

TO: The Administrative Board of the Courts
FROM: Commercial and Federal Litigation Section
DATE: December 15, 2016
RE: Proposed Amendment to Rule 26 of the Rules of the Commercial Division
Addressing the Limitation of Total Hours of Trial

The Commercial and Federal Litigation Section of the New York State Bar Association (“*Section*”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, counsel to the Chief Administrative Judge Lawrence K. Marks, dated October 18, 2016 (“*Memorandum*”), proposing an amendment to Rule 26 of the Rules of the Commercial Division, to address the authority of the court to set trial time limitations in Commercial Division matters (the “*Proposal*”). The Proposal is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Section recommends adoption of the proposed amendment to Rule 26, which would expressly authorize Commercial Division Justices, in their discretion, to impose trial time limitations upon different phases of trial, as such amendment will promote shorter, more efficient trials.

II. SUMMARY OF PROPOSAL

The Proposal seeks to revise Rule 26 of the Rules of the Commercial Division, 22 NYCRR § 202.70(g), to expressly authorize the Commercial Division Justices to impose time limitations on the parties’ respective cases and/or different claims and defenses presented at trial, which time limitations have long been authorized and upheld on appeal by state and federal courts both in New York and around the United States. Specifically, the Advisory Council proposes that Rule 26 of the Rules of the Commercial Division be amended as follows:

“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.”

In support of the Proposal, the Advisory Council notes that “Judges would be free to use or not to use the new procedure” (Memorandum, Ex. A at 2), and cites Civil Practice Law and Rules 4011 and case precedent that have long supported a judge’s right to impose time limits on different phases of trial (*id.*), “in order to achieve a speedy and unprejudiced disposition of matters”

(CPLR 4011). The Advisory Council identifies several “beneficial impacts on litigation” that may be fostered by imposing time limitations, including that it 1) will “allow the court to better plan its own docket”; 2) “requires counsel to focus on their theories of the case in advance, and consider how to best structure the case within the established limitations”; 3) “can help minimize repetition, thereby mitigating the costs associated with an unduly lengthy trial”; and 4) “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” (Memorandum, Ex. A at 2-3). The Advisory Council identifies case precedent that supports the imposition of reasonable time limitations in the Second Circuit, Southern District of New York and other state and federal district and circuit courts throughout the United States (*see* Memorandum, Ex. A thereto at 3-6).

However, the Advisory Council cautions that the “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” (Memorandum, Ex. A at 3).

III. Response and Suggestions to Further the Goals of the Proposal

The Section agrees with the Advisory Council that long-standing case precedent has permitted the imposition of time limitations on the parties’ respective cases or different claims and defenses presented at trial, and that such time limitations will promote shorter, more efficient trials, which the Section agrees are desirable goals. However, the Section also recognizes the need for litigants to be provided a full and fair opportunity to establish their case and/or defenses, as cautioned by the Advisory Council.

The Section is also aware of the position of some defense counsel that the discretion afforded to Commercial Division Justices may create an imbalance between the time permitted for a plaintiff’s case and the time permitted for a defendant’s case, particularly when extensions are granted late in trial. The issue is a matter of an imbalance created by limiting the time allowed for defendant’s cross-examination of plaintiff’s witnesses, but allowing extensions on defendant’s case. While defendants (and plaintiffs) receive the benefit of the late-in-trial extension of time, some defense counsel suggest that there may be the occasion that a defendant may have preferred to have that additional time spent on cross-examination of plaintiff’s witnesses, an opportunity that has since passed.

However, the Section feels that the benefits afforded by the discretion given to Commercial Division Justices by the proposed amendment to Rule 26 outweigh the likelihood of prejudice, and appellate oversight of such time limitations is sufficient to curtail any abuse of that discretion and to minimize any concern that a litigant may be denied a full and fair opportunity to present their case or defense.

Although a new rule may not be necessary to further define the Court’s discretion and authority to impose such time limitations, the Section concludes that the benefit to practitioners, corporate counsel, clients, and judges of having a rule explicitly describing that authority substantially outweighs not having such a rule.

Accordingly, the Section recommends that the Proposal be adopted.

Memorandum

To: Commercial Division Advisory Council

From: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

Date: January 13, 2017

Re: Response to Public Comments on Proposed Amendments to Rule 26 of the Commercial Division Rules

The Commercial Division Advisory Council has given consideration to the public comments made by the Commercial and Federal Litigation Section of the New York State Bar Association (“ComFed Section”) to the proposed amendment to Rule 26 of the Commercial Division Rules, which is the rule addressing time limitations for trials.

In its memorandum dated December 15, 2016 to the Administrative Board of the Courts, the ComFed Section recommends adoption of the proposed amendment. The ComFed Section states in its memorandum that “The Section agrees with the Advisory Council that long-standing case precedent has permitted the imposition of time limitations on the parties’ respective cases or different claims and defenses presented at trial, and that such time limitations will promote shorter, more efficient trials, which the Section agrees are desirable goals.” The ComFed Section notes in passing that “[a]lthough a new rule may not be necessary to further define the Court’s discretion and authority to impose such time limitations, the Section concludes that the benefit to practitioners, corporate counsel, clients, and judges of having a rule explicitly describing that authority substantially outweighs not having such a rule.”

While it is correct that the Court already has such discretion and authority, the Commercial Division Advisory Council agrees with the ComFed Section that the proposed amendment nonetheless should be adopted. Such time limitations are not generally used now in the Commercial Division. A rule that expressly addresses the authority of judges to impose time limitations on trials could serve to enhance the visibility of such limitations and encourage lawyers and judges to use them. As set forth in the Advisory Council’s September 15, 2016 memorandum in support of the proposed amendment to Rule 26, “[i]f 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.”

In addition, a Commercial Division Rule which explicitly confirms the Court’s authority to impose time limitations on trials may provide reassurance to corporate clients which are considering litigation in the Commercial Division, but are concerned that New York State trials may be unduly prolonged and expensive. In particular, the proposed Rule will enable New York lawyers to advise potential litigation clients that New York

has recently adopted a mechanism expressly designed to reduce the length and cost of trials in the Commercial Division and to improve their efficiency.

Finally, the proposed Rule reflects the Commercial Division Advisory Council's extensive research and analysis of similar rules in federal and state courts throughout the United States and the Advisory Council's conclusions as to the best way to implement time limitations on trials. In effect, the Advisory Council has done substantial work in order to recommend best practices for time limitations on trials. Thus, the Rule may assist judges and lawyers who wish to employ time limitations on trials and will prevent them from having to "reinvent the wheel" whenever time limitations on trials are proposed.