

To: Office of Court Administration

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

Re: Comments on Four Proposals from the Commercial Division Advisory Council¹

Date: January 22, 2014

This memo comments on four proposals for procedural innovations in the Commercial Division concerning accelerated adjudication, interrogatories, a uniform Preliminary Conference Order and a pilot mediation program.

Chief Judge Lippman created a permanent Commercial Division Advisory Council in March 2013 to assist in the implementation of recommendations contained in the 2012 report from the Task Force on Commercial Litigation in the 21st Century.

The Commercial Division Advisory Council recently made four recommendations concerning procedures in the Commercial Division, and counsel to the New York State Unified Court System has published those proposals for comment. Those proposals concern:

- 1) A proposed new rule relating to an optional accelerated adjudication process in the Commercial Division;
- 2) A proposed new rule relating to the number and scope of interrogatories allowed in Commercial Division practice;
- 3) A proposed uniform Preliminary Conference Order; and
- 4) A pilot mandatory mediation program for implementation in New York County's Commercial Division.

We describe the four proposals below, along with our recommended comments.

Accelerated Adjudication

The Commercial Division Advisory Council recommends adoption of a new rule concerning "Accelerated Adjudication Actions" for inclusion in the Rules of the Commercial Division of the Supreme Court. The rule sets forth a group of restrictions upon the complexity of any action falling within its purview, such that all parties to such actions would be deemed to have

¹ Opinions expressed are those of the Section preparing this report and do not represent opinions of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.

irrevocably waived certain procedural rights. The purpose of the rule is to allow parties to **elect** a simpler, faster mode of litigation—including through specific election in pre-dispute contract negotiation. (That is, rather than a mandatory arbitration clause, contracting parties could consent in advance to “Accelerated Adjudication” treatment of any dispute arising from their contract.)

The rule states in general terms that all cases governed by it should be ready for trial by no later than nine months after filing of an RJI, and then sets forth certain specific aspects of litigation under its auspices:

- Conclusive waiver of jurisdictional defenses and the doctrine of *forum non conveniens*;
- No jury trials;
- No punitive damages;
- No interlocutory appeals;
- Discovery limitations (for each side):
 - No more than 7 interrogatories;
 - No more than 5 RFAs;
 - No more than 7 depositions of 7 hours each;
 - Document requests limited to documents “relevant” to a claim or defense and generally to be “restricted in terms of time frame, subject matter and persons or entities to which the requests pertain;”
 - Electronic discovery to be done with “narrowly tailored” descriptions of custodians whose documents are to be searched, and subject to court order requiring that requesting party advance costs of e-discovery in the event that the costs and burdens of same “are disproportionate to the nature of the dispute or the amount in controversy,” subject to the allocation of costs in the final judgment.

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We believe these simplified procedures are a potentially powerful tool for the simplification of litigation in the Commercial Division. We note, however, that without a specific enforcement mechanism, the nine-month deadline for trial-readiness is more aspirational than realistic.

The only substantive recommendations that the Section makes are the following:

1. In Section (i) under the heading of “Concerning electronic discovery,” the Section recommends that the term “on the basis of generally available technology” be omitted.

The term “generally available technology” is confusing, will change in unknown ways over time, and may be subject to inconsistent interpretations. By omitting this language, Section (i) will be, as follows: “the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents.”

2. We note that it is unclear what will happen in the event that parties agree to the Accelerated Adjudication procedures, but the case is not otherwise eligible for assignment to the Commercial Division (*e.g.*, because the case does not meet the monetary threshold in a particular county or because the case does not meet the subject matter criteria). Will the Commercial Division nonetheless accept the case? Will the Accelerated Adjudication provisions be applied by other IAS parts in the event that the case is not heard by the Commercial Division? Or, notwithstanding the agreement of the parties, will the parties otherwise be required to comply with all of the provisions of the CPLR if the case is not assigned to the Commercial Division and Rule 9 does not apply to the action? The Section urges the OCA to clarify this ambiguity so that (a) the Commercial Division will only be handling cases appropriate for Commercial Division adjudication and (b) parties have clarity when contractual provisions providing for Accelerated Adjudication will be applied by the courts.

Therefore, subject to the two recommendations set forth above, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a significant step towards more efficient resolution of those cases for which accelerated procedures are appropriate. We assume that the OCA will keep statistics with regard to the use of this procedure and its effect on case dispositions. The Section recommends that the proposed rule be adopted subject to the two recommendations set forth above.

Interrogatories

The Commercial Division Advisory Council recommends, in essence, that the Commercial Division adopt limitations on number and scope of interrogatories that closely parallel those in place in the Southern District. Under the proposal, each party would be limited to 25 interrogatories (without subparts). At the outset of discovery, interrogatories would be limited to those seeking witness identities, general logistical information about documents and physical evidence, and damages calculations. Contention interrogatories would be allowed at the conclusion of discovery. Other interrogatories would be permitted only by consent or by court order. The proposed text of the new rule follows:

- (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.

The only material difference between the proposal and the analogous Southern District rule is that the proposed rule requires either consent or court order for any interrogatories outside the normal scope, whereas the Southern District rule nominally allows such interrogatories “if they are a more practical method of obtaining the information sought than a request for production or a deposition.” We believe the proposal represents an improvement over the Southern District rule, which frequently gives rise to disputes between parties as to which discovery method is “more practical”—disputes that generally require court resolution in any case.

For reference, here is the text of the Southern District’s Local Civil Rule 33.3:

(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 insurance 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.

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We believe this proposal is a helpful incremental step in limiting the expense and burden of litigation in the commercial division, and we therefore recommend that this Committee endorse the proposal.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Uniform Preliminary Conference Order

The Commercial Division Advisory Council has recommended the use of a uniform Preliminary Conference (“PC”) Order for all Commercial Division matters. Rule 8 of the Uniform Rules for the Commercial Division specifies a range of issues to be discussed prior to the Preliminary Conference. Moreover, the Rules contemplate that the preliminary conference will serve as the forum where counsel – with the Court’s guidance and direction – will actively plan the litigation and address, at an initial stage, certain of the complications in discovery and motion practice the parties anticipate. However, because many of the standard PC Order forms used in Commercial Division parts around the state cover only a few of the topics specified in Rule 8, the level of active management of cases can vary from court to court and case to case.

The proposed uniform Preliminary Conference Order is designed to help the parties and the Court make sure that the key components of typical commercial litigation are addressed at the outset – much as a FRCP 26(f) discovery plan and FRCP 16 scheduling order gives structure to business litigation in the federal courts. Among the topics included in the proposed PC Order are:

- (1) A section concerning confidentiality forms typically used in business cases;
- (2) A section requiring the parties to summarize their key claims and defenses;
- (3) A section certifying that the parties have met concerning e-discovery and addressed document preservation, search terms, issues relating to privilege logs and claw back provisions for inadvertent disclosure;² and
- (4) A section concerning expert disclosure in light of new Rule 13(c).

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² We have been advised that although the proposed PC Order requests that parties identify search terms and custodians, the Commercial Division Advisory Council is considering proposing that the language be modified to require only that the parties inform the Court that they have taken the step of identifying custodians and search terms. The Section agrees with the proposed modification; there is no need for a publicly filed Order to list the individual custodians in each case or all of the search terms the parties intend to use. So long as the parties confirm that they have undertaken the exercise of identifying this information, the essential planning/case management function will be achieved.

Although not all commercial cases statewide will require the level of detail in planning the proposed Preliminary Conference Order requires, we believe this proposal will generally help the preliminary conference achieve its important case management function.

The Section, however, does have two proposed modifications concerning the provisions on “Electronic Discovery”:

Section 7(b) of the proposed Preliminary Conference Order requires counsel to certify their competence as to matters relating to their clients’ technological systems or have brought someone to the conference who can address these issues. While the Section certainly agrees that counsel should be knowledgeable about e-discovery issues and the technological systems at issue in the particular case, the Section opposes a requirement that counsel make a certification. In the Section’s view, competence is an issue of professional responsibility, not an item that requires certification in the Preliminary Conference Order. Moreover, the Section is concerned that a certification requirement in the Order could embolden parties to seek contempt sanctions and unnecessarily increase motion practice.

The Section, therefore, recommends changing the second sentence of Section 7(b) from:

“Counsel hereby certify to the extent they believe this case is reasonably likely to include electronic discovery, they are sufficiently versed in matters relating to their clients’ technological systems to discuss competently all issues relating to electronic discovery or have brought someone to address these issues on their behalf.”

to:

“Counsel are reminded that, if this case is reasonably likely to include electronic discovery, they should be familiar with their clients’ technological systems so as to discuss competently all issues relating to electronic discovery or bring someone to address these issues on their behalf.”

Section 7(c)(ii) [Production] asks the parties to identify relevant search terms and the general cut-off date of the discovery. Technology is constantly evolving and “search terms” may not be used in cases that employ Technologically Assisted Review (TAR), such as predictive coding. As an alternative, the Section recommends that the language require that the parties confirm they have discussed the “means, parameters, custodians, protocol and technology to be used for the culling and production of relevant electronically stored information and the dates by which production shall be made.” The general cut-off date of discovery is confusing. If it relates only to electronically stored information, it is encompassed by the Section’s recommended language. If it relates to all discovery, it should be subsumed in Section 8 for the cut-off of fact disclosure.

Therefore, subject to a minor modification to clarify that custodians and search terms will not be set forth in the proposed Preliminary Conference Order and the recommendations concerning Sections 7(b) and 7(c)(ii) of the proposed Preliminary Conference Order set forth above,, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposal as a meaningful step towards greater efficiency of litigation in the Commercial Division.

Pilot Mediation Program

The Commercial Division Advisory Council has recommended the adoption of a pilot program in the New York County Commercial Division, to sunset after eighteen months unless renewed, under which one out of every five newly filed cases in the Commercial Division would be referred for mandatory mediation. Parties would be required to complete mediation within 180 days of assignment to an individual justice (i.e. normally upon filing of an RJI). Parties could opt out if all sides so stipulate, and any party would be permitted to apply for exclusion from the program on the basis that mediation would be ineffective or unjust.

The recommendation by the Commercial Division Advisory Council is based largely upon the recommendation of the ADR Committee of the Commercial and Federal Litigation Section, and is premised on the view that mediation is underutilized in Commercial Division matters and upon the experience of other courts to have implemented such systems, including the Western District of New York, which reports that 70% of cases that go to mediation there are settled.

Of course, the Supreme Court already maintains a panel of mediators; free mediation is available in all Commercial Division cases. However, the pilot program’s proponents believe that mediation remains underutilized. We agree, and recognize that (in the words of the Faster-Cheaper-Smarter Working Group of the Commercial and Federal Litigation Section, which made a similar proposal in June 2012) “[m]ediation will often succeed despite the skepticism of counsel and parties.” We also note the observation ADR Committee’s observation that their members who are in-house counsel were particularly vocal in urging adoption of this proposal.

The ADR Committee has indicated that it will monitor the implementation and results of the pilot program; we believe this is wise, and also that it might be logical for a representative of this Committee to liaise with the ADR Committee in that connection.

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We believe this proposal may be helpful in achieving more optimal use of mediation to resolve Commercial Division cases at an early stage, and we think that this Committee could serve a potentially helpful role in evaluating the success of the proposal as it is implemented.

Therefore, the Commercial and Federal Litigation Section of the New York State Bar Association endorses the proposed pilot program as a meaningful step towards the maximizing the early resolution of Commercial Division matters through mediation, where possible.