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April 26, 2012

Honorable Loretta A. Preska
Chief United States District Court Judge
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: Proposed Local Rule - E-Discovery

Dear Judge Preska:

At Your Honor's suggestion, following an address to the New York City Bar Association's Litigation Committee in June 2010, the committee undertook during the 2010-2011 committee year a project to craft a local rule to govern e-discovery for the Southern and Eastern Districts of New York. The text was unanimously approved by the Litigation Committee at its September 2011 meeting. Thereafter, the draft proposed rule was circulated to certain other committees of the New York City Bar Association for comment. Comments to the proposed draft rule were considered by the Litigation Committee and revisions were made as appropriate. We are pleased to enclose for Your Honor's consideration the proposed Local Rule on E-Discovery that is the end-product of our deliberative process.

In drafting the proposed rule, the Litigation Committee attempted to achieve the following goals:

1) To prevent e-discovery from delaying the substantive litigation and from being unnecessarily costly;

2) To insure that e-discovery efforts are in-step with discovery obligations, deadlines, and timing envisioned by the Federal Rules of Civil Procedure and the Local Rules, particularly with respect to automatic disclosures and meet and confer obligations under Federal Rules of Civil Procedure 16 and 26;

3) To establish a presumptive number of custodians for initial search purposes;

4) To limit e-discovery in the first instance to data that is readily accessible as part of a party's regular and ordinary business;

5) To cause parties to establish search methodology for e-discovery information at the outset of litigation;

6) To establish preservation obligations that are not overly burdensome;

7) To establish production formats of the e-discovery information; and

8) To permit relief from the proposed Local Rule as the parties or the Court deem necessary.

We believe that the proposed Local Rule will be of great assistance to the discovery process. We thank Your Honor for considering the proposal and stand ready to assist in the process of its adoption.

Respectfully,

Robert A. O'Hare Jr.

Encl.
Cc: Alan Rothstein, Esq., Counsel
The Association of the Bar of the City of New York

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May 14, 2012

Honorable Carol Bagley Amon
Chief Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Proposed Local Rule - E-Discovery

Dear Chief Judge Amon:

The Litigation Committee of the New York City Bar Association undertook a project during the 2010-2011 committee year to craft a local rule to govern e-discovery for the Southern and Eastern Districts of New York. The text was unanimously approved by the Litigation Committee at its September 2011 meeting. Thereafter, the draft proposed rule was circulated to certain other committees of the New York City Bar Association for comment. Comments to the proposed draft rule were considered by the Litigation Committee and revisions were made as appropriate. We are pleased to enclose for Your Honor's consideration the proposed Local Rule on E-Discovery that is the end-product of the deliberative process. The draft proposal has also been sent to Chief Judge Loretta Preska for consideration by the appropriate committee at the Southern District.

In drafting the proposed rule, the Litigation Committee attempted to achieve the following goals:

1) To prevent e-discovery from delaying the substantive litigation and from being unnecessarily costly;

2) To insure that e-discovery efforts are in-step with discovery obligations, deadlines, and timing envisioned by the Federal Rules of Civil Procedure and the Local Rules, particularly with respect to automatic disclosures and meet and confer obligations under Federal Rules of Civil Procedure 16 and 26;

3) To establish a presumptive number of custodians for initial search purposes;

4) To limit e-discovery in the first instance to data that is readily accessible as part of a party's regular and ordinary business;

5) To cause parties to establish search methodology for e-discovery information at the outset of litigation;

6) To establish preservation obligations that are not overly burdensome;

7) To establish production formats of the e-discovery information; and

8) To permit relief from the proposed Local Rule as the parties or the Court deem necessary.

We believe that the proposed Local Rule will be of great assistance to the discovery process. We thank Your Honor for considering the proposal and stand ready to assist in the process of its adoption.

Respectfully,

Robert A. O'Hare Jr.

Encl.
Cc: Alan Rothstein, Esq., Counsel
The Association of the Bar of the City of New York

Proposed Local Rule on E-Discovery

1. **Exchange of Electronic Discovery Information.** In accordance with the timing set forth in Federal Rule of Civil Procedure 26(a)(1)(C), and simultaneously with a party's service of its initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)(A), a party shall provide to the other parties the following information:

   a. A list of the names of not more than ten persons, including current and former employees, whose discoverable, accessible electronically stored information ("ESI") the disclosing party has in its possession, custody, or control, including a brief description of each person's title and responsibilities;

   b. A copy of the disclosing party's relevant organizational charts for the relevant time periods;

   c. A list of each relevant electronic system and each relevant type of personal electronic device that has been in place at all relevant times and a general description of each system, including (i) the nature, scope, character, organization, and formats employed in each system; (ii) the form and manner in which the data is maintained; and (iii) whether the producing party deems the system or device readily accessible;

   d. Pertinent information about the accessibility of discoverable ESI, including, but not limited to (i) the party's system-wide storage, deletion, and backup practices; (ii) whether an electronic system identified pursuant to (1)(c) is no longer in use; (iii) whether ESI is maintained in redundant electronic storage media; or (iv) whether retrieval of ESI involves substantial cost;

   e. A copy of the party's relevant document retention policy, if any; and

   f. A description of any problems reasonably anticipated to arise in connection with e-discovery, if any.

2. **Search Methodology for Discoverable Electronically Stored Information.** A party shall disclose to the other parties, in writing, the proposed methodology to be employed in conducting an electronic search to locate discoverable ESI. A party shall serve its proposed methodology with its Responses and Objections to initial document requests under Federal Rule of Civil Procedure 34. Within fourteen (14) days of service of its Responses and Objections a

party shall meet and confer with the other parties so as to reach an agreement as to the method of searching, including the words, terms, phrases, date restrictions, and custodians to be searched and any custodian whose e-mail or other ESI during the relevant period should be reviewed in full (rather than being searched using specified words, terms, and phrases). During the meet and confer, the party also shall reach agreement as to the timing and conditions of any additional searches of such party's ESI that may become necessary in the normal course of discovery. As to individual custodians, unless otherwise agreed to, or ordered by the Court, parties are limited to electronic searches of ten custodians of each other party.

3. **Timing of Electronic Discovery.** Discovery of ESI shall proceed in the following sequenced fashion:

a. Immediately after a party agrees to the search methodology to be used to search its ESI, such party shall search its documents, other than those identified as limited accessibility ESI, and, thereafter, produce responsive ESI in accordance with Federal Rule of Civil Procedure 26(b)(2);

b. The date on which production of ESI-related documents shall begin shall be set forth in the scheduling order;

c. Electronic searches of a party's documents identified as of limited accessibility shall be conducted only after such party's initial electronic document search has been completed;

d. Requests of a party for information expected to be found in limited accessibility documents must be narrowly focused with a factual basis supporting the request; and

e. On-site inspections of a party's electronic media under Federal Rule of Civil Procedure 34(b) shall not be permitted, absent exceptional circumstances where good cause and specific need have been demonstrated.

4. **Production Format of Electronically Stored Information.** If a party cannot agree to the format for document production, ESI such as emails and word documents shall be produced to the requesting party as image files (e.g., PDF or TIFF) with corresponding load or index files. When the image file is produced, the producing party must preserve the integrity of the ESI's

contents, i.e., the original formatting of the document, its metadata and, where applicable, its revision history. After initial production in image file format is complete, a party must demonstrate particularized need for production of these ESI in their native format. Documents that cannot reasonably be viewed in image format, including but not limited to spreadsheet files (*e.g.*, Excel), database files (*e.g.*, Access) and presentation files (*e.g.*, Powerpoint), must be produced in native file format with metadata.

5. **Preservation of Electronically Stored Information.** ESI that can reasonably be anticipated to be relevant to the subject-matter of the litigation shall be preserved.

6. **Limited Accessibility Electronically Stored Information.** The primary source of ESI for production should be data and information used in the ordinary and regular course of business. A court may, in its discretion, order a search of limited accessibility ESI that is not used in the ordinary and regular course of business, upon consideration of whether the need and relevancy of the material outweighs the cost and burden of retrieving and processing the ESI, including the disruption of business and the information management activities. When balancing the cost, burden, need, and relevancy of ESI, the court and the parties will apply the proportionality standard embodied in Federal Rule of Civil Procedure 26(b)(2)(C), which requires consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing ESI, as well as the nature of the litigation and the amount in controversy. All formats primarily used for backup or disaster recovery purposes are presumed to present a burden that outweighs the relevancy of data preserved in such formats and need not be searched absent relevance and special need. Without limiting a party's preservation obligations under Section 5 of this rule, absent a showing of relevance and special need, a

responding party will not be required or preserve, review or produce deleted, shadowed, fragmented or residual ESI.

7. **Judicial Relief.** Notwithstanding the foregoing, a party may make an application to the Court for any relief concerning discovery of ESI, including with respect to any provision of this rule.