LITIGATION
INFORMATION MEMO
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Rules Amended to Respond to Continued Proliferation of Electronic Discovery in Commercial Matters

In 1995, then-Chief Judge Judith Kaye established the Commercial Division of the New York Supreme Court, reinforcing New York State as the center not only of finance and commerce for the country, but also for litigating commercial disputes. Over the next two decades, while businesses continued to litigate in New York State, they were transitioning their offices away from hard copy correspondence and files to electronic messages and data storage. This transition impacted discovery in commercial litigation, forcing lawyers and judges to wrestle with how to handle a new format of potentially relevant material.

To address these sorts of issues, in 2012, Chief Judge Jonathan Lippman convened a Task Force on Commercial Litigation in the 21st Century to provide "practical proposals" that would create a "lasting impact" on this commercial litigation. The Task Force, recognizing the changes to commercial litigation over the previous 23 years, made more than 20 proposals. In response, Chief Judge Lippman assembled the Commercial Division Advocacy Council (CDAC), and charged it with implementing the proposals, as well as to keep the Commercial Division Rules in line with current practice.

Recently, the CDAC's Technology Committee did just that, proposing amendments to the Commercial Division Rules that would update and guide "practitioners relating to the discovery of electronically stored information (ESI) in the Commercial Division." Specifically, CDAC proposed to amend Commercial Division Rules 1, 8, 9, 11-c, 11-e, 11-g, and Appendices (the Proposal). On Sept. 7, 2021, the Administrative Board of the Courts sought comments on the Proposal, and on March 7, 2022, Chief Administrative Judge Lawrence Marks issued Administrative Order AO/72/22 accepting the Proposal and amending the Commercial Division Rules accordingly, effective April 11, 2022 (the Amendments).

The Amendments to Commercial Division Rules 1, 8 and 9, and Appendices B, E and F constitute mostly "technical changes" arising out of the far more significant changes made to Commercial Division Rule 11-c and Appendix A.

Commercial Division Rule 11-c has grown in length from one paragraph concerning non-party ESI discovery to eight paragraphs concerning party and non-party ESI discovery. This expansion:

- refers parties to the Commercial Division's Guidelines for Discovery of ESI, *i.e.*, Appendix A to the Commercial Division Rules;
- requires counsel to confer prior to the preliminary conference concerning electronic discovery topics;
- permits Requests for Production of ESI to specify the format in which ESI should be produced, and absent specification, requires parties to produce ESI in its ordinary form or in a searchable format;
- demands the costs and burdens of ESI discovery "not be disproportionate to its benefits, considering the nature of the dispute, the amount in controversy and the importance of the materials requested to resolving the dispute";

- requires requesting parties to promptly defray reasonable expenses arising out of a non-party's production of ESI;
- encourages efficient use of technology for ESI production, including "technology-assisted review";
- permits clawback of material inadvertently produced containing privileged material; and
- reminds parties of their duty to preserve ESI.

According to the CDAC, this re-write seeks to:

- elucidate e-discovery rules by consolidating them in one place;
- modify existing rules for clarity, consistency and to reflect the evolution of e-discovery and law; and
- address specific topics, such as proportionality, production formats, preservation and inadvertent privilege production.

In sum, it catches the Commercial Division Rules up with reality, *i.e.*, that "[e]-discovery is fundamental to the conduct of cases in the Commercial Division, with the majority of document discovery in commercial matters now involving ESI."

Appendix A, *i.e.*, the ESI Guidelines, builds from the changes in Rule 11-c, making previously included guidelines applicable to parties and nonparties alike, as well as adding new guidelines to "incorporate significant developments in the law and practice with respect to e-discovery." These new guidelines:

- encourage good faith cooperation in discovery;
- remind counsel of the importance of e-discovery competence;
- remind counsel to assist clients actively with preservation, collection, search, review and production of ESI;
- provides guidance on defensible preservation and collection of ESI;
- implements a process for parties to address ESI that is "not reasonably accessible";
- guides the selection of procedures, methodologies, and technologies for producing ESI, including technology-assisted review;
- enumerates a meet and confer process to agree on acceptable ESI production;
- permits clawback of privileged ESI material; and
- explains when it is appropriate to shift discovery costs.

While these proposals are "advisory rather than mandatory," they are meant to help guide parties and counsel while allowing courts "discretion and flexibility" in managing ESI discovery in commercial litigation.

The days of commercial litigation discovery consisting of boxes of paper in a warehouse are, by and large, behind us. So, too, are the traditional rules of discovery applicable in such cases. These Amendments continue to bring the Commercial Division Rules in line with this reality.

This dynamic equilibrium between technology and discovery practices and rules will only continue in the coming years. To stay updated on this issue – and any discovery or commercial litigation issues – stay in touch with Bond. We will continue to keep you apprised here, but also are happy to answer your direct questions. To that end, please do not hesitate to reach out to Liza R. Magley, any attorney in Bond's Litigation practice or the Bond attorney with whom you are regularly in contact.

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