

Comments on Proposed Amendment to Commercial Division Rule 11-e, to Address Technology Assisted Review in Discovery

COMMERCIAL & FEDERAL LITIGATION SECTION

Com-Fed #3

April 30, 2018

The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) is pleased to submit these comments in response to the Memorandum of John W. McConnell, dated March 8, 2018 (“Memorandum”), proposing an amendment to the Rules of the Commercial Division (the “Rules”) to “include language addressing technology assisted review in discovery...”

The proposal of the Commercial Division Advisory Council (“Advisory Committee”) seeks to amend the Rules to show “that the Commercial Division is sensitive to the cost of document review in complex commercial cases” and that they are “in line with other courts, including other centers of high-stakes commercial litigation such as the Southern District [of New York] and the Delaware Chancery Court.” The Memorandum by the CDAC (the “Memorandum”) is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The Advisory Committee’s proposal seeks to amend Commercial Division Rule 11-e, which governs responses and objections to document requests served in cases in the Commercial Division, to include the following language:

The parties are encouraged to use the most efficient means to review documents, including electronically stored information (“ESI”), that is consistent with the parties’ disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding, in appropriate cases.

II. SUMMARY OF PROPOSAL

The Advisory Committee desires to incorporate language pertaining to technology assisted review in discovery to make clear that the Commercial Division is sensitive to the cost of document review in complex commercial cases.” *Memorandum at 6.*

The Advisory Committee acknowledges that the proposed rule would not “prescribe whether or when any particular form of technology assisted review may or should be used” because of the possibility that methodologies “would quickly become obsolete, and in any event the appropriateness of a given methodology [could] only be determined in the context of the particular case and the data set to be reviewed.” *Id.* Indeed, the Advisory Committee’s proposed is not intended “to limit the role of the presiding justice in supervising document disclosure, *see* CPLR 3104(a), or to insulate the responding party’s production from challenge, *see* CPLR 3124.” *Id.*

Furthermore, the Advisory Committee states that the proposed rule takes into account “proportionality as a relevant consideration in determining the appropriateness of a document review method” (*Id.* at 8) and “encourages the responding party to consider the most efficient means to meet [its discovery] obligations...but it does not prevent the requesting party from challenging those means as inadequate or a production as incomplete, nor does the proposed rule constrain in any way the presiding justice’s oversight of the disclosure process.” *Id.* at 9.

III. COMMENTS

The Section views favorably the positions taken by the Advisory Committee and fully endorses its proposal to incorporate the aforementioned language into Commercial Division Rule 11-e which would govern the use of technology assisted review in discovery. The Section therefore recommends that the amendment to proposed Rule 11-e be adopted.



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John W. McConnell, Esq.
Counsel
Office of Court Administration
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Re: Comments on Proposals Concerning Commercial Division Rules 9-a, 11-e, and 17

Dear Mr. McConnell:

The New York City Bar Association (the “City Bar”) has reviewed the proposals of the Commercial Division Advisory Council to amend the following Commercial Division Rules:

- Rule 9-a, encouraging use of CPLR provisions permitting immediate trial or pretrial evidentiary hearings on material issues of fact;
- Rule 11-e, regarding technology-assisted review in discovery;
- Rule 17, regarding word limits in briefs, affidavits, and affirmations.

The City Bar generally supports the objectives of these revisions, subject to two observations and some more specific comments and suggestions, on two of the proposals, which are detailed below. First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts. We offer the following additional comments concerning the proposed amendments to Rules 11-e and 17.¹

¹ These comments reflect the input of the City Bar’s Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

Proposed Amendment to Rule 11-e

The City Bar supports the proposed amendment of Rule 11-e to address technology assisted review in discovery. The technological tools described in the Commercial Division Advisory Council’s supporting memorandum, including predictive coding, cannot and should not completely replace human judgment in the document review process (at least not yet), but they can make discovery more manageable and efficient in an increasing number of cases. The Advisory Council’s memorandum notes that it is important for parties to “confer and agree on an appropriate approach to document review,” and we believe that the rule should more explicitly encourage such cooperation. Accordingly, we suggest that the following sentence be added to the proposed rule: “The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.”

Proposed Amendment to Rule 17

The City Bar supports the proposed amendment of Commercial Division Rule 17 to the extent that it replaces the current Rule’s page limits with word limits. We also support the word count certification requirement for briefs. However, we believe that a requirement to certify a word count on the signature page of affirmations and affidavits would be unnecessary, unduly burdensome, and impractical.

The concerns expressed by the Commercial Division Advisory Council about attorneys’ formatting contortions, such as narrowing margins and squeezing arguments into footnotes, seem more pertinent to legal briefs than to affidavits or affirmations. Further, affiants may sometimes sign affirmations or affidavits without having themselves prepared the document on a word processing program. Counsel routinely draft and edit such documents in consultation with the affiant. Moreover, it is not uncommon in practice, after an affiant signs an affidavit or affirmation, for changes to be made to pages preceding the signature page with the affiant’s permission, without executing a new signature page. This is particularly the case when an affiant is geographically distant from counsel. Requiring a word count on affirmations and affidavits on the signature page therefore would needlessly complicate finalization of these documents. Given the relatively low risk of creative use of margins or footnotes to evade the word limit in such documents, we do not believe the benefit of the proposed certification requirement would outweigh the complications and inconvenience it is likely to cause.

For these reasons, the City Bar recommends revising the third sentence of the proposed revised rule to read: “The signature block of every brief, and memorandum shall include the phrase ‘Words’ followed by the number of words in the document.”

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair
Council on Judicial
Administration

Michael P. Regan
Chair
Committee on State
Courts of Superior
Jurisdiction

Barbara Seniawski
Chair
Committee on Litigation

MEMORANDUM

TO: Office of Court Administration
FROM: Commercial Division Advisory Council
DATE: May [], 2018
RE: **Response to Public Comments Concerning Proposed Rule
Regarding Use of Technology-Assisted Review**

EXECUTIVE SUMMARY

On March 8, 2018, the Office of Court Administration (the “OCA”) released for public comment a recommendation of the Commercial Division Advisory Council (the “Council”) to adopt a proposed rule addressing the use of technology-assisted review in discovery, to be incorporated as an amendment to Rule 11-e of the Commercial Division Rules. In response, the OCA received two comments, one from the Commercial and Federal Litigation Section of the New York State Bar Association (the “State Bar”) and one from the New York City Bar Association (the “City Bar”). Both the State Bar and the City Bar expressed support for the proposed amendments to Rule 11-e. The City Bar also suggested the addition of a sentence to the proposed rule encouraging the parties to confer about the use of technology-assisted review. The Council views the City Bar’s constructive suggestion as entirely in keeping with the purpose of the proposed rule and is pleased to adopt it.

DISCUSSION AND ANALYSIS

The State Bar’s comments review the reasons advanced by the Council in support of the proposed amendment to Rule 11-e and conclude with unqualified support for the proposal:

The Section views favorably the positions taken by the Advisory Committee and fully endorses its proposal to incorporate the aforementioned language into Commercial Division Rule 11-e which would govern the use of technology assisted review in discovery. The Section therefore recommends that the amendment to proposed Rule 11-e be adopted.

The City Bar's comments also express support for the proposed amendment, with one proposed addition. In particular, the City Bar suggests that the proposed amendment make more express that the parties are encouraged to confer and cooperate throughout the discovery process with respect to their use of technology-assisted review:

The City Bar supports the proposed amendment of Rule 11-e to address technology assisted review in discovery. The technological tools described in the Commercial Division Advisory Council's supporting memorandum, including predictive coding, cannot and should not completely replace human judgment in the document review process (at least not yet), but they can make discovery more manageable and efficient in an increasing number of cases. The Advisory Council's memorandum notes that it is important for parties to "confer and agree on an appropriate approach to document review," and we believe that the rule should more explicitly encourage such cooperation. Accordingly, we suggest that the following sentence be added to the proposed rule: "The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production."

The Council thanks the City Bar for its thoughtful suggestion of an additional sentence explicitly encouraging parties to confer on an on-going basis about technology-assisted review, which the Council views as entirely in keeping with the spirit and intent of the proposed rule as well as the Commercial Division Rules concerning disclosure generally. The Council therefore supports including the City Bar's proposed addition in the amendment to Rule 11-e, so that the amendment would read as follows:

The parties are encouraged to use the most efficient means to review documents, including electronically stored information ("ESI"), that is consistent with the parties' disclosure obligations under Article 31 of the CPLR and proportional to the needs of the case. Such means may include technology-assisted review, including predictive coding,

in appropriate cases. The parties are encouraged to confer, at the outset of discovery and as needed throughout the discovery period, about technology-assisted review mechanisms they intend to use in document review and production.

The City Bar’s support for the proposed rule is otherwise qualified only by two “observations” that the City Bar has also made in connection with other rule changes proposed by the Council. Specifically, in its letter to John W. McConnell commenting on the Council’s proposals concerning Commercial Division Rules 9-a, 11-e, and 17, the City Bar states:

The City Bar generally supports the objectives of these revisions, subject to two observations First, we believe that the proposed new Rule 9-a, and the additions to Rule 11-e, are better viewed as best practices or guidelines rather than rules. It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules. Second, the City Bar believes that these proposed amendments, subject to the comments below, would benefit courts beyond the Commercial Division and encourages the Office of Court Administration to consider promulgating similar rules or best practices for the other State trial courts.

With respect to the City Bar’s first “observation,” that in its view the additions to Rule 11-e are “better viewed as best practices or guidelines rather than rules,” the Council respectfully disagrees and believes that it is important to include this proposal in a Commercial Division Rule. As noted in the Council’s memorandum dated December 11, 2017 proposing the additions to Rule 11-e, in recent years, as technology-assisted review has become more prevalent and more sophisticated, the federal courts have provided parties with considerable guidance through judicial decisions concerning the appropriate use of technology-assisted review in discovery, whereas “the New York State courts—including in the Commercial Division, where the costs of document review are

likely to be most burdensome—have provided little analogous guidance.” The Council therefore believes that a Commercial Division Rule expressly addressing, and encouraging in appropriate cases, the use of technology-assisted review is important to fill this gap and make clear that the Commercial Division expressly encourages the use of technology-assisted review where it is the most efficient means for a party to fulfill its disclosure obligations in a particular matter.

Manifesting this encouragement through a rule, rather than “best practices or guidelines set forth in an appendix,” may have the additional advantage of reassuring corporate clients who are considering litigation in the Commercial Division that the Justices of the Commercial Division understand the significant efficiencies that can be achieved through technology-assisted review in cases requiring large-scale review of documents, including large volumes of electronically stored information, and that the presiding Justice will encourage and support the appropriate use of technology-assisted review in such cases. In particular, the proposed Rule will enable New York lawyers to advise potential litigation clients that New York has recently adopted a rule expressly endorsing the appropriate use of technology-assisted review in document-intensive cases.

Indeed, the proposed Rule is but one of several new Commercial Division Rules expressly designed to reduce the length and cost of litigation in the Commercial Division and to improve its efficiency. Embodying these mechanisms in rules, rather than merely “best practices or guidelines,” provides clients and their counsel with greater assurance that the Commercial Division is a modern, efficient, and effective forum for the resolution of complex disputes. Thus, the proposed Rule is fully consistent with and supportive of Chief Judge DiFiore’s Excellence Initiative, which has already resulted in

numerous “measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public.” (The State of Our Judiciary 2018 Excellence Initiative: Year Two, February 2018, page i.)

Finally, the proposed amended Rule 11-e reflects the Council’s research and analysis, and its conclusions concerning the approach to technology-assisted review that would work best for litigants and the Court in the Commercial Division. Because it reflects careful consideration, based on the broad experience of the diverse group of practitioners and judges who are members of the Council, concerning the appropriate use of technology-assisted review, the proposed amended Rule 11-e may assist judges and lawyers who are considering use of technology-assisted review to avoid “reinventing the wheel” by researching the subject from scratch. Instead, they may rely on the principles articulated in the proposed Rule.

More broadly, the City Bar states in its letter to Mr. McConnell: “It would be our preference to have these and other best practices and guidelines set forth in an appendix to the Commercial Division Rules or other resource for judges and practitioners, rather than as formal Commercial Division Rules.” The City Bar has expressed the same preference in response to previous proposals by the Council for new Commercial Division rules, and the Council has previously explained the reasons for enactment of formal Rules. There are approximately 180 bar associations in the State of New York. Out of those 180, the City Bar is the only bar association urging that the proposed amendment to Rule 11-e be a best practice or guidance in an appendix rather than a rule. It therefore appears that the other 179 bar associations in New York State do not share the City Bar’s preference for a best practices appendix.

With respect to the City Bar’s second “observation,” encouraging the OCA “to consider promulgating similar rules or best practices for the other State trial courts,” the Council is grateful to the City Bar for confirming that the proposed amendment to Rule 11-e is sufficiently important and valuable to merit adoption in courts beyond the Commercial Division. The Council also believes that this observation supports its view that the addition to Rule 11-e is important and valuable enough to merit inclusion in a rule, rather than a “best practice or guideline.”

While it greatly appreciates the City Bar’s support, the Council only has jurisdiction to recommend changes to the rules of the Commercial Division; the City Bar’s proposal is thus beyond the scope of the Council’s responsibilities. Other bodies, such as the Advisory Committee on Civil Practice, are better placed to recommend statewide court rule changes like those suggested by the City Bar.

In addition, the Council believes that the proposed amendment to Rule 11-e is likely to have the greatest impact in the Commercial Division, where the proportion of document-intensive cases on the docket is the greatest. While the ever-increasing use of electronic communications and social media by both businesses and individuals may make technology-assisted review more relevant to other State court’s dockets over time, the Commercial Division is the logical place to start developing rules and decisional law concerning the appropriate use of technology-assisted review. Such an approach is in keeping with the Commercial Division’s historical role as a laboratory for innovation; after rules have been piloted in the Commercial Division, other parts in the court system have adopted those rules. For these reasons, the Council respectfully urges that adoption of the

proposed amendment to Commercial Division Rule 11-e not be delayed by consideration of a rule that would apply in all courts statewide.

CONCLUSION

For the reasons set forth above, the Council respectfully requests that the proposed amendment to Rule 11-e, including the addition suggested by the City Bar, be adopted.