

DISCUSSION TOPICS FOR RULE 26(f) CONFERENCE:

Court Expectations:

- 1) **Competence.** Counsel shall be sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf.
- 2) **Rule 1 and Rue 26(b)(1).** Counsel are expected to have reviewed Rule 1 and Rule 26(b)(1) and considered their obligations thereunder in discussing and preparing a discovery plan.
- 3) **Additional consideration of proportionality.** Counsel shall discuss and consider whether phased or iterative discovery will increase efficiency, reduce costs and lead to a faster resolution of the case when preparing a discovery plan.
- 4) **Document Requests.** Counsel shall be fully familiar with their obligations under Rules 34 and 26(g) and consider and discuss ways to ensure compliance and minimize disputes regarding overbreadth and specificity of requests and responses.
- 5) **Preliminary Investigation by Counsel.** Counsel for the parties are expected to speak with clients/key witnesses and data managers at the earliest time possible in the case to identify how the witnesses communicated with others and/or recorded information on relevant topics (e.g., text, phone, in-person meetings, instant messaging, video conferences/skype, web-based conferences, wikis, email, power points, blogs, social media, other applications) and where the clients/witnesses maintain documents on topics relevant to the litigation (e.g., personal mobile devices and social media accounts, external vendor's servers, internal servers and databases). This investigation is required in order to determine the most efficient way to collect and exchange relevant information.

Topics for Discussion/ Consideration:

- 1) **Efficient/Economic Management of Case.**
 - a) Appropriateness of Initial Disclosures pursuant to Rule 26(a)(1). Is there some readily identifiable document or category of documents that should be produced immediately in lieu of initial disclosures?
 - b) Possibility of a stay or limitation of discovery pending a dispositive motion.
 - c) Phased discovery – is it appropriate? (e.g., should expert discovery follow summary judgment practice?)
 - d) Proposed discovery limitations (e.g., waiver of interrogatories, requests for admission expert depositions, limited number of depositions)

- e) Preservation depositions and/or depositions on data sources
 - f) Foreign discovery and issues anticipated
 - g) Non-party discovery
 - h) Issues to be tried, including ways in which issues can be narrowed to make trial more meaningful and efficient, as well as whether there are certain issues as to which a mini-trial would be helpful
 - i) Bifurcation
 - j) Class/collective certification issues
 - k) Damages discovery and whether experts are needed
 - l) Insurance coverage
- 2) **Preservation of Information.** (Universe of documents to be preserved may be broader than universe of documents to be searched in appropriate cases and as part of a phased discovery process.)
- a) Discuss the obligation to preserve potentially relevant electronically stored information and agree to the following scope and methods for preservation, including but not limited to: retention of electronic data and implementation of a data preservation plan; identification of potentially relevant data; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; and identification of the individual(s) responsible for data preservation, etc.

Plaintiff(s) are preserving the following data (email, databases, text messages on mobile devices, video, phone messages, photographs, communications and posting on websites or social media (e.g., Facebook, LinkedIn, Twitter, Instagram), communications via applications (e.g., What's App, Snap Chat, etc.):

Defendant(s) are preserving the following data (email, databases, text messages on mobile devices, video, phone messages, photographs, communications and posting

on websites or social media (e.g., Facebook, LinkedIn, Twitter, Instagram),
communications via applications (e.g., What's App, Snap Chat, etc.):

b) Discuss the extent to which the parties have disclosed or have agreed to disclose the dates, contents, and/or recipients of "litigation hold" communications.

c) Anticipated need for judicial intervention regarding the following issues concerning the duty to preserve, the scope, or the method(s) of preserving electronically stored Information:

3) Production.

a) Source(s) of Hard Copy Documents and Method for producing such documents (e.g., exchange of paper copies, scans of documents into scannable PDF format).

b) Source(s) of Electronically Stored Information. The parties anticipate that discovery may occur from one or more of the following potential source(s) of electronically stored information (e.g., email, word processing documents, spreadsheets, presentations, databases, instant messages, web sites, blogs, social media,

ephemeral data, etc.):

Plaintiff(s) custodians and/or databases:

Defendant(s) custodians and/or databases:

c) Form(s) of Production:

(1) Documents will be produced in the following formats with the following metadata:

(2) Exceptions to the form(s) of production indicated above (e.g., word processing documents in TIFF with load files, but spreadsheets in native form):

(3) Anticipated need for judicial intervention regarding the following issues concerning the form(s) of production:

4) **Search and Review.**

a) Limitations on Production. Factors relating to the scope of production, including but not limited to: (i) number of custodians; (ii) identity of custodians; (iii) date ranges for which potentially relevant data will be drawn; (iv) locations of data (including subject matter files and folders maintained by key custodians); (v) timing of productions (including phased discovery or rolling productions); and (vi) electronically stored information in the custody or control of non-parties. To the extent the parties have reached agreements related to any of these factors, describe below:

(1) Plaintiff(s) custodians and date range(s):

(2) Defendant(s) custodians and date range(s):

(3) Limitations on number of custodians:

(4) Non-party custodians of data and whether subpoenas are contemplated and/or authorizations needed:

(5) Timing of Review and Production: Priority of custodian review (i.e., should certain custodians' records be reviewed before others?) and timing for production (including rolling production schedule):

[The parties are reminded that discovery is iterative and that producing parties have an obligation to supplement production]

b) Methodologies or protocols for the search and review of electronically stored information, as well as the disclosure of techniques to be used/level of transparency. Some of the approaches that may be considered include: the use and exchange of keyword search lists, "hit reports," and/or responsiveness rates; concept search; machine learning, or other advanced analytical tools; limitations on the fields or file types to be searched; date restrictions; limitations on whether back-up, archival, legacy, or deleted electronically stored information will be searched; testing; sampling; etc. To the extent the parties have reached agreement as to search and review methods, provide details below:

(1) Search terms (if they will be used for collections, culling or otherwise) (search terms may not be appropriate for documents pulled from certain custodians/sources):

Plaintiff(s):

Defendant(s):

(2) Methods to increase efficiency and reduce costs in connection with document review and production (e.g., de-duplication, identification of near duplicates, domain limitations, deNISTing, file types excluded, filtering, email threading and e-mail thread reduction (isolating only the all-inclusive e-mails for review), clustering similar types of documents for review, prioritization and predictive coding (finding potentially relevant documents based on a "sample set").

(3) Are there any stipulations that the parties can enter into that would reduce the scope of discovery needed? If so, when will the parties finalize the stipulation(s)?

c) **Privacy and Secure Storage of Data.** Are there special privacy concerns (protected health and genetic information, financial information, other special privacy concerns) and/or privacy laws pertinent to the information to be exchanged (e.g. GDPR)? Have Counsel considered and discussed secure transfer and storage of data (use of encryption, secure FTP sites, etc.)?

d) Anticipated need for judicial intervention regarding the following issues concerning the search and review of electronically stored information:

5) **Confidentiality.** Is a stipulation and order of confidentiality needed? [The parties are directed to Judge Tarnofsky's model form].

6) **Privileged Material.**

a) Identification. The parties have agreed to the following method(s) for the identification (including the categorical logging; a combination of categorical and document by document logging; the disclosure of the number of documents withheld; production of metadata list with some combination of the above; exclusion of certain documents or domain communications from privilege logging altogether), and the redaction of privileged documents:

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- b) **Inadvertent Production / Claw-Back Agreements.** Pursuant to Fed R. Civ. Proc. 26(b)(5) and F.R.E. 502(e), the parties have agreed to the following concerning the inadvertent production of privileged documents (e.g. “quick- peek” agreements, on-site examinations, non-waiver agreements or orders pursuant to F.R.E. 502(d), etc.) [The parties may propose a claw-back to include in Judge Tarnofsky’s Model Protective Order]:

[The parties are advised that Judge Tarnofsky has a form 502(d) Order incorporated into her model Confidentiality Stipulation and Order located on the SDNY Individual Practices webpage. The parties also are advised that to the extent there is a dispute about privilege, the Court expects that privilege log to be submitted in excel format with hyperlinks to any in camera documents for review and columns addressing author, recipients, attorney designations, privilege asserted, subject matter of communication, explanation for privilege.]

- c) **Date(s) for production of privilege logs** (The Court’s preference is that privilege logs be produced simultaneously or within a week of each production tranche):

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- d) **Cost of Production.** The parties have analyzed their client’s data repositories and have estimated the costs associated with the production of electronically stored information. The factors and components underlying these costs are estimated as follows:

(1) **Costs:**

Plaintiff(s):

Defendant(s):

(2) **Cost Allocation.** The parties have considered cost-shifting or cost-sharing and have reached the following agreements, if any:

(3) **Cost Savings.** The parties have considered cost-saving measures, such as the use of a common electronic discovery vendor or a shared document repository, and have reached the following agreements, if any:

7) **Authenticity.** The parties have discussed and considered ways to authenticate documents and stipulations regarding same to minimize disputes and costs.

8) **Additional Unresolved Issues Needing Court Intervention:**
