

TO: Office of Court Administration
FROM: New York State Bar Association's Commercial and Federal Litigation Section
DATE: May 29, 2015
RE: The Advisory Council's Proposal Relating To Proportionality In Discovery

The Commercial and Federal Litigation Section ("*Section*") is pleased to submit these comments in response to the Commercial Division Advisory Council's Memorandum dated April 9, 2015, proposing an amendment to the Preamble to the Rules of the Commercial Division (the "*Preamble*").

I. EXECUTIVE SUMMARY

The Section agrees that proportionality in discovery is crucial to the promotion of cost-efficient resolution of matters and that emphasis on proportionality in the Preamble is appropriate and warranted.

II. SUMMARY OF PROPOSAL

The Proposal recommends that the Preamble be amended to include the words "encourage proportionality in discovery" among the items listed following "The Commercial Division is mindful of the need to . . ."

**III. RESPONSE AND SUGGESTIONS TO FURTHER
THE GOALS OF THE PROPOSAL**

The Section concurs with the Proposal's decision to add the quoted text to the Preamble. Chief Judge Lippman's Task Force on Commercial Litigation in the 21st Century noted the burdens of e-discovery that have increased in recent years due to the expanded use of technology, and the need to address the challenges faced by the courts and litigants in this regard. An emphasis on proportionality in discovery -- particularly e-discovery -- as proposed by the Advisory Council will further advance the goals of the Taskforce. The Section notes with approval the currently proposed amendment to Federal Rules of Civil Procedure 26(b)(1) which addresses proportionality in discovery and lists factors to be considered in evaluating proportionality. The Section recommends that once the new Rule 26(b)(1) is adopted, and the bench and bar have had experience with it, that consideration be given to an amendment to the Rules of the Commercial Division that more specifically addresses factors to be considered in evaluating proportionality in discovery.

CONTACT

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**REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION,
COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION
AND COMMITTEE ON LITIGATION**

**COMMENTS ON PENDING PROPOSALS
FROM THE COMMERCIAL DIVISION ADVISORY COUNCIL**

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

1. Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives.

The City Bar supports the objective of the proposed Rule concerning entity designees, which is to reduce the likelihood of a mismatch between the information sought and the witness produced. However, the City Bar questions whether an amendment of the Commercial Division Rules is necessary to achieve this objective.

The permissive, rather than mandatory, language of the proposed Rule makes it unnecessary in light of existing practice under the CPLR and the case law. A party desiring to depose a specific corporate representative may designate such person in the deposition notice under CPLR 3106(d). Further, CPLR 3107 already permits a party desiring to take the deposition of an entity representative to enumerate the matters upon which the person is to be examined, and, as the Advisory Council points out on page seven of its memorandum, the case law imposes an obligation on the entity being deposed to tender a knowledgeable witness. Thus, the proposed Rule adds nothing to the procedures already provided by the CPLR and developed under case law.

The City Bar is also concerned about the complexity of the proposed Rule. The multiple subsections and sub-subsections make the Rule difficult to understand and could lead to confusion and disputes over issues that are now settled.

The dissent among City Bar members supports the proposed Rule, believing that a single rule rather than a procedure derived from multiple sources will provide better guidance to attorneys. The dissent is not concerned about the permissive language of the proposed Rule, because, as with any other discovery device, a party may elect to utilize the proposed Rule or may elect to forego it. In addition, the dissent believes the requirement that an entity identify the

witness it will tender prior to the deposition (even if no specific witness is named in the notice) would allow litigants to be better prepared.

The Advisory Council also proposes to amend recently adopted Commercial Division 11-d, which presumptively limits depositions to seven hours. The proposed amendment would limit the deposition of an entity to seven hours in total, irrespective of the number of constituent witnesses. The City Bar opposes this amendment. A seven hour limit is too restrictive for a corporate entity that provides information through multiple representatives. Each representative will provide information about different aspects of the case, and each examining party should be allowed to explore these aspects fully. This is especially true for cases in the Commercial Division, which frequently involve complex factual and legal issues. Further, the proposed amendment will impose the unnecessary burden on the examining party to obtain consent or apply to the court for an enlargement of this limit, creating the added burden of motion practice.

This amendment also has some dissenting City Bar members who believe a presumptive seven-hour limit would encourage better preparation and more focused questioning of entity representatives, leading to fewer multi-day depositions and thereby decreasing costs.

2. Proposed amendment of Preamble to the Rules of the Commercial Division relating to proportionality in discovery.

The City Bar favors proportionality in discovery and supports the proposed amendment to reaffirm in the Preamble to the Commercial Division Rules the guiding principle of proportionality in the conduct of discovery in the Commercial Division. However, a significant number of members are concerned that the term 'proportionality' is not sufficiently well-defined and would favor a more specific definition of the standard.

3. Proposed amendment of 22 NYCRR § 202.70(b) and (c), relating to eligibility criteria for matters that may be heard in the Commercial Division.

The City Bar supports the proposed amendment to add a monetary threshold for arbitration cases (except international arbitrations) in the Commercial Division. The City Bar supports the proposed amendment to exclude home improvement contract cases involving residential properties, but notes that the proposed rule does not reflect the Advisory Council's stated intent in the memorandum, which is not to exclude renovations contracted for by the owner of a rental property, a co-op board or a condominium board. The proposed rule as drafted does not address this exception.

4. Proposed new Model Status Conference Order Form for use in the Commercial Division.

The City Bar opposes the use of the model status conference form because it does not believe it will help accomplish the goal of expediting the litigation process. Instead, the burdensome requirements of the form will impose unnecessary legal fees on litigants without providing substantial value at status conferences. The status conference form should primarily focus on identifying the outstanding discovery issues between the parties, rather than cataloging

the parties' progress as to each facet of the preliminary conference form. The proposed form also assumes that the assigned Commercial Division justice knows nothing about the case, when in fact the assigned justice should be familiar with the issues and the parties by the time of the status conference.

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**THE NEW YORK CITY LAW DEPARTMENT'S COMMENTS
CONCERNING THE PROPOSED AMENDMENT TO THE PREAMBLE
TO THE COMMERCIAL DIVISION RULES**

The City of New York, New York (the "City") strongly supports the proposed amendment to the Preamble of the Rules of the Commercial Division with respect to proportionality in discovery. The amendment recognizes the critical need for proportionality in litigation and will help mitigate litigation expenses.

Discovery in general is expensive and e-discovery in particular is extremely expensive. The sheer volume, pervasiveness, dispersion, and potential evanescence of electronically stored information ("ESI") – particularly email – elevate commercial cases to a wholly new level of effort and cost compared to conventional paper cases. The hard and soft costs include: (1) identification of the (numerous) likely custodians at one or more agencies and the IT systems in which they may have stored discoverable ESI; communication and explanation of litigation holds (and follow-up communication); the disruption of the work of custodians, whose jobs are to deliver services to the public, and of the supporting agency IT staff; and (2) preservation of far more than merely discoverable ESI, sometimes by collection to avoid spoliation risks; collection, sometimes by an outside vendor; processing, almost always by an outside vendor; hosting; attorney review; and production.

At any given time, the City has numerous open cases in the Commercial Division. Many of these matters involve significant disputes with sizable entities seeking very large sums. The costs and burdens of discovery even in these cases are often excessive and disproportionate to the damages at issue, especially when e-discovery is pursued. Moreover, the City is also a defendant in a fair number of "asymmetrical" commercial cases brought by small entities where the amount at risk is comparatively low. Often in such matters, adversaries will seek extremely

voluminous discovery – especially e-discovery – effectively forcing a settlement that will, from the City’s perspective, be significantly less expensive than the cost of litigation. These smaller entities neither maintain the extensive records required of the City nor do they have as many potential custodians/witnesses. Accordingly, they are in effect immune to equivalent burdens being placed on them and, as a practical matter, not restrained by reciprocal discovery.

The express recognition of proportionality in commercial cases will help deter attempts at exorbitant discovery and limit costs to a reasonable amount related to the size of the case.