

**NEW YORK STATE BAR ASSOCIATION**  
**COMMERCIAL AND FEDERAL LITIGATION SECTION**  
**COMMENT ON AMENDMENTS TO THE COMMERCIAL DIVISION RULES<sup>1</sup>**

**SUMMARY**

The Administrative Board of the Courts has requested comments on possible rule changes proffered by the Commercial Division Advisory Council (“CDAC”) relating to the discovery of electronically stored information (“ESI”) and, more specifically, seeks comments regarding proposed amendments to Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F (the “Amendments”). The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the proposed rule amendments be adopted, as further explained below.

**COMMENT**

**I. OVERVIEW**

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. It includes legal professionals familiar with the rapidly advancing development of electronic discovery law and practice. Thus, in offering the following comments, the Section is drawing on a broad range of experience.

The Commercial Division hears cases involving sophisticated litigants and complex discovery often encompassing large volumes of ESI. It is therefore important that the Commercial Division’s rules provide parties with additional guidance on eDiscovery expectations to promote greater efficiency and uniformity. After review, the Section supports the eDiscovery Amendments proposed by the CDAC. The Amendments consolidate rules related to eDiscovery and emphasize the importance of parties’ cooperation in accordance with current practices recognized in New York courts. But to make clear that future judicial decisions regarding eDiscovery take into account prior case law, when citing to provisions of the CPLR in its proposed Amendments, we would suggest that the CDAC indicate that compliance must also be consistent with the common law.

**II. THE AMENDMENTS**

eDiscovery is fact-driven and will vary by case. Consequently, it is important that parties carefully consider and address potential issues early on, with that dialogue ideally commencing before ESI is collected, reviewed, and exchanged. The proposed Amendments will assist counsel in doing so by providing guidance on issues and topics to discuss with their clients and adversaries. The

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<sup>1</sup> Opinions expressed in this memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

balance of this Comment addresses particular Amendments warranting some additional exploration.

## **A. The Amendments and Revised Guidelines**

First, revising the Commercial Division Guidelines for Discovery of ESI (the “Guidelines”) to apply to all parties (as opposed to just non-parties) will encourage counsel to examine matters related to ESI with their respective clients prior to the preliminary conference of each case. These topics may include sources of discoverable ESI, sources not reasonably accessible, issues related to reasonable preservation, privilege logs, production formats, and cost-sharing (or cost shifting).<sup>2</sup> In its experience, the Section believes that encouraging discussion and resolution of these issues at the earliest stages will better prepare parties to engage in more productive preliminary conferences, which in turn will promote the necessary exchange of responsive information and help streamline the discovery process.

The revised Guidelines acknowledge that producing parties are ordinarily best situated to evaluate the procedures, methodologies, and technologies for producing their own ESI. First popularized by the Sedona Conference,<sup>3</sup> this principle is premised on the notion that since responding parties should have a comprehensive understanding of their own information systems, they are typically in a better position to determine how to discharge their eDiscovery obligations without undue “discovery on discovery” or judicial intervention, absent a good-faith showing of some production deficiency.<sup>4</sup>

At the same time, the Guidelines rightly encourage parties to engage in a good faith exchange of basic information regarding their processes.<sup>5</sup> The Guidelines provide a reminder to counsel that they must take an active role in their clients’ preservation and collection of ESI, a concept also widely recognized in other jurisdictions. Additionally, the Guidelines provide a list of factors for parties to consider when negotiating the format of production. Again, by including these parameters, the Guidelines will encourage parties to think more proactively about eDiscovery and solidify the Commercial Division’s commitment to more streamlined and effective discovery processes.

The Amendments and Guidelines also reinforce that in New York state courts, the inadvertent or unintentional production of ESI subject to attorney-client privilege, work product, or other recognized protections is not a waiver if the party took reasonable precautions to prevent disclosure and notified the other party that such information was inadvertently produced.<sup>6</sup> This serves as a helpful reminder to practitioners, as this standard is not expressly addressed in the CPLR. Given the sheer volume of documents requiring assessment for privilege in modern discovery practice, the recognition that privilege review perfection is, in reality, impossible is commendable. As such, the Section supports the Commercial Division’s efforts to bring consistency to the treatment of

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<sup>2</sup> Proposed Amendments to Rule 11-c(b) and the Commercial Division Guidelines for Discovery of ESI.

<sup>3</sup> See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018).

<sup>4</sup> Id.

<sup>5</sup> Proposed Amendments to Guidelines - Section V(A).

<sup>6</sup> Proposed Amendment to Rule 11-c(g).

inadvertent disclosures and encourages parties to enter into written, court-ordered non-waiver agreements extending those protections. For instance, parties may enter into agreements specifying that privilege is not waived by any disclosure, whether inadvertent *or otherwise*.<sup>7</sup> Such court orders may avoid potentially costly downstream discovery disputes.

## **B. Defraying Non-Party Discovery Costs**

Another noteworthy section of the Amendments is the proposed change to Rule 11-c(e), which specifies that a requesting party shall defray the costs associated with a non-party's production of ESI, as required under CPLR 3111 and 3122(d). Specifically addressing this requirement is a helpful reminder to requesting parties, as some counsel who practice less frequently in New York may not be familiar with this jurisdiction-specific requirement.

The Section suggests adding more guidance and clarity regarding the extent to which costs must be defrayed. For instance, the Section recommends that the CDAC provide examples of the types of reasonable production expenses a requesting party may have to defray, as provided in the Commercial Division's current Appendix A – Guidelines for Discovery of ESI from Nonparties. Some examples may include the costs associated with preserving or collecting duplicative or not reasonably accessible sources of ESI, and the purely technical costs of production, such as generating images, running OCR, and preparing load files. This will help reduce potential sticker-shock for both requesting and responding parties.

## **C. Costs and Burdens of ESI Discovery Shall Not Be “Disproportionate”**

Last is the update to Rule 11-c(d), which specifies that the costs and burdens of discovery of ESI shall not be disproportionate to its benefits.<sup>8</sup> As noted in the Amendments, this change draws on the Preamble to the Commercial Division Rules encouraging proportionality.<sup>9</sup> The Section finds this Amendment to Rule 11-c(d) particularly helpful as it will conform with federal practice in providing parties and judges with factors to consider when determining whether discovery is burdensome or disproportionate, such as the nature of the dispute, importance of the materials to resolving the dispute, and the amount in controversy. Given the vast amounts of ESI often involved in Commercial Division cases and the Court's commitment to cost-effective adjudication of complex commercial cases, this Amendment will further the Court's objective and provide parameters for parties to consider when issuing and responding to discovery requests.

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<sup>7</sup> For example, a number of federal judges provide template orders, similar to the model Federal Rule of Evidence 502(d) order originally published by Hon. Andrew J. Peck (ret.), that specify “the production of privileged or work-product protected documents, electronically stored information (“ESI”) or other information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or in any other federal or state proceeding.”

<sup>8</sup> Proposed Amendment to Rule 11-c(d).

<sup>9</sup> The Section also supports CDAC's proposal 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.

### III. CONCLUSION

The Section recommends the adoption of the proposed Amendments and notes its proposed suggestions concerning those Amendments. The Amendments will further consolidate and clarify the Commercial Division's Rules regarding eDiscovery and promote the Court's objective to resolve complex cases in a just, speedy, and efficient manner.

Respectfully submitted,

New York State Bar Association  
Commercial and Federal Litigation Section  
Daniel K. Wiig, Section Chair

October 21, 2021

Approved by the Commercial & Federal Litigation Section Executive Committee, October 20, 2021

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