NEW YORK STATE BAR ASSOCIATION
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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.

MEMORANDUM

TO: Office of Court Administration

FROM: Commercial Litigation Committee of the Nassau County Bar Association
Kevin Schlosser, Chair (kschlosser@msek.com)

DATE: July 22, 2014

SUBJECT: Proposed Adoption of New Commercial Division Rule 9 and Amendment of Commercial Division Rules 8(b) and 11(c), Relating to Presumptive Limitations on the Number and Duration of Depositions

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The Commercial Litigation Committee ("Committee") of the Nassau County Bar Association respectfully submits these comments in response to the Memorandum dated June 20, 2014 concerning the proposed adoption of new Commercial Division Rule 9 and amendment of Commercial Division Rules 8(b) and 11(c), relating to presumptive limitations on the number and duration of depositions.

I. SUMMARY OF COMMITTEE'S COMMENTS

The proposed new Rule 9 would set presumptive limits of (i) seven (7) hours for the length of depositions, and (ii) ten (10) depositions in each case, with extensions being granted only upon a showing of "good cause." Proposed changes to Rule 8 and 11 would add provisions addressing the manner in which the parties would discuss and potentially opt out by unanimous agreement or seek court review of such issues in the absence of agreement.

As explained below, the Committee is not in favor of the proposal to set a presumptive limit of seven (7) hours on the length of depositions in commercial cases. The Committee's opposition is based upon the following factors:

(1) The uncertainty of legal authority to impose arbitrary restrictions on the duration of depositions in the absence of amending the CPLR;

(2) The absence of any demonstrable need for presumptive limits on the duration of depositions in commercial litigation;

(3) The inadvisability of arbitrarily limiting one of the most fundamental tools of discovery, which enhances settlement of cases prior to trial as well as making trials, where necessary, more efficient and focused; and

(4) The risk of creating new causes for disputes and "posturing" over the length of depositions.

While the Committee is indeed in favor of special rules dedicated to commercial litigation and the general effort to sharpen and improve the Commercial Division Statewide Rules, a rule that has the effect of substantially limiting a fundamental right of discovery as explicitly provided by the CPLR does not appear to be advisable in the absence of demonstrable need. At the very least, parties should be empowered to "opt out" of such a rule without unanimous consent of their adversaries.

While the Committee similarly believes that there is no present need to set a presumptive limit on the number of depositions in commercial litigation, setting such a limit is not likely to abridge fundamental discovery rights. Thus, the Committee takes no position on the proposed limitation on the presumptive number of depositions. (It should be noted that certain Committee members were also opposed to setting a presumptive limit on the number of depositions, but this did not represent a majority of the Committee.)

II. THE COMMITTEE OPPOSES PRESUMPTIVE LIMITS ON THE DURATION OF DEPOSITIONS

A. Lack of Legal Authority for Proposed Limitation on Length of Depositions in the Absence of Amending the CPLR

Depositions are, of course, one of the most fundamental discovery tools firmly authorized by the CPLR and thoroughly entrenched in New York practice. *See,e.g.*, CPLR 3102(a); 3106; 3107, 3113 & 3117. The CPLR contains no authorization for abridging the fundamental right to depositions by forcing parties to limit the taking of depositions to any arbitrary length of time in all cases. Rather, the CPLR affords parties full and complete depositions to the extent and within the bounds of their broad discovery rights and subject to application for protective orders in the event of discovery abuse. See CPLR 3103(a). Indeed, a protective order limiting discovery is "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Id.*

While there is a dearth of case law addressing the specific issue of limiting the length of depositions, there is appellate authority rejecting the trial courts' arbitrarily limiting the length of depositions. In *Farrakhan v. N.Y.P. Holdings, Inc.*, 226 A.D.2d 133, 640 N.Y.S.2d 80 (1st Dep't 1996), for example, the First Department reversed the lower court's order limiting plaintiff's deposition to three days. The First Department acknowledged that the trial court is vested with broad discretion in supervising pre-trial discovery, but found that the trial court "abused its discretion by limiting [plaintiff's] deposition to three days." The First Department found that since "the length of time needed to take [plaintiff's] deposition cannot be ascertained with any certainty, placing an arbitrary time limit on the process would almost certainly curtail defendants' ability to acquire a complete and thorough deposition." *See also Koch v. Sheresky, Aronson & Mayefsky LLP*, 33 Misc.3d 1228(A), 943 N.Y.S.2d 792 (N.Y. Co. Sup. Ct. 2011)

("Depositions should be completed in a reasonable time..., but the amount necessary will vary depending on many factors, including the nature of the case and the deposition technique of the questioning attorney"); 2 *Modern New York Discovery* § 28:37 (2d ed.) ("It is improper for a court to set a time for the completion of a deposition where the length of time needed to take the deposition could not be ascertained with any certainty.").

It is questionable, therefore, whether the fundamental right to depositions as expressly afforded under the CPLR may be limited arbitrarily without legislative amendment of the CPLR. As written, proposed Rule 9 is mandatory, unless there is mutual agreement between and/or among all of the parties. Thus, under the Rule, without unanimous consent of all parties, one party can be forced to limit the rights it is expressly afforded by the CPLR.

Further restricting the objecting party's rights to a deposition, proposed Rule 9 requires the party seeking to question a witness for more than seven (7) hours to prove "good cause" for continuing the deposition longer than such time. The Committee believes that imposing such an ostensibly higher standard of "good cause" is another imprudent and unwarranted abridgment of discovery rights afforded by the CPLR. Indeed, this undefined standard of "good cause" could serve to limit the court's broad discretion to the extent it believes it is compelled to find "good cause" as a condition to allowing a deposition to last more than seven (7) hours and unless the moving party sustains the burden of proving such "good cause." In this regard, it is questionable whether a rule of court can properly limit the broad discretion afforded to courts under established case law and the CPLR.

In view of the questionable authority for imposing such a rule that impairs the fundamental right to depositions promulgated by the CPLR, the Committee opposes such a rule. By way of analogy, the seven (7) hour presumptive limit of depositions in cases pending in Federal courts was instituted through a properly-implemented change to the Federal Rules of Civil Procedure (FRCP) -- the Federal court's counterpart to the New York CPLR.

Insofar as the stated goal of this proposed amendment is to make commercial litigation more cost efficient, it is possible that such a rule will lead to the opposite result -- further court intervention and disputes in connection with challenges to the legal authority of the rule itself.

B. There is No Demonstrable Need for the Proposed Rule Limiting the Length of Depositions

The proposed Rule limiting the length of depositions presumes that parties have somehow abused their right to depositions by needlessly extending them and thereby causing otherwise avoidable time, expense and court intervention. No evidence is presented to support such a presumption. On the contrary, it is unlikely that such

evidence exists. As noted above, there is a dearth of case law addressing claims of alleged discovery abuse by unduly and improperly prolonging depositions. Moreover, as discussed above, those courts that have addressed the issue have rejected arbitrary limitations on the length of depositions.

There is no evidence that in commercial litigation, and specifically in the Commercial Division, parties seek to abuse their right to depositions and unnecessarily prolong them. Actually, depositions in commercial litigation pending in the Commercial Division are likely to legitimately require more time than non-commercial cases. For example, it is common practice in personal injury cases for depositions to be completed within one day and, oftentimes, both parties are deposed on the same day and at the same location. In commercial litigation, on the other hand, it is rare for more than one deposition (especially of parties) to be completed within one day. As cases in the Commercial Division become more complex and sophisticated, and the monetary thresholds for the Commercial Division continue to increase, it is likely that cases of this nature will require depositions that are lengthier than non-commercial cases. Similarly, in commercial litigation, it is extremely likely that voluminous email and other documents and exhibits will need to be addressed during depositions, thereby requiring additional time for presenting the exhibits and questioning thereon at the deposition.

The Committee is not suggesting that all depositions in commercial cases should take more than seven (7) hours. Rather, the Committee opposes setting an arbitrary limit and forcing that limitation on parties against their will. While the presumptive limit of seven (7) hours for depositions in the federal courts, implemented by formal change to FRCP 30(d)(1), has been cited as a justification for a similar rule in the New York Commercial Division, we believe such reliance is misplaced. First, FRCP 30(d)(1) applies to all litigation in the federal courts, whether a commercial case or other subject matter. In those instances where depositions may need to be taken for more than seven (7) hours, the Federal courts have broad discretion and are in fact directed to allow for additional time. Indeed, FRCP 30(d)(1) expressly provides: "The court *must* allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." (Emphasis added.) While no statistics are available, it is likely that commercial-type cases in the federal courts have resulted in longer depositions more often than in other types of cases.

Indeed, the commentary to the proposed Commercial Division Rule 9 recognizes numerous circumstances for which depositions would justifiably require more than seven (7) hours. See "a" through "g" at page 5 of commentary ("a. the deponent require(s) an interpreter; b. the deponent insists upon providing evasive and/or non-responsive answers to questions; c. the lawyer representing the deponent engages in inappropriate or otherwise obstreperous conduct; d. the examination reveals that documents have been requested but not produced; e. the examination reveals the existence of critical, but as-yet-unrequested documents; f. additional time is necessary

in multi-party cases to permit adequate examination of the deponent by counsel whose interests may not entirely overlap 12; and g. the deponent's own lawyer wishes to cross-examine."). The text of the proposed Rule 9 does not, however even refer to these circumstances as examples of "good cause" for extending the duration beyond the seven (7) hour mandatory limit.

The ironic thing about proposed Rule 9 is that it would force parties in the most complex type of cases – those falling within the Commercial Division – to limit the time for depositions, while no such limitation is imposed in all other non-commercial cases. It does not appear to be advisable for the New York State Court system to impose a rule that actually prohibits parties *only in commercial litigation pending in the Commercial Division* from taking depositions of over seven (7) hours, while *all other cases* do not impose such a limitation. Indeed, as discussed above, it would appear that depositions are more likely to require extra time in commercial cases, rather than in non-commercial cases.

In summary, the Committee believes that in the absence of identifiable evidence justifying the abridgement of this fundamental discovery right, no such limitation should be imposed, especially without formal amendment of the CPLR.

In short, there is nothing to suggest that the system is not working just fine as it relates to the length of depositions. "If it ain't broke, don't fix it."

C. Full and Complete Depositions Actually Lead to Timely Settlements and More Efficient Trials

As stated above, there is no evidence that there is any particular need to impose arbitrary limitations on the length of depositions in order to save time or money or avoid disputes. There are few reported decisions on the topic, and there are no statistics offered with the proposed Rule 9 as to how often this issue arises in the Commercial Division in any event. On the other hand, allowing parties the freedom to exercise their discovery rights as dictated by the well-established parameters of New York practice is likely to enhance the early resolution of cases. Taking an effective and unfettered deposition during discovery is often instrumental in motivating settlement of the case prior to trial. An effective deposition can not only ferret out weak or meritless claims, but also uncover damning evidence supporting claims or defenses.

Moreover, in those rare cases that do not settle and a trial is necessary, having comprehensive depositions taken prior to trial will certainly make the actual trial more efficient. Deposition transcripts are not only offered at trial in whole or in part, but they also often enable questioners to focus examination of the witnesses at trial.

Thus, comprehensive depositions actually serve the goal of avoiding needless costs, time and court intervention. In short, in those instances where a deposition requires more than seven (7) hours, the additional time would be well worth it in the long

run and actually save time and money.

D. The Proposed Rule Limiting the Length of Depositions is Likely to Cause Further Areas of Dispute and Needless Court Intervention

As noted, by no means does the Committee maintain that all depositions in commercial litigation must be conducted for more than seven (7) hours. Indeed, it is quite possible that many depositions, including non-parties or witnesses that are not as material, can be completed within seven (7) hours. However, a rule that artificially limits the time to seven (7) hours in commercial cases could lead to undue posturing of counsel and/or attempts to delay answering questions so as to pressure the attorney taking the deposition to unduly limit or rush the examination. Disputes over the time limit are more likely to arise with an arbitrary limitation than without one.

In short, leaving the parties as they are now, with the flexibility of completing the depositions in commercial litigation within reasonable time is more likely to avoid disputes. Insofar as there is little or no evidence of widespread abusive deposition tactics unduly prolonging depositions, imposing a rule that limits depositions is not likely to save any time or resources in any event. In those rare instances where a party is indeed abusing the right of depositions by unduly prolonging any given deposition, a protective order is likely to be issued in the Commercial Division without extended time or expense, especially insofar as courts in the Commercial Division often handle such matters without formal motions. There is no evidence that any such issues cannot be handled in the same efficient manner that the Commercial Division traditionally handles any such disputes.

In conclusion, the Committee opposes proposed new Rule 9 that would arbitrarily and artificially limit the time for depositions to seven (7) hours in commercial cases.

III. PRESUMPTIVE LIMITS ON THE NUMBER OF DEPOSITIONS

Once again, there does not appear to be any real evidence or statistical support for imposing a presumptive limit on the number of depositions to be conducted in the Commercial Division. While there is such a limitation under FRCP 30(a)(2)(A)(i), there is no compelling reason why such a rule must be imposed in the Commercial Division.

Nevertheless, the Committee believes that imposing such a rule is not likely to impair the fundamental rights of parties in commercial litigation. Ten (10) depositions appear to be a fair number. Moreover, in those instances where the relevant number of witnesses exceeds ten (10), it is likely that the parties will be able either to agree or articulate reasons for needing to take particular depositions so as to obtain court permission. Of course, the court should have broad discretion to grant such an application, even in the absence of requiring proof of the undefined "good cause."

Thus, while the Committee finds no justification for imposing a new rule limiting

depositions to ten (10), it neither opposes nor supports such a rule.

IV. THE FEDERAL RULES WILL NOT BE IMPLEMENTING ANY FURTHER LIMITS ON THE LENGTH OR NUMBER OF DEPOSITIONS IN THE CURRENT PROPOSED AMENDMENTS

There is commentary in the explanation for these proposed Rule changes that proposed amendments to the FRCP will further limit the length and number of depositions. However, as reported by the Advisory Committee of the Federal Courts, public comments on these proposed changes were resoundingly negative. As a result of the substantial opposition to further limitations on depositions, the Advisory Committee withdrew those proposed amendments. Thus, the FRCP will not have any further limits on depositions in the upcoming amendments.

The report of the Advisory Committee can be found at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf.

The overwhelming public opposition to further limitations on depositions shows that depositions are indeed viewed as fundamental discovery tools and should not be arbitrarily or artificially limited.

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Pamela L. Gallagher
Co-Chair
Brian D. Graifman
Co-Chair
Supreme Court Committee

September 8, 2014

Proposed New Commercial Division Rules 8(b) and 11(c) Relating to Presumptive Limitations on the Number and Duration of Depositions

The Supreme Court Committee[1] reviewed the Office of Court Administration ("OCA") proposal recommended by the Commercial Division Advisory Council proposing new Commercial Division Rules 8(b) and 11(c) relating to presumptive limitations on the number and duration of depositions.

By majority vote, the members of the Supreme Court Committee voted against the adoption of the new Commercial Division Rules presumptively limiting depositions to seven hours in duration and ten in number unless the parties agree otherwise or demonstrate good cause to the court, following a presentation by members of the Commercial Division Advisory Council. The proposed new rule is comparable in sum and substance to the deposition limitations set forth in the Federal Rules of Civil Procedure.

A majority of members were opposed to any new limitations on discovery and deemed the seven hour limitation arbitrary. Members expressed concern that judges in the Commercial Division do not have resources, such as magistrate judges, to assist in the resolution of discovery disputes, and that the proposed rule might be used reflexively to limit the fact-finding process. Some within the majority agreed that the ten deposition limitation was not unreasonable, but that the proposal as a whole was too restrictive.

A minority of members supported the Commercial Division Advisory Council's proposed new limitations in duration and number of depositions based on their positive view of the federal deposition limitations and the opportunity for parties to agree on alternatives or to ask the court for a variance on good cause shown.

A separate minority proposed an alternative rule that would limit depositions to ten in number but allow the duration to exceed seven hours by "borrowing" a day from one of the ten total depositions available. Proponents of the alternative proposal suggested that, although many cases do not require more than ten depositions, it is often the case that a party will need more than

[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.

one day to complete the questioning of a key deponent. Those opposed to this alternative proposal suggested that it was as arbitrary as the Commercial Division Advisory Council's proposal, and the same end could be accomplished under the original proposal upon agreement by the parties.

Accordingly, the Committee does not support the adoption of the proposed new Commercial Division Rules 8(b) and 11(c).

[redacted]

From: Tom Mullaney <tmm@mullaw.org>
Sent: Friday, August 08, 2014 4:07 PM
To: rulecomments
Subject: There Should be no Limitation on Depositions

Dear Sir or Madam,

I have practiced in the State and Federal Courts of New York some time, and have experience with both the Federal Rule limitations and the current State Court rule. I have never felt that any adversary was abusing the unlimited deposition time and number in a state case, whereas I have found in several Federal cases that witnesses and lawyers are very attuned to the amount of available testimony time, and there are frequent tactics to "eat up the clock." I also think that having to keep track of actual testimony time and debating what should count as actual testimony time seems undignified in a profession where we strive to be courteous and dignified in, at our best, our pursuit the truth.

Tom

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