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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
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MEMORANDUM

September 29, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed new Rule of the Commercial Division relating to responses and objections to document requests.

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The Commercial Division Advisory Council has recommended adoption of a new Rule of the Commercial Division intended to promote clearer, more useful responses to document requests propounded under CPLR 3120 (Exh. A). The proposed rule would require a party responding to a document request to "state with specificity the grounds for any objection to production." It also would require an affirmative statement concerning whether responsive material is in fact being withheld, and, if so, in what way the responding party has limited its production. This is intended to address the confusion that frequently arises when a producing party makes objections and still produces information.

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 November 25, 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: May 22, 2014

RE: **Document Requests in the Commercial Division of the Supreme Court of New York**

EXECUTIVE SUMMARY

In June 2012, Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century (the "Task Force") released its report and recommendations ("Report"), which discussed current practices in the Commercial Division and considered whether any such practices warranted modification.

The Report requested, *inter alia*, that the Commercial Division Advisory Council (the "Council") consider a modification of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules") to restrict the number and scope of document demands. Report at 23. In contrast to the Report's endorsement of the Federal model with respect to presumptive limitations on depositions, the Report did not endorse any particular course of action with respect to restricting demands for documents. *Id.*

Having considered the issue, the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") recommends that no presumptive limitations be imposed with respect to document demands. However, the Subcommittee does recommend the promulgation of a new Commercial Division Rule to promote clearer and more useful responses to document requests propounded under CPLR 3120. With regard to the latter, 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 Commercial Division Rules.

The Proposed Rule would require that objections be stated with specificity, which would include a statement regarding: (a) whether otherwise responsive documents are being withheld on the basis of a specific objection, and if so, setting forth the limiting parameters of the production; and (b) whether, in fact, documents responsive to the request at issue exist. The impetus behind the Proposed Rule is the same as that behind the proposed amendment to Rule 34 of the Federal Rules of Civil Procedure:

> "[it] responds to the common lament that [] responses often begin with a 'laundry list' of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld. Providing [the information in the Proposed Rule] can aid the decision whether to contest the objections."

2013 Federal Rules Advisory Committee Memorandum at 269. [1]

DISCUSSION AND ANALYSIS

Presumptive Limitations on Document Demands

Currently, neither New York State Supreme Court generally nor the Commercial Division specifically imposes presumptive limitations on the number of requests a litigant may issue. The right to propound document requests is bounded only by the court's power to issue a protective order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or

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[1] The proposed amendments to the Federal Rules of Civil Procedure, and related commentary, are set forth in the Memorandum of the Advisory Committee on Civil Rules ("**Federal Rules Advisory Committee**"), dated May 8, 2013, as supplemented June 2013 ("**2013 Federal Rules Advisory Committee Memorandum**"). The 2013 Federal Rules Advisory Committee Memorandum forms part of the 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. All page citations in this memorandum to the 2013 Federal Rules Advisory Committee Memorandum are based upon this online version.

other prejudice to any person or the courts." CPLR 3103(a). The courts of the Commercial Division also have broad discretion to craft the preliminary conference order to limit document requests "as may be necessary to the circumstances of the case." Commercial Division Rules §202.70(g)(11)(c). The Subcommittee considers these safeguards sufficient, and thus opposes the imposition of any presumptive limitations.

The major factor militating against presumptive numerical limits on document demands is the impermissibility under the case law of propounding "blunderbuss" document requests. By way of background, the Legislature amended CPLR 3120 in 1993 in order to eliminate the requirement that the documents requested be identified with specificity. Prior to the change, parties were often required to engage in the infamous (and inefficient) "*Rios* two-step[2]," which necessitated a round of depositions for the sole purpose of enabling parties to draft document demands with the requisite level of specificity. The amendment largely eliminated this problem by permitting parties to seek documents "by category."

Although the 1993 amendment moved New York state practice closer to practice under Rule 34 of the Federal Rules of Civil Procedure, requests under the CPLR remained more restrictive. As noted by one commentator:

> A party may demand documents under CPLR 3120 [as amended] either "by individual item or by category," so long as the item or category, as opposed to the document, is described with reasonable particularity.
>
> Under Fed. R. Civ. P. 34, on which [the current] CPLR 3120 is patterned, courts have held that when determining the propriety of a notice to produce, "[t]he question is whether a reasonable man would know what documents ... are called for." Under the Federal Rules, a general designation is permissible when it reflects the extent of the discovering party's knowledge of the documents at

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[2] The "*Rios* two-step" pays homage to the First Department case of *Rios v. Donavan*, 21 AD2d 209 (1st Dep't 1964), which is often viewed as the origin of the deposition-before-document demand procedure.

> the time the request is served, and the recipient understands what documents are being requested.
>
> CPLR 3120 shifts to the producing person the burden of determining the existence of particular relevant documents. . . . Consequently, document demands not sufficiently tailored to the matters pleaded in the action are regularly deemed improper.

3 N.Y.Prac., *Com. Litig. in New York State Courts* § 25:34 [3d ed.] (citations omitted); *accord Konrad v 136 E. 64th St. Corp.*, 209 AD2d 228 [1st Dept 1994] ("While the recent amendment to CPLR 3120 eliminating the requirement that documents be designated 'specifically' is applicable to our review of this matter, a vast categorical demand for documents may constitute a new kind of abuse of the discovery device") (internal quotations omitted); *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 27 Misc 3d 1061, 1069 [Sup Ct 2010] (Bransten, J.) (citing *Konrad, supra*, and rejecting document demand as an impermissibly "vast categorical demand for documents") (internal quotations omitted).

Against this backdrop, the Subcommittee believes that presumptive numerical limitations on document requests would be ill advised, particularly given the realities of modern-day complex commercial litigation, which often involves staged discovery and large data sets. Parties looking to ensure that their document demands were sufficiently inclusive would, so as not to deplete prematurely the permitted number of requests, take to propounding demands that conflict with the judicial proscription against overbroad blunderbuss requests. These requests would lead, in turn, to an increase in applications for judicial intervention, the results of which would be either time-consuming judicial re-crafting of the offending requests, or the wholesale judicial rejection of the entire set of document demands. *See Wander v St. John's Univ.*, 38 Misc 3d 1231(A) [Sup Ct 2011] (denying motion to compel and noting, "it is not the court's role to attempt to prune the proper from the objectionable"); *MBIA Ins. Corp.*, 27 Misc 3d at 1069; *see also* 221 Siegel's Prac. Rev. 3 ("Even under the new permission to demand by category,

however, it soon became clear that a demand would still be vacated in its entirety if found unduly burdensome") (internal quotations omitted). Either way, the hoped-for efficiencies of presumptive numerical limitations on document requests would be illusory and place increased strain on judicial resources.

Notably, the Federal Rules Advisory Committee considered at length – and ultimately rejected – a presumptive limit for the number of specific requests permitted under Rule 34, the federal analogue to CPLR 3120. *See* 2013 Federal Rules Advisory Committee Memorandum at 267. Although omitted from the final commentary, a review of earlier reports reveal some of the concerns.[3] One pertained to problems inherent in counting the number of requests. To illustrate the problem, the report posed the following hypothetical:

> "If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count?"

2012 Federal Rules Advisory Committee Memorandum at 230. The Subcommittee considers the above to be an instructive example of the likely difficulties that the courts and the parties would face in addressing numerical limitations.

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[3] *See* Memorandum of the Federal Rules Advisory Committee, dated December 5, 2012 ("**2012 Federal Rules Advisory Committee Memorandum**"). The 2012 Federal Rules Advisory Committee Memorandum forms part of the Agenda Book for the Committee on Rules of Practice and Procedure, Cambridge, MA, January 3-4, 2013, available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf. All page citations in this memorandum to the 2012 Federal Rules Advisory Committee Memorandum are based upon this online version. *See also* Duke Subcommittee Meeting Notes: February 1, 2013 ("**Duke Subcommittee Notes**"). The Duke Subcommittee Notes form part of the Agenda Book for the Advisory Committee on Civil Rules, Norman, OK, April 11-12, 2013, available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2013-04.pdf. All page citations in this memorandum to the Duke Subcommittee Notes are based upon this online version.

Another factor militating against presumptive numerical limitations for document requests is the rise of e-discovery. According to some experts, as parties make increased use of predictive coding and technology assisted review, traditional requests for documents "may be reduced to a preliminary role to identify the subjects of inquiry." Duke Subcommittee Notes at 107. As such, "[w]hy limit what's on the way out?" *Id.* Again, this Subcommittee considers this a realistic and warranted concern.

Clearer responses to CPLR 3120 Requests to Produce

As aptly recognized by the Federal Rules Advisory Committee, "[d]iscovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests." 2013 Federal Rules Advisory Committee Memorandum at 269. More particularly, responses to document requests are often unenlightening at best and evasive at worst, "leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of [an] objection." *Id* at 309. The Proposed Rule is designed to address this issue. It requires a party to state its objections with specificity.[4] It also requires that a party affirmatively state whether responsive material is being withheld from production, and if so, in what way the responding party has limited its production. The Subcommittee believes that this amendment should help to "end the confusion that frequently arises when a producing party states several objections and still produces information." *Id.*

The Proposed Rule also provides the option for a party to respond to an item or category in such a way as to indicate that it has not yet determined whether responsive documents are

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[4] Admittedly, the CPLR already requires specificity with respect to objections. *See* CPLR 3122(a) (requiring a party to "serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified"). In the Subcommittee's view, however, this statutory requirement is often honored in the breach. Incorporating CPLR 3122(a)'s specificity requirement into the Commercial Division Rules will revitalize the requirement and make clear that the Justices of the Commercial Division expect attention to (and compliance with) it.

being withheld. This sub-section of the Proposed Rule was included to make it clear that parties should not delay a written response on the basis that it has not yet conducted a comprehensive document review to enable an accurate representation as to whether or not particular documents are being withheld in response to a particular request. Such an unintended consequence was a concern voiced in response to the proposed amendments to Federal Rule 34[5] -- a concern shared by this Subcommittee.

RECOMMENDATION

For these reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and urge the Chief Administrative Judge to promulgate it as soon as is practicable.

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[5] *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) at pages 39-40, available online at https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/Report_On_Proposed_Amendments_To_Federal_Rules_Of_Civil_Procedure_1,_4,_16,_26,_30,_31,_33,_34,_36,_37,_84.html

EXHIBIT A

PROPOSED AMENDMENT

AMENDMENT #1

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

"Rule X Responses and Objections to Document Requests

(a) For each individual request propounded, the responding party shall, in its Response and Objections served pursuant to CPLR 3122(a) (the "Responses"), either:

i. state that the production will be made as requested; or

ii. state with specificity the grounds for any objection to production.

(b) By a date agreed to by the parties or at such time set by the Court, the responding party shall serve the Responses contemplated by Rule X(a)(ii), which shall set forth specifically: (i) whether the objection(s) interposed pertains to all or part of the request being challenged; (ii) whether any documents or categories of documents are being withheld, and if so, which of the stated objections forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents; and (iii) the manner in which the responding party intends to limit the scope of its production.

(c) By agreement of the parties to a date no later than the date set for the commencement of depositions, or at such time set by the Court, a date certain shall be fixed for the completion of document production by the responding party.

(d) By agreement of the parties to a date no later than one (1) month prior to the close of fact discovery, or at such time set by the Court, the responding party shall state, for each individual request: (i) whether the production of documents in its possession, custody or control and that are responsive to the individual request, as propounded or modified, is complete; or (ii) that there are no documents in its possession, custody or control that are responsive to the individual request as propounded or modified..

(e) Nothing contained herein is intended to conflict with a party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).