NEW YORK STATE BAR ASSOCIATION
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May 22, 2014

VIA E-MAIL and MAIL

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed Commercial Division Rule Relating to Guidelines for ESI Discovery from Nonparties

Dear Mr. McConnell:

On behalf of the New York State Bar Association Commercial and Federal Litigation Section, I enclose the attached memorandum with the Section's comments on the new proposed rule of the Commercial Division relating to guidelines for discovery of electronically stored information from nonparties.

If there are any questions about the Section's comments, please let me know.

Respectfully yours,

Gregory K. Arenson

Gregory K. Arenson
Chair

cc: Paul D. Sarkozi, Esq. (via e-mail w/encl.)
Constance M. Boland, Esq. (via e-mail w/encl.)
Adam I. Cohen, Esq. (via e-mail w/encl.)

MEMORANDUM

To: **Office of Court Administration**

From: **The Commercial and Federal Litigation Section**

Date: **May 14, 2014**

Re: **Comments on Proposed new Rule of the Commercial Division relating to guidelines for discovery of electronically stored information from nonparties in the Commercial Division of the Supreme Court**

Introduction

On April 9, 2014, the Chief Administrative Judge, through the Office of Court Administration, published for comment a proposal for a new Commercial Division Rule (22 NYCRR § 202.7(g)), recommended by the Commercial Division Advisory Council, setting forth certain "Guidelines" for electronic discovery ("E-Discovery") from nonparties. This report contains comments by the Commercial and Federal Litigation Section of the New York State Bar Association (the "Section") to the proposed Rule. The Section supports the intent of the Guidelines and believes that the Guidelines are potentially useful to practitioners and jurists, especially in light of the fact that the CPLR has still not been amended to address E-Discovery. The Section also applauds the Council's introduction of proportionality principles and the meet-and-confer process into nonparty practice in the Commercial Division. However, we believe that there are certain issues that warrant further consideration and, in some instances, the Section recommends amending or removing certain guidelines, as set forth below.

The proposed Rule 34 states that parties and nonparties "should adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI") from Nonparties." The six Guidelines are intended to promote certain goals with respect to E-Discovery from nonparties, including: a) efficiency; b) early assessment of potential burdens on nonparties in an effort to reduce those burdens; c) identification of costs to be borne by the

requesting party; and d) cooperation in resolving disputes without Court involvement. Importantly, the Guidelines state that they are not intended to modify governing case law or replace the CPLR, the Commercial Division Rules, the Uniform Civil Rules for the Supreme Court, or any other applicable rules or regulations.

The "Purpose" Section

We recommend that the "Purpose" Section of the Guidelines be amended to address two issues.

First, there is an overarching concern that practitioners and jurists may construe and apply the Guidelines as if they create mandatory, new, independent duties and obligations with respect to E-Discovery from nonparties. They should not be so construed. The authority of the Chief Administrative Judge to adopt administrative procedural rules, such as proposed Rule 34 and the Guidelines, without the prior approval of the legislature extends only to rules that do not conflict with and are consistent with the CPLR and existing law or rules that fill a "gap" in the administrative process concerning issues not squarely addressed in the CPLR and other applicable law.[1] The Council acknowledges this in labeling these tenets as "Guidelines," rather than "Rules," and plainly states that the Guidelines are not intended to modify governing case law or replace any provision of the CPLR or other applicable rules. In addition, Guideline I is qualified by the clause that it is "[s]ubject to all applicable court rules regarding discovery," and Guideline VI specifically refers to two sections of the CPLR as providing authority for at least part of that Guideline.

Nevertheless, proposed Rule 34 does state that "[p]arties and nonparties *should* adhere" to the Guidelines, Guideline III says that a party "*should* reasonably limit" its requests, and

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[1] *Levenson v. Lippman*, 4 N.Y. 3d 280, 290-91 (N.Y. 2005); *see also* N.Y. Const. art. VI § 30; N.Y. Jud. Law §§ 211(1)(b) and 212(2)(d); *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 5-6 (N.Y. 1986).

Guideline V provides that the party and nonparty "*should* seek to resolve disputes." "Should" has been defined to mean the past tense of "shall" or a verb "used in the auxiliary function" to express condition or obligation, propriety, or expediency, among other things.[2] (Guidelines IV and VI use the word "shall" but that is appropriate because the duties and obligations referenced in those Guidelines are specifically defined in the CPLR as obligations using the word "shall." *See* CPLR 3111; 3122(a) and (d).) Because the Guidelines use such language, there is a reasonable possibility that the Guidelines may be construed as if they, standing alone and without any other authority, define mandatory requirements.

To clarify more precisely how the Guidelines should be construed and applied, the Section suggests that the following sentence should be added to the "Purpose" section of the Guidelines: "The Guidelines should be construed and applied in a manner that is consistent with governing case law and applicable sections and rules of the CPLR, the Commercial Division Rules, the Uniform Civil Rules for the Supreme Court, and any other applicable rules and regulations."

Second, nonparties served with subpoenas are not otherwise involved in the underlying litigation and, in many circumstances, may not be familiar with the Commercial Division Rules, including proposed Rule 34 and the Guidelines. In fact, counsel who do not practice regularly in the Commercial Division may be wholly unaware of Rule 34 and the Guidelines, as the Guidelines are not part of the CPLR or even referenced in the CPLR. Indeed, the Commercial Division Advisory Council recommends that a link to the Guidelines appear on the Commercial Division homepage and the nycourts.gov website, presumably to make the Guidelines more accessible to all practitioners. But this may not provide all practitioners with sufficient notice of

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2 *Merriam-Webster.com* Merriam-Webster, n.d. Web 20May2014.http://www.merriam-webster.com/dictionary/should>.

Rule 34 and the Guidelines. For this reason, the Section recommends that the "Purpose" section of the Guidelines should specifically recommend that a party serving a subpoena on a nonparty seeking E-Discovery in the Commercial Division should cite to or reference proposed Rule 34 of the Commercial Division Rules and the Guidelines in the subpoena. This way, the party receiving the subpoena will be aware of and will easily be able to locate Rule 34 and the Guidelines.

Guideline I

Guideline I addresses early assessment and encourages "parties seeking ESI discovery from nonparties" to discuss "the ESI to be sought as early as permissible in an action." The Section believes that the encouragement of early discussion should extend to nonparties as well and a specific reference to nonparties should be added. This appears to be the intent of the drafters of the Guidelines because they state in Rule 34 that "parties and nonparties should adhere" to the Guidelines. However, the first Guideline fails to include nonparties. There is no reason why discussions between a party issuing a subpoena and a nonparty receiving one should not take place promptly after service of the subpoena or a notice to preserve. These discussions may serve to narrow the scope of the requested ESI and, accordingly, the scope of any related preservation obligation on the part of the nonparty. To remove all doubt, Guideline I should be amended to state that "parties seeking ESI discovery from nonparties and nonparties who receive requests for ESI discovery are encouraged to engage in discussions regarding the ESI to be sought as early as permissible in an action."

Guideline II

The second Guideline states that a nonparty receiving a request for ESI should enact preservation steps "promptly," and these steps should "reasonably cover the requested ESI." The

Section believes that Guideline II should be removed. The timing and scope of a nonparty's duty to preserve ESI are determined by case law. It is unclear what the word "promptly" means in Guideline II, and the use of such a vague standard is likely to give rise to frequent motion practice over whether the nonparty enacted preservation steps "promptly." Whether a nonparty acted with the requisite diligence in enacting preservation efforts will depend on the facts and circumstances, and indicating that the nonparty should act "promptly" does nothing to clarify the appropriate timing of the obligation in any particular case.

Guideline II also confuses the timing of the trigger of a preservation obligation for nonparties. By limiting its prescription for nonparty preservation to the period following the receipt of a "request" for E-Discovery, the Guideline suggests that a nonparty has no preservation obligation until receipt of a request and that a simple request always triggers the preservation obligation. There is a paucity of New York law on the trigger of the duty to preserve of a nonparty. Generally, a nonparty is not under the same duty to preserve as a party when it has a "reasonable anticipation" of litigation.[3] However, under New York law a nonparty may have an obligation to preserve ESI in other circumstances, such as when it receives a written demand to preserve from a party intending to serve a subpoena or under a preservation order.

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[3] *See, MetLife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 483-84 (N.Y. 2004) (no duty to preserve arose for nonparty insurer with notice of potential litigation between insured and plaintiff, notwithstanding telephone conversation in which nonparty insurer agreed to preserve evidence, where plaintiff failed to seek preservation order, provide written notice, to preserve or volunteer to pay preservation costs); *Ortega v. City of New York*, 9 N.Y.3d 69 (N.Y. 2007) (nonparty duty to preserve arose from preservation order, without which there was no independent duty to preserve), *citing*, *Fletcher v. Dorchester Mutual Ins. Co.*, 773 N.E. 2d 420, 424-25 (Mass. 2002) ("[a] nonparty witness is not required to preserve and store an item merely because that item may be of use to others in pending or anticipated litigation").

Guideline II suggests that a duty to preserve for a nonparty can only be triggered by receipt of a request, and this is not entirely consistent with existing case law.[4]

The second Guideline's description of the scope of the preservation obligation is problematic. The Guideline states that, until agreement or court order on the scope of the request, the nonparty's preservation should "reasonably cover the requested ESI." This standard does not provide real guidance, as it adds no definition of what would constitute reasonable coverage. More importantly, it would also significantly expand the nonparty's preservation obligation beyond its current purview. Under New York law, a nonparty's obligation to produce is limited by the "material and necessary" standard. In other words, it must be relevant to the prosecution or defense of an action.[5] Given this defined scope of discovery, a nonparty should not be required to preserve ESI in accord with whatever a party requests. Moreover, the steps taken to preserve ESI should comport with the proportionality considerations in Guideline III.

Parties and nonparties alike often over-preserve ESI because the proper scope of discovery has not yet been determined at the time the preservation obligation arises, and they want to limit the risk of spoliation sanctions. While erring on the side of over-preservation may be prudent as a general matter, parties requesting E-Discovery from nonparties should be encouraged to minimize the burden of preservation on the nonparty. This would include not only making sure that requests and their corresponding preservation implications are not overly broad, but also that they are proportional in light of the factors set forth in Guideline III.

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4 *Metropolitan Life*, 1 N.Y.3d at 483-89 (stating that a nonparty's duty to preserve may, in certain circumstances, be triggered by a court order, a written agreement, a written request, an offer to cover the costs of preservation, or a special relationship between the party and nonparty).

5 *Kapon v. Koch*, 2014 WL 1315590 (N.Y. Slip. Op. 2327 April 3, 2014).

Guideline III

The third Guideline recommends that a party seeking discovery from a nonparty should limit its request in accordance with certain proportionality factors. Specifically, the guideline enumerates the following factors: a) the "nature" of the litigation; b) the amount in controversy; c) the "expected" importance of the requested ESI; d) whether the ESI is available from another source; e) the "relative accessibility" of the ESI; and, f) the "expected" burden and cost to the nonparty.

The first factor, "the nature of the litigation," is unduly vague and should be replaced with the correct phrase referencing this concept which was used at least twice by a New York appellate court. In *Tener v. Cremer,*[6] the First Department, Appellate Division analyzed when the Federal Rules of Civil Procedure would limit discovery and quoted the section of Rule 26 which states that discovery should be limited when "the burden or expense . . . outweighs its likely benefit," considering, among other things, "the importance of the issues at stake in the litigation."[7] Later, in *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*,[8] the same court listed seven factors to be considered in determining when it is appropriate to allow cost-shifting, citing *Zubulake v. UBS Warburg, LLC.*[9] One of the factors listed was "[t]he importance of the issues at stake in the litigation."[10] The Section believes that this formulation -- "[t]he importance of the issues at stake in the litigation" – the phrase used by a New York appellate court, should replace the phrase "the nature of the litigation" in Guideline III.A.

The fifth factor in Guideline III.E. is "[t]he relative accessibility of the ESI." It is not clear what the term "relative accessibility" means, and the Guidelines provide no definition or

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6 89 A.D.3d 75, 80 (1st Dep't 2011).
7 *Tener*, 89 A.D.3d at 80 (quoting Fed. R. Civ. P. 26(b)(2)(C)(iii)).
8 94 A.D.3d 58, 64 (1st Dep't 2012).
9 217 F.R.D. 309, 322 (S.D.N.Y. 2003).
10 *GreenPoint*, 94 A.D.3d at 64.

citation to any authority. Currently, the controlling case in New York on nonparty discovery is *Tener v. Cremer*,[11] and, to the extent that the *Tener* court established an accessibility standard, that standard is the governing law in New York and should be referenced in the Guidelines.[12]

In fact, the *Tener* court uses the word "relative" in connection with accessibility at least once, in a footnote, and it quotes from a Sedona Conference Commentary that discusses relative accessibility of potentially discoverable information.[13] But it is not clear whether either of these references in *Tener* explains or defines the "relative accessibility" concept found in Guideline III.E. Moreover, the *Tener* court does not use the words "relative accessibility" to refer to the standard of accessibility it applied in the *Tener* case. If the drafters of Guideline III.E. intended the words "relative accessibility" to refer to the accessibility standard the First Department applied in *Tener*, then it would be more accurate and more comprehensible if Guideline III.E. described this factor as: "The accessibility of the ESI, as defined in applicable case law."

Furthermore, Guideline III.E. raises other concerns. Accessibility is also a concept that is used in Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure, which states that "[a] party need not produce discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense." The possibility exists that Guideline III.E. is not referring to the accessibility standard in *Tener*, but to the

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11 89 A.D.3d 75, 79-80 (1st Dep't 2011).

12 In *Tener*, the First Department adopted the cost/benefit analysis set forth in the Commercial Division, Nassau County Guidelines for Discovery of Electronically Stored Information when it reversed an order denying a motion to hold a nonparty in contempt for failing to produce ESI that was not reasonably accessible in response to a subpoena. 89 A.D.3d at 81. The court remanded for a hearing to determine whether the ESI could be found and whether it would be relevant and to determine the costs of locating the ESI. *Tener*, 89 A.D.3d at 82.

13 In a footnote, the First Department noted that the "Sedona Conference also recommends analyzing **accessibility as a relative concept** and includes the ease with which the data can be searched as a factor: 'The **relative accessibility** of a source of potentially discoverable information is best evaluated by assessing the burdens involved in viewing, extracting, preserving, and searching the source as well as other relevant factors imposed by the location, including the dispersion and the volumes involved.'" *Tener*, 89 A.D.3d at 80 n.4 (quoting The Sedona Conference Working Group, *The Sedona Conference Commentary on: Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, at 9 (July 2008)) (emphasis added).

standard in the Federal Rules. Because the words "reasonably accessible" or "not reasonably accessible" are not used in Guideline III.E., one may infer that the "relative accessibility" standard in Guideline III.E. was intended to be something other than the Federal Rules standard. However, in Guideline IV, the drafters use the term "not reasonably accessible," apparently referring to the Federal Rules standard. Reading the two Guidelines, it is not clear whether "relative accessibility" and "not reasonably accessible" refer to the same standard or different standards or whether one, or both, refer to the accessibility standard used by New York state courts.

Nor is it clear whether the *Tener* court applied a standard that differed in any material way from the standard in the Federal Rules. The *Tener* court states that it is adopting the procedures outlined in the Nassau County Commercial Division Guidelines. The latter guidelines are derived from a federal court's protocol that was based on the Federal Rules. The *Tener* court attempts to distinguish its approach from that advocated by Rule 45 of the Federal Rules, but then applies the Rule 45 analysis, and it relies on several federal cases.[14] Whatever rule the *Tener* court crafted, it borrowed heavily from federal sources. *Id.*

Even under the Federal Rules, courts have interpreted the meaning of accessibility differently. Some courts have opined that the concept implies a technical hurdle, *i.e.*, that it requires some special technical measures to access the ESI sought.[15] Other courts have held that the accessibility standard in the Federal Rules is simply meant to indicate that there is undue burden or expense associated with accessing the ESI.[16]

The Advisory Council should clarify what it means by "relative accessibility." Relative to what? Accessible in what sense? Is it the accessibility standard used by the *Tener* court? Is

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14 *Tener*, 89 A.D.3d at 80-82.

15 Cohen and Lender, Electronic Discovery: Law and Practice, Cost Shifting §5.02, at 7-9 (2d ed. 2014).

16 *Id.*

this a different standard or the same as that which appears in the Federal Rules of Civil Procedure? Is it the same or a different standard from what appears in Guideline IV? Without such clarification, Guideline III.E. will give rise to differing interpretations and litigation over whether ESI is "relatively accessible" based on those different interpretations.

Guideline IV

Guideline IV states that, if a nonparty objects to discovery because the ESI is "not reasonably accessible" due to undue burden or cost, the objection "shall" be stated with "reasonable particularity." This Guideline seems to be an effort to apply CPLR 3122(a)1. to the issue of accessibility of ESI. CPLR 3122(a)1. states, in part, that, if a person served with a subpoena seeks to assert an objection, the person "shall serve a response which shall state with reasonable particularity the reasons for each objection." CPLR 3122(a)1. At a minimum, this Guideline should cite to CPLR 3122(a)1. as its authority. Unfortunately, citing to the controlling CPLR Rule does not resolve the problems presented by Guideline IV and, for these reasons, the Section recommends that this Guideline be removed.

First, the Guideline imports the standard quoted above from Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure by referring to ESI that is "not reasonably accessible." The use of the formulation "not reasonably accessible" creates the same problems enumerated above with respect to the lack of clarity as to what "accessible" means with respect to ESI in New York courts.

Second, Guideline IV is inconsistent with CPLR 3122(a)1., which states that the "reason" for the objection should be stated with "reasonable particularity"; the Guideline says that the *objection* should be stated with "reasonable particularity." This Guideline would change or modify the CPLR, despite the fact that is not the stated intent of the Guidelines.

Third, even if the Guideline were to be corrected, there is no explanation as to why the exhortation to state reasons with reasonable particularity should be limited to instances where a party is claiming that certain ESI is "not reasonably accessible." Rather, the reasons for all objections should be stated with "reasonable particularity" under CPLR 3122(a)1., so there is no need for a special Guideline that states this general requirement in the specific context of nonparty discovery. It simply serves no purpose; CPLR 3122(a)1. thoroughly addresses this issue. Accordingly, Guideline IV should be removed.

Guideline V

Guideline V provides that the party and nonparty should use the meet-and-confer process in discussing the scope of discovery, the timing and form of production, and ways to reduce cost and burden. In addition, it provides that the party and nonparty should work toward resolving disputes through negotiation or by calling on the court's law clerks or special referees before resorting to motion practice.

The Section suggests that the word "formal" on the second line of Guideline V be deleted as unnecessary. In addition, while Guideline V encourages the requesting party and nonparty to discuss the form of production, it should also recommend that the requesting party provide for the form of production in the subpoena. In this way, if the requesting party seeks a form of production that the nonparty finds convenient, or at least unobjectionable, that issue would be immediately resolved and there would be no need for the party and nonparty to meet and confer on the form of production.

To help contain the cost of the nonparty's privilege review, Guideline V should suggest that the party and nonparty consider entering into a claw-back agreement, such as that referenced

in Rule 8(b)(vii) of the Rules of the Commercial Division of the Supreme Court[17] and as described in Rule 502 of the Federal Rules of Evidence, which may also be submitted to the court to be entered as an order. The Commercial Division Advisory Council should consider annexing a proposed form claw-back agreement to the Guidelines. Privilege review may prove to be less costly and time-consuming if the nonparty is assured that any inadvertent production of privileged information would be returned pursuant to an agreed-upon procedure outlined in such a claw-back agreement or court order.

Guideline VI

Guideline VI states that "[t]he requesting party shall defray the nonparty's reasonable production expenses in accordance with Rules 3111 and 3122(d) of the CPLR." Guideline VI uses the word "shall" because the obligation to defray the nonparty's "reasonable production expenses" is specifically provided for in CPLR 3111 and 3122(d). Guideline VI attempts to clarify these Rules by providing examples of what courts have allowed as "reasonable production expenses" including attorneys' fees for privilege review, the cost of E-Discovery consultants and business disruption costs.

Guideline VI.C. states that the reasonable production expenses "may" include the "cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable." While this statement is technically correct – business disruption costs "may" be included – listing business disruption costs in the Guideline without any qualification creates the impression that business disruption costs should be considered in every case. That is not consistent with New York law.

[17] 22 NYCRR § 202.70(g)(8)(b)(vii).

In addressing business disruption costs, we are again construing the holding in *Tener*.[18] The *Tener* court held that, if the nonparty produced the ESI at issue, the plaintiff would pay the nonparty's costs of production and the court "should consider whether to include in that allocation the cost of disruption to [the nonparty's] normal business operations." *Id.* The *Tener* court noted that one of the reasons why business disruption costs should be considered was because "plaintiff waited one year before sending the subpoena and preservation letter," thereby rendering it even more difficult and more expensive for the nonparty to access the ESI, which was not reasonably accessible. Had the plaintiff in *Tener* not waited one year to serve the subpoena and preservation letter, it is not clear whether the First Department would have instructed the trial court to consider awarding the costs of business disruption. Thus, it is only in the appropriate case, where, as in *Tener*, the acts of the requesting party increase any undue burden or expense to be incurred by the nonparty, that the costs of business disruption should be considered.[19]

We respectfully suggest that qualifying language be added to the beginning of the sentence in Guideline VI. C., such as "As provided in applicable case law," or "When the facts warrant," to better reflect the holding of the First Department in *Tener* regarding consideration of recovering the nonparty's costs of business disruption.

Conclusion

The Section believes that proposed new Rule 34 and the Guidelines, with certain amendments and clarifications, may be useful tools for practitioners seeking E-discovery from

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18 *Tener v. Cremer*, 89 A.D.3d 75, 82 (1st Dep't 2011).

19 This would comport with Rule 45(d)(1) of the Federal Rules of Civil Procedure, which provides that a nonparty may be entitled to "lost earnings and reasonable attorney's fees" but only as a sanction against a party that fails to take "reasonable steps to avoid imposing undue burden or expense" on the subpoenaed nonparty.

nonparties in the Commercial Division. The Section appreciates that the Office of Court Administration is considering its comments in this report.

Prepared by:

The Electronic Discovery Committee of the Commercial and Federal Litigation Section,

Constance M. Boland and Adam I. Cohen, Co-Chairs

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Pamela L. Gallagher
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Brian D. Graifman
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Supreme Court Committee

May 28, 2014

Proposed adoption of new rule 22 NYCRR 202.70(g) relating to Electronic Discovery from Non-parties in the Commercial Division

The Supreme Court Committee[1] reviewed the Office of Court Administration ("OCA") proposal regarding the adoption of new rule 22 NYCRR 202.70(g) relating to electronic discovery from non-parties in the Commercial Division.

A majority of the members of the Supreme Court Committee at our meeting on May 20, 2014 voted in favor of the proposal following a presentation by members of the Commercial Division Advisory Council.

The new rule would encourage parties and non-parties alike to adhere to the Commercial Division's Guidelines for Discovery of Electronically Stored Information ("ESI"), set forth in Appendix A to the Rules of the Commercial Division.

Members discussed how this proposed rule conforms to the recent decision in Kapon v. Koch, 2014 N.Y. Slip Op. 02327 (April 3, 2014), which rejected the argument that a party subpoenaing a non-party has the initial burden of demonstrating a need for the disclosure. The Court so held even if the information had not previously been sought from a party. The Kapon decision means not only that ESI and discovery may be sought directly from sources other than litigants, but that both parties and nonparties are well served by the meet-and-confer process set forth in the Guidelines in order to negotiate the scope of ESI discovery and the reasonable costs associated with disclosure.

[1] The views expressed are those of the Supreme Court Committee, have not been approved by the New York County Lawyers' Association Board of Directors and do not necessarily represent the views of the Board.