

## Commercial Division of New York State Supreme Court Adopts Rule Regarding Responses and Objections to Document Requests

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**On January 22, 2015, the Chief Administrative Judge of the Courts of New York adopted a new rule applicable to the Commercial Division, effective April 1, 2015, that will require parties to provide increased specificity when responding and objecting to document requests. While the CPLR already requires parties to state objections with “reasonable particularity,” the new Rule goes considerably farther by (1) requiring an objecting party to specifically identify which objections form the basis for its withholding documents from production and the specific manner by which the producing party intends to limit the scope of its production, (2) setting a default deadline prior to the start of fact depositions by which the responding party must complete production of its documents and (3) requiring the responding party to state prior to the close of fact discovery whether, with respect to each individual document request, it has completed its document production or whether there are no responsive documents in its possession, custody or control.**

**Although it is unclear how the rule will be interpreted and implemented in practice, it is clear that litigants in the Commercial Division will need to pay close attention to this rule to ensure compliance.**

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## A. Background

Rule 11-e of the Rules of Practice for the Commercial Division, which was adopted by order of the Chief Administrative Judge of the Courts on January 22, 2015 and becomes effective April 1, 2015, is the latest of a series of reforms intended to streamline business-related litigation in response to problems identified in Chief Judge Jonathan Lippman's Task Force on Commercial Litigation in the 21st Century. Recent changes include the increase of monetary thresholds for Commercial Division cases throughout New York, new limits on the number of depositions and interrogatories per case, and changes regarding requirements for privilege logs.

## B. Application of the Rule

Rule 11-e provides specific requirements for responding and objecting to document requests pursuant to CPLR 3122(a), which governs responses to notices to produce served on parties and subpoenas *duces tecum* served on third parties. The new rule imposes three major changes:

- First, pursuant to Rule 11-e(b), responses must specifically state (i) whether the objection(s) pertain to all or part of the request being challenged; (ii) whether any documents or categories of documents are being withheld and which specific objections form the basis for withholding such documents; and (iii) the manner in which the responding party intends to limit the scope of its production.
- Second, pursuant to Rule 11-e(c), either the parties must agree to or the Court must set a date for the completion of document production. Any date set by agreement must be no later than the date set for the commencement of depositions.
- Third, pursuant to Rule 11-e(d), one month prior to the close of fact discovery or pursuant to a date set by the Court, the responding party must state, with respect to each individual request, whether it has completed production of documents responsive to such request, as propounded or modified, or that it has no responsive documents in its possession, custody or control.

Rule 11-e also explicitly states that this new Rule's requirements are not intended to conflict with a producing party's obligation to supplement its disclosure obligations pursuant to CPLR 3101(h).

## C. Rationale

CPLR 3122(a) already requires responses to state "with reasonable particularity" the basis for each objection, and that objections to any "part of an item or category" be specified. The Subcommittee on Procedural Rules to Promote Efficient Case Resolution, which recommended adoption of this new Rule, noted that this requirement "is often honored in the breach." Accordingly, while Rule 11-e is not intended to change the standard by which any particular objection is to be evaluated, it does change the manner in which objections must be made. In particular, it requires disclosure of whether

responsive material is being withheld on the basis of a specific objection. According to the Subcommittee, this change is intended to help “end the confusion that frequently arises when a producing party states several objections and still produces information.”

#### D. Potential Issues and Questions Raised By Rule 11-e

The wording of Rule 11-e raises several issues and questions for practitioners to bear in mind.

First, as currently stated, Rule 11-e is “effective April 1, 2015.” The Rule therefore appears to apply to all then-pending cases regardless of when they were filed. It remains to be seen, however, whether the Rule will be amended to specify that its requirements apply only to cases filed on or after the effective date, as the Chief Administrator of the Court previously has clarified on at least one other occasion in connection with recent administrative orders.

Second, it is unclear under Rule 11-e(b) whether a responding party may state in its objections and responses that it does not yet know whether it is withholding responsive documents. The Subcommittee, in recommending the Rule’s adoption, stated that “the Proposed Rule . . . provides the option for a party to respond to an item or category in such a way as to indicate that it has not yet determined whether responsive documents are being withheld.” But, as the New York City Bar Association has noted, the wording of Rule 11-e contains no express provision setting forth this “option.”

Third, it is unclear what the form and impact will be of the statement regarding the completion of a document production as contemplated by Rule 11-e(d). A formal obligation to specifically state whether a document production is complete for each individual document request prior to the close of fact discovery is entirely new.

Fourth, although Rule 11-e(a) invokes CPLR 3122(a), which applies expressly to both parties and non-parties, the Rule itself refers only to “parties.” This suggests that the Rule is not intended to change the required responses by third parties, but the Rule’s reference to CPLR 3122(a) arguably leaves this issue unsettled.

#### E. Key Considerations for Commercial Division Litigants

Regardless of how these issues and questions are resolved, Rule 11-e will affect how litigants in the Commercial Division respond and object to document requests. While parties and their counsel often use template objections accompanied by a vague commitment to produce documents “subject to” those objections, this approach no longer will suffice, because responding parties are now required to specify whether they are withholding documents on the basis of each objection to each individual request. Practitioners in the Commercial Division should carefully re-evaluate any existing forms and standard responses to assess what changes will need to be made to comply with the requirements of the Rule. In addition, the Rule has important implications concerning the timing of the completion of document production during fact discovery. While rolling productions of documents will likely continue to be the norm, no longer can a responding party target an end date to “substantially complete” its document production. Further, the rule imposes on a responding party a new obligation to make representations about the sufficiency and completeness of its production for each specific document request, requiring a responding party to carefully consider the scope of its production for each such request.

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