AMERICAN INNS of COURT

The New York American Inn of Court Judicial Roundtable

Litigating in the Second Circuit or NYS Courts: What are the Differences?

February 20, 2018

Moderator: *Hon. Saliann Scarpulla*

Panelists:
Hon. Stewart Aaron
Hon. Pamela Chen
Hon. Judith Gische
Hon. Debra James
Hon. Barbara Kapnick
Hon. Richard Sullivan

CLE Credits: 1.5 Professional Practice
Reception: 5:30 to 6:30 PM
Program: 6:30 to 8:00 PM
United States Courthouse 500 Pearl Street | Room 850

Planning Committee:
Hon. Saliann Scarpulla, NY Sup. Ct., Commercial Division
Brittney Cox, Hughes Hubbard & Reed LLP
Daniel Graber, Graber PLLC
Vilia B. Hayes, Hughes Hubbard & Reed LLP
Jay Safer, Wollmuth Maher & Deutsch LLP

The New York American Inn of Court Judicial Roundtable
Litigating in the Second Circuit or NYS Courts: What are the Differences?

Timed Agenda

Introduction by Hon. Saliann Scarpulla ..... 5 minutes

Panel Discussion ..... 75 minutes

A. Hon. Stewart Aaron and Hon. Debra James:
Discovery, Experts and Sanctions..... 25 minutes

B. Hon. Pamela Chen and Hon. Judith Gische:
Evidence Issues..... 25 minutes

C. Hon. Richard Sullivan and Hon. Barbara Kapnick:
Appellate Practice..... 25 minutes

Question and Answer..... 10 minutes

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AMERICAN INNS of COURT

PART 1

DISCOVERY, EXPERTS AND SANCTIONS

Hon. Stewart Aaron and *Hon. Debra James*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

	Plaintiff(s),	No. __-cv-____ ( ) (SDA)
-against-		
	Defendant(s).	

----------x

REPORT OF RULE 26(f) MEETING AND PROPOSED CASE MANAGEMENT PLAN

In accordance with Federal Rule of Civil Procedure 26(f), counsel for the parties spoke on _____ and exchanged communications thereafter, and submit the following report of their meeting for the court's consideration:

1. **Summary of Claims, Defenses, and Relevant Issues**

Plaintiff:

_____
_____
_____

Defendant:

_____
_____
_____

2. **Basis of Subject Matter Jurisdiction: _____**

3. **Subjects on Which Discovery May Be Needed**

Plaintiff:

_____

_____

_____

Defendant:

_____

_____

_____

4. **Informal Disclosures**

The information required by Rule 26(a)(1) of the Federal Rules of Civil Procedure was disclosed by Plaintiff(s) on _____. In addition, on _____, Plaintiff(s) produced/will produce an initial set of relevant documents identified in its Initial Disclosures and will continue to supplement its production.

The information required by Rule 26(a)(1) of the Federal Rules of Civil Procedure was disclosed by Defendant(s) on _____. In addition, on _____, Defendant(s) produced/will produce an initial set of relevant documents identified in its Initial Disclosures and will continue to supplement its production.

5. **Formal Discovery**

The parties jointly propose to the Court the following discovery plan:

a. All fact discovery must be completed by _____.

b. The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Southern District of New York. The following interim deadlines may be extended by the parties on consent without application to the Court,

provided that the parties meet the deadline for completing fact discovery set forth in 3(a) above.

i. Depositions: Depositions shall be completed by _____ and limited to no more than _____ depositions per party. Absent an agreement between the parties or an order from the Court, non-party depositions shall follow initial party depositions.

ii. Interrogatories: Initial sets of interrogatories shall be served on or before _____. All subsequent interrogatories must be served no later than 30 days before the discovery deadline.

iii. Requests for Admission: Requests for admission must be served on or before _____.

iv. Requests for Production: Initial requests for production were/will be exchanged on _____ and responses shall be due on _____. All subsequent requests for production must be served no later than 30 days before the discovery deadline.

v. Supplementation: Supplementations under Rule 26(e) must be made within a reasonable period of time after discovery of such information.

6. **Anticipated Discovery Disputes**

Are there any anticipated discovery disputes? Does either party seek limitations on discovery? Describe.

_____

_____

_____

7. **Amendments to Pleadings**

a. Are there any amendments to pleadings anticipated?_____

b. Last date to amend the Complaint: _____

8. **Expert Witness Disclosures**

At this time, the parties do/do not (circle one) anticipate utilizing experts. Expert discovery shall be completed by _____.

9. **Electronic Discovery and Preservation of Documents and Information**

a. Have the parties discussed electronic discovery? _____

b. Is there an electronic discovery protocol in place? If not, when the parties except to have one in place? _____

c. Do the parties want the Court to enter a Rule 502(d) Order? (*see* Rule 502(d) Order)

Yes _____ No _____

d. Are there issues the parties would like to address concerning preservation of evidence and/or electronic discovery at the Initial Case Management Conference?

_____
_____
_____

10. **Anticipated Motions**

_____
_____
_____

11. **Early Settlement or Resolution**

The parties have/have not (circle one) discussed the possibility of settlement. The parties request a settlement conference by no later than _____. The following information is needed before settlement can be discussed:

_____
_____
_____

12. **Trial**

a. The parties anticipate that this case will be ready for trial by _____.

b. The parties anticipate that the trial of this case will require _____ days.

c. The parties do/do not (circle one) consent to a trial before a Magistrate Judge at this time.

d. The parties request a jury/bench (circle one) trial.

13. **Other Matters**

_____

_____

_____

Respectfully submitted this _____ day of _____.

ATTORNEYS FOR PLAINTIFF(S):

_____

ATTORNEYS FOR DEFENDANT(S):

_____

STATE OF NEW YORK
UNIFIED COURT SYSTEM
25 BEAVER STREET
NEW YORK, NEW YORK 10004
TEL: (212) 428-2160
FAX: (212) 428-2155

A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

April 7, 2015

To: All Interested Persons

From: John W. McConnell

Re: Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives.

==========

The Commercial Division Advisory Council has recommended adoption of a new Commercial Division Rule (22 NYCRR § 202.70[g]), relating to depositions of entity representatives (Exh. A). The proposed new rule would require a party wishing to depose an entity on particular matters to enumerate those matters "with reasonable particularity" in its notice or subpoena. The party being deposed would then be required to designate a representative able to offer testimony on the specified topics. The new rule is intended to promote a more efficient process for deposition of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced. While the proposed rule is modeled on Federal Rule of Civil Procedure 30(b)(6), the Advisory Council states that it "has been carefully drafted to be fully consistent with both the letter and spirit of the CPLR." The proposal adheres to CPLR 3106(d), and departs from the federal rule, in requiring the entity being deposed to designate the witness it will produce.

The Advisory Council also has recommended an amendment of recently adopted Commercial Rule 11-d (presumptive limitations on depositions) to clarify that the seven hour presumptive durational limit applies cumulatively across all entity witnesses tendered by that entity. The proposal recognizes that the complexity of entity depositions may often warrant enlargement of the seven hour limit and explicitly provides that the limit may be enlarged by agreement of the parties or application to the court, "which shall be freely granted."

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 5, 2015.**

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

EXHIBIT A

PROPOSED RULE #1

The Commercial Division Rules shall be amended to add the following:

"Rule X Identification of Matters for Deposition of Entity

(a) A notice or subpoena may name as a deponent a corporation, business trust, 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* name a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in (b), then no later than ten days prior to the scheduled deposition:

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

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

c. 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* name a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in (b), then:

a. 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 by produced;

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

c. if the named entity, pursuant to sub-section (e) above, 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.

PROPOSED AMENDMENT #2

Commercial Division Rule 11-d shall be amended as follows:

1. In sub-paragraph (c), the phrase "pursuant to CPLR 3106(d)" should be replaced with "through one or more representatives".
2. In sub-paragraph "(d)", the phrase "pursuant to CPLR 3106(d)" should be deleted therefrom.
3. The following sub-paragraph shall be inserted by between current rule 11-d(d) and (e):

   "(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.."

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

DATE: March 10, 2015

RE: **Depositions of Entity Representatives in the Commercial Division of the Supreme Court of New York**

EXECUTIVE SUMMARY

Subsequent to its establishment in 2013 by Chief Judge Jonathan Lippman, the Commercial Division Advisory Council proposed several amendments to the Division's Statewide Rules of Practice (the "Division's Rules"). Through a series of administrative orders, Chief Administrative Judge Gail Prudenti promulgated these amendments, which have since become fully integrated into the Division's Rules.

The integrated amendments, which implement changes proposed by the Task Force on Commercial Litigation in the 21st Century (the "Task Force") and range from enhanced expert disclosure to presumptive limitations on depositions, all share two common goals: (a) to make more efficient and cost-effective the adjudication of commercial disputes in the New York State Commercial Division; and (b) to burnish the Division's reputation as the premier forum in the United States for the resolution of the most complex business disputes.

Having now given effect to the Task Force's recommendations, the Advisory Council's mandate has shifted to the next phase – "[the] further periodic review of the needs and goals of the Commercial Division" (Task Force Report at 31). Towards that end, the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") recommends the adoption of a Commercial Division Rule calculated to provide litigants with another arrow in the quiver of efficiency. The new rule would facilitate the pre-trial examination

of entities using the paradigm set forth in Federal Rule of Civil Procedure 30(b)(6). As set forth in detail in this memorandum, the new rule has been carefully drafted to be fully consistent with both the letter and the spirit of the CPLR and will assist the Commercial Division in achieving the objectives for which it was established

The Subcommittee recommends that:

(1) the Council forward to the Administrative Board of Judges the proposed rules set forth in Exhibit A (the "Proposed Rule"); and

(2) the Proposed Rule be incorporated into the Commercial Division Rules.

DISCUSSION AND ANALYSIS

Federal Rule of Civil Procedure 30(b)(6) provides a streamlined method for the examination of entities. The full text of the rule reads as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph . . . does not preclude a deposition by any other procedure allowed by these rules.

Rule 30(b)(6) provides litigants with a highly efficient disclosure device. Pursuant to the rule, an examining party wishing to depose an entity on an array of different subjects need only identify the topics on which testimony is being sought. Based upon the identification of topics, the onus then falls upon the deposing party to identify the specific representative or representatives who will offer testimony on those topics. Furthermore, Rule 30(b)(6) obligates the deposing party to ensure that the tendered witness is sufficiently knowledgeable about the

topics on which he has been designated to testify. Once given, the testimony by the 30(b)(6) designee will "bind" the entity that tendered the witness.

In recommending the incorporation of a Rule 30(b)(6) analog into Commercial Division practice, the Subcommittee does not mean to suggest that representative testimony offered on behalf of an entity is a foreign concept under current state law practice. To the contrary, the CPLR expressly contemplates that an entity can and will testify via an appropriate representative. *See* CPLR 3106(d), 3107 & 3117(2). The salient portions of these provisions are set forth below:

> **CPLR 3106(d)**: *Designation of Deponent:* A party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they 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.

> **CPLR 3107**: A party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise. The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice need not enumerate the matters upon which the person is to be examined. A party to be examined pursuant to notice served by another party may serve notice of at least ten days for the examination of any other party, his agent or employee, such examination to be noticed for and to follow at the same time and place.

> **CPLR 3117**: *Use of Depositions*: At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions . . . 2. the deposition testimony of any person who at the time the testimony was given was an

> officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence . . . .

Taken together, this triumvirate of provisions makes clear that Rule 30(b)(6)-type examinations are entirely consistent with current state court practice. In reaching this conclusion, the Subcommittee examined three key features of 30(b)(6) depositions under federal practice: (1) the "binding" nature of 30(b)(6) testimony; (2) the delineation by the examining party of the specific topics upon which testimony is sought; and (3) the requirement that the deposing entity tender a knowledgeable witness. Our analysis follows:

Feature #1: The "Binding" Nature of 30(b)(6) Testimony

One of the oft-cited characteristics of a Rule 30(b)(6) deposition is that the witness' testimony "binds" the entity that tendered the witness to testify on its behalf. But what precisely does the term "binds" mean? Does a 30(b)(6) deponent's testimony "bind" the entity such that the entity is precluded from offering contrary evidence to rebut the deponent's testimony, or, alternatively, does the witness' testimony "bind" the entity, but only insofar as it constitutes a party admission usable against (but also rebuttable by) the entity who tendered the witness?

The federal courts are not uniform on this issue. While it is true that certain courts do treat 30(b)(6) testimony as a dispositive formal concession by the entity who tendered the witness[1], others consider 30(b)(6) testimony to be nothing more than an evidentiary admission – one that may be rebutted with contrary evidence tendered by the entity that produced the witness

[1] 2 N.Y.Prac., *Com. Litig. in New York State Courts* § 11:20 (3d ed.) (collecting cases).

at issue.[2]

The Second Circuit has not opined on this issue, but courts in this circuit appear to treat 30(b)(6) testimony as rebuttable party admissions, not dispositive concessions. For example, in the Southern District of New York case of *A & E Products Grp., L.P. v. Mainetti USA Inc.*[3], Judge Patterson analyzed the relevant authorities and concluded that "the court is not bound in its decision by the 30(b)(6) evidence offered." *Id.* at *7. As the Court explained:

> It is true that a corporation is "bound" by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be "bound" by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue.... Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted.

Id. (quotation marks and citation omitted); *see also Document Sec. Sys., Inc. v. Coupons.com, Inc.*, No. 11-CV-6528 CJS, 2014 WL 5465467, at *11, f n 7 (W.D.N.Y. Oct. 28, 2014); *In re Weatherford Int'l Sec. Litig.*, No. 11 CIV. 1646 LAK JCF, 2013 WL 4505259, at *4 (S.D.N.Y. Aug. 23, 2013); *Sea Trade Co. v. FleetBoston Fin. Corp.*, No. 03 CIV. 10254 (JFK), 2008 WL 4129620, at *21 (S.D.N.Y. Sept. 4, 2008); *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, No. 02 CIV. 9144 (PAC), 2006 WL 988143, at *9, fn 14 (S.D.N.Y. Apr. 13, 2006).

New York state law treats the testimony of an entity's representative as an evidentiary party admission, the same treatment accorded to 30(b)(6) testimony by the weight of the authority in the Second Circuit. *See* CPLR 3117 ("any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following

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[2] 5A N.Y.Prac., *Evidence in New York State and Federal Courts* § 8:14.

[3] *A & E Products Grp., L.P. v. Mainetti USA Inc., No. 01 CIV. 10820 (RPP)*, 2004 WL 345841 (S.D.N.Y. Feb. 25, 2004)

provisions . . . (2) the deposition testimony of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence . . .); *accord Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 N.Y.2d 94, 103 (1996) ("Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, *or contained in a deposition*, a bill of particulars, or an affidavit") (emphasis added); *Ocampo v. Pagan*, 68 AD3d 1077, 1078 (2d Dep't. 2009) (same).

To summarize, to the extent that the proposed Commercial Division amendment will treat representative testimony as a rebuttable evidentiary admission by the tendering entity, it is entirely consistent with the existing rules in this state (not to mention the interpretation afforded Rule 30(b)(6) by courts in the Second Circuit). By contrast, any amendment to the Commercial Division Rules that would purport to treat the witness' testimony as a dispositive concession would arguably be inconsistent with New York law and would require a concomitant amendment to the CPLR.

Feature # 2: The Specification of the Topics Upon Which Testimony is Sought

When a federal litigant invokes Rule 30(b)(6), the deposition notice or subpoena at issue "must describe with reasonable particularity the matters for examination." The Proposed Rule imposes a commensurate requirement (*see* Exhibit A). The Subcommittee considers the proposed language to be entirely consistent with the CPLR, which itself contemplates (but does not require) the issuing party to list the topics for examination in the deposition notice. *See* CPLR 3107 ("The [deposition] notice *need not* enumerate the matters upon which the person is

to be examined.") (emphasis added). The permissive language utilized by CPLR 3107 clearly permits the inclusion of a topic list as part of the deposition notice.[4]

And the efficiencies that result from providing the opposing party with a list of topics to be covered are self-evident. The list will enable the deposing entity to identify with precision the witness or witnesses best suited to offer the testimony at issue, thereby reducing the chances for a mismatch (intentional or otherwise) between the information sought and the witness tendered.

Feature # 3: The Requirement that the Deposing Entity Tender a Knowledgeable Witness

Federal Rule 30(b)(6) requires the person(s) designated by the entity sought to be deposed to "testify about information known or reasonably available to the organization." This places "an obligation [on the producing entity] to properly prepare its designee." *A & E Products Grp., L.P. v. Mainetti USA Inc.*, No. 01 CIV. 10820 (RPP), 2004 WL 345841, at *6 (S.D.N.Y. Feb. 25, 2004) (collecting cases). That obligation, according to the case law, is commensurate with a party's obligation in responding to interrogatories or document requests. *See Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 CIV. 3016(AGS)(HB, 2002 WL 1835439, at *2 (S.D.N.Y. Aug. 8, 2002) ("I conclude that the scope of the entity's obligation in responding to a 30(b)(6) notice is identical to its scope in responding to interrogatories served pursuant to Rule 33 or a document request served pursuant to Rule 34.").

The Subcommittee believes that state court practice already imposes an obligation upon a deposing entity to tender a knowledgeable witness. Under existing New York law, the deposing entity has the right, in the first instance, to designate its own representative for testimony. *See e.g Seattle Pac. Indus., Inc. v. Golden Valley Realty Associates*, 54 AD3d 930, 932 (2d Dep't

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[4] Support for listing the topics for examination is also found in connection with depositions of non-parties. Specifically, CPLR 3101 (a)(4) which, among other things, governs depositions of nonparties, mandates a written "notice stating the circumstances or reasons such disclosure is sought or required." Although the requisite specificity of a CPLR 3101(a)(4) statement is minimal, nothing in the rule would preclude an examining party from identifying the topics under examination as part of its notice.

2008). In fact, where the examining party seeks to depose an entity "by" a particular witness, the CPLR expressly provides the entity with the right, 10 days in advance of the examination, to cross designate a representative witness of its own choosing. *See* CPLR 3106 (d).

Despite this presumption in favor of entity choice, it is legally inadequate for the entity to designate someone who lacks sufficient knowledge to provide adequate testimony. Under New York law, a party may demand the production of additional witnesses upon a showing, *inter alia*, that "the representatives already deposed had insufficient knowledge, or were otherwise inadequate." *Seattle Pac. Indus., Inc. v. Golden Valley Realty Associates*, 54 AD3d 930, 933 (2d Dep't 2008) (court ordered additional depositions of the principal owners of the plaintiff where first witness produced had insufficient knowledge); *see also Gomez v. State*, 106 AD3d 870, 872 (2d Dep't 2013) (court ordered additional deposition of another of defendant's employees where first witness tendered by entity lacked sufficient knowledge of relevant facts); *Nunez v. Chase Manhattan Bank*, 71 AD3d 967, 968 (1st Dep't 2010) (same); *Alexopoulos v. Metropolitan Transportation Authority,* 37 AD3d 232, 233 (1st Dep't 2007) (same); *Filoramo v. City of New York*, 61 AD3d 715, 716-717 (2d Dep't 2009) (in personal injury suit against the city, court ordered additional deposition of investigating officer who signed the line-of-duty injury report and made original records);

Finally, there appears to be nothing improper under New York law for an entity to designate a representative witness even if that witness is not then employed by the entity; all that is necessary for the testimony to be usable as a party admission is that the witness tendered be an "authorized agent." *See* CPLR 3117. A witness tendered by an entity to act as its representative is, as a definitional matter, an "authorized agent."

The foregoing principles (*i.e.* the right of an entity to designate its own witness, but only if that witness is sufficiently knowledgeable) suggests strongly that New York law does not

prohibit (and indeed may require) that a representative witness be appropriately educated on behalf of the entity.

***Nota Bene*: The Proposed Rule Must Require the Deposing Party to Identify its Chosen Deponent(s)**

As demonstrated above, virtually all of the facets of a Rule 30(b)(6) deposition are consistent with existing New York practice. There is one aspect, however, that, if not addressed appropriately within the proposed rule, would create a conflict with the CPLR – the need to identify the deponent. Although Rule 30(b)(6) permits an entity to designate which of its representatives will testify on the various enumerated subjects[5], it does not require that the deposing party disclose the witness' identity in advance of the examination.[6] The Proposed Rule, as drafted, *would* require the deposing entity to designate a witness prior to the deposition. *See* Exhibit A.

This departure from Rule 30(b)(6) is necessitated by CPLR 3106(d). Under CPLR 3106(d), if an examining party purports to notice the deposition of an entity "by" a particular representative and the deposing party wishes to designate a different representative, the deposing party must identify the name of the witness in a notice of cross-designation at least ten (10) days in advance of the deposition. The effect of this regime is that the requesting party will always know the identity of the witness prior to the examination; either the entity will produce the

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[5] *See* Fed. Rule Civ. P. 30(b)(6) ("The named organization...*may* set out the matters on which each person designated will testify.") (emphasis added).

[6] Federal Rule 30(b)(6) provides that "[t]he named organization must [] designate one or more...persons who consent to testify on its behalf." *See also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at *6 (M.D.N.C. Sept. 6, 1996) *aff'd sub nom. Food Lion, Inc. v. Capital Cities/ABC, ABC Holding Co., Am. Broad. Companies, Lynne Litt, Richard N. Kaplan, Ira Rosen, Susan Barnett*, 951 F. Supp. 1211 (M.D.N.C. 1996) (observing that a "designation occurred by reason of the simple fact that [defendant] produced these persons in response to [plaintiff's] Rule 30(b)(6) notices.")

witness identified in the initial notice, or it will need to identify and produce an alternative witness.

The Proposed Rule addresses this reality of state practice by requiring the deposing entity to identify the witness(es) it will tender. To do otherwise would guarantee that examining parties would invariably identify a representative for deposition, if only to ensure that if the entity disagrees with the designation, it will identify the alternate witness in its notice of cross-designation.

Statewide Rule 11-d Must be Amended in Connection with this Proposed Rule

Consideration of the Proposed Rule caused the Subcommittee to reexamine the newly promulgated (and soon-to-become-effective) Rule 11-d of the Commercial Division's Rules, which imposes presumptive limitations on depositions. As currently drafted, Rule 11-d provides that the deposition of an entity will count as a single deposition for the purposes of the presumptive ten-deposition limit, even if the entity is deposed through more than one representative witness. *See* Commercial Division Rule 11-d(c) ("[T]he 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.") This is consistent with current federal practice. *See* Fed.R. Civ. P. 30 Notes of Advisory Committee on Rule – 1993 Amendment ("A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.").

But Rule 11-d is silent on whether, for the purposes of the presumptive durational limit, each representative witness may be deposed for seven hours, or whether the deposition of the entity will be presumptively limited to seven hours in total, irrespective of the number of constituent witnesses. In an effort to avoid this arguable loophole from becoming a "black hole," the Subcommittee recommends making seven hours the presumptive durational limit for entity depositions across all witnesses tendered by that entity. This said, the Subcommittee recognizes

that the sheer number of topics of examination and the complexity of some of them (e.g. testimony about the architecture of a multi-national company's computer system and how and where it stores various pieces of data) may well warrant an enlargement of the seven hour limitation. Accordingly, the proposed amendment to Rule 11-d recognizes the presumptive cumulative durational limit of seven hours, but explicitly provides that this limit may be enlarged upon agreement or application to the Court and that such an application shall be "freely granted."

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and further amendment to Rule 11-d and urge the Chief Administrative Judge to promulgate them as soon as is practicable.

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

October 27, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on a Proposed New Rule of the Commercial Division Addressing Consultation on Expert Testimony in Advance of Trial

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The Administrative Board of the Courts is seeking public comment on a proposed new rule of the Commercial Division (22 NYCRR §202.70[g]), proffered by the Commercial Division Advisory Council, to make clear the court's power to require counsel to consult in good faith on expert testimony in advance of trial of Commercial Division matters. The text of the proposed rule is as follows:

_____. Consultation Regarding Expert Testimony.

The court may direct that prior to the pre-trial conference, 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.

As discussed in the Council's memorandum supporting the proposal (Exh. A), such consultation is expected to narrow areas of disagreement between experts, streamline the trial process, and reduce the volume of technical testimony at trial.

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Persons wishing to comment on the proposed rule should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than December 20, 2016.**

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

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

DATE: September 12, 2016

RE: **Proposal for Streamlining Expert Testimony at Trial**

INTRODUCTION AND EXECUTIVE SUMMARY

The year 2013 marked a watershed event in the history of commercial litigation in the New York State Court System. By administrative order issued in September of that year, then-Chief Administrative Judge A. Gail Prudenti promulgated Statewide Commercial Division Rule 13, creating for Commercial Division litigants and their counsel a presumption in favor of fulsome expert disclosure. Among the justifications provided for this enhanced expert disclosure were the centrality of expert testimony to most commercial disputes and the concomitant importance to the litigants of fleshing out fully the scope of the expert testimony being offered and testing its strengths and weaknesses. The hope was that parties would have a fuller understanding of their respective cases for the purposes of assessing settlement options and, if necessary, preparing for trial. As was true with the numerous other amendments to the Commercial Division Rules promulgated subsequently, the overarching goal of Rule 13 was to promote efficiency and predictability in the adjudication of commercial disputes in the New York State Courts. Enhanced expert disclosure has now been a staple of Commercial Division practice for three years, and by all accounts, it has been a welcome change, furthering the twin goals of predictability and efficiency in resolving commercial cases.

Given the success with which Rule 13 has met since its enactment, it is only natural to consider whether further expert-centric enhancements could streamline the adjudicative process

even further. The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") respectfully submits that expert testimony could be rendered that much more useful, not to mention digestible, by attempting to narrow disagreement among competing experts. Doing so could well reduce the volume of technical testimony through which the fact finder will be forced to sift, thereby reducing trial time and enhancing efficiencies.

The process of narrowing down areas of dispute among experts can be achieved through a court-mandated addition to the processes attendant to trial preparation. Currently, the Statewide Rules of the Commercial Division impose several pretrial obligations upon the litigants, all of which are designed to facilitate the orderly presentation of proofs at trial. *See* Rule 27 (motions *in limine*); Rule 28 (exchange of trial exhibits and consultation among counsel to narrow evidentiary issues); Rule 29 (deposition designation and consultation among counsel to narrow evidentiary issues); Rule 30 (at or before pre-trial conference, court may require the parties to prepare a written stipulation of undisputed facts).

In a similar vein, the Subcommittee recommends a proposed rule that would permit the presiding justice, at his or her discretion, to direct counsel for the parties to consult regarding the opinions to be offered by their respective experts at trial. Through this process, and with the benefit of reviewing the experts' reports and deposition testimony, counsel would endeavor to reach agreement with regard to one or more of the opinions being offered. Any agreement reached, which could be memorialized in an appropriate stipulation, would necessarily reduce the amount of expert testimony necessary at trial.

CONCLUSION

For the foregoing reasons, the Subcommittee recommends that:

(1) the Council forward to the Chief Administrative Judge the proposed rule set forth in Exhibit A (the "Proposed Rule"); and

(2) the Proposed Rule be incorporated into the Commercial Division Rules.

EXHIBIT A

PROPOSED RULE

AMENDMENT #1

The Commercial Division Rules shall be amended to add the following:

"Rule X Consultation Regarding Expert Testimony

The court may direct that prior to the pre-trial conference, 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.

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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

June 27, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed adoption of a Preamble to the Rules of the Commercial Division (22 NYCRR § 202.70(g)) relating to sanctions.

==========

The Commercial Division Advisory Council has recommended adoption of a Preamble to the Rules of the Commercial Division addressing the imposition of sanctions for dilatory litigation conduct, failure to appear for scheduled matters, undue delay in producing relevant documents and other conduct causing unnecessary expense and delay (Exh. A). The Advisory Council's proposal follows up on the 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century, which recommended that Commercial Division Justices be encouraged to consider the imposition of authorized sanctions where litigants and counsel ignore case management orders or other deadlines. The Advisory Council believes that the best way to implement this recommendation is to adopt a Preamble in the Rules of the Commercial Division acknowledging the problems caused by dilatory tactics, directing litigants and counsel to familiarize themselves with existing provisions authorizing sanctions, and advising that Commercial Division Justices will impose sanctions when warranted to enforce case management orders and discovery schedules. The proposed Preamble is not "intended to expand or alter the scope and/or remedies available under [existing] sanction rules."

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than August 26, 2014.**

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

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Best Practices for Judicial Case Management

RE: Proposed New Rule Regarding Sanctions

DATE: April 29, 2014

The Subcommittee on Best Practices for Judicial Case Management in the Court System has prepared a new Rule addressing dilatory litigation conduct and sanctions, which would be included as a preamble to the Rules of the Commercial Division of the Supreme Court. The Chief Judge's Task Force on Commercial Litigation in the 21st Century recognized that the Commercial Division needs to make reasonable efforts to better accommodate clients who can be frustrated with the wasted time and resources expended in getting parties and their counsel to comply with case management orders and deadlines.

In its June 2012 report, the Chief Judge's Task Force on Commercial Litigation in the 21st Century concluded that sanctions were often underutilized in Commercial Division cases and issued the following recommendation regarding ***Imposition of monetary and non-monetary sanctions for failure to adhere to case management orders and other deadlines:***

> While sanctions have long been available in New York State courts, they are often underutilized. The integrity of the judicial process is compromised when litigants and counsel ignore or defy case management orders or other deadlines. Further erosion of judicial trust occurs when the court fails to sanction a litigant or counsel who incessantly engages in behavior of this type. The Task force recommends that Commercial Division Justices be encouraged to consider monetary and non-monetary sanctions already provided for where parties fail to comply with case management orders or other deadlines.
>
> The Task Force also notes the importance of how orders imposing sanctions are viewed by appellate courts, and suggests that stronger pronouncements from the Appellate Division will result in the imposition of more meaningful sanctions orders and, in turn, reduce frivolous practice. (Report at p. 24).

In light of the fact that there is already substantial authority to allow judges to impose sanctions in the Commercial Division, the Subcommittee believes the best way to implement the Task Force's recommendation is to reinforce the existing rules with a preamble to the Commercial Division Rules that (a) acknowledges the problems caused by dilatory tactics and counsel who fail to appear for conferences, (b) directs litigants and their counsel who use the Commercial Division to familiarize themselves with the numerous sanctions provisions in the Rules, and (c) advises that Commercial Division judges will impose sanctions as the circumstances warrant in order to enforce compliance with case management orders and discovery schedules. Accordingly, the following proposed Rule would be an addition to the

Commercial Division Rules (Section 202.70 of the Uniform Rules for N.Y.S. Trial Courts), inserted at the end of the current text of §202.70(g), before Rule 1.

Proposed Preamble to Commercial Division Rules:

> The Commercial Division understands that the businesses, individuals, and attorneys who use this Court have expressed their frustration with adversaries 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. The Commercial Division will not tolerate such practices. The Commercial Division is mindful of the need to conserve client resources, promote efficient resolution of matters, and increase respect for the integrity of the judicial process. Litigants and counsel who appear in this Court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference, Rule 13(a) regarding adherence to discovery schedules, and Rue 24(d) regarding the need for counsel to be fully familiar with the case when making appearances. Sanctions are also available in this Court under Rule 3126 of the Civil Practice Law and Rules and Part 130 of the Rules of the Chief Administrator of the Courts. The judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances. Use of these enforcement mechanisms enables the Commercial Division to function efficiently and effectively, and with less wasted time and expense for the court, parties and counsel. Nothing herein is intended to expand or alter the scope and/or remedies available under the above-cited sanction rules.

This language has been revised from an earlier version to respond to the views expressed during our last Advisory Council meeting that (a) the Subcommittee should not propose language that moves too dramatically toward increasing applications for sanctions, but (b) the proposed Rule should have more force than simply an aspirational statement that judges can avail themselves of the sanctions tools available to them. We believe the language above takes a moderate approach in addressing the sanctions issue. If this proposal is deemed insufficient over time, the Advisory Council can revisit the issue to formulate more strict sanctions provisions in the future.

Overall, we believe that the proposed Rule adequately appropriately addresses the point that litigants and their counsel need to attend to case management obligations in the Commercial Division with the utmost diligence and appropriately warns users of the court that failure to abide by the court rules can lead to sanction orders and other remedies. We ask the Commercial Division Advisory Council to consider the proposed sanctions Rule for approval at our next meeting.

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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

April 9, 2015

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of Preamble to the Rules of the Commercial Division (22 NYCRR § 202.70(g)), relating to proportionality in discovery.

The Commercial Division Advisory Council has recommended an amendment of the Preamble to the Rules of the Commercial Division (22 NYCRR § 202.70[g]) confirming that the Division is mindful of the need to "encourage proportionality in discovery" (Exh. A). The Advisory Council has observed that the costly nature of discovery is an unfortunate reality of complex commercial litigation, and that litigants often view discovery costs as being out of proportion to the issues at stake in litigation. While the CPLR and the Rules of the Commercial Division already recognize the benefits of proportionality in various ways, the Advisory Council believes that it would be appropriate to reaffirm in the Preamble to the Commercial Division Rules that proportionality is one of the principles guiding the conduct of discovery in the Commercial Division. In that connection, the Advisory Council notes that a pending amendment of Federal Rule of Civil Procedure 26(b)(1) would replace the broad "reasonably calculated to lead to the discovery of admissible evidence" standard with specific proportionality factors intended to narrow the scope of permissible discovery in federal court.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 8, 2015.**

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

MEMORANDUM

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Date: March 6, 2015

Subject: Proposal to Amend the Preamble of the Commercial Division Rules to Mention Proportionality

Introduction

The costly nature of discovery is an unfortunate reality of complex commercial litigation. All too often litigants view the cost of discovery as out of proportion to the issues at stake in the litigation, resulting in cases not being filed, settlements being made to avoid litigation costs regardless of merit and litigants fleeing to other forums. The recent changes to the Commercial Division rules regarding discovery have instituted limits on how discovery is conducted. From establishing presumptive limits on the number of interrogatories, to a presumptive limit on the number of depositions to presumptive time limits on oral depositions, the new Commercial Division rules help to streamline the mechanics of the process.

Elements of proportionality have allowed the Justices of the Commercial Division to consider the need, use, availability of discoverable material and the cost of such discovery in proportion to what is at stake in a case. Consideration of such standards is not new to the Commercial Division. The standards of usefulness and reason, in addition to consideration of expense and undue disadvantage, have always been considered under CPLR 3103 in limiting the scope of discovery. Proportionality also has already been adopted by the Commercial Division as a guide in managing electronic discovery. Recognition of its efficacy across all lines of discovery will help to achieve the just and inexpensive resolution of commercial matters, as envisioned by the Chief Judge's Task Force on Commercial Litigation in the 21st Century. Accordingly, it is recommended that the Preamble to the Rules of the Commercial Division be amended by adding four words to the preamble in order to confirm that proportionality is a potential guide in conserving resources in conducting discovery.

Discussion

The Chief Judge's Task Force on Commercial Litigation in the 21st Century explicitly recognized the need for "Limitations on Document Demand, Interrogatories and Depositions." In its June 2012 report, the Task Force recommended that this Advisory Council consider modification of the Commercial Division rules to restrict the number and scope of document demands and interrogatories and to limit the number and duration of depositions. Designed to control cost and reduce time spent in discovery, the Advisory Council recommended, and the Commercial Division Rules adopted, presumptive limits on interrogatories and the number and duration of depositions.

The Task Force also charged this Advisory Council with the task of considering any other rule changes that might facilitate prompt, just and cost-effective resolution of pretrial proceedings so as to ensure the Commercial Division retains its competitive edge.

On September 16, 2014, the Judicial Conference of the United States approved an amendment to Federal Rules of Civil Procedure Rule 26(b)(1) which defines the scope of discovery in federal court. The revised rule, now pending before the U.S. Supreme Court and to be transmitted to Congress, will take effect on December 1, 2015, absent Congressional action. Under the proposed rule, the new Rule 26(b)(1) will displace the broad "reasonably calculated to lead to the discovery of admissible evidence" standard with several proportionality factors for application in establishing a narrower scope of permissible discovery in federal court.[1]

For the Commercial Division to maintain its competitive stature in responding to the needs of the business community, it is recommended that the Preamble to the Commercial Division Rules explicitly confirm that the principles of proportionality, which currently exist under the CPLR, apply in conducting discovery in the Commercial Division. In common with principles of proportionality, usefulness and reason have long been the applicable standard in determining the scope of discovery under CPLR 3101.[2] The cost and disadvantages of the discovery sought have likewise been considered among the factors in limiting discovery under CPLR 3103.[3] Therefore, proportionate discovery is not new. Both the bench and the bar have recognized the benefits of proportionate

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1 Under the amendment, the new Rule 26(b)(1) will read as follows:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

2 See Andon v. 302-304 Mott St. Assoc., 94 N.Y.2d 740, 709 N.Y.S.2d 873 (2000) (the test is usefulness and reason; the "competing interests must always be balanced; the need for discovery must be weighed against any special burdens").

3 CPLR 3103 provides that "The court may any time on its own initiative...make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

discovery principles in adopting guidelines for the management of electronic discovery, which explicitly set forth factors for the parties' consideration.[4] While principles of proportionality are already contained in existing standards, a reminder of its presence will help to streamline the process.

Rather than a rule change or amendment to the CPLR, reference to proportionality in the Preamble to the Commercial Division rules appears appropriate. The Preamble places emphasis on several key concerns that particularly impact commercial litigants, *i.e.*, dilatory tactics, the needs to conserve client resources, promote efficient resolution of matters, and increase respect for the integrity of the judicial process.

Conclusion

Given that proportional discovery can lead to conservation of resources and the promotion of cost-efficient resolution of matters, it is believed that the best way to acknowledge the concept of proportionality in the Commercial Division Rules is to mention it in the Preamble. Accordingly, the Commercial Division Advisory Council recommends that the Preamble to the Commercial Division Rules be amended by adding to the Preamble the four words which are underscored below.

* * *

[4] Under Rule 11.C of the Commercial Division Rules, Discovery of Electronically Stored Information from Nonparties, parties and nonparties should adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from nonparties, which can be found in Appendix A to these Rules of the Commercial Division. 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.

Proposed Amendment to Preamble

(g) Rules of practice for the Commercial Division

Unless these rules of practice for the Commercial Division provide specifically to the contrary, the rules of Part 202 also shall apply to the Commercial Division, except that Rules 7 through 15 shall supersede section 202.12 (Preliminary Conference) and Rules 16 through 24 shall supersede section 202.8 (Motion Procedure).

Preamble. The Commercial Division understands that the businesses, individuals and attorneys who use this Court have expressed their frustration with adversaries 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. The Commercial Division will not tolerate such practices. The Commercial Division is mindful of the need to conserve client resources, encourage proportionality in discovery, promote efficient resolution of matters, and increase respect for the integrity of the judicial process. Litigants and counsel who appear in this Court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference. Rule 13(a) regarding adherence to discovery schedules, and Rule 24(d) regarding the need for counsel to be fully familiar with the case when making appearances. Sanctions are also available in this Court under Rule 3126 of the Civil Practice Law and Rules and Part 130 of the Rules of the Chief Administrator of the Courts. The judges in the Commercial Division will impose appropriate sanctions and other remedies and orders as is warranted by the circumstances. Use of these enforcement mechanisms enables the Commercial Division to function efficiently and effectively, and with less wasted time and expense for the Court, parties and counsel. Nothing herein is intended to expand or alter the scope and/or remedies available under the above-cited sanction rules.

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

January 14, 2016

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed amendment of Commercial Division Rules (22 NYCRR 202.70(g)) Regarding Memorialization of Rulings in Disclosure Conferences.

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The Administrative Board of the Courts is seeking public comment on a new rule, proposed by the Commercial Division Advisory Council, for disclosure conferences in the Commercial Division (Exh. A). As described in a supporting memorandum by the Council (Exh. B), the proposed rule calls for the written memorialization by the parties of resolutions reached at disclosure conferences (or the dictation of such resolutions in to the record), for submission to and approval by the presiding judge. The new rule is designed to make more efficient the already expedited practice of resolving disclosure disputes through informal conferences.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than March 14, 2016.**

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

EXHIBIT A

PROPOSED RULE

The Commercial Division Rules shall be amended to add the following:

"Rule X Rulings at Disclosure Conferences

The following procedures shall govern all disclosure conferences conducted by nonjudicial personnel:

(a) At the request of any party:

i. prior to the conclusion of the conference, the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the court for approval and signature by the presiding justice; or

ii. prior to the conclusion of the conference, all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be "ordered," or the court shall otherwise enter an order incorporating the resolutions reached.

(b) The foregoing procedures shall not apply to telephone conferences."

EXHIBIT B

MEMORANDUM

TO: New York State Office of Court Administration

FROM: Commercial Division Advisory Council (the "Council")

DATE: December 8, 2015

RE: **Proposed Rule Regarding Memorialization and Effectuation of Rulings Issued During Conferences**

INTRODUCTION

Subsequent to its establishment in 2013 by Chief Judge Jonathan Lippman, the Commercial Division Advisory Council proposed a number of amendments to the Division's Statewide Rules of Practice (the "Division's Rules"). Through a series of administrative orders, former Chief Administrative Judge Gail Prudenti promulgated these amendments, which have since become fully integrated into the Division's Rules.

The integrated amendments, which implement changes proposed by the Task Force on Commercial Litigation in the 21st Century (the "Task Force") and range from enhanced expert disclosure to presumptive limitations on depositions, all share two common goals: (a) to make more efficient and cost-effective the adjudication of commercial disputes in the New York State Commercial Division; and (b) to burnish the Division's reputation as the premier forum in the United States for the resolution of the most complex business disputes.

Having now given effect to the Task Force's recommendations, the Advisory Council's mandate has shifted to the next phase—"[the] further periodic review of the needs and goals of the Commercial Division" (Task Force Report at 31). Towards that end, the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") recommends the adoption of a new rule to make more efficient the already expedient practice of resolving disclosure disputes through informal conferences.

The precise issue to be addressed is the memorialization and endorsement of rulings issued at conferences conducted before nonjudicial personnel. While in many cases, including at preliminary conferences and formal compliance conferences, court directives and deadlines are embodied in written orders (either using the sample conference forms recommended by this Council or customized forms prepared by the individual justices), in others, conferences held before a member of chambers often result in the issuance of oral rulings that are not reduced to writing. The difficulties created by oral "rulings" are clear – memories fade and disputes arise after-the-fact among the parties regarding the precise ruling(s) issued and its (their) scope. The resulting disputes can and often do result in costly, protracted and unnecessary motion practice, which would have not been needed had the "rulings" been reduced to writing. Moreover, the reshuffling of a retired or elevated justice's case inventory to another justice – one who is not steeped in the case history – only magnifies the problem; oral "rulings" cannot be confirmed by a review of the record.

There are two relatively simple ways to address this problem and simultaneously insure that "rulings" made by nonjudicial personnel secure the appropriate judicial imprimatur:

1. Requiring, at the request of any of the parties, that all resolutions reached at conferences held before nonjudical personal be reduced to writing by counsel and presented to the presiding justice to be "so ordered"; or
2. Requiring, at the request of any of the parties, that the resolutions reached be dictated into the record before the court reporter, with the transcript either to be "so ordered" or the resolutions otherwise incorporated into an order of the court.

PROPOSED RULE

"The following procedures shall govern all disclosure conferences conducted by nonjudicial personnel:

(a) At the request of any party:

i. prior to the conclusion of the conference, the parties shall prepare a writing setting forth the resolutions reached and submit the writing to the Court for approval and signature by the presiding justice; or

ii. prior to the conclusion of the conference, all resolutions shall be dictated into the record, and either the transcript shall be submitted to the court to be "ordered," or the court shall otherwise enter an order incorporating the resolutions reached.

(b) The foregoing procedures shall not apply to telephone conferences."

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the proposed rule and its incorporation into the Statewide Rules of the Commercial Division.

JDL

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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

October 6, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed amendment of Commercial Division Rule 14 (22 NYCRR § 202.70(g)), relating to disclosure disputes.

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The Commercial Division Advisory Council has recommended an amendment of Commercial Division Rule 14 that would set forth a new procedure for resolving discovery disputes (Exh. A). Presently, Rule 14 provides that counsel must consult in good faith to resolve discovery disputes; if counsel are unable to resolve a dispute the aggrieved party shall contact the court to arrange a conference as soon as practicable. The proposed amendment provides that if the court's Part Rules address discovery disputes, those Part Rules will govern. If the court's Part Rules are silent with respect to discovery disputes, the following procedures would apply. If counsel are unable to resolve a dispute after consulting in good faith, counsel for the moving party would be required to submit to the court a letter not exceeding three single-spaced pages in length outlining the nature of the dispute and requesting a telephone conference. The opposing party would have four business days to submit a responsive letter, after which the court would schedule a telephone or in-court conference with counsel. The proposal provides that failure to comply with this procedure may result in a motion being held in abeyance until the court has the opportunity to conference the matter. If the parties need to make a record, they would still have the opportunity to submit a formal motion.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than November 25, 2014.**

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

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Best Practices for Judicial Case Management

RE: Proposed New Version of Rule 14 of the Commercial Division

DATE: April 29, 2014

The Subcommittee on Best Practices for Judicial Case Management in the Court System has prepared a new version of Rule 14 of the Rules of the Commercial Division of the Supreme Court. The new version of the Rule was drafted to address two of the recommendations of the Chief Judge's Task Force on Commercial Litigation in the 21st Century: (a) the recommendation for using letter submissions for discovery disputes, and (b) the recommendation for conducting discovery conferences by telephone when appropriate. The text of these two recommendations is attached.

Current Rule 14 regarding Disclosure Disputes is brief and directs counsel to contact the court if a discovery dispute cannot be resolved through good faith discussions. The Proposed Rule 14 sets forth a new procedure directing counsel to provide the court with three-page letter briefs regarding unresolved discovery disputes and states that the court will attempt to address the matter through a telephone conference where possible. The text of the Current Rule 14 and Proposed Rule 14 are set forth below.

Existing Rule 14:

Rule 14. Disclosure Disputes. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See section 202.7. Except as provided in Rule 24 hereof, if counsel are unable to resolve any disclosure dispute in this fashion, the aggrieved party shall contact the court to arrange a conference as soon as practicable to avoid exceeding the discovery cutoff date. Counsel should request a conference by telephone if that would be more convenient and efficient than an appearance in court.

Proposed Rule 14:

Rule 14. Disclosure Disputes. If the court's Part Rules address discovery disputes, those Part Rules will govern discovery disputes in a pending case. If the court's Part Rules are silent with respect to discovery disputes, the following Rule with apply.

Discovery disputes are preferred to be resolved through court conference as opposed to motion practice. Counsel must consult with one another in a good faith effort to resolve all disputes about disclosure. See Section 202.7. If counsel are unable to resolve any disclosure dispute in this fashion, counsel for the

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

To address the preferences of individual judges, the Subcommittee has formulated the proposed new Rule 14 to serve as a default protocol where an individual judge does not have Part Rules that address discovery disputes. Individual judges who wish to tailor the discovery dispute mechanism to be even more streamlined may do so in their Part Rules. At the same time, we believe that a framework for providing three-page letter briefs followed by a telephone conference will help practitioners and judges who would prefer to have a written outline of the issues that will be addressed prior to the start of a conference call. Such letter briefs will also allow the parties a chance to set forth their positions in writing (including case citations) and obtain an indication from the judge regarding how the dispute will be resolved. The overall expectation is that the letter-briefing process will assist both the court and the parties in filtering out unnecessary or inefficient motions.

We note that the proposed Rule 14 also emphasizes that discovery disputes will be addressed through a telephone conference where possible. This provision responds to the Task Force's recommendation that telephone conferences be employed more widely to reduce costs and attorneys' fees. The current version of Rule 14 states that telephone conferences can be requested but does not have the same emphasis favoring them over an in-person conference.

Overall, we believe that the proposed Rule 14 will provide a welcome protocol to litigants for addressing discovery disputes in an economical fashion. This default protocol will advise users of the Commercial Division and their counsel that the Commercial Division has a streamlined process in place for efficiently resolving discovery disputes. We ask the Commercial Division Advisory Council to consider the Proposed Rule 14 for approval at the May 5, 2014 meeting.

Appendix to Memorandum Regarding Proposed Rule 14

Two relevant recommendations of the Chief Judge's Task Force on Commercial Litigation in the 21st Century:

Recommendation 6.b: *Using Letter Submissions for Discovery Motions.*

> Although letter submissions are encouraged in many Commercial Division Parts, they are not universally permitted. Experience, however, shows that letter submissions are often the most effective way to present discovery disputes: they are cheaper and more efficient than formal motions, and more balanced and less subject to "ambush" than oral presentations at conferences. We recognize that letter submissions, unless e-filed, often do not become part of the official court record, and this may be something that needs to be changed. For now, letters frequently remain the best way to address discovery disputes in the first instance.

Recommendation 6.c: *Conducting Discovery Conferences By Telephone.*

> We encourage judges to conduct at least routine discovery and status conferences by telephone rather than requiring the attorneys to travel to court. We recognize that some conferences (for example, the initial discovery conference and post-Note of Issue conferences) should be handled in person, but most others need not be. This is particularly true when the discovery process is proceeding smoothly, or an open issue has already been fully presented through letters to the court. Allowing telephone conferences in these circumstances will increase efficiency and reduce costs and attorneys' fees.

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, I hereby promulgate the attached revised New Model Preliminary Conference Order form (Exh. A) for optional use in the Commercial Division of the Supreme Court. Prior versions of this form are hereby repealed.

This order shall take effect on August 1, 2016.

Chief Administrative Judge of the Courts

Dated: June 24, 2016

AO/132/16

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X

_____
_____
_____
_____

Plaintiff(s)

- against -

_____
_____
_____
_____

Defendant(s)
----------X

Present: Hon._____

Part: _____

Index No.:_____ _____

RJI Filing Date: _____

NEW MODEL PRELIMINARY CONFERENCE ORDER

I. **APPEARANCES**: Please include (1) your name; (2) your firm's name and address; (3) your firm's telephone number; (4) your direct telephone number; and (5) your e-mail address.

Plaintiff(s):

_____
_____
_____
_____
_____

Defendant(s):

_____
_____
_____
_____
_____

Please use additional pages, if necessary.

II. CONFIDENTIALITY AGREEMENT AND ORDER:

The court recognizes that most cases in the Commercial Division involve facts that are highly sensitive. In such cases, in order for the parties to proceed to proper discovery, the parties should enter into a Confidentially Agreement which the court will "So Order."

The parties are directed to use the model Confidentiality Agreement promulgated in the Trial Part before which they are appearing. If the Trial Part does not have a specific form it uses, the parties are referred to the model Confidentiality Agreement promulgated by the City Bar found at: *http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf.*

If the parties need to change the Confidentiality Agreement promulgated in the Trial Part or by the City Bar, the parties are to submit a **signed** Confidentiality Agreement with the changes and a red line copy for the court's review.

The parties _____ **HAVE** or _____ **HAVE NOT** entered into a Confidentiality Agreement.

The Court _____ **HAS** or _____ **HAS NOT** "So Ordered" the Confidentiality Agreement and, if the Court has "So Ordered" it, on what date did the Court "So Order" it: _____ _____

The parties ____ **WILL** or ____**WILL NOT** be entering into a Confidentiality Agreement. If the parties **WILL**, please indicate when the parties expect to enter into the Confidentiality Agreement: _____

If the parties have decided that they **WILL NOT** enter into a Confidentiality Agreement, please provide the Court with an explanation as to the reason(s) the parties have decided **not** to enter into a Confidentiality Agreement.

_____
_____
_____

III. PRE-ANSWER MOTIONS

(a) Has the Plaintiff served an amended complaint?

If so, when _____

What are the changes to the Complaint from the original to the amended complaint:

_____
_____
_____

(b) Did Defendant(s) make a pre-answer motion to dismiss?

____ YES ____ NO

(c) When did the Court render its decision on the Motion to Dismiss?

_____

(d) Is the Court's decision on Appeal?

____ YES ____ NO

(e) What Causes of Action remain in the Complaint after the Court's decision?

(i) _____
(ii) _____
(iii) _____
(other) _____

(f) When did the Defendant(s) file their answer to the Complaint:

_____
_____

IV. DESCRIPTION OF THE CASE: Pursuant to **22 NYCRR 202.12(c)(1)**, please provide a brief description of the factual and legal issues raised in the pleadings of the case:

(a) Plaintiff's salient facts in support of claims/counterclaim defenses:

_____
_____
_____

Amount Demanded: $_____

(b) If issue has been joined (i.e. if Defendant has answered the Complaint) Defendant _____'s, salient facts in support of defenses, counterclaims and Third-Party Claims.

_____
_____
_____

Amount Demanded on the Counterclaim/Third-Party Claims: _____

If there are multiple defendants:

(c) If issue has been joined (i.e. if Defendant has answered the Complaint), Defendant, _____'s, salient facts in support of defenses, counterclaims and Third Party Claims.

_____
_____
_____

Amount Demanded on the Counterclaim/Third-Party Claims: _____

Please use additional sheets, if needed.

V. DISCOVERY

It is hereby **ORDERED** that disclosure shall proceed pursuant to the Commercial Division Rules found at
http://www.nycourts.gov/rules/trialcourts/202.shtml#70

(1) GENERAL ADMONITIONS:

The Preamble to the Commercial Division Rules, **22 NYCRR 202.70(g)**, states that the parties should be "mindful of the need to conserve client resources, *encourage proportionality in discovery*, promote efficient resolution of matters, and increase respect for the integrity of the judicial process." (Emphasis added.) Litigants and counsel who appear in this Court are directed to review the Rules regarding sanctions, including the provisions in Rule 12 regarding failure to appear at a conference, Rule 13(a) regarding adherence to discovery schedules, and Rule 24(d) regarding the need of counsel to be fully familiar with the case when making appearances . . . . .

(2) DOCUMENT PRODUCTION

All documents produced by any and all parties and non-parties MUST be Bates Stamped.

Pursuant to **Rule 11-e(a), 22 NYCRR 202.70(g)(11-e)**(a) "For each document request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Responses"), either:

> *(a) state that the production will be made as requested; or*
> *(b) state with reasonable particularity the grounds for any objection to production.*

(a) Initial demands for discovery and inspection shall be served by all parties on or before _____.

(b) Responses to demands shall be served by all parties on or before _____

(3) INTERROGATORIES

Pursuant to **Rule 11-a, 22 NYCRR 202.70(g)(11-a)** "Interrogatories (a) are limited to 25 in number, including subparts, unless another limit is specified in the Preliminary Conference Order. This limit applies to consolidated actions as well; (b) 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 documentation, including pertinent insurance agreements, and other physical evidence.

(a) Interrogatories shall be served by all parties on or before _____

(b) Answer to interrogatories shall be served on or before _____.

(4) DEPOSITIONS OF INDIVIDUALS:

Pursuant to **Rule 11-d, 22 NYCRR 202.70(g)(11-d),**"(a) Unless otherwise stipulated to by the parties or ordered by the court:(1) the number of depositions (of individuals) 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." Please review the remainder of Rule 11-d for additional directives concerning depositions.

(a) Please indicate that the parties have met and conferred concerning the timing of depositions:

____ **YES** ____ **NO**

If **YES**, when _____
If **NO**, when will you meet and confer _____.

(b) Defendant's deposition of Plaintiff on or before _____

(c) Plaintiff's deposition of Defendant(s) on or before _____

(d) **All depositions shall be completed on or before:** _____

(5) DEPOSITION OF ENTITIES:

A new rule has been proposed (awaiting final action by the Board of Judges) concerning the deposition of entities such as a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or government subdivision, agency or instrumentality, or any other legal or commercial entity.

The new Rule is intended to promote a more efficient process for deposition of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced. The proposed Rule and the memorandum in support can be found at: www.nycourts.gov/rules/comments/index.shtml April 7, 2015 Proposed adoption of new Commercial Division Rule and amendment to Commercial Rule 11-d, relating to depositions of entity representatives.

The essential elements of the new Rule are (emphasis added):

(i) A party wishing to take a deposition of an entity will serve a notice or subpoena enumerating those matters to be the subject of the deposition "with reasonable particularity."

(ii) If the notice or subpoena *does not* name a particular officer, director, member or employee of the entity, the named entity must designate one or more officers, directors, members or employees or other individual(s) who **consent to testify** on its behalf; the identity, description and title of that individual; and the matter(s) on which that individual will testify.

(iii) If the notice or subpoena *does* name a particular officer, director, member or employee of the entity, the entity, pursuant to CPLR 3106(d), shall produce that individual, **unless**, no later than ten days before the deposition, the entity designates *another individual* who **consents to testify** on its behalf, in the place of the named or

subpoenaed officer, director , member or employee of the entity; and shall provide the identification, description or title of the new individual, and the matter(s) on which the individual will testify.

(iv) 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).

(v) 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 is in effect **but** may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely given.

Names of entities to be deposed:

(i) For Plaintiff: _____
(ii) For Plaintiff: _____
(iii) For Defendant(s): _____
(iv) For Defendant(s): _____

Please use additional sheet if necessary.

(6) DISCLOSURE DISPUTES

Pursuant to Rule 14, **22 NYCRR 202.70(g)(14)**, discovery disputes will be resolved in the following manner:

1. If the Part Rules outline a mechanism to resolve discovery disputes, the Part Rules must be followed; or, if there are no Part Rules:

2. Follow the mechanism laid out in **Rule 14**, namely a party with a disclosure dispute shall write a letter to the Part, maximum 3-page single spaced in length, outlining the issue(s); the other side(s) may submit response letter(s) of equal length. The Part will then schedule a conference to, hopefully, resolve the dispute.

(7) IMPLEADER:

Defendant shall serve his Third-Party summons and complaint no later than 20 days after the end of the last deposition of a named Plaintiff and Defendant(s) and/or the last deposition of a representative of a named party.

(8) ELECTRONIC DISCOVERY AND PRIVILEGE LOGS

Discovery of Electronically Stored Information (ESI) is one of the most expensive and challenging discovery categories. The new Commercial Division Rules, as it concerns electronic discovery, **22 NYCRR 202.12(b) and (c)(3)**, as well as the related privilege logs, attempt to rein in the cost and complexity of electronic discovery and related privilege logs. In assessing whether the matter before the Court will benefit from electronic discovery, the parties should consider: (i) is there potentially relevant ESI material in the case; (ii) do the parties intend to rely on ESI; (iii) are there less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of the ESI; (iv) is the cost of preserving and producing ESI proportionate to the amount in controversy; and (v) what is the likelihood that discovery of ESI will aid in the resolution of the dispute.

A. ELECTRONIC DISCOVERY

(a) Will there be Electronic Discovery in the case:

____ YES ____ NO _____ NOT SURE

(b) **Meet and Confer:** Pursuant to Uniform Commercial Division Rule 8(b), **22 NYCRR 202.70(g)(8)(b)**, counsel MUST certify that they have *met and conferred* regarding electronic discovery, *before* the Preliminary Conference

(i) Date(s) parties had their meet and confer conference(s): _____

(ii) Did the parties reach an agreement concerning electronic discovery

____ YES ____ NO ___ PARTIALLY

(iii) Are counsel at this Preliminary Conference sufficiently versed in matters related to their client's technological systems to discuss competently all issues relating to electronic discovery:

____ YES ____ NO

(c) Other directives concerning electronic discovery.

The following topics are to be updated and supplemented as new information becomes available.

(I) **Preservation: 22 NYCRR 202.12(c)(3)(a), (c) and (g)**

(ii) **Production: 22 NYCRR 202.12(c)(3)(e),(d)**

(iv) **Claw Back Provisions** for inadvertent production:

(v) **Costs:** Each party shall bear its own costs of production pursuant to *U.S. Bank Nat'l Assoc. v. Greenpoint Mtge. Funding Inc.* 94 A.D.3d 58 (1st Dep't 2012). In the event that cost shifting becomes an issue, the parties shall follow the mechanism for Disclosure Dispute found in section **(6).**

(d) Judicial Intervention

The parties anticipate the need for judicial intervention.

____ YES ____ NO ___ MAYBE

(e) **Discovery of Electronically Stored Information from Non-Parties:**

Parties and non-parties should adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information (ESI) from non-parties which can be found in Appendix A to the Rules of the Commercial Division.

B. PRIVILEGE LOGS

One of the most time-consuming and costly aspects of discovery in complex commercial litigation cases is the creation and maintenance of privilege logs. At present, privilege logs are governed by CPLR 3122(b) which mandates "that a party who intends to withhold documents because of privilege (must) prepare a 'privilege log' which (i) contains a separate entry for each document being withheld; (ii) provides 'pedigree' information for each such document and (iii) sets forth the specific privileges and immunities that insulate that document from production. (Memorandum concerning Privilege Log Practices in the Commercial Division at p.1)

THE CATEGORICAL or DOCUMENT-BY-DOCUMENT APPROACH

(a) Rule 11-b, **22 NYCRR 202.70(g)(11-b), mandates** that the parties 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 categories of information can be excluded from the logging requirements;
- any other issues pertinent to privilege review. (Rule 11-b(a))

(b) (1) The new rule clearly states that the preference in the Commercial Division is for the parties to use **categorical designations** where appropriate to reduce the time and costs

associated with preparing privilege logs. . . . (An example of such a **categorical designation** is the designation that all communications between the client and the client's attorney AFTER the commencement of the action would be designated as exempt pursuant to the attorney-client privilege.) . . . The parties are encouraged to utilize a reasoned method of organizing the documents . . .

*There are specific rules that must be followed to ensure that the documents contained in a **categorical designation** were properly placed in that category.*

(2) In the event the requesting party refuses to permit a **categorical approach**, and instead insists on a **document-by-document** listing on the privilege log then . . . the requirements of CPLR 3122 must be followed. In that circumstance, however, the producing party, upon showing of good cause, may apply to the court for an allocation of costs, including attorneys' fees, incurred with respect to preparing a **document-by-document** privilege log . . . .

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

While there are other important section of the new Privilege Log Rule that will have to be considered and followed, these sections need not be repeated here.

(c) Have both the Plaintiff and Defendant(s) read the Rules concerning Electronically Stored Information (ESI) and the new Privilege Logs:

Plaintiff: _____ ____ **YES** ____ **NO**
Defendant: _____ ____ **YES** ____ **NO**
Defendant: _____ ____ **YES** ____ **NO**

Please use additional sheets if necessary.

(d) Pursuant to the new Electronic Discovery and Privilege Log Rules, have the parties met and conferred concerning ESI and Privilege Logs:

_____ **YES** _____ **NO**

(e) If the Parties have met and conferred, when did they meet:

_____

(f) Will the parties be choosing:

Categorical Privilege Log: ____ **YES** ____ **NO**

OR **Document-by-Document Privilege Log:**

____ **YES** ____ **NO**

(9) END DATE OF FACT DISCLOSURE:

Fact Disclosure shall be completed by _____

(10) EXPERT DISCOVERY (if any):

Pursuant to the proposed Rule 13(c), **22 NYCRR 202.70(g)(13(c))**, the Court hereby ORDERS that if any party intends to introduce expert testimony at trial or in support of a motion for summary judgment, the parties, no later than thirty (30) days prior to the completion of fact discovery, shall confer on a

schedule for expert disclosure – including the identification of experts, the agreement to exchange expert reports and the timetable for the deposition of testifying experts. Expert disclosure shall be completed no later than four (4) months after the completion of fact discovery.

In the event that a party objects to this procedure or timetable, the parties shall request a conference to discuss the objection(s) with the Court.

*The note of issue and certificate of readiness may **not** be filed until the completion of expert disclosure.*

Do the parties believe that there will be expert discovery in this case?

____ **YES** ____ **NO**

(11) END DATE OF ALL DISCOVERY:

_____

(12) NOTE OF ISSUE:

_____ shall file a note of issue/certificate of readiness on or before _____.

A copy of this P.C. order and all subsequent Compliance and Status Conference Order must be served and filed with the Note of Issue.

(13) DISPOSITIVE MOTION(S):

All dispositive motion(s) shall be made on or before _____ or within _____ days after the filing of the Note of Issue.

***Please Note:** If a party intends to use documents in their dispositive motion that the party wishes to file in a redacted form or under seal, the party must make an application to the court under 22 NYCRR 216.1(a) to have the Court issue a **written decision** specifying that there is*

"good cause" for such document(s) to be filed in a redacted form or under seal. This should be done PRIOR to making a dispositive motion.

Such dispositive motions may be filed by Order to Show Cause or Notice of Motion. The Court encourages the parties to confer and agree on the dates for the opposition and reply papers to be exchanged and e-filed.

(14) COMPLIANCE CONFERENCE:

Parties or their representatives **with knowledge of the case and this Preliminary Conference Order** shall appear for a Compliance Conference on

_____

Parties or their representatives **with knowledge of the case and this Preliminary Conference Order** shall appear as well at all *subsequent* Status Conferences.

VI. ALTERNATIVE DISPUTE RESOLUTION

The judges in the Commercial Division encourage all parties to work toward a proper and just resolution of all the issues in the case. The judges of the Commercial Division believe that the parties are better served the earlier a proper and just resolution can be reached. Toward that end, the judges ask the litigants and their attorneys, on a *continuous basis going forward*, to consider any and all mechanisms to resolve the issues before them.

___ • settlement conferences;

___ • participation in the Commercial Division's Alternative Dispute Resolution (ADR) (if applicable) and/or

___ • retention of a private mediator.

Please indicate when the parties believe they will be ready to commence their chosen mechanism to resolve the issues in the case:

___ (a) Within sixty (60) days of the Preliminary Conference;

___ (b) Within thirty (30) days after document and interrogatory discovery has been completed;

___ (c) When depositions of the parties have been completed; or

___ (d) After the close of Fact Discovery and during the four month period of Expert Discovery.

VII. ADDITIONAL DIRECTIVES:

Please follow the specific Rules found under the Part Rules of the Judge before whom you are appearing.

Please be aware of and follow **all** the Rules found at **22 NYCRR 202.70(g)**. Particularly, please comply with the following two Rules:

Rule 2: Parties shall **immediately** inform the court that an action has settled, been discontinued or disposed of by submission of a stipulation or a letter;

Rule 5: ALL counsel **MUST** sign up for the FREE ***eTrack*** court notification service to keep track of future court appearances. Counsel are also responsible for notifying all other counsel of future court appearances. Please review the ***eTrack*** "Frequently Asked Questions" for details.

****

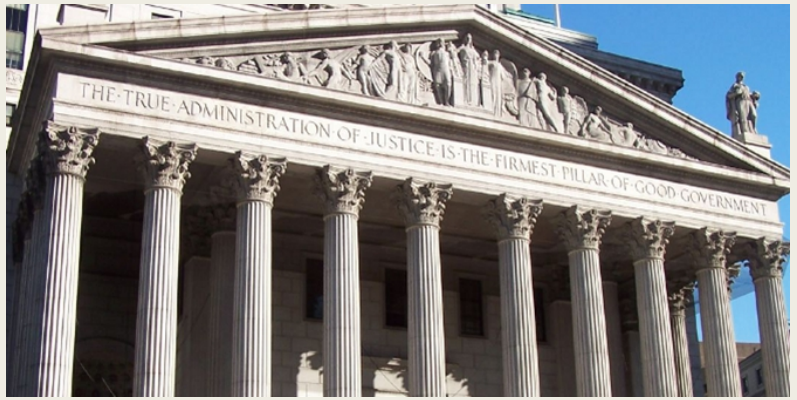
THE DATES SET FORTH HEREIN MAY NOT BE ADJOURNED EXCEPT WITH THE PRIOR APPROVAL OF THE COURT.

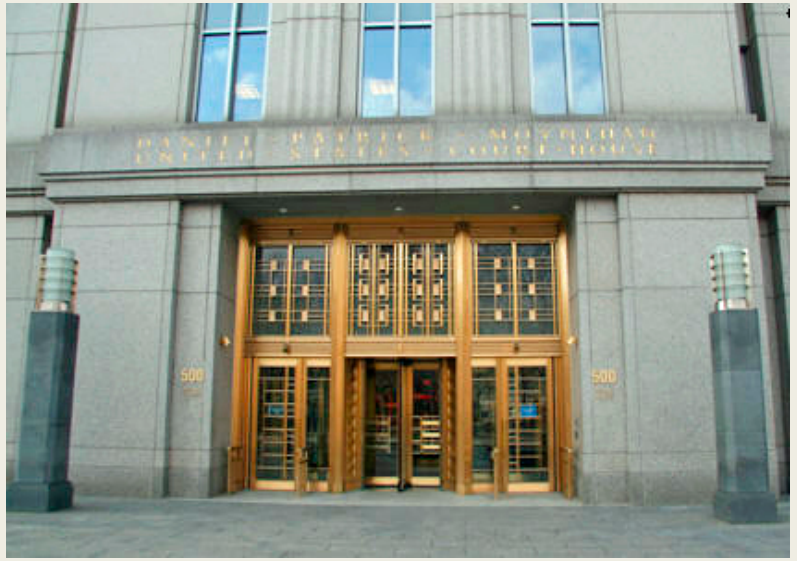
THE PARTIES MUST BRING COPIES OF ALL DISCLOSURE ORDERS TO ALL CONFERENCES.

SO ORDERED:

DATE: _____

_____
J.S.C.





DISCOVERY IN NEW YORK STATE & FEDERAL COURT

- Hon. Debra James, Justice of the Supreme Court
- Hon. Stewart D. Aaron, U.S. Magistrate Judge

February 20, 2019

PRELIMINARY CONFERENCE

NY SUP. CT.	COMM. DIVISION	FED. CT.
Uniform Civil Rule 202.12: Parties may submit stip & order agreeing to timetable for completion of discovery in lieu of attending conference, unless court orders otherwise. Topics covered at conference: simplification of fact & legal issues; timetable for discovery; method & scope of ESI; addition of parties; & settlement. May request conference by telephone. Rule 202.10.	Uniform Civil Rule 202.12, plus Comm. Div. Rule 8 (consultation between counsel prior to conference required); Rule 11 (content of preliminary conference order). Optional form of Order prepared by Comm. Division Advisory Council that justices may use.	Rule 16: Most judges have form of Order for parties to complete prior to conference. Topics covered at conference: formulating & simplifying issues; amending pleadings; obtaining admissions; avoiding unnecessary proof; summary judgment; controlling & scheduling discovery; ESI; identifying witnesses & documents; timetable for discovery; & settlement.

DEPOSITION PRACTICE

	CPLR	COMM. DIV. RULES	FED. R. CIV. P.
Priority of depositions	CPLR 3106(a): Yes	Yes, CPLR applies	No
Limits on number and duration	No	Yes. Rule 11-d: Presumptive 10 per side, 7 hours in length; Rule 9 (accelerated adjudication): presumptive 7 per side.	Yes. Rule 30(a)(2)(A)(i): presumptive 10 per side; Rule 30(d)(1): presumptive 7 hours in length
Designation of representative of organization	Party desiring to take deposition of particular officer, director, member or employee shall include in notice identity, description or title of such individual & adverse party may designate substitution on 10-day notice. CPLR 3106(d).	Rule 11-f similar to Fed. R. Civ. P. 30(b)(6) (see box to right).	Party desiring to take deposition must describe matters with reasonable particularity & organization must designate deponent to testify about information known or reasonably available. Rule 30(b)(6).

DEPOSITION PRACTICE (cont'd)

	NY SUP. CT.	COMM. DIVISION	FED. CT.
Conduct of depositions	Uniform Civil Rule 221.1: Only objections as to form; no speaking objections. Rule 221.2: No refusal to answer except to preserve privilege, to enforce court-imposed limitation, or when question improper & would cause prejudice to witness.	Same as NY Sup. Ct.	Rule 30(c)(2): Only objections as to form; no speaking objections; no instruction not to answer except to preserve privilege, to enforce court-imposed limitation or to present motion under Rule 30(d)(3) (deposition being conducted in bad faith to harass).

EXPERT DISCOVERY

	CPLR	COMM. DIV. RULES	FED. R. CIV. P.
Expert disclosures	Yes. CPLR 3101(d)(1)(i): must disclose subject matter on which each expert expected to testify, substance of facts and opinions on which expert expected to testify, qualifications and summary of grounds for opinion.	Yes. Rule 13(c) similar to Fed. R. Civ. P. 26(b)(2)(B).	Yes. Rule 26(b)(2)(B): must disclose statement of opinions and basis & reasons; facts or data considered; exhibits used to summarize or support; qualifications, including list of publications authored in previous 10 years; list of cases in which, during previous 4 years, witness testified as expert at trial or by deposition & statement of compensation to be paid.
Expert depositions	No, unless special circumstances. CPLR 3101(d)(1) (iii).	Yes. Rule 13(c).	Yes. Rule 26(b)(4)(A).

PROPORTIONALITY

CPLR	COMM. DIV. RULES	FED. R. CIV. P.
No provisions addressing proportionality.	Incorporated into Preamble. *See also* Rule 11-f (parties encouraged to use most efficient means to review documents consistent with disclosure obligations & proportional to needs of case)	Rule 26(b)(1): Parties may obtain discovery regarding any nonprivileged matter relevant to any party's claim or defense & proportional to needs of case, considering importance of issues at stake, amount in controversy, parties' relative access to relevant information, parties' resources, importance of discovery in resolving issues, & whether burden or expense of proposed discovery outweighs likely benefit.

DISCOVERY DISPUTES

	NY SUP. CT.	COMM. DIVISION	FED. CT.
Method of resolving	Meet and confer	Meet and confer	Meet and confer
Motion practice	Refer to judge's rules and practices	Refer to judge's rules and practices	Refer to judge's rules and practices
Judicial officer who addresses discovery disputes	Use of court attorneys, judicial hearing officers and referees. *See* CPLR § 3104.	Same as NY Sup. Ct.	Use of Magistrate Judges; differences between SDNY & EDNY

DISCOVERY SANCTIONS

	CPLR/NY RULE	COMM. DIV. RULES	FED. R. CIV. P.
Discovery penalties	CPLR § 3126: order deeming issues resolved; order prohibiting party from supporting or opposition claims or defenses; or order striking pleadings, staying case or rendering default judgment.	CPLR applies. Plus Preamble to Commercial Division Rules discusses sanctions for failure to appear at depositions or scheduled court dates. Rule 12 provides for sanctions for non-appearance at conference.	Rule 37: order directing facts as established; order prohibiting party from supporting or opposing claims or defenses; order striking pleadings, staying proceedings or dismissing action; or contempt order. *See also* Fed. R. Civ. P. 30(d)(2) (sanction for impeding deposition).
Bad litigation conduct	Part 130: Sanctions for frivolous conduct.	Part 130 applies.	28 USC § 1927: for vexatiously multiplying proceedings.