APPENDIX A
Commercial Division
Guidelines for Discovery of
Electronically Stored Information ("ESI")

The purpose of these Guidelines for Discovery of ESI (the "Guidelines") is to:

- Provide efficient discovery of ESI (a.k.a., e-discovery) in civil cases;
- Assist counsel in identifying ESI issues to be considered and addressed with its client;
- Encourage the early assessment and discussion of the costs of preserving, retrieving, reviewing and producing ESI given the nature of the litigation and the amount in controversy;
- Facilitate an early evaluation of the significance of and/or need for ESI in light of the parties' claims or defenses;
- Assist parties in resolving disputes regarding ESI informally and without Court supervision or intervention whenever possible;
- Encourage meaningful discussions and cooperation between parties; and
- Ensure a productive Preliminary Conference by, among other things, identifying terms and issues that will be addressed at the Preliminary Conference and/or in the Preliminary Conference Stipulation and Order.

The Guidelines are advisory only and intended to facilitate compliance with the CPLR, the Uniform Civil Rules for the Supreme Court, and the Rules of the Commercial Division of the Supreme Court. In the case of any conflict between the Guidelines and these rules, the relevant rules should control.

The Guidelines apply to discovery from parties and nonparties alike, and the term "parties", as used in these Guidelines, should be read to include nonparties to the extent applicable.

Parties are encouraged to review the Guidelines at or before the commencement of proceedings.

I. CONDUCT OF THE E-DISCOVERY PROCESS

A. Parties are encouraged to share information relating to the e-discovery process, and to attempt in good faith to resolve disputes about ESI through the informal meet and confer process where possible, rather than through formal discovery or motion practice. Such informal discussions are strongly encouraged at the earliest reasonable stage of the discovery process. An attorney's advocacy for a client is not compromised by conducting discovery in a cooperative manner, which tends to reduce litigation costs and delay, and facilitate the cost-effective, predictable and fair adjudication of cases.

B. Parties should tailor requests for ESI to what is reasonable and proportionate, considering the burdens of the requested discovery, the nature of the dispute, the amount in controversy, and the importance of the materials requested to resolving those issues. Parties should not use discovery of ESI for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

C. Consistent with New York Rule of Professional Conduct 1.1, counsel should be familiar with the legal and technical aspects of e-discovery in the matter so that it may appropriately advise its client how to conduct discovery in an efficient and legally defensible manner. This should include legal knowledge and skill with respect to the rules and case law related to e-discovery; its client's storage, organization, and format of ESI; and relevant information retrieval technology. Where appropriate (*e.g.*, in cases where there will likely be significant ESI discovery), and in order to assist with competent representation with respect to ESI issues, the parties should consider each designating an ESI Liaison, a person with particular knowledge and expertise about the parties' electronic systems and the e-discovery process, who can be prepared to participate in informal resolution of ESI disputes between the parties and presentation of issues to the Court should the need arise.

II. PRELIMINARY CONFERENCE

A. Consistent with Rule 11-c(b), the parties should confer with the client with regard to anticipated electronic discovery issues prior to the Rule 7 Preliminary Conference. The Parties should consider a written stipulation for the preservation, collection, review and production of ESI, and consider submitting that agreement to the court to be ordered. A number of such ESI stipulations have been entered in the Commercial Division and there are published models available from other courts (*e.g.*, federal courts in the Northern District of California, the District of Maryland, and the Eastern District of Michigan), which may be consulted. Issues that cannot be resolved between the parties should be presented to the Court for resolution prior to or at the Preliminary Conference.

B. Matters related to ESI that should be discussed prior to the Preliminary Conference should generally include:

1. the extent to which e-discovery is likely to be necessary for the just and efficient resolution of the dispute;

2. the appropriate scope of preservation, including any sources of ESI that do not need to be preserved because they are not reasonably accessible;

3. any potential conflicts between a party's discovery obligations and state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information;

4. the identification of custodians, time frame, and sources of ESI to be searched, including the identification of ESI sources that are not reasonably accessible;

5. the method for searching and reviewing ESI, including the use of search terms, the exclusion of certain types of documents and other non-discoverable information from discovery, the use of de-duplication and email thread suppression, and the use of technology assisted review ("TAR").

6. the appropriate format for production of ESI;

7. identification, redaction, labeling, and logging of privileged and other ESI protected from discovery or disclosure, including agreement on the clawback of inadvertently produced materials;

8. the anticipated cost and burden of ESI discovery and whether cost-sharing or cost-shifting is appropriate;

9. opportunities to reduce costs and increase efficiency and speed of e-discovery, such as through the phasing of discovery so as to prioritize searches that are most likely to be relevant, the use of sampling to test the likely relevance of searches, alternative methods for logging privilege information, and/or sharing expenses like those related to litigation document repositories.

III. PRESERVATION AND COLLECTION OF ESI

A. Counsel should take an active role in assisting its client in the preservation and collection of ESI. This should include becoming knowledgeable about relevant ESI in its client's possession, custody, or control, and how such information is generated, maintained, retained, and disposed. Counsel should assist its client in all stages of the preservation and collection process, including the implementation of an effective legal hold, reasonable monitoring of compliance with that legal hold, identification of sources of relevant ESI, and defensible collection of that ESI.

B. Counsel should be knowledgeable of the sources where a client's discoverable ESI may exist, including workstations, email systems, instant messaging systems, document management systems (e.g., Google Drive, Sharepoint, Confluence), collaboration tools (e.g., Microsoft Teams, Slack), social media, mobile devices and apps, cloud-based storage, back-up systems, and structured databases, so that it may advise its client as to whether such sources need to be collected and searched. Where counsel is not itself knowledgeable with respect to such sources, it should consult with persons with appropriate subject-matter expertise, knowledge, and competence.

C. A party should take reasonable steps to identify and to preserve relevant data in its possession, custody, or control once litigation is pending or is reasonably anticipated. Factors to consider in formulating such steps should include, but are not limited to:

1. the claims, defenses, and relevant facts in dispute;

2. relevant time frames, geographic locations, and individuals;

3. the types of ESI that may be relevant to the claims and defenses and the current repositories and custodians of that data;

4. whether legacy, archived, or offline ESI sources are reasonably likely to contain relevant, non-duplicative information;

5. whether there are third-party sources that have relevant information that falls within the preservation obligation and, if so, what actions should be taken to preserve that ESI;

6. whether any automatic or routine document retention or destruction policies should be suspended or modified; and

7. the circumstances and information known or reasonably available to counsel and the parties at the time the preservation efforts at issue are or were undertaken.

D. Reasonable preservation steps should include a written litigation hold(s) to be distributed to relevant individuals as soon as litigation is reasonably anticipated and/or has commenced. Reasonable preservation may also require affirmative action in order to ensure relevant ESI is not lost through the operation of processes that may automatically delete ESI. Parties should also consider the preservation risks associated with the use of "ephemeral" messaging systems (*e.g.*, Snapchat, Telegram) that facilitate the disappearance of messages after they have been read by a recipient.

E. The parties should discuss preservation, including the implementation of litigation holds, in order to ensure that the scope of preservation is reasonably tailored and not unduly burdensome. Such a discussion should occur at the onset of the case and periodically throughout the case as issues evolve. Preservation letters are not required to notify an opposing party of its preservation obligation. If a party does send a preservation letter, the letter should not be overbroad but rather should provide reasonable detail to allow informed decisions about the scope of the preservation obligation, such as the names of parties, a description of claims, potential witnesses, the relevant time period, sources of ESI the party knows or believes are likely to contain relevant information, and any other information that might assist the responding party in determining what information to preserve. A party has a duty to preserve relevant ESI, consistent with its common law, statutory, regulatory, or other duties, regardless of a preservation letter from an opposing party.

F. For some sources of ESI, the burden of preserving them outweighs the potential benefit of unique, relevant ESI they may contain. The parties should discuss whether such sources need to be preserved beyond what may be preserved pursuant to normal business retention practices.

IV. ESI NOT REASONABLY ACCESSIBLE

A. As the term is used herein, ESI should not be deemed "not reasonably accessible" based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data. Whether data are not reasonably accessible due to undue burden or cost will depend on the facts of the case.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible unless the objection has been stated with particularity, and not in conclusory or boilerplate language. The party asserting that ESI is not reasonably accessible should be

prepared to specify facts that support its contention, including submitting an appropriate and detailed analysis in the form of an affidavit.

C. If the requesting party intends to seek discovery of ESI from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, and consider conditions on obtaining this information, such as limits as to the scope, and allocation of costs between the requesting party and the producing party, as set forth in Rule 11-c(d) and in accordance with Section VIII of the Guidelines.

V. SEARCHING, FILTERING AND REVIEWING ESI

A. Ordinarily, the producing party is best situated to evaluate the procedures, methodologies, and technologies for producing their own ESI, though a producing party should engage in a good faith exchange of information about its process and attempt to resolve any disputes regarding the process to be employed.

B. Counsel should take an active role in assisting its client in the search and review of ESI. Counsel should assist its client in all stages of the search and review process, including, as appropriate, use of search terms and other methods for filtering ESI, review of ESI to determine what is responsive and/or privileged, and the production of responsive ESI.

C. A search methodology need not be perfect but it should be reasonable under the circumstances. A reasonable methodology may include steps to reduce the volume of data by removing ESI that is duplicative, cumulative, or not reasonably likely to contain information within the scope of discovery.

D. The parties should exchange reasonable information about a party's process for searching and reviewing ESI, including search terms to be used, filtering out of certain file types, date filters, de-duplication, email thread suppression, and the use of technology assisted review (TAR) to aid in the review process.

E. Consistent with Rule 11-c(f), the parties are encouraged to use efficient means to identify ESI for production. The parties should tailor searches of ESI to (a) apply to custodians whose ESI may reasonably be expected to contain evidence that is material to the dispute and (b) employ search terms and other search methodologies (*e.g.*, TAR) reasonably designed to identify evidence that is material to the dispute. So that use of TAR is not unjustifiably discouraged, its use should not be held to a higher standard than the use of search term keywords or manual review. Counsel employing TAR should ensure that it is sufficiently knowledgeable regarding its use and/or associate with persons with appropriate subject-matter expertise, knowledge, and competence.

VI. FORM OF PRODUCTION OF ESI

A. As set forth in Rule 11-c(c), a party requesting ESI may specify the format in which ESI shall be produced. The party responding to that request may object to the requested format to the extent it is burdensome or for any other valid reason, and if it does so, it should specify with particularity the format in which it proposes to produce ESI, about

which the parties should meet and confer, consistent with Rule 11-c(c). The parties are encouraged to reach agreement on a format for the production of ESI to avoid unnecessary expense and the risk of costly re-productions.

B. Agreement on the form of production of ESI should address, among other issues, the following:

1. whether documents should be produced as images (e.g., TIFF, JPG) or as native files;

2. how searchable text associated with documents should be provided;

3. what metadata fields should be provided;

4. how documents should be labeled (e.g., by bates number) and how confidentiality designations and privilege redactions should be applied;

5. production formats for non-document forms of ESI, such as multimedia, text messages, instant messages, social media, and structured databases.

C. Ordinarily, absent agreement or court order to the contrary, a party should be permitted to produce ESI in the form in which it is ordinarily maintained, i.e., its native format. Where the native format would be unusable to the requesting party, the parties should meet and confer on a reasonable format.

D. The producing party should not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

VII. PRIVILEGE AND OTHER PROTECTIONS FROM DISCOVERY

A. Parties should take reasonable steps to safeguard ESI subject to the attorney client privilege or other protections from disclosure. That said, pursuant to Rule 11-c(g), the inadvertent or unintentional production of ESI containing protected information should not be deemed a waiver if reasonable precautions were taken to prevent disclosure and prompt notice is given of the inadvertent disclosure. The use of search terms or other technology processes rather than wholesale manual review may be considered reasonable precautions to identify privileged material provided that they were appropriately employed.

B. The parties may extend or modify the protections and duties of Rule 11-c(g) by written agreement.

C. Counsel are reminded of their obligations under Rule 4.4(b) of the New York Rules of Professional Conduct concerning their receipt of documents that appear to have been inadvertently sent to them.

D. Parties should be aware of and give due regard to state, federal, and foreign laws governing the use and disclosure of protected personal, health, financial, trade secret and other information, consistent with their New York discovery obligations.

VIII. COSTS

A. As a general matter, the producing party should bear the cost of searching for, retrieving, and producing ESI. However, where the court determines the request constitutes an undue burden or expense on the responding party, the court may exercise its broad discretion to permit the shifting of costs between the parties. When evaluating whether costs should be shifted, courts should consider:

1. the extent to which the request is specifically tailored to discover relevant information;
2. the availability of such information from other sources;
3. the total cost of production, compared to the amount in controversy;
4. the total cost of production, compared to the resources available to each party;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation; and
7. the relative benefits to the parties of obtaining the information.

B. Where a party seeks production of ESI from a non-party, the party seeking discovery shall promptly defray the reasonable expenses associated with the non-party's production of ESI, in accordance with Rules 3111 and 3122(d) of the CPLR. Such reasonable production expenses may include the following:

1. Reasonable fees charged by outside counsel and e-discovery consultants;
2. The reasonable costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production;
3. The reasonable cost of disruption to the nonparty's normal business operations to the extent such cost is quantifiable and warranted by the facts and circumstances; and
4. Other costs as may be reasonably identified by the nonparty.