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UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

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MEMORANDUM

April 7, 2015

To: All Interested Persons

From: John W. McConnell

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

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The Commercial Division Advisory Council has recommended adoption of a new Commercial Division Rule (22 NYCRR § 202.70[g]), relating to depositions of entity representatives (Exh. A). The proposed new rule would require a party wishing to depose an entity on particular matters to enumerate those matters "with reasonable particularity" in its notice or subpoena. The party being deposed would then be required to designate a representative able to offer testimony on the specified topics. The new rule is intended to promote a more efficient process for deposition of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced. While the proposed rule is modeled on Federal Rule of Civil Procedure 30(b)(6), the Advisory Council states that it "has been carefully drafted to be fully consistent with both the letter and spirit of the CPLR." The proposal adheres to CPLR 3106(d), and departs from the federal rule, in requiring the entity being deposed to designate the witness it will produce.

The Advisory Council also has recommended an amendment of recently adopted Commercial Rule 11-d (presumptive limitations on depositions) to clarify that the seven hour presumptive durational limit applies cumulatively across all entity witnesses tendered by that entity. The proposal recognizes that the complexity of entity depositions may often warrant enlargement of the seven hour limit and explicitly provides that the limit may be enlarged by agreement of the parties or application to the court, "which shall be freely granted."

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 5, 2015.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

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PROPOSED RULE #1

The Commercial Division Rules shall be amended to add the following:

"Rule X Identification of Matters for Deposition of Entity

(a) A notice or subpoena may name as a deponent a corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

(b) Notices and subpoenas directed to an entity may enumerate the matters upon which the person is to be examined, and if so enumerated, the matters must be described with reasonable particularity.

(c) If the notice or subpoena to an entity *does not* name a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in (b), then no later than ten days prior to the scheduled deposition:

a. the named entity must designate one or more officers, directors, members or employees, or other individual(s) who consent to testify on its behalf;

b. such designation must include the identity, description or title of such individual(s); and

c. if the named entity designates more than one individual, it must set out the matters on which each individual will testify.

(d) If the notice or subpoena to an entity *does* name a particular officer, director, member or employee of the entity, but elects to set forth the matters for examination as contemplated in (b), then:

a. pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled

deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead by produced;

b. pursuant to CPLR 3106(d), a notice or subpoena that names a particular officer, director, member, or employee of the entity shall include the notice or subpoena served upon such entity the identify, description or title of such individual; and

c. if the named entity, pursuant to sub-section (e) above, cross-designates more than one individual, it must set out the matters on which each individual will testify.

(e) A subpoena must advise a nonparty entity of its duty to make the designations discussed in this rule.

(f) The individual(s) designated must testify about information known or reasonably available to the entity.

(g) Deposition testimony given pursuant to this rule shall be usable against the entity on whose behalf the testimony is given to the same extent provided in CPLR 3117(2) and the applicable rules of evidence.

(h) This rule does not preclude a deposition by any other procedure allowed by the CPLR.

PROPOSED AMENDMENT #2

Commercial Division Rule 11-d shall be amended as follows:

1. In sub-paragraph (c), the phrase "pursuant to CPLR 3106(d)" should be replaced with "through one or more representatives".
2. In sub-paragraph "(d)", the phrase "pursuant to CPLR 3106(d)" should be deleted therefrom.
3. The following sub-paragraph shall be inserted by between current rule 11-d(d) and (e):

   "(e) "For the purposes of subsection (a)(2) of this Rule, the deposition of an entity shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf. Notwithstanding the foregoing, the cumulative presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted.."

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

DATE: March 10, 2015

RE: **Depositions of Entity Representatives in the Commercial Division of the Supreme Court of New York**

EXECUTIVE SUMMARY

Subsequent to its establishment in 2013 by Chief Judge Jonathan Lippman, the Commercial Division Advisory Council proposed several amendments to the Division's Statewide Rules of Practice (the "Division's Rules"). Through a series of administrative orders, Chief Administrative Judge Gail Prudenti promulgated these amendments, which have since become fully integrated into the Division's Rules.

The integrated amendments, which implement changes proposed by the Task Force on Commercial Litigation in the 21st Century (the "Task Force") and range from enhanced expert disclosure to presumptive limitations on depositions, all share two common goals: (a) to make more efficient and cost-effective the adjudication of commercial disputes in the New York State Commercial Division; and (b) to burnish the Division's reputation as the premier forum in the United States for the resolution of the most complex business disputes.

Having now given effect to the Task Force's recommendations, the Advisory Council's mandate has shifted to the next phase – "[the] further periodic review of the needs and goals of the Commercial Division" (Task Force Report at 31). Towards that end, the Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee") recommends the adoption of a Commercial Division Rule calculated to provide litigants with another arrow in the quiver of efficiency. The new rule would facilitate the pre-trial examination

of entities using the paradigm set forth in Federal Rule of Civil Procedure 30(b)(6). As set forth in detail in this memorandum, the new rule has been carefully drafted to be fully consistent with both the letter and the spirit of the CPLR and will assist the Commercial Division in achieving the objectives for which it was established

The Subcommittee recommends that:

(1) the Council forward to the Administrative Board of Judges the proposed rules set forth in Exhibit A (the "Proposed Rule"); and

(2) the Proposed Rule be incorporated into the Commercial Division Rules.

DISCUSSION AND ANALYSIS

Federal Rule of Civil Procedure 30(b)(6) provides a streamlined method for the examination of entities. The full text of the rule reads as follows:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph . . . does not preclude a deposition by any other procedure allowed by these rules.

Rule 30(b)(6) provides litigants with a highly efficient disclosure device. Pursuant to the rule, an examining party wishing to depose an entity on an array of different subjects need only identify the topics on which testimony is being sought. Based upon the identification of topics, the onus then falls upon the deposing party to identify the specific representative or representatives who will offer testimony on those topics. Furthermore, Rule 30(b)(6) obligates the deposing party to ensure that the tendered witness is sufficiently knowledgeable about the

topics on which he has been designated to testify. Once given, the testimony by the 30(b)(6) designee will "bind" the entity that tendered the witness.

In recommending the incorporation of a Rule 30(b)(6) analog into Commercial Division practice, the Subcommittee does not mean to suggest that representative testimony offered on behalf of an entity is a foreign concept under current state law practice. To the contrary, the CPLR expressly contemplates that an entity can and will testify via an appropriate representative. *See* CPLR 3106(d), 3107 & 3117(2). The salient portions of these provisions are set forth below:

> **CPLR 3106(d)**: *Designation of Deponent:* A party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.

> **CPLR 3107**: A party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise. The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice need not enumerate the matters upon which the person is to be examined. A party to be examined pursuant to notice served by another party may serve notice of at least ten days for the examination of any other party, his agent or employee, such examination to be noticed for and to follow at the same time and place.

> **CPLR 3117**: *Use of Depositions*: At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions . . . 2. the deposition testimony of any person who at the time the testimony was given was an

> officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence . . . .

Taken together, this triumvirate of provisions makes clear that Rule 30(b)(6)-type examinations are entirely consistent with current state court practice. In reaching this conclusion, the Subcommittee examined three key features of 30(b)(6) depositions under federal practice: (1) the "binding" nature of 30(b)(6) testimony; (2) the delineation by the examining party of the specific topics upon which testimony is sought; and (3) the requirement that the deposing entity tender a knowledgeable witness. Our analysis follows:

Feature #1: The "Binding" Nature of 30(b)(6) Testimony

One of the oft-cited characteristics of a Rule 30(b)(6) deposition is that the witness' testimony "binds" the entity that tendered the witness to testify on its behalf. But what precisely does the term "binds" mean? Does a 30(b)(6) deponent's testimony "bind" the entity such that the entity is precluded from offering contrary evidence to rebut the deponent's testimony, or, alternatively, does the witness' testimony "bind" the entity, but only insofar as it constitutes a party admission usable against (but also rebuttable by) the entity who tendered the witness?

The federal courts are not uniform on this issue. While it is true that certain courts do treat 30(b)(6) testimony as a dispositive formal concession by the entity who tendered the witness[1], others consider 30(b)(6) testimony to be nothing more than an evidentiary admission – one that may be rebutted with contrary evidence tendered by the entity that produced the witness

[1] 2 N.Y.Prac., *Com. Litig. in New York State Courts* § 11:20 (3d ed.) (collecting cases).

at issue.[2]

The Second Circuit has not opined on this issue, but courts in this circuit appear to treat 30(b)(6) testimony as rebuttable party admissions, not dispositive concessions. For example, in the Southern District of New York case of *A & E Products Grp., L.P. v. Mainetti USA Inc.*[3], Judge Patterson analyzed the relevant authorities and concluded that "the court is not bound in its decision by the 30(b)(6) evidence offered." *Id.* at *7. As the Court explained:

> It is true that a corporation is "bound" by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be "bound" by his or her testimony. All this means is that the witness has committed to a position at a particular point in time. It does not mean that the witness has made a judicial admission that formally and finally decides an issue.... Evidence may be explained or contradicted. Judicial admissions, on the other hand, may not be contradicted.

Id. (quotation marks and citation omitted); *see also Document Sec. Sys., Inc. v. Coupons.com, Inc.*, No. 11-CV-6528 CJS, 2014 WL 5465467, at *11, f n 7 (W.D.N.Y. Oct. 28, 2014); *In re Weatherford Int'l Sec. Litig.*, No. 11 CIV. 1646 LAK JCF, 2013 WL 4505259, at *4 (S.D.N.Y. Aug. 23, 2013); *Sea Trade Co. v. FleetBoston Fin. Corp.*, No. 03 CIV. 10254 (JFK), 2008 WL 4129620, at *21 (S.D.N.Y. Sept. 4, 2008); *L-3 Commc'ns Corp. v. OSI Sys., Inc.*, No. 02 CIV. 9144 (PAC), 2006 WL 988143, at *9, fn 14 (S.D.N.Y. Apr. 13, 2006).

New York state law treats the testimony of an entity's representative as an evidentiary party admission, the same treatment accorded to 30(b)(6) testimony by the weight of the authority in the Second Circuit. *See* CPLR 3117 ("any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following

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[2] 5A N.Y.Prac., *Evidence in New York State and Federal Courts* § 8:14.

[3] *A & E Products Grp., L.P. v. Mainetti USA Inc., No. 01 CIV. 10820 (RPP)*, 2004 WL 345841 (S.D.N.Y. Feb. 25, 2004)

provisions . . . (2) the deposition testimony of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence . . .); *accord Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 N.Y.2d 94, 103 (1996) ("Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, *or contained in a deposition*, a bill of particulars, or an affidavit") (emphasis added); *Ocampo v. Pagan*, 68 AD3d 1077, 1078 (2d Dep't. 2009) (same).

To summarize, to the extent that the proposed Commercial Division amendment will treat representative testimony as a rebuttable evidentiary admission by the tendering entity, it is entirely consistent with the existing rules in this state (not to mention the interpretation afforded Rule 30(b)(6) by courts in the Second Circuit). By contrast, any amendment to the Commercial Division Rules that would purport to treat the witness' testimony as a dispositive concession would arguably be inconsistent with New York law and would require a concomitant amendment to the CPLR.

Feature # 2: The Specification of the Topics Upon Which Testimony is Sought

When a federal litigant invokes Rule 30(b)(6), the deposition notice or subpoena at issue "must describe with reasonable particularity the matters for examination." The Proposed Rule imposes a commensurate requirement (*see* Exhibit A). The Subcommittee considers the proposed language to be entirely consistent with the CPLR, which itself contemplates (but does not require) the issuing party to list the topics for examination in the deposition notice. *See* CPLR 3107 ("The [deposition] notice *need not* enumerate the matters upon which the person is

to be examined.") (emphasis added). The permissive language utilized by CPLR 3107 clearly permits the inclusion of a topic list as part of the deposition notice.[4]

And the efficiencies that result from providing the opposing party with a list of topics to be covered are self-evident. The list will enable the deposing entity to identify with precision the witness or witnesses best suited to offer the testimony at issue, thereby reducing the chances for a mismatch (intentional or otherwise) between the information sought and the witness tendered.

Feature # 3: The Requirement that the Deposing Entity Tender a Knowledgeable Witness

Federal Rule 30(b)(6) requires the person(s) designated by the entity sought to be deposed to "testify about information known or reasonably available to the organization." This places "an obligation [on the producing entity] to properly prepare its designee." *A & E Products Grp., L.P. v. Mainetti USA Inc.*, No. 01 CIV. 10820 (RPP), 2004 WL 345841, at *6 (S.D.N.Y. Feb. 25, 2004) (collecting cases). That obligation, according to the case law, is commensurate with a party's obligation in responding to interrogatories or document requests. *See Twentieth Century Fox Film Corp. v. Marvel Enterprises, Inc.*, No. 01 CIV. 3016(AGS)(HB, 2002 WL 1835439, at *2 (S.D.N.Y. Aug. 8, 2002) ("I conclude that the scope of the entity's obligation in responding to a 30(b)(6) notice is identical to its scope in responding to interrogatories served pursuant to Rule 33 or a document request served pursuant to Rule 34.").

The Subcommittee believes that state court practice already imposes an obligation upon a deposing entity to tender a knowledgeable witness. Under existing New York law, the deposing entity has the right, in the first instance, to designate its own representative for testimony. *See e.g Seattle Pac. Indus., Inc. v. Golden Valley Realty Associates*, 54 AD3d 930, 932 (2d Dep't

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[4] Support for listing the topics for examination is also found in connection with depositions of non-parties. Specifically, CPLR 3101 (a)(4) which, among other things, governs depositions of nonparties, mandates a written "notice stating the circumstances or reasons such disclosure is sought or required." Although the requisite specificity of a CPLR 3101(a)(4) statement is minimal, nothing in the rule would preclude an examining party from identifying the topics under examination as part of its notice.

2008). In fact, where the examining party seeks to depose an entity "by" a particular witness, the CPLR expressly provides the entity with the right, 10 days in advance of the examination, to cross designate a representative witness of its own choosing. *See* CPLR 3106 (d).

Despite this presumption in favor of entity choice, it is legally inadequate for the entity to designate someone who lacks sufficient knowledge to provide adequate testimony. Under New York law, a party may demand the production of additional witnesses upon a showing, *inter alia*, that "the representatives already deposed had insufficient knowledge, or were otherwise inadequate." *Seattle Pac. Indus., Inc. v. Golden Valley Realty Associates*, 54 AD3d 930, 933 (2d Dep't 2008) (court ordered additional depositions of the principal owners of the plaintiff where first witness produced had insufficient knowledge); *see also Gomez v. State*, 106 AD3d 870, 872 (2d Dep't 2013) (court ordered additional deposition of another of defendant's employees where first witness tendered by entity lacked sufficient knowledge of relevant facts); *Nunez v. Chase Manhattan Bank*, 71 AD3d 967, 968 (1st Dep't 2010) (same); *Alexopoulos v. Metropolitan Transportation Authority,* 37 AD3d 232, 233 (1st Dep't 2007) (same); *Filoramo v. City of New York*, 61 AD3d 715, 716-717 (2d Dep't 2009) (in personal injury suit against the city, court ordered additional deposition of investigating officer who signed the line-of-duty injury report and made original records);

Finally, there appears to be nothing improper under New York law for an entity to designate a representative witness even if that witness is not then employed by the entity; all that is necessary for the testimony to be usable as a party admission is that the witness tendered be an "authorized agent." *See* CPLR 3117. A witness tendered by an entity to act as its representative is, as a definitional matter, an "authorized agent."

The foregoing principles (*i.e.* the right of an entity to designate its own witness, but only if that witness is sufficiently knowledgeable) suggests strongly that New York law does not

prohibit (and indeed may require) that a representative witness be appropriately educated on behalf of the entity.

***Nota Bene*: The Proposed Rule Must Require the Deposing Party to Identify its Chosen Deponent(s)**

As demonstrated above, virtually all of the facets of a Rule 30(b)(6) deposition are consistent with existing New York practice. There is one aspect, however, that, if not addressed appropriately within the proposed rule, would create a conflict with the CPLR – the need to identify the deponent. Although Rule 30(b)(6) permits an entity to designate which of its representatives will testify on the various enumerated subjects[5], it does not require that the deposing party disclose the witness' identity in advance of the examination.[6] The Proposed Rule, as drafted, *would* require the deposing entity to designate a witness prior to the deposition. *See* Exhibit A.

This departure from Rule 30(b)(6) is necessitated by CPLR 3106(d). Under CPLR 3106(d), if an examining party purports to notice the deposition of an entity "by" a particular representative and the deposing party wishes to designate a different representative, the deposing party must identify the name of the witness in a notice of cross-designation at least ten (10) days in advance of the deposition. The effect of this regime is that the requesting party will always know the identity of the witness prior to the examination; either the entity will produce the

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[5] *See* Fed. Rule Civ. P. 30(b)(6) ("The named organization...*may* set out the matters on which each person designated will testify.") (emphasis added).

[6] Federal Rule 30(b)(6) provides that "[t]he named organization must [] designate one or more...persons who consent to testify on its behalf." *See also Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at *6 (M.D.N.C. Sept. 6, 1996) *aff'd sub nom. Food Lion, Inc. v. Capital Cities/ABC, ABC Holding Co., Am. Broad. Companies, Lynne Litt, Richard N. Kaplan, Ira Rosen, Susan Barnett*, 951 F. Supp. 1211 (M.D.N.C. 1996) (observing that a "designation occurred by reason of the simple fact that [defendant] produced these persons in response to [plaintiff's] Rule 30(b)(6) notices.")

witness identified in the initial notice, or it will need to identify and produce an alternative witness.

The Proposed Rule addresses this reality of state practice by requiring the deposing entity to identify the witness(es) it will tender. To do otherwise would guarantee that examining parties would invariably identify a representative for deposition, if only to ensure that if the entity disagrees with the designation, it will identify the alternate witness in its notice of cross-designation.

Statewide Rule 11-d Must be Amended in Connection with this Proposed Rule

Consideration of the Proposed Rule caused the Subcommittee to reexamine the newly promulgated (and soon-to-become-effective) Rule 11-d of the Commercial Division's Rules, which imposes presumptive limitations on depositions. As currently drafted, Rule 11-d provides that the deposition of an entity will count as a single deposition for the purposes of the presumptive ten-deposition limit, even if the entity is deposed through more than one representative witness. *See* Commercial Division Rule 11-d(c) ("[T]he deposition of an entity pursuant to CPLR 3106(d) shall be treated as a single deposition even though more than one person may be designated to testify on the entity's behalf.") This is consistent with current federal practice. *See* Fed.R. Civ. P. 30 Notes of Advisory Committee on Rule – 1993 Amendment ("A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify.").

But Rule 11-d is silent on whether, for the purposes of the presumptive durational limit, each representative witness may be deposed for seven hours, or whether the deposition of the entity will be presumptively limited to seven hours in total, irrespective of the number of constituent witnesses. In an effort to avoid this arguable loophole from becoming a "black hole," the Subcommittee recommends making seven hours the presumptive durational limit for entity depositions across all witnesses tendered by that entity. This said, the Subcommittee recognizes

that the sheer number of topics of examination and the complexity of some of them (e.g. testimony about the architecture of a multi-national company's computer system and how and where it stores various pieces of data) may well warrant an enlargement of the seven hour limitation. Accordingly, the proposed amendment to Rule 11-d recognizes the presumptive cumulative durational limit of seven hours, but explicitly provides that this limit may be enlarged upon agreement or application to the Court and that such an application shall be "freely granted."

RECOMMENDATION

For the reasons set forth above, the Subcommittee recommends that the Council support the Proposed Rule and further amendment to Rule 11-d and urge the Chief Administrative Judge to promulgate them as soon as is practicable.