

**Commercial Division, Nassau County
Guidelines for Discovery of
Electronically Stored Information (“ESI”)¹**

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

- *Provide efficient discovery of ESI in civil cases;*
- *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 prior to the Preliminary Conference; 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 intended to be practical suggestions concerning discovery of ESI; they are not intended to be a checklist.

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

I. DEFINITIONS

- A. As used herein, “ESI” includes, but is not limited to, e-mails and attachments, voice mail, instant messaging and other electronic communications, word processing documents, text files, hard drives, spreadsheets, graphics, audio and video files, databases, calendars, telephone logs, transaction logs, Internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information and backup materials, Native Files and the corresponding Metadata which is ordinarily maintained.
- B. As used herein, the term “Metadata” means: (i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated,

¹ These guidelines, which have been prepared in consultation with members of the bar familiar with current issues and trends in litigation involving ESI, are designed to help practitioners identify at the early stage of a dispute the type and nature of electronically stored information that parties may deem appropriate to preserve and/or produce in litigation -- in preparation for a Preliminary Conference under the Commercial Division Uniform Rules. These guidelines substantially rely upon the Suggested Protocol for Discovery of ESI developed by a joint bar-court committee consisting of Chief Magistrate Judge Paul W. Grimm of the United States District Court for the District of Maryland, members of the bar of that court and technical consultants, a copy of which can be found at: www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

edited, or modified such Native File; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted, sent, received or otherwise manipulated by a user of such system. Metadata is a subset of ESI.

- C. As used herein, the term “Native File(s)” means ESI in the electronic format of the application in which such ESI was created, viewed and/or modified. Native Files are a subset of ESI.
- D. As used herein, the term “Load File” means a file that relates to a set of scanned or electronic images or electronically processed files that indicate where individual pages or files belong together as documents, including attachments, and where each document begins and ends. A Load File may also contain data relevant to the individual documents, such as Metadata, coded data, text, and the like. Load Files must be obtained and provided in prearranged formats to ensure transfer of accurate and usable images and data.²
- E. As used herein, the term “Static Image(s)” means a representation of ESI produced by converting a Native File into a standard image format capable of being viewed and printed on standard litigation support software. The most common forms of Static Images used in litigation are ESI provided in either Tagged Image File Format (TIFF, or .TIF files) or Portable Document Format (PDF). If Load Files were created in the process of converting Native Files to Static Images, or if Load Files may be created without undue burden or cost, Load Files are typically produced together with Static Images.

II. PRELIMINARY CONFERENCE

- A. Prior to the Preliminary Conference, counsel for the parties should:
 - 1. review and jointly complete the Preliminary Conference Stipulation and Order, and be familiar with its requirements;
 - 2. meet and confer in a good faith effort to identify matters concerning ESI not in contention, resolve disputed questions without need for court intervention and identify issues requiring court approval or intervention, in compliance with Rule 8 of the Uniform Commercial Division Rules; and
 - 3. prepare a written plan/stipulation for the preservation, collection, review and production of ESI, including without limitation, data and tangible things, if any, reasonably anticipated to be subject to discovery in the action, as set forth in the Preliminary Conference Stipulation and Order.

² The definition of “Load Files” is taken from materials promulgated by the Sedona Conference, whose writings on ESI have had a substantial influence on the development of the law and practices concerning ESI nationwide. Practitioners may find other materials promulgated by the Sedona Conference useful in determining how best to address the challenges their clients face relating to ESI.

B. Counsel are advised to confer regarding at least the following topics, including and beyond those set forth in Commercial Division Rule 8(b) related to ESI prior to the Preliminary Conference:

1. implementing litigation holds;
 - a. Courts have held that ESI should be preserved when litigation is reasonably foreseeable. Accordingly, counsel should anticipate that parties and/or the Court will likely expect litigation hold(s) to be in place upon commencement of the action, and no later than the date of the Preliminary Conference. Moreover, counsel should be mindful that some courts have imposed duties upon counsel to take reasonable steps to monitor their clients' implementation of litigation holds and revise or supplement the litigation holds as may be appropriate.
 - b. Counsel should discuss the scope of each party's litigation hold, including: the categories of potentially discoverable ESI to be segregated and preserved; the claims and defenses as to which ESI is relevant; identification of "key persons" and likely witnesses; the relevant time period for the litigation hold; the types and locations of ESI; how relevant ESI should be preserved; the location and form of maintaining ESI subject to the litigation hold; instructions to be contained in a litigation hold notice regarding preservation of ESI subject to the litigation hold; and whether an "e-discovery" liaison is required for each party.
2. each party's document or record retention policies; and
3. their respective clients' current and relevant past ESI and policies regarding ESI, if any, and become reasonably familiar with same; or alternatively, identify a person familiar with the client's electronic systems who can participate in the Preliminary Conference. Such persons are invited to attend the Preliminary Conference.

C. At the Preliminary Conference, counsel shall be prepared to discuss:

1. all matters concerning ESI as to which there is disagreement between the parties;
2. the anticipated scope of requests for, and objections to, production of ESI;
3. the form of production of ESI and, specifically, but without limitation, whether all ESI will be produced in a single format, or multiple formats, and whether those formats will be Native File, Static Image, and/or other searchable or non-searchable formats;

4. identification, in reasonable detail, of ESI that is or is not reasonably accessible without undue burden or cost, the methods of storing and retrieving ESI that is not reasonably accessible, and the anticipated costs and efforts involved in retrieving such ESI;
5. methods of identifying pages or segments of ESI produced in discovery (i.e. Bates-stamping);
6. the method and manner of redacting information from ESI if only part of the ESI is discoverable, and the exchange of redaction logs;
7. relevant ESI custodians, including such person(s)' name, title and job responsibilities;
8. cost-sharing or cost-shifting, if applicable, for the preservation, retrieval, review and/or production of ESI, including any litigation support database (e.g. Concordance; Summation; etc.);
9. search methodologies or protocols for retrieving or reviewing ESI. For example, some counsel currently use: key word searches, concept searches, "fuzzy search models", probabilistic search models and clustering searches; agreement(s) on search terms; limitations on the fields or document types to be searched; limitations regarding whether back up, archival, legacy or deleted ESI is to be searched; and sampling to develop an objective basis on which to evaluate the likelihood and cost of obtaining responsive ESI;³
10. preliminary depositions of information systems personnel, and limits on the scope of such depositions;
11. the need for two-tier or staged discovery of ESI (e.g., an initial search of a key custodian's documents, or a key time-period, only; followed by a broader or different search if necessary). The two-tiered approach is intended to be used when ESI can initially be produced in a manner that is more cost-effective, while reserving the right to request or to oppose additional more comprehensive production in a later stage or stages;
12. the need for any protective orders or confidentiality orders;
13. the need for certified forensic specialists and/or experts to assist with the search for and production of ESI;
14. the protocols to be observed when preparing logs of documents withheld from production, in whole or in part, based on an assertion of (1) attorney client privilege, (2) work product doctrine and/or (3) any other basis for

³ Sampling refers to a process by which subsets of ESI are identified and searched for the purpose of developing a factual basis on which to estimate the cost of collecting, reviewing and producing ESI. Examples of ESI samples include, but are not limited to, identified subsets of (1) "key" custodians, (2) sources of ESI and (3) time periods.

withholding an otherwise responsive document from production; and

15. whether the parties must make reasonable efforts to maintain the data as Native Files in a manner that preserves the integrity of the files, including but not limited to, the contents of the file and the Metadata related to the file, including the file's creation date and time.

D. Parties are encouraged to exchange information regarding ESI prior to the Preliminary Conference, including but not limited to information regarding network design, types of databases, ESI document retention policies, organizational charts for information systems personnel and inaccessible ESI.

III. FORM OF PRODUCTION OF ESI

A. ESI shall be produced in the form in which it is ordinarily maintained or in reasonably usable format. The parties shall agree on the format of production prior to the Preliminary Conference.

B. A Producing Party is not required to produce the same ESI in more than one format. However, the parties may agree that ESI will be produced in one format initially (i.e. TIFF format or Static Images) and that some or all of the same ESI will be produced in another format (i.e. with certain Metadata) upon request, if such data is necessary to support the parties' claims or defenses.

C. The Producing Party may not reformat, scrub or alter the ESI to intentionally downgrade the usability of the data.

IV. REASONABLY ACCESSIBLE

A. As the term is used herein, ESI is not to be deemed "inaccessible" 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.

B. No party should object to the discovery of ESI on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with reasonable particularity, and not in conclusory or boilerplate language. Wherever the term "reasonably accessible" is used in these Guidelines, 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.

V. COSTS

A. On the issue of whether the Requesting or Producing Party bears the cost of producing ESI, and cost-shifting/cost-sharing, the law in New York is still developing.

B. Several courts in the Commercial Division have addressed the issue, and counsel should consider and be guided by such case law, including but not limited to:

- **Finkelman v. Klaus**, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct., Nassau Co. Nov. 28, 2007) (Bucaria, J.).
- **Delta Financial Corp. v. Morrison**, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Sup. Ct., Nassau Co. Aug. 17, 2006) (Warshawsky, J.).
- **Weiller v. New York Life Ins. Co.**, 6 Misc.3d 1038(A), 800 N.Y.S.2d 359 (N.Y. Sup. Ct., N.Y. Co. Mar. 16, 2005) (Cahn, J.).
- **Lipco Elec. Corp. v. ASG Consulting Corp.**, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (N.Y. Sup. Ct., Nassau Co. Aug. 18, 2004) (Austin, J.).

See also:

- **Waltzer v. Tradescape & Co., L.L.C.**, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep't 2006).
- **Etzion v. Etzion**, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct., Nassau Co. 2005) (Stack, J.).

VI. PRIVILEGE

Inadvertent or unintentional production of ESI containing information that is subject to the attorney-client privilege, work product protection, or other generally-recognized privilege shall not be deemed a waiver in whole or in part of such privilege if, after learning of such disclosure, the Producing Party promptly gives notice either in writing, or later confirmed in writing, to the Receiving Party or Parties that such information was inadvertently produced and requests that the Receiving Party return the original data. Absent a challenge under this paragraph or during the pendency of any such challenge, or contemplated challenge, the Receiving Party or Parties shall sequester or return all such material, including copies, except as may be necessary to bring a challenge before the Court, to the Producing Party promptly upon receipt of the written notice and request for return. The parties are encouraged to seek an order of the Court to further clarify the protections to be given to inadvertently disclosed privileged materials. Counsel are also 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.

VII. SANCTIONS

- A. Sanctions may be imposed against a party and/or its counsel when ESI is demanded, withheld or destroyed in bad faith or with gross negligence, including but not limited to the penalties permitted pursuant to Rule 12 of the Rules of the Commercial Division of the Supreme Court.
- B. Sanctions may also be imposed if a party fails to maintain and preserve ESI, as provided in paragraph 12(c) of the Preliminary Conference Stipulation and Order.