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**REPORT BY THE COUNCIL ON JUDICIAL ADMINISTRATION,  
COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION  
AND COMMITTEE ON LITIGATION**

**COMMENTS ON PENDING PROPOSALS  
FROM THE COMMERCIAL DIVISION ADVISORY COUNCIL**

These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

**1. Proposed adoption of new Commercial Division Rule and amendment of Commercial Division Rule 11-d, relating to depositions of entity representatives.**

The City Bar supports the objective of the proposed Rule concerning entity designees, which is to reduce the likelihood of a mismatch between the information sought and the witness produced. However, the City Bar questions whether an amendment of the Commercial Division Rules is necessary to achieve this objective.

The permissive, rather than mandatory, language of the proposed Rule makes it unnecessary in light of existing practice under the CPLR and the case law. A party desiring to depose a specific corporate representative may designate such person in the deposition notice under CPLR 3106(d). Further, CPLR 3107 already permits a party desiring to take the deposition of an entity representative to enumerate the matters upon which the person is to be examined, and, as the Advisory Council points out on page seven of its memorandum, the case law imposes an obligation on the entity being deposed to tender a knowledgeable witness. Thus, the proposed Rule adds nothing to the procedures already provided by the CPLR and developed under case law.

The City Bar is also concerned about the complexity of the proposed Rule. The multiple subsections and sub-subsections make the Rule difficult to understand and could lead to confusion and disputes over issues that are now settled.

The dissent among City Bar members supports the proposed Rule, believing that a single rule rather than a procedure derived from multiple sources will provide better guidance to attorneys. The dissent is not concerned about the permissive language of the proposed Rule, because, as with any other discovery device, a party may elect to utilize the proposed Rule or may elect to forego it. In addition, the dissent believes the requirement that an entity identify the

witness it will tender prior to the deposition (even if no specific witness is named in the notice) would allow litigants to be better prepared.

The Advisory Council also proposes to amend recently adopted Commercial Division 11-d, which presumptively limits depositions to seven hours. The proposed amendment would limit the deposition of an entity to seven hours in total, irrespective of the number of constituent witnesses. The City Bar opposes this amendment. A seven hour limit is too restrictive for a corporate entity that provides information through multiple representatives. Each representative will provide information about different aspects of the case, and each examining party should be allowed to explore these aspects fully. This is especially true for cases in the Commercial Division, which frequently involve complex factual and legal issues. Further, the proposed amendment will impose the unnecessary burden on the examining party to obtain consent or apply to the court for an enlargement of this limit, creating the added burden of motion practice.

This amendment also has some dissenting City Bar members who believe a presumptive seven-hour limit would encourage better preparation and more focused questioning of entity representatives, leading to fewer multi-day depositions and thereby decreasing costs.

**2. Proposed amendment of Preamble to the Rules of the Commercial Division relating to proportionality in discovery.**

The City Bar favors proportionality in discovery and supports the proposed amendment to reaffirm in the Preamble to the Commercial Division Rules the guiding principle of proportionality in the conduct of discovery in the Commercial Division. However, a significant number of members are concerned that the term ‘proportionality’ is not sufficiently well-defined and would favor a more specific definition of the standard.

**3. Proposed amendment of 22 NYCRR § 202.70(b) and (c), relating to eligibility criteria for matters that may be heard in the Commercial Division.**

The City Bar supports the proposed amendment to add a monetary threshold for arbitration cases (except international arbitrations) in the Commercial Division. The City Bar supports the proposed amendment to exclude home improvement contract cases involving residential properties, but notes that the proposed rule does not reflect the Advisory Council’s stated intent in the memorandum, which is not to exclude renovations contracted for by the owner of a rental property, a co-op board or a condominium board. The proposed rule as drafted does not address this exception.

**4. Proposed new Model Status Conference Order Form for use in the Commercial Division.**

The City Bar opposes the use of the model status conference form because it does not believe it will help accomplish the goal of expediting the litigation process. Instead, the burdensome requirements of the form will impose unnecessary legal fees on litigants without providing substantial value at status conferences. The status conference form should primarily focus on identifying the outstanding discovery issues between the parties, rather than cataloging

the parties' progress as to each facet of the preliminary conference form. The proposed form also assumes that the assigned Commercial Division justice knows nothing about the case, when in fact the assigned justice should be familiar with the issues and the parties by the time of the status conference.

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