

The Mother of Innovation: 2021 Commercial Division Rule Changes

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Many of the 2021 Commercial Division rule changes arose from pandemic-related health and safety concerns. However, the changes do far more than merely enable the Commercial Division parts to continue to adjudicate cases effectively in the COVID-19 world. These rules are designed to increase the efficiency and productivity of the Commercial Division beyond COVID-19 and further entrench its role as a leader in efficient adjudication and innovation among courts.

"As I see it," said Socrates, "the true creator of our invention is necessity." Plato, *Republic* at II.369c. So too did the necessity for change become apparent to judges and practitioners as successive waves of COVID-19 infections compelled courts to shut their doors to in-person legal proceedings. But the administration of justice is and must be unshakable. In the midst of uncertainty and crisis, courts were quick to deploy new technologies and enact rules to enable virtual proceedings and sustain court operations. At the front line of this effort was the New York State Commercial Division, no stranger to innovation, which last year added or amended five rules to §202.70(g) of the Rules of Practice encompassing: pre-trial submissions (Rule 31), alternative dispute resolution (ADR) (Rule 3(a)), disclosure statements (Rule 35), virtual evidentiary hearings and non-jury trials (Rule 36), and remote depositions (Rule 37).

As a specialized forum for business disputes, the Commercial Division carries a well-earned reputation for innovation. The Commercial Division was formed in 1995 following the success of its experimental predecessors, the four initial Commercial

Parts which demonstrated that a state court could provide "efficient, cost-effective and timely processing of commercial cases and an improvement in the quality of disposition." Robert L. Haig, *Can New York's New Commercial Division Resolve Business Disputes as Well as Anyone*, 13 *Touro L. Rev.* 191, 196 (1996). Since then, it has been at the vanguard in adopting rules and advanced technologies to aid in effective caseload management, including being the first in New York to utilize electronic filing. N.Y.S. Unified Court Sys., *History*, Commercial Division—NY Supreme Court. Such was the Commercial Division's success as an "efficient, sophisticated, up-to-date court, dealing with challenging commercial cases" that 29 Commercial Division rules were adopted into the New York State Supreme Court's Uniform Rules, effective Feb. 21, 2021, for use throughout the court system. Administrative Order 270/2020, N.Y.S. Unified Court Sys. (Dec. 29, 2020) ("AO 270/2020"). Chief Administrative Judge Lawrence K. Marks properly cited the preeminence of the Commercial Division and its role as "an incubator ... a recognized leader in court system innovation ... demonstrating an unparalleled creativity and flexibility in development of rules and practices."

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Many of the 2021 Commercial Division rule changes arose from pandemic-related health and safety concerns. However, the changes do far more than merely enable the Commercial Division parts to continue to adjudicate cases effectively in the COVID-19 world. Rather, consistent with the Division's original purpose, these rules are designed to increase the efficiency and productivity of the Commercial Division beyond COVID-19 and further entrench its role as a leader in efficient adjudication and innovation among courts.

Rule 31: Pre-Trial Submissions

The amendments to Rule 31, initially proposed months before the pandemic arrived, relieve counsel of the requirement to submit pre-trial memoranda, unless directed by the court. The revisions also permit counsel to submit pre-trial memoranda, trial exhibits, and proposed jury instructions on a USB drive. This amended rule also no longer mandates submissions in WordPerfect format, opting instead to accept submissions as Word documents. The driving rationale behind these changes was an understanding that modern courtroom practices and technology were changing, and that many justices had already adopted such practices. See Com. Div. Advisory Council Technology Subcommittee, Proposed Revisions to Commercial Division Rule 31 (Jan. 24, 2020). In formalizing contemporary practices used by justices and courts in the Commercial Division and elsewhere, the amended Rule 31 better reflects the modern character of the Commercial Division and its pursuit of "cost-effective, predictable, and fair adjudication of complex commercial cases." AO 270/2020.

Rule 3: ADR and Settlement Conferences

Like the other 2021 rule changes, the amendments to Rule 3(a), governing ADR, are in line with the Commercial Division's innovative character, which had "already made the expanded use of alternative dispute resolution a hallmark of court reform and innovation." Com. Div. Advisory Council, Proposal to Amend Commercial Division Rule 3(a) to Provide for Neutral Evaluators on Rosters of Approved Neutrals (June 20, 2020) (Rule 3(a) Proposal) at 2. Though the changes appear relatively modest, they noticeably expand the availability of ADR in the Commercial Division by permitting neutral evaluators to be certified with only six hours of training instead of the forty hours required for mediators pursuant to Part 146 of the Rules of the Chief Administrative Judge.

In proposing the Rule 3(a) amendments, the Commercial Division Advisory Council (the Council) was intent on expanding the availability of ADR services, but also on addressing the "historical lack of diversity" that was exacerbated by the 40-hour mediation training requirement. Rule 3(a) Proposal at 1, 5. Citing the disproportionate impact that the long mediation training requirements might have on women and minorities, the Council believed reducing that requirement would increase ADR opportunities and the diversity in the court's neutral rosters.

Rule 35: Disclosure Statements

While new to the Commercial Division, Rule 35 reflects the familiar standards of §100.3(E)(1)(c) of the Rules of Judicial Conduct, which requires judges to recuse themselves if they, their spouses or their minor children have an "economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding." The new rule requires corporate parties to file disclosure statements identifying any parent corporations and any publicly held corporations owning 10% or more of its stock. The new rule mirrors Rule 71 of the Federal Rules of Civil Procedure (FRCP), which itself stemmed from Rule 26.1 of the Federal Rules of Appellate Procedure. Like FRCP 71, Rule 35 obviously is designed to better enable judges to consider whether they should preside over a case due to potential conflicts resulting from implicated economic interests.

Rule 36: Virtual Evidentiary Hearings or Non-jury Trials

No stranger to new court technologies, the Commercial Division is well-prepared to implement Rule 36, which permits virtual evidentiary hearings and virtual non-jury trials on consent of the parties. Though virtual proceedings unquestionably "resulted from necessity, not from choice," the Council nevertheless proposed Rule 36 with the understanding that "[t]he proposal is not intended as a temporary or interim measure to deal only with current constraints ... caused by the pandemic. Instead, this proposal is designed to increase the efficiency and productivity of future court operations and also thereby benefit the public in general and the bar." Com. Div. Advisory Council, Proposal for New Commercial Division Rule Permitting Virtual Evidentiary Hearings and Non-Jury Trials on Consent (June 2, 2020) (Rule 36 Proposal) at 2.

The benefits of Rule 36 in the context of a pandemic are self-evident. But the value of virtual evidentiary hearings and non-jury trials goes far beyond simply allowing courts to function in such times. Recognizing the value of this new tool, the Council believed Rule 36 would “encourage parties to make voluntary use of an easy-to-use and helpful technological tool” and “facilitate participation of lawyers, witnesses and parties whom have disabilities which prevent or hamper their attendance in court.” Rule 36 Proposal at 3-4. Not surprisingly, considerations of innovation and efficiency were also at the heart of the proposal for Rule 36, which embraced the “opportunities technology provides to help the public, the bar and the judiciary, by improving the efficiency and productivity of the New York State court.”

Rule 37: Remote Depositions

While CPLR 3113(d) has permitted remote depositions by stipulation, new Rule 37 enables a party unilaterally to seek leave of court to conduct depositions remotely. On such a motion, the court is to consider several factors, including, but not limited to: (1) distance and travel costs; (2) party status; (3) the importance of the testimony; and (4) safety.

Rule 37 mandates that remote depositions “shall replicate, insofar as practical, in-person depositions and parties should endeavor to eliminate any potential for prejudice that may arise as a result of the remote format of the deposition.” To that end, Rule 37 encourages parties to utilize Appendix G thereto, the “form protocol for remote deposition” that addresses many of the practical concerns likely to arise during remote depositions. Its key provisions include clauses governing sufficient technologies, private communications, breakout rooms, written transcripts, audio and video quality, and even the deponent’s technological abilities.

Conclusion

Far from immune to crisis, the Commercial Division, like most other courts, was forced to adapt since the onset of pandemic. The 2021 Commercial Division rule changes are reflective of the terrible impact COVID-19 had on the justice system, yet also mirror the Commercial Division’s well-earned reputation as an innovative and efficient forum for complex cases. In proposing Rule 36, the Council commented on the Commercial Division’s charge and role as “a laboratory for innovation in the court system,” and that “after new rules and procedures have been introduced in the Commercial Division, other parts of the court system can evaluate whether these innovations might be valuable to them as well.” While past success is no guarantee of the future, the 2021 rule changes justify continued faith in the Commercial Division’s ability to render efficient adjudication of complex commercial cases even in the worst of times.



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