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New York Commercial Division Adopts Rule on Deposition Limits

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 fourth in a series alerting clients to changes to the practice rules within New York's Commercial Division. This memorandum addresses the new Rule 11-d 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 sets presumptive limits on the number and duration of depositions by parties litigating in the Commercial Division.

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Rule 11-d—Limitations on Depositions—Adopted December 29, 2014; Effective April 1, 2015

When the Task Force issued its report and recommendations in 2012, it endorsed the concept of limits on the number of depositions, finding that such limits would be "fundamentally fair to all parties, prevent gamesmanship, and . . . assist in streamlining discovery in most commercial cases."[3]

Currently and until Rule 11-d goes into effect, the Commercial Division imposes no presumptive limitations on a civil litigant's right to take depositions and that right can only be modified by court

[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] *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.

order "denying, limiting, conditioning or regulating the use of any disclosure device [in order to] prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or other courts."[4] The decision whether to issue such a protective order is made by the presiding justice on a case-by-case basis.

On June 20, 2014, the Advisory Council recommended adoption of deposition limits and solicited public comments. The Advisory Council issued a memorandum responding to public comments on September 8, 2014.[5] On December 29, 2014, Chief Administrative Judge Gail Prudenti adopted Rule 11-d of Section 202.70(g) of the Uniform Rules. The Rule goes into effect on April 1, 2015, and is only applicable to cases filed in the Commercial Division on or after that date.

Rule 11-d establishes a presumptive limit of **ten depositions for each side** and a presumptive limit for the duration of depositions of **seven hours per witness**. As with federal litigation, the seven hour limit would allow for reasonable breaks for lunch and other reasons, and only time actually spent on the record will be applied towards the limit.[6] The Rule further establishes that the deposition of a corporation or other legal entity shall be treated as a single deposition, even if more than one person is designated to testify on the entity's behalf. Thus, for example, if a party were to subpoena an accounting firm, and that firm sent two employees to testify, the total combined deposition time for those two employees could not exceed seven hours.

As with the Federal Rules of Civil Procedures,[7] the parties can extend or alter the presumptive limits by agreement. By an amendment to Rule 8 of the Uniform Rules, "Consultation Prior to Preliminary and Compliance Conferences," parties are encouraged to discuss and reach agreement on the need to vary the presumptive number or duration of depositions.

Absent agreement, a party can obtain a court order to modify the limits upon a showing of good cause.[8] By an amendment to Rule 11 of the Uniform Rules, "Discovery," the court is required to proactively "consider the appropriateness of altering prospectively the presumptive limitations." Under the

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[4] *See* N.Y. CPLR 3103 (McKinney 2013).

[5] The Office of Court Administration received comments from: (1) the Commercial and Federal Litigation Section of the New York State Bar Association, (2) the Commercial Litigation Committee of the Nassau County Bar Association, (3) the Supreme Court Committee of the New York County Lawyers' Association, and (4) Manhattan-based attorney Thomas M. Mullaney.

[6] *See* Fed R. Civ. P. 30(d)(1) advisory committee's note.

[7] *See* Fed. R. Civ. P. 26(f)(3)(E).

[8] Again, the same is true with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(2)(A).

amended rule, to make a determination about whether to modify the presumptive limitations on depositions, the court should consider the following factors:

- The overall complexity of the litigation;
- Whether the deponent requires an interpreter;
- Whether the deponent insists upon providing evasive and/or non-responsive answers to questions;
- Whether the lawyer representing the deponent engages in inappropriate or otherwise obstreperous conduct;
- Whether the examination reveals that documents have been requested but not produced;
- Whether the examination reveals the existence of critical, but as-yet unrequested documents;
- Whether additional time is necessary in multi-party cases to permit adequate examination of the deponent by counsel whose interests may not entirely overlap[9]; and
- Whether the deponent's own lawyer wishes to cross-examine.

At least twenty-two states currently impose some kind of restrictions on the number and/or duration of depositions.[10] This tracks the deposition limitations set forth in the Federal Rules of Civil Procedures,[11] as well as in certain states, including Hawaii, Montana, and Utah.[12] According to the Advisory Council, no state has a presumptive limit on the number of depositions greater than ten.[13] While there has been a proposal to amend the Federal Rules of Civil Procedure to further reduce the

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[9] The Advisory Council nevertheless warns counsel in multiple-party cases that such cases are not automatically entitled to an expansion of the presumptive deposition limitations, and that counsel should maximize efficiency by allocating topics for depositions among themselves or selecting one attorney to act as lead examiner and reserving remaining counsel sufficient time to fill any perceived gaps in questioning. *See* http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf, Exhibit A, at 5 n. 12.

[10] See http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf, Exhibit B, for a chart of these twenty-two states and their restrictions on depositions.

[11] *See* Fed. R. Civ. P. 30(a)(2)(A)(i); Fed. R. Civ. P. 30(d)(1).

[12] *See* http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf, Appendix A at 3 n. 7.

[13] *See* http://www.nycourts.gov/rules/comments/PDF/DepositionsRuleRequest.pdf, Exhibit A at 3.

number of presumptive depositions from ten to five,[14] the Advisory Council considered five depositions insufficient for the kinds of complex commercial cases that are brought in the Commercial Division.[15]

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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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[14] *See* http://www.nycourts.gov/rules/comments/PDF/PC-PacketStaggdApps.pdf, Exhibit A at 4.

[15] *See* http://www.nycourts.gov/rules/comments/PDF/PC-PacketStaggdApps.pdf, Exhibit A at 4.