

Proposed Commercial Division Rule For Corporate Depositions

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The Commercial Division of the New York State Supreme Court attracts complex business litigation and has its own set of rules specifically designed to make such litigation as efficient as possible for the litigants and the court. Many of the Commercial Division rules, codified at 22 N.Y.S.R.R. § 202.70(g), modify the general state court practices under the New York Civil Practice Law & Rules and often mirror the Federal Rules of Civil Procedure. Very recently, the Administrative Board of the Courts of New York published for public comment a new rule relating to the deposition of corporations and other entities which, once again, brings the Commercial Division more in line with federal practice. This new rule would permit a party to seek the deposition of an entity by providing a list of topics on which the entity will be deposed and permitting the entity to designate individuals to testify on those topics, akin – though not identical – to the familiar Rule 30(b)(6) depositions in federal court.

Currently, the CPLR does not directly provide for the deposition of a corporation or other legal entity in the same manner as the federal rules. Rule 3106(d), for example, permits a party to designate the “identity, description or title” of a particular “officer, director, member or employee of a person” in a notice or subpoena. Such person must then be produced unless the person notifies the requesting party no later than 10 days before the deposition that another individual will be produced instead. Rule 3107 reiterates that if the name of the person to be deposed is not known, the requesting party can provide a “general description sufficient to identify him or the particular class or group to which he belongs.” But, Rule 3107 also provides that “[t]he notice need not enumerate the matters upon which the person is to be examined.” Rule 3117 then provides that the testimony of a party’s officer, director, member, employee or managing or authorized agent may be used as a party admission.

The proposed new rule would draw on and amplify these CPLR provisions to permit a party to name any legal or commercial entity as a deponent in a notice or subpoena and “enumerate the matters upon which the person is to be examined.” If it does so, the matters must be “described with reasonable particularity.” The entity must then “designate one or more officers, directors, members, or employees, or other individual(s) who consent to testify on its behalf,” including the identity, description, or title of such individual(s) and, if more than one individual is designated, the matters on which each individual will testify. In this way, the new rule is similar to the deposition procedures under Federal Rule 30(b)(6). The recommendation supporting the new rule states that the proposed rule “is intended to promote a more efficient process for depositions of entity representatives and reduce the likelihood of a mismatch between the information sought and the witness produced.”

The new rule, however, departs from the federal rules by requiring entities to designate their representatives at least 10 days in advance of the deposition. The new rule also maintains the ability

under CPLR 3106(d) for the notice or subpoena to name a specific officer, director, member or employee of the entity as the deponent while also identifying matters for examination pursuant to the new rule. In that circumstance, the entity must produce the named individual unless it cross-designates a different individual at least 10 days in advance, as provided in CPLR 3106(d).

The proposed new rule does not require the entity to educate its representative on the enumerated matters, but in its recommendation supporting the new rule, the Commercial Division Advisory Council states its belief that New York law already requires entities to produce knowledgeable witnesses. Deposition testimony given pursuant to the proposed new rule will be “usable against the entity on whose behalf the testimony is given” to the same extent provided in the CPLR and the rules of evidence. In other words, the testimony will be deemed an evidentiary admission of the entity. Thus, as under federal practice, corporations and other legal entities should take great care in preparing any witnesses deposed under this new Commercial Division rule.

Finally, the Administrative Board is also seeking public comment on an amendment to the recently adopted Commercial Rule 11-d (presumptive limitations on depositions) to clarify that the seven hour presumptive durational limit on depositions applies cumulatively across all entity witnesses tendered by that entity. But, requests to extend the 7 hour limit should be “freely granted” in light of the often complex and time-consuming nature of entity depositions.

Kelley Drye’s [New York Commercial Division Practice](#) will continue monitoring this and other developments in the New York Commercial Division. If you have any questions please contact:

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