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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
Counsel

MEMORANDUM

November 26, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed adoption of a new Rule of the Commercial Division (22 NYCRR § 202.70(g)), relating to use of interrogatories in the Commercial Division of the Supreme Court.

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The Commercial Division Advisory Council has recommended adoption of a new Commercial Division Rule that would address the number and scope of interrogatories that may be served in the Commercial Division (Exhibit A, p. 5). In brief, the proposed rule would (1) limit interrogatories to 25 in number; (2) restrict interrogatories to certain specified topics, unless otherwise ordered; (3) prohibit interrogatories seeking information beyond a specified list, except where the parties consent or there is a court order; and, (4) permit interrogatories seeking information concerning claims or allegations in pleadings. The Advisory Council considered three alternative proposals and ultimately recommended adoption of alternative three, which is set forth on page 5 of the attached memorandum (Exh. A, p. 5).

Persons wishing to comment on this proposal should e-mail their submissions to CommDivInterrogs@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 January 29, 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. The issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the court system.

EXHIBIT A

Memorandum

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Date: August 1, 2013

Re: Interrogatories in the Commercial Division of the Supreme Court of New York

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INTRODUCTION

The Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") has given consideration to a rule regarding the use of interrogatories in the Commercial Division. This memorandum provides background on the use of interrogatories in New York courts, as well as limitations that are or can be imposed. It then sets forth three alternatives for a proposed rule limiting the number and/or scope of interrogatories, and makes a recommendation for consideration by the entire Council.

BACKGROUND

Interrogatories often are thought of as the most abused discovery device. The cost of preparing and responding to interrogatories can be high and, in many cases, the substantive information exchanged through the use of interrogatories is limited. Put succinctly, "the problem with interrogatories is that lawyers believe, and the system reinforces, that the exchange and answer of interrogatories is a game. . . . Historically, 'practitioners have used interrogatories as a litigation tactic to harass and to overwhelm an opponent or to delay the resolution of a dispute.'" A. Luria, *An Expense Out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change*, 9 Chap. L. Rev. 29, 31 (2005).

In commercial cases, however, New York courts generally view interrogatories as useful tools that can avoid wasting time and expense. For example, because commercial litigation generally involves corporate entities, and because corporations are expected to respond from the collective knowledge of the corporation—not the individual knowledge of one specific individual—interrogatories can be particularly appropriate in the commercial litigation context. 3 N.Y. Prac., Com. Litig. in New York State Courts § 26:4 (3d ed.).

Views regarding the sequencing of interrogatories are not monolithic:

> [E]ven though the CPLR does not create a priority among discovery devices nor prohibit the simultaneous use of discovery

> devices, one discovery device should be used before another. Thus, some courts have stated that interrogatories should be used before depositions are taken. According to these decisions, interrogatories can seek identification of documents, and therefore, set the stage for more meaningful depositions or even obviate the need for depositions in commercial cases. On the other hand, courts have also held that interrogatories are useful after depositions to obtain information that was not obtained in depositions.

3 N.Y. Prac., Com. Litig. in New York State Courts § 26:4 (3d ed.).

One type of interrogatory that is useful after depositions is the contention interrogatory. A contention interrogatory is an interrogatory that seeks to elicit support for claims or allegations in a pleading. "[C]ontention interrogatories seeking the factual foundation of allegations are common in New York State court litigation, and are an accepted practice in federal litigation in New York." Id. The Federal Rules of Civil Procedure provide that an "interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but [that] the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." Fed. R. Civ. P. 33(a)(2) (emphasis added).

LIMITATIONS ON INTERROGATORIES

Two types of limitations of interrogatories are commonplace: (1) numerical limitations; and (2) scope limitations.

1. Numerical limitations

Pursuant to Rule 11(c) of the Rules of the Commercial Division of the Supreme Court, the preliminary conference order may limit interrogatories and other discovery "as may be necessary to the circumstances of the case." Moreover, in the New York County Commercial Division, a June 2007 Statement of the Administrative Judge Regarding Implementation of Certain Rules of the Commercial Division adopts a numerical limitation of twenty five interrogatories, including subparts.[1] This numerical limitation is consistent with Federal Rule of Civil Procedure 33(a)(1) which provides that, unless otherwise stipulated or ordered, a party may not serve more than twenty-five written interrogatories, although leave to serve additional interrogatories may be granted.[2]

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[1] The individual rules of certain of the New York County Commercial Division judges make reference to this Statement.

[2] Many court rules contain numerical restrictions for interrogatories:

> Alaska Rules of Civil Procedure Rule 33, Illinois Court Rule 213, Maine Rule of Court 33, [and] Tennessee Knox County Local Chan. Ct. Rule 8 . . . limit interrogatories to 30. Kentucky Rules of Civil Procedure §33.01 also limits interrogatories to 30, but excepts from the count (a) the name and address of the person answering; (b) the names and addresses of the witnesses; and (c) whether the person answering is willing to supplement his answers if

Footnote continued on next page

2. **Scope limitations**

Local Civil Rule 33.3 of the U.S. District Court for the Southern District of New York is an example of a rule that places a limitation on the scope of interrogatories. Local Civil Rule 33.3 provides as follows:

> (a) Unless otherwise ordered by the court, at the commencement of discovery, interrogatories will be restricted to those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location, and general description of relevant documents, including pertinent agreements, and other physical evidence, or information of a similar nature.
>
> (b) During discovery, interrogatories other than those seeking information described in paragraph (a) above may only be served (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the court.
>
> (c) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the Court has ordered otherwise.

Justice Sherwood's individual rules limit the scope of interrogatories in a way similar to Local Rule 33.3(a), but do not incorporate any aspects of 33.3(b) or (c):

> Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material

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information subsequently becomes available. California Civil Procedure § 2030(c) limits interrogatories to 35. Alabama, Arizona and Pennsylvania Local Court Rules limit interrogatories to 40. The Georgia Civil Practice Code §9-11-33 and Nebraska Court Rules 33 limit interrogatories to 50. . . . Wisconsin limits prisoners to a total of 15 interrogatories, documents and admissions.

Report on Proposed New York Court Rule Regarding Interrogatories, Association of the Bar of the City of New York Committee on State Courts of Superior Jurisdiction (Oct. 29, 2004), at 7 n.12 http://www.nycbar.org/pdf/report/StateCourts_interrogatories_rpt.pdf (internal citations omitted).

and necessary documents, including pertinent insurance agreements, and other physical evidence.[3]

THREE ALTERNATIVE PROPOSALS

Given this background, the following are three alternative proposals for the Council to consider:

Alternative #1

The language of the first proposed rule is adapted from the June 2007 Statement of the Administrative Judge Regarding Implementation of Certain Rules of the Commercial Division:

> **The number of interrogatories, including subparts, shall be limited to 25, unless another limit is specified in the preliminary conference order.**

This alternative simply places a presumptive limitation on the number of interrogatories.

Alternative #2

The language of the second proposed rule adopts the language of Judge Sherwood's individual rules, with very minor wordsmithing:

> **Interrogatories are limited to 25 in number, including subparts, unless another limit is specified in the preliminary conference order. This limit applies to consolidated actions as well. Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.**

This alternative both places a presumptive limit on the number of interrogatories and also presumptively limits what can be requested in interrogatories. Notably, contention interrogatories would not be permitted without court approval.

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[3] NYCOURTS.GOV, *Practices for Part 49*, http://www.nycourts.gov/courts/comdiv/PDFs/Judge%20Sherwood%205-2012.pdf.

Alternative #3

The language of the third proposed rule is based upon an amalgam of Alternatives #1 and #2, adding what is contained in SDNY Civil Rule 33.3(b) & (c):[4]

> **(a) Interrogatories are limited to 25 in number, without subparts, unless another limit is specified in the preliminary conference order. This limit applies to consolidated actions as well.**
>
> **(b) Unless otherwise ordered by the court, interrogatories are limited to the following topics: name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence.**
>
> **(c) During discovery, interrogatories other than those seeking information described in paragraph (b) above may only be served (1) if the parties consent, or (2) if ordered by the court for good cause shown.**
>
> **(d) At the conclusion of other discovery, and at least 30 days prior to the discovery cut-off date, interrogatories seeking the claims and contentions of the opposing party may be served unless the court has ordered otherwise.**

This alternative permits interrogatories outside the scope of the limited interrogatories permitted by Justice Sherwood, and explicitly authorizes contention interrogatories.

The Subcommittee discussed the three alternatives above and recommends the adoption of the third alternative. The third alternative appropriately provides a limited number and scope of interrogatories, but at the same time permits contention interrogatories at the close of discovery.

ADDENDUM

AT ITS MEETING ON SEPTEMBER 23, 2013, THE COMMERCIAL DIVISION ADVISORY COUNCIL VOTED IN FAVOR OF ALTERNATIVE #3 AND RECOMMENDED ITS ADOPTION.

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[4] SDNY Civil Rule 33.3(c) has been revised in the proposal below to provide that interrogatories other than those specifically permitted may be served only if the parties consent. The Subcommittee believes that the language in Rule 33.3(c) that permits broader interrogatories "if they are a more practical method of obtaining the information sought than a request for production or a deposition" is too subjective.