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A. GAIL PRUDENTI
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MEMORANDUM

To: To All Interested Persons

From: John W. McConnell

Re: 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.

Date: June 20, 2014

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The Commercial Division Advisory Council has recommended adoption of a new Rule of the Commercial Division that would establish a presumptive limit of 10 depositions for each side and limit the duration of depositions to seven hours per witness (Exh. A). The Advisory Council's proposal follows up on the 2012 Report of the Chief Judge's Task Force on Commercial Litigation in the 21st Century, which endorsed the limitations on depositions set forth in the Federal Rules of Civil Procedure. The Advisory Council's proposed limit of 10 depositions per side is consistent with Fed. Rule Civ. P. 30(a)(2)(A)(i) and procedural rules of other states. The seven hour durational limit is consistent with Fed. Rule Civ. P. 30(d)(1) and would allow for reasonable breaks for lunch and other reasons. To ensure that litigants and judges have flexibility to tailor the presumptive limitations to the circumstances of each case, the parties would be able to extend or alter the presumptive limits by agreement. Absent such an agreement, the party seeking a variance would be required to obtain an appropriate court order upon a showing of good cause. The Advisory Council believes that this proposal will improve the efficiency of discovery and reduce the overall cost of litigation.

Persons wishing to comment on this proposal 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 August 19, 2014.**

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
DATE: March 26, 2014
RE: **Depositions in the Commercial Division of the Supreme Court of New York**

EXECUTIVE SUMMARY

As is true in the other parts of New York State Supreme Court, the Commercial Division imposes no presumptive limitations on a civil litigant's right to take depositions. This seemingly unfettered entitlement is bounded only by the court's power, either *sua sponte* or on motion, to issue a protective 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 the courts." *See* CPLR 3103. The decision as to whether or not to grant a protective order is one made by the presiding justice on a case-by-case basis.

Exploring ways to improve the process of litigating commercial cases in the New York state court system, Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century (the "Task Force") examined current practices in the Commercial Division to consider whether any warranted modification. Among the issues considered were the number and duration of depositions available to commercial litigants. When the Task Force released its report and recommendations in June 2012 ("Report"), it urged several procedural reforms, including the imposition of presumptive limitations on the number and length of depositions. According to the Report:

The Chief Judge's Task Force on Commercial Litigation in the 21st Century, Report and Recommendations to the Chief Judge of the State of New York (2012).

The Task Force endorses as a model the limitations imposed by the Federal Rules of Civil Procedure. For example, under the Federal Rules, there is a presumptive limit of ten depositions per side with each deposition limited to one seven-hour session. Unless the parties stipulate, leave of court is required to increase the number and duration of depositions. While the Federal Rules on depositions can be restrictive, especially in multi-party cases, the Task Force believes that limitations are fundamentally fair to all parties, prevent gamesmanship, and will assist in streamlining discovery in most commercial cases. In addition, a well-tailored preliminary conference order can address whether additional and/or lengthier depositions are warranted.²

The Report does not make specific recommendations regarding the precise limitations contemplated. That task was delegated to the Commercial Division Advisory Council (the “Council”), a permanent body of practitioners and jurists charged with advising the Chief Judge on, among other things, the implementation of the Task Force’s recommendations.

Having considered the issue, the Council’s Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the “Subcommittee”) recommends that:

- (1) the Council forward to the Administrative Board of Judges the proposed rule set forth in **Exhibit A** (the Proposed Rule”); and
- (2) the Proposed Rule be incorporated into the Statewide Rules of Practice for the Commercial Division (the “Commercial Division Rules”).

The Proposed Rule would provide a presumptive limit on depositions to 10 per side, and a further presumptive limit on the duration of the examinations – *i.e.* seven hours per witness.

DISCUSSION AND ANALYSIS

Presumptive limitations on length and number of depositions are hardly without precedent. In 1993, the United States Supreme Court adopted amendments to Federal Rules of Civil Procedure, limiting the presumptive number of depositions to 10 per side. In 2000, the Court adopted a further presumptive limitation: that depositions not exceed one day and seven

² *Id.* at 23-24.

hours in length.³ The Advisory Committee Notes that accompanied these amendments explained that they were enacted to encourage counsel “to develop a mutual cost-effective plan for discovery in the case,”⁴ and curb the “undue costs and delays” resulting from “overlong depositions.”⁵

And the federal court system is not the only one in which the governing rules of practice impose restrictions on the use of depositions as a discovery device. Currently, there are 22 states imposing such restrictions, although limitations differ from state to state; some limit the number of aggregate deposition hours, others limit the duration of individual depositions, and still others limit both the number and duration of examinations. For ease of reference, we have summarized these variations on the chart annexed to this memorandum as **Exhibit B**.⁶

RECOMMENDATION

a. Numerical Limitation

The Subcommittee recommends that the number of depositions permitted in the Commercial Division should be presumptively limited to 10 per side. This limit finds precedent not only in the Federal Rules, but also in the procedural rules adopted by a number of states.⁷ Our research has uncovered no jurisdiction that has seen fit to impose a presumptive numerical limit on depositions in excess of 10.⁸

³ Fed. Rule Civ. P. 30(a)(2)(A)(i) (numerical limit of 10 depositions); Fed. Rule Civ. P. 30(d)(1) (durational limit of one seven hours day).

⁴ Notes of Advisory Committee on 1993 Amendments.

⁵ Committee Notes regarding 2000 Amendments.

See Koppel G., *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 Vand. L. Rev. 1167, 1219-1220 and Appendix (2005); The Foundation of the International Association of Defense Counsel, *State Best Practices Survey* (2011).

⁷ These states are D.C., Hawaii, Montana, Utah, and Wyoming (see Exhibit B).

⁸ For the purposes of this report, and apart from Delaware, we have considered only the basic state statutes and rules of civil procedure collected in the Thomson Reuters 50 State Statutory Survey for Depositions and Interrogatories (2013) *available at* 0020 SURVEYS 3 (Westlaw). It should be noted that the Foundation of the International Association of Defense Counsel did conduct a fairly extensive 300-page survey in 2011 on discovery practices throughout the country. That survey identified one court – the North Carolina Business Court – that presumptively limits depositions to 12 for each party (not including depositions by testifying experts). *See* The Foundation of the International Association of Defense Counsel, *State Best Practices Survey* 206 (2011); N.C. Business Court Rule 18.2. Regarding Delaware, we reviewed the division-specific protocols governing practice in the Complex Commercial Litigation Division of its Superior Court. None of these protocols imposes presumptive limitations on

In connection with our recommendation, we note the likelihood that within the next year, the Federal Rules of Civil Procedure will be amended to reduce the number of presumptive depositions per side from 10 to five.⁹ Our considered view is that the presumptive five deposition per side limit is insufficient for cases litigated in the Commercial Division, whose *raison d'être* is the adjudication of the most complex commercial cases pending in the New York State court system. By contrast, the presumptive five deposition per side limit may be appropriate for cases in the federal courts, which vary in size and complexity from straightforward personal injury actions just over the monetary threshold for diversity jurisdiction to lawsuits alleging violations of the antitrust laws and seeking damages in the billions. In any event, the numerical reduction contemplated by the proposed amendments to the Federal Rules has met with some resistance on grounds, *inter alia*, that the empirical research underpinning the proposed change does not support the reduction.¹⁰

b. Durational Limitation

We are of the view that a presumptive durational limitation of 7 hours for depositions is appropriate. The Proposed Rule is based upon the current presumptive limit in federal court, and it would follow the federal court practices of both permitting reasonable breaks for lunch and other reasons and charging against the presumptive limitation only the time actually spent on-the-record.

depositions, although the division's sample case management order contains a decretal paragraph contemplating some limitation on deposition quantity (*i.e.* a numerical limit to be set by the parties and the court at the initial Scheduling Conference) and duration (*i.e.* a seven hour per examination). *See* Revised Case Management Order, available online at http://courts.delaware.gov/Superior/pdf/CCLD_sample_case_mgt_order_rev_2011.pdf

⁹ Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, available online at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>

¹⁰ *See* New York State Bar Association Commercial and Federal Litigation Section, Report on Proposed Amendments to Federal Rules of Civil Procedure 1, 4, 16, 26, 30, 31, 33, 34, 36, 37, 84 and Appendix of Forms 31 (2013).

c. Built-In Flexibility

Because the complex litigations that fill the Commercial Division dockets are not “cookie cutter”, and because active case management is among the hallmarks of the Commercial Division, judges and litigants must retain the flexibility to tailor the presumptive limitations contemplated by the Proposed Rule to the circumstance of each case. Accordingly, and similar to the Federal Rules¹¹, the Proposed Rule provides that the presumptive limitations as to both number and duration may be extended, or otherwise altered, by agreement and, absent agreement, the party seeking the variance must obtain an appropriate court order upon a showing of good cause. In addition to assessing the overall complexity of the litigation, courts may also consider other factors, including whether:

- 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 overlap¹²; and
- g. the deponent’s own lawyer wishes to cross-examine.

¹¹ See Fed. R. Civ. P. 26(b)(2)(A).

¹² Of course, the very fact that litigation involves multiple parties does not automatically justify modifications in the presumptive limitations in the Proposed Rule. Counsel in such cases are well-advised to maximize efficiency by allocating the various topics to be covered among themselves or selecting one attorney to act as lead examiner, with remaining counsel being left sufficient time to fill in any perceived interstices.

It is reasonable to expect that the attorneys and the witness will make efforts to reach reasonable accommodations with one another in order to limit the need for judicial intervention.¹³

CONCLUSION

The Subcommittee believes that the Proposed Rule will further a number of laudatory goals, including the encouragement of cooperation among counsel, discouraging unnecessary and potentially wasteful discovery, and reducing the overall cost of litigation. Accordingly, the Subcommittee submits that the Commercial Division Advisory Council recommend adoption of the Proposed Rule by the Administrative Board of Judges and urge its integration into the Commercial Division Rules as soon as is practicable.

JDL

¹³ See 22 N.Y.C.R.R. §202.7(a)(2).

EXHIBIT A

PROPOSED AMENDMENT

AMENDMENT #1

The Commercial Division Rules shall be amended to add the following immediately following Rule 8(b)(xi):

“(xii) the need to vary the presumptive number of depositions set forth in Rule 9 (a)(i) or (xiii) the need to vary the presumptive durations of depositions set forth in Rule 9(a)(ii) or 9(a)(iii).”

AMENDMENT #2

The Commercial Division Rules shall be amended to add the following:

“Rule 9 Limitations on Depositions.

(a) Unless otherwise stipulated to by the parties or ordered by the court:

- i. the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall be limited to 10; and
- ii. depositions shall be limited to 7 hours per deponent.

(b) Notwithstanding Rule 9(a)(i), the propriety of and timing for depositions of non-parties shall be subject to any restrictions imposed by applicable law.

(c) For the purposes of Rule 9(a)(i), the deposition of an entity pursuant to CPLR 3106(d) shall be treated as a single deposition even though more than one person may be designated to testify on the entity’s behalf.

(d) For the purposes of this Rule, each deposition of an officer, director, principal or employee of an entity who is also a fact witness, as opposed to an entity representative pursuant to CPLR 3106(d), shall constitute a separate deposition.

(e) For good cause shown, the court may alter the limits on the number of depositions or the duration of an examination.

(f) Nothing in this rule shall be construed to alter the right of any party to seek any relief that it deems appropriate under the CPLR or other applicable law.

AMENDMENT #3

The Commercial Division Rules shall be amended to add the following sentence at the end of Rule 11(c):

“Additionally, the Court should consider the appropriateness of altering prospectively the presumptive limitations depositions set forth in Rule 9.”

EXHIBIT B

SURVEY OF DEPOSITION LIMITATIONS

Jurisdiction	Limitation	Statute
Federal	Ten depositions per side.	Fed. R. Civ. P. 30(a)
	Depositions limited to one day of seven hours.	Fed. R. Civ. P. 30(d)(2)
Alaska	Three depositions per side. (Figure does not include the depositions of parties, experts, physicians or document custodians)	Alaska R. Civ. P. 30(a)(2)(A)
	Six hours for parties, experts, physicians. Three hours for other deponents.	Alaska R. Civ. P. 30(d)(2)
Arizona	Presumptive prohibition on non-party depositions. (Does not include the depositions of experts and document custodians)	Ariz. R. Civ. P. 30(a)
	Depositions limited to four hours.	Ariz. R. Civ. P. 30(d)
California	Depositions limited to 7 hours. (Does not apply, <i>inter alia</i> , to expert witnesses or cases designated as "complex" under Rule 3.400 California Rules of Court. Complex cases are those requiring "exceptional judicial management". Cases provisionally designated as complex include antitrust and securities claims, toxic and mass tort claims and class actions)	Cal. Civ. Proc. Code §2025.290

Jurisdiction	Limitation	Statute
	Persons may be deposed only once.	Cal. Civ. Proc. Code §2025.610(a)
	“Small Claims” (suits under \$5,000); no discovery.	Cal. Civ. Proc. Code §116.310(b)
	“Limited Civil Case” (suits under \$25,000): one oral deposition.	Cal. Civ. Proc. Code §94(b)
Colorado	One deposition of each adverse party and of two other persons. (Does not include expert witnesses)	Colo. R. Civ. Proc. 26(b)(2)(A)
	Depositions limited to one day of 7 hours.	Colo. R. Civ. Proc. 26(d)(2)
Connecticut	Discovery in “Expedited Process Cases” (i.e. under \$75,000) limited to depositions of parties only.	Conn. R. Super. Ct. Civ. §23-6
D.C.	Limited to ten depositions	D.C. Super. Ct. R. Civ. P. 30(a)(2)(A)
	Depositions limited to one day of seven hours.	D.C. Super. Ct. R. Civ. P. 30(d)(2)
Hawaii	Limited to ten depositions	Haw. Rul. Civ. P. 30(a)(2)(A)
	Depositions limited to one day of seven hours	Haw. Rul. Civ. P. 30(d)(2)
Illinois	In cases under \$50,000, depositions limited to parties, treating physicians and expert witnesses.	Ill. Sup. Ct. R. 222(f)(2)(a)-(b)

Jurisdiction	Limitation	Statute
	Depositions in all cases limited to three hours.	Ill. Sup. Ct. R. 206(d) and 222(f)(2)
Iowa	In small claims (i.e. \$5,000 or less); presumptive prohibition on depositions	Iowa R. Civ. P. 1.702
Kentucky	In "Economical Litigation Docket" cases (i.e. cases, regardless of the amount in controversy, regarding contracts, personal injury, property damages, property rights and termination of parental rights), depositions presumptively limited to parties.	KY. R. Civ. P. 89 and 93.01
Maine	Limit of five depositions per party.	ME. R. Civ. P. 30(a)
	Deposition limited to 8 hours.	ME. R. Civ. P. 30(d)(2)
Maryland	Deposition limited to one day of seven hours.	MD. Circ. Ct. R. 2-411
Massachusetts	Presumptive prohibition on depositions if, <i>inter alia</i> , there is no reasonable likelihood that recovery will exceed \$5,000 if plaintiff prevails.	Mass. R. Civ. P. 30(a)(ii)
Minnesota	Deposition limited to one day of seven hours.	Minn. R. Civ. P. 30.04(b)
Montana	Ten depositions per side.	Mont. R. Civ. P. 30(a)(2)(A)(i)
	Depositions limited to one day of seven hours.	Mont. R. Civ. P. 30(d)(1)
New Hampshire	Volume limit of 20 hours <i>in total</i> per party	NH R Super. Ct. 26(a)
New Mexico	Depositions limited to one day of seven hours. (Does not apply to experts)	NM R Dist. Ct. 1-030(D)(2)
Oklahoma	Deposition limited to six hours.	Okla. Stat. Ann. Tit. 12, §3230(a)(3)
South Dakota	Depositions limited to one day of	SD ST §15-6-30(d)(2)

Jurisdiction	Limitation	Statute
	seven hours.	
Texas	Depositions limited to six hours in all cases.	Tex. R. Civ. P. 199.5(c)
	<p>“Discovery Control Plans”</p> <p>(every case must be governed by one of three plans, under which the discovery volume limits vary)</p> <p>Level 1 – suits involving \$100,000 or less: volume limit of 6 hours <i>in total</i> per party, which can be expanded up to 10 hours without leave of court.</p> <p>Level 2 – suits not governed by Level 1 or Level 3; volume limit of 50 hours <i>in total</i> per side.</p> <p>Level 3 – requires court (on party’s motion or on its own) to tailor a discovery order to the circumstances of the case; not volume limits.</p>	Tex. R. Civ. P. 190.1-190.4.
Utah	<p>Tier 1 (\$50,000 or less); parties limited to 3 hours of depositions.</p> <p>Tier 2 (\$50,000 - \$300,000); parties limited to 15 hours of depositions</p> <p>Tier 3 (\$300,000 or more); parties limited to 30 hours of depositions.</p>	Utah R. Civ. P. 26(c)(5)
	Depositions limited to four hours for non-parties, and seven hours for parties.	Utah R. Civ. P. 30(d)
Wyoming	Limit of ten depositions per side.	Wyo. R. Civ. P. 30(a)(2)(A)
	Depositions limited to one day of seven hours.	Wyo. R. Civ. P. 30(d)(2)