New York State Law Digest

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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

THE CPLR AND THE UNIFORM RULES

The Complicated Nature of New York State's Procedural Law

We have discussed in the past the complicated nature of the various sources of procedure in New York State. While the CPLR occupies a significant portion of the arena, it shares its applicability with other statutes (e.g., Estates Powers and Trusts Law; General Obligations Law; General Construction Law; Judiciary Law; Uniform Commercial Code), local practice idiosyncrasies and, most prominently, the Uniform Rules. There can be several reasons advanced for the creeping prominence of those rules, but a most basic one is the ease with which the Uniform Rules can be amended, in contrast to the CPLR, which requires the involvement of the Legislature and the Governor. Any procedural bill, which does not exactly solicit enthusiastic adherents among legislators, may come up against an array of forces and special interest groups that can work hard to sabotage the passage of the bill.

The Prominence of the Uniform Rules

For some time, practitioners have been keenly aware that in specific areas—for example, appellate practice—the relevant rules . . . rule. The commercial division rules have transformed practice there, as they continue to replicate the federal system, with many provisions differing from and, in some instances, in conflict with the CPLR. Moreover, in other areas like discovery and motion and calendar practice, the rules play a prominent role. With the wholesale adoption of rules in the general trial courts in February 2021 (as further amended July 2022), perhaps we have reached a tipping point in New York practice.

As a result, it is imperative that counsel be fully versed in the rules. Below, we address some significant examples of the rules that impact New York Practice, primarily relating to discovery, and that apply in the general trial courts. We also reference, at times, the relevant commercial division rules. But those practicing in that part are already (or need to become) familiar with the varied practice there. We hope to return to these issues from time to time.

Depositions, CPLR Article 31, and 22 N.Y.C.R.R. § 202.20-b

CPLR Article 31 provides extensive provisions concerning the time, place, conduct, and use of depositions, among other things. What is does not state are any restrictions on how long a deposition is to take or how many depositions can be conducted. That has been left to the Uniform Rules. For many years there have been limits on depositions in federal court, and the commercial division adopted such rules years ago (22 N.Y.C.R.R. § 202.70(g), Rule 11-d). In the 2021 amendment spree, similar limits were applied in the general trial courts.

22 N.Y.C.R.R. § 202.20-b is entitled "Limitations on Deposition" and provides that unless stipulated by the parties or court-ordered, depositions taken by the plaintiffs, defendants, or third-party defendants are limited to ten and seven hours per deponent. The propriety of and timing for non-party depositions are subject to any restrictions imposed by applicable law. Moreover:

- For the purposes of both the number and duration of the depositions, the deposition of an entity through one or more representatives is to be treated as a single deposition, even if more than one person is designated to testify on behalf of the entity. Nevertheless, "the cumulative

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presumptive durational limit may be enlarged by agreement of the parties or upon application for leave of Court, which shall be freely granted."

- A deposition of an officer, director, principal, or employee who is also a fact witness (as opposed to a CPLR 3106(d) entity representative) constitutes a separate deposition.
- The court can alter the above deposition limits (number and duration) for "good cause shown."
- A party's right to seek appropriate relief under the CPLR or other applicable law remains intact.

Whether the 10/7 rule is relevant in many cases in the general trial courts, which overwhelmingly handle personal injury cases, is subject to debate. Nevertheless, there are commercial cases that do not meet the monetary threshold of the commercial division and, thus, it is a rule that cannot be ignored. In *Wanliss v. Retina Assoc. of N.Y., P.C.,* 2024 N.Y. Slip Op. 04478 (2d Dep't Sept. 18, 2024), the Second Department affirmed the trial court's denial of plaintiff's motion seeking to extend a deposition because

> the plaintiff did not demonstrate the existence of good cause to extend the time limit for Roen's deposition, which had already proceeded for more than 10 hours. The transcript of Roen's deposition does not show any significant delay caused by improper conduct or obstruction by the deponent or her attorney, and the plaintiff has not shown that seven hours was an insufficient amount of time within which to complete the deposition under the circumstances of the case.

Id. at *3.

Designation of Deponent, CPLR 3106(d), and 22 N.Y.C.R.R. § 202.20-d

CPLR 3106(d) authorizes a party seeking a deposition of a corporation to designate a particular officer, director, or employee. The corporation must then produce that individual unless it notifies the requesting party, no later than 10 days prior to the scheduled deposition, that the corporation will instead produce another individual, providing the identity, description, or title of the individual. If the party seeking the deposition is unhappy with the corporation's designated deponent, the party can move for a protective order.

But unlike the federal or commercial division rules (22 N.Y.C.R.R. § 202.70(g), Rule 11-f), the CPLR does not provide a mechanism to depose entities with respect to specific matters. Via the 2021 amendments, 22 N.Y.C.R.R. § 202.20-d was added, which permits a party to identify specific matters on which to examine an entity, as defined in the rule, at the deposition. Thus, the notice or subpoena can set forth, with reasonable particularity, the matters upon which the person is to be examined. If a particular person is not identified, but the matters for examination are enumerated, then, at least 10 days before the deposition, the entity is to designate and identify the individual, with knowledge, including the name and title or description, who consents to testify, and, if multiple persons are designated, the matters about which each individual will testify. If the notice or subpoena names a specific individual and includes the matters for examination, the entity must produce the designated person, unless it notifies the requesting party at least 10 days before the deposition that it will produce another identified individual or other individuals and provides the matters on which each individual will testify. The rule does not preclude a deposition by any other procedure the CPLR permits.

Again, this is an important rule in commercial cases that do not meet the commercial part monetary threshold. It may also be relevant in some "non-commercial" cases, as defined in the rules.

Objections, Directions Not to Answer at a Deposition, CPLR 3115, and 22 N.Y.C.R.R. Part 221

CPLR 3115 sets forth objections relating to the qualification of persons taking the deposition, competency, and objections to questions. Objections must be made at a deposition to errors that might be obviated or removed if the objections were promptly presented, or they are waived. These would include the most common objections as to the form of questions or answers, and objections to errors and irregularities in the manner of the taking of the deposition, in the oath or affirmation or in the conduct of persons. In addition, one should object to questions that seek privileged information.

What CPLR 3115 does not address, and what was a continuing problem years ago, were speaking objections and improperly directing witnesses not to answer questions. Those issues were addressed in a 2006 rule, 22 N.Y.C.R.R. Part 221, which provides that a deponent is required to answer all questions except to preserve a privilege or right of confidentiality, to enforce a limitation in a court order, or "when the question is plainly improper and would, if answered, cause significant prejudice to any person." Thus, an attorney cannot direct a witness not to answer except in the instances described above or as specifically allowed in CPLR 3115. *See Phillips Auctioneers LLC v. Grosso,* 2023 N.Y. Slip Op. 31051(U) (Sup. Ct., N.Y. Co. 2023) (trial judge directs counsel to attend a CLE on how to defend a deposition, and the witness, a New York licensed attorney who improperly objected to questions, refused to answer, and acted with incivility, to attend a CLE on civility); *Rubin v. Sabharwal,* 76 Misc.3d 1211(A) (Sup. Ct., N.Y. Co. 2022) (applying Rule 221 to particular deposition questions and directions not to answer). The Rule also prohibits counsel defending a deposition from interrupting the deposition to communicate with the witness unless all parties agree, or it is for the purpose of determining whether a ground for an objection such as privilege applies.

When confronted with obstreperous attorneys or witnesses, courts can appoint referees to supervise the continuation and completion of the deposition. *See e.g., Slapo v. Winthrop Univ. Hosp*., 186 A.D.3d 1281 (2d Dep't 2020) ("While we agree with the court's characterization of the improper conduct of Slapo's attorney at Brem's deposition, we observe that the defense attorneys violated 22 NYCRR § 221.1 by making numerous objections and making speaking objections. We further note that Brem violated 22 NYCRR 221.2 by refusing to answer questions. Given the obstructive conduct by the defense attorneys and Brem in violation of 22 NYCRR part 221, and the

improper conduct of Slapo's attorney during the deposition, we agree with the court that appropriate supervision of the balance of Brem's deposition is necessary.").

Minimal Expert Disclosure Under CPLR 3101 and Expansive Disclosure Under Commercial Division Rule 13(c), 22 N.Y.C.R.R. § 202.70(g), Rule 13(c)

CPLR 3101(d)(1) provides for very limited disclosure of the expert's identity, the subject matter on which the expert is expected to testify, the substance of the facts and opinion on which the expert is expected to testify, the expert's qualifications, and a summary of the grounds for the expert's opinion. It does not provide for the expert's deposition (except in certain limited circumstances) or for a report. Further disclosure, including depositions, is only available by court order upon a showing of special circumstances.

In contrast, federal practice provides for wide-ranging and expansive disclosure of experts. Commercial Division Rule 13(c) (22 N.Y.C.R.R. § 202.70(g), Rule 13(c)) is reminiscent of federal law and could not be more different than the narrow CPLR permissible disclosures. It provides for the exchange of the testifying expert's detailed report and the expert's deposition. The report is to include a complete statement of the expert's opinions and the basis and the reasons for them, the data considered in forming the opinion(s), any exhibits to be used, the witness's qualifications (including a list of authored publications in the previous 10 years), a list of other cases in which the expert testified in the prior four years, and the compensation to be paid. All expert disclosure must be completed no later than four months after fact discovery is complete.

In addition, "[t]he note of issue and certificate of readiness may not be filed until the completion of expert disclosure. Expert disclosure provided after these dates without good cause will be precluded from use at trial." *See Agora Gourmet Foods Inc. v. Edge*, 2021 N.Y. Slip Op. 32036(U) (Sup. Ct., Westchester Co. 2021) ("With regard to Plaintiff's attempt to designate Hydro's Canavan as an expert on the eve of trial even though it had hired Hydro (Canavan) prior to filing its Note of Issue, the Court fails to see how Plaintiff has established good cause to permit Canavan to testify as an expert at the trial.").

The failure to provide the written report and data supporting the expert's opinions can result in the exclusion of the expert disclosure. *See e.g., Taxi Tours Inc. v. Go N.Y. Tours Inc.*, 227 A.D.3d 530 (1st Dep't 2024) (Appellate Division affirms trial court's exclusion of expert report and testimony and denial of leave to reopen discovery. "Go New York did not provide the data forming the basis for its expert's opinions, which was gathered in connection with Go New York's allegations of false online reviews. The omission of the reviews prejudiced the Taxi Tours defendants' ability to respond to the expert's opinions (citation omitted). Go New York's reliance on the federal law standard, in which noncompliance would not lead to exclusion of expert disclosure where 'the non-disclosing party sustains its burden of showing that the failure to disclose was either substantially justified or harmless' (citation omitted), is unavailing. The absence of the data cannot be considered harmless given the prejudice involved and Go New York has not shown that its nondisclosure was substantially justified. Go New York has provided no excuse for failing to preserve copies of the review data purportedly substantiating its expert's opinions. Go New York has not presented any efforts it took to back up the data before inquiring about the matter on May 11, 2023, weeks after providing the expert disclosure on April 27, 2023.").

It is important to note that in the 2021 amendments applicable to the general trial courts, there were *no* provisions adopted similar to the commercial division rule with respect to expert disclosure. Thus, in those courts, the CPLR 3101 limited expert disclosure requirements apply. Not a surprise, since the plaintiffs' personal injury bar has consistently insisted that requiring depositions of all experts in each case would result in many fewer cases being affordable to bring.

However, it should also be stressed (as noted above) that in commercial cases (and some "non-commercial" ones) prosecuted in the general trial courts, full expert disclosure (including depositions and expert reports) could be important. Regardless, there is nothing that prohibits parties from agreeing among themselves to depose each other's experts. *See, e.g., Jamaica Pub. Serv. Co. v. La Interamericana Compania de Seguros Generales S.A.,* 293 A.D.2d 336, 336 (1st Dep't 2002) ("There is no merit to plaintiff's challenge to the court's order, orally rendered at a conference, directing depositions of experts, in view of the letter one of the defendants addressed to the court and circulated to all parties reiterating the court's directives given at the conference, plaintiff's responsive letter expressly consenting to such letter, and plaintiff's participation in the depositions of experts. Unless public policy is affronted, not the case here, parties are afforded great latitude in charting their own procedural course (citations omitted).").

Interrogatories, CPLR 3130-3133, 22 N.Y.C.R.R. § 202.20, and 22 N.Y.C.R.R. § 202.70(g), Rule 11-a

CPLR 3130–3133 address the use of interrogatories, their timing and scope, answers and objections and restrictions on their use. Nowhere is there a limit on the number to be served. Such restrictions can be found, however, in the Uniform Rules.

The general trial courts limit the number of interrogatories to 25 (including subparts), unless the parties agree to a different number of interrogatories or the court orders otherwise. 22 N.Y.C.R.R. § 202.20.

The commercial division rules are a bit more detailed in this area. 22 N.Y.C.R.R. § 202.70(g), Rule 11-a, also limits the number of interrogatories to 25, unless the preliminary conference order specifies a different limit. Rule 11-a(a). Moreover, unless the court orders otherwise, the interrogatories must be limited to the "name of witnesses with knowledge of information material and necessary to the subject matter of the action, computation of each category of damage alleged, and the existence, custodian, location and general description of material and necessary documents, including pertinent insurance agreements, and other physical evidence." Rule 11-a(b). Any other interrogatories can be served during discovery if the parties consent or if the court so orders for good cause shown. Rule 11-a(c). *See Lurie v. Lurie*, 226 A.D.3d 992 (2d Dep't 2024) ("The plaintiffs further demonstrated that 'good cause'

(Rules of Commercial Div of Sup Ct [22 NYCRR 202.70(g)] rule 11-a[c]) existed for the interrogatories, including the interrogatory for information identifying any gifts, transfers, devises, and/or bequests made by Abraham Lurie to Susan Lurie, Leila Lurie, Louis Venezia, and/or any children of Leila Lurie in 2012.").

Unless otherwise ordered by the court, interrogatories seeking the claims and contentions of the opposing party can be served when other discovery has concluded and at least 30 days before the discovery cut-off date. Rule 11-a(d).

Significantly, CPLR 3130(1) provides that, except in a matrimonial action, a party cannot serve written interrogatories and a demand for a bill of particulars on the same party. Moreover, in a property damage, personal injury, or wrongful death action based solely on a cause of action for negligence, a party cannot serve interrogatories upon and take a deposition of the same party pursuant without leave of court. Thus, in your garden variety personal injury action (e.g., slip-and-fall or motor vehicle action), a defendant generally serves a demand for a bill of particulars (instead of interrogatories) together with a deposition notice and a notice for discovery and inspection. Thus, the restriction on interrogatories is generally of no moment in those cases.

Efforts to Resolve Issues Without Court Intervention, 22 N.Y.C.R.R. § 202.20-f and 22 N.Y.C.R.R. § 202.7(c)

While CPLR Article 31 governs disclosure, it does not require counsel to consult before bringing any dispute to the court's attention via motion. Instead, 22 N.Y.C.R.R. § 202.20-f(a) provides that "[t]o the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice." Moreover, "[a]bsent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference." 22 N.Y.C.R.R. § 202.20-f(b). *See also* 22 N.Y.C.R.R. § 202.7(c). The failure to consult or otherwise comply with these rules (for example, failing to include an affirmation of good faith) can result in the denial of the motion. *See also* Commercial Division Rule 14, 22 N.Y.C.R.R. § 202.70(g), Rule 14.

Thus, in *Bayview Loan Servicing, LLC v. Evanson*, 2024 N.Y. Slip Op. 04367 (2d Dep't Sept. 11, 2024), the Appellate Division affirmed the trial court's denial of defendant's motion to strike the complaint pursuant to CPLR 3126 for failing to "substantively comply with the requirements of 22 NYCRR 202.7 and 202.20-f(b)."

Statement of Material Facts, CPLR 3212 and 22 N.Y.C.R.R. § 202.8-g

CPLR 3212 governs summary judgment motions. In addition to providing timing guidelines, it references the submission of an affidavit "by a person having knowledge of the facts" and the standard: "The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

22 N.Y.C.R.R. § 202.8-g, was a contentious addition in 2021 (and was amended in 2022), relating to the statement of material facts on a summary judgment motion. This type of document has long been used in the federal courts and in the commercial division (Rule 19-a). Currently, subdivision (a) provides that the statement of material facts (with appropriate citation to evidence submitted) *may be* directed by the court, removing the prior mandatory language. Where the statement is served by the proponent of the motion, the party opposing must provide a correspondingly numbered response. 22 N.Y.C.R.R. § 202.8-g(b). Subparagraph (c) makes clear that any of the statements that are not controverted may be deemed admitted only for the purposes of the motion, not the entire action. In addition, the subsection provides that "[t]he court may allow any such admission to be amended or withdrawn on such terms as may be just."

Finally, subsection (e) sets forth multiple remedies to the court where a party fails to provide the required statement. Thus, if the motion's proponent fails to include the statement, the court can order compliance and adjourn the motion, deny the motion without prejudice to renewal upon compliance, or can take such other action as may be just and appropriate. Where the opponent of a motion fails to provide the required counterstatements, the court can similarly order compliance and adjourn the motion; can, after notice to the opponent and an opportunity to cure, deem the assertions in the proponent's statement to be admitted for the purposes of the motion; or may take such other action as may be just and appropriate. *See On the Water Prods., LLC v. Glynos,* 211 A.D.3d 1480 (4th Dep't 2022) ("Trial court erred in determining that it was compelled to deem plaintiff's assertions admitted because the defendants did not submit counter statements. Although the court had discretion under section 202.8-g (former [c]) to deem the assertions in plaintiff's statement of material facts admitted, it was not required to do so (citations omitted). '[B]lind adherence to the procedure set forth in 22 NYCRR 202.8-g' was not mandated (citation omitted)."); *Smith v. MDA Consulting Engrs., PLLC*, 210 A.D.3d 1448 (4th Dep't 2022) (Appellate Division deems defendant's mistake in failing to file promptly a statement of material facts corrected by late filing, citing to CPLR 2001); *Handley v. BH Props. NYC, LLC*, 2024 N.Y. Slip Op. 31019(U) (Sup. Ct., N.Y. Co. 2024) ("[T]he absence of a separate statement of undisputed material facts is not fatal to a motion for summary judgment. Pursuant to 22 NYCRR 202.8-g (a), the court is afforded with discretion as to whether such statement is required. This court declines to deny the motion on the procedural basis of defendants' failure to include a statement of undisputed material facts and will resolve this matter on its merits (see 22 NYCRR 202.8-g [e]).").

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