New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comments on Proposed New Rule 9-a of the Rules of the Commercial Division, Relating to the Encouragement of Use of CPLR Provisions Permitting Immediate Trial or Pretrial Evidentiary Hearing on a Material Issue of Fact

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #5 April 30, 2018

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 March 12, 2018, proposing a new Rule 9-a of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 9-a), relating to the encouragement of use of CPLR provisions permitting an immediate trial or pretrial evidentiary hearing on a material issue of fact (the "Memorandum"). A copy of the Memorandum is attached hereto as Exhibit "A."

I. EXECUTIVE SUMMARY

All trial courts have the authority under the CPLR to order that a material issue of fact raised by motion be separately and immediately tried by the court or a referee assigned by the court. *See* CPLR § 2218, R 3211(c), R 3212(c). The Section agrees with the Commercial Division Advisory Council's (the "Advisory Council") assessment that, in practice, courts have seldom utilized these procedures to resolve potentially dispositive material issues in the early stages of litigation. The Advisory Council seeks to encourage the use of these procedures by adopting new Rule 9-a, which reminds and encourages counsel to advocate, where appropriate on motion that a pre-trial hearing or immediate trial may be effective in resolving a material issue in the case. We therefore recommend that the proposed new Rule 9-a be adopted.

II. SUMMARY OF THE MEMORANDUM

The Advisory Council recognizes that the trial courts (including those in the Commercial Division) already have the authority to order an evidentiary hearing or an immediate trial on a material issue of fact raised on motion. The Advisory Council notes that these procedures are rarely used, resulting in often lengthy litigation, extensive and expensive discovery, and a trial that may ultimately result in a determination that, for example, a statute of limitation bars suit, an issue that could have been resolved much earlier.

The Advisory Council notes that early resolution of material issues can result in many benefits to the judiciary and the litigants. It may resolve the litigation entirely, citing, for example, dispositive affirmative defenses such as a statute of limitation or a jurisdictional defect. If the material issue is key to a claim or defense, early resolution may encourage settlement of remaining issues in the case. At a minimum, early resolution of key issues may streamline discovery, later proceedings and trial. Each of these benefits will serve to conserve litigant as well as judicial resources.

The Advisory Council, however, acknowledges that all issues of material fact may not be proper for early disposition, that litigants may desire for issues to be determined by a jury, and that limited discovery on key issues may be necessary. Therefore, the Advisory Council has proposed a new Rule 9-a to address these considerations. As proposed, it provides:

> *"Subject to meeting the requirements of CPLR §§ 2218, 3211(c) or 3212(c), parties are encouraged to demonstrate on a motion to the court when a pre-trial evidentiary hearing or immediate trial may be effective in resolving a factual issue sufficient to effect the disposition of a material part of the case. Motions where a hearing or trial on a material factual issue may be particularly useful in disposition of a material part of a case, include, but are not limited to:*
>
> > *(1) Dispositive motions to dismiss or motions for summary judgment;*
> > *(2) Preliminary injunction motions, including but not limited to those instances where the parties are willing to consent to the hearing being on the merits;*
> > *(3) Spoliation of evidence motions where the issue of spoliation impacts the ultimate outcome of the action;*
> > *(4) Jurisdictional motions where issues, including application for long arm jurisdiction, may be dispositive;*
> > *(5) Statute of limitations motions; and*
> > *(6) Class action certification motions[.]*
>
> *In advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited discovery targeting the factual issue to be tried."*

III. COMMENTS

The proposed new Rule 9-a does not modify or expand the court's existing authority to order a pre-trial hearing or immediate trial of material issues of fact raised on motion. However, as drafted, the proposed new Rule 9-a, appropriately, in the view of the Section, strongly encourages the parties and/or counsel, who may be in a better position to assess materiality and the benefit that early resolution may achieve, to request the court to exercise such already existing authority. The final decision, of course, as to whether to order a pre-trial hearing or an immediate trial remains with the trial judge, and the trial judge may continue to order same even without request from counsel or the parties. The Section therefore recommends that the proposed new Rule 9-a be adopted.

COUNCIL ON JUDICIAL ADMINISTRATION

HON. CAROLYN DEMAREST
CHAIR
CED79P@GMAIL.COM

STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

MICHAEL P. REGAN
CHAIR
1301 AVE OF THE AMERICAS
NEW YORK, NY 10019
PHONE: (212) 907-9700
FAX: (212) 907-9800
MREGAN@SGRLAW.COM

LITIGATION COMMITTEE

BARBARA SENIAWSKI
CHAIR
1460 BROADWAY
FLOOR 4
NEW YORK, NY 10036
PHONE: (212) 595-4536
FAX: (917) 591-4692
BARBARA@SENIAWSKILAW.COM

By Email
John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Comments on Proposals Concerning Commercial Division Rules 9-a, 11-e, and 17

Dear Mr. McConnell:

The New York City Bar Association (the "City Bar") has reviewed the proposals of the Commercial Division Advisory Council to amend the following Commercial Division Rules:

- Rule 9-a, encouraging use of CPLR provisions permitting immediate trial or pretrial evidentiary hearings on material issues of fact;
- Rule 11-e, regarding technology-assisted review in discovery;
- Rule 17, regarding word limits in briefs, affidavits, and affirmations.

The City Bar generally supports the objectives of these revisions, subject to two observations and some more specific comments and suggestions, on two of the proposals, which are detailed below. First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts. We offer the following additional comments concerning the proposed amendments to Rules 11-e and 17.[1]

[1] 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.

Proposed Amendment to Rule 11-e

The City Bar supports the proposed amendment of Rule 11-e to address technology assisted review in discovery. The technological tools described in the Commercial Division Advisory Council's supporting memorandum, including predictive coding, cannot and should not completely replace human judgment in the document review process (at least not yet), but they can make discovery more manageable and efficient in an increasing number of cases. The Advisory Council's memorandum notes that it is important for parties to "confer and agree on an appropriate approach to document review," and we believe that the rule should more explicitly encourage such cooperation. Accordingly, we suggest that the following sentence be added to the proposed rule: "The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production."

Proposed Amendment to Rule 17

The City Bar supports the proposed amendment of Commercial Division Rule 17 to the extent that it replaces the current Rule's page limits with word limits. We also support the word count certification requirement for briefs. However, we believe that a requirement to certify a word count on the signature page of affirmations and affidavits would be unnecessary, unduly burdensome, and impractical.

The concerns expressed by the Commercial Division Advisory Council about attorneys' formatting contortions, such as narrowing margins and squeezing arguments into footnotes, seem more pertinent to legal briefs than to affidavits or affirmations. Further, affiants may sometimes sign affirmations or affidavits without having themselves prepared the document on a word processing program. Counsel routinely draft and edit such documents in consultation with the affiant. Moreover, it is not uncommon in practice, after an affiant signs an affidavit or affirmation, for changes to be made to pages preceding the signature page with the affiant's permission, without executing a new signature page. This is particularly the case when an affiant is geographically distant from counsel. Requiring a word count on affirmations and affidavits on the signature page therefore would needlessly complicate finalization of these documents. Given the relatively low risk of creative use of margins or footnotes to evade the word limit in such documents, we do not believe the benefit of the proposed certification requirement would outweigh the complications and inconvenience it is likely to cause.

For these reasons, the City Bar recommends revising the third sentence of the proposed revised rule to read: "The signature block of every brief, and memorandum shall include the phrase 'Words' followed by the number of words in the document."

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair
Council on Judicial Administration

Michael P. Regan
Chair
Committee on State Courts of Superior Jurisdiction

Barbara Seniawski
Chair
Committee on Litigation

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution

RE: Response to Comments on Proposed New Rule 9-a

DATE: May 24, 2018

SUMMARY

On March 12, 2018, the Office of Court Administration ("OCA") published for public comment the Commercial Division Advisory Council's recommendation regarding new Rule 9-a of the Rules of the Commercial Division (22 NYCRR § 202.70[g], Rule 9-a), relating to the encouragement of use of CPLR provisions permitting an immediate trial or pretrial evidentiary hearing on a material issue of fact. During the public comment period, OCA received two (2) comments, one from the Commercial and Federal Litigation Section of the New York State Bar Association and one from the New York City Bar Association. Both comments expressed support for the substance of the proposed new rule. However, the City Bar recommended that the proposed new Rule be incorporated into a best practice or guideline and appended to the Commercial Division Rules, rather than adopted as a formal rule. The City Bar also believes that proposed new Rule 9-a would benefit courts beyond the Commercial Division and encourages the OCA to consider promulgating similar rules or best practices for the other State trial courts. The Commercial Division Advisory Council is grateful to the State Bar and the City Bar for their support of the proposed new Rule. The Council also appreciates the City Bar's view that the proposed new rule is sufficiently important and valuable that it should be adopted in courts beyond the Commercial Division. Despite

its appreciation for the City Bar's support, the Commercial Division Advisory Council disagrees with the City Bar's suggestion that the Rule should be reduced to a best practice or guideline and notes that it only has jurisdiction to recommend changes to the rules of the Commercial Division.

DISCUSSION

In its letter to Mr. McConnell commenting on the Commercial Division Advisory Council's proposals concerning Commercial Division Rules 9-a, the City Bar states:

> The City Bar generally supports the objectives of these revisions, subject to two observations and some more specific comments and suggestions, on two of the proposals, which are detailed below. First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts.

The Council believes that a formal rule, rather than a best practice or guideline, is important in reaching its objective of encouraging and enhancing litigation efficiencies. As noted in the Advisory Council's memorandum dated December 8, 2017 proposing new Rule 9-a, "New York State courts often do not conduct an immediate trial of material fact issues and instead postpone their resolution until the plenary trial"; in addition, pre-trial evidentiary "hearings are significantly underutilized in the Commercial Division." A Commercial Division rule that expressly addresses immediate trials or pre-trial evidentiary hearings to resolve material factual issues would serve to enhance the visibility of these procedures and encourage lawyers and judges to use them in commercial cases. As set forth in the Commercial and Federal Litigation Section's memorandum dated April 30, 2018 commenting on proposed new Rule 9-a:

> The Section agrees with the Commercial Division Advisory Council's (the "Advisory Council") assessment that, in practice, courts have seldom utilized these procedures to resolve potentially dispositive material issues in the early stages of litigation. The Advisory Council seeks to encourage the use of these procedures by adopting new Rule 9-a, which reminds and encourages counsel to advocate, where appropriate on motion that a pre-trial hearing or immediate trial may be effective in resolving a material issue in the case. We therefore recommend that the proposed new Rule 9-a be adopted.

In addition, a Commercial Division Rule which explicitly confirms the Court's authority to conduct immediate trials and pre-trial evidentiary hearings for this purpose will provide reassurance to corporate clients which are considering litigation in the Commercial Division, but are concerned that such litigation may be unduly prolonged and expensive. In particular, the proposed Rule will enable New York lawyers to advise potential litigation clients that New York has recently adopted a mechanism expressly designed to reduce the length and cost of litigation in the Commercial Division and to improve its efficiency.

Indeed, the proposed Rule is but one of several new Commercial Division Rules expressly designed to reduce the length and cost of litigation in the Commercial Division and to improve its efficiency. Embodying these mechanisms in rules, rather than merely "best practices or guidelines," provides clients and their counsel with greater assurance that the Commercial Division is a modern, efficient, and effective forum for the resolution of complex disputes. Thus, the proposed Rule is fully consistent with and supportive of Chief Judge DiFiore's Excellence Initiative, which has already resulted in numerous "measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public." (The State of Our Judiciary 2018 Excellence Initiative: Year Two, February 2018, page i.)

Finally, the proposed Rule reflects the Commercial Division Advisory Council's research and analysis and the Advisory Council's conclusions as to the situations where an immediate trial or pre-trial evidentiary hearing of a material issue of fact might be particularly useful and cost-effective in disposition of a material part of a case. In effect, the Advisory Council has recommended efficient uses of CPLR §§2218, 3211(c) and 3212(c) in commercial cases. Thus, proposed new Commercial Division Rule 9-a may assist judges and lawyers who wish to employ these procedures and will prevent them from having to "reinvent the wheel" whenever disputed issues of material fact prevent the disposition of certain pre-trial motions. To facilitate particularly efficient use of the new rule, it also expressly provides that "[i]n advance of an immediate trial or evidentiary hearing, the parties may request, if necessary, that the court direct limited expedited discovery targeting the factual issue to be tried." Thus, the Commercial Division Advisory Council disagrees with the City Bar's suggestion and believes that it is important to include this proposal in a Commercial Division Rule.

More broadly, the City Bar states in its letter to Mr. McConnell: "It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules." The City Bar has expressed the same preference in response to previous proposals by the Council for new Commercial Division rules, and the Council has previously explained the reasons for enactment of formal Rules. There are approximately 180 bar associations in the State of New York. Out of those 180, the City Bar is the only bar association urging that the proposed amendment to Rule 9-a be a best practice or guidance in an appendix rather than a rule. It therefore appears that the other 179 bar associations in New York State do not share the City Bar's preference for a best practices appendix.

Notwithstanding this position, the Advisory Council agrees with the City Bar in underscoring that the proposed new rule is sufficiently important and valuable that it should be adopted in courts beyond the Commercial Division. Historically, the Commercial Division has served as a laboratory for innovation; after rules have been piloted in the Commercial Division, other parts in the court system have adopted those rules. However, the City Bar's proposal is beyond the scope of the Commercial Division Advisory Council's responsibilities. There are other bodies that can recommend statewide court rule changes like the rule changes suggested by the City Bar, such as the Advisory Committee on Civil Practice. It may make great sense to have a rule change considered and adopted that would apply to other courts statewide, but such a rule change must be separately recommended, subjected to public comment and then adopted.

CONCLUSION

It is respectfully urged that the Council adopt the proposed new Rule 9-a without modification or delayed by consideration of a rule that would apply in all courts statewide.

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