NEW YORK STATE BAR ASSOCIATION
COMMERCIAL AND FEDERAL LITIGATION SECTION
COMMENT ON AMENDMENTS TO THE COMMERCIAL DIVISION RULES[1]

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

[1] 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).[2] 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,[3] 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.[4]

At the same time, the Guidelines rightly encourage parties to engage in a good faith exchange of basic information regarding their processes.[5] 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.[6] 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

[2] Proposed Amendments to Rule 11-c(b) and the Commercial Division Guidelines for Discovery of ESI.
[3] *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018).
[4] Id.
[5] Proposed Amendments to Guidelines - Section V(A).
[6] 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*.[7] 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.[8] As noted in the Amendments, this change draws on the Preamble to the Commercial Division Rules encouraging proportionality.[9] 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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[7] 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."

[8] Proposed Amendment to Rule 11-c(d).

[9] 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 — October 21, 2021
Commercial and Federal Litigation Section
Daniel K. Wiig, Section Chair

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

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Shweta McCallen
Steven Nathan
Victoria Turchetti
William Dailey

*Denotes Principal Authors of Comment

From: Ray Beckerman <ray@beckermanlegal.com>
Sent: Thursday, September 9, 2021 3:03 PM
To: rulecomments
Subject: Commercial Division Rules on ediscovery

To Office of Court Administration

I have been practicing in the New York and federal courts for 42 1/2 years. I think the separate rules on e-discovery do a disservice to our profession. In my opinion there should be no special rules for e-discovery of this type. All that is accomplished by these rules is to make it even harder for non-wealthy litigants and smaller law firms to survive and to have a level playing field in the New York courts, as it has already become more difficult and more costly in the federal courts.

If the Commercial Division is to become the exclusive domain of large firms, and litigants who can afford the high costs of e-discovery vendors, a great deal will have been lost.

By continuing to treat e-discovery as a separate subject from discovery itself, even these amendments continue to make e-discovery a barrier to the courts and to evenhandedness to which we all aspire.

Respectfully submitted,

Ray Beckerman

Ray Beckerman
Law Office of Ray Beckerman, P.C.
10818 Queens Blvd. 4th Fl.
Forest Hills NY 11375
(718) 544-3434
ray@beckermanlegal.com
http://beckermanlegal.com

Schulte Roth&Zabel LLP

919 Third Avenue
New York, NY 10022
212.756.2000
212.593.5955 fax

www.srz.com

Writer's Direct Number
212.756.2355

Writer's E-mail Address
robert.abrahams@srz.com

November 4, 2021

VIA EMAIL

Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street
New York, New York 10004

rulecomments@nycourts.gov

Re: Request for Public Comment on Proposal to Amend Commercial Division Rules

Dear Ms. Millett:

Discovery of electronically stored information is an area of the law that I have focused on in my practice as a commercial litigator and as a co-author (with my colleague Barbara Reid) of the Document Discovery chapter in Bob Haig's treatise, Commercial Litigation in New York State Courts.

I write to address the proposed amendment to Rule 11-c(d) of the Commercial Division Rules. The proposed amendment correctly stresses the importance of proportionality in discovery of Electronically Stored Information. However, while I think the addition of the text from existing Rule 9(d)(iii) is very helpful, it does not go far enough. The test for the selection of custodians addressed in Rule 9(d)(ii)[1] -- a critical issue in any discussion of proportionality in discovery -- should be included as well.

[1] Rule 9(d)(ii) states: "the description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute;".

Rule 9(d)(ii) correctly articulates the test that should be used in all cases, not just in accelerated adjudication actions. Custodians should be identified based on a reasonable expectation that they are in possession of electronic documents that contain the evidence that is relevant to the issues in dispute. Any other test would constitute a fishing expedition; a practice the courts have held is inappropriate.[2] Further, by omitting this test from Rule 11-c, counsel could conclude that the Commercial Division Rules are, *sub silentio*, endorsing a more broad ranging test that would not be consistent with Rule 11-c.

For the aforementioned reasons, I suggest that the following text be added as an additional subsection in Rule 11-c:

> Custodians from whom electronic documents may be collected shall be tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.[3]

Respectfully,

Robert M. Abrahams

[2] See e.g., Dristas v. Anchem Products, Inc., 169 A.D.3d 156 (1st Dep't 2019). See also Commercial Litigation in New York State Courts (5th edition), § 30:7 -- CPLR 3120, Designation of Documents, fn. 9.

[3] I suggest that the word "narrowly" be omitted as it is superfluous and misleading. The key is that the search is appropriately tailored.

Peter J. Fazio
Phone (212) 593-5458
Fax (212) 593-6970
pjfazio@arfdlaw.com

November 8, 2021

Via Electronic Mail
Eileen D. Millett, Esq.
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York, 10004
rulecomments@nycourts.gov

RE: Request for Public Comment on Proposal to Amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F to Provide Additional Guidelines Related to the Discovery of Electronically Stored Information in the Commercial Division

Dear Ms. Millett:

In response to the Administrative Board of Courts' invitation for comments, the undersigned, Peter J. Fazio of Aaronson Rappaport Feinstein & Deutsch, LLP, Robert G. Scumaci of Gibson McAskill & Crosby, LLP, and Craig A. Leslie of Phillips Lytle, LLP submit the following comments.

We appreciate the opportunity to submit comments to the Administrative Board of the Courts in response to its invitation for feedback concerning the proposal proffered by the Commercial Division Advisory Council ("CDAC") to amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F, which provide updates and further guidelines to practitioners relating to the discovery of electronically stored information ("ESI") in the Commercial Division.

1. Rule 11-c(a)

We support revisions to Rule 11-c, including those revisions in subsection (a), which revise this Rule to clarify that the ESI Guidelines should be consulted. However, we believe this Rule should apply to parties and non-parties alike, given that relevant ESI can be in the possession, custody or control of parties and non-parties, and the Rule should treat both similarly with respect to their production of ESI. Moreover, the ESI Guidelines expressly state that they cover both parties and non-parties, so the reference to parties only is confusing.

In addition, we support the addition of language to Rule 11-c(a) which clarifies that the ESI Guidelines should be serve as guideposts only, as a determination of proportional discovery of ESI must be made on a case by case basis, considering the proportionality factors included in proposed Rule 11-c(d). Consequently, we suggest revising Rule 11-c(a) as follows: "Parties and nonparties should consult the Commercial Division's Guidelines for Discovery of Electronically

Stored Information ("ESI") ("the ESI Guidelines"), which can be found in Appendix A to these Rules of the Commercial Division. These ESI Guidelines are intended as guideposts only, as a determination of proportional discovery of ESI must be made on a case by case basis, considering the proportionality factors included in proposed Rule 11-c(d)."

2. Rule 11-c(b)

We support the inclusion of subsection (b), which instructs counsel to confer regarding electronic discovery topics, however, discussion of such electronic discovery topics at the preliminary conference may not be necessary if the parties otherwise agree. Therefore, we propose that the Board add language providing that the electronic discovery topics to which the parties cannot agree should be discussed at the preliminary conference, as set forth in Appendix A, subsection II.B.1. Moreover, the electronic discovery topics are too broad and should be modified as set forth below with respect to Appendix A, subsection II.B.

3. Rule 11-c(c)

We do not support the inclusion of subsection (c) regarding the format of production of ESI as drafted. Rather, this provision should track the Federal Rules. The current wording of the proposed revisions implies that the requesting party can dictate the format of the responding party's production. The Sedona Principles and New York caselaw recognize that the responding party is best situated to determine how to produce ESI. *See e.g. Hyles v. New York City*, 2016 WL 4077114, at *3 (S.D.N.Y. Aug. 1, 2016) (citing to Sedona Principle 6 and finding that the "responding party is best situated to decide how to search for and produce ESI"); *Kaye v. New York City Health and Hospitals Corp.*, 2020 WL 7237901, at *6 (S.D.N.Y. Dec. 9, 2020) (same).[1] We propose revising this section to state: "The producing party may specify the format in which ESI shall be produced. If the producing party does not specify a format, the producing party shall produce documents in the form or forms in which it is ordinarily maintained or in a reasonably useable form."

4. Rule 11-c(d)

We do not support the inclusion of subsection (d) as written. This provision requires that ESI discovery not be disproportionate to its benefits, rather than stating affirmatively that ESI discovery should be proportional to its benefits. Disproportionate discovery should not be allowed, irrespective of whether the requesting party is required to pay for it. Therefore, we suggest revising this provision to state: "The cost and burdens of discovery of ESI shall be proportionate to its benefits, considering the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving the dispute. A court may deny or modify discovery that is not proportionate. Further, considering the proportionality of a

[1] *See also Livingston v. City of Chicago*, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020) (finding that the responding party was best situated to decide how to search for and produce responsive ESI); *and In re Viagra (Sildenafil Citrate) Products Liab. Lit.*, 2016 WL 7336411, at *1 (N.D. Cal. Oct. 14, 2016) (same).

discovery request, a court may order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment."

5. Rule 11-c(e)

We support the inclusion of subsection (e), which requires the requesting party to provide money to pay for the reasonable expenses associated with a non-party's production of ESI, and would like to see this expanded to apply to ESI requested from parties.

6. Rule 11-c(f)

We do not support the inclusion of subsection (f) as written, as the Sedona Principles and New York caselaw recognize that the responding party is best situated to decide how to produce ESI. In many cases, technology assisted review ("TAR") can be more expensive than other methods for a variety of reasons, including associated vendor costs and the high cost of negotiating the terms on which TAR will be used compared with other methods of collection. The way it is written, the Council's proposal implies that TAR is the preferred method for review of ESI, and that plainly is not true in many (or even most) cases. Therefore, we propose revising subsection (f) to be agnostic as to which collection method is chosen, consistent with the Sedona Principles, which have been cited with approval by New York courts. *See e.g. Hyles*, 2016 WL 4077114, at *3 (citing to Sedona Principle 6 and finding that the "responding party is best situated to decide how to search for and produce ESI"); *Kaye*, 2020 WL 7237901, at *6 (same).[2] As such, this provision should simply state that "The parties are encouraged to use efficient means to identify ESI for production. The parties shall confer, at the outset of discovery and as needed throughout the discovery period, about document review and production."

7. Rule 11-c(g)

We generally support inclusion of a "clawback" provision in subsection (g), however, we do not recommend that any clawback require a showing of inadvertence. Inadvertence is not contained with the corollary Fed. R. Evid. 502(d). Rather, that Rule requires the return of privileged information without any showing of fault or lack thereof. As such, we propose that the Board strike all language requiring any showing of inadvertence, and consider and include the following language (proposed language *italicized*):

> *The* ~~Inadvertent or unintentional~~ production of ESI or documents containing information that is subject to the attorney-client privilege, work product

[2] *See also United States Equal Employment Opportunity Comm'n v. George Washington Univ.*, 2020 WL 3489478, at *11 (D.D.C. Jun. 26, 2020) ("The Sedona Principles clearly state that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."); *and Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop*., 2020 WL 3498161, at *4 (E.D. Pa. June 29, 2020) (finding that in general, the producing party is in a far better position than the court to determine how to search for and collect documents).

> protection, or other generally recognized privilege shall not be deemed a waiver in whole or in part of such privilege. ~~if the producing party (i) took reasonable precautions to prevent disclosure, and (ii)~~*Any party who identifies ESI or documents which may reasonably contain information that is subject to the attorney-client privilege, work product protection, or other generally recognized privilege shall promptly notify the producing party.* ~~after learning of the inadvertent disclosure, promptly gave notice either in writing, or later confirmed in writing, to the receiving party or parties that such information was inadvertently produced and requests that the receiving party or parties return or destroy the produced ESI.~~ Upon such notice, or as otherwise required, the receiving party or parties shall promptly return or destroy all such material, including copies, except as may be necessary to bring a challenge before the Court. The parties may extend or modify the protections and duties of this provision by written agreement, as provided in Rule 11 g(c), which shall be submitted to the Court to be ordered. Nothing in this rule shall abridge a lawyer's obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning a lawyer's receipt of documents that appear to have been inadvertently sent.

We note that the proposed modified language above is consistent with Federal Rule of Evidence 502(d), which provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding." This proposed revision to the proposed Rule avoids the court having to make an evidentiary ruling on whether a party took reasonable precautions sufficient to warrant a determination of "inadvertence" or "unintentional" disclosure, and facilitates efficient discovery.

8. Rule 11-c(h)

We support the inclusion of subsection (h), which recognizes that a party should take reasonable steps to preserve ESI that it has a duty to preserve, considering the proportionality under Rule 11-c(d) of the discovery sought.

9. Proposed Rule 11-c(i)

We support the addition of a new proposed subsection to Rule 11-c, which addresses appropriate limitations that serve the goals of just, speedy, and inexpensive determination of Commercial Division cases. To this end, we suggest the addition of the following language which will assist in resolving and avoiding disputes about common issues concerning the number of custodians, time periods for ESI searches, inaccessible ESI sources, and time spent searching for ESI. The suggested limitations should govern cases, absent an Order of the Court or stipulation by the parties:

"Absent an order of the Court upon a showing of good cause or stipulation by the parties,

a party from whom ESI has been requested shall not be required to search for responsive ESI:

(1) from more than ten (10) key custodians;

(2) that was created more than five (5) years before the filing of the lawsuit;

(3) from sources that are not reasonably accessible without undue burden or cost; or

(4) for more than 160 hours, exclusive of time spent reviewing the ESI determined to be responsive for privilege or work product protection, provided that the producing party can demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested."[3]

10. Rule 8

We support the proposed revision of Rule 8 to conform with the proposed revisions to Rule 11-c as consistent with our comments above.

11. Rule 1(b)

We support the proposed revision of Rule 1(b), but suggest that the term "all issues" is overly broad and therefore difficult (if not impossible) to comply with. Instead, we recommend that the Rule use the word "generally" to modify the word "discuss," so that practitioners would be required to be sufficiently versed in their clients' systems that they could generally discuss electronic discovery. We proposed the Rule would read as follows (proposed language *italicized*):

> Consistent with the requirements of Rule 8(b), counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to *generally* discuss ~~competently all issues relating to~~ electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.

12. Rule 9(d)

We support the proposed revision of Rule 9(d). However, we suggest editing 9(d)(i) to add the italicized language: "the production of electronic documents shall normally be made in a searchable format that is usable by the party receiving the e-documents, *unless the documents are not maintained in the ordinary course of business in a searchable format.*" There may be situations where, for example, scanned versions of brochures or other documents are maintained by a company electronically (e.g., in TIFF or PDF format) but are not maintained in a searchable format, and a party has the right to produce the documents as they are maintained in the ordinary

[3] *See* Model Order Relating to the Discovery of Electronically Stored Information (ESI) Checklist for Rule 26(f) Meet and Confer Regarding ESI, United States District Court for the Eastern District of Michigan, September 20, 2013.

course of business.

13. 11-e(f)

We support the proposed removal of subsection e(f), as this subsection is now subsumed by Rule 11-c(e).

14. Rule 11-g

We support the proposed revision of Rule 11(g) to conform with the proposed revisions to 11-c and the Appendices to the Rules of the Commercial Division as consistent with our comments above regarding the clawback provision.

15. Appendix A

We support the proposed changes to Appendix A, except as set forth below.

In subsection II.A., which suggests that parties confer with the client regarding anticipated electronic discovery issues prior to the Rule 7 Preliminary Conference, we propose replacing the second and third sentences with language that clarifies that the parties are to use reasonable and proportional steps to preserve ESI, rather than entering a stipulation with the Court. This change is consistent with the 2015 amendments to Federal Rule of Civil Procedure 37(e). According to the Advisory Committee Notes to revised Rule 37(e), "[d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all electronically stored information is often impossible…This rule recognizes that 'reasonable steps' to preserve suffice; it does not call for perfection."

In subsection I.A, which encourages parties to share information regarding the e-discovery process, we propose adding the following language: "Parties shall not serve formal discovery seeking discovery related to the producing party's searches and collection process, as such requests are improper 'discovery on discovery' and do not relate to a claim or defense." *Grant v. Witherspoon*, 2019 WL 7067088, at *1 (S.D.N.Y. Dec. 23, 2019) (finding that where discovery on discovery is sought, the requesting party must provide an adequate factual basis to justify it, and the court must "closely scrutinize the request in light of the danger of extending the already costly and time-consuming discovery process *ad infinitum*" (citing *Winfield v. City of New York*, 2018 WL 840085, at *3 (S.D.N.Y. Feb. 12, 2018)); *see also Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.*, 2016 WL 3906712, at *7 (S.D.N.Y July 14, 2016; *Freedman v. Weatherford Int'l Ltd.*, 2014 WL 3767034, at *2-3 (S.D.N.Y. July 25, 2014) (finding that while there are circumstances where such collateral discovery is warranted, the plaintiffs had "not proffered an adequate factual basis for the belief that the current production is deficient.").

In subsection II.B.1, which suggests that e-discovery to be discussed is that "likely to be

necessary for the just and efficient resolution of the dispute," we propose revising this language to be consistent with the scope of discovery as set forth in Fed. R. Civ. P. 26(b), which is based on a standard including reasonableness and proportionality, including and that discovery be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

We recommend that subsection II.B.2. be revised to remove an obligation to discuss "the appropriate scope of preservation," and focus instead on sources of ESI that do not need to be preserved because they are not reasonably accessible." We have concerns that inclusion of the first clause in the proposed Rule may encourage counsel to seek detailed information about a party's litigation hold notice and preservation efforts (such as the names of custodians to whom the hold is sent or other detailed information about steps a party took in anticipation of litigation), which are protected by the work product doctrine and, as to some activities, may be covered by the attorney-client privilege.

In subjection II.B.4, where it suggests that the parties identify relevant custodians, time frame and sources of ESI, we propose revising that line to say, "the identification of *a reasonable and proportional list of* relevant custodians, time frame and sources of ESI, including the identification of ESI sources that are not reasonably accessible." The Council's proposed language suggests that the intent is to identify any person who might have relevant materials in response to broad discovery requests, which does not take into account the proportionality requirement in the Rule. Moreover, counsel may not possess detailed information regarding relevant custodians at the time of the preliminary conference

In subsection II.B.5, which suggests that the parties should discuss the method for searching for and reviewing ESI, we propose revising this language to reflect that the Sedona Principles and New York caselaw recognize that ***the responding party is best situated to decide how to search for and produce ESI***. We propose revising subsection (f) consistent with the Sedona Principles, which have been cited with approval by New York courts. *See e.g. Hyles*, 2016 WL 4077114, at *3 (citing to Sedona Principle 6 and finding that the "responding party is best situated to decide how to search for and produce ESI"); *Kaye*, 2020 WL 7237901, at *6 (same).[4] Specifically, the Rule should state (proposed language *italicized*):

> ~~the method for searching and reviewing ESI, including the use of search terms,~~
> the exclusion of certain types of documents and other non-discoverable

[4] *See also United States Equal Employment Opportunity Comm'n v. George Washington Univ.*, 2020 WL 3489478, at *11 (D.D.C. Jun. 26, 2020) ("The Sedona Principles clearly state that "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."); *and Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop*., 2020 WL 3498161, at *4 (E.D. Pa. June 29, 2020) (finding that in general, the producing party is in a far better position than the court to determine how to search for and collect documents).

information from discovery, *and* the use of de-duplication and email thread suppression~~, and the use of technology assisted review ("TAR")~~.

In subsection II.B.7, which states that the parties should discuss clawback of inadvertently produced materials, we propose a revision to the language consistent with our comments to Rule 11-c(g) regarding the clawback provision, which can be accomplished by deleting the word "inadvertently" and revising the remainder of the sentence to read: *…consistent with Rule 11-c(g)*.

In subsections III.A and C, which suggests that counsel should assist clients in implementing a legal hold and which suggests that parties take reasonable steps to identify and preserve relevant data, we suggest replacing these references with language that clarifies that the parties are to use reasonable and proportional steps to preserve ESI, as consistent with Federal Rule of Civil Procedure 37(e). Using consistent language will increase clarity and remove opportunities for conflicting interpretations of the duty to preserve.

In subsection V.E, which suggests that the parties are encouraged to use efficient means to identify ESI for production, including technology assisted review ("TAR") in appropriate situations, we suggest removing the references to TAR contained therein. As noted above, the responding party is best situated to decide how to search for and produce ESI, and TAR can be more expensive to implement than other methods.

In subsection VI.A, as set forth in our comments to revised Rule 11-c(c), we do not recommend that the party requesting ESI should be permitted to specify the format in which ESI should be produced. Instead, we suggest revising this subsection to reflect that the responding party is best situated to decide how to search for and produce ESI. Specifically, we propose language that recognizes that responsive information and documents, including ESI, will be produced in a commercially reasonable manner or in the manner kept in the responding party's regular course of business, whichever is less burdensome, and more economical. This language is consistent with CPLR § 104 and Federal Rule of Civil Procedure 1, which seeks to secure the just, speedy, and inexpensive determination of every civil judicial proceeding.

In subsection VI, C, we suggest removing "i.e., its native format." In many cases, it will be preferable to produce documents that are TIFFed and Bates stamped so that the documents can be redacted and cannot be manipulated prior to printing. And, native format documents often contain numerous embedded items making it impossible to separate out documents that may have privileged content or need to otherwise be removed from the production.

We do not support the proposed revisions to section VII.A, which suggest that only inadvertently or unintentionally produced ESI should not be deemed to be a waiver of the protection "if reasonable precautions were taken to prevent disclosure." This standard permits the non-producing party to create a sideshow related to whether the producing party acted inadvertently or unintentionally, and expressly requires the court to assess whether the producing party took "reasonable precautions" to prevent disclosure, which is not necessary to the

determination of whether the protected information should be returned. if this revision is made, the last sentence is superfluous. This provision should read:

> Parties should take reasonable steps to safeguard ESI subject to the attorney client privilege or other protections from disclosure. That said, pursuant to Rule [11-c(g)], the ~~inadvertent or unintentional~~ production of ESI containing protected information should not be deemed a waiver ~~if reasonable precautions were taken to prevent disclosure and prompt notice is given of the inadvertent disclosure~~.

16. Stipulated and Order for the Production and Exchange of Confidential Information

In paragraphs 18(a) and (b), which suggests the parties should implement and adhere to reasonable procedures to ensure that protected documents are identified and withheld, we propose revising the proposed language as consistent with our comments above concerning Rule 11-c(g) as to the clawback provision and Federal Rule of Evidence 502(d), which provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."

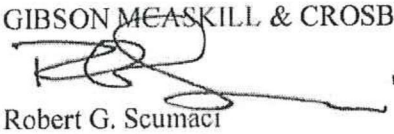
CONCLUSION

We appreciate the Board's hard work in examining whether the Commercial Division Rules and Appendices should be amended. The revisions and feedback discussed above would, in our view, further the aim of achieving a speedy, fair and efficient process. We thank the Board for the opportunity to contribute its feedback to the review process. Please do not hesitate to contact us if the Board has any questions regarding this feedback letter or needs further information or assistance.

Very truly yours,
AARONSON RAPPAPORT FEINSTEIN & DEUTSCH, LLP

Peter J. Fiato

GIBSON MCASKILL & CROSBY, LLP



Robert G. Scumaci

PHILLIPS LYTLE, LLP

Craig A. Leslie

COUNCIL ON JUDICIAL ADMINISTRATION

MICHAEL P. REGAN
CHAIR
45 MAIN STREET, #800
BROOKLYN, NY 11201
Phone: (203) 648-8433
regan.mp@gmail.com

STATE COURTS OF SUPERIOR JURISDICTION COMMITTEE

BART J. EAGLE
CHAIR
1700 BROADWAY, 41ST FLOOR
NEW YORK, NY 10019
Phone : (212) 586-0052
Fax : (212) 586-5491
bje@szslaw.com

LITIGATION COMMITTEE

JOHN M. LUNDIN
CHAIR
405 LEXINGTON AVENUE, 26TH FLOOR
NEW YORK, NY 10174
Phone : (212) 541-2402
JLundin@LundinPLLC.com

November 8, 2021

By Email
Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

Re: Response to (1) September 7, 2021 Request for Public Comment on Proposal to Amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F to Provide Additional Guidelines Related to the Discovery of Electronically Stored Information in the Commercial Division; and (2) September 14, 2021 Request for Public Comment on Proposal to Amend Commercial Division Rule 11 to Include a Preamble on Proportionality and Reasonableness and to Add Provisions Allowing the Court to Direct Early Case Assessment Disclosures and Analysis (the "Proposals")

Dear Ms. Millett:

We write in response to your Request for Public Comment on the above-referenced Proposals.

The City Bar's Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the Proposals. As discussed below, we support the Proposals with a few, small changes discussed below that we view as furthering the purpose of the Proposals.

First, the Proposals do not address, but should, the often difficult and time-consuming question of the technical aspects of a production. That is, in what format should ESI be produced and what data should be produced, beyond an image of the document being produced? For that reason, we propose that Rule 11 in addition be amended to provide for the use of the ESI stipulation attached as Exhibit 1.

Importantly, the proposed stipulation creates the framework for the process of meeting and conferring regarding the technical aspects of a production but the parties are free to modify or amend it by agreement so they can adopt the approach that is best for them in the context of their litigation. The proposed ESI stipulation contains a privilege claw-back provision for the parties to use on the rare occasions when they are not using the Commercial Division model confidentiality order which, under the Proposals, now will contain a privilege claw-back provision.

Second, the proposed new Rule 11(a) and (b) should be modified to make clear that any written description of a party's claims/defenses is not binding and does not limit the scope of its pleadings; it simply is a tool to facilitate case management. We propose addressing this with a new subparagraph (c) stating: "Any written description of a party's claims/defenses provided under this rule is not binding and does not limit the scope of a party's pleadings."

Third, with respect to the Preamble to Rule 11, we believe that it is important to add that depositions should also be handled in a manner that is proportional and reasonable in light of the complexity of the case and the amount of proof required to resolve the claims and defenses. Indeed, whereas current Commercial Division Rule 11-d provides for a total of 10 depositions by each party, each up to 7 hours in duration, the issues in a particular case may not warrant numerous depositions. Accordingly, we propose revising the final sentence to the Preamble, as follows (additional language underlined): "It is important that counsel's discovery requests, <u>including depositions</u>, are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action."

Thank you for your consideration.

Respectfully,

Michael P. Regan, Chair
Council on Judicial Administration

Bart J. Eagle, Chair
State Courts of Superior Jurisdiction Committee

John M. Lundin, Chair
Litigation Committee

Cc: Maria Cilenti, City Bar Senior Policy Counsel
mcilenti@nycbar.org

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY Of NEW YORK

---------- X

Index No. _____
Part _____

Plaintiff(s),

-against-

STIPULATION FOR THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION

Defendant(s).

---------- X

Pursuant to this Stipulation and Order for the Production of Electronically Stored Information (Stipulation), the parties shall undertake the following responsibilities as to Electronically Stored Information (ESI):

1. Consistent with the parties' obligations to meet and confer in good faith in accordance with all applicable rules, including under Rule 202.7(c) of the Uniform Civil Rules for the Supreme Court (22 N.Y.C.R.R. 202.7(c)), within a reasonable period of time after service of written discovery requests, the parties shall meet and confer in an attempt to agree upon the following search, collection and production parameters for ESI: (a) the identification of custodians reasonably likely to have ESI responsive to the applicable written discovery requests; (b) the sources where ESI responsive to the applicable written discovery requests is reasonably likely to be found; (c) the identification of search terms reasonably likely to identify ESI responsive to the applicable written discovery requests, and/or the use of predictive coding or other search and review methodologies; (d) the manner of collecting ESI; (e) the formatting and production of ESI; (f) the de-duplication of ESI; and (g) the delivery of ESI. However, if the parties cannot, after meeting and conferring in good faith, agree on any or all of the above, then

the parties shall contact the court, pursuant to the Part Rules of the assigned judge regarding the resolution of discovery disputes, if any, or Rule 14 of the Commercial Division Rules, in order to resolve the impasse.

2. Except for documents produced in native format, all documents shall be Bates numbered, searchable, and produced in either TIFF or PDF format at 300 dpi or greater.

3. Documents produced in paper format shall be accompanied by a delimited text file (.DAT) or an Excel file (.xls) or a text file (.txt) containing these metadata fields: (a) Beginning Bates Number; (b) Ending Bates Number; (c) Name of Document; and (d) Number of Pages. The parties may agree to include other fields. The parties shall meet and confer regarding the delimiters for the file.

4. Documents produced in electronic form – such as emails, Excel spreadsheets, word processing documents and presentations – shall be accompanied by a delimited text file (.DAT) or an Excel file (.xls) or a text file (.txt) containing as many of the metadata fields listed on Exhibit A as may reasonably be produced. The parties shall meet and confer regarding the delimiters for the file and the field names appropriate for their databases.

5. Attachments, enclosures, and/or exhibits to any parent document shall be produced sequentially following the parent document.

6. If spreadsheets are produced in their native format, they shall be produced in the order that they were stored in the ordinary course of business, *i.e.*, emails and attached spreadsheets should not be separated from each other. A placeholder TIFF or PDF should also be produced in order to preserve the location of the native document in the production. The placeholder should say "Produced as Native File" (or an equivalent message) and list the associated document Bates number at the bottom of the placeholder page. The original file name

should be prepended with the document Bates number. The extractable metadata (to the extent the metadata is available) and text should be produced in the same manner as other documents that originated in electronic form. The parties agree to work out a protocol governing the use and format of documents produced pursuant to this paragraph at trial, depositions or hearings.

7. The requesting party may ask for documents that were initially produced in their petrified (TIFF or PDF) format to be produced in their native format should the petrified version not be reasonably usable. The documents should then be produced in their unaltered native format, subject to the producing party's right to move for appropriate relief under CPLR 3103.

8. [IF THE PARTIES ARE NOT SUBJECT TO A NO PRIVILEGE WAIVER PROVISION IN ANOTHER STIPULATION, THEN ADD:] The parties agree that the production of privileged or work-product protected ESI, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery (including, but not limited to, the attorney-client privilege or work product protections). In the event that any party produces any ESI that such party or any other party determines is privileged or otherwise immune from discovery, in whole or in part, pursuant to the attorney-client privilege, work product doctrine, common interest doctrine, or any other applicable privilege or protection from disclosure, such materials ("Protected Information") may be retrieved by the producing party or any other party claiming privilege over such Protected Information by giving written notice to the producing Party and all other Parties. Upon receipt of written notice that the party that intends to retrieve Protected Information, the party in possession of the Protected Information, or any other persons who have received a copy of the Protected Information, shall be required to promptly return, destroy or delete all such Protected Information. The terms of this paragraph will not be deemed a waiver of any Party's right to challenge a Party's designation of materials as Protected Information.

9. Should any provision in this Stipulation conflict with any provision in the parties' Stipulation and Order for the Production and Exchange of Confidential Information, the Confidentiality Stipulation shall govern.

10. This Stipulation may be modified or amended by written agreement of the Parties.

Dated: _____
New York, New York

[FIRM]

By:_____

Tel: (___) ___-____
Fax: (___) ___-____

Attorneys for Plaintiff(s)

[FIRM]

By:_____

Tel: (___) ___-____
Fax: (___) ___-____

Attorneys for Defendant(s)

SO ORDERED: _____
_____

J.S.C. Dated

Exhibit A: Metadata Fields for ESI

Field Name	Sample Data	Description
PRODBEG	ABC0000001	First Bates number of document
PRODEND	ABC0000001	Last Bates Number of document
ATTACHRANGE	ABC0000001 - ABC0000015	Bates number of the first page of the parent document to the Bates number of the last page of the last attached "child" document
PRODBEGATTACH	ABC0000001	First Bates number of the attachment range
PRODENDATTACH	ABC0000015	Last Bates number of the attachment range
PARENT_BATES	ABC0000001	First Bates number of the parent document (should be populated for each "child" document)
CHILD_BATES	ABC0000002; ABC0000014	First Bates number of every "child" attachment; can be more than one Bates number listed depending on the number of attachments (should be populated for each "parent" document)
FROM	John Smith	Email: Sender Native: Author(s) of document
TO	Coffman, Janice; LeeW [mailto:LeeW@MSN.com]	Recipient(s)
CC	Frank Thompson [mailto:frank Thompson@edt.com]	Carbon copy recipient(s)
BCC	John Cain	Blind carbon copy recipient(s)
SUBJECT	Board Meeting Minutes	Email: Subject line of the email Native: Title of document (if available)

Field Name	Sample Data	Description
DATE_SENT	10/12/2010	Email: Date the email was sent
TIME_SENT	7:05 PM	Email: Time the email was sent
FILE_EXTEN	MSG	The file type extension of the document
FILE_NAME	Draft.doc	The file name of the email attachment or loose e-file
FILESIZE	125,455	Size of file in KB
PGCOUNT	1	Number of pages in native document
Confidentiality	[Blank] / Confidential / Highly Confidential	Confidentiality designation applied pursuant to Confidentiality Stipulation and/or Protective Order
Redacted	[Blank] / Redacted	Denotes documents on which redactions have been applied

New York County Lawyers Association

NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON THE SUPREME COURT'S COMMENTS ON AMENDMENTS TO THE COMMERCIAL DIVISION RULES[1]

I. OVERVIEW

The Administrative Board of the Courts has requested public comment with respect to the proposed rule changes, by the Commercial Division Advisory Council ("CDAC"), to amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F (the "Amendments"). These updates are intended to provide greater guidelines for the discovery of electronically stored information ("ESI"). For the reasons detailed below, the New York County Lawyers Association ("NYCLA") Committee on the Supreme Court, endorses these proposed rule changes.

NYCLA is an organization of nearly 9,000 lawyers. Its membership comprises attorneys from all areas of the practice in New York, including governmental, corporate in-house, large-firm, and small-firm practitioners. NYCLA issues reports and position papers on matters of interest to our membership and advocates changes in law and procedure that we believe will promote the public interest.

NYCLA commends the CDAC for its efforts to amend the rules with respect to the expanding area of ESI discovery. In the past, ESI discovery typically arose in larger matters. Today, however, it is becoming more prevalent in nearly every type of legal dispute. As technology becomes ubiquitous in everyone's life, as nearly everyone communicates and stores their work material electronically, it is essential that the rules for ESI discovery be streamlined for greater clarity and conformity to better address these issues. Having reviewed the rules, NYCLA affirms its support that these changes are a good step toward accomplishing those goals in an ever-evolving area of law. This is accomplished by consolidating the rules regarding e-discovery and underscoring the importance of several key points, under one rule, such as the encouragement of early discussion of ESI, and for consideration of proportionality, cooperation, technical competence, form of production, prevention of the waiver of privilege, as well as guidance on when cost shifting is appropriate.

II. THE AMENDMENTS

Nowadays, discovery for a legal action will almost certainly involve electronic discovery, which will frequently entail greater complexity. Consequently, it is critical that parties engage in conversations at the outset of a legal matter, to curtail any downstream issues from arising as things progress. Every case has its own factual circumstances and will therefore need to be tackled on a

[1] The views expressed here are those of the NYCLA Committee on the Supreme Court only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board. The NYCLA Committee on the Supreme Court would like to thank Yitzy Nissenbaum, Esq. for his insights and contributions to this commentary.

case-by-case basis. The Amendments focus on several facets for which counsel should discuss both with their clients and adversaries. This comment will concentrate on some of the key points and why these changes are warranted.

A. SCOPE OF ESI GUIDELINES

As a starting point, it is only logical that the ESI Guidelines extend to all parties and not be limited specifically to non-parties. Guidelines regarding the handling of ESI should certainly equally extend to the parties primarily involved in the dispute, with it serving as an impetus for counsel to confront complex ESI concerns in advance of the preliminary conference. Undoubtedly, early preparation and examination of potential issues by the parties will result in a more comprehensive and productive preliminary conference and facilitate the process.

While it is certainly true that a party is "best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information,"[2] the Guidelines rightly encourage a producing party to "engage in a good faith exchange of information about its process and attempt to resolve any disputes regarding the process to be employed."[3]

B. CONSOLIDATION AND CLARIFICATION OF RULES

By consolidating the rules under the umbrella of one specific rule, it crystallizes the various obligations a party may have with respect to its ESI obligations. A starting point, as advocated in the Guidelines, is that the parties should engage in good faith effort to resolve any issues at the outset, in contrast to leaving potential conflicts to be dealt with, on an as needed basis, as the matter evolves. By making reference to the Guidelines, which provides in detail the topics to be discussed, it obviates the need for current Rule 1 (b) and 8(b).

NYCLA lauds the Guidelines for its emphasis that counsel is obligated to advise clients regarding a client's obligations ranging from preservation to production. This is particularly true with respect to the preservation of electronic data, with new forms of communications appearing every day, like Slack, Teams, chat applications, social media, mobile devices, and the preservation risks of "ephemeral" messaging systems.[4] Methods for electronically conversing are constantly evolving and it is an attorney's ethical obligation to remain technically competent or associate with a qualified third-party e-discovery specialist for handling data from that type of medium.[5] Moreover, it is counsel's obligation to investigate and evaluate with specificity as to why ESI may

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[2] *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1 (2018).

[3] Proposed Amendments to Guidelines - Section V(A).

[4] Proposed Amendments to Guidelines – Section III(B), (D); *see also* The Sedona Conference, *Commentary on Ephemeral Messaging* (January 2021).

[5] *See* ABA Model Rules of Professional Conduct Rule 1.1, Comment 8; NYRPC Rule 1.1, Comment 8; Proposed Amendments to Guidelines – Section I(C).

not be reasonably accessible for a pending matter. Accordingly, in uniformity with the CPLR, proposed rule 11-c(h), requires a party take 'reasonable steps' to properly preserve ESI.

The rules are further clarified by subsequently listing in 11-c(c), within the same rule regarding the need to consult the Guidelines, that a requesting party may specify the format in which ESI should be produced. In line with FED R. CIV. P. 34, a party may request the format in which documents should be produced and that the responding party, if objecting to the requested format, specify with particularity the basis of its objection. Importantly, the Guidelines, however, encourages the parties "to reach agreement on a format for the production of ESI to avoid unnecessary expense and the risk of costly re-productions."[6]

It is also highlighted, that in the absence of an agreed upon form of production it should be produced in "the form in which it is ordinarily maintained, or in a searchable format that is usable by the party receiving the ESI."[7] In light of the growth of other electronic methods for communicating, for example via collaboration tools and mobile communication, there is a greater need for clarification of the form of production, for these forms of ESI, in the absence of an agreement.

The Guidelines should certainly be praised for its stressing the need for the parties to address production formats for non-document forms of ESI, "such as multimedia, text messages, instant messages, social media, and structured databases."[8] At the same time, the rule needs to clarify how that that type of data should be produced, in the absence of an agreement. Producing text messages, and alike, in native form is not a viable option and there is no acceptable standardized form, as to what is considered a reasonable format, for that type of ESI data. All too often, parties fail to reach an agreement on the format in which documents are to be produced, and even within ESI agreements, parties almost inevitably fail to properly address the form in which these types of ESI should be produced in.

Similarly, by placing the concept of proportionality within the same rule in 11-c(d), from Rule 9(d), it emphasizes to the parties the need to tailor its ESI request to what is reasonable and proportionate. Proportionality is essential to the concept of litigation, as the cost of litigation should not outweigh the benefit. This is not merely based on monetary considerations, as the importance of the issues is equally essential, and will now conform to federal practice.[9]

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[6] Proposed Amendments to Guidelines – Section VI.

[7] Proposed Rule 11-c(c).

[8] Proposed Amendments to Guidelines – Section VI(B)(5).

[9] It is generally acknowledged "that discovery is one of the most expensive time-consuming aspects of litigating a commercial case," and it is for this reason that NYCLA would also support amending Rule 11 to include a preamble on Proportionality and Reasonableness. *See* Request for Public Comment on Proposal to Amend Commercial Division Rule 11 to Include a Preamble on Proportionality and Reasonableness and the Add Provisions Allowing the Court to Direct Early Case Assessment Disclosures and Analysis, Eileen D. Millett, Sept. 14, 2021; *see also* FED R. CIV. P 26(b)(1).

Accordingly, NYCLA concurs with the Amendment to consolidate it under one rule and as the Guidelines notes "[p]arties should not use discovery of ESI for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[10]

Having incorporated the principle of proportionality with Rule 11-c, technology-assisted review ("TAR"), which is also aimed at reducing costs,[11] should be joined into the same rule. Accordingly, NYCLA agrees with the uniting of these principles within the same rule and moving it out of current Rule 11-e(f).

Importantly, the Guidelines emphasize that the "use of TAR is not unjustifiably discouraged, its use should not be held to a higher standard than the use of search term keywords or manual review."[12] This is especially true considering that TAR methods only continue to improve and have been generally shown to be more efficient, with one court indicating that it may even be the required methodology employed for review someday.[13]

Nonetheless, NYCLA particularly commends the addition to the Guidelines that "[c]ounsel employing TAR should ensure that it is sufficiently knowledgeable regarding its use and/or associate with persons with appropriate subject-matter expertise, knowledge, and competence."[14] This is important for two primary reasons. Firstly, it is incumbent that counsel either be sufficiently versed in TAR or associate with a subject matter expert on TAR, if it will be utilized for discovery. Secondly, TAR is certainly not appropriate in all cases, especially considering the medium of communication. With the growth of short message content, for example chat application and alike, where the individual messages lack context, TAR is likely not a suitable method.[15]

C. Inadvertent Production of Privileged ESI

Importantly, the Amendments and Guidelines underscore the point that the inadvertent or unintentional production of ESI subject to attorney-client privilege, work product, or other generally recognized privilege is not a waiver if reasonable precautions were taken to prevent the

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[10] Proposed Amendments to Guidelines – Section I(B).

[11] *See* FED R. CIV. P. 26(b)(1), Committee Notes on Rules – 2015 Amendment. ("The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.")

[12] Proposed Amendments to Guidelines – Section V(E).

[13] *See Hyles v. New York City*, No. 10-cv-3119 (AT) (AJP), 2016 U.S. Dist. LEXIS 100390, at *9-10 (Aug. 1, 2016) ("There may come a time when TAR is so widely used that it might be unreasonable for a party to decline to use TAR. We are not there yet.").

[14] *Id.*

[15] While a full review employing TAR may not be appropriate, Analytic tools, such as Sentiment Analysis, for detecting the tone of a message, may still prove highly useful.

disclosure and upon learning of the disclosure promptly notified the other party of the inadvertent disclosure. This is of particular import as it is not expressly addressed in the CPLR. The volume of data generated daily only continues to proliferate, with electronic discovery entailing larger sets of data requiring review for disclosure.

Commensurate with this growing population, is the growth of potentially privileged material requiring assessment and review and it is therefore untenable to expect that no privileged materials could slip through the cracks. Accordingly, NYCLA supports the effort to make this supremely clear in the rules that an inadvertent privilege disclosure should not automatically mean that privilege has been waived. Parties should also strongly consider the option of extending these protections by entering into written agreements, as noted in the amendment. Echoing the comments from the NYSBA Commercial and Federal Litigation Section, NYCLA concurs that parties should enter into written, court-ordered non-waiver agreements to prevent privilege waiver, whether inadvertently or otherwise.[16] Entering into such agreements, thereby curtails subsequent costly disputes.

D. Defray Reasonable Expenses for Non-Party's ESI Production

Significantly, the proposed change to Rule 11-c(e), embeds into the rule the jurisdiction-specific requirement that a requesting party defray the costs associated with a non-party's production of ESI, as compelled under CPLR 3111 and 3122(d). Once again echoing the comments from the NYSBA Commercial and Federal Litigation Section, NYCLA agrees that greater guidance is needed, as to the extent and types of costs a party should try to defray. Incorporation of the examples referenced in the Commercial Division's current Appendix A – Guidelines for discovery of ESI Discovery, may serve to accomplish this goal.[17]

III. Conclusion

It is for the aforementioned reasons that NYCLA supports the adoption of the proposed Amendments, noting its suggestions and the need for clarification with respect to newly developing forms of ESI. The Amendments serve to merge and elucidate the Commercial Division's Rules to promote just, speedy, efficient and cost-effective resolutions. Nonetheless, it needs to be noted that the rules will likely need to be constantly updated to keep pace with technological growth, as the legal community is often lagging behind on that front.

November 8, 2021

[16] *See* New York State Bar Association Commercial and Federal Litigation Section Comment on Amendments to the Commercial Division Rules, Oct. 21, 2021, Section II(A).

[17] *Id.*, at Section II(B).

November 8, 2021

Eileen D. Millett, Esq.
Office of Court Administration
25 Beaver Street, 11th floor
New York, New York 10004

Dear Ms. Millett,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, I write to comment on the Proposal to Amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11e(f), 11-g and related appendices, published September 7, 2021. MACA welcomes this opportunity and we thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of approximately 125 law firms with litigation practices (primarily large and mid-sized firms) as well as the Attorney General's Office. Our members' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of the procedures applicable in various state and federal court systems. In particular, our members have extensive experience with the Statewide Rules of the Commercial Division and as well as practice throughout the New York Supreme Court.

We support adoption of the proposed amendment. The provisions the amendment would add—authorizing the requesting party to specify the form of production, combining the principles of proportionality and cost-shifting, and standardizing the treatment of inadvertently produced privileged material—all are sufficiently concrete and specific to provide meaningful regulation of the e-discovery process and address recurring needs of

litigants as they go through it. To the extent the proposed amendment represents a reorganization of existing rules, the amendment would serve to make the Commercial Division rules more user-friendly for litigants. The qualities of meeting real life procedural needs of litigants, concreteness, specificity and user-friendliness are hallmarks of good rulemaking.

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Again, MACA is grateful for the opportunity to comment on the proposal to amend the Commercial Division's e-discovery rules. If the OCA would like elaboration on any of the foregoing, please let me know.

Respectfully submitted,

s/Timothy K. Beeken
MACA Rules Committee Chair
Counsel & Managing Attorney
Debevoise & Plimpton LLP