rule 202.20-f provides

that the failure to meet and confer "may result in a denial of a discovery motion, without prejudice to renewal once the provisions have been complied with." (Emphasis added).

The Uniform Civil Rules for the Supreme Court and the County Court ("Uniform Civil Rules") have required for decades that motions related to disclosure be accompanied by "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." Uniform Civil Rules § 202.7(a). As the Preliminary Report recognizes, the requirement to meet and confer prior to a discovery motion has been enforced by the Appellate Division. *See Barnes v. NYNEX, Inc.*, 274 A.D.2d 368 (2d Dep't 2000).

The Preliminary Report, p. 9, recognizes the authority of the Chief Administrative Judge to promulgate rules for the courts, but the analysis in the Preliminary Report gives too little weight to the rulemaking authority of the Chief Administrative Judge. New York Constitution, Article 6, § 30, authorizes the Chief Administrative Judge to issue rules "to regulate practice and procedure in the courts," and the legislature has authorized the rulemaking authority in Judiciary Law § 212-2(d). The requirement that attorneys meet and confer regarding discovery disputes is an appropriate regulation of practice in the courts. It is also salutary for both the bench and the bar, and has been part of New York practice for decades. The NYSBA should not oppose a requirement that attorneys cooperate on discovery, and the position of the Preliminary Report is a step backwards in New York practice. And the NYSBA should certainly not take the erroneous position that Uniform Rule 202.20-f and by extension Commercial Division Rule 14 violate the CPLR.

C. Orders to Show Cause.

Uniform Rule 202.8-d provides:

Section 202.8-d 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 Section 202.8-e. Absent advance permission of the court, reply papers shall not be submitted on orders to show cause.

Commercial Division Rule 19 provides:

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.

The Preliminary Report, p. 9, asserts that Uniform Rule 202.8-d violates CPLR 2214(d), which provides that a motion may be brought by order to show cause "in a proper case," whereas the Uniform Rule requires "genuine urgency."

The language that an order to show cause should be presented only in a case of "genuine urgency" appears to be an appropriate elucidation of what constitutes "a proper case" to not follow the provisions of the CPLR 2214 for notice of a motion. In addition to the general rulemaking authority of the Chief Administrative Judge, CPLR 3401 expressly authorizes the Chief Administrative Judge to adopt "rules regulating the hearing of causes." Further, "genuine urgency" is consistent with how courts have applied the "proper case" standard of CPLR 2214(d). It is not clear why the NYSBA would advocate that attorneys should be able to avoid the notice requirements of CPLR 2214 for a motion other than in a case of "genuine urgency."

The Preliminary Report also asserts that Uniform Rule 202.8-d violates CPLR 2214(d) because it makes no allowance for an order to show cause in cases involving unrepresented parties or where relief sought is not opposed. Preliminary Report, p. 28. But there is nothing in CPLR

2214(d) that requires those applications to be made by order to show cause. The provisions of CPLR 2214 allowing a party to file a motion on notice are perfectly appropriate, even if the application is unopposed or the adversary is not represented by counsel.

D. Motions for Summary Judgment.

Uniform Rule 202.8-g provides:

Section 202.8-g Motions for Summary Judgment; Statements of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, 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 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.

Commercial Division Rule 19-a provides:

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.

There is a difference between Uniform Rule 202.8-g and Commercial Division Rule 19-a. Under the Commercial Division rule, the court "may" direct that the motion be accompanied by the statement of material facts, whereas the Uniform Rule now requires them.

Irrespective of the usefulness of this device, and whether its use should be required in all summary judgment motions in the courts of New York, the Section submits that the Uniform Rule and certainly Commercial Division Rule 19-a does not violate the CPLR. Again, the Uniform Rule is an appropriate elucidation of the provisions of CPLR 3212. The Uniform Rules are replete with requirements regarding the form of papers submitted in the courts that go far beyond what is specified in the CPLR.

The Preliminary Report expressed concern that the Uniform Rule, which can act as a notice to admit under CPLR 3123, contains no limitations on any deemed admission and no opportunity to reverse that admission. There is nothing in the Uniform Rule, however, that precludes a judge from taking notice that a statement of material fact was modified or withdrawn. Thus, the Uniform Rule is not inconsistent with the requirements of CPLR 3123.

The case law is clear that the court's review of a motion for summary judgment is a search for a material question of fact. The Statement of Material Facts, and the response thereto, is an effort to assist the court in that analysis. It does not violate the CPLR.

E. Temporary Restraining Orders.

Uniform Rule 202.8-e provides:

Section 202.8-e Temporary Restraining Orders.

Unless the moving party can demonstrate significant prejudice by reason of giving notice, or that notice could not be given despite a good faith effort to provide notice, a temporary restraining order should not be issued ex parte. Unless excused by the court, the applicant must give notice of the time, date and place that the application will be made in a manner, and provide copies of all supporting papers, to the opposing parties sufficiently in advance to permit them an opportunity to appear and contest the application. Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating either that: (a) notice has been given; or (b) notice could not be given despite a good faith effort to provide it or (c) there will be significant prejudice to the party seeking the restraining order by giving of notice. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.

Commercial Division Rule 20 provides:

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 *ex parte*. The applicant must give notice, including copies of all supporting papers, to the opposing parties sufficient to permit them an opportunity to appear and contest the application.

The Preliminary Report, pp. 10-11. asserts that Uniform Rule 202.8-e "is in direct conflict with CPLR 6313, which provides that in a motion for preliminary injunction, upon a showing of immediate and irreparable injury, a temporary restraining order may be granted without notice."

The Task Force's assertion that Uniform Rule 202.8-e violates CPLR 6313 ignores the word "may" in CPLR 6313. Obviously, whether relief should be granted ex parte is a matter of the court's discretion under CPLR 6313. Uniform Rule 202.8-e provides guidance to the bench and bar as to when that discretion to grant ex parte should be exercised. It does not change the standard of "immediate and irreparable injury" set forth in CPLR 6313. Requiring that a party seeking ex parte relief demonstrate why they could not give notice of the application is not an improper standard and does not violate the CPLR.

What's more, comparable requirements have been in effect since 2007. Uniform Rule 202.7(f) requires each applicant for a TRO to affirm that: (i) "there will be significant

prejudice to the party seeking the restraining order by giving of notice"; or (ii) "a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application." 22 NYCRR 202.7(f). Courts have long recognized that Rule 202.7(f) is appropriate and enforceable. *See Tesone v. Hoffman*, 84 A.D.3d 1219, 1221 (2d Dep't 2011). It is unclear why NYSBA would advocate that it should be easier to make ex parte applications for temporary relief, or how a long-standing requirement places an improper burden on practitioners.

CONCLUSION

The Preliminary Report questions the number of rules a practitioner must consult in order to litigate cases in the courts of New York. However, practitioners have needed to familiarize themselves with the Uniform Civil Rules since 1986. Those rules have been promulgated by the Chief Administrative Judge through constitutional and statutory authority.

The Section did not advocate for the new Uniform Rules adopted by order of the Chief Administrative Judge effective February 1, 2020. The Section does not object to the NYSBA seeking a stay of the effect of those rules. However, the Uniform Rules and by implication the Commercial Division Rules do not violate the CPLR, and the NYSBA should not adopt a report that undermines the innovative and collaborative approach that has made the Commercial Division a success.

Respectfully submitted,

/s/Daniel K. Wiig
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Approved by resolution of the Executive Committee, June 30, 2021.