



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUN SEL

MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on Proposal to Amend Commercial Division Rule 11 to Include a Preamble on Proportionality and Reasonableness and to Add Provisions Allowing the Court to Direct Early Case Assessment Disclosures and Analysis

Date: September 14, 2021

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Commercial Division Advisory Council (“CDAC”), to amend Commercial Division Rule 11 to include a preamble about proportionality and reasonableness and to add provisions allowing the Court to direct early case assessment disclosures and analysis prior to and after the preliminary conference (Ex. A – CDAC memo). CDAC notes that proportionality and reasonableness “must govern discovery in all cases” (Ex. A, p. 3), and CDAC states that similar provisions relating to early case assessment documents are utilized in other courts (Ex. A, p. 3).

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than November 15, 2021.

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

June 30, 2021

TO: The Administrative Board of the Courts
FROM: The Commercial Division Advisory Council
RE: Proposed Modifications to Commercial Division Rule 11

This memorandum provides suggested modifications to Commercial Division Rule 11 that the Commercial Division Advisory Council's Subcommittee on Best Practices for Judicial Case Management has recommended. The Advisory Council now respectfully submits the following proposed Rule revision for the Administrative Board's consideration and approval.

Rule 11. (Discovery).

A. Current Version of Rule 11

Rule 11. Discovery.

(a) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program, including, in all cases in which the parties certify their willingness to pursue mediation pursuant to Rule 10, provision of a specific date by which a mediator shall be identified by the parties for assistance with resolution of the action; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.

(b) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.

(c) The preliminary conference order may provide for such limitations of interrogatories and other discovery as may be necessary to the circumstances of the case. Additionally, the court should consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d.

(d) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

B. Proposed Revision to Rule 11

Preamble to Rule 11. Acknowledging that discovery is one of the most expensive, time-consuming aspects of litigating a commercial case, the Commercial Division aims to provide practitioners with a mechanism for streamlining the discovery process to lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery. It is important that counsel's discovery requests are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action.

Rule 11. Discovery.

- (a) **The court may direct plaintiff to produce a document stating clearly and concisely the issues in the case prior to the preliminary conference. If there are counterclaims, the court may direct the party asserting such counterclaims to produce a document stating clearly and concisely the issues asserted in the counterclaims. The court may also direct plaintiff and counterclaim plaintiff to each produce a document stating each of the elements in the causes of action at issue and the facts needed to establish their case.**
- (b) **The court may further direct, if a defendant filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff and counterclaim plaintiff to revisit the documents to again state, clearly and concisely, the issues remaining in the case, the elements of each cause of action and the facts needed to establish their case.**
- (c) The preliminary conference will result in the issuance by the court of a preliminary conference order. Where appropriate, the order will contain specific provisions for means of early disposition of the case, such as (i) directions for submission to the alternative dispute resolution program; (ii) a schedule of limited-issue discovery in aid of early dispositive motions or settlement; and/or (iii) a schedule for dispositive motions before disclosure or after limited-issue disclosure.
- (d) The order will also contain a comprehensive disclosure schedule, including dates for the service of third-party pleadings, discovery, motion practice, a compliance conference, if needed, a date for filing the note of issue, a date for a pre-trial conference and a trial date.
- (e) The preliminary conference order may provide for limitations on interrogatories and other discovery as may be necessary to the circumstances of the case. Additionally, the court should consider the appropriateness of altering prospectively the presumptive limitations on depositions set forth in Rule 11-d.
- (f) The court will determine, upon application of counsel, whether discovery will be stayed, pursuant to CPLR 3214(b), pending the determination of any dispositive motion.

C. Rationale for Revision

The Advisory Council recommends Rule 11 be modified to include a Preamble about proportionality and reasonableness—two concepts that must govern discovery in all cases, including the most intricate, difficult and complex Commercial Division case. These concepts are included in a Preamble so that no party or counsel may argue that these concepts are modifying any legal standards or Rules that apply to the scope of discovery.

The Advisory Council also recommends the addition of provisions allowing the court to direct early case assessment disclosures and analysis prior to and after the preliminary conference. The goal of these recommendations is to streamline the discovery process so that discovery is aligned with the needs of a case and not a search for each and every possible fact in the case. Similar provisions for early case assessment documents are utilized in other international fora and federal courts.

We thank you for your consideration of these proposed changes to Rule 11.