Proposed adoption of new rule 22 NYCRR 202.70(g) relating to Electronic Discovery from Non-parties in the Commercial Division

The Supreme Court Committee\(^1\) reviewed the Office of Court Administration (“OCA”) proposal regarding the adoption of new rule 22 NYCRR 202.70(g) relating to electronic discovery from non-parties in the Commercial Division.

A majority of the members of the Supreme Court Committee at our meeting on May 20, 2014 voted in favor of the proposal following a presentation by members of the Commercial Division Advisory Council.

The new rule would encourage parties and non-parties alike to adhere to the Commercial Division’s Guidelines for Discovery of Electronically Stored Information (“ESI”), set forth in Appendix A to the Rules of the Commercial Division.

Members discussed how this proposed rule conforms to the recent decision in *Kapon v. Koch*, 2014 N.Y. Slip Op. 02327 (April 3, 2014), which rejected the argument that a party subpoenaing a non-party has the initial burden of demonstrating a need for the disclosure. The Court so held even if the information had not previously been sought from a party. The *Kapon* decision means not only that ESI and discovery may be sought directly from sources other than litigants, but that both parties and nonparties are well served by the meet-and-confer process set forth in the Guidelines in order to negotiate the scope of ESI discovery and the reasonable costs associated with disclosure.

\(^1\) The views expressed are those of the Supreme Court Committee, have not been approved by the New York County Lawyers’ Association Board of Directors and do not necessarily represent the views of the Board.