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New York Commercial Division Adopts Rule on Entity Depositions

The Commercial Division Advisory Council was created in 2013 as a follow up to Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century.¹ The Council's goal is to advise the Chief Judge on an ongoing basis about matters concerning the Commercial Division of the Supreme Court of New York, to consider how the Commercial Division can better serve the needs of the business community and the changing economy, and to implement the recommendations of the Task Force's 2012 comprehensive report.² Roberta Kaplan, a litigation partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, serves on the Advisory Council and as the Co-Chair of the Advisory Council's Subcommittee on Best Practices for Judicial Case Management.

This memorandum is the fifth in a series alerting clients to changes to the practice rules within New York's Commercial Division. This memorandum addresses the new Rule 11-f of Section 202.70(g) (Rules of Practice for the Commercial Division) of the Uniform Civil Rules for the Supreme Court and the County Court (the "Uniform Rules"), which permits a party wishing to depose an entity on particular matters to enumerate the issues upon which the entity will be deposed; requires that such issues be described with "reasonable particularity"; requires the entity being deposed to designate one or more representative who can offer testimony on those matters; and requires the representative being deposed to "testify about information known or reasonably available to the entity."³ This memorandum also briefly addresses the modifications to existing Rule 11-d, which was amended to clarify that the presumptive seven-hour durational limit on depositions applies cumulatively to all entity witnesses, though the court should "freely" grant requests for additional time.⁴

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¹ For more information on the Council, see http://www.nycourts.gov/press/PDFs/PR13_05.pdf.

² The Task Force's report can be found at <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf>.

³ The text of the new rule is available at <http://nylawyer.nylj.com/adgifs/decisions15/101315rules.pdf>.

⁴ See *id.*

Rule 11-f—Entity Depositions—Adopted October 8, 2015; Effective December 1, 2015

When the Task Force issued its report and recommendations in 2012, it endorsed the concept of placing certain limitations on depositions that would be more in line with those in the Federal Rules, on the belief that such measures would be “fundamentally fair to all parties, prevent gamesmanship, and . . . assist in streamlining discovery in most commercial cases.”⁵ More specifically, Rule 11-f “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.”⁶

Rule 11-f is a departure from the traditional New York state court practice of only requiring a deponent to testify based on his or her personal knowledge, and not as to matters known or reasonably available to the entity for which he or she works.⁷

The new rule is modeled on Federal Rule 30(b)(6) but does not entirely mirror it. The Advisory Council explained that Rule 11-f “has been carefully drafted to be fully consistent with both the letter and spirit of the CPLR.”⁸ Thus, for example, under the new rule, a party has the option but is not required to list the topics on which it will depose the entity, while the federal rule requires a party to do so. And, Rule 11-f adheres to CPLR 3106(d) in requiring that the entity being deposed identify the witness it will produce at least ten days before the deposition, whereas the federal rule requires the entity to designate representative(s) but is silent as to when.⁹

Rule 11-f establishes that a party may serve a notice or subpoena on any legal or commercial entity.¹⁰ While, as noted above, a party is not required to identify which matters the deponent will be asked about, *if* the party chooses to do so, the party *must* describe the matters with “reasonable particularity.”

⁵ See <https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf> at 23-24; <http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf>, Appendix A at 2.

⁶ See <http://www.nycourts.gov/rules/comments/PDF/CD-EntityDepositions.pdf>.

⁷ Many states have rules similar to Rule 11-f adopted here. See, e.g., N.J. Ct. R. 4:14-2; Tex. R. Civ. P. 199.2(b)(1).

⁸ See *id.*; Fed. R. Civ. P. 30(b)(6).

⁹ See Fed. Rule Civ. P. 30(b)(6) (“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.”) (emphasis added). Under the federal rules, then, the deposing party might not know the identify of the entity’s representative until the deposition itself.

¹⁰ Including a “corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality.”

The party seeking the deposition has the option but not the requirement to identify the particular representative(s) of the entity it seeks to question.

- *If the party declines to identify a particular deponent, then the entity must designate, at least ten days before the deposition, the identit(y)(ies) and title(s) of the individual(s) who will testify on its behalf, and on which issues.*
- *If the party does designate a particular deponent or deponents, and elects to set forth the topics for examination, the entity must produce that deponent or, at least ten days before the deposition, must notify the other party of the name and title of who will testify instead and, if more than one deponent, on which issues.*

As with the federal rules, deposition testimony given pursuant to the new rule is usable against the entity on whose behalf the testimony was given.

The new rule is unclear as to what will happen in the event of non-compliance. For example, what if a witness is designated and shows up for his or her deposition but cannot answer any of the questions asked? Issues like these will likely have to be worked out in the course of future motion practice concerning these and related issues.

While Rule 11-f is silent as to the parties' recourse in the event of non-compliance, under Rule 14, unless otherwise directed by the judge's individual rules, litigants must brief all discovery disputes by letter (no more than three single-spaced pages), and the court must then schedule a telephonic or in-person conference to address the dispute.¹¹

Amended Rule 11-d—Limitations on Depositions—Amendments Adopted October 8, 2015; Effective December 1, 2015

Together with the introduction of the new rule, existing Rule 11-d was amended to specify that all deponents testifying on behalf of an entity will cumulatively be subject to the presumptive seven-hour deposition limitation. The amendment adds, however, that the cumulative presumptive durational limit may be enlarged either by agreement of the parties or by the court, upon request, and that such a request "shall be freely granted." Given this somewhat unusual language that enlargements should be "freely" granted, it remains to be seen how effective this seven-hour limitation will actually prove to be in practice.

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¹¹ All Commercial Division rules, including Rule 14, are available at <https://www.nycourts.gov/rules/trialcourts/202.shtml>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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