NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

# MEMORANDUM

October 18, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of Rule 26 of the Rules of the Commercial Division Addressing the Limitation of Total Hours of Trial

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of Rule 26 of the Rules of the Commercial Division (22 NYCRR §202.70[g], Rule 26 ["Estimated Length of Trial"]) to articulate the power of the court to require estimates of, and to limit, the total number of hours of trial of Commercial Division matters. Proffered by the Unified Court System's Commercial Division Advisory Council, the text of the proposed amendment is as follows (new matter in bolded underline):

> Rule 26. ~~Estimated~~ Length of Trial. At least ten days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. **If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours.**

As described by the Council in a memorandum supporting the proposal (Exh. A), this language is designed to make clear the power of the court to set trial time limitations – a practice which, it notes, is increasingly common in courts around the country. According to the Council, the setting of such limits has had the laudatory consequence of paring attorney arguments and examinations to essentials, increasing efficiency, and controlling the costs of trial (Exh. A, p. 6). Under the proposed amendment, use of this practice would remain at the discretion of the trial judge.

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Persons wishing to comment on the proposed amendment should e-mail their submissions to 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 December 20, 2016.**

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

**TO:** Commercial Division Advisory Council

**FROM:** Subcommittee on Procedural Rules to Promote Efficient Case Resolution ("Subcommittee")

**DATE:** September 15, 2016

**RE:** **Proposed Amendment to Rule 26 of the Commercial Division Rules Regarding Time Limitations for Trial**

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Rule 26 currently provides:

"Estimated Length of Trial. At least 10 days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial."

The proposed amendment would consist of adding the following text at the end of Rule 26 of the Commercial Division Rules:

"If requested by the court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours." As part of the amendment, the word "Estimated" would be deleted from the heading of Rule 26. The reference to trial hours permitted by the court refers to the total time allotted each side for

their trial presentation, not specific and separate time limitations designated for each aspect of the trial.

The new Rule 26 would thus read as follows:

"Length of Trial. At least 10 days prior to trial or such other time as the court may set, the parties, after considering the expected testimony of and, if necessary, consulting with their witnesses, shall furnish the court with a realistic estimate of the length of the trial. If requested by the Court, the estimate shall also contain a request by each party for the total number of hours which each party believes will be necessary for its direct examination, cross examination, redirect examination, and argument during the trial. The court may rule on the total number of trial hours which the court will permit for each party. The court in its discretion may extend the total number of trial hours."

Under this new Rule, Judges would be free to use or not to use the new procedure. If the court does not request the parties to specify the number of hours each party needs to present its case, there will be no change to the current practice. This new rule would not require judges to use time limits if they don't want to. CPLR 4011 (Sequence of Trial) provides authority for the Court to set trial time limitations. *See In the Matter of Seymour*, 267 A.D.2d 1053 (4th Dep't 1999) ("[T]he length of closing arguments is a matter resting within the sole discretion of the trial court (*see generally*, ... CPLR 4011), and the court did not abuse its discretion in limiting the summation of each party to five minutes.").

Imposing time limits can, in the appropriate circumstances, have beneficial impacts on litigation. Not only does it allow the court to better plan its own docket, but it also requires counsel to focus on their theories of the case in advance, and consider how to best structure the case within the established limitations. Such an approach can help minimize repetition, thereby mitigating the costs associated with an unduly lengthy trial. It also may enable jurors to better focus on the streamlined presentation, and facilitate the

selection of a jury with a better understanding of the established length of the trial. Of course, in establishing limitations, a court must be mindful of allowing litigants a full and fair opportunity to establish their cases and defenses, and must maintain the flexibility to adapt to the circumstances ultimately presented.

An increasing number of courts are requiring time limits for trial. In the Southern District of New York, for example, "'there is a long line of cases making clear the authority of district judges to impose reasonable time limitations on trials.'" *Lessoff v. Metro-North Commuter R.R.*, No. 11 Civ. 09649 (LGS), 2014 WL 1395022, at *8 (S.D.N.Y. Apr. 10, 2014) (citation omitted); *accord Lidle v. Cirrus Design Corp.*, 278 F.R.D. 325, 331 (S.D.N.Y.2011), *aff'd*, 505 F. App'x 72 (2d Cir. 2012); *Friedline v. N.Y.C. Dep't of Educ.*, No. 06 Civ. 1836(JSR), 2009 WL 37828, at *2 (S.D.N.Y. Jan. 5, 2009), *aff'd sub nom. Cruz v. N.Y.C. Dep't of Educ.*, 376 F. App'x 82 (2d Cir. 2010); *Latino Officers Ass'n, Inc. v. City of New York*, No. 99 Civ. 9568, 2003 WL 22300158, at *2 (S.D.N.Y. Oct. 8, 2003).

Decisions from other Circuits have likewise recognized the right of courts to impose time limitations. *See, e.g., Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1408 (11th Cir. 2011) (finding that the district court's time limitation on trial was not an abuse of discretion where the court was not inflexible and granted additional time when one party exceeded its allotted time); *Thanedar v. Time Warner, Inc.*, 352 F. App'x 891, 896 (5th Cir. 2009) (finding that the district court's time limitation on trial was not plainly erroneous where the court considered each party's estimate of time needed and offered suggestions on how to preserve time); *Life Plus Int'l v. Brown*, 317 F.3d 799, 807 (8th Cir. 2003) ("Trial courts are permitted to impose reasonable time limits on the

presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence."); *Sparshott v. Feld Entm't, Inc.*, 311 F.3d 425, 433 (D.C. Cir. 2002) ("The district court's decisions on how to structure time limits are reviewable only for abuse of discretion."); *Navellier v. Sletten*, 262 F.3d 923, 941 (9th Cir. 2001) (noting that the Ninth Circuit allows time limits to "'prevent undue delay, waste of time, or needless presentation of cumulative evidence'" (quoting *Amarel v. Connell*, 102 F.3d 1494, 1513 (9th Cir. 1996))); *Amarel v. Connell*, 102 F.3d 1494, 1514-15 (9th Cir. 1996) ("The case law makes clear that where a district court has set reasonable time limits and has shown flexibility in applying them, that court does not abuse its discretion. Moreover, to overturn a jury verdict based on a party's failure to use its limited time for witness cross-examination would be to invite parties to exhaust their time limits without completing cross-examination, then appeal on due process grounds."); *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 520 (5th Cir. 1994) ("In the management of its docket, the court has an inherent right to place reasonable limitations on the time allotted to any given trial."); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 442 (1st Cir. 1991) ("District courts may impose reasonable time limits on the presentation of evidence."); *Flaminio v. Honda Motor Co., Ltd.*, 733 F.2d 463, 473 (7th Cir. 1984) (noting that "in this era of crowded district court dockets federal district judges not only may but must exercise strict control over the length of trials, and are therefore entirely within their rights in setting reasonable deadlines in advance and holding the parties to them").[1]

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[1] *See also Tersigni v. Wyeth-Ayerst Pharm., Inc.*, No. 11-0466-RGS, 2014 WL 793983, at *1-2 (D. Mass. Feb. 28, 2014) (rejecting party's objection to imposition of time limit and imposing 18 hour limit on each party's presentation of case); *Lentz v. Cincinnati Ins. Co.*, No. 1:01CV599, 2006 WL 2860974, at *1 (S.D. Ohio 2006) (finding that 12 hours allotted to both the plaintiff and the defendant

"Moreover, in order to prevail on a claim that a time limit was too short, a party must have come forward with an offer of proof showing how its presentation would be curtailed by it and must demonstrate prejudice." *Evans v. Port Auth. of N.Y. & N.J.*, 246 F. Supp. 2d 343, 351 (S.D.N.Y. 2003) (collecting cases); *see also Cruz v. N.Y.C. Dep't of Educ.*, 376 F. App'x 82, 84 (2d Cir. 2010) (trial court acted within its discretion in limiting certain witnesses' testimony to two hours, after plaintiff's counsel had repeatedly underestimated length of witness testimony and engaged in prolonged examination; record did not reflect that time limit had "hampered [plaintiff's] ability to present her case" or "affected her substantial rights"); *Cedar Hill Hardware & Const. Supply, Inc. v. Ins. Corp. of Hannover*, 563 F.3d 329, 353 (8th Cir. 2009) (concluding that trial court had not abused its discretion in setting time limits because "the district court imposed time limits late in the trial after gaining a clear picture of the attorneys' methods and habits in their use of time"); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008) ("But even if the strict time limits amounted to an abuse of discretion, the district court's error is presumed harmless until shown to be prejudicial."); *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008) (affirming district court's limit of trial to six days, holding that the plaintiffs did not show that there was "harm incurred as a result" of the time limit (citation omitted)); *Akouri v. State of Florida Dept. of Transp.*, 408 F.3d 1338, 1346 (11th Cir. 2005) (upholding time restrictions because plaintiff "failed to adduce any evidence that the court acted inflexibly or unreasonably with respect to [the] time restrictions"); *Life Plus Int'l*, 317 F.3d at 807 (noting that a party seeking to challenge a

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was reasonable in "a relatively simple employment case"); *Lareau v. Page*, 840 F. Supp. 920, 933 (D. Mass. 1993), *aff'd*, 39 F.3d 384 (1st Cir. 1994) (noting that time limits "are an extraordinarily valuable focusing mechanism which promote cleaner trials directed to the matters genuinely in dispute").

time limit "must lodge a timely objection to the time limits and must make a proffer of evidence that was excluded for lack of sufficient time"); *Evans*, 246 F. Supp. 2d at 351 ("[I]n order to prevail on a claim that a time limit was too short, a party must have come forward with an offer of proof showing how its presentation would be curtailed by it and must demonstrate prejudice.").

State courts also have recognized the right of courts to require trial time limitations. *See California Crane Sch., Inc. v. Nat'l Comm'n for Certification of Crane Operators*, 171 Cal. Rptr. 3d 752, 757-58 (Ct. App. 2014); *In re Z.C.J. Jr.*, No. 04-12-00010-CV, 2012 WL 3597209, at *3 (Tex. App. Aug. 22, 2012); *In re Kister*, 955 N.E.2d 1029, 1050 (Ohio Ct. App. 2011).

A number of commentators have set forth the benefits of time limitations for trial:

Imposing trial limitations avoids protracted trials which delay justice for other litigants who must wait for the lengthy trial to end. Time limitations allow a larger number of trials to occur more frequently. *See, generally* Andrew S. Kaufman, *Justice Delayed: An Argument for Time Limits at Trial*, N.Y.L.J., April 14, 2015; Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 Rev. Litig. 431 (2013).

Time limits arguably assist lawyers in at least three ways: "improving presentations, controlling costs, and increasing the likelihood of victory." It has been noted time limitations have been imposed "on some of the largest trials ever." Lawyers are forced to pare down their openings and closings to their essentials, time spent on witness examinations will be reduced, and time limits discourage objections. *See* David

Bissinger & Erica Harris, *Working on the Clock; The Advantage of Timed Trials*, Tex. Law, April 2, 2012.

Judges will have discretion under proposed Rule 26 whether to require any time limitations. As noted above, the court may, but is not required, to set the number of hours permitted by each party at trial. In their discretion, under new Rule 26, Judges may also extend the time allowed to each side. Lawyers will be forced to be more efficient and plan their case with greater specificity. They will focus on the most important facts and arguments to present to the jury.

This rule allows the court the express option to fix the time periods for trial presentation after reviewing the parties' submissions if it determines the case is best tried with set time limits.

The benefits to requiring submission by each side of their estimated trial time outweigh the negatives as shown by experience. If proper thought is given to the time requested and to the limits ordered by the court, the end result will be better for the jury, the litigants, the attorneys, and the courts.

## RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and its incorporation into the Statewide Rules of the Commercial Division.