

## 4 Proactive Strategies For 'Rocket Docket' Discovery in SDNY

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Attorneys, particularly those handling complex litigation matters, are generally accustomed to conducting civil discovery over the course of years, with document review and production alone often spanning six to 12 months.

Over the past decade, however, judges in the U.S. District Court for the Southern District of New York have steadily adopted case management plans that have dramatically and intentionally hastened the pace of discovery, creating a quasi-"rocket docket" jurisdiction in one of the country's most active federal judicial districts.

As a result, attorneys who practice in the SDNY have likely experienced expedited discovery schedules as short as four months, and the trend shows no sign of abating. Crowded dockets and a desire to ensure litigants can resolve their claims in a timely manner, among other judicial efficiency concerns, have likely contributed to judges' decisions to update their rules to push cases forward more purposefully.[1]

Of the 45 district judges currently sitting in the SDNY, at least 25 require parties to complete fact discovery within 120 days of the initial pretrial conference, with some judges shortening that period to just 90 days and at least one judge[2] setting a 60-day deadline for the completion of all discovery.

Judges using an expedited case management plan may allow extensions for good cause shown — for example, when the case is particularly complex or presents unique jurisdictional challenges, or when witnesses are overseas or unavailable within the applicable time frame. Generally, however, they expect parties to operate in good faith to meet the required discovery benchmarks and are unlikely to grant adjournment requests as a matter of course.

Individual rules that incorporate the abbreviated discovery schedule generally include the following language:

All fact discovery shall be completed no later than \_\_\_\_\_ . [A period not to exceed 120 days (use an exact date), unless the Court finds that the case presents unique complexities or other exceptional circumstances.].[3]

Moreover, absent the application of a specific statute, such as the Private Securities Litigation Reform Act, the filing of a motion to dismiss does not automatically stay discovery and a defendant cannot assume a request to stay discovery will be granted.

## **The Unique Challenges of Condensed Discovery**

Counsel should consider the unique challenges associated with assignment to an SDNY judge with tighter discovery deadlines, particularly in complex commercial cases that will likely require deviation from the judge's standard schedule. In those cases, taking the earliest opportunity to clearly articulate to the court the reasons why such deviation is required — e.g., because of the complexity of the underlying subject matter or location of information and witnesses — may help streamline any subsequent application to extend discovery deadlines.

While tighter discovery deadlines may, at first glance, appear to benefit plaintiffs, in situations where defendants do not have onerous review or production obligations and can quickly identify and produce relevant and critical information, defendants may gain the upper hand in terms of timing pressure. Such a scenario might occur where the plaintiff is the purchaser in a corporate acquisition and has control of both its own and the seller's documents and information after closing.

At the first sign of discovery disputes, practitioners should meet and confer with opposing counsel quickly and frequently so they can promptly apply to the court for altered deadlines, if necessary. Underestimating sufficient time to meet and confer, especially with dilatory counsel on the other side, could prejudice a party's ability to obtain relief from the court.

Similarly, counsel should build in the extra time inevitably required when dealing with out-of-state or foreign discovery and work to secure relevant information as soon as possible, even if those efforts need to be started before party discovery formally begins. This approach offers the best chance of obtaining critical information while also creating a record for the court justifying an extension, if required.

## **How to Prepare for Rocket Docket Discovery**

When attorneys find themselves before an SDNY judge who employs a rocket docket approach to discovery, aggressive preparation of a discovery plan soon after service of the complaint — or before, if you are representing a plaintiff — should occur even if a motion to dismiss will be filed.

Getting a speedy handle on key documents and conducting witness interviews concerning discovery-specific issues, such as relevant time periods, key witnesses, the timeline and scope of the dispute, is essential to meeting tight discovery deadlines.

Indeed, under a rocket docket schedule, parties will have little time to prepare discovery requests, review and produce documents, review incoming productions, and schedule and conduct depositions. This tight timeline should underscore the importance of preemptively preparing for discovery.

Likewise, attorneys should formulate a nonparty discovery plan alongside their proposed party discovery schedule, ensuring sufficient time to request relevant documents, conduct third-party depositions and handle objections. While these nonparty disputes can often be proper grounds for an extension request, it is important to serve nonparty discovery as early as possible to demonstrate a pattern of diligence to the court.

Below are some key strategies for staying on the fast track.

## ***Produce documents early and consider a streamlined deposition process.***

Attorneys should plan on making a substantial document production concurrent with service of responses and objections to discovery requests. This will allow parties to get ahead of the condensed discovery timeline and more quickly proceed to depositions.

Although relatively uncommon prior to the COVID-19 pandemic, remote depositions have become second nature in litigations of all kinds over the past three years. When parties have only four months to complete fact discovery, remote depositions can serve as an effective tool for streamlining testimony, particularly where witnesses reside in different jurisdictions or when testimony will occur over sequential days or on a double track.

If parties agree to remote depositions, they should adopt a specific protocol to govern the process; this can be a stand-alone document or built into a broader discovery protocol, *infra*.

## ***Prepare a discovery protocol ahead of initial conference.***

Preparing a discovery protocol well in advance of the initial conference will demonstrate diligence to the court at the outset. Furthermore, assuming the protocol is reasonable, the nonpreparing party may be hard pressed to reject the adoption of the plan, given that it will have to defend that rejection to the court.

The preparing party's initial protocol should reflect party custodians, relevant time ranges, initial search terms or employment of technology-assisted review, with the understanding that the other side should be able to incorporate its own information easily into the document and finalize an agreed-upon electronically stored information protocol without experiencing material delay.

## ***Educate the client about how to manage fast-track discovery.***

Rapid discovery will inevitably result in significantly higher discovery-related costs at the start of a case; clients may be unprepared for the immediate and significant costs.

Practitioners should consider educating their clients soon after the complaint is filed, or before filing if representing the plaintiff. This is worthwhile even if the client is sophisticated and accustomed to litigation in federal courts — and, for that matter, even if the client has been before other judges in the SDNY previously.

Because costs that traditionally span more than a year will need to be condensed into four months, flagging this issue early for clients can help avoid unintentional billing surprises and prevent disruption in during the discovery process.

## ***Create a detailed record of disputes and delays.***

Although attorneys are well accustomed to maintaining a record of discovery issues and disagreements, the need to document disputes and delays with opposing counsel in real time is paramount in rocket-docket discovery cases.

For example, if one's party's unreasonable delay in complying with discovery requests, making complete productions or scheduling depositions makes the other party unable to reasonably comply with the court-ordered discovery schedule, a detailed record with supporting documentation will need to be incorporated into extension requests.

By presenting a detailed account of an adversary's obstruction to the court, in addition to granting your extension request, the court may be inclined to exclude important evidence that your adversary's client seeks during discovery.

## **Full Steam Ahead in SDNY**

Rocket dockets can be a tremendous benefit to clients seeking quick resolution of their claims. This is particularly true in the current environment where COVID-19 and court congestion has caused considerable delay in ongoing litigation, including in the SDNY.

At the same time, careful case management is essential to successfully litigating cases that are subject to condensed discovery periods. Proactivity is key when it comes to planning and executing discovery, educating clients, documenting obstruction by your adversary, and even managing internal case staffing.

As the SDNY continues to trend toward more expedited civil discovery, attorneys who integrate an intentional approach to managing discovery will be well positioned to overcome the obstacles presented by a rocket docket.

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[1] Although the Eastern District of New York has a similarly busy docket, it does not appear that judges in the EDNY have incorporated shortened discovery schedules into their own individual rules.

[2] Although a majority of the judges with expedited discovery deadlines set 90- or 120-day plans, Judge John G. Koeltl's July 6, 2022 Civil Scheduling Order provides: "The Court expects discovery to be completed within 60 days of the first scheduling conference unless, after the expiration of that 60 day period, all counsel stipulate that additional time (not to exceed 60 more days) is needed to complete discovery. The expert disclosures required by Fed. R. Civ. P. 26(a)(2) shall be made at least 30 days before the completion of discovery."

[3] See, e.g., Individual Civil Case Management Plan and Scheduling Order for, inter alia, Judges Caproni, Castel, Engelmayer, Karas, Rochon, and Torres, available at <https://www.nysd.uscourts.gov/judges/district-judges>.