



NEW YORK
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November 8, 2021

By Email

Eileen D. Millett, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 100041
rulecomments@nycourts.gov

Re: Response to (1) September 7, 2021 Request for Public Comment on Proposal to Amend Commercial Division Rules 11-c, 8, 1(b), 9(d), 11-e(f), 11-g, and Appendices A, B, E, and F to Provide Additional Guidelines Related to the Discovery of Electronically Stored Information in the Commercial Division; and (2) September 14, 2021 Request for Public Comment on Proposal to Amend Commercial Division Rule 11 to Include a Preamble on Proportionality and Reasonableness and to Add Provisions Allowing the Court to Direct Early Case Assessment Disclosures and Analysis (the “Proposals”)

Dear Ms. Millett:

We write in response to your Request for Public Comment on the above-referenced Proposals.

The City Bar’s Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the Proposals. As discussed below, we support the Proposals with a few, small changes discussed below that we view as furthering the purpose of the Proposals.

First, the Proposals do not address, but should, the often difficult and time-consuming question of the technical aspects of a production. That is, in what format should ESI be produced and what data should be produced, beyond an image of the document being produced? For that reason, we propose that Rule 11 in addition be amended to provide for the use of the ESI stipulation attached as Exhibit 1.

Importantly, the proposed stipulation creates the framework for the process of meeting and conferring regarding the technical aspects of a production but the parties are free to modify or amend it by agreement so they can adopt the approach that is best for them in the context of their litigation. The proposed ESI stipulation contains a privilege claw-back provision for the parties to use on the rare occasions when they are not using the Commercial Division model confidentiality order which, under the Proposals, now will contain a privilege claw-back provision.

Second, the proposed new Rule 11(a) and (b) should be modified to make clear that any written description of a party's claims/defenses is not binding and does not limit the scope of its pleadings; it simply is a tool to facilitate case management. We propose addressing this with a new subparagraph (c) stating: "Any written description of a party's claims/defenses provided under this rule is not binding and does not limit the scope of a party's pleadings."

Third, with respect to the Preamble to Rule 11, we believe that it is important to add that depositions should also be handled in a manner that is proportional and reasonable in light of the complexity of the case and the amount of proof required to resolve the claims and defenses. Indeed, whereas current Commercial Division Rule 11-d provides for a total of 10 depositions by each party, each up to 7 hours in duration, the issues in a particular case may not warrant numerous depositions. Accordingly, we propose revising the final sentence to the Preamble, as follows (additional language underlined): "It is important that counsel's discovery requests, including depositions, are both proportional and reasonable in light of the complexity of the case and the amount of proof that is required for the cause of action."

Thank you for your consideration.

Respectfully,

Michael P. Regan, Chair
Council on Judicial Administration

Bart J. Eagle, Chair
State Courts of Superior Jurisdiction Committee

John M. Lundin, Chair
Litigation Committee

Cc: Maria Cilenti, City Bar Senior Policy Counsel
mcilenti@nycbar.org

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X

Index No. _____
Part _____

Plaintiff(s),

-against-

**STIPULATION FOR THE
PRODUCTION OF
ELECTRONICALLY
STORED INFORMATION**

Defendant(s).

----- X

Pursuant to this Stipulation and Order for the Production of Electronically Stored Information (Stipulation), the parties shall undertake the following responsibilities as to Electronically Stored Information (ESI):

1. Consistent with the parties' obligations to meet and confer in good faith in accordance with all applicable rules, including under Rule 202.7(c) of the Uniform Civil Rules for the Supreme Court (22 N.Y.C.R.R. 202.7(c)), within a reasonable period of time after service of written discovery requests, the parties shall meet and confer in an attempt to agree upon the following search, collection and production parameters for ESI: (a) the identification of custodians reasonably likely to have ESI responsive to the applicable written discovery requests; (b) the sources where ESI responsive to the applicable written discovery requests is reasonably likely to be found; (c) the identification of search terms reasonably likely to identify ESI responsive to the applicable written discovery requests, and/or the use of predictive coding or other search and review methodologies; (d) the manner of collecting ESI; (e) the formatting and production of ESI; (f) the de-duplication of ESI; and (g) the delivery of ESI. However, if the parties cannot, after meeting and conferring in good faith, agree on any or all of the above, then

the parties shall contact the court, pursuant to the Part Rules of the assigned judge regarding the resolution of discovery disputes, if any, or Rule 14 of the Commercial Division Rules, in order to resolve the impasse.

2. Except for documents produced in native format, all documents shall be Bates numbered, searchable, and produced in either TIFF or PDF format at 300 dpi or greater.

3. Documents produced in paper format shall be accompanied by a delimited text file (.DAT) or an Excel file (.xls) or a text file (.txt) containing these metadata fields: (a) Beginning Bates Number; (b) Ending Bates Number; (c) Name of Document; and (d) Number of Pages. The parties may agree to include other fields. The parties shall meet and confer regarding the delimiters for the file.

4. Documents produced in electronic form – such as emails, Excel spreadsheets, word processing documents and presentations – shall be accompanied by a delimited text file (.DAT) or an Excel file (.xls) or a text file (.txt) containing as many of the metadata fields listed on Exhibit A as may reasonably be produced. The parties shall meet and confer regarding the delimiters for the file and the field names appropriate for their databases.

5. Attachments, enclosures, and/or exhibits to any parent document shall be produced sequentially following the parent document.

6. If spreadsheets are produced in their native format, they shall be produced in the order that they were stored in the ordinary course of business, *i.e.*, emails and attached spreadsheets should not be separated from each other. A placeholder TIFF or PDF should also be produced in order to preserve the location of the native document in the production. The placeholder should say “Produced as Native File” (or an equivalent message) and list the associated document Bates number at the bottom of the placeholder page. The original file name

should be prepended with the document Bates number. The extractable metadata (to the extent the metadata is available) and text should be produced in the same manner as other documents that originated in electronic form. The parties agree to work out a protocol governing the use and format of documents produced pursuant to this paragraph at trial, depositions or hearings.

7. The requesting party may ask for documents that were initially produced in their petrified (TIFF or PDF) format to be produced in their native format should the petrified version not be reasonably usable. The documents should then be produced in their unaltered native format, subject to the producing party's right to move for appropriate relief under CPLR 3103.

8. [IF THE PARTIES ARE NOT SUBJECT TO A NO PRIVILEGE WAIVER PROVISION IN ANOTHER STIPULATION, THEN ADD:] The parties agree that the production of privileged or work-product protected ESI, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery (including, but not limited to, the attorney-client privilege or work product protections). In the event that any party produces any ESI that such party or any other party determines is privileged or otherwise immune from discovery, in whole or in part, pursuant to the attorney-client privilege, work product doctrine, common interest doctrine, or any other applicable privilege or protection from disclosure, such materials ("Protected Information") may be retrieved by the producing party or any other party claiming privilege over such Protected Information by giving written notice to the producing Party and all other Parties. Upon receipt of written notice that the party that intends to retrieve Protected Information, the party in possession of the Protected Information, or any other persons who have received a copy of the Protected Information, shall be required to promptly return, destroy or delete all such Protected Information. The terms of this paragraph will not be deemed a waiver of any Party's right to challenge a Party's designation of materials as Protected Information.

9. Should any provision in this Stipulation conflict with any provision in the parties' Stipulation and Order for the Production and Exchange of Confidential Information, the Confidentiality Stipulation shall govern.

10. This Stipulation may be modified or amended by written agreement of the Parties.

Dated: _____
New York, New York

[FIRM]

[FIRM]

By: _____

By: _____

Tel: (____) ____-____

Tel: (____) ____-____

Fax: (____) ____-____

Fax: (____) ____-____

Attorneys for Plaintiff(s)

Attorneys for Defendant(s)

SO ORDERED: _____

J.S.C.

Dated

Exhibit A: Metadata Fields for ESI

Field Name	Sample Data	Description
PRODBEG	ABC0000001	First Bates number of document
PRODEND	ABC0000001	Last Bates Number of document
ATTACHRANGE	ABC0000001 - ABC0000015	Bates number of the first page of the parent document to the Bates number of the last page of the last attached “child” document
PRODBEGATTACH	ABC0000001	First Bates number of the attachment range
PRODENDATTACH	ABC0000015	Last Bates number of the attachment range
PARENT_BATES	ABC0000001	First Bates number of the parent document (should be populated for each “child” document)
CHILD_BATES	ABC0000002; ABC0000014	First Bates number of every “child” attachment; can be more than one Bates number listed depending on the number of attachments (should be populated for each “parent” document)
FROM	John Smith	Email: Sender Native: Author(s) of document
TO	Coffman, Janice; LeeW [mailto:LeeW@MSN.com]	Recipient(s)
CC	Frank Thompson [mailto:frank.Thompson@edt.com]	Carbon copy recipient(s)
BCC	John Cain	Blind carbon copy recipient(s)
SUBJECT	Board Meeting Minutes	Email: Subject line of the email Native: Title of document (if available)



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Field Name	Sample Data	Description
DATE_SENT	10/12/2010	Email: Date the email was sent
TIME_SENT	7:05 PM	Email: Time the email was sent
FILE_EXTEN	MSG	The file type extension of the document
FILE_NAME	Draft.doc	The file name of the email attachment or loose e-file
FILESIZE	125,455	Size of file in KB
PGCOUNT	1	Number of pages in native document
Confidentiality	[Blank] / Confidential / Highly Confidential	Confidentiality designation applied pursuant to Confidentiality Stipulation and/or Protective Order
Redacted	[Blank] / Redacted	Denotes documents on which redactions have been applied