COMMENT ON PROPOSED AMENDMENTS OF THE UNIFORM RULES OF THE TRIAL COURTS (22 NYCRR § 202.12(b) AND (c)(3)) AND THE RULES OF THE COMMERCIAL DIVISION (22 NYCRR § 202.70(g)) (RULE 8), REQUIRING COUNSEL TO CONFER PRIOR TO THE PRELIMINARY CONFERENCE IN CASES REASONABLY LIKELY TO INVOLVE ELECTRONIC DISCOVERY

The New York City Bar Association (the "City Bar") is grateful for the opportunity to provide comments on the January 7, 2013, proposal (the "Proposal") by the Unified Court System's E-Discovery Working Group to amend the Uniform Rules of the Trial Courts to require counsel to confer on e-discovery issues prior to the preliminary conference whenever a case is reasonably likely to involve electronic discovery, unifying such requirements for non-Commercial Division cases in Supreme or County Court, and adding a non-exhaustive list of considerations intended to guide the court and counsel in determining whether a case is reasonably likely to involve e-discovery.[1] These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and E-Discovery Working Group.[2]

The City Bar is generally supportive of the Proposal.[3] Consistent with the current Commercial Division Rules of Practice[4] and the Civil Practice Law & Rules,[5] and the parallel Federal Rules,[6] it is beneficial for counsel to discuss issues arising from the discovery of electronically stored information ("ESI") at the outset of litigation, in order to address difficulties with preservation of ESI, as well as the time- and cost-efficient production of ESI. The Proposal may be beneficial especially in smaller cases where the costs of e-discovery potentially exceed the value of plaintiff's reasonable recovery.

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[1] A copy of the Proposal, issued by the Office of Court Administration on January 7, 2013, is annexed as Appendix A.

[2] These entities collectively include practitioners, academics and judges, and the Council also includes chairs of other court-related committees of the City Bar.

[3] Because the Proposal affects only Section 202 of the Uniform Rules of the Trial Courts, which section applies only in Supreme and County Courts, the City Bar understands that the Proposal does not have any impact on actions in other courts in this State. In particular, the City Bar's Trusts, Estates & Surrogate's Courts Committee notes its understanding that the Proposal would not apply in Surrogate's Courts because (1) the proposal concerns the Uniform Rules for the Supreme and County Courts which are inapplicable to Surrogate's Courts and (2) the preliminary conference which is the subject of the rule is triggered by the filing of a Request for Judicial Intervention, which form is not used in Surrogate's Courts.

[4] *See* 22 N.Y.C.R.R. § 202.70(g), Rule 8(b).

[5] *See, e.g.*, N.Y. C.P.L.R. § 104.

[6] *See* Fed. R. Civ. P. 26(f)(3)(C).

The City Bar recognizes that the Proposal embodies the result of extensive, detailed negotiations over the past year, with delicate compromises among competing considerations, and our relatively modest comments are made with that consideration in mind. It is our hope and expectation that none of the following specific comments will in any way upset the careful calibrations reflected in the existing Proposal.

Our suggestions are as follows:

Rule 201.12

Subsection (b)(1)(D)

In proposed section 202.12(b)(1)(D), we suggest adding the phrase "and burden" after the word "cost." In our view, production of ESI may at times present a substantial burden of time, effort, resources and management distraction that may not be completely captured in an economic "dollars and cents" analysis of "cost" alone, and the addition of this phrase would clarify that such non-economic burdens should also be considered by the Court and parties.

Subsections (b) and Rule (c)(3)

The phrase "a case is reasonably likely to include electronic discovery" is used in two different ways in proposed section 202.12(b), which could cause confusion. The first use of "a case is reasonably likely to include electronic discovery" appears to refer to a determination by counsel, seemingly on an objective standard, which if met, requires an automatic conferral with opposing counsel regarding anticipated electronic discovery issues prior to the Preliminary Conference. The second use of the phrase refers to a discretionary standard that a court may employ in determining whether the case is reasonably likely to include electronic discovery, but does not invite counsel to use the same factors in making the assessment as to the need for discussion prior to the Preliminary Conference. In addition, it is not clear from 202.12(b)(1) in what context a court would draw upon these factors given that the determination of the need for the discussion will be made by counsel. One possible modification is to replace the clause in (b)(1): "A non-exhaustive list of considerations that a court may use for determining whether a case is reasonably likely to include electronic discovery is:" with the following:

> A non-exhaustive list of considerations for counsel to use in assessing the need for discussion of electronic discovery prior to the preliminary conference, and for a court determining whether any particular electronic discovery should be produced in a given case, include:

The identification of a set of factors in section 202.12 to determine whether "a case is reasonably likely to include electronic discovery" suggests that in certain cases e-discovery is required while in other cases it is not. In other words, the language suggests an all-or-nothing approach, either there is e-discovery or none at all. In fact, there are cases where some of the e-discovery is cost effective to produce while the rest is not.[7] In addition to distinguishing between e-discovery and

[7] For examples of where courts have dealt with only limited categories of e-discovery, we refer to the following cases: Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, 294 A.D.2d 190, 743 N.Y.S.2d 72 (1st Dep't 2002) (in response to petitioners' request for all outstanding files generated or collected in connection with defendants law firm's representation, including work product, correspondence, research, drafts and similar non-final product, the issue in the case involved only seven of the 187 files identified for requisite

non-e-discovery cases, a distinction could be drawn among cases in which various levels of e-discovery are required. The language quoted in the paragraph above, we believe, would address this concern

Subsection (c)(3)(C)

In proposed section 202.12(c)(3)(C), we suggest appending the phrase "and whether the electronically stored information is reasonably accessible" at the end of the current proposal, after the word "site." One of the primary reasons to identify potentially relevant sources of data is to address, at the outset, the question whether such sources are able to be accessed without unreasonable burden. The Federal Rules specifically address the issue and provide that such data need not be accessed, reviewed or produced if it is not "reasonably accessible."[8] Although we do not suggest incorporating into the Proposal the detailed procedural framework set forth in the Federal Rules, we believe that addressing such issues in the initial conference between counsel and in a preliminary conference with the Court may forestall later motion practice or undue surprise to any party.

In addition, we believe the considerations in proposed Rule 202.12(b)(1)(C), (D) and (E) may also be helpful factors to include in proposed Rule 202.12(c)(3).

Post-Preliminary Conference E-Discovery Issues

The Preliminary Conference Order should recognize that new e-discovery issues may emerge following the Preliminary Conference and that the parties may not be fully aware of all aspects of the electronic systems at an early stage of the case. Accordingly, we recommend that the Preliminary Conference Order should provide that if new electronic discovery issues arise following the preliminary conference the parties should confer as appropriate.

Section 202.70 Rule 8(b)

Proposed Rule 8(b)(v) appears to contain a typo, merging two separate items. We suggest that (v) should be written as "(v) the identification of the individual(s) responsible for preservation of electronically stored information," and separately a new (vi) should be "(vi) the scope, extent and form of production." The remaining numerals after new (vi) would need to be increased. There also should be a space between "(iv)" and "implementation."

In addition, existing Rule 8 refers to "designation of experts" as an electronic discovery issue, but it is unclear what is intended by this reference. To make clear that it is referring to experts to facilitate electronic discovery, we suggest modifying the reference in Rule 8(b)(x) to "designation of technical experts to assist with electronic discovery matters."

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production, which the law firm contended were contained in certain un-indexed back-up data tapes from its earlier computer system); In re Maura, 17 Misc.3d 237, 842 N.Y.S.2d 851 (Surr. Ct. Nassau Co. 2007) (in proceeding to determine the validity of a right of election, in addition to, inter alia, deposition testimony, the decedent's estate planning file and certain statements of income, the decedent's wife sought access to the business computers of the attorney who drafted the prenuptial agreement at issue); Delta Fin. Corp. v. Morrison, 13 Misc.3d 604, 605, 819 N.Y.S.2d 908 (Sup. Ct. Nassau Co. 2006) ("among numerous discovery disputes in these matters," the parties argued about three categories of electronic documents); see also Detraglia v. Grant, 68 A.D.3d 1307, 890 N.Y.S.2d 696 (3d Dep't 2009)(in personal injury action involving a car accident, in addition to depositions and the driver's billing records for his cellular telephones, the plaintiff sought the driver's Verizon wireless air card).

[8] Fed. R. Civ. P. 26(b)(2)(B) provides in part, "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."

Incorporation Into Commercial Division Rules

We understand that certain other commenters have expressed concern to OCA that the Proposal will force some parties in noncommercial cases to engage in expensive discovery that is not warranted in their cases. We do not agree with such comments. To the contrary, we believe that the considerations set forth in section 1 of the Proposal are designed to avoid exactly that problem, and we believe that the language of the Proposal effectively addresses these issues. Indeed, for that same reason, we suggest that these same considerations should be incorporated into Rule 8(b) and Rule 11 of the Rules of Practice for the Commercial Division, 22 N.Y.C.R.R. § 202.70(g). Based on the current monetary thresholds for Commercial Division cases,[9] extensive processing, review and production of electronically stored information may be cost-prohibitive in many Commercial Division actions. In the experience of various City Bar practitioners, disputes over hundreds of thousands of dollars in civil litigation frequently do not warrant the enormous cost and expense that full-blown e-discovery entails, and cannot be efficiently brought to judicial resolution or just settlement if such e-discovery is mandated.

A Final Observation

Finally, we have a general observation about the Proposal. Some practitioners who commented on the Proposal expressed their concern that, in some instances, judges and court personnel across the State – particularly outside the Commercial Division – lack knowledge, experience, and familiarity with the particular costs and burdens associated with the processing, review and disclosure of electronically stored information. This lack of knowledge can contribute to the failure of the courts to address these issues in preliminary conferences, to include detailed parameters regarding electronically stored information in preliminary conference orders, or to address disputes regarding the disclosure and costs of electronically stored information effectively. Accordingly, although we appreciate and concur with the intention of the Proposal to address these issues, we also believe that judges, court attorneys, and OCA personnel required to deal with litigants on these issues should be provided with training on electronic discovery issues.

We are pleased to note that the OCA E-Discovery Working Group has an educational subcommittee that has been working to improve judicial and law clerk education about e-discovery issues. Thus far, we understand the subcommittee has produced a series of videotapes to educate judges about e-discovery issues and has prepared a bench book for judges to help them identify key issues. We encourage more such efforts, along with regular updates to reflect the constant evolution and change in the relevant technologies and best practices.

In sum, we applaud the Chief Administrative Judge, the Unified Court System, and OCA for taking on this issue and recognize the Proposal's elegant balancing of many competing concerns. We hope our suggestions prove to be helpful. We stand ready to provide further commentary upon request.

Thank you for your consideration.

March 2013

[9] *See* 22 N.Y.C.R.R. § 202.70(a).