



**WORKING CONCEPTS OF
THE FASTER SMARTER CHEAPER WORKING GROUP
OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION
OF THE NEW YORK STATE BAR ASSOCIATION**

January 25, 2012

The Faster Smarter Cheaper Working Group (“Working Group”) has been tasked by the Section Chair with finding more efficient ways to resolve business disputes. The Working Group is composed of experienced practitioners, drawn from in-house counsel and outside counsel, and members of the State and Federal judiciary. The working concepts outlined below are broken into four categories: settlement/ADR, litigation process, cost-effective and efficient discovery practices and legislative process. At times, there may be an overlap between the categories, but each concept is designed to either expedite and/or make more efficient or less expensive the litigation process. The Working Group intends to further develop some or all of these concepts into a more comprehensive report and recommendations.

The following are the Working Group’s preliminary concepts:

I. Settlement/ADR

A. In contract negotiations, parties should strongly consider incorporating clauses requiring pre-litigation mediation before initiating litigation or other proceedings. The obligation to engage in mediation would arise upon the identification by one or more parties to the contract of a dispute arising thereunder. Upon notice from any party to the contract of such a dispute, the parties would promptly engage in mediation for a brief period of time. The clause would provide that the mediation process would involve disclosure of documents critical to the dispute and/or significantly supportive of a party’s position. The extent or amount of disclosure required as part of the mediation process would be within the discretion of the mediator, including the prospect for a limited number of depositions to be conducted prior to the mediation.

B. Upon commencement of litigation in federal court, parties should be strongly encouraged to consent to the disposition of their action before a Magistrate Judge pursuant to 28 USC § 636 (c), which in most cases will expedite the litigation.

C. In addition to the opportunity for referral to mediation pursuant to guidelines presently in effect in both federal District Courts and in the NYS Commercial Division, an expedited non-binding arbitration process should be established for all matters with liquidated damages in an amount less than \$250,000 or such other amount as each jurisdiction deems appropriate. The arbitrator would be selected from the standard list of neutrals and would essentially serve as a neutral evaluator. There would be no discovery. Rather, each party would be afforded a brief period of time (not to exceed one day for the total process) to present a highlight of their evidence to the arbitrator. The non-binding arbitration would be conducted off the record and would be without prejudice. The arbitrator would render the non-binding decision within a brief period of time such as two (2) weeks. Following the conclusion of this process, the parties could stipulate to accept the decision of the arbitrator, negotiate their own settlement terms or elect to return on the litigation path. This process would allow for a dual track to permit continuation of litigation to the extent deemed essential for the protection of the interest of the parties, while providing the parties with an early, neutral evaluation of the merits.

D. All parties will be required to conduct research about sustainable jury verdicts on claims for unliquidated damages in cases similar to theirs and to submit such research in connection with court ordered mediation. For those claims or causes of action seeking liquidated damages, parties would be required to submit, without prejudice, a reasonably reliable calculation of damages. Further, the parties would be required to certify that they have engaged in a calculation of budgeted litigation costs and should be prepared to discuss generally with the mediator the likely costs to be incurred.

II. Litigation Process

Suggested improvements to the litigation process cluster in four areas: (1) early case assessment; (2) streamlined rocket docket available to consenting parties; (3) cost-shifting; and (4) cost-saving teleconferencing for Court conferences. The focus of our principal suggestions is in the first area: early case assessment.

A. Early Case Assessment. For early case assessment to be effective, the parties must have a solid grasp of the facts underlying their claims and applicable legal requirements early in the litigation process. We offer two recommendations for consideration:

1. Use of a neutral evaluator or facilitator before the first Court status conference to review each side's position, provide feedback on the claims and defenses, proposed motion practice and discovery needs and to encourage the parties to agree on a streamlined set of the procedures actually needed to resolve their dispute.

2. An early conference with the Court to assess counsel's preparedness; to determine whether dismissal motions are contemplated and review the grounds for any such motions; and to discuss likely discovery and damage claims. The goal of this conference would be to map out an efficient case management plan tailored to the real needs of the case.

We suggest that a pilot project be designed for each of these alternatives. For the pilot involving use of a neutral evaluator, we suggest that a pro bono panel of NYSBA litigator volunteers be assembled.

B. Streamlined Rocket Docket. We suggest that a fast-track-to-trial be offered to litigants. Parties would have the option of agreeing to submit their dispute to a fast track procedure with a guaranteed early trial date. Very limited motion practice (or none) and limited discovery would be available to the consenting parties. In this regard, we suggest that a study be

conducted to gather best practices in this area and develop specific proposals for a rocket docket design.

C. Litigation-related Cost Savings. The expenses incurred in connection with court conferences are substantial. Local and out of town travel expenses and waiting time in court can be considerable. We suggest the use of video and teleconferences for appropriate court conferences, unless the Court sees a need to have the parties attend in person.

D. Cost-Shifting. To discourage unnecessary motion practice and discovery requests, we are exploring whether additional tools to permit cost shifting would be appropriate or whether we need only urge courts to actively exercise their discretion under existing authority.

III. Cost-Effective and Efficient Discovery Practices

A. The following contractual provisions can be included in business contracts::

1. A provision limiting discovery in an agreed-upon way for controversies involving less than a specified dollar amount. For example, if a dispute involves less than X dollars (\$1.5 or \$2 million, as examples), the parties can agree to limit e-discovery or limit the number of permitted documents, interrogatories or depositions, which, upon completion, might lead to mediation before a lawsuit is filed..

2. An “Economical Litigation Agreement” combining arbitration and litigation. In the event of a contractual dispute that is filed in Court, the parties can agree in advance to have the discovery process and litigation management plan overseen and enforced by an arbitrator, with cost and fee shifting and a requirement of proportionality (tailoring discovery to the size of the dispute).

3. A provision to use an industry neutral to evaluate claims. The parties can agree to involve an industry neutral knowledgeable about the e-discovery process at the

beginning of any dispute to determine the most efficient way to manage e-discovery. For example, a neutral expert could be employed to evaluate the scope and validity of requested e-discovery searches utilizing computer-aided database searches.

B. The following potential rules could be adopted to promote efficient discovery:

1. A requirement that parties to a litigation (state or federal) meet and confer concerning ESI as soon as practicable. If appropriate, each side's IT professionals should be part of that meet-and-confer.

(i) The parties should attempt to agree on what will be preserved and reviewed.

(ii) Consideration should be given to the time period covered, custodians and key words, computer-assisted search (sometimes called predictive) or other search methods.

(iii) Sampling or phasing of ESI discovery should be discussed.

(iv) The substance of what is required in initial disclosures under Rule 26(a)(1), Fed. R. Civ. P., should be a subject covered.

(v) The use and possible neutral evaluation of computer assisted or other search methodologies should be discussed. The neutral evaluator should have the requisite expertise in technology/information retrieval to measure the accuracy of search methodologies using metrics recognized by TREC/Sedona Conference, and/or effectiveness of keyword lists.

2. Promptly following the meet-and-confer among the parties, there should be a conference with the Court to set forth, among other things, a case management plan. The parties should be required to prepare a draft discovery plan in anticipation of the Court conference. If no agreement concerning discovery issues can be reached among the parties during the meet-and-confer, the issues should be addressed at the Court conference,

3. In State Court, there should be a requirement for the plaintiff to file an RJI for a discovery conference within 30 days or as quickly as possible after an answer is served. The substance of the conference should follow the form of the preliminary conference order in the Commercial Division of Nassau County Supreme Court. If this procedure is not followed, the case will not be permitted to be in the Commercial Division.

4. Regarding privilege logs, there was one suggestion to use the equivalent of a sampling technique. Use metadata including the subject line on e-mails to populate the entries on a privilege log. The requesting party may choose a small number of documents (20, for example) for an *in camera* review by the Court. If the Court decides that those documents are indeed privileged, the party will then be unable to challenge any further documents. If a substantial number of the documents (five, for example) are not privileged, then the producing party must prepare and defend a complete privilege log.

5. Pre-motion conferences should be required before parties are permitted to make a discovery motion. Courts should consider requiring the submission of at most a short letter setting forth any discovery dispute.

IV. The Legislative Process

The civil litigation process in New York Supreme Court can be streamlined through the following types of legislative amendments or enactments:

A. Consider Amending/Revamping CPLR 3216 To Give Judges Greater Power to Dismiss Actions For Want of Prosecution.

One recurring area of concern among state court practitioners and litigants is that cases in Supreme Court, in particular, oftentimes simply take too long to come to resolution.

Specifically, as a consequence of the current procedural rules, cases can go dormant for long periods of time (even a decade or longer) due to a plaintiff's failure to prosecute.

Currently, in the situation of a plaintiff's failure to prosecute, Rule 3216 of the CPLR requires that a party give notice by registered or certified mail to the plaintiff, who then has 90 days to file a note of issue and revive the case. This leaves litigants with a Hobson's choice of "waking a sleeping tiger," or allowing a dormant case to languish on in the court system, resulting oftentimes, in the case of corporations, in the need to carry reserves on a defendant's financial books. Moreover, Rule 3216 is permissive so, even if the 90-day deadline is not met, a plaintiff can still revive a case upon a good cause showing; and, to this point, the Court of Appeals has adopted the "extremely forgiving" standard, upon a showing of justifiable excuse for the delay and a meritorious case.

New York should consider adopting the California approach (codified at Cal Civ P. § 583.130), which reflects a strict legislative policy that a plaintiff in a civil action shall proceed with "reasonable diligence," and all parties shall cooperate in bringing the case to trial or other disposition within a specified timeframe. The California policy has the two fold effect of: (i) promoting resolution of cases on the merits before evidence is lost/destroyed or memories fade (much like statutes of limitations); and (ii) to protect defendants from being subjected to the annoyance of an unmeritorious action remaining undecided for an indefinite period of time.

Most civil cases in California fall within the 5-year rule (§ 583.310), which requires that a case go to trial within 5 years after commencement; however, New York could enact an even shorter timeframe (e.g., three years), given the volume of cases currently on the state court dockets.

Under the proposed approach, CPLR 3216 should be overhauled to provide that the Supreme Court shall dismiss an action on its own motion, or on motion of the defendant, after notice, if the action is not brought to trial within the time period prescribed. The requirement should be mandatory and not subject to extension, excuse or exception, except as expressly provided by statute.

B. Additional Proposed Legislative Enactments To Streamline Electronic Discovery

The Association in 2008 adopted a proposal to amend Article 31 of the CPLR to incorporate provisions encouraging early discussions among counsel to address electronic discovery issues, attempt to limit the types and volume of such discovery, and resolve issues involving formatting, treatment of difficult-to-access materials, in order to address all such issues at the initial case management conference. That proposal has not been enacted into law. In the interim, other groups (including the City Bar) have developed e-discovery proposals that go farther in requiring early planning, cooperation in management, and limitations on the scope of electronic discovery. The Section should revisit its earlier proposal, reach out to groups that have developed alternative proposals, and endeavor to harmonize the different approaches in order to have a better chance of winning legislative approval.

In conjunction with a revised e-discovery proposal, the Section also should develop a New York version of the provision in Fed. R. Civ. P. 34 requiring the recipient of inadvertently disclosed privileged communications to return or destroy such materials promptly upon request by the sender.

The Section's CPLR Committee is presently working to develop a New York analogue to Rule 502 of the Federal Rules of Evidence to set a standard for addressing scope-of-waiver issues arising from inadvertent disclosures of privileged materials.

The Faster Smarter Cheaper Working Group
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