

To: John W. McConnell  
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: April 26, 2018

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

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

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

**I. EXECUTIVE SUMMARY**

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

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

technology-assisted review, including predictive coding, in appropriate cases.

## **II. SUMMARY OF PROPOSAL**

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

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

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

### **III. COMMENTS**

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