Patterson Belknap Webb & Tyler LLP

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User's Guide to Recent Revisions in the Commercial Division Rules

[A complete list of the Rules of the Commercial Division can be found here]

I. INTRODUCTION

In 1995, the Commercial Division was formed in New York. Since its formation, the Commercial Division has seen an increase in the number and complexity of cases being filed. In response to this change, New York's Chief Judge created a Task Force on Commercial Litigation. In 2012, the Task Force issued a series of reform proposals aimed at better managing judicial resources, encouraging the use of non-judicial personnel and alternative dispute resolution, and increasing engagement with the corporate and academic communities and the Bar. Thereafter, the Chief Judge formed a Commercial Division Advisory Council which recommended various rules changes to implement the Task Force's report. From these recommendations, the following new rules and amendments have been enacted in 2014 or will be enacted in 2015.

This guide contains a summary of some important new rules and amendments to existing rules that have been enacted recently. For a complete list of the rules of the Commercial Division of the Supreme Court, please follow the link found **here**.

II. CASE INITIATION

Section 202.70 of the Commercial Division Rules

(a) Monetary thresholds. (AMENDED)

Goal: To raise monetary thresholds in order to ease heavy dockets.

The new monetary thresholds for the Commercial Division, exclusive of punitive damages, interests, costs, disbursements and counsel fees claimed, are as follows:

Albany County	$50,000
Eighth Judicial District	$100,000
Kings County	$150,000
Nassau County	$200,000
New York County	$500,000
Onondaga County	$50,000
Queens County	$100,000
Seventh Judicial District	$50,000
Suffolk County	$100,000
Westchester County	$100,000

(d) Assignment to the Commercial Division. (AMENDED)

Goal: To (1) reduce the delay and (2) involve a judicial officer early on in the case.

Within 90 days after service of a complaint, any party may seek assignment of a case to the Commercial Division by filing a Request for Judicial Intervention ("RJI") that attaches a completed Commercial Division RJI Addendum certifying that the case meets the jurisdictional requirements for Commercial Division assignment. Failure to file an RJI pursuant to this time deadline precludes a party from seeking assignment of the case to the Commercial Division absent good cause for the delay pursuant to subdivision (e) below.

(e) Transfer into the Commercial Division. (AMENDED)

If an RJI is filed within the specified 90-day period and the case is assigned to a noncommercial part because the filing party did not designate the case as "commercial" on the RJI, any other party may apply to the Administrative Judge, within ten days after receipt of the RJI, to transfer the case into the Commercial Division. Notwithstanding these time deadlines, any party may apply to the Administrative Judge to transfer a case to the Commercial Division by showing good cause for the delay. In addition, a non-Commercial Division justice to whom a case is assigned may *sua sponte* request that the Administrative Judge transfer a case meeting the jurisdictional requirements into the Commercial Division.

III. SANCTIONS

(g) Rules of practice for the Commercial Division. (AMENDED, effective April 1, 2015)

Goal: To discourage dilatory conduct.

Preamble. The judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances. This includes sanctions for lawyers who engage in dilatory tactics, fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs.

IV. COURT APPEARANCES

Rule 8. Consultation prior to Preliminary and Compliance Conferences. (AMENDED)

Goal: To encourage parties to discuss settlement and identify early on any discovery that is useful in settlement discussions.

(a) Counsel shall consult prior to a preliminary or compliance conference about resolution of the case, in whole or in part; the use of alternate dispute resolution to resolve all or some issues in the litigation; and any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. **(effective September 2, 2014)**

(b) Counsel shall also confer regarding the need to vary the presumptive number (10) or duration (7 hours each) of depositions set forth in Rule 11-d. **(effective April 1, 2015)**

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The Commercial Division has also prescribed a new optional Model Compliance Conference Order form. The new model form contains provisions addressing, *inter alia*, confidentiality agreements, disclosure agreements, causes of action and amounts in controversy, scheduling deadlines, and alternative dispute resolution. **(effective April 1, 2015)**

Rule 34. Staggered Court Appearances. (NEW RULE)

Goal: To eliminate the wasted time and expense involved in court appearances by waiting for a matter to be heard by the court.

Each court appearance before a Commercial Division Justice for oral argument on a motion shall be assigned a specified time slot. 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. Requests for adjournments or to appear telephonically must be e-filed and received in writing by the court by no later than 48 hours before the scheduled court appearance.

V. DISCOVERY

Rule 11. Discovery. (AMENDED, effective April 1, 2015)

Goal: To give the court flexibility to tailor discovery to the individual case.

The preliminary conference order may provide for limitations on interrogatories and other discovery. The Court should also consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d.

Rule 11-a. Interrogatories. (NEW RULE)

Goal: To reduce unnecessary discovery and streamline case management.

Interrogatories are limited to 25 in number, including subparts, unless another limit is specified in the preliminary conference order. Unless otherwise ordered by the Court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.

At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

Rule 11-b. Privilege Logs. (NEW RULE)

Goal: To reduce the burden and expense of compiling privilege logs.

The official preference in the Commercial Division is for attorneys to use category level, rather than document level, designations in privilege logs. Parties may use "any reasoned method of organizing documents in the specified category" in their privilege logs. The following are important considerations:

Form of privilege log: Parties must provide a certification setting forth with specificity those facts supporting the privileged status of the information in each category, and the steps taken to identify the documents in the category. Privilege logs must be signed by a "Responsible Attorney."

Fee shifting: If the requesting party refuses to agree to a category-based privilege log, the document-by-document log requirement set forth in CPLR 3122 shall be followed. The producing party, however, may apply to the Court for allocation of costs, including attorneys' fees, incurred in completing a document by document log, and such costs will be awarded "upon good cause shown."

Email chains: Uninterrupted email chains constitute a single entry for purposes of document-by-document privileged logs.

Rule 11-c., Appendix A. Discovery of ESI from Nonparties.

Goal: To lower the burden on nonparties in complying with electronic discovery demands.

Note: These are only guidelines; they do not supersede any other rules or caselaw.

A party seeking ESI discovery from a nonparty should reasonably limit its discovery requests, taking into consideration the following proportionality factors:

A. The importance of the issues at stake in the litigation;
B. The amount in controversy;
C. The expected importance of the requested ESI;
D. The availability of the ESI from another source, including a party;
E. The "accessibility" of the ESI, as defined in applicable case law; and
F. The expected burden and cost to the nonparty.

In the event that no agreement is reached through the meet and confer process, the requesting party and the nonparty are encouraged to seek resolution by availing themselves of the Court System's resources, such as by requesting a telephonic conference with a law clerk or special referee or the appointment of an unpaid mediator in accordance with Rule 3 of the Commercial Division Rules.

Pursuant to CPLR §§ 3111 and 3122(d), the requesting party shall defray the nonparty's reasonable production expenses.

Rule 11-d. Deposition Limits. (NEW RULE, effective April 1, 2015)

Goal: To lower litigation costs by limiting the number and duration of depositions.

Plaintiffs, defendants, and third-party defendants are presumptively limited to 10 depositions. Depositions are limited to 7 hours per deponent.

Parties may stipulate to additional or longer depositions. Commercial Division judges may grant exceptions to this time limit for "good cause shown."

The deposition of an entity pursuant to CPLR 3106(d) shall be treated as a single deposition even though more than

one person may be designated to testify on the entity's behalf. However, 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.

The Court should consider the appropriateness of altering the presumptive deposition limits in the preliminary conference order issued pursuant to Rule 11(c).

Rule 11-e. Responses and Objections to Document Requests. (NEW RULE, effective April 1, 2015)

Goal: To ensure timely and meaningful responses to document requests.

(a) In answering each document request, the responding party shall either: (i) state that production will be made as requested; or (ii) state with reasonable particularity the grounds for any objection.

(b) By a date agreed to by the parties or set by the Court, the responding party shall serve the Responses which shall set forth specifically: (i) whether the objection(s) 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 objections forms the basis for such withholding; and (iii) the manner in which the responding party intends to limit the scope of its production.

(c) A date certain shall be agreed by the parties or set by the Court for the completion of document production by the responding party.

(d) By an agreed date no later than one (1) month before to the close of fact discovery, or at a time set by the Court, the responding party shall state for each individual request: (i) whether the production of documents is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the particular request as propounded or modified.

Rule 14. Disclosure Disputes. (AMENDED, effective April 1, 2015)

Goal: To encourage resolution of discovery disputes by teleconference and to standardize discovery dispute letter writing practice.

The preferred method for resolving discovery disputes is through court conferences rather than through motion practice.

If a discovery dispute cannot be resolved through good faith consultation, counsel is to submit a letter to the court not exceeding three single-spaced pages outlining the nature of the dispute, representing that the party has conferred with opposing counsel in good faith, or explaining why no consultation occurred and requesting a telephone conference. Any affected opposing party or non-party shall submit a responsive letter not exceeding three single-spaced pages not later than four business days thereafter.

The Court will schedule a conference with counsel after receipt of the parties' letters, which shall be conducted by telephone when possible. If the parties desire to make a record, they will still have the opportunity to submit a formal motion.

This rule applies only when the Court's Part Rules are silent as to the procedure for handling a discovery dispute.

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VI. PILOT PROJECTS

Automatic referral to mandatory mediation (effective July 28, 2014; remains in effect for 18 months).

Goal: To aid parties in reaching early resolution of business disputes through mandatory mediation.

One out of every five cases newly assigned to the Commercial Division, except *pro se* cases, will be sent to mandatory mediation. The Clerk shall inform counsel of the referral to mediation by posting in the e-filing system. To be exempt from mediation, a party must petition the Court within 30 days and make a showing of good cause as to why mediation would be ineffective, unduly burdensome, or unjust.

Both parties have up to 120 days after the filing of a RJI to jointly notify the ADR Coordinator of an agreed upon mediator or to request that the Coordinator assign a mediator. Transmission of a notice confirming the name of the mediator shall constitute the Confirmation Date.

The first ADR session shall be conducted no later than 30 days after the Confirmation Date and shall conclude within 45 days, unless such time is extended by an additional 30 days. The mediation process shall be completed within 210 days.

Mediators will serve for four hours of mediation at no fee. A fee of $300 per hour will be charged after the initial four hours.

Special Master Pilot Program (effective September 2, 2014; remains in effect for 18 months).

Goal: To conserve judicial resources by referring complex discovery issues to Special Masters.

The Chief Administrative Judge will provide for the appointment of a pool of Special Masters, which shall consist of retired practitioners with substantial experience in complex commercial matters. The Commercial Division Justices designated to participate in this pilot program, together with the Office of Court Administration, will determine the procedures and forms to be used in the program. The Chief Administrative Judge will select the county or counties in which to implement a Special Masters program in the Commercial Division on a pilot basis. Justices participating in the program may, in their discretion and with the consent of the parties, designate matters for assignment to a Special Master to hear and report upon the matters assigned.

VII. ACCELERATED ADJUDICATION ACTIONS

Rule 9: Accelerated Adjudication Actions. (NEW RULE)

Goal: To provide a mechanism for litigants to reduce litigation costs by voluntarily opting into an accelerated process.

Written consent of the parties is necessary to enter the accelerated adjudication process. All pre-trial proceedings, including all discovery, pre-trial motions, and mandatory mediation, shall be completed and the parties shall be ready for trial within nine months from the date of filing of an RJI. This procedure is available in all actions except for class actions brought under Article 9 of the CPLR.

Parties in an accelerated adjudication proceeding irrevocably waive the following rights:

(1) any objections based on lack of personal jurisdiction or the doctrine of *forum non conveniens*;
(2) the right to trial by jury;
(3) the right to recover punitive or exemplary damages;
(4) the right to any interlocutory appeal.

Significant discovery limitations (pertaining to ESI and non-ESI) are also imposed in accelerated adjudication actions unless the parties contract otherwise.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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