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UNIFIED COURT SYSTEM  
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A. GAIL PRUDENTI  
Chief Administrative Judge

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## 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.

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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](mailto: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

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**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

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## 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 21<sup>st</sup> 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 21<sup>st</sup> 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.<sup>1</sup>

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.<sup>2</sup> The cost and disadvantages of the discovery sought have likewise been considered among the factors in limiting discovery under CPLR 3103.<sup>3</sup> Therefore, proportionate discovery is not new. Both the bench and the bar have recognized the benefits of proportionate

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<sup>1</sup> 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.

<sup>2</sup> 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").

<sup>3</sup> 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."

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discovery principles in adopting guidelines for the management of electronic discovery, which explicitly set forth factors for the parties' consideration.<sup>4</sup> 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.

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<sup>4</sup> 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.

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### **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.