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UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
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MEMORANDUM

April 9, 2014

To: All Interested Persons

From: John W. McConnell

Re: Proposed adoption of a new Rule of the Commercial Division (22 NYCRR § 202.70(g)), relating to guidelines for discovery of electronically stored information from nonparties in the Commercial Division of the Supreme Court.

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The Commercial Division Advisory Council has recommended adoption of a new Commercial Division Rule (22 NYCRR § 202.70(g)), relating to discovery of electronically stored information (“ESI”) from nonparties (Exh. A). The proposed rule states that parties and nonparties “should adhere to the Commercial Division’s Guidelines for Discovery of . . . ESI from Nonparties.” The Guidelines were developed by the Advisory Council with input from, among others, the Chief Administrative Judge’s Working Group on Electronic Discovery, for the stated purpose of improving the efficiency of e-discovery and reducing the potential costs and burdens imposed on non-litigants. Under the proposed Guidelines, parties are encouraged to reasonably limit their e-discovery requests based on consideration of an enumerated list of proportionality factors; nonparties are encouraged to issue prompt litigation holds, state objections with reasonable particularity and resolve disputes over ESI through informal methods other than motion practice; and parties and nonparties are expected to meet and confer about the timing, scope and form of ESI production, and the requesting party’s obligation to defray reasonable production expenses under the CPLR.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than May 28, 2014.**

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

REPORT

TO: Commercial Division Advisory Council
FROM: Use of Technology in Commercial Division Cases Subcommittee
DATE: March 25, 2014
RE: Guidelines for Discovery of ESI from Nonparties

Attached are (a) the Guidelines for Discovery of Electronically Stored Information (“ESI”) from Nonparties, reflecting the amendments approved at the March 19, 2014 Council meeting, and (b) a proposed Rule 34 to Section 202.70 (Rules of the Commercial Division of the Supreme Court) of the Uniform Civil Rules For The Supreme Court And The County Court.

The proposed Rule 34 states that parties and nonparties should adhere to the Guidelines, which are found at Appendix A to the Rules of the Commercial Division.

We recommend that a link to the Guidelines (Appendix A) appear on the nycourts.gov website immediately below the new Rule 34. We also recommend that the Commercial Division’s homepage on the nycourts.gov website provide a link (at least temporarily) to the Guidelines.

Proposed Rule 34 to Section 202.70 (Rules of the Commercial Division of the Supreme Court) of the Uniform Civil Rules For The Supreme Court And The County Court

Rule 34. Discovery of Electronically Stored Information from Nonparties. Parties and nonparties should adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties, which can be found in Appendix A to these Rules of the Commercial Division.

[Appendix A]

**Commercial Division, New York Supreme Court
Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties**

Purpose

The purpose of these Guidelines for Discovery of ESI from Nonparties (the "Guidelines") is to:

- Provide for the efficient discovery of ESI from nonparties in Commercial Division cases;
- Encourage the early assessment and discussion of the potential costs and burdens to be imposed on nonparties in preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;
- Identify the costs of nonparty ESI discovery that will require defrayal by the party requesting the discovery; and
- Encourage the informal resolution of disputes between parties and nonparties regarding the production of ESI, without Court supervision or intervention whenever possible.

These Guidelines are not intended to modify governing case law or to replace any parts of the Rules of the Commercial Division of the Supreme Court (the "Commercial Division Rules"), the Uniform Civil Rules for the Supreme Court, the New York Civil Practice Law and Rules (the "CPLR"), or any other applicable rules or regulations pertaining to the New York State Unified Court System.

Definition of ESI

As used herein, "ESI" includes any electronically stored information stored in any medium from which such information can be obtained, either directly or after translation by the responding party into a reasonably usable form.

Guidelines

- I. Subject to all applicable court rules regarding discovery, parties seeking ESI discovery from nonparties are encouraged to engage in discussions regarding the ESI to be sought as early as permissible in an action.
- II. A nonparty receiving a request for the discovery of ESI is encouraged to promptly issue a preservation notice/litigation hold concerning the requested ESI. Until the scope of the request has been determined by agreement or court order, the preservation notice/litigation hold should reasonably cover the requested ESI.
- III. A party seeking ESI discovery from a nonparty should reasonably limit its discovery requests, taking into consideration the following proportionality factors:
 - A. The nature of the litigation;
 - B. The amount in controversy;
 - C. The expected importance of the requested ESI;
 - D. The availability of the ESI from another source, including a party;
 - E. The relative accessibility of the ESI; and
 - F. The expected burden and cost to the nonparty.
- IV. To the extent a nonparty objects to the discovery of ESI on the grounds that such ESI is not reasonably accessible because of undue burden or cost, any such objection shall be stated with reasonable particularity.
- V. The requesting party and the nonparty should seek to resolve disputes through informal mechanisms and should initiate formal motion practice only as a last resort. The requesting party and the nonparty should meet and confer concerning the scope of the ESI discovery, the timing and form of production, ways to reduce the cost and burden of the ESI discovery (such as the use of advanced analytic software applications and other technologies that can screen for relevant and privileged ESI), and the requesting party's defrayal

of the nonparty's reasonable production expenses. In connection with the meet and confer process, the requesting party and the nonparty should consider the proportionality factors set forth in paragraph III. In the event no agreement is reached through the meet and confer process, the requesting party and the nonparty are encouraged to seek resolution by availing themselves of the Court System's resources, such as by requesting a telephonic conference with a law clerk or special referee or the appointment of an unpaid mediator in accordance with Rule 3 of the Commercial Division Rules.

VI. The requesting party shall defray the nonparty's reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR. Such reasonable production expenses may include the following:

- A. Fees charged by outside counsel and e-discovery consultants;
- B. The costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;
- C. The cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable; and
- D. Other costs as may be identified by the nonparty.