BUSINESS LAW TODAY

Keeping Current:

Recent Developments in the Commercial Division of the New York State Supreme Court (Part Two)

By Hon. Timothy S. Driscoll

Last year, the author reported on the many then-recent changes that had taken place in the Commercial Division of the New York State Supreme Court to ensure the expeditious resolution of business cases. (See "Keeping Current: The New York State Supreme Court Commercial Division: Past, Present, and Future.") These included (1) an increased monetary threshold for assignment of cases to the Commercial Division, (2) more robust expert disclosure mirroring the practice in federal courts, (3) limitations on privilege logs, (4) limitations on interrogatories, (5) a pilot program in New York County (Manhattan) for mandatory mediation of one in every five new cases, and (6) the opportunity for accelerated adjudication of business disputes.

These changes flow from the mandate of Chief Judge Jonathan Lippman that New York State continue to provide a first-rate court division – the Commercial Division of the New York State Supreme Court – to resolve business disputes and thereby ensure that the state remains the commercial capital of the world. There has been "no rest for the weary," however, as the Chief Judge's Commercial Division Advisory Council, under the leadership of Robert L. Haig of Kelley Drye & Warren, continues to recommend innovations to streamline the resolution of business disputes. In the past year alone, Chief Administrative Judge A. Gail Prudenti, upon the advice and consent of the Administrative Board of the New York State Courts, has approved a number of additional measures to further ensure that the Commercial Division remains an efficient and cost-effective forum for the resolution of business disputes. Among these measures are the following.

Earlier Assignment to the Commercial Division

At least as measured by the increasing caseload of Commercial Division judges, attorneys and their clients litigating in New York State courts prefer to have their business disputes resolved in the Division. Indeed, the total number of cases pending in the Division has grown by 13 percent from 2008–2014. Even more pronounced are the number of motions, which has seen an 85 percent increase in that same time period.

The advantages of the Commercial Division, such as active management of cases and judges and law clerks who specialize in business disputes may dissipate, however, if the case is not promptly assigned to a Commercial Division judge. Thus, as of September 2014, a party has 90 days from the service of the complaint to seek assignment to the Commercial Division by filing a Request for Judicial Intervention (RJI), certifying that the case meets the jurisdictional requirements (including any applicable monetary threshold) for such assignment. If an RJI is filed without the party requesting assignment to the Commercial Division, the other party may, within 10 days after receipt of the RJI, request that the Administrative Judge reassign the case to the Commercial Division. Both the 90-day period and the 10-day period may be extended upon a showing of good cause for any delay. The laudable goal of this amendment is to give Commercial Division judges an earlier opportunity to manage their caseloads.

Limitations on Depositions

The New York Civil Practice Law and Rules (CPLR) do not impose a limit on the length of time for a deposition, or on the number of depositions each party can take. While an attorney seeking to limit the time of his or her client's deposition can move for a protective order under CPLR 3103, the more common practice is for a lawyer to invoke the "goose/gander" rule and spend at least as much time deposing the other side's client as the time for his or her own client's deposition.

Borrowing from federal practice, new Rule 11-d sets a presumptive limit on the number and duration of depositions. Depositions are to take seven hours apiece, and are limited to 10 depositions per side. The parties may jointly agree to modifications of either prong. Alternatively, if there is no agreement, a party may make application to the court to vary these presumptions,

which requires a showing of good cause. "Good cause" itself requires consideration of several factors, including the complexity of the litigation, possible evasiveness by the witness, and inappropriate conduct by the lawyer representing the deponent. This significant development is designed, in the words of the Advisory Council, to "encourage . . . cooperation amongst counsel," "discourage[e] unnecessary and potential wasteful discovery," and "reduc[e] the overall cost of litigation." It almost certainly will accomplish all of these goals.

No More Boilerplate Responses to Document Requests

Any attorney who has practiced in the commercial litigation field has his or her own "boilerplate" objections to document requests. These objections typically include words and phrases such as "overbroad," "irrelevant," and "not reasonably calculated to lead to admissible evidence." Of course, the objections typically end with a phrase akin to, "Subject to, and without waiver of the above objections, the following documents are enclosed." New Rule 11-e requires specificity when responding and objecting to document requests. The objecting/producing party must state (1) whether the objections pertain to all or part of the request being challenged; (2) whether any documents or categories of documents are being withheld, and if so, which of the stated objections forms the basis for the responding party's decision to withhold otherwise responsive documents or categories of documents; and (3) the manner in which the responding party intends to limit the scope of its production. Thus sounds the death knell for non-case and document specific objections!

ESI from Nonparties

Commercial practitioners often complain about the time and cost of producing electronically stored information (ESI). Those complaints, which may also reflect the anticipated reaction of in-house counsel reviewing bills associated with this task, likely intensify when the entity asked to produce ESI is not even a party to the case. New Rule 11-c and Appendix A to that rule offer some guidelines for nonparty disclosure of ESI. While these guidelines do not replace existing court rules and statutes regarding discovery, they nevertheless require counsel to consider various "proportionality factors" when seeking ESI from non-parties, such as (1) the amount in controversy; (2) the importance of the requested ESI; (3) the availability of the ESI from another source, including a party; and (4) the expected burden and cost to the nonparty. In an effort to reduce potential litigation costs arising from ESI sought from nonparties, the guidelines further encourage informal resolution of any disputes with motion practice "only as a last resort."

Resolution of Disclosure Disputes

Motions regarding discovery can be compared to a root canal – never all that welcome, and only occasionally necessary after all less-invasive measures have failed. New Commercial Division Rule 14 follows that metaphor as it strikes a balance for resolution of discovery disputes between full-scale motion practice and endless bickering between the parties and their attorneys. At the outset, prior to filing a motion, counsel must consult with one another in good faith to resolve any disclosure disputes. If this early step is not successful, any party may submit a letter to the court of no more than three single-spaced pages outlining the dispute and requesting a telephone conference. Within four business days thereafter, the opposing party (or nonparty) may respond in three single-spaced pages. The judge, or the judge's law clerk, will then attempt to resolve the dispute through a telephone or in-court conference. Parties who desire a formal record after this process still have the opportunity to submit a formal motion.

This process is obviously advantageous to litigants, lawyers, and the court. Litigants no longer must automatically ask their lawyers to compose voluminous tomes regarding potentially insignificant deficiencies in disclosure. Lawyers can avoid the enmity that frequently occurs among counsel during protracted motion practice on issues not related to the merits of the case. And judges and their law clerks can resolve – or at least attempt to resolve – the dispute informally, and as a potential bonus can use the conference regarding discovery disputes as a vehicle to begin discussing global resolution of the matter.

Staggered Court Appearances and Sanctions

Waiting for a courtroom "cattle call" to be completed is a common complaint among New York State court practitioners. Whether due to high caseloads or a desire by judges and court personnel to use the didactic process to ensure compliance with court rules, the norm in many New York State parts (the local nomenclature for the courtroom) has been the calling of the entire calendar at one time. This often served to test the patience of the early-arriving attorney who waited for a seemingly interminable time for his or her late-arriving adversary, and could even result in cases in which all sides were present, but nevertheless were left waiting for the call as the court presided over a lengthy oral argument.

A brand new rule – Rule 34 – recognizes that staggered court appearances can increase efficiency and decrease lawyers' waiting time. Thus, the rule requires the court to assign a time slot, the length of which is in the judge's discretion, for oral argument on any motion.

Lawyers who are late for a scheduled appearance, or fail to comply with other deadlines, do so at their peril. Indeed, effective as of April 1, 2015, a preamble to the Commercial Division rules strongly cautions against dilatory behavior at any stage in the proceedings, stating that the Commercial Division will not tolerate attorneys who "fail to appear for hearings or depositions, unduly delay in producing relevant documents, or otherwise cause the other parties in a case to incur unnecessary costs." Although this preamble does not provide a separate statutory ground for a court to issue sanctions, it directs counsel and litigants to familiarize themselves with existing provisions regarding sanctions.

While the Advisory Council may not be

actively seeking to heed the words of the philosopher Heraclitus that "the only constant is change," it surely will continue to work to ensure that the Commercial Division of the New York State Supreme Court is at the forefront in its ability to serve the business community and attorneys who practice in the field of commercial litigation.

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