

To: John W. McConnell
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: April 26, 2018

Re: Proposed New Rule 9-a of the Rules of the Commercial Division, Relating to the Encouragement of Use of CPLR Provisions Permitting Immediate Trial or Pretrial Evidentiary Hearing on a Material Issue of Fact

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 March 12, 2018, proposing a new Rule 9-a of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 9-a), relating to the encouragement of use of CPLR provisions permitting an immediate trial or pretrial evidentiary hearing on a material issue of fact (the “Memorandum”). A copy of the Memorandum is attached hereto as Exhibit “A.”

I. EXECUTIVE SUMMARY

All trial courts have the authority under the CPLR to order that a material issue of fact raised by motion be separately and immediately tried by the court or a referee assigned by the court. *See* CPLR § 2218, R 3211(c), R 3212(c). The Section agrees with the Commercial Division Advisory Council’s (the “Advisory Council”) assessment that, in practice, courts have seldom utilized these procedures to resolve potentially dispositive material issues in the early stages of litigation. The Advisory Council seeks to encourage the use of these procedures by adopting new Rule 9-a, which reminds and encourages counsel to advocate, where appropriate on motion that a pre-trial hearing or immediate trial may be effective in resolving a material issue in the case. We therefore recommend that the proposed new Rule 9-a be adopted.

II. SUMMARY OF THE MEMORANDUM

The Advisory Council recognizes that the trial courts (including those in the Commercial Division) already have the authority to order an evidentiary hearing or an immediate trial on a material issue of fact raised on motion. The Advisory Council notes that these procedures are rarely used, resulting in often lengthy litigation, extensive and expensive discovery, and a trial that may ultimately result in a determination that, for example, a statute of limitation bars suit, an issue that could have been resolved much earlier.

The Advisory Council notes that early resolution of material issues can result in many benefits to the judiciary and the litigants. It may resolve the litigation entirely, citing, for example, dispositive affirmative defenses such as a statute of limitation or a jurisdictional defect. If the material issue is key to a claim or defense, early resolution may encourage settlement of remaining issues in the case. At a minimum, early resolution of key issues may streamline discovery, later proceedings and trial. Each of these benefits will serve to conserve litigant as well as judicial resources.

The Advisory Council, however, acknowledges that all issues of material fact may not be proper for early disposition, that litigants may desire for issues to be determined by a jury, and that limited discovery on key issues may be necessary. Therefore, the Advisory Council has proposed a new Rule 9-a to address these considerations. As proposed, it provides:

“Subject to meeting the requirements of CPLR §§ 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:

- (1) Dispositive motions to dismiss or motions for summary judgment;*
- (2) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;*
- (3) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;*
- (4) Jurisdictional motions where issues, including application for long arm jurisdiction, may be dispositive;*
- (5) Statute of limitations motions; and*
- (6) Class action certification motions[.]*

In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited discovery targeting the factual issue to be tried.”

III. COMMENTS

The proposed new Rule 9-a does not modify or expand the court’s existing authority to order a pre-trial hearing or immediate trial of material issues of fact raised on motion. However, as drafted, the proposed new Rule 9-a, appropriately, in the view of the Section, strongly encourages the parties and/or counsel, who may be in a better position to assess materiality and the benefit that early resolution may achieve, to request the court to exercise such already existing authority. The final decision, of course, as to whether to order a pre-trial hearing or an immediate trial remains with the trial judge, and the trial judge may continue to order same even without request from counsel or the parties. The Section therefore recommends that the proposed new Rule 9-a be adopted.