

**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

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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.