ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

WHEREAS, the Commercial Division of New York State Supreme Court is an efficient, sophisticated, up-to-date court, dealing with challenging commercial cases, and has had as its primary goal the cost-effective, predictable and fair adjudication of complex commercial cases, and

WHEREAS, since its inception the Commercial Division has implemented rules, procedures and forms especially designed to address the unique problems of commercial practice, and through the work of the Commercial Division Advisory Council – a committee of commercial practitioners, corporate in-house counsel and jurists devoted to the Division's excellence – the Commercial Division has functioned as an incubator, becoming a recognized leader in court system innovation, and demonstrating an unparalleled creativity and flexibility in development of rules and practices, and

WHEREAS, the Administrative Board of the Courts (Board) requested public comment on the advisability of adopting Commercial Division Rules into general civil practice, and after review of public comments, including those received from the Advisory Committee on Civil Practice and the Advisory Committee on Matrimonial Practice, and after input from a working group of judges and attorneys, and recognizing that the COVID-19 pandemic has created unique opportunities for permanent reform, the Board approved adoption of certain Commercial Division Rules to other courts of civil jurisdiction, and

NOW THEREFORE, upon consultation with and approval of the Administrative Board of the Courts, pursuant to authority vested in me as Chief Administrative Judge of the State of New York under Article VI, section 28(b) of the State Constitution, I have determined to incorporate certain rules, and variations thereof, of the Commercial Division into the Uniform Rules for the Supreme Court and the County Court, effective February 1, 2021 until further order as per the attached Exhibits delineating each rule so adopted.

Chief Administrative Judge of the Courts

Dated: December 29, 2020

AO/270/2020

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[1] Please note "New Uniform Rule Section" indicates new Rule placement as recommended by Counsel's office. Other new Rules were previously assigned by the Commercial Division Working Group in their recommendations.

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# EXHIBITS

# EXHIBIT A

**Regarding Commercial Division Rule 1: Appearance by Counsel with Knowledge and Authority.**

Section 202.1 Uniform Civil Rules for the Supreme Court and the County Court are amended to create new subdivisions (f) and (g) as follows:

> (f) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. Failure to comply with this rule may be treated as a default for purposes of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130.2.1.
>
> (g) It is important that counsel be on time for all scheduled appearances.

# EXHIBIT B

**Regarding Rule 2: Settlements and Discontinuances.**

Section 202.28 of the Uniform Civil Rules for the Supreme Court and the County Court are amended as follows:

Section 202.28 Discontinuance of Civil Actions and Notice to the Court.

(a) ~~In any discontinued action, the attorney for the defendant shall file a stipulation or statement of discontinuance with the county clerk within 20 days of such discontinuance. If the action has been noticed for judicial activity within 20 days of such discontinuance, the stipulation or statement shall be filed before the date scheduled for such activity.~~ If an action is settled, discontinued, or otherwise disposed of, counsel shall immediately inform the assigned judge or court part by submission of a copy of the stipulation or a letter directed to the clerk of the part along with notice to the chambers of the assigned judge via telephone, or email. This notification shall be made in addition to the filing of a stipulation with the county clerk.

(b) ~~If an action is discontinued under paragraph (a), or wholly or partially settled by stipulation pursuant to CPLR 2104, or a motion has become wholly or partially moot, or a party has died or become a debtor in bankruptcy, the parties promptly shall notify the assigned judge in writing of such an event.~~ Counsel, including self-represented litigants, are under a continuing obligation to notify the court as promptly as possible in the event that an action is settled, discontinued or otherwise disposed of or if a case or motion has become wholly or partially moot, or if a party has died or filed a petition in bankruptcy. Such notification shall be made to the assigned judge in writing.

# EXHIBIT C

**Regarding Rule 3: Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.29 as follows:

> Section 202.29 Settlement Conference Before a Justice Other than the Justice Assigned to the Case.
>
> In any civil action or proceeding, should counsel wish to proceed with a settlement conference before a justice or judge other than the justice or judge assigned to the case, counsel may jointly request that the assigned justice or judge grant such a separate settlement conference. The request may be made at any time in the litigation. Such request will be granted in the discretion of the justice or judge assigned to the case upon finding that such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice. If the request is granted, the assigned justice or judge shall make appropriate arrangements for the designation of a "settlement judge."

# EXHIBIT D

**Regarding Rule 4: Electronic Submission of Papers**

Section 202.5-a of the Uniform Civil Rules for the Supreme Court and the County Court is amended as follows:

Section 202.5-a Filing by ~~Facsimilie~~ Electronic Transmission.

~~(a) Application.~~

~~(1) There is hereby established a pilot program in which papers may be filed by facsimile transmission with the Supreme Court and, as is provided in section 206.5-a of this Title, with the Court of Claims. In the Supreme Court, the program shall be limited to commercial claims and tax certiorari, conservatorship, and mental hygiene proceedings in Monroe, Westchester, New York and Suffolk Counties.~~

~~(2) "Facsimile transmission" for purposes of these rules shall mean any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such document.~~

~~(b) Procedure.~~

~~(1) Papers in any civil actions or proceedings designated pursuant to this section, including those commencing an action or proceeding, may be filed with the appropriate court clerk by facsimile transmission at a facsimile telephone number provided by the court for that purpose. The cover page of each facsimile transmission shall be in a form prescribed by the Chief Administrator and shall state the nature of the paper being filed; the name, address and telephone number of the filing party or party's attorney; the facsimile telephone number that may receive a return facsimile transmission, and the number of total pages, including the cover page, being filed. The papers, including exhibits, shall comply with the requirements of CPLR 2101(a) and section 202.5 of this Part and shall be signed as required by law. Whenever a paper is filed that requires the payment of a filing fee, a separate credit card or debit card authorization sheet shall be included and shall contain the credit or debit card number or other information of the party or attorney permitting such card to be debited by the clerk for payment of the filing fee. The card authorization sheet shall be kept separately by the clerk and shall not be a part of the public record. The clerk shall not be required to accept papers more than 50 pages in length, including exhibits but excluding the cover page and the card authorization sheet.~~

~~(2) Papers may be transmitted at any time of the day or night to the appropriate facsimile telephone number and will be deemed filed upon receipt of the facsimile transmission, provided, however, that where payment of a fee is required, the papers will not be deemed filed unless accompanied by a completed credit card or debit card authorization sheet. The clerk shall date-stamp the papers with the date that they were received. Where the papers initiate an action, the clerk also shall mark the papers with the index number. No later than the following business day, the clerk shall transmit a copy of the first page of each paper, containing the date of filing and, where appropriate, the index number, to the filing party or attorney, either by facsimile or first class mail. If any page of the~~

~~papers filed with the clerk was missing or illegible, a telephonic, facsimile, or postal notification transmitted by the clerk to the party or attorney shall so state, and the party or attorney shall forward the new or corrected page to the clerk for inclusion in the papers.~~

~~(c) Technical failures. The appropriate clerk shall deem the UCS fax server to be subject to a technical failure on a given day if the server is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon of that day. The clerk shall provide notice of all such technical failures by means of the UCS fax server which persons may telephone in order to learn the current status of the Service which appears to be down. When filing by fax is hindered by a technical failure of the UCS fax server, with the exception of deadlines that by law cannot be extended, the time for filing of any paper that is delayed due to technical failure shall be extended for one day for each day in which such technical failure occurs, unless otherwise ordered by the court.~~

(a) Papers and correspondence by fax. Papers and correspondence filed by fax shall comply with the requirements of section 202.5 except that papers shall not be submitted to the court by fax without advance approval of the justice assigned. Correspondence sent by fax should not be followed by hard copy unless requested.

(b) Papers submitted in digital format. In cases not pending in the court's Filing by Electronic Means System, the court may permit counsel to communicate with the court and each other by e-mail. Papers and correspondence filed by fax shall comply with the requirements of section 202.5 except that papers shall not be submitted to the court by fax without advance approval of the justice assigned. In the court's discretion, counsel may be requested to submit memoranda of law by e-mail or by other electronic means, such as by a computer flash drive, along with an original and courtesy copy.

# EXHIBIT E

**Regarding Rule 6: Form of Papers.**

Subdivision (a) of section 202.5 of the Uniform Civil Rules for the Supreme Court and the County Court is amended as follows:

(a) Index Number; Form; Label.

(1) The party filing the first paper in an action, upon payment of the proper fee, shall obtain from the county clerk an index number, which shall be affixed to the paper. The party causing the first paper to be filed shall communicate in writing the county clerk's index number forthwith to all other parties to the action. Thereafter such number shall appear on the outside cover and first page to the right of the caption of every paper tendered for filing in the action. Each such cover and first page also shall contain an indication of the county of venue and a brief description of the nature of the paper and, where the case has been assigned to an individual judge, shall contain the name of the assigned judge to the right of the caption. In addition to complying with the provisions of CPLR 2101, every paper filed in court shall have annexed thereto appropriate proof of service on all parties where required, and if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins. In addition, every paper filed in court, other than an exhibit or printed form, shall contain writing on one side only, except that papers that are fastened on the side may contain writing on both sides, and shall contain print no smaller than 12-point, or 8 ½ x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than 10 point. Papers that are stapled or bound securely shall not be rejected for filing simply because they are not bound with a backer of any kind.

(2) Each electronically-submitted memorandum of law, affidavit and affirmation, exceeding 4500 words, shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document.

# EXHIBIT F

**Regarding Rule 8: Consultation prior to Preliminary and Compliance Conferences.**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.23 as follows:

202.23 Consultation prior to Preliminary and Compliance Conference

Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

# EXHIBIT G

**Regarding Rule 11-a: Interrogatories**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20 as follows:

Section 202.20 Interrogatories.

Interrogatories are limited to 25 in number, including subparts, unless the court orders otherwise. This limit applies to consolidated actions as well.

# EXHIBIT H

**Regarding Rule 11-b: Privilege Logs**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-a as follows:

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.

# EXHIBIT I

**Regarding Rule 11-c: Discovery of Electronically Stored Information from Nonparties.**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.11 as follows:

> Section 202.11. Parties and nonparties should adhere to the Electronically Stored Information ("ESI") guidelines set forth in Appendix hereto.

Section V of Appendix A of the Uniform Civil Rules for the Supreme Court and the County Courts is hereby amended as follows:

> V. The requesting party shall defray the nonparty's reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR. ~~*Such reasonable production expenses may include the following:*~~
>
> ~~*A. Fees charged by outside counsel and e-discovery consultants;*~~
>
> ~~*B. The costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;*~~
>
> ~~*C. The cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable and warranted by the facts and circumstances; and*~~
>
> ~~*Other costs as may be identified by the nonparty.*~~

# EXHIBIT J

**Regarding Rule 11-d: Limitation on Depositions**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-b as follows:

Section 202.20-b Limitations on Depositions.

(a) Unless otherwise stipulated to by the parties or ordered by the court:

(1) the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and

(2) depositions shall be limited to 7 hours per deponent.

(b) Notwithstanding subsection (a)(1) of this Rule, the propriety of and timing for depositions of non-parties shall be subject to any restrictions imposed by applicable law.

(c) For the purposes of subsection (a)(1) of this Rule, the deposition of an entity through one or more representatives shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf.

(d) For the purposes of this Rule, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), shall constitute a separate deposition.

(e) For the purposes of subsection (a)(2) of this Rule, the deposition of an entity shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted.

(f) For good cause shown, the court may alter the limits on the number of depositions or the duration of an examination.

(g) Nothing in this Rule shall be construed to alter the right of any party to seek any relief that it deems appropriate under the CPLR or other applicable law.

# EXHIBIT K

**Regarding Rule 11-e: Responses and Objections to Document Requests**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-c as follows:

Section 202.20-c Requests for Documents.

(a) For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Response"), either:

(1) state that the production is made as requested; or

(2) state with reasonable particularity the grounds for any objection to production.

(b) Each Response shall state: (i) whether the objection(s) interposed pertains to all or part of the request being challenged; (ii) whether any documents or categories of documents are being withheld, and if so, which of the stated objection(s) forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents: and (iii) the manner in which the responding party intends to limit the scope of its production.

(c) In each Response, the responding party shall verify, for each individual requests: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified.

(d) Nothing contained herein is intended to conflict with a party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).

(e) The parties are encouraged to use the most efficient means to review documents, including electronically stored information ("ESI"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases. The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.

(f) Absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to or, if objected to, such objection was overruled by the court.

# EXHIBIT L

**Regarding Rule 11-f: Depositions of Entities; Identification of Matters**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-d as follows:

Section 202.20-d Depositions of Entities; Identification of Matters

(a) A notice or subpoena may name as a deponent a corporation, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.

(c) If the notice or subpoena to an entity does not identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then no later than ten days prior to the scheduled deposition:

(1) the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;

(2) such designation must include the identity, description or title of such individual(s); and

(3) if the named entity designates more than one individual, it must set out the matters on which each individual will testify.

(d) If the notice or subpoena to an entity does identify a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in section (b) of this Rule, then:

(1) pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced;

(2) pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include in the notice or subpoena served upon such entity the identity, description or title of such individual; and

(3) if the named entity, pursuant to subsection (d)(1) of this Rule, cross-designates

more than one individual, it must set out the matters on which each individual will testify.

(e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this Rule.

(f) The individual(s) designated must testify about information known or reasonably available to the entity.

(g) Deposition testimony given pursuant to this Rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.

(h) This Rule does not preclude a deposition by any other procedure allowed by the CPLR.

# EXHIBIT M

**Regarding Rule 13: Adherence to Discovery Schedule, Expert Disclosure**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-e as follows:

Section 202.20-e Adherence to Discovery Schedule.

(a) Parties shall strictly comply with discovery obligations by the dates set forth in all case scheduling orders. Applications for extension of a discovery deadline shall be made as soon as practicable and prior to the expiration of such deadline. Non-compliance with such an order may result in the imposition of an appropriate sanction against that party or for other relief pursuant to CPLR 3126.

(b) If a party seeks documents from an adverse party as a condition precedent to a deposition of such party and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the non-producing party from introducing such demanded documents at trial.

# EXHIBIT N

**Regarding Rule 14: Disclosure Disputes**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-f as follows:

Section 202.20-f Disclosure Disputes.

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.

# EXHIBIT O

**Regarding Rule 14-a: Rulings at Disclosure Conferences**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-g as follows:

Section 202.20-g Rulings at Disclosure Conferences.

The following procedures shall govern all disclosure conferences conducted by non-judicial personnel.

Prior to the conclusion of the conference, at the request of any party

(1) all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be "so ordered," or the court shall otherwise enter an order incorporating the resolutions reached;

(2) the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the court for approval and signature by the justice presiding; or

(3) prior to the conclusion of the conference, the parties shall prepare an outline of the material terms of any resolution and shall thereafter agree upon and jointly submit to the court within one (1) business day of the conference a stipulated proposed order, memorializing the resolution of their discovery dispute. If the parties are unable to agree upon an appropriate form of proposed order, they shall so advise the court so that the court can direct an alternative course of action.

# EXHIBIT P

**Regarding Rule 15: Adjournments of Conferences.**

Section 202.10 of the Uniform Civil Rules for the Supreme Court and the County Courts is amended as follows:

Section 202.10 Appearance at Conferences.

(a) Any party may request to appear at a conference by ~~telephonic or other~~ electronic means. Where feasible and appropriate, the court is encouraged to grant such requests.

(b) Adjournments of conferences shall be granted upon a showing of good cause. An adjournment of a conference will not change any date in any court order, including but not limited to the preliminary conference order, unless otherwise directed by the court.

# EXHIBIT Q

**Regarding Rule 16: Motions in General**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-a as follows:

Section 202.8-a. Motion in General

(a) Form of Motion Papers. The movant shall specify in the notice of motion, order to show cause, and in a concluding section of a memorandum of law, the exact relief sought. Regardless of whether the papers are filed electronically or in hard copy or as working copies, counsel must submit as part of the motion papers copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212). Counsel should use tabs on hard or working copies when submitting papers containing exhibits. Copies must be legible. If a document to be annexed to an affidavit or affirmation is voluminous and only discrete portions are relevant to the motion, counsel shall attach excerpts and submit the full exhibit separately. Documents in a foreign language shall be translated as required by CPLR 2101(b). Whenever reliance is placed upon a decision or other authority not readily available to the court, a copy of the case or of pertinent portions of the authority shall be submitted with the motion papers.

(b) Proposed orders. When appropriate, proposed orders should be submitted with motions, e.g., motions to be relieved, pro hac vice admissions, open commissions, etc. No proposed order should be submitted with motion papers on a dispositive motion.

(c) Adjournment of Motions. Unless the court orders otherwise, no motion may be adjourned on consent more than three times or for a cumulative total of more than 60 days.

# EXHIBIT R

**Regarding Rule 17: Length of Papers**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-b as follows:

Rule 202.8-b. Length of Papers.

(a) Unless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each; (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.

(b) For purposes of paragraph (a) above, the word count shall exclude the caption, table of contents, table of authorities, and signature block.

(c) Every brief, memorandum, affirmation, and affidavit shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document.

(d) The court may, upon oral or letter application on notice to all parties permit the submission of affidavits, affirmations, briefs or memoranda which exceed the limitations set forth in paragraph (a) above. In the event that the court grants permission for an oversize submission, the certification required by paragraph (b) above shall set forth the number of words in the document and certify compliance with the limit, if any set forth by the court.

# EXHIBIT S

**Rule 18. Sur-Reply and Post-Submission Papers.**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-c as follows:

Section 202.8-c. Sur-Reply and Post-Submission Papers

Absent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted, except that counsel may inform the court by letter of the citation of any post-submission court decision that is relevant to the pending issues, but there shall be no additional argument. Materials submitted in violation hereof will not be read or considered. Opposing counsel who receives a copy of materials submitted in violation of this Rule shall not respond in kind.

# EXHIBIT T

**Regarding Rule 19. Orders to Show Cause**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-d as follows:

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.

# EXHIBIT U

**Regarding Rule 19-a: Motions for Summary Judgment; Statements of Material Facts**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-g as follows:

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.

# EXHIBIT V

**Regarding Rule 20: Temporary Restraining Orders**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-e as follows:

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.

# EXHIBIT W

**Regarding Rule 22. Oral Argument**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.8-f as follows:

Section 202.8-f. Oral Argument.

(a) Each court or court part shall adopt a procedure governing request for oral argument of motions, provided that, in the absence of the adoption of such a procedure by a particular court or part, the provisions of paragraph (b) shall apply. The procedure to be adopted shall set forth whether oral argument is required on all motions or whether the court will determine, on a case-by-case basis, whether oral argument will be heard and how counsel shall request argument and, if oral argument is permitted, when counsel shall appear.

(b) Any party may request oral argument of a motion by letter accompanying the motion papers. Notice of the date selected by the court shall be given, if practicable, at least 14 days before the scheduled oral argument. At that time, counsel shall be prepared to argue the motion, discuss resolution of the issue(s) presented and/or schedule a trial or hearing.

(c) Oral arguments may be conducted by the court by electronic means.

# EXHIBIT X

**Regarding Rule 28: Pre-Marking of Exhibits.**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.34 as follows:

Section 202.34. Pre-Marking of Exhibits

Counsel for the parties shall consult prior to trial and shall in good faith attempt to agree upon the exhibits that will be offered into evidence without objection. Prior to the commencement of the trial, each side shall then mark its exhibits into evidence, subject to court approval, 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.

# EXHIBIT Y

**Regarding Rule 30: Settlement and Pretrial Conferences**

Section 202.26 of the Uniform Civil Rules for Supreme Court and the County Court is amended as follows:

Section 202.26 Settlement and Pretrial Conferences.

~~(a) After the filing of a note of issue and certificate of readiness in any action, the judge shall order a pretrial conference, unless the judge dispenses with such a conference in any particular case.~~

~~(b) To the extent practicable, pretrial conferences shall be held not less than 15 nor more than 45 days before trial is anticipated.~~

~~(c) The judge shall consider at the conference with the parties or their counsel the following:~~

~~(1) simplification and limitation of the issues;~~

~~(2) obtaining admission of fact and of documents to avoid unnecessary proof;~~

~~(3) disposition of the action, including scheduling the action for trial;~~

~~(4) amendment of pleadings or bill of particulars;~~

~~(5) limitation of number of expert witnesses; and~~

~~(6) insurance coverage, where relevant.~~

~~The judge also may consider with the parties any other matters deemed relevant.~~

~~(d) In actions brought under the simplified procedure sections of the CPLR, the court shall address those matters referred to in CPLR 3036(5).~~

~~(e) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations, or accompanied by a person empowered to act on behalf of the party represented, will be permitted to appear at a pretrial conference. Where appropriate, the court may order parties, representatives of parties, representatives of insurance carriers or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to also attend in person or telephonically at the settlement conference. Plaintiff shall submit marked copies of the pleadings. A verified bill of particulars and a doctor's report or hospital record, or both, as to the nature and extent of injuries claimed, if any, shall be submitted by the plaintiff and by any defendant who counterclaims. The judge may require additional data, or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this subdivision may be deemed a default under CPLR 3404. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this subdivision.~~

~~(f) If any action is settled or discontinued by stipulation at a pretrial conference, complete minutes of such stipulation shall be made at the direction of the court. Such transcribed stipulation shall be enforceable as though made in open court.~~

~~(g)~~

~~(1) At the pretrial conference, if it appears that the action falls within the monetary jurisdiction of a court of limited jurisdiction, there is nothing to justify its being retained in the court in which it is then pending, and it would be reached for trial more quickly in a lower court, the judge shall order the case transferred to the appropriate lower court, specifying the paragraph of CPLR 325 under which the action is taken.~~

~~(2) With respect to transfers to the New York City Civil Court pursuant to CPLR 325, if, at the pretrial conference, the conditions in paragraph (1) of this subdivision are met except that the case will not be reached for trial more quickly in the lower court, the judge, in his or her discretion, may order the case so transferred if it will be reached for trial in the lower court within 30 days of the conference. In determining whether the action will be reached for trial in the lower court within 30 days, the judge shall consult with the administrative judge of his or her court, who shall advise, after due inquiry, whether calendar conditions and clerical considerations will permit the trial of actions in the lower court within the 30-day timeframe. If the action is not transferred to a lower court, it shall be tried in the superior court in its proper calendar progression.~~

(a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

(b) Pre-Trial Conference. Prior to Trial, counsel shall confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. Where a pre-trial conference is scheduled, or otherwise prior to the commencement of opening statements, counsel shall be prepared to discuss all matters as to which there is disagreement between the parties and settlement of the matter, and the court may require the parties to prepare a written stipulation of undisputed facts.

(c) Consultation Regarding Expert Testimony. The court may direct that prior, or during, trial, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation.

# EXHIBIT Z

**Regarding Rule 31: Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.20-h as follows:

Section 202.20-h Pre-Trial Memoranda, Exhibit Book and Requests for Jury Instructions.

(a) Counsel shall submit pre-trial memoranda at the pre-trial conference, or such other time as the court may set. Counsel shall comply with CPLR 2103(e). A single memorandum no longer than 25 pages shall be submitted by each side. No memoranda in response shall be submitted.

(b) On the first day of trial or at such other time as the court may set, counsel shall submit an indexed binder or notebook, or the electronic equivalent, of trial exhibits for the court's use. A copy for each attorney on trial and the originals in a similar binder or notebook for the witnesses shall be prepared and submitted. Plaintiff's exhibits shall be numerically tabbed, and defendant's exhibits shall be tabbed alphabetically.

(c) Where the trial is by jury, counsel shall, on the first day of the trial or such other time as the court may set, provide the court with case-specific requests to charge and proposed jury interrogatories. Where the requested charge is from the New York Pattern Jury Instructions - Civil, a reference to the PJI number will suffice. Submissions should be by hard copy and electronically, as directed by the court.

# EXHIBIT AA

**Regarding Rule 32: Scheduling Witnesses**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.37 as follows:

Section 202.37. Scheduling Witnesses

At the commencement of the trial 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. The court may permit for good cause shown and in the absence of substantial prejudice, a party to call a witness to testify who was not identified on the witness list submitted by that party. The estimates of the length of testimony provided by counsel are advisory and the court may permit further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded.

# EXHIBIT BB

**Regarding Rule 32-a: Direct Testimony by Affidavit**

Section 202.20-i of the Uniform Civil Rules for the Supreme Court and the County Court are added as follows:

Section 202.20-i Direct Testimony by Affidavit.

The court may require that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, (a) that the court may not require the submission of a direct testimony affidavit from a witness who is not under the control of the party offering the testimony and (b) the opposing party shall have the right to object to statements in the direct testimony affidavit, and the court shall rule on such objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that such portion be stricken. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness.

# EXHIBIT CC

**Rule 34. Staggered Court Appearances**

The Uniform Civil Rules for the Supreme Court and the County Court are amended by adding new section 202.23 as follows:

Section 202.23 Staggered Court Appearances.

Staggered court appearances are a mechanism to increase efficiency in the courts and to decrease lawyers' time waiting for a matter to be called by the courts. While this rule is intended to streamline the litigation process, it will be ineffectual without the cooperation and participation of litigants. Improving the process of litigation by instituting staggered court appearances, for example, requires not only the promulgation of rules such as this one, but also, and more importantly, the proactive and earnest adherence to such rules by parties and their counsel and the court.

(a) Each court appearance for oral argument on a motion shall be assigned either a set time or a time interval during which the appearance is expected to be held. The assignment of time or time interval, and the length of time allotted to a case is solely in the discretion of the court.

(b) In order for the court to be able to address any and all matters of concern to the court and in order for the court to avoid the appearance of holding ex parte communications with one or more parties in the case, even those parties who believe that they are not directly involved in the matter before the court must appear at the appointed date and time assigned by the court unless specifically excused by the court.

(c) Since the court is setting aside a specific time or time interval for the case and since there are occasions when the court's electronic or other notification system fails or occasions when a party fails to receive the court-generated notification, each attorney who receives notification of an appearance on a specific date and time is responsible for notifying all other parties by e-mail that the matter is scheduled to be heard on that assigned date and time. All parties are directed to exchange e-mail addresses with each other at the commencement of the case and to keep these e-mail addresses current, in order to facilitate notification by the person(s) receiving the court notification.

(d) Requests for adjournments shall be transmitted in writing to the court and to all parties, in such manner as the court may direct, so as to be received no later than 48 hours before the hearing and shall set forth whether the other parties consent to the adjournment.

**NYSBA FAMILY LAW SECTION, Matrimonial Update, January 2021**

By Bruce J. Wagner
Whiteman Osterman & Hanna LLP, Albany

**Child Support - CSSA – Over the Cap – Reduced**

In Matter of Good v. Ricardo, 2020 Westlaw 7050405 (2d Dept. Dec. 2, 2020), the father appealed from a December 2019 Family Court order denying his objections to a September 2019 Support Magistrate order which, after a hearing, granted the motion's March 2019 petition for upward modification of child support. The parties' July 2011 stipulation, incorporated into their November 2011 divorce judgment, required the father to pay $5,650 per month in child support for 2 children, based upon his 80% share of the parties' $339,023 in combined parental income. The Support Magistrate, based upon the 15% modification ground (the 3-years ground also applied), set the father's child support obligation at $6,650 per month, finding that his 72% share of the CSSA obligation based upon the entire combined parental income of $475,390, or $7,131 per month, was unjust and inappropriate, and Family Court sustained this determination. The Second Department reversed, on the law, on the facts and in the exercise of discretion, and restored the father's obligation to the $5,650 required under the July 2011 stipulation, noting that although the Magistrate stated that she considered the standard of living the children would have enjoyed had the household remained intact, and their needs, "the

record does not demonstrate that the children are not living *** the lifestyle they would have enjoyed had the household remained intact," and the father was also paying 80% of significant add-on expenses, including uncovered health expenses, educational expenses, extra-curricular activities, summer camp, sleep away camp, a trip to Europe and electronics, plus $1,600 per month in child care expenses, as against the mother's admission that she was only incurring $530 per month for child care.

**Counsel Fees - After Trial; Maintenance – Durational Affirmed; Increase Upon Emancipation Reversed**

In Sufia v. Khalique, 2020 Westlaw 7636042 (2d Dept. Dec. 23, 2020), the husband appealed from an October 2019 Supreme Court judgment which, upon an April 2019 decision after trial of the wife's September 2015 action, awarded her maintenance of $1,786.99 per month for 14 years, to increase to $3,004.59 per month upon the emancipation of the youngest child and counsel fees of $25,000. The Second Department modified, on the facts and the exercise of discretion, by deleting the maintenance increase provision and providing that maintenance shall terminate upon the wife's marriage or the death of either party. The parties were married in 1987 and have 4 children, 1 unemancipated as of the time of trial, and Supreme Court imputed annual income of $150,000 to the husband and $24,694 to the wife. The Appellate Division held that there was no basis in the record for the maintenance increase and the

counsel fee award was a provident exercise of discretion under the circumstances, citing the DRL 237(a) rebuttable presumption in favor of the less monied spouse.

**Custody - Housing; Sex Offender Contact with Child**

In Matter of Papineau v. Sanford, 2020 Westlaw 7653744 (4th Dept. Dec. 23, 2020), the mother appealed from a February 2019 Family Court order which awarded sole legal and physical custody of the parties' son to the father. The Fourth Department affirmed, noting that the father and child engaged in various activities together and that the father, who owns the home in which he lives with his wife, supported the child's educational needs and sought appropriate counselling for the child. The Court noted that the mother lived with her own mother and that the mother allowed the child to be in the presence of and supervised by, her partner, who was a registered sex offender.

**Custody - Modification – Arrest, Neglect**

In Matter of Richard EE. v. Mandy FF., 2020 Westlaw 7775404 (3d Dept. Dec. 31, 2020), the mother appealed from a February 2019 Family Court order, which granted the father's June 2018 petition to modify an August 2016 order (sole legal and primary physical custody to mother) so as to grant him sole legal and primary physical custody of the parties' daughter born in 2012. The father's petition was based upon the mother's arrest on various criminal charges. Family Court ordered an FCA 1034 investigation

and a DSS investigation sustained a report that the mother regularly left the child and her half siblings with a neighbor whom she suspected of trafficking women and drugs out of his home. The mother was thereafter convicted of assault 3d and criminal mischief 4th and was sentenced to probation. The Third Department affirmed, noting that the evidence revealed that the father lives in Ohio with his fiancée and that the child has lived with him since the mother's arrest and is enrolled in school, and concluding that the father's home environment was "more stable" and that he "is better equipped to provide for the overall well[-] being of the child."

**Custody - Modification – Child's Wishes (16 y/o); Unstable Employment and Housing**

In Matter of Anthony YY. V. Emily ZZ., 2020 Westlaw 7647730 (3d Dept. Dec. 24, 2020), the mother appealed from a May 2019 Family Court order, which granted the father's 2018 petition to modify a 2007 Family Court order (joint legal custody, primary to mother) so as to grant him primary physical custody of the parties' child born in 2003 and weekend time to the mother. The father's petition alleged that the mother's housing and employment were unstable and that she had a difficult relationship with the child. The Third Department affirmed, noting that the mother failed to provide a structured environment recommended by mental health professionals and subjected the child "to a string of relocations

and school transfers," which would require the child "to make a disruptively long commute to school if she continued to live with the mother," while the father lives in the child's school district. The Court concluded by noting the child's preference to live with the father which is entitled to "great weight" given her age.

**Custody - Modification–Educational Decisions, Hygiene, Relocation, Smoking**

In Matter of Mathena XX. v. Brandon YY., 2020 Westlaw 7061926 (3d Dept. Dec. 3, 2020), the mother appealed from a May 2019 Family Court order which, following a hearing, dismissed her August 2018 petition seeking modification of an August 2017 consent order (joint legal and shared physical custody of their children born in 2012 and 2015, father's residence for school enrollment) and granted the father's petition, to the extent of awarding him primary decision-making on education, designated his residence as primary for school enrollment and provided the mother with the 1st, 2nd and 4th weekends of each month, plus shared holidays and vacations. The Third Department affirmed, noting that the father's relocation out of the previously agreed school district to a place 40 miles from the mother's home, constituted the requisite change in circumstances. The Appellate Division cited the father's testimony over hygiene concerns wherein he related that the children "were often returned to him unbathed and smelling strongly of cigarette smoke" and July 2018 photographs in evidence that

showed the mother's residence to be "unkempt and in complete disarray." The Third Department found that Family Court's decision was supported by the record and noted that Family Court was within its discretion to credit the father's testimony (he informed the mother in advance of his relocation, where he obtained a new Monday-Friday job) over the mother's testimony that she "could not recall having spoken with the father about his plans to relocate."

**Custody - Prohibit Exposure to Significant Other – Denied**

In Matter of Burke v. Livingston, 2020 Westlaw 7636397 (2d Dept. Dec, 23, 2020), the father appealed from an April 2019 Family Court order which, without a hearing, denied the father's application to prohibit both parents from exposing the subject children (born in 2012, 2016, 2017) to a significant other until the youngest child attains the age of 18. The mother opposed the application and the AFC supported the application in part, requesting that such a significant other not be permitted to spend the night when the children are in residence. The Second Department affirmed, noting that the father did not allege, in either his petition or supporting affidavit, that the mother has a significant other whose presence is a negative impact upon the children, or that she even has a significant other, concluding that the father failed to make an evidentiary showing warranting a hearing.

**Custody - Third Party – Grandparent Visitation – Standing Found**

In Matter of Noguera v. Busto, 133 NYS3d 884 (2d Dept. Dec.

9, 2020), the maternal grandmother appealed from an August 2019 Family Court order which, after a hearing, found that she lacked standing to seek visitation with her grandchild born in 2009. In 2012, while custody proceedings were pending between the mother and father, the mother fled to Argentina with the child, who was not returned to his father in NY until 2018. The Second Department reversed, on the facts, and remitted to Family Court for a best interests hearing and an in camera examination of the child. The Appellate Division held the evidence established that grandmother developed a relationship with the child early in his life and made repeated efforts to continue that relationship, and that "any knowledge, acquiescence, or participation by the grandmother in the mother's misconduct is a factor to be weighed" in the best interests hearing.

**Custody - UCCJEA – NY Inconvenient Forum**

In Matter of Sanchez v. Johnson, 2020 Westlaw 7379662 (2d Dept. Dec. 16, 2020), the mother appealed from a September 2018 Family Court order which granted the child's March 2018 motion to dismiss, upon forum non conveniens grounds and with the condition that a Florida proceeding be commenced, the father's January 2015 petition, seeking to modify a January 2013 consent order (physical custody to mother). Family Court had issued a temporary custody order in favor of the father; at or about the time of the father's January 2015 petition, the mother lived in NY and the father lived

in NC. In late 2016, the father and child moved from NC to FL. The Second Department affirmed, noting that the child has had no significant connection to NY since 2015 and since 2016, the substantial, relevant evidence pertaining to the child's "care, protection, education, and personal relationships is in Florida, not New York" and that the mother's use of excessive corporal punishment on the child, which precipitated the father's modification petition and the child's moves to NC and FL, weigh in favor of NY declining jurisdiction, citing DRL 76-f(2)(a).

**Custody - Visitation – Willful Violation**

In Matter of Harley K. v. Brittany J., 2020 Westlaw 7062110 (3d Dept. Dec. 3, 2020), the mother appealed from a July 2019 Family Court order which, after a hearing, granted the father's February 2019 petition to hold her in willful violation of a May 2018 order; granted her sole legal and physical custody of their daughter born in 2014; provided the father with two set weekdays and alternate weekends; and directed that the father shall ensure that the parties' daughter was not left alone with his girlfriend's son. The Third Department affirmed, noting that the mother did not dispute that she refused to allow the father's visitation with their daughter from late December 2018 through the filing of his petition in February 2019, based upon her allegation that he had violated the provision regarding his girlfriend's son. Family Court stated that "the mother took it upon herself to violate the

prior order even though a court-ordered investigation by Child Protective Services came back as unfounded" and found the mother in contempt because she "engaged in self-help." The Appellate Division concluded by noting that Family Court imposed no sanction upon the mother, instead warning her that she could be incarcerated for future violations.

**Divorce - Adultery – Counterclaim Dismissed**

In Agulnick v. Agulnick, 2020 Westlaw 7234017 (2d Dept. Dec. 9, 2020), the husband appealed from an April 2019 Supreme Court order which, in his October 2018 divorce action, denied his motion for summary judgment dismissing the wife's adultery counterclaim. The parties were married in 2004. Adultery was of significance in this case, given the terms of the parties' September 2006 post-nuptial agreement, which contained his admission of prior infidelity and which provided that if he committed further adultery, the wife would receive 80% of his future lifetime earnings and 80% of all marital assets. The Second Department reversed, on the law, and granted the husband's motion for summary judgment dismissing the wife's counterclaim. The Appellate Division held that the wife's theory was based upon the husband's opportunity to commit adultery with a babysitter who was in the marital home and on vacations on an overnight basis, and who attended social events. The Second Department reasoned that: the wife's focus upon the husband's opportunity to commit adultery

"amounts to [his] mere proximity to [the babysitter] at various times and places"; "[t]here is no investigator, no photograph, and no suspicious documents, texts, emails or social media posts"; and "the wife's opposition to summary judgment amounts to mere unilateral speculation, conjecture, guess, and surmise stemming from the husband's and [the baby sitter's] mere proximity to one another, without anything more."

**Enforcement - Foreign Money Judgment (England)**

In Akhmedova v. Akhmedova, 2020 Westlaw 7502507 (1st Dept. Dec. 22, 2020), the husband appealed from a January 2020 Supreme Court order, which granted the wife's motion for summary judgment in lieu of complaint in an action seeking recognition and enforcement pursuant to CPLR Article 53 of 2016 and 2018 money judgments granted to her by the English High Court of Justice. The First Department affirmed, rejecting the husband's arguments that the action should be dismissed because he is not subject to personal or in rem NY jurisdiction and upon certain statutory defenses, and holding that the action may proceed even in the absence of personal or in rem jurisdiction and that the husband did not establish any of his defenses under CPLR 5304(a)(1), (b)(4), or (b)(5).

**Enforcement - Jail Sentence Reversed Where Arrears Paid**

In Matter of Rondeau v. Jerome, 2020 Westlaw 7647902 (3d Dept. Dec. 24, 2020), the father appealed from a July 2019 Family Court

order, which committed him for 90 days for a willful violation of an August 2013 order directing him to pay $63 per week for child support for a child born in 2008. At the June 2019 confirmation hearing, the father was prepared to pay the outstanding arrears ($1,403) in full, but Family Court found that the father's failure to abide by a judicial mandate was nevertheless deserving of punishment. The Third Department reversed, on the law and vacated the sentence, holding that a sentence may continue only until the offender, if able, complies with the support order (FCA 156, Judiciary Law 774[1]), and Family Court therefore "abused its discretion when it issued the order of commitment."

**Equitable Distribution - Business Valuation–Date of Commencement; Failure of Proof; Marital Debt Defined**

In Izhaky v. Izhaky, 2020 Westlaw 7502277 (1st Dept. Dec. 22, 2020), both parties appealed from a July 2019 Supreme Court order following a September 2017 Referee report. The First Department affirmed, rejecting the wife's contention that she did not consent to certain loans found to be marital debt, where she cited no contemporaneous proof, and noted that despite her argument that she did not benefit from loan proceeds, the same were used to support one or more marital businesses and she "does not try to argue" that the businesses did not support the family. As to a mortgage, the Appellate Division noted that the wife agreed to the same in exchange for keeping her dental practice and office space

and that she therefore benefited therefrom. The First Department found that the wife does not dispute that she had the burden of proof on the value of the husband's business, but held that while the business should be valued as of date of commencement as an active asset, the wife failed to meet her burden of proof by merely producing loan applications containing the husband's certified statements of value, where those applications "pre-dated the commencement of this action by years" and were therefore "not viable proof of value."

**Equitable Distribution - Credit for Down Payment**

In Li v. Lin, 2020 Westlaw 7502131 (1st Dept. Dec. 22, 2020), the wife appealed from a February 2019 Supreme Court order which, among other things, following a hearing before a referee, confirmed the recommendation to grant the husband a $200,000 credit for the down payment toward the $620,000 purchase of the marital residence in 2009. The First Department affirmed, holding that the wife failed to articulate a reason to disturb the referee's credibility determination, which accepted the husband's testimony about the sources of funds for the down payment.

**Family Offense - Aggravated Harassment 2d, Assault 3d, Harassment 2d – Found; 5-Year Order and Aggravating Circumstances**

In Matter of Kalyan v. Trasybule, 2020 Westlaw 7233566 (2d Dept. Dec. 9, 2020), the respondent, petitioner's ex-boyfriend, appealed from a July 2019 5-year order of protection issued after

a hearing, which found that he committed aggravated harassment 2d, assault 3d and harassment 2d, and the existence of aggravating circumstances. The Second Department affirmed, noting that the evidence established that respondent went to petitioner's home, where he caused her physical injury, namely, swelling to her face lasting over a week, a bloody nose and injuries which made it painful for her to move, as well as the presence of aggravating circumstances as defined by FCA 827(a)(vii).

**Pendente Lite - Custody – Decision-Making; Order of Protection – Influence of Alcohol**

In Agulnick v. Agulnick, 2020 Westlaw 7234025 (2d Dept. Dec. 9, 2020), the husband appealed from: (1) a January 2019 Supreme Court order which, after a hearing in his October 2018 divorce action, directed that the parents have temporary joint legal custody of their children, now ages 14, 10 and 4 and the wife have unsupervised access; and (2) a December 2018 order of protection directing the wife to say away from him and the children only while she was under the influence of alcohol. The Second Department modified the January 2019 order on the facts, by directing that if the parties are unable to agree upon any medical, educational or therapeutic issue involving any of the children, after consulting in good faith, the father shall have final decision-making authority, and affirmed the order of protection, holding that Supreme Court's directives were supported by the circumstances of

the case (unspecified).

**COURT RULE ITEM**

Pursuant to Administrative Order 270/2020 (AO/270/2020), issued December 29, 2020 and **effective February 1, 2021**, numerous Commercial Division Rules have been incorporated into 22 NYCRR Part 202. The Administrative Order and its supporting exhibits, which are posted along with this update, total over 60 pages, and a thorough reading is recommended.