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New York Commercial Division Practice Guide

Excerpt: Chapter VI. Discovery in the Commercial Division

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VI.
Discovery in the Commercial Division

By Peter W. Tomlinson and Benjamin F. Jackson

A. Introduction

Thanks to recent efforts to harmonize the Commercial Division's rules with the Federal Rules of Civil Procedure, discovery in the Commercial Division now largely mirrors that in federal courts. Nevertheless, there remain important differences between discovery practice in the Commercial Division, federal courts, and other New York State courts.

B. Court Appearances

1. Overview

Counsel who appear in the Commercial Division are expected to be thoroughly familiar with their cases, both procedurally and substantively, and they must be fully authorized to enter into agreements on behalf of their clients.[1] As a result, in the Commercial Division, it is especially unwise for lead counsel to pay other counsel to make one-time appearances at compliance conferences and the like, as is commonly done in other Parts of the Supreme Court.

Counsel are expected to be on time for all scheduled appearances.[2] Failure to appear for a conference could result in sanctions, including dismissal; the striking of an answer; or an inquest or direction for judgment.[3] Counsel for all parties—even those who believe they are not directly involved in the matter before the court—must appear at every scheduled appearance unless specifically excused by the court. If an individual is appearing as a self-represented person, that individual must appear at every scheduled court appearance regardless of whether he or she anticipates being heard. Requests for adjournments or to appear telephonically must be e-filed and received in writing by the court by no later than 48 hours before the hearing.[4]

> **Practice Tip:** The Commercial Division is fairly strict about its court appearance rules. For example, in *Somerset Investment Corp. v. Chreidi*,[5] the Nassau County Commercial Division awarded the plaintiff costs for the defendant's failure to make court appearances without adequate notice to plaintiff, even though defendant was self-represented, residing in the United Arab Emirates, and undergoing treatment for Hodgkin's lymphoma.[6]

Like federal courts, but unlike other Parts of the Supreme Court, the Commercial Division generally operates on a schedule of staggered court appearances, meaning that all conferences and hearings are assigned a specific time slot, the length of which is in the sole discretion of the court.[7] Note, though, that individual Commercial Division justices' scheduling practices may vary; for instance, an individual justice might stagger the motion calendar but not the conference calendar. Each attorney who receives notification of an appearance on a specific date and time is responsible for notifying all other parties by e-mail that the matter is scheduled to be heard on that assigned date and time.[8]

> **Practice Tip:** In the Kings County Commercial Division, all preliminary and compliance conferences are held on Wednesdays at 9:45 a.m. unless otherwise directed by the court. The conference calendar is called after the first call of the motion calendar.[9]

Adjournments on consent are permitted with the approval of the court for good cause, so long as notice of the request is provided to all parties. An adjournment does not affect any dates or deadlines unless the court states otherwise.[10]

> **Practice Tip:** Each county's Commercial Division and/or individual Commercial Division justices may also have specific rules regarding requests for a court conference and adjournments. For instance, the Kings County Commercial Division Rules set forth specific procedures for adjourning preliminary conferences and other conferences.[11] Onondaga County Commercial Division Justices Deborah Karalunas and Anthony J. Paris require all requests for a court conference to be made in writing on notice, unless time is of the essence, in which case the request can be made by telephone.[12]

2. Preliminary conferences

Before the preliminary conference, counsel for all parties are expected to meet and confer about case management and e-discovery. In terms of case management, before the preliminary conferences the parties should discuss:

- the possibility of settlement (in whole or in part);
- the use of alternate dispute resolution (e.g., arbitration, mediation) to resolve some or all issues;
- discovery issues that might be discussed at the conference (e.g., whether the parties plan to use experts, the timing and scope of expert disclosure, and the need to vary the presumptive number or duration of depositions); and

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[1] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 1(a).

[2] *Id.* R. 1(c).

[3] *Id.* R. 12.

[4] *Id.* R. 34.

[5] No. 023125/2007, 2010 BL 106309 (Sup. Ct. Nassau Cty. Apr. 26, 2010).

[6] *Id.* at *2–3. The court otherwise declined to sanction defendant or strike the answer. *Id.* at *3.

[7] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 34.

[8] *Id.* R. 34(c).

[9] Kings Cty. Com. Div. R. 6, http://www.nycourts.gov/courts/comdiv/PDFs/Kings_CD_Rules.pdf.

[10] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 15.

[11] *See* Kings Cty. Com. Div. R. 9–10, http://www.nycourts.gov/courts/comdiv/PDFs/Kings_CD_Rules.pdf.

[12] Hon. Deborah Karalunas, Personal Rules of Justice Deborah Karalunas, R. 1, https://www.nycourts.gov/COURTS/5jd/onondaga/supremecounty/Karalunas_Commercial_Rules_Sept-11.pdf; Hon. Anthony J. Paris, Personal Rules of Hon. Anthony J. Paris, R. 1, http://www.nycourts.gov/courts/5jd/onondaga/supremecounty/ParisCommercialDivisionRrules.pdf.

- any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case.[13]

In terms of e-discovery, before the preliminary conferences the parties should discuss:

- potentially relevant types or categories of electronically stored information (ESI);
- the relevant time frame;
- how ESI is maintained;
- potentially relevant sources of ESI and whether those sources are reasonably accessible;
- preservation plans;
- the scope, extent, order, and form of production;
- how to identify, redact, label, and log privileged or confidential ESI;
- clawback provisions for privileged or protected ESI;
- the scope or method for searching and reviewing ESI; and
- anticipated costs and burdens and who shall bear them.[14]

Counsel for all parties must also ensure they exchange e-mail addresses and keep those addresses current.[15]

Counsel for all parties who attend the preliminary conference are required by the Commercial Division's rules to be sufficiently versed in their clients' information technology (IT) systems that they can competently discuss all issues relating to electronic discovery. Counsel may bring a client representative or an outside expert with them to the preliminary conference to assist in discussions of e-discovery issues.[16] Often, it is a good idea to bring an e-discovery stipulation for the court to so-order. (*See* 801 LPS Practice Tool 10, *Electronic Discovery Order*.)

Following the preliminary conference, the court issues a preliminary conference order setting forth a comprehensive schedule for the case, whether alternative dispute resolution will be used, limitations on discovery, and whether discovery will be stayed pending the determination of any dispositive motion.[17] (*See* 801 LPS Practice Tool 19, *Preliminary Conference Order*.)

3. Compliance conferences

Before each compliance conference, counsel should meet and confer regarding:

- the possibility of settlement (in whole or in part);
- the use of alternate dispute resolution (e.g., arbitration, mediation) to resolve some or all issues;
- discovery issues that might be discussed at the conference (e.g., whether the parties plan to use experts, the timing and scope of expert disclosure, and the need to vary the presumptive number or duration of depositions); and
- any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case.[18]

4. Disclosure conferences

In the Commercial Division, disclosure conferences are typically conducted by the justice's law secretary. If any party makes a request to do so, the parties must before the conclusion of the conference prepare a written document setting forth the resolutions reached and then submit that writing to the court for approval. Alternatively, before the conclusion of the conference, all resolutions can be dictated into the record, the transcript of which can then be so-ordered by the court, or the court can enter an order incorporating the resolutions reached.[19]

5. Telephonic conferences

Justices of the Commercial Division and their law secretaries are often willing to conduct conferences by telephone. Requests to appear telephonically must be e-filed and received in writing by the court no later than 48 hours before the hearing.[20] Generally, the court does not place calls or set up conference lines, so the typical process is for one attorney to call the other, then to place that attorney on hold and call the court, and then to conference the calls.

Following a telephonic conference regarding a discovery dispute, if a party requests and the court so directs, the parties must within one business day agree upon and jointly submit to the court a stipulated proposed order memorializing the resolution of the discovery dispute. If the parties are unable to agree upon an appropriate form of proposed order, they must advise the court.[21]

Practice Tip: Frequently the court does not have much time to devote to a telephonic conference, so it is often advisable to have (1) a simple request for the court, and (2) a reasonable compromise to offer.

Practice Tip: Some Commercial Division justices require premotion telephonic conferences before certain kinds of motions can be filed. Refer to 801 LPS § VII-C4, *Premotion requirements*, for more discussion of premotions.

6. Adjournments

Requests for adjournments must be e-filed and received in writing by the court by no later than 48 hours before the hearing.[22] Refer to 801 LPS § VII-C5, *Adjournments*, for more discussion of adjournments.

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[13] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 8.

[14] *Id.*

[15] *Id.* R. 34.

[16] *Id.* R. 1(b).

[17] *Id.* R. 11. Refer to 801 LPS § V-C1, *Preliminary conference*, for more discussion of preliminary conferences.

[18] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 8(a). Refer to 801 LPS § V-C2, *Compliance conferences*, for more discussion of compliance conferences.

[19] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 14-a(a).

[20] *Id.* R. 34(d).

[21] *Id.* R. 14-a(b).

[22] *Id.* R. 34(d).

C. Timeline for Discovery

1. Accelerated actions

The Commercial Division strives to resolve cases as quickly as possible, but in practice the time it takes for the Commercial Division to fully resolve a case can vary significantly—cases can take anywhere from just a few months to several years to resolve. Commercial Division Rule 9 allows parties to agree to an ''accelerated action'' with an expedited schedule leading to a bench trial within nine months, on the condition that there be only limited discovery and no interlocutory appeals. In accelerated actions, discovery is presumptively limited to:

- seven interrogatories per party;
- five requests to admit per party;
- seven discovery depositions of up to seven hours in length per party; and
- document requests, subject to strict limitations for relevance, time frame, subject matter, and persons or entities.[23]

The parties can agree to broaden or narrow the amount of discovery as they believe necessary.

As for e-discovery, in an accelerated action the list of ESI custodians must be ''narrowly tailored'' to include ''only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.''[24] Additionally, if a request for e-discovery would impose costs or burdens that are disproportionate to the value of the case, the court can either deny the request or order disclosure on the condition that the requesting party advance the reasonable costs of production to the other side; these costs are subject to reallocation at the time of final judgment.[25] Like the general limitations on fact discovery, these guidelines for e-discovery can also be modified with the consent of all parties.[26]

2. Deadlines

In general, the Commercial Division requires strict compliance with all deadlines set forth in case scheduling orders.[27] Any deadline prior to the discovery cutoff deadline set forth in the preliminary conference order can be modified upon the consent of all parties.[28] Applications to modify or extend a deadline should be made as soon as practicable and, most important, must be made prior to the expiration of the original deadline.[29]

The consequences for missing a deadline in the Commercial Division can be serious, as parties are usually held responsible for their lawyer's failure to meet a court-ordered deadline,[30] and noncompliance with a scheduling order can result in sanctions under C. P. L. R. § 3126.[31] If a party repeatedly and willfully disregards deadlines, the Commercial Division has discretion to first grant a conditional order of dismissal and later to dismiss that party's claims, answer, or counterclaims.[32]

> **Comment:** The Commercial Division generally requires compliance with disclosure obligations to be meaningful. A pro forma response to a discovery request without any substantive content or a response that has not been made in good faith may be treated as if no response was provided at all.[33]

3. Stay of discovery

One notable difference between the Commercial Division and other parts of the New York Supreme Court is that in the Commercial Division, discovery is not automatically stayed pending the disposition of any dispositive motion pursuant to C. P. L. R. § 3214(b).[34] Rather, when a dispositive motion is filed, the Commercial Division has discretion under its Rule 11(d) to stay discovery pursuant to C. P. L. R. § 3214(b). Generally, the Commercial Division allows discovery to proceed while the motion is pending.[35]

D. Fact Discovery

1. Overview

Fact discovery in the Commercial Division is generally modeled on the Federal Rules of Civil Procedure. There are presumptive limits on the number of depositions and interrogatories, and time limits for responding to requests for admission and document requests.

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[23] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 9(c)(5).
[24] *Id.* R. 9(d)(2).
[25] *Id.* R. 9(d)(3).
[26] *Id.* R. 9(d).
[27] *Id.* R. 13.
[28] *Id.*
[29] *Id.*

[30] Arpino v. F.J.F. & Sons Elec. Co., 959 N.Y.S.2d 74, 79–80 (App. Div. 2d Dep't 2012) (''Although perhaps an undesirable outcome, parties, where necessary, will be held responsible for the failure of their lawyers to meet court-ordered deadlines and provide meaningful responses to discovery demands and preliminary conference orders. The failure to abide by these basic rules governing compliance with disclosure orders cannot and will not be tolerated in our courts.'' (citations omitted)).
[31] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 13.
[32] *See* Colley v. Romas, 857 N.Y.S.2d 260, 261 (App. Div. 3d Dep't 2008).
[33] *See, e.g.*, *Arpino*, 959 N.Y.S.2d at 79.
[34] *E.g.*, Priya Hospitality LLC v. Patel, No. 23475/10, 2011 BL 392372, at *8 (Sup. Ct. Queens Cty. May 24, 2011) (assigning case to Commercial Division and noting that ''pursuant to its rules, there is no automatic stay of discovery pending the determination of a dispositive motion'').
[35] *See* Harrop & Co. v. Apollo Inv. Fund VII, L.P., No. 651949/2014, 2015 BL 217219, at *6–7, (Sup. Ct. N.Y. Cty. June 25, 2015) (''The strong general practice of the Commercial Division is to allow discovery to proceed, notwithstanding the filing of a motion to dismiss, in order to ensure that cases proceed as expeditiously as possible.'').

2. *Depositions*

a. *General limitations on depositions*

Each party is limited to 10 depositions, which are each limited to seven hours of ''tape time,'' meaning time spent on the record.[36] Breaks for lunch, bathroom breaks, and other reasonable breaks do not count toward the seven-hour limit. As with nearly all aspects of discovery in the Commercial Division, the parties can agree to increase or decrease the number of depositions or the time limits for depositions. Parties can also apply to the court for additional depositions or additional deposition time, but they must demonstrate ''good cause'' for modifying the existing limits.[37] There is an exception for depositions of an entity through one or more representatives pursuant to C. P. L. R. § 3106(d), in which case Commercial Division Rule 11-d(e) provides that applications for leave of court for more time ''shall be freely granted.''[38]

Depositions of an entity through one or more representatives pursuant to C. P. L. R. § 3106(d) are treated as a single deposition, even though more than one person may be designated to testify on the entity's behalf.[39] If an entity's representative is also separately deposed in his or her individual capacity as a fact witness, the individual-capacity deposition counts separately toward the deposition limit.[40]

A party has the right to demand a document as a condition precedent to a deposition, which can be useful in scenarios in which a witness is not materially involved in the matter at hand and opposing counsel appears to be on a fishing expedition. In this scenario, counsel for the witness (or the entity for which the witness works) should demand the documents be produced by a fixed date sufficiently in advance of the deposition to allow for meaningful review. If opposing counsel does not produce the documents by that date, the party seeking the disclosure can then ask the court to preclude the other party from introducing the demanded documents at trial.[41]

b. *Depositions of corporate entities*

Commercial Division Rule 11-f provides for a procedure analogous to that provided by Federal Rule of Civil Procedure 30(b)(6), through which a party can depose an entity through the testimony of one or more designated representatives. The list of entities that can be deposed through this procedure includes, but is not limited to, corporations, business trusts, estates, trusts, partnerships, limited liability companies, associations, joint ventures, public corporations, governments, government subdivisions, government agencies, and government instrumentalities.[42] Any deposition testimony given pursuant to Commercial Division Rule 11-f is usable against the entity.[43]

In a notice or subpoena to an entity, practitioners should include a list of the matters on which deposition testimony is sought.[44] (*See* 801 LPS Practice Tool 12, *Notice to Take Deposition upon Oral Examination*.) Rule 11-f(b) provides that ''the matters must be described with reasonable particularity,'' but in practice a one-sentence description of each subject of testimony should be sufficient. The notice or subpoena may also identify (by name and title, or description if necessary) particular officers, directors, members, or employees whose testimony on behalf of the entity is sought.[45] If the entity is a nonparty, the subpoena must advise the entity of its duty to designate a representative.

If the notice or subpoena identifies a list of topics for testimony but does not identify any particular individuals whose testimony is sought, then no later than 10 days before the deposition, the entity must designate its representatives (including their names and titles, or a description of their position if necessary) and as to which matters they will testify (note that this last step is unnecessary if only one individual is designated).[46] If the notice or subpoena identifies both the topics and the representatives whose testimony is sought, the entity can either produce those representatives or, no later than 10 days before the deposition, notify the requesting party that another individual or other individuals (identified by name, title, or description if necessary) will be produced instead.[47] If more than one individual is cross-designated by the entity, the entity must in its response set out the matters on which each individual will testify.[48]

The entity's designees are responsible for testifying about information ''known or reasonably available to the entity.''[49] This differs from an ordinary deposition, in which the witness is expected to testify based only on personal knowledge or recollection. As a result, practitioners should carefully prepare an entity's designee to answer any questions within the scope of the noticed deposition topics based on information available to the *entity* (not just information available to the witness individually). Thus, the preparation for the deposition often involves a fairly extensive review of company documents and other materials.

3. *Interrogatories*

a. *Ordinary interrogatories*

Each party is presumptively limited to 25 interrogatories, unless the case is an accelerated action (*see* 801 LPS § VI-C1, *Accelerated actions*) or the preliminary conference order provides for a different number.[50] Interrogatories are limited to the following topics, unless otherwise ordered by the court:

- names of witnesses with knowledge of information material and necessary to the subject matter of the action;
- computations of each category of damage alleged;
- the existence, custodian, location, and general description of material and necessary documents, including per-

[36] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-d(a).
[37] *Id.* R. 11-d(f).
[38] *Id.* R. 11-d(e).
[39] *Id.* R. 11-d(c).
[40] *Id.* R. 11-d(d).
[41] *Id.* R. 13(b).
[42] *Id.* R. 11-f(a).
[43] *Id.* R. 11-f(g).
[44] *See id.* R. 11-f(b).
[45] *See id.* R. 11-f(d).
[46] *Id.* R. 11-f(c).
[47] *Id.* R. 11-f(d)(1).
[48] *Id.* R. 11-f(d)(3).
[49] *Id.* R. 11-f(f).
[50] *Id.* R. 11-a(a). This limit also applies to consolidated actions.

tinent insurance agreements, and other physical evidence.[51]

During discovery, interrogatories seeking information on any other topics may be served only if the parties consent or if ordered by the court for good cause shown.[52] The Commercial Division's limitations on the scope of interrogatories largely mirror those provided for by Southern District of New York Local Civil Rule 33.3, but they are more restrictive. In the Southern District, it is possible to serve interrogatories on additional topics if they are ''a more practical method of obtaining the information sought than a request for production or a deposition,''[53] whereas that is not the case in the Commercial Division.

Commercial Division justices may impose additional limits on interrogatories. Additionally, Commercial Division justices may impose specific requirements as to objections to interrogatories. For example, Justice Schecter's individual rules specify that the Commercial Division's on limits on interrogatories will be strictly enforced.[54]

b. Contention interrogatories

The parties may also serve contention interrogatories, which are interrogatories regarding the claims and contentions of the opposing party. These interrogatories can be served only after discovery is complete and up to 30 days before the discovery cutoff date, unless the court orders otherwise.[55] This rule is more restrictive than Rule 33.3 of the Local Civil Rules for the Southern District of New York, under which contention interrogatories may be served during discovery if they are ''a more practical method of obtaining the information sought than a request for production or a deposition.''[56]

4. Requests for admission

Requests for admission are requests for a party to admit (1) the genuineness of a document, (2) the correctness or fairness of representation of a photograph, or (3) the truth of a particular matter set forth in the request.[57] Requests for admission in the Commercial Division are governed by C. P. L. R. § 3123 and can be served any time up to 20 days before trial.[58]

Upon receiving a request for admission, a party has the following options: (1) serve a sworn denial; (2) serve an explanation for why it cannot admit or deny; (3) serve an admission; or (4) not respond (which is effectively an admission). Any response should be made within 20 days of service; otherwise, the fact is deemed admitted.[59] Any admission may be used for the purpose of the pending action only.[60] At any time, the court may allow a party to amend or withdraw an admission ''on such terms as may be just.''[61]

Comment: Practitioners should be wary not to simply deny every request for admission because an unreasonable denial can allow the requesting party to recover the costs incurred in proving the fact denied, which includes attorneys' fees.[62]

5. Document requests

The parties may issue document requests to each other. Generally, at the outset of the litigation, the parties should try to reach an agreement on a deadline for the completion of document productions. This date must be set prior to the date of the first deposition; otherwise, court approval is required. If the parties cannot agree, the court will set the deadline itself.[63]

Upon receiving a document request, the responding party must serve initial responses and objections (pursuant to C. P. L. R. § 3122(a)) by a date agreed to by the parties or set by the court. In these initial responses and objections, the receiving party must respond to each request individually, by either (1) stating that all of the requested documents will be produced, or (2) stating an objection or multiple objections ''with reasonable particularity,'' including whether an objection pertains to all or part of the request.[64] A response should also state whether any documents or categories of responsive documents are being withheld and which of the stated objections forms the basis for the decision to withhold. In addition, the responding party must state the precise manner in which it intends to limit the scope of its productions.[65] Then, at a date agreed upon by the parties or set by the court no later than one month before the close of fact discovery, the responding party must again respond to each request by stating (1) whether the production of documents in its possession, custody, or control and that are responsive to the individual request, as propounded or modified, is complete; or (2) that there are no documents in its possession, custody, or control that are responsive to the individual request as propounded or modified.[66]

Each party should designate an attorney to supervise document collection and privilege review. Under Commercial Division Rule 11-b(d), the responsible attorney must be actively involved in establishing procedures for document collection, monitoring document collection, and ensuring that responsive, nonprivileged documents are timely produced.

E. Expert Discovery

Expert discovery in the Commercial Division is similar to that in the federal system and is governed by Commercial Division Rule 13(c). The timeline for expert disclosure in the Commercial Division is as follows: Not later than 30 days before the completion of fact discovery, the parties must confer

[51] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-a(b).
[52] *Id.* R. 11-a(c).
[53] S.D.N.Y. Local Civ. R. 33.3(b).
[54] Hon. Jennifer Schecter, Practices in Part 54 (Feb. 23, 2019), https://www.nycourts.gov/courts/ComDiv/NY/PDFs/Practices_in_Part_54.pdf [hereinafter Justice Schecter's Rules].
[55] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-a(d). Justice Schecter's individual rules provide that contention interrogatories are not permitted. Justice Schecter's Rules, *supra* note 54.
[56] S.D.N.Y. Local Civ. R. 33.3(b).
[57] N.Y. C. P. L. R. § 3123(a).
[58] *Id.*
[59] *Id.*
[60] *Id.* § 3123(b).
[61] *Id.*
[62] *Id.* § 3123(c).
[63] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-e(c).
[64] *Id.* R. 11-e(a)–(b).
[65] *Id.* R. 11-e(b)(ii)–(iii).
[66] *Id.* R. 11-e(d).

on a schedule for expert disclosure, which should include dates for identifying expert witnesses,[67] exchanging written expert reports, and expert depositions. The deadline for completing expert disclosure is four months after the completion of fact discovery, and any expert disclosure provided after the deadline without good cause will be precluded from use at trial. The note of issue (*see* 801 LPS Practice Tool 18, *Note of Issue*) and certificate of readiness cannot be filed until expert disclosure is complete. If any party objects to this timetable, the parties should immediately request a court conference to discuss and have the court set dates.

If the expert witness is a party's employee and regularly gives expert testimony as part of his or her job duties, or, as is more often the case, the expert witness is being paid for his or her services, then the party must produce a written expert report. This report must contain the following:

- all opinions the witness will express at trial;
- the basis for these opinions;
- the data or other information considered by the expert witness in forming the opinions;
- any summary exhibits or demonstratives;
- the witness's qualifications, including all publications authored in the last 10 years;
- a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous 4 years; and
- how much the witness is being paid for work on the case.

If a party wishes to preserve the option of having an expert witness testify at trial, the party must also produce the expert for a pretrial deposition.[68] Preparing an expert witness for a deposition often takes a full day or more. An expert should be prepared to testify as to anything contained in his or her expert report and anything in his or her background or qualifications.

Comment: Practitioners are advised to prepare an aggressive mock cross-examination, as well as to scour Google, Facebook, LinkedIn, and any other sources of personal information on the witness or the witness's publication history for potential issues that may come up during the deposition.

Commercial Division Rule 13(c) is modeled on Federal Rule of Civil Procedure 26(a)(2), and in that regard it provides for more robust expert disclosure than that available in ordinary New York Supreme Court actions through C. P. L. R. § 3101(d). For example, C. P. L. R. § 3101(d) does not require a written expert report or provide for expert depositions. Further, whereas C. P. L. R. § 3101(d)(iii) prohibits disclosure beyond that provided for in C. P. L. R. § 3101(d) without a court order upon a showing of special circumstances, in the Commercial Division parties are encouraged to engage in more liberal expert disclosure than that provided by the Commercial Division's rules, and they may do so on a voluntary basis without the need for court approval.[69]

In addition, Rule 30(c) provides that the Court may direct the parties to consult, prior to the pre-trial conference, as to whether there are any areas in which their respective expert testimony is not in dispute.

F. E-Discovery

1. Overview

Parties appearing in the Commercial Division are required to discuss e-discovery issues before the preliminary conference (for more information on e-discovery and preliminary conferences, see 801 LPS § VI-F2, *Nassau County's e-discovery rules*). At the initial meet-and-confer regarding e-discovery, counsel may wish to discuss the following issues:

- **Document preservation:**
  - o Litigation holds
  - o Document retention policies
  - o Preservation of native files
  - o Need for forensic experts/specialists
- **Document accessibility and retrieval:**
  - o Client's past experiences with and policies regarding ESI
  - o IT systems used by the client
  - o Preliminary depositions of IT personnel
  - o Accessibility of ESI
  - o Identity of custodians
  - o Search methodologies
  - o Retrieval and review protocols
  - o Use of technology-assisted review (''TAR''), machine learning, and predictive coding
- **Costs:**
  - o Anticipated costs and burdens associated with retrieval

[67] It is an open question whether the testimony of fact witnesses based in part on expert scientific, technical, or other specialized knowledge — so-called ''embedded expert testimony'' — is subject to the disclosure requirements set forth in Commercial Division Rule 13(c), or the less stringent requirements of C. P. L. R. § 3101(d)(1)(i), which only require disclosure ''in reasonable detail'' of the ''subject matter'' of a witness' expert testimony, the ''substance'' of their expert opinion,'' and a ''summary of the grounds for that opinion.'' C. P. L. R. § 3101(d)(1)(i). To avoid the risk that such testimony will be precluded due to a failure to make the proper disclosures, parties are advised to meet and confer to discuss this issue at the outset of expert discovery, to ensure that no party can later claim surprise and inability to obtain discovery about the ''embedded expert testimony'' in question.

[68] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 13(c); *see* Sakow v. Columbia Bagel, Inc., 792 N.Y.S.2d 321, 323 (Sup. Ct. N.Y. Cty. 2004).

[69] Sieger v. Zak, 953 N.Y.S.2d 553, 2012 BL 127577, at *2 (Sup. Ct. Nassau Cty. 2012).

- o Anticipated costs and burdens associated with reviewing the retrieved ESI
- o Cost sharing and cost shifting
- o Need for two-tier or staged discovery

- **Production parameters:**
  - o Form of production sought (single format or multiple formats, native/static/other, searchable/nonsearchable)
  - o Bates stamping

- **Privilege and confidentiality:**
  - o Protective/confidentiality orders
  - o Redactions
  - o Privilege logs
  - o Search terms

Often, the court will require the parties to enter into an e-discovery stipulation for the court to so-order.

It is frequently advisable to extensively discuss search terms at the outset of a case, especially in a complex and document-intensive matter. It is important to bear in mind that broad search terms can yield a large number of potentially responsive documents and will significantly increase the producing party's costs of reviewing and producing documents, and the receiving party's review costs. By the same token, narrow search may yield few documents and lead to disputes down the line over whether to modify or add more search terms.

In complex cases, e-discovery may be referred to a special referee, who supervises all e-discovery issues and determines what safeguards are required to protect confidential and privileged information. When e-discovery is referred to a special referee, the Rules of the Commercial Division, Special Referee Part,[70] apply.[71]

As discussed below, there are specific rules for e-discovery in the Nassau County Commercial Division, as well as for requests for ESI directed at nonparties.

2. Nassau County's e-discovery rules

The Nassau County Commercial Division has developed its own set of e-discovery rules,[72] which apply to requests made both to parties and to nonparties.[73] The Nassau County e-discovery rules are as follows:

- Load files: Load files must be provided in prearranged formats to ensure the transfer of accurate and usable images and data.[74]
- Preliminary conference: Before the preliminary conference, counsel should meet and confer to extensively discuss ESI issues, and they must prepare a written plan or stipulation for ESI. Counsel should also either become very familiar with their client's ESI or identify a person who is familiar to accompany them to the preliminary conference.[75] At the preliminary conference, counsel should be prepared to discuss ESI in detail.[76]
- Accessibility: Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for data—not simply its source or the type of storage media. Objections based on accessibility are not valid unless they are ''stated with reasonable particularity, and not in conclusory or boilerplate language.'' The objecting party ''should be prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.''[77]
- Privilege: Parties are encouraged to obtain a clawback order to govern inadvertently disclosed privileged materials. The default rule is that inadvertent or unintentional production of ESI containing privileged information is not deemed a waiver in whole or in part of the privilege if, after learning of the disclosure, ''the producing party promptly gives notice either in writing, or later confirmed in writing, to the receiving party . . . that such information was inadvertently produced and requests that the receiving party return the original data.'' Absent a challenge or during the pendency of a challenge or contemplated challenge, the receiving party must sequester or return such material to the producing party (except as may be necessary to bring a challenge before the court).[78]
- Sanctions: Demanding, withholding, or destroying ESI in bad faith or with gross negligence, or failure to maintain and preserve ESI, may result in sanctions.[79]

3. Technology-Assisted Review (TAR)

Commercial Division Rule 11-e(f) governs the use of technology-assisted review (commonly known as ''TAR'') in the discovery process. This relatively new rule, adopted on July 19, 2018, states:

> 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, in-

[70] *E.g.*, N.Y. Sup. Ct., Civ. Branch, N.Y. Cty., Rules of the Special Referees' Part (Part SRP), https://www.nycourts.gov/courts/1jd/supctmanh/SR-JHO/Rules-SRP.pdf.

[71] Hines v. Charles H. Greenthal Mgmt. Corp., No. 10021/06, 2009 BL 159043, at *4 (Sup. Ct. N.Y. Cty. July 13, 2009).

[72] Com. Div.—N.Y. Sup. Ct., Nassau Cty., Guidelines for Discovery of Electronically Stored Information (''ESI''), http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf [hereinafter Nassau ESI Rules].

[73] Tener v. Cremer, 931 N.Y.S.2d 552, 554 (App. Div. 1st Dep't 2011).

[74] Nassau ESI Rules, *supra* note 72, R. I.D.

[75] *Id.* R. II.A-B.

[76] *Id.* R. II.C.

[77] *Id.* R. IV.B.

[78] *Id.* R. VI.

[79] *Id.* R. VII.

cluding 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.[80]

According to the Commercial Division Advisory Council's memorandum accompanying the then-proposed rule change, this rule is intended to ''make clear that the Commercial Division is sensitive to the cost of document review in complex commercial cases and is in line with other courts, including other centers of high-stakes commercial litigation such as the Southern District and the Delaware Chancery Court, in supporting the use of technology-assisted review, including predictive coding, in appropriate cases.''[81]

This rule does not prescribe ''whether or when any particular form of technology-assisted review may or should be used.''[82] Instead, ''[i]f the methodology chosen is reasonable in the circumstances—that is, if the burden of identifying additional ESI outweighs the need for additional discovery and its importance in resolving the issues in dispute—then it should be deemed sufficient to meet a party's disclosure obligations.''[83]

The rule encourages parties ''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.''[84] Still, the rule ''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.''[85]

4. Requests to nonparties

Appendix A to the Commercial Division's rules governs the discovery of ESI from nonparties to the litigation.[86] A party seeking ESI from a nonparty must discuss his or her request with the nonparty as early as possible and should request that the nonparty implement a litigation hold.[87] Requests for e-discovery from nonparties are subject to a proportionality requirement that takes into account the following factors:

- the importance of the issues at stake in the litigation;
- the amount in controversy;
- the expected importance of the requested ESI;
- the availability of the ESI from another source, including a party;
- the ''accessibility'' of the ESI, as defined in applicable case law; and
- the expected burden and cost to the nonparty.[88]

The requesting party is required to defray the nonparty's reasonable production expenses, including but not limited to:

- fees charged by outside counsel and e-discovery consultants;
- the costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production; and
- the cost of disruption to the nonparty's normal business operations (if quantifiable and if warranted by the circumstances).[89]

Comment: Motion practice over e-discovery disputes from nonparties is disfavored and should be initiated only as a last resort after a meet-and-confer process, which may include a discussion of defrayal of costs. Before filing a motion, the requesting party and the nonparty should consider first attempting to have a telephonic conference with a law clerk, a special referee, or an unpaid mediator.[90]

5. Cost shifting

a. Appropriateness of cost shifting

The court may order the requesting party to pay a producing party's[91] or nonparty's[92] costs of producing ESI.

In the case of nonparties, the Commercial Division's rules require the requesting party to defray the nonparty's reasonable production expenses.

In the case of parties, the law of cost shifting for ESI in the Commercial Division is developing in courts across the state. The presumption in New York is that the producing party must bear the costs of discovery for all reasonable requests.[93] However, in *U.S. Bank N.A. v. GreenPoint Mortgage Funding, Inc.*,[94] the First Department adopted the cost-shifting framework set forth by Judge Scheindlin in *Zubulake v. UBS War-*

[80] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-e(f).

[81] Commercial Division Advisory Committee Memorandum dated Mar. 8, 2018, at 6, *available at* https://www.pbwt.com/content/uploads/2018/03/RPC-CDTechAssistedReview.pdf [hereinafter Advisory Committee Mar. 8, 2018 Memorandum].

[82] *Id.*

[83] *Id.* at 8 (quotation marks omitted).

[84] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-e(f).

[85] Advisory Committee Mar. 8, 2018 Memorandum, *supra* note 81, at 9.

[86] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-c; *id.* app'x A.

[87] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), app'x A, pts. I–II.

[88] *Id.* pt. III.

[89] *Id.* pt. V (citing N.Y. C. P. L. R. § 3111, N.Y. C. P. L. R. § 3122(d)); *see also* Finkelman v. Klaus, 856 N.Y.S.2d 23, 23 (Sup. Ct. Nassau Cty. 2007).

[90] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), app'x A, pt. IV.

[91] *See, e.g.*, Weiller v. N.Y. Life Ins. Co., 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359, 2005 N.Y. Slip. Op. 50341(U), at *17 (Sup. Ct. N.Y. Cty. 2005).

[92] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), app'x A, pt. V.

[93] *See, e.g.*, Kennedy Assocs. v. JP Morgan Chase Bank N.A., No. 650019/2012, 2014 BL 6198, at *2 (Sup. Ct. N.Y. Cty. Jan. 7, 2014); Lipco Elec. Corp. v. ASG Consulting Corp., 4 Misc. 3d 1019, 798 N.Y.S.2d 345, 2004 N.Y. Slip Op. 50967(U), at *8 (Sup. Ct. Nassau Cty. 2004).

[94] 939 N.Y.S.2d 395 (App. Div. 1st Dep't 2012).

burg LLC.[95] The *Zubulake* cost-shifting framework sets forth a two-step process. First, the court asks whether cost shifting is appropriate, which is the case only if the requested documents are inaccessible. For electronic documents, any data that is retained in a machine readable format is typically accessible. Second, if the data is inaccessible, the court examines seven factors to determine how to shift costs:

1. the extent to which the request is specifically tailored to discover relevant information;
2. the availability of such information from other sources;
3. the total cost of production, compared to the amount in controversy;
4. the total cost of production, compared to the resources available to each party;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the parties of obtaining the information.

In general, factors (1) and (2) are the most important in the analysis, followed by factors (3), (4), and (5); factors (6) and (7) are rarely considered.[96]

Additionally, in accelerated actions, the requesting party may be ordered by the court to advance the reasonable costs of production to the other side (subject to the allocation of costs in the final judgment), if the costs and burdens of e-discovery are disproportionate to the nature of the dispute or the amount in controversy.[97]

b. Procedure for seeking cost shifting

If a producing party believes that cost shifting is appropriate, he or she should generally first meet and confer with the requesting party to ask for reimbursement. If the requesting party's response is unsatisfactory, the producing party can then make a motion to limit or strike the discovery requests at issue. If, following the resolution of that motion, the producing party still believes he or she is entitled to certain costs associated with searching for, retrieving, and producing ESI, the producing party can then file a motion for the costs to be shifted to the requesting party.[98]

Under certain circumstances, the court may order the producing party to first search a limited set of documents or to do an initial search with a limited set of search terms, and then provide an affidavit regarding the results to the court, which will then determine whether a full search is necessary and whether further cost shifting is warranted.[99]

G. Confidentiality and Privileged Materials

1. Protective orders and confidentiality agreements

Practices concerning confidentiality agreements vary from one Commercial Division justice to the next, and many justices have their own preferred standard models. Although the Commercial Division Rules do not mandate a procedure for seeking a confidentiality order, Commercial Division Rule 11-g suggests that courts permit the parties to either (a) submit appendix B to the Commercial Division Rules (which shows a sample confidentiality agreement) or (b) submit to the court a red-line against appendix B with proposed changes and a written explanation of why the changes are warranted.

The Commercial Division Rules also permit parties to seek protective orders for the purpose of denying or limiting certain discovery, usually on grounds of annoyance, expense, or embarrassment.[100] (*See* 801 LPS Practice Tool 17, *Stipulation and Order for the Production and Exchange of Confidential Information*.) In general, parties should attempt to resolve any issues through the meet-and-confer process and then by making a motion to limit or strike the discovery requests in question before moving for a protective order; otherwise, the court may rule that the motion for a protective order is premature.[101]

2. Privilege logs

a. Meet-and-confer process

At the outset of a case, the parties should meet and confer to discuss privilege issues, including (a) the scope of privilege review, (b) the format for the privilege log and what information shall be included, and (c) the submission of a proposed clawback or nonwaiver stipulation to the court for it to so-order.[102] Practitioners should be wary of agreeing at the outset to privilege review parameters that they expect will cause issues down the line; Commercial Division Rule 11-b(a) suggests that if a party does not object to the privilege review parameters proposed by another party at the outset of the litigation, this fact may be relevant to the court when addressing later privilege disputes. Once the parties reach agreement on a privilege review protocol, they should memorialize the agreement and submit it to the court for it to be so-ordered.[103] Each party should also designate an attorney (formally desig-

[95] 217 F.R.D. 309 (S.D.N.Y. 2003).

[96] U.S. Bank N.A. v. GreenPoint Mortg. Funding, Inc., 939 N.Y.S.2d 395, 399–400 (App. Div. 1st Dep't 2012); *Kennedy Assocs.*, 2014 BL 6198, at *6.

[97] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 9(d)(3).

[98] *U.S. Bank*, 939 N.Y.S.2d at 400.

[99] *See* Delta Fin. Corp. v. Morrison, 819 N.Y.S.2d 908, 914 (Sup. Ct. Nassau Cty. 2006).

[100] *See* N.Y. C. P. L. R. § 3103(a).

[101] *See, e.g.*, *U.S. Bank*, 939 N.Y.S.2d at 400 (''Applying these standards to the instant motion for a protective order, we find that the motion by defendant was premature. The more prudent course of action would have been for defendant to first make a motion to limit or strike the discovery requests initiated by plaintiff that it found to be overbroad, irrelevant, or unduly burdensome.'').

[102] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-b(a).

[103] *Id.* R. 11-b(e).

nated the ''responsible attorney'') to supervise document collection and privilege review.[104]

b. Categorical versus document-by-document privilege logs

The Commercial Division Rules express a strong preference for the use of categorical privilege logs,[105] in recognition of the fact that the creation of privilege logs has become a substantial expense in complex commercial litigation.[106] (See 801 LPS Practice Tool 16 for a sample categorical privilege log.) While a party can refuse to permit a categorical approach and instead insist on a document-by-document privilege log, in many cases this is not advisable, as upon a showing of good cause the opposing party can apply to the court to have the costs of preparing the document-by-document log (including attorneys' fees) shifted to the party resisting the categorical approach.[107]

In general, the parties are given wide latitude to define the categories used in the privilege log. Commercial Division Rule 11-b(b)(1) requires only the use of a ''reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category.'' In practice, the party producing the privilege log will want the categories in his or her log to be as broad as possible to make it more difficult for the opposing party to evaluate the contents of the category and challenge the privilege determinations; and of course, that party will want his or her opponent's privilege log's categories to be narrowly defined, so as to facilitate privilege challenges. Because categorical definitions can lead to disputes and costly motion practice down the line, counsel are often best served by taking a middle-of-the-road approach, providing just enough detail so as not to raise the court's suspicion about frivolous assertions of privilege or, alternatively, about categories so broad as to be useless to one's opponent in evaluating whether the documents at issue are indeed privileged. For each category, the producing party must provide a N.Y. Comp. Codes R. & Regs. tit. 22, § 130-1.1a certification signed by the responsible attorney[108] (or alternatively by the party through an authorized and knowledgeable representative) setting forth with specificity why the documents in the category are privileged, as well as the steps taken to identify the documents so categorized (i.e., how the privilege review was performed, including whether each document was reviewed individually or whether sampling was employed and, if so, how it was conducted).

If the parties do wind up submitting a document-by-document privilege log, Commercial Division Rule 11-b(b)(3) provides that each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include:

- an indication that the e-mails represent an uninterrupted dialogue;
- the beginning and ending dates and times (as noted on the e-mails) of the dialogue;
- the number of e-mails within the dialogue; and
- the names of all authors and recipients, together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case).

c. Special masters

In particularly complex cases in which the parties anticipate that many responsive documents will be privileged or otherwise protected and in which producing privilege logs is expected to be costly, the parties are encouraged under Commercial Division Rule 11-b(c) to hire a special master to aid in producing privilege logs, with all parties sharing the costs. Generally, the parties should agree to share costs in proportion to the relative amounts of effort they each would expect to otherwise expend in producing privilege logs.

H. Third-Party Discovery

1. In-state third-party discovery

There are no special Commercial Division Rules on obtaining in-state third-party discovery, and as such, the procedures set forth in C. P. L. R. § § 2305, 3120, 3122, and 3122-a govern.

No court order is needed before seeking documentary discovery or an inspection of real property from a nonparty located in New York (though libraries and certain state and municipal governmental entities and their officers form exceptions).[109] An attorney may simply issue the third party a subpoena duces tecum requiring the production of documents and stating the circumstances or reasons such disclosure is sought or required.[110] The subpoena duces tecum must give the third party at least 20 days to respond. The nonparty may file written objections within 20 days of service. If the nonparty does not fully comply with the subpoena, the party can move to compel production (though note that, in practice, a premotion telephonic conference may be required before the motion can be filed).

The nonparty is permitted to produce copies (as opposed to originals) of documents so long as they are complete and accurate, unless the subpoena directs that original copies of the documents be produced for inspection and copying at the place where the nonparty keeps the documents.[111] Any business records that are produced must be accompanied by an affidavit signed by the custodian or other qualified witness charged with

[104] *Id.* R. 11-b(d).

[105] *Id.* R. 11-b(b)(1).

[106] *See The Chief Judge's Task Force on Commercial Litigation in the 21st Century: Report and Recommendations of the Chief Judge of the State of New York* (June 2012), https://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudges Task ForceOnCommercialLitigationInThe21stpdf.pdf, at 17–18.

[107] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 11-b(b)(2).

[108] *See id.* R. 11-b(d) (defining ''responsible attorney'').

[109] A court order is required before a subpoena duces tecum can be served on a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof. N.Y. C. P. L. R. § 3120(4). Obtaining such a court order requires that a motion be made on notice to the library, department, bureau or officer, and the adverse party. *Id.*

[110] N.Y. C. P. L. R. § § 3101(a)(4), 3120.

[111] *Id.* § 3122. N.Y. C. P. L. R. § 3122 also contains special protections against the unauthorized disclosure of medical records, but these are unlikely to apply in a Commercial Division case.

responsibility of maintaining the records, attesting in substance that the documents are business records under C. P. L. R. § 4518(a), which permits the records to be deemed business records for purposes of trial, without the need for any testimony by a live witness.[112] C. P. L. R. § 3122-a(c) sets forth additional procedures for admitting business records produced pursuant to a nonparty subpoena at a hearing or at trial.

In addition, a party may take the deposition of a nonparty without the permission of the court by serving a subpoena upon the nonparty. This subpoena may be joined with a subpoena duces tecum seeking the production of documents.[113]

Any subpoena served on a nonparty must simultaneously be served on all parties. Once the nonparty complies with a party's subpoena, either in whole or in part, that party must notify each other party that the items are available for inspection and copying.[114]

2. Out-of-state third-party discovery

The specific procedure a party must follow to obtain third-party discovery from an individual or entity located in another state depends on whether that state has adopted the Uniform Interstate Deposition and Discovery Act (UIDDA), which New York has joined and codified at C. P. L. R. § 3119. To obtain third-party discovery in a state that has also adopted the UIDDA,[115] a party must simply present the clerk of the jurisdiction where compliance is required with a New York subpoena, and the clerk will then issue a local subpoena. In states that have not adopted the UIDDA,[116] different rules may apply. The party seeking the out-of-state third-party discovery may be required to first obtain a formal commission from the Commercial Division authorizing out-of-state discovery and then obtain a second order from a court in the jurisdiction in which compliance is sought to enforce the Commercial Division's commission.

I. Discovery Disputes

The Commercial Division prefers to resolve discovery disputes through court conferences rather than written motion practice. In general, the court's Part Rules govern discovery disputes, but if those rules are silent as to discovery disputes, Commercial Division Rule 14 provides for the following procedure:

- Counsel must first meet and confer and attempt in good faith to resolve the dispute.
- If counsel cannot resolve the dispute, the moving party submits to the court a letter of three single-spaced pages or less that (a) outlines the dispute, (b) requests a telephone conference, and (c) represents that the moving party has conferred with opposing counsel in a good faith effort to resolve the issues raised in the letter (or, if no meet-and-confer occurred, that good cause exists for the lack of a meet-and-confer).

Practice Tip: The representation of good faith conferral should be as specific as possible and should indicate the time, place, or medium (e.g., telephone, e-mail) of discussion; topics of discussion; and any resolutions. The court may consider insufficient a pro forma exchange of objections and simple demands without any meaningful response or consideration of compromise.[117]

- Not later than four business days after receiving the dispute letter, any affected opposing party or nonparty may submit a responsive letter not exceeding three single-spaced pages.
- The court then schedules a telephone or in-court conference with counsel. Typically, this is a telephonic conference conducted by the court's law clerk.

Following this procedure does not preclude a party from later filing a formal discovery motion.[118]

In conclusion, although discovery practice in the Commercial Division is similar to that in federal courts, practitioners should note several important differences. While the Commercial Division's detailed discovery rules provide more traps for the unwary than might be the case in a typical federal or other New York State court action, they also help to make discovery in the Commercial Division more efficient, streamlined, and in tune with contemporary litigation practice.

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[112] N.Y. C. P. L. R. § 3122-a.

[113] *Id.* § 2305(b).

[114] *Id.* § 3120(3).

[115] The following states and territories have adopted the UIDDA: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *Interstate Depositions and Discovery Act*, Uniform Law Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35.

[116] The following states and territories have not adopted the UIDDA: Connecticut, Florida, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, Oklahoma, Puerto Rico, Rhode Island, Texas, and Wyoming. *Id.* However, legislation to adopt the UIDDA has been introduced in Florida, Maine, and Rhode Island. *Id.*

[117] *See, e.g.*, Amherst Synagogue v. Schuele Paint Co., 816 N.Y.S.2d 782, 783 (App. Div. 4th Dep't 2006).

[118] N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70(g), R. 14.

