To: John W. McConnell
Counsel, Office of Court Administration

From: Commercial and Federal Litigation Section of the New York State Bar Association

Date: [January __, 2018]

Re: Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Privilege Waiver During Disclosure

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The Commercial and Federal Litigation Section of the New York State Bar Association ("Section") is pleased to submit these comments in response to the Memorandum of John W. McConnell, dated November 15, 2017 ("Memorandum"), proposing an amendment to the Rules of the Commercial Division (the "Rules") to include "sample 'privilege claw-back' language for use in the standard form stipulation and order for the production of confidential information in matters before the Commercial Division."

As stated in the Memorandum, the proposal of the Commercial Division Advisory Council ("CDAC") seeks to amend the Rules to make them generally consistent with the existing protocols established at the federal level and in other states concerning the handling of inadvertent disclosure of information during the course of discovery. The formal proposal by the CDAC ("CDAC Memorandum") is attached as Exhibit A.

I. EXECUTIVE SUMMARY

The CDAC's proposal seeks to amend Commercial Division Rule 11-g, which governs the use of confidentiality orders in the Commercial Division, to include the following language in the current confidentiality stipulation and order as follows:

"(c) In connection with their review of electronically stored information and hard copy documents for production (the "Documents"), the Parties agree as follows:

a. to implement and adhere to reasonable procedures to ensure that Documents protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information") are identified and withheld from production.

b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.

c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

In the event the parties wish to deviate from the foregoing language, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter.

(d) Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules."

II. SUMMARY OF PROPOSAL

As stated in the Memorandum, the CDAC desires to incorporate existing New York law with regard to inadvertent disclosure into the Commercial Division's Standard Form to achieve the following goals:

> *First*, it makes it facially apparent that the new provision is intended to be consistent with existing New York state law.
>
> *Second*, it ensures that the parties commit to taking appropriate steps to screen for privilege and promptly remediate any error – *i.e.* steps that are necessary under New York law to avoid an inadvertent waiver.
>
> *Third*, the new provision eliminates the possibility that the presumptive non-waiver embodied in the so-ordered Standard Form will be litigated, thereby reducing greatly the chance that a non-party seeking to challenge the implications of an inadvertent production in another forum will become aware of its occurrence in the first instance.

CDAC Memorandum at 5.

The CDAC acknowledges that "quick peek" agreements (which occur when parties produce documents prior to doing an appropriate privilege review) would be excluded from its proposal since they "are inconsistent with New York law" as they are "entirely ineffective against waiver claims interposed by non-parties to [such agreements]" *Id.* at 6. As such, the CDAC further notes that the risks under existing law "that a party who voluntarily produces privileged material will effectuate a subject matter waiver – a privilege waiver that goes beyond the document disclosed." *Id.*

III. COMMENTS

The Section views favorably the positions taken by the CDAC and fully endorses its proposal to amend the Standard Form governed by Commercial Division Rule 11-g which would allow parties to agree to include "sample 'privilege claw-back' language" that limits the risks associated with inadvertent disclosure of information.

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January 29, 2018

By Email

John W. McConnell, Esq.
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Re: New York City Bar Comments on Proposed Amendment to Commercial Division Rule 11-g to Mitigate Risk Associated with Inadvertent Privilege Waiver During Disclosure

Dear Mr. McConnell:

The New York City Bar Association has reviewed the proposal of the Commercial Division Advisory Council to amend Commercial Division Rule 11-g (22 NYCRR § 202.70[g], Rule 11-g[d] and [d]) to include sample "privilege claw-back" language for use in the standard form of stipulation and order for the production of confidential information in matters before the Commercial Division. The City Bar supports the objective of adding sample privilege claw-back language to the Commercial Division Rules and offers these comments concerning the Proposed Amendment.[1]

We agree with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution that amending the CPLR would be the most effective means of mitigating the risk of inadvertent privilege waiver. An amendment to the CPLR would provide the greatest predictability not only in the Commercial Division but also across the state courts. In the meantime, amending the Commercial Division Rules to include sample claw-back language is a step in the right direction.

[1] These comments reflect the input of the City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation.

We do not agree that the proposed claw-back language "eliminates" the possibility of litigation regarding the question of waiver, and we suggest refining the language to address ambiguities that may lead to disputes. For example, the proposed language includes stipulations that each party will implement "reasonable procedures" to avoid inadvertent disclosure and take "reasonable steps" to correct inadvertent disclosures but does not define those terms. Although judicial opinions provide guidance regarding such concepts, parties may find themselves in conflict over the application of such precedents to a question of waiver. The proposal also includes a stipulation that neither party, when presented with a request for the return of protected information inadvertently produced, will challenge the other's document review procedures or efforts to rectify the inadvertent disclosure, or claim prejudice. It is unclear, however, whether the waiver of any right to challenge the producing party's actions or claim prejudice depends upon the producing party's actual implementation of "reasonable procedures" for document review and taken "reasonable steps" to correct the error.[2]

To promote fairness and minimize disputes, the sample claw-back provisions should also require a party who, upon review, identifies a document appearing to contain privileged material [or other protected information] to promptly notify the producing party in writing of having received the document, allowing the producing party to request a claw-back.

We recommend that sample claw-back provisions be added to the Commercial Division Rules as part of a new, separate rule, rather than as a subsection of Rule 11-g (Proposed Form of Confidentiality Order). Many parties will want to include claw-back provisions in a confidentiality stipulation and order, but other parties may prefer a stand-alone claw-back stipulation and order, and judges (including judges who do not elect to use the form stipulation that appears in Appendix B to the Commercial Division Rules) may prefer to include such provisions in a preliminary conference or other order. Setting forth sample claw-back provisions in a separate rule would underscore the flexibility with which the stipulations can be written. It would also comport with the Subcommittee's stated goal of providing language that may be incorporated "into the Standard Form [Confidentiality Stipulation and Order], *or into another form of order utilized by the Justice presiding over the matter*" (emphasis added).

Finally, while any sample claw-back language must provide clear and useful provisions that parties can adopt wholesale, we believe that the language of the Proposed Amendment that specifically allows for deviation from the form provisions is also essential. In major commercial actions with voluminous document production (which this rule is designed to address), important protections beyond attorney-client privilege, materials prepared in anticipation of litigation, and attorney work-product are likely to apply. Parties may be harmed through the inadvertent production of material that is subject to other privileges and protections recognized at common law, protected from disclosure pursuant to a state or federal statute (such as HIPAA), or broadly recognized as highly sensitive and confidential (such as Social Security Numbers and financial

[2] Further ambiguity arises in the language preceding subsection (a) of the proposed claw-back provisions. Among other things, it includes a definition of "Documents" that conflicts with the definition set forth in numbered paragraph 1 of the Appendix B form stipulation and order. We recommend that the language be revised to state simply, "The Parties agree as follows," and that the phrase "documents or information" replace the capitalized term "Documents" in subsection (a) of the proposed claw-back provisions.

account numbers). The proposed claw-back provisions properly allow litigants and judges to mitigate the risk of inadvertent disclosure of such documents and information by varying the language as they deem appropriate (e.g., by listing specific additional bases for protection or more broadly refer to other applicable privileges or protections),[3] and this aspect of the proposal would make the Commercial Division a more attractive forum in which to resolve disputes.

Very truly yours,

Hon. Carolyn E. Demarest (Ret.)
Chair, Council on Judicial Administration

Michael P. Regan
Chair, Committee on State Courts of Superior Jurisdiction

Barbara Seniawski
Chair, Committee on Litigation

[3] One recent example that highlights the need for such protection is Wells Fargo's inadvertent production in July 2017 of "a vast trove of confidential information about tens of thousands of the bank's wealthiest clients." https://www.nytimes.com/2017/07/21/business/dealbook/wells-fargo-confidential-data-release.html

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January 16, 2018

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Proposed Amendment of Commercial Division Rule 11-g

Dear Mr. McConnell,

On behalf of the Managing Attorneys and Clerks Association, Inc. ("MACA") and its Rules Committee, we write to comment on the proposal to amend Commercial Division Rule 11-g, published November 15, 2017. We welcome this opportunity and thank the Office of Court Administration for soliciting the views of the bar on this important subject.

MACA is comprised of more than 120 law firms with litigation practices, primarily large and mid-sized firms. Our members' positions within our respective firms and concomitant responsibilities afford us a breadth of understanding of the day to day operations of the various state and federal court systems. In particular, our members have extensive experience with the Statewide Rules of the Commercial Division and procedures relating to inadvertent production in both the New York State and the federal courts.

We generally agree with the proposal to amend Commercial Division Rule 11-g to bring better definition and predictability to how inadvertent disclosures of privileged information are handled. We agree with the Commercial Division Advisory Council's

observation in its September 5, 2017 supporting memorandum that the most efficient and effective way to modify court treatment of inadvertent disclosures and other privilege-related matters would be through legislation; and with the Council's lament concerning legislative inaction on this topic. Given such inaction, we believe it appropriate for the Unified Court System to address the situation via rulemaking.

We are concerned that the proposed language included in the Commercial Division Advisory Council's September 5, 2017 memorandum goes a bit too far in relieving the Producing Party of enforceable duties concerning its handling of privileged documents. Specifically, we believe that in subsection (b) on page 4 of the memo the Producing Party should be required to take steps to correct its error *promptly* after discovery of the error; and that the duties of the Receiving Party in subsection (c) should be contingent on the Producing Party satisfying its obligations under subsection (b). Accordingly, we would modify the text of those two subsections to read as follows:

b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error promptly after becoming aware of it, including a request to the Receiving Party for its return.

c. upon such request of the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, when the Producing Party has complied with subsection (b), above, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.

We recognize that these limitations would preserve some possibility of litigation over the procedure by which inadvertent productions are resolved, which the Advisory Council indicated in its September 5, 2017 memo that it sought to avoid. We believe it important to preserve the Receiving Party's right to challenge the Producing Party's utilization of the clawback procedure, however, because it is the only way a court can review litigants' use of the procedure in a particular case, which in turn is the only means available to oversee use of the procedure overall. We are in favor of reducing litigation over inadvertent productions, but we are reluctant to support eliminating the validating and regulating benefits of court oversight altogether.

As we have commented on some other Commercial Division Rule proposals, we also do not see a reason to limit the new rule to actions pending within the Commercial Division. We accordingly would urge the OCA to monitor litigants' and the courts' experiences with the new rule, assuming it is adopted, with an eye to eventually implementing similar procedures for all trial courts within the Unified Court System.

* * *

Again, we are grateful to the OCA for the opportunity to comment on this proposal, and look forward to helping ensure that any amendment to Commercial Division Rule 11-g is implemented smoothly.

Respectfully submitted,

/s/Timothy K. Beeken
Counsel & Managing Attorney
Debevoise & Plimpton LLP

M E M O R A N D U M

TO: Office of Court Administration

FROM: Commercial Division Advisory Council

DATE: February 5, 2018

RE: **Response to Public Comments Regarding Proposed Amended Standard Form of Confidentiality Order**

EXECUTIVE SUMMARY

On November 15, 2017, the Office of Court Administration ("OCA") released for public comment the Commercial Division Advisory Council's ("Council") recommendation regarding an amendment to Commercial Division Rule 11-g to protect against the waiver of privilege due to inadvertent production of documents during discovery. In response, OCA received only three sets of comments: one submitted by Commercial and Federal Litigation Section of the New York State Bar Association ("Comm. Fed."), another from the New York City Bar's Council on Judicial Administration, Committee on State Courts of Superior Jurisdiction and Committee on Litigation (collectively "NYC Bar"), and the third submitted by the Managing Attorneys and Clerks Association, Inc. ("Managing Clerks").

All three organizations endorse the proposed amendment to Rule 11-g. According to Comm. Fed.:

> "The Section views favorably the positions taken by the [Commercial Division Advisory Council] and *fully endorses* its proposal to amend the Standard Form [of Confidentiality Order] governed by Commercial Division Rule 11-g which would allow parties to agree to include 'sample "privilege claw-back" language' that limits the risks associated with inadvertent disclosure of information." (emphasis added.)

The NYC Bar was also supportive:

> "The City Bar supports the objective of adding sample privilege claw-back language to the Commercial Division Rules. . . . We agree with the Subcommittee on Procedural Rules to Promote Efficient Case Resolution that amending the CPLR would be the most effective means of mitigating the risk of inadvertent privilege waiver. An amendment to the CPLR would provide the greatest predictability not only in the Commercial Division, but also across the state courts. In the meantime, amending the Commercial Division Rules to include sample claw-back language is a step in the right direction." (NYC Bar Comments at 1.)

Finally, the Managing Clerks noted with approval that:

> "[w]e generally agree with the proposal to amend Commercial Division Rule 11-g to bring better definition and predictability to how inadvertent disclosures of privileged information are handled. We agree with the Commercial Division Advisory Council's observation in its September 5, 2017 supporting memorandum that the most efficient and effective way to modify court treatment of inadvertent disclosures and other privilege-related matters would be through legislation; and with the Council's lament concerning legislative inaction on this topic. Given such inaction, we believe it appropriate for the Unified Court System to address the situation via rulemaking." (Managing Clerk's Comments at 1-2.)

The NYC Bar and Managing Clerks also made specific comments regarding the proposal itself. The Council has reviewed those comments and responds as follows:

Comment	**Source**	**Council Response**
The proposed amendment does not (but should) define the "reasonable procedures" and "reasonable steps" that parties must undertake to protect against inadvertent production of privilege material.	NYC Bar Comments at 2.	**Disagree**: Defining "reasonable procedures" and "reasonable steps" is an inherently fact-intensive exercise. These terms are not susceptible to pat definitions that may be incorporated into form claw-back language. Moreover, Federal Rule of Evidence 502, the provision upon which the proposed amendment to Rule 11-g is

		modeled, also refers to "reasonable steps" without defining it further. As the NYC Bar itself acknowledges, New York caselaw provides guidance on this issue, and the Council's memorandum in support of the proposal cites to some of this caselaw. (Council Proposal at 5.)
"To promote fairness and minimize disputes, the sample claw-back provisions should also require a party who, upon review, identifies a document appearing to contain privileged material . . . to promptly notify the producing party in writing of having received the document, allowing the producing party to request a claw-back."	NYC Bar Comments at 2.	**Disagree**: The New York Rules of Professional Conduct already impose upon lawyers the obligation to notify adversary counsel as to the production of facially privileged materials. *See* New York Rules of Professional Conduct, Rule 4.4 (b).
Modify language of proposed amendment to Rule 11-g to make clear that the claw-back language may be added either to the form of confidentiality order being utilized in the case or used as language for a stand-alone order.	NYC Bar Comments at 2.	**Agree**: Clarifying the proposed amendment to contemplate incorporation of the claw-back language into another type of order (i.e. something other than the confidentiality order in the case) is sensible. There is nothing magic about including the claw-back provision in the confidentiality order. In fact, several federal judges contemplate a standalone FRE 502 order. Text to incorporate this modification appears on the attached redline.

The definition of "Document", as utilized in the proposed amendment to Rule 11-g is inconsistent with the definition of "Document" that appears in paragraph 1 of the Standard Form of Confidentiality Order.	NYC Bar Comments at 2 fn.2.	**Agree**: Given its contemplated incorporation into the Standard Form of Confidentiality Order, the proposed amendment should not inject ambiguity into the balance of the document. Text to rectify this inconsistency appears on the attached redline.
The proposed amendment should contemplate the claw-back of information protected not only by the attorney-client privilege, work product doctrine, and as materials prepared in anticipation of litigation, but by other privileges and protections as well.	NYC Bar Comments at 2.	**Disagree:** Federal Rule of Evidence 502, the model for the current proposal, is similarly limited to the inadvertent waiver of attorney client privilege and work product protection. Any attempt to extend beyond this would require the integration of the laws of waiver for each and every additional privilege and protection to be included under the claw-back's purview. In any event, the proposed rule contemplates deviating from the form language by providing the presiding justice with an explanation for the change. Moreover, as noted above, NYRPC 4.4(b) already requires a "lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender."

Proposed amendment to Commercial Division Rule 11-g should be modified to make clear that a party's waiver of the right to challenge the inadvertency of production is contingent on the producing party actually implementing reasonable procedures to screen for privilege.	Managing Clerk's Comments at 2.	**Disagree**: The proposed amendment already addresses this issue by contemplating that the undertaking to use reasonable steps to screen for privilege has been incorporated into a court order. Parties wishing to preserve the right to challenge the adequacy of screening procedures have the option of not using the claw-back provision in their litigation. By agreeing in a court order both to use reasonable procedures to screen for privilege and, simultaneously, forego the right to challenge the adequacy of the other side's procedures, the parties are making a conscious choice, after weighing for themselves the costs and benefits of that decision. In this regard, the result approximates the entry by a federal judge of a FRE 502(d) order; pursuant to such an order, it is neither a waiver of privilege nor even an obligation on the part of the producing party to take reasonable steps to screen for privilege. Significantly, nothing in the proposed amendment to Rule 11-g requires (or even contemplates) a party to forego challenging whether or a clawed-back document is privileged in the first instance.

Since the proposed amendment to Commercial Division Rule 11-g that OCA circulated for public comment was first vetted extensively by the 40+ members of the Advisory Council, and particularly since only two sets of comments were received, it is the considered view of the Council that with the exception of a finite number of changes, the proposed rule should remain unchanged from what was originally submitted to OCA.

The accompanying document reflects the proposed amendment submitted to OCA by the Council in September of 2017, redlined against those changes proposed by the NYC Bar and the Managing Clerks and accepted by the Council.

CONCLUSION

For the reasons set forth above, the Council respectfully requests that the proposed amendment to Commercial Division Rule 11-g originally submitted by the Council to OCA, as further modified in light of the comments received by the NYC Bar and the Managing Clerks, be adopted.

JDL

(I) The text of current rule 11-g(c) shall be deleted and replaced with the following language:

> "(c) In the event the parties wish to incorporate a privilege claw-back provision into either (i) the confidentiality order to be utilized in their commercial case, or (ii) another form of order utilized by the Justice presiding over the matter, they shall ~~insert~~ utilize the following text ~~as separate paragraph~~:
>
> > '__. In connection with their review of electronically stored information and hard copy documents for production (the "Documents Reviewed"), the Parties agree as follows:
> >
> > a. to implement and adhere to reasonable procedures to ensure ~~that~~ Documents Reviewed that are protected from disclosure pursuant to CPLR 3101[c], 3101[d][2] and 4503 ("Protected Information") are identified and withheld from production.
> >
> > b. if Protected Information is inadvertently produced, the Producing Party shall take reasonable steps to correct the error, including a request to the Receiving Party for its return.
> >
> > c. upon request by the Producing Party for the return of Protected Information inadvertently produced, the Receiving Party shall promptly return the Protected Information and destroy all copies thereof. Furthermore, the Receiving Party shall not challenge either the adequacy of the Producing Party's document review procedure or its efforts to rectify the error, and the Receiving Party shall not assert that its return of the inadvertently produced Protected Information has caused it to suffer prejudice.'

In the event the parties wish to deviate from the foregoing language, they shall submit to the Court a red-line of the proposed changes and a written explanation of why the deviations are warranted in connection with the pending matter."

(II) A new subsection (d) shall be added to Rule 11-g, which shall read:

"Nothing in this rule shall preclude a party from seeking any form of relief otherwise permitted under the Civil Practice Law and Rules."