NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION
HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE
HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE
DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on a proposal to amend Commercial Division Rule 11 to require certain initial disclosures

Date: February 7, 2025

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The Administrative Board of the Courts is seeking public comment on a proposal recommended by the Commercial Division Advisory Council (CDAC) to amend Rule 11 of the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70) to require parties to automatically exchange certain delineated categories of discovery at the outset of any litigation pending before the Commercial Division.

The proposed amendments are attached as Exhibit 1.

Attached as Exhibit 2 is a memorandum from CDAC providing background on this issue and the reasons for the proposed amendments. The Advisory Council notes that the Federal Rules of Civil Procedure require both sides to disclose basic case information at the beginning of the litigation, which minimizes the "burden, delay and expense of discovery and allows parties to competently assess the risks of trial and the benefits of potential settlement in the early stages of the litigation."

The Advisory Council also reports that, in the absence of mandatory disclosure rules, various Commercial Division judges have created their own "partial-disclosure regimes" to facilitate discovery, and the Advisory Council strongly recommends that there instead be a single uniform disclosure system applicable to all Commercial Division cases. Finally, the Advisory Council notes that an existing court rule governs early mandatory disclosure in matrimonial actions [22 NYCRR § 202.16(f)(1)], and the Advisory Council believes that having a Commercial Division rule customized to the needs of complex commercial practice will provide a "more uniform and consistent approach that will benefit counsel and avoid the proliferation of individual justice's idiosyncratic practices."

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court

Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than Friday, March 28, 2025.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT 1

Proposed Amendments

The Rules of the Commercial Division (22 NYCRR § 202.70) are amended by adding a new Rule 11 to read as follows (additions underscored):

Rule 11-h. Initial Disclosures.

(a) Required Disclosures.

(1) *Initial Disclosures.*

(A) *In General.* Except as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual that the disclosing party intends to use to support its claims or defenses, unless such use is solely for impeachment, together with a brief description of the information expected to be elicited from such individual;

(ii) a copy of all documents, electronically stored information, or other tangible things referred to in the pleadings unless they are attached to the pleadings;

(iii) a computation of each category of damages claimed by the disclosing party.

(B) *Time for Initial Disclosures.*

(i) *In General.* A party must make the initial disclosures within 14 days after the parties' consultation as required in Rule 8 prior to the Preliminary Conference, unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what initial disclosures, if any, are to be made and must set the time for initial disclosure.

(ii) *For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 8 consultation must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(iii) *For Disclosures Required by CPLR 3101(f).* All disclosures required under CPLR 3101(f) must be made by the earlier of:

(a) 14 days after the parties' consultation as required in Rule 8 prior to the Preliminary Conference; or

(b) ninety days after service of an answer.

(2) The disclosing party is not precluded from using any testimony, documents or other material that was not identified as part of the initial disclosures, provided that the disclosing party demonstrates that it could not have included such testimony, document or material in its initial disclosures.

(3) Failure to utilize good faith in making an initial disclosure may result in an award to the non-disclosing party of the attorney's fees and costs occasioned by such failure.

(b) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 11-h must be in writing, signed, and served.

(c) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

EXHIBIT 2

MEMORANDUM

TO: The Administrative Board of the Courts

FROM: The Commercial Division Advisory Council

DATE: November 19, 2024

RE: Proposed Addendum to Commercial Division Rule 11 – Mandatory Initial Disclosures

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This memorandum proposes adding an addendum to Rule 11 of the Practice Rules of the Commercial Division of the Supreme Court, 22 N.Y.C.R.R. § 202.70 ("Rule 11" or, collectively, the "Rules"), requiring parties to automatically exchange certain delineated categories of discovery at the outset of any litigation pending before the Commercial Division.

Introduction

Since its inception, the principal aim of the Commercial Division of the New York State Supreme Court (the "Commercial Division") has been to provide cost-effective, predictable and fair adjudication of complex commercial cases.[1] As resolution of commercial cases has become increasingly complicated and expensive, the Commercial Division has continuously reviewed and amended its practices and procedures to ensure the highest level of efficiency and to maintain its position as the forefront leader of worldwide commercial litigation.

In recent years, discovery reform has taken center stage in this ongoing review. Acknowledging that the increased complexity, time, and burden associated with modern discovery practice has generated a significant increase in overall litigation expenses, the Commercial Division has pledged itself "to provide practitioners with a mechanism for

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[1] Preamble, Rules of practice for the Commercial Division, https://ww2.nycourts.gov/rules/trialcourts/202.shtml#70 (last accessed Nov. 7, 2024).

streamlining the discovery process to lessen the amount of time required to complete discovery and to reduce the cost of conducting discovery."[2] In furtherance of this mission, various proposals have been made (and implemented) to promote efficiency, predictability, and reliability in discovery procedures throughout the Commercial Division.

Continuing this trend, this Report recommends implementing a mandatory initial disclosure system that requires parties to exchange several categories of discovery at the outset of litigation, without waiting to be prompted by discovery requests.

Discussion & Rationale

Under the current Rules, parties litigating in New York courts can withhold all documents and other essential facts and force the opposing parties to pursue formal discovery processes in order to obtain even basic information. In the absence of voluntary cooperation, resort to formal discovery procedures results in significant costs, particularly where compliance must be compelled through court intervention. Substantial discovery costs may grow so significantly as to outweigh the amount in controversy, frustrating effective and fair adjudication. Requiring that key information be provided at the outset serves to mitigate this concern. Indeed, the success of the federal initial disclosure regime (as implemented by the Federal Rules of Civil Procedure and adopted by multiple state courts) reveals that timely disclosure of basic case information from both parties at the outset of litigation both minimizes the burden, delay and expense of discovery and allows parties to competently assess the risks of trial and the benefits of potential settlement in the early stages of the litigation.

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[2] Preamble to Rule 11 of Rules of practice for the Commercial Division, https://ww2.nycourts.gov/rules/trialcourts/202.shtml#70 (last accessed Nov. 7, 2024); *see also* Memorandum re: Proposed Modifications to Commercial Division Rule 11, dated June 30, 2021. (Request for Public Comment - rule 11 9-14.pdf) (last accessed Nov. 7, 2024).

A brief history of the federal initial disclosure system provides helpful support for the Committee's recommendation. Initial disclosures were first introduced into federal practice as part of the 1993 Amendments to Federal Rule of Civil Procedure Rule 26(a). Then, as now, the goal of imposing mandatory initial disclosures was to save litigants time and expense by "accelerat[ing] the exchange of basic information about the case and [] eliminat[ing] the paperwork involved in requesting such information."[3] Despite its stated purpose, the prospect of mandatory initial disclosures faced significant opposition, especially from district courts that had already implemented their own local disclosure programs.[4] To appease the opposition, the 1993 initial disclosure amendments included language allowing courts to alter disclosure requirements by local rule or order.[5]

This "opt-out" language effectively rendered the 1993 initial disclosure amendments suggestions, rather than uniform disclosure mandates. Reports detailing the patterned implementation of these disclosure provisions around the country found that, as of March 1998, there were approximately 49 district courts that had implemented Rule 26(a)(1) disclosure requirements (at least in part), while the other 44 that had not implemented any mandatory disclosure regime (though 20 of these districts allowed implementation of Rule 26(a)(1) by judicial order in specific cases).[6]

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[3] FED. R. CIV. P. 26(a)(1)(A) advisory committee's note to 1993 amendment.

[4] *Id.*

[5] *Id.*

[6] *See, e.g.*, Donna Stienstra, Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (Mar. 28, 1998). [Implementation of Disclosure in the United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26 (March 1998).]

Despite this reluctance, nationwide surveys conducted following the implementation of the 1993 Amendments found that, where implemented, the effects of mandatory disclosures on litigation efficiency were generally positive, except that "[m]any lawyers [reported] experience[ing] difficulty in coping with divergent disclosure and other practices as they move from one district to another."[7] One such survey conducted by the Federal Judicial Center ("FJC") found that "[f]ar more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them" and that mandatory initial disclosures "increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement."[8] Similarly, a survey conducted by the RAND Institute for Civil Justice found that cases in jurisdictions requiring early mandatory disclosures of information bearing on both sides of the dispute saw a significant decrease in attorney work hours spent on the litigation.[9] Tellingly, despite initial opposition, lawyers surveyed by the FJC "ranked adoption of a uniform national disclosure rule second among proposed rule changes (behind increased availability of judges to resolve discovery disputes) as a means to reduce litigation expenses without interfering with fair outcomes."[10]

With these results in mind, the Advisory Committee undertook further amendment to Rule 26(a)(1), this time with a focus on establishing a nationally uniform disclosure regime.[11]

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7 FED. R. CIV. P. 26(a)(1)(A) advisory committee's note to 2000 amendment.

8 *See* Thomas E. Willging, Donna Stienstra, & John Shapard, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C.L. REV. 525, 562-63 (1998).

9 *See* James S. Kakalik et al., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 48-51 (reprinted in 39 B.C.L. REV. 613) (1998).

10 FED. R. CIV. P. 26(a)(1)(A) advisory committee's note to 2000 amendment.

11 *Id.*

The 2000 amendments to Rule 26(a)(1), which are still in place today, removed the "opt-out" language, narrowed the scope of the disclosure obligation "to cover only information that the disclosing party may use to support its position," and added exemptions for specified categories of proceedings.[12] The amended rule also added language "permit[ting] a party who contends that disclosure is not appropriate in the circumstances of the case to present its objections to the court, which must then determine whether disclosure should be made."[13]

Following its success at the federal level, several states have implemented comprehensive initial disclosure systems that mimic the approach set forth in the 2000 amendments to Rule 26(a).[14] In addition, some states have elected to adopt initial disclosures in a more limited way, including in their commercial courts.[15] Most notable among these specialty court adoptions is that Delaware's Complex Commercial Litigation Division "require[s] early mandatory disclosures such as those contemplated by Federal Rule of Civil Procedure 26(a)[.]"[16]

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[12] *Id.*

[13] *Id.*; *see also* FED. R. CIV. P. 26(d), (f).

[14] *See, e.g.*, IOWA R. CIV. P. 1.500(1) ("[A] party must ... provide to other parties: ... All documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment."); MINN. R. CIV. P. 26.01(a) ("[A] party must ... provide to other parties: ... all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment."); N.H. R. CIV. P. 22 ("[A] party must ... provide to other parties: ... all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment."); UTAH R. CIV. P. 26(a)(a)(1) ("[A] party shall ... serve on the other parties: a copy of all documents, data compilations, electronically stored information, and tangible things in the possession or control of the party that the party may offer in its case-in-chief, except charts, summaries and demonstrative exhibits that have not yet been prepared and must be disclosed in accordance with paragraph (a)(5).").

[15] *See, e.g.,* Handbook, Indiana Commercial Court Discovery Guidelines, at 26 (last modified Jan. 31, 2023), http://www.in.gov/judiciary/iocs/files/comm-ct-handbook.pdf; *see also* Delaware Complex Commercial Litigation Division (CCLD)—Administrative Governance, https://courts.delaware.gov/superior/complex.aspx (last accessed Nov. 7, 2024).

[16] Delaware Complex Commercial Litigation Division (CCLD)—Administrative Governance, https://courts.delaware.gov/superior/complex.aspx (last accessed Nov. 7, 2024).

This Committee has previously acknowledged the need for, and utility of, early disclosures to streamline and increase the overall efficiency of discovery. For example, in a memorandum dated June 30, 2021, this Committee added:

> The Advisory Council also recommends the addition of provisions allowing the court to direct early case assessment disclosures and analysis prior to and after the preliminary conference. The goal of these recommendations is to streamline the discovery process so that discovery is aligned with the needs of a case and not a search for each and every possible fact in the case. Similar provisions for early case assessment documents are utilized in other international fora and federal courts.[17]

Still, neither the Rules nor the CPLR presently provide for mandatory initial disclosures like those required by Federal Rule 26(a)(1).[18] As a result, judges in the Commercial Division have resorted to creating their own partial-disclosure regimes to facilitate discovery in their courtrooms. For example, the justices in the Nassau County Commercial Division require parties to disclose the nature of the case, amount of any demand sought, the existence of any insurance policies, and the identity of deposition witnesses in their form Preliminary Conference Order,[19] while at least Justice Andrews of the Suffolk County Commercial Division requires plaintiffs and counterclaimants, pursuant to Rule 11(a), "to produce a document, not to exceed 5 pages without permission of the Court, clearly and concisely stating the issues in their respective

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[17] Memorandum re: Proposed Modifications to Commercial Division Rule 11, dated June 30, 2021. (Request for Public Comment - rule 11 9-14.pdf) (last accessed Nov. 7, 2024); *see also* Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York* (June 2012) https://www.nycourts.gov/LegacyPDFS/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf ("[T]he Task Force proposes that Rules 7 and 8 of the Uniform Rules be amended to require the parties to discuss prior to the preliminary conference, and for the court to address to the Preliminary Conference, whether any particular limited disclosure – whether in the form of document exchange, interrogatories or partial depositions of one or two key witnesses or party representatives—would help facilitate settlement discussions or mediation.").

[18] While the CPLR does not require comprehensive initial disclosures like those required by Federal Rule 26(a)(1), it does require defendants to provide automatic disclosure of insurance information and documentation within 90 days of filing an answer. *See* CPLR § 3103(f).

[19] Preliminary Conference Form, Commercial Division of Nassau County (Nassau-PC-Order2-1-09.pdf) (last accessed Nov. 7, 2024).

cases or claims" at least one week prior to their scheduled preliminary conference.[20] But, if we are to learn from the history of the federal initial disclosure regime, the lack of consistency among these ad hoc disclosure regimes highlights the need for a uniform initial disclosure system applicable to all cases in all courtrooms across the Commercial Division.

Consistent with the CPLR

While the CPLR does not require comprehensive initial disclosures like those required by Federal Rule 26(a)(1), it does require defendants to provide automatic disclosure of insurance information and documentation within 90 days of filing an answer.[21] The addendum proposed herein does not conflict with the required disclosures set forth in Section 3101(f). Instead, it incorporates Section 3101(f) by reference and provides for earlier, complete disclosure of the required insurance information in certain cases. Further, Section 3101(f) and case law are silent as to the appropriateness of the timing and scope of the remaining proposed initial disclosures in the specific context of commercial disputes. Moreover, since individual justices already perceive the advantages of mandatory initial disclosures, addressing the issue through a Commercial Division Rule will serve to provide a more uniform and consistent approach that will benefit counsel and avoid the proliferation of individual justice's idiosyncratic practices.

This Committee believes that, just as matrimonial actions are governed by specific early mandatory disclosure rules tailored to the particular needs of matrimonial practice,[22] so too should Commercial Division cases be subject to mandatory initial disclosure rules customized to the needs of complex commercial practice. Further, should these mandatory initial disclosures

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[20] Part 44—Practices and Procedures, Commercial Division of Suffolk County, https://www.nycourts.gov/LegacyPDFS/Courts/10jd/suffolk/SC_Part_Rules/andrews.pdf. (last modified Feb. 6, 2024).

[21] N.Y. C.P.L.R. § 3101(f).

[22] *See* 22 N.Y.C.R.R. § 202.16(f) (directing parties in matrimonial proceedings to provide specific disclosures at least 10 days prior to a preliminary conference).

not meet the needs of a particular case before the Commercial Division, the proposed addendum provides that any party may object to the initial disclosure requirements and request a conference with the court if it believes that such disclosures are not warranted under the circumstances of a particular case. Finally, apart from the insurance disclosures required by CPLR 3101(f) and incorporated by reference into the proposed initial disclosure rule, our proposal does not provide for supplementation of the disclosures made at the outset of the matter. We believe that a supplementation requirement would be duplicative of the regular discovery process and would be needlessly burdensome.

Proposed Addendum to Rule 11

To address the concerns set forth herein, this Committee recommends that the below language be added as an addendum to Rule 11 ("Rule 11-h"):

Rule 11-h. Initial Disclosures.
(a) Required Disclosures.

(1) *Initial Disclosures.*

(A) *In General.* Except as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual that the disclosing party intends to use to support its claims or defenses, unless such use is solely for impeachment, together with a brief description of the information expected to be elicited from such individual;

(ii) a copy of all documents, electronically stored information, or other tangible things referred to in the pleadings unless they are attached to the pleadings;

(iii) a computation of each category of damages claimed by the disclosing party.

(B) *Time for Initial Disclosures—*

(i) *In General.* A party must make the initial disclosures within 14 days after the parties' consultation as required in Rule 8 prior to the Preliminary Conference, unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the

court must determine what initial disclosures, if any, are to be made and must set the time for initial disclosure.

(ii) *For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 8 consultation must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(iii) *For Disclosures Required by CPLR 3101(f).* All disclosures required under CPLR 3101(f) must be made by the earlier of:

(a) 14 days after the parties' consultation as required in Rule 8 prior to the Preliminary Conference; or

(b) ninety days after service of an answer.

(2) The disclosing party is not precluded from using any testimony, documents or other material that was not identified as part of the initial disclosures, provided that the disclosing party demonstrates that it could not have included such testimony, document or material in its initial disclosures.

(3) Failure to utilize good faith in making an initial disclosure may result in an award to the non-disclosing party of the attorney's fees and costs occasioned by such failure.

(b) *Form of Disclosures*—Unless the court orders otherwise, all disclosures under Rule 11-h must be in writing, signed, and served.

(c) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

This proposal is modeled after the federal approach to initial disclosures set forth in Rule 26(a)(1) and incorporates some of the disclosure requirements previously in the Individual Practices and Preliminary Conference forms used by certain judges in the Commercial Division.

Conclusion

The Commercial Division prides itself on consistently being at the cutting-edge of commercial dispute resolution. The proposed addendum suggests adopting an initial disclosure regime comparable to those in use by federal courts and in Delaware's Complex Commercial

Litigation Division in order to increase the overall efficiency of discovery in the Commercial Division, and to keep pace with other courts at the forefront of complex commercial litigation.