

New York Commercial Division Leads the Way With New E-Discovery Rules

By Saliann Scarpulla,
Julie North and Scott Reents

The Commercial Division of the New York Supreme Court recently adopted a series of significant rule changes to modernize how its courts tackle the increasingly thorny issue of e-discovery, the production of electronically stored information (ESI). Particularly in the post-pandemic world, business is most often conducted through electronic means—from email exchanges to text messages to Zoom calls. This now prevailing method of conducting business makes e-discovery essentially synonymous with document discovery for cases of all sizes. As the cost and complexity of e-discovery increases, straightforward, flexible rules for addressing this area are essential to the just and efficient resolution of disputes. The Commercial Division has recognized and addressed this reality. The overhaul of its e-discovery rules positions the New York Commercial Division as a leader in this area and, as a result, an attractive forum for businesses looking to resolve their significant litigation matters.



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The Commercial Division’s e-discovery rule amendments comprehensively address e-discovery in a single rule, consolidating pre-existing rules and adopting new provisions to address topics not previously covered. In addition, new advisory guidelines offer parties a clear, consistent, and practical outline for conducting defensible e-discovery and avoiding and resolving disputes without costly motion practice.

While the new e-discovery rule offers guidance on a wide range of issues, three are particularly noteworthy:

- *First*, it addresses managing the burdens of e-discovery economically so that the parties can focus their resources on litigating the merits of the dispute. The new rule incorporates a “proportionality” requirement to ensure that the costs of e-discovery are balanced against its benefits. The rule also provides clear and practical guidance for the parties to reach early agreement on e-discovery topics that will help prevent costly disputes and later do-overs.
- *Second*, the new rule addresses e-discovery in the context of emerging technologies. The rule

covers the preservation, collection, and production of new but increasingly common forms of ESI, such as instant messaging, social media, mobile devices, and cloud-based sources. It also encourages parties to consider the use of advanced technology in the discovery process, including artificial intelligence-based approaches such as technology assisted review (TAR), which can dramatically speed and reduce the costs of e-discovery.

• *Third*, the new rule addresses protection of parties' most sensitive information in the face of growing complexity and volume of ESI. The rule offers protections against waiver from inadvertent disclosure of privileged information, which becomes more likely with large volume ESI productions. It also encourages parties to give due regard to the increasing number of important state, federal, and foreign laws that protect sensitive personal, health, financial, trade secret and other information, such as the California Consumer Protection Act (CCPA), the federal Health Insurance Portability and Accountability Act (HIPAA), and the EU's General Data Protection Regulation (GDPR).

Yes, the new rule significantly expands the Commercial Division's coverage of e-discovery issues, but it does so in a way that is entirely consistent with the CPLR and existing New York decisional law. The purpose of the new rule is to codify and clarify existing law, while addressing significant

developments in the practice of e-discovery over the last several years. The new rule is informed by the guidelines and experiences of a number of federal and state courts, federal and New York decisional law, and relevant thought-leading organizations.

The changes will not only help parties address e-discovery in their cases, but they will also bring greater transparency and predictability to how courts handle e-discovery issues that are brought before them. The rule amendments are structured to significantly reduce unnecessary conflicts over e-discovery and allow courts and parties to focus on the merits of their disputes.

The Commercial Division Advisory Council, which proposed these changes, was determined to provide guidance on e-discovery that is readily understandable and useful to practitioners and business clients with all types and levels of litigation experience. We believe that the effort has been successful and that all lawyers and businesses that encounter e-discovery issues in New York State will benefit from these changes.

The benefits will accrue to a diverse range of parties and cases, from complex commercial disputes with multimillion dollar claims to less complex cases involving smaller companies and more modest demands. While historically e-discovery may have been limited to large, complex cases, now litigation of even relatively modest and

straightforward claims often involves the exchange of electronic evidence. The new rule charts a path for conducting e-discovery in a way that does not result in exorbitant and disproportionate costs for such cases.

Parties often have a choice of where to bring their commercial disputes for resolution. Because of the increasing significance and cost of e-discovery in modern litigation, parties will look to jurisdictions that offer rules for e-discovery that are fair, efficient, comprehensive, and clear. The latest amendments from the Commercial Division place this court at the forefront of courts across the country in how e-discovery is governed, and how commercial disputes are resolved.

Saliann Scarpulla is Justice of the New York State Supreme Court, Appellate Division, First Department and a member of the New York Commercial Division Advisory Council. **Julie A. North** is a retired partner of the litigation department of Cravath Swaine & Moore and a member of the New York Commercial Division Advisory Council. **Scott B. Reents** is the lead attorney for data analytics and e-discovery at Cravath.

CRAVATH, SWAINE & MOORE LLP