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August 14, 2014

VIA ELECTRONIC AND FIRST CLASS MAIL

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Dear Mr. McConnell:

On behalf of the New York State Bar Association's Commercial and Federal Litigation Section, I enclose the attached memoranda with the Section's comments on the new proposed rules of the Commercial Division relating to (a) the imposition of sanctions and (b) the presumptive number and duration of depositions.

If you have any questions about the Section's comments, please let me know.

Respectfully yours,



Paul D. Sarkozi
Chair

Enclosure

To: John W. McConnell

From: Commercial and Federal Litigation Section of the New York State Bar Association

RE: Proposed Commercial Division rule change concerning sanctions

Date: August 12, 2014

The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") submits the following comments in response to your memorandum dated June 27, 2014 with respect to the proposed 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.

The Section endorses the adoption of the proposed Preamble.

The Section is of the opinion that the proposed preamble provides the Court with the ability to express its intent within the context of existing rules and statutes that already cover the topic of sanctions. By providing a statement of its intent and the specific provisions of existing rules and laws that give the Court the power to mete out sanctions, litigants and counsel are being provided with ample additional and prior notice that non-compliance with Court rules and Orders will not be tolerated and may not be without cost to the violators.

While some may conclude that the proposed preamble is unnecessary, it satisfies our sense of fairness as this addition is intended to give notice to all constituencies that the Court intends a noteworthy change in its approach to sanctions.

To: John W. McConnell

From: Commercial and Federal Litigation Section of the New York State Bar Association

RE: Proposed Commercial Division rule changes concerning presumptive limitations on number and length of depositions

Date: August 12, 2014

The Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") submits the following comments in response to your memorandum dated June 20, 2014 with respect to the proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rules 8(b) and 11(c), relating to presumptive limitations on the number and duration of depositions.

The Section endorses the proposed new Rule and the proposed amendments.

The adoption of presumptive limitations on the length and number of depositions in cases governed by the Federal Rules of Civil Procedure did not, from the anecdotal experiences of our members, thwart or impair the ability of commercial litigants in federal court to obtain effective discovery. Lawyers are creative; they can figure out how to do more with less. Witness the effect of page limits on briefs and time limits on oral arguments.

Boundaries provide reasons for lawyers to be more efficient. And if both lawyers conclude they cannot get the job done within the limitations, proposed Rule 9(a)¹ gives them the flexibility to agree to vary the limitations in their case, without seeking relief from the Court. To the extent that the limitation imposes a greater burden on one party than another, the Court will undoubtedly entertain the grounds for exceeding the limitation, while at the same time providing protection to the objecting party who will at least have the rule to rely upon in the first instance. (The limitations might also cause the parties to communicate in more detail about witnesses in advance of serving notices to identify the witnesses who can provide the "biggest bang" for the "discovery buck.")

The presumptive limitations also impose a sense of proportionality, which is clearly consistent with the trend in the Commercial Division's analysis of other discovery issues, notably electronic discovery. A case involving a \$200,000 dispute could (and should?) be fairly litigated with fewer than ten depositions.

The Committee also notes that there is nothing in the proposed rule changes that precludes a party from seeking protection within the presumptive limits. That is, if the dispute

¹ The Section notes that Rule 9 has been assigned to Accelerated Adjudication Actions, so that the numbering of the proposed rule needs to be changed. In addition, the Section notes that Amendment No. 1 makes reference to proposed Rule 9(a)(iii), which does not appear anywhere in the proposed rule.

involves limited issues and a relative small amount in controversy, a party who notices nine depositions might well be faced with a motion for protection under CPLR 3103.

In any event, the flexibility to seek relief from the limitations appears to have been a sufficient safety valve in federal practice and there is no reason to doubt its efficacy before the Commercial Division. While the Committee did hesitate momentarily when noting that the Delaware Superior Court did not have such a presumptive limitation, on further reflection it was concluded that a presumptive limitation in the Commercial Division would likely be yet another “selling” point for commercial litigation in the Commercial Division.

September 8, 2014

**Proposed Preamble to the Commercial Division
Rules Regarding Sanctions**

The Supreme Court Committee¹ reviewed the Office of Court Administration (“OCA”) proposal recommended by the Commercial Division Advisory Council regarding the adoption of a preamble to the Commercial Division Rules.

By majority vote, the members of the Supreme Court Committee voted against the adoption of a preamble to the Commercial Division Rules regarding the sanctions that may be imposed against litigants or counsel who engage in dilatory tactics, following a presentation by members of the Commercial Division Advisory Council.

A majority of members deemed the proposed preamble unnecessary, as the preamble itself states that its intent is not to alter the scope of sanctions available, and the judges in the Commercial Division already are aware of those sanctions. Others opposed the language in the preamble that could be interpreted as encouraging sanctions motions, which can result in costly motion practice and delay. Further, although the preamble is directed at litigants and counsel, some feared it could be interpreted as a tacit directive to judges to impose sanctions more often.

A minority of members supported the proposed preamble based on the perspective that New York State courts in general rarely award sanctions in cases of overt delay by litigants or counsel, contributing to a culture permissive of dilatory tactics.

While many agreed that litigants and attorneys should adhere to litigation deadlines and court schedules, members were unpersuaded that the proposed preamble would be effective in addressing an issue of this magnitude. Accordingly, the Committee does not support the adoption of the proposed preamble.

¹ The views expressed are those of the Supreme Court Committee only, have not been approved by the New York County Lawyers’ Association Board of Directors, and do not necessarily represent the views of the Board.