

Proposal Offers Guidance on E-Discovery From Nonparties

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Manhattan State Supreme Court
Rick Kopstein/NYLJ

In an effort to provide further direction to practitioners on the subject of e-discoverable material from nonparties, an advisory committee has recommended new guidelines for adoption in New York's Commercial Division.

The **guidelines** take into account the proliferation of electronically-stored information (ESI) in complex commercial disputes by providing a blueprint for attorneys to make this aspect of litigation more manageable and less costly.

Submitted by the Commercial Division Advisory Council, the proposed rule was released for public comment Wednesday by the Office of Court Administration. It is among a number of procedural reforms proposed by the council over the last year to improve processes within the Commercial Division.

"ESI is certainly increasingly a major component of any complex commercial case. As offices go paperless, everything becomes electronic—that could include all discovery. The exception has started to swallow the rule," said Joshua Blosveren, a partner at Hoguet Newman Regal & Kenney, a council member who helped formulate the guidelines.

According to Sharon Porcellio, litigator at Bond Schoeneck & King, council member and co-drafter of the guidelines, electronically-stored information by a nonparty can include records held by banks, accountants or investment firms—"any entity that will have records potentially relevant to the dispute," she said.

Although New York Civil Practice Law & Rules 3111 and 3122(d) state that a party seeking ESI from a nonparty shall defray "reasonable production expenses," that language can be ambiguous, Porcellio added.

“The point of the guidelines is to get the party and nonparty together and ask, ‘What do we really need, what do we really need to focus on?’” Blossveren said. “It can really disrupt a company’s business when they have to spend time finding documents rather than performing their regular work.”

Blossveren and Porcellio, who sit on the technology subcommittee of the advisory council, said they looked to case law like *Tener v. Cremer*, 89 A.D.3d 75, 931 N.Y.S.2d 552 (1st Dep’t 2011), Nassau County’s **e-discovery guidelines**, Sedona Conference commentary and the Chief Administrative Judge’s Working Group on Electronic Discovery to construct the guidelines.

The timing of the proposal’s release for public comment is notable in light of a recent Court of Appeals’ **ruling** that clarified the statewide standard of enforcing subpoenas to nonparties, favoring the more expansive interpretation by the First and Fourth Departments.

“That decision confirms that New York has liberal discovery rules and that includes discovery from nonparties,” Blossveren said. “That makes the need for guidelines like this even more pronounced.”

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