



**MEMORANDUM**

To: All Interested Persons

From: Anthony R. Perri

Re: Request for Public Comment on Amending Commercial Division Rule 28  
Relating to the Pre-marking of Exhibits

Date: November 15, 2022

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to amend Commercial Division Rule 28 “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.” (Ex. A, p. 2.) The proposed revisions to Rule 28 and the rationale for the revisions are set forth in Exhibit A.

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Persons wishing to comment on the proposal should e-mail their submissions to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or write to: Anthony R. Perri, Esq., Acting Counsel, Office of Court Administration, 25 Beaver Street, 11<sup>th</sup> Fl., New York, New York, 10004. Comments must be received no later than January 16, 2023.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

# **EXHIBIT A**

July 1, 2022

**TO:** Members of the Commercial Division Advisory Council  
**FROM:** Subcommittee on Best Practices for Judicial Case Management  
**RE:** Proposed Modifications to Commercial Division Rule 28

This memorandum provides suggested modifications to Commercial Division Rule 28 that the Commercial Division Advisory Council's Subcommittee on Best Practices for Judicial Case Management has recommended. Now, with two years of experience of the pandemic, we are particularly mindful of the potentially long-lasting impact of the pandemic on the functioning of the courts and how courtroom practices might be transformed going forward. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board's consideration and approval.

**Rule 28 (Pre-Marking of Exhibits).**

A. Current Version of Rule 28

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.

B. Proposed Revision to 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 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. Rationale 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 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 another format that does not lend itself easily to physical marking.

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

We thank you for your consideration of these proposed changes to Rule 28.