

# **Business Court Advisory Committee**

## **Meeting Agenda**

**Friday, August 29, 2014**

9:00 AM to 12:00 PM

State Courts Building \* 1501 West Washington \* Conference Room 230 \* Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 1644

	<b>Call to Order</b>	
Item no. 1	<b>Introductory comments</b>	<i>Mr. Rosenbaum, Chair</i>
Item no. 2	<b>Approval of July 11, 2014 meeting minutes</b> Page 3	<i>Mr. Rosenbaum</i>
Item no. 3	<b>Review of draft documents and statistical information</b> Page 9  <b>A. New rule of civil procedure</b> Page 17  <b>B. Revised civil cover sheet</b>  <b>C. Proposed administrative order</b> Page 19  <b>D. Statistical information</b> Page 21	<i>All</i>
Item no. 4	<b>Electronically stored information (“ESI”)</b> Page 29	<i>All</i>
Item no. 5	<b>Repository of decisions</b>	<i>All</i>
Item no. 6	<b>Roadmap</b>  ➤ <b>Confirmation of the next meeting date</b>	<i>Mr. Rosenbaum</i>
Item no. 7	<b>Call to the Public</b>  <b>Adjourn</b>	<i>Mr. Rosenbaum</i>

*The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.*

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

**Note:** *A date for the next meeting will be determined under agenda item number 6.*



**Business Court Advisory Committee**

**State Courts Building, Phoenix**

**Meeting Minutes: July 11, 2014**

**Members attending:** David Rosenbaum (Chair), Michael Arkfeld, Ray Billotte, Mark Larson, Lisa Loo, Judge Scott Rash, Judge John Rea, Patricia Refo, Marcus Reinkensmeyer, Mark Rogers, Nicole Stanton, Stephen Tully, Steven Weinberger

**Attending by phone:** Glenn Hamer by his proxy Katie Fischer, Judge Christopher Whitten

**Absent:** Judge Kyle Bryson, Andrew Federhar, William Klain

**Staff:** Mark Meltzer, Theresa Barrett, Sabrina Nash, Nick Olm

**1. Call to Order.** The Chair called the meeting to order at 9:05 a.m. He thanked the members for their participation in the 3 committee workgroups that were established at the June 6, 2014 meeting. The Chair believes the committee is on schedule to meet the December deadline for reporting to the Arizona Judicial Council. He then requested the members to review draft minutes of the June 6, 2014 meeting.

**MOTION:** A member moved to approve those minutes, it was followed by a second, and it was unanimously passed by the members. **BCAC: 2014-02**

The Chair then asked for reports from each of the 3 workgroups.

**2. Judge Assignment and Rotation Workgroup (presented by Judge Rea).** Judge Rea described an issue associated with judicial assignments in Maricopa County. On the one hand, that court recognizes the desirability of assigning a judge to the area of law in which the judge is experienced. On the other hand, the court needs to address its institutional needs. With regard to those needs, Maricopa County judges are currently assigned to one of the superior court's four major divisions: family (27 judges), criminal (27 judges), juvenile (16 judges), and civil (23 judges.) About one-third of the Maricopa judges rotate every year, in part because many family law judges request rotation after completing a 2 or 3 year assignment to the family division, and this impacts the assignment of judges to the other divisions. This circumstance may affect long-term planning for a business court in Maricopa County. Commercial courts in several jurisdictions, including the Delaware Chancery Court, permanently dedicate judges to a business court, or assign their judges to a business court for a decade or longer. A similar, relatively permanent assignment of judges to a business court in Maricopa County may not be achievable. However, Judge Rea believes that in the short term, it might be feasible to establish a pilot business court in Maricopa County that utilizes 3 judges on concurrent 3-year assignments. The optimal time to begin this pilot would be in June 2015, simultaneously with annual judicial rotations.

A 3-year pilot program would allow sufficient time to process and evaluate a meaningful number of cases. The workgroup believes that the committee should recommend that the pilot program adopt metrics for measuring success. The workgroup also recommends that the 3-judge pilot program include a judge from the complex bench

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(who deals with complex business cases), another judge from civil “special assignment” (who may have more flexibility in calendaring), and a third judge from a general civil calendar. It might be useful to compare the effectiveness of these business court judges with a civil judge who may have some business cases, but who does not have a designated business court docket under the pilot program.

The committee members discussed the anticipated volume of business cases for this pilot. They specifically discussed whether assignment of a case would be on a voluntary basis, or whether assignment would be mandatory if the case was otherwise eligible. One member suggested that the committee resolve this decision now because it will influence the committee’s design of the pilot’s rules and procedures. The member was concerned about opposition to a mandatory program if the business court’s rules are significantly different from current rules of civil practice.

A number of members expressed the belief that the program must be mandatory for eligible cases; if the program is voluntary, it might fail to capture the requisite volume of cases. Also, if the program is voluntary, it might lead to a dispute between parties regarding whether they should opt-in or opt-out of the pilot, and this dispute could require judicial resolution; a mandatory pilot would eliminate that issue. Most importantly, the fundamental concept of a business court is that all commercial cases should be heard there. The members agreed that business court rules must have the flexibility to be modified by agreement of the parties or court order so the rules can meet the needs of individual cases. Accordingly, if the needs of an otherwise eligible commercial case warrant reassignment of the case to a general civil calendar, the rules should provide that option. A member also observed that publicizing the business court’s advantages, such as cost effectiveness and efficiency, will garner interest from the legal and business communities and increase overall support for the court.

A related question was whether a case would be eligible for the pilot if it was filed before the program’s implementation date. The members envisioned that the 3 program judges might be able to identify portions of their current caseloads for assignment to the pilot. If non-business court judges could refer some of their existing cases, the program could start with an even larger nucleus of cases. Referrals would need to be selective, because a case could have pre-existing discovery plans that might be disrupted if the case was reassigned to the pilot and subject to a different set of procedures and timelines. Some members also expressed concern about randomly assigning cases to the business court.

**ACTION:** At the next meeting, Mr. Billotte will provide further statistical information concerning the number of pending cases that might be eligible for the pilot, including more detail regarding a large number of cases that currently appear in a “miscellaneous” category.

A further issue dealt with data collection by court administration after the pilot begins. The members agreed that the court should collect data on business cases both at the time of filing, as well as when the case is resolved. A revised cover sheet would be helpful not only for determining eligibility, but also for capturing front-end data. The Chair observed that someone would need to evaluate the data. One member suggested

that this committee should monitor the data on an ongoing basis. This would allow the committee to propose modifications to rules, forms, or methods of data collection as necessary and appropriate during the term of the 3-year pilot.

**3. Case Eligibility Workgroup [presented by Ms. Stanton.]** Ms. Stanton reported that in reaching its recommendations, this workgroup discussed business court criteria used by other jurisdictions. The Case Eligibility Workgroup accordingly recommended that criteria for the Arizona pilot should:

- (a) Identify cases that are not eligible for business court.
- (b) Also identify cases that are eligible without regard to the amount in controversy (e.g., actions involving corporate governance, shareholder actions, and lawsuits concerning trade secrets.)
- (c) Include eligibility criteria for a broader set of case types, which were specified in a workgroup memo, when the amount in controversy reaches a designated dollar threshold. Ms. Stanton noted that the workgroup did not reach consensus on the amount of the dollar threshold for this group of cases.

The system envisioned by the workgroup would utilize a “gatekeeper” to confirm that a case is eligible, and the gatekeeper would likely be a business court “duty” judge.

Member comments included the following:

- Can a defendant file a motion to designate a case for the complex court after plaintiff has indicated that it is a business court case? The members agreed that the defendant could do so.
- Are class actions eligible for business court? Possibly. A complex class action is eligible for the complex court. A consumer class action against a business may not belong in a business court, although another type of class action, such as one involving securities fraud, might. The committee should decide whether consumer cases under the UCC are eligible for the program. A similar decision should be made concerning class actions against government entities.
- A “shotgun” complaint might include a cause of action that is eligible for business court, but the case as a whole may not be eligible. The duty judge’s review will determine the eligibility of these cases.
- A recent study by the Maricopa County Court Administrator found that 30 percent of resolved business cases were under \$50,000, and another 15 percent were under \$100,000. The committee’s decision concerning the amount of the dollar threshold could affect eligibility for a significant percentage of cases.
- Equal access to justice means that even cases involving lower dollar amounts should be eligible for business court; some of these cases have issues, and require work, which is comparable to a higher dollar case. One of the concepts supporting a business court is establishing a forum to litigate a smaller

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commercial case cost-effectively. The dollar threshold should therefore be relatively low.

- However, the criteria should not divert cases into business court that are otherwise subject to superior court arbitration. Arbitration cases have high rates of resolution and party satisfaction.
- The volume of eligible cases will have an impact on the workload of business court judges, especially if there is a mandatory Rule 16(d) conference.
- Lawsuits involving business on both sides of the “v.” should presumptively be eligible, and business torts should be in business court, but there are exceptions. For example, a motor vehicle accident involving drivers from two different companies does not belong in business court.
- The list of eligible cases should include a “catch-all” provision.

This committee’s discussion concluded with tentative agreement among the members that the dollar threshold should be \$50,000. The category should include business versus business cases and other categories where a business is a party, but there should be exceptions for certain case types, among them motor vehicle accidents and possibly some class actions or consumer lawsuits. The court sometimes might rely on the parties’ own identification of a case as a “business” case. Even when a case is assigned to business court, if the assignment subsequently appears to be inappropriate, the court can remove it from the business court track (and it could remain assigned to a business court judge.) Furthermore, the proposed rules, similar to the complex rules, might provide that any judge can utilize business court case management techniques in any case where those rules may be useful.

**4. Rules, Procedures, and Forms Workgroup [presented by Ms. Refo].** Ms. Refo advised that the workgroup’s most divisive issue was whether admission to the pilot program should require a mandatory waiver of jury. One member asked whether business courts in other jurisdictions require such a waiver (staff was unaware of any), and commented that juries are unpredictable and can drastically alter expected outcomes. The business community would therefore prefer a mandatory jury waiver. Ms. Refo noted that juries typically have the task of discerning who is telling the truth, but the overwhelming majority of cases will be resolved with neither a jury nor a bench trial. One member observed that there are more skirmishes over discovery than battles at trial. In any event, the parties can always waive a jury and try the case to a judge, and a mandatory waiver of jury might be disfavored by the community as a whole. A mandatory waiver also has constitutional dimensions. Although there was not unanimity among the members, the majority sentiment was that a jury waiver should not be a requirement of the pilot business court.

Other case management concerns, including time and expense, were also considered by the workgroup. In particular:

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- There should be a mandatory stay of discovery pending disposition of a motion to dismiss when that motion might resolve the entire case. A partial motion to dismiss only should stay discovery of those issues or claims that are the subject of the motion.
- The business court judges may wish to adopt an abbreviated type of motion practice (for example, “letter motions.”) However, since there are a variety of practices, each business court judge may wish to use his or her preferred method, and the committee should not recommend a uniform practice. Regardless of the method, there needs to be a quick and efficient way of getting issues before a judge to obtain a speedy judicial resolution. A judge member requires the parties to place a telephone call to him prior to filing certain kinds of motions. The judge can rule at the conclusion of the phone call, or if the issue is more complex, the judge then can order the parties to file briefs. If the issue involves a matter requiring special expertise, the judge will encourage the parties to speak with an expert, and the expert can then report to the court.
- A streamlined form of protective order should be available, and it should presumptively be entered by the court upon request of a party. This form should be flexible enough to be customized for the needs of a particular case.
- The business court rules should include a list of documents that presumptively do not belong in a privilege log. The use of agreements under Rule 502 should be encouraged. The business court should also make use of checklists and presumptions that effectively drive down the costs of litigation.
- Early judicial intervention is important. Rule 16 conferences should be mandatory, with “honest to goodness” case management. The parties should confer with the judge on “proportionality” issues early in the case. Early judicial intervention is especially critical in cases where attorneys or parties are unable to independently reach agreement on case management issues.

One member responded that discovery issues are less frequent when all parties realize the detriment of “mutually assured destruction” through excessive discovery. Problems instead arise when one side unilaterally attempts to destroy the other with unnecessary discovery. The member observed the difficulty of legislating professionalism by court rule, and suggested that the court use effective sanctions against counsel who are incompetent or unprofessional. Another member responded that in matters of discovery and disclosure, an attorney relies on what the client provides, and clients can mistakenly or intentionally overlook their obligations. In some particularly complex cases, the attorney for a party may need to be at the client’s workplace to supervise discovery and disclosure. Another member suggested the use of a special master, especially one who has expertise concerning a particular discovery issue. And another member pointed out that some judges have a fundamental philosophy against imposing sanctions. The Chair expressed a hope that business court judges would impose discovery sanctions infrequently, because the business court rules

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should specify what everyone's obligations are and the parties and their attorneys should discuss those obligations at the inception of litigation. A member proposed that the rules could provide a list of what discovery issues the parties need to agree upon in standard cases. The rules could also address streamlining procedures for straightforward cases, and cost-shifting in appropriate situations. Mr. Arkfeld suggested that "sampling" issues be added to that list.

This led to a discussion of electronically stored information ("ESI"). Mr. Arkfeld observed the rapidity with which technology is developing, and he cautioned that a rule written for today's ESI requirements might be inapplicable in the near future. For example, document custodians are being supplanted by servers on the cloud. He also mentioned the cost-saving benefits of new and fast-changing electronic search methodology. He believes that parties should discuss ESI early in the process. He also mentioned that ESI requires a cultural shift: that the parties need to realize, especially in a lower dollar case, the possibility that something might be missed, and that the amount in controversy in many cases does not justify incurring discovery costs to find "everything." He pointed out that a manual review of documents sometimes reveals almost the same amount of information as predictive coding.

Mr. Arkfeld added that digital technology has existed for almost 30 years, yet the legal profession has not kept up with, nor always appreciated, the spectrum of technology. He recommended that attorneys who appear in business court certify that they are competent to handle technology issues that may be present in the case. New York and California have adopted this requirement, although they offer an alternative for counsel to provide a list of other individuals, including experts, who can address those technology issues on their behalf. He encourages parties to "e-disclose" before they "e-discover." He also referred to a New York administrative order that permits the identification of privileged documents by category (for example, e-mail threads) rather than by identifying each individual document.

**5. Roadmap.** The Chair directed staff to prepare documents that reflect today's discussions for the committee's review at the next meeting. Rules, checklists, and forms that streamline business litigation are a core objective of this committee. One member encouraged the committee's work product to "push the envelope" on ESI issues. The member believes it's untenable that litigation considerations require businesses to retain massive volumes of information. He also noted an expanding gap between the capability of business technology, and the capacity of attorneys to ask the right questions.

The Chair confirmed that the next meeting will be on Friday, August 29, 2014.

**6. Call to the Public; Adjourn.** There was no response to a call to the public. The meeting adjourned at 11:47 a.m.

**Rule 8.1: Assignment and management of commercial cases [New]**

**(a) Application.** This rule applies in any county that has established a specialized commercial court. The court administrator of that county will assign to its commercial court any “commercial case,” as defined in Rule 8.1(a)(1), if a commercial case also meets the criteria of either Rule 8.1(b) or Rule 8.1(c).

1. A “commercial case” is one where either
  - A. At least one plaintiff and one defendant are “business organizations,” or
  - B. The primary issues of law and fact concern a “business organization” or a “business contract or transaction.”
2. A “business organization” includes a corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, or a business trust, and excludes an individual, a sole proprietorship, a family trust, a political subdivision or a government entity.
3. A “business contract or transaction” is one in which a business organization sold, purchased, or transferred goods, services, realty, or other obligations. The term “business contract or transaction” excludes a “consumer contract or transaction.”
4. A “consumer contract or transaction” is one that is primarily for personal, family, or household purposes.

**(b) Regardless of the amount in controversy,** a commercial case will be assigned to the commercial court if the case:

1. Concerns the internal affairs, governance, dissolution, or liquidation of a business organization;
2. Arises out of obligations, liabilities, or indemnity claims between or among owners of the same business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, and trustees);
3. Concerns the sale, merger, or dissolution of a business organization, or the sale of substantially all of the assets of a business organization;
4. Relates to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, complete, or disclose;

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5. Is a shareholder derivative action;
6. Arises from a commercial real estate transaction;
7. Arises from a relationship between a franchisor and a franchisee;
8. Involves the purchase or sale of securities or allegations of securities fraud;
9. Concerns a claim under state antitrust law.

**(c) If the amount in controversy is at least \$50,000,** a commercial case will be assigned to the commercial court if the case:

1. Arises from a transaction governed by a contract or by the Uniform Commercial Code;
2. Arises out of business activity, such as unfair competition, tortious interference, misrepresentation or fraud;
3. Involves the sale of services by, or to, a business organization;
4. Is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;
5. Concerns a surety bond, or arises under any type of commercial insurance policy purchased by a business organization, including an action involving coverage, bad faith, or a third-party indemnity claim against an insurer.

**(d) The following cases are not eligible for the commercial court,** even if they meet all other criteria specified in Rule 8.1:

1. Eviction actions;
2. Eminent domain or condemnation actions;
3. Civil rights actions;
4. Motor vehicle torts and other tort claims involving physical injury to a plaintiff;
5. Administrative appeals;

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6. Actions arising from domestic relations, a protective order, or a criminal matter, except a criminal contempt arising in a commercial court case;
6. Any matter that a statute or other law requires another court or court division to hear.

**(e) Miscellaneous provisions regarding assignment.**

1. After assignment of a case to the commercial court by the court administrator, a commercial court judge, upon motion of a party or on the judge's own initiative, may determine whether assignment of that case to the commercial court is appropriate under Rules 8.1(a) through (c). Any party filing a motion under this rule must do so not later than 20 days after the defendant files (i) an answer to plaintiff's complaint, or (ii) a motion under Rule 12. If the judge determines that a case is not appropriate for the commercial court, that judge may reassign the case to a general civil court.
2. On motion of a party or on the court's own initiative, a judge of a general civil court may order transfer of a case to the commercial court if that judge determines that the matter meets the criteria of Rules 8.1(a) through 8.1(c).
3. Assignment of case to the commercial court does not impair the right of a party to request assignment of the case to a complex civil litigation program pursuant to Rule 8(i).

**(f) Case Management.** Rules 16(a) through 16(k) apply to cases in the commercial court, except:

1. Scheduling conferences\* under Rule 16(d) are mandatory.
2. The parties' Rule 16(b) joint report\* must address the following additional items:
  - A. The parties must confer and attempt to reach agreement concerning the disclosure and production of electronically stored information ("ESI"), including (i) requirements and limitations on disclosure and production of ESI; (ii) the form or formats in which the ESI will be disclosed or produced; and (iii) sharing or shifting of costs incurred by the parties for disclosing and producing ESI. The joint report\* must state the agreements reached by the parties with regard to ESI, and those areas on which they were unable to agree.
  - B. The joint report\* must state whether the parties reached agreements pursuant to Rule 502 of the Rules of Evidence.

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- C. The joint report\* must state whether any party is requesting the court to enter a protective order pursuant to Rule 26(c), and if so, a brief statement concerning the need for a protective order.
  
- D. The joint report\* must state whether there are any issues concerning claims of privilege or protection of trial preparation materials pursuant to Rule 26.1(f).

\*Note to BCAC: Items marked with an asterisk will require preparation of a modified Form 12(a) for use in commercial cases.

**(g) Motions.** A judge of the commercial court with notice to the parties may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

**Rule 8.1: Assignment and management of commercial cases [New]**

**(a) Application.** This rule applies in any county that has established a specialized court for commercial cases. The court administrator of that county will assign to its commercial court any “commercial case,” as defined in Rule 8.1(a)(1), if in addition a commercial case meets the requirements of either Rule 8.1(b) or Rule 8.1(c).

1. A “commercial case” is one where either
  - A. All or some of the opposing parties are “business organizations;” or
  - B. The primary issues of law and fact concern a “business organization” or a “business contract or transaction.”
2. A “business organization” includes a corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, or a business trust, and excludes an individual, a sole proprietorship, a family trust, a political subdivision or a government entity.
3. A “business contract or transaction” is one in which a business organization sold, purchased, or transferred goods, services, realty, or other obligations. The term “business contract or transaction” excludes a “consumer contract or transaction.”
4. A “consumer contract or transaction” is one that is primarily for personal, family, or household purposes.

**(b) Regardless of the amount in controversy,** the court administrator will assign a case to the commercial court if the case:

1. Concerns the internal affairs, governance, dissolution, or liquidation of a business organization;
2. Arises out of obligations, liabilities, or indemnity claims between or among owners of a business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, and trustees);
3. Concerns the sale or merger of a business organization, or the sale of substantially all of the assets of a business organization;
4. Relates to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, complete, or disclose;

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***MRA edits shown by underline***

5. Is a shareholder derivative action;
  6. Arises from a commercial real estate transaction;
  7. Arises from a relationship between a franchisor and a franchisee;
  8. Involves the sale of securities;
  9. Concerns a claim under state antitrust law.
- (c) **If the amount in controversy is at least \$50,000, - suggest \$25,000 -** the court administrator will assign a case to the commercial court if the case:
1. Arises from a transaction governed by a contract or by the Uniform Commercial Code;
  2. Arises out of business activity, such as unfair competition, tortious interference, or fraud;
  3. Involves the sale of services by, or to, a business organization;
  4. Is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;
  5. Concerns a surety bond, or arises under any type of commercial insurance policy purchased by a business organization, including an action involving coverage, bad faith, or a third-party indemnity claim against an insurer.
- (d) **Miscellaneous provisions regarding assignment.**
1. The court administrator is responsible for identifying cases that are appropriate for the commercial court, and for assigning cases to that court. A party may object if a case has been assigned to a commercial court under Rule 8.1(d)(1 through 4). A party has 20 days after the date of a notice assigning a case to the commercial court to request the assigned judge to order transfer of the case to a general civil court. A request under this rule is not considered a change of judge as a matter of right under Rule 42(f)(1).
  2. After assignment of a case to the commercial court by the court administrator, a commercial court judge may independently determine whether assignment of that case to the commercial court is appropriate. If the judge determines that a case is not appropriate for the commercial court, he or she may order a transfer of the case to a general civil court.

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3. On motion of a party or the court, a commercial court judge may order a transfer of any case not otherwise identified in Rules 8.1(b) or 8.1(c) to the commercial court if doing so will serve the objectives of effective judicial case management.
  4. A judge of a general civil court may order transfer of a commercial case to the commercial court.
  5. The parties for good cause, and subject to court approval, may stipulate to the assignment of a case to the commercial court.
  6. The provisions of Rule 8.1 apply to cases involving multiple parties, including class actions.
  7. Assignment of case to the commercial court does not impair the right of a party to request assignment of the case to a complex civil litigation program pursuant to Rule 8(i).
- (e) **Case Management.** Rules 16(a) through 16(k) apply to cases on the commercial court, except:
1. Scheduling conferences under Rule 16(d) are mandatory. A party does not need to request a conference.

The parties shall cooperate to secure the just, speedy, and inexpensive determination of every action and proceeding.

2. The parties' Rule 16(b) joint report must address the following additional items:
  - A. Counsel for the parties, or unrepresented parties, must certify in the joint report that they have the knowledge and skill to address and respond to the legal and information technology issues presented in the case, and if they cannot so certify, they must provide the name or names of other individuals with that knowledge and skill who are authorized to do so on their behalf. This includes the knowledge and skill to identify, preserve, collect and produce the various types of electronically stored information (ESI).
  - B. “On a case-by-case basis, the duty of competence may require a higher level of technical knowledge and ability, depending on the e-discovery issues involved in a given matter and the nature of the ESI involved. Such competency requirements may render an otherwise highly experienced attorney not competent to handle certain litigation matters involving ESI. An attorney lacking the required competence for the e-discovery issues in the case at issue has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation. Lack of

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**MRA edits shown by underline**

competence in e-discovery issues can also result, in certain circumstances, in ethical violations of an attorney’s duty of confidentiality, the duty of candor, and/or the ethical duty not to suppress evidence.” Source: CA ethics opinion 11-0004

- C. [The failure to cooperate will result in sanctions, taxation of costs, transfer to regular court, etc. ]
- D. [E-Disclosure, as opposed to eDiscovery] A party must, without awaiting a discovery request, provide to the other parties: a copy and a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

~~The parties must confer and attempt to reach agreement concerning the disclosure and production of electronically stored information (“ESI”), including (i) requirements and limitations on disclosure and production of ESI; (ii) the form or formats in which the ESI will be disclosed or produced; and (iii) sharing or shifting of costs incurred by the parties for disclosing and producing ESI. The joint report must state the agreements reached by the parties with regard to ESI, and those areas on which they were unable to agree.~~

- E. The joint report must state whether the parties reached agreements pursuant to Rule 502 of the Rules of Evidence.
- F. The joint report must state whether any party is requesting the court to enter a protective order pursuant to Rule 26(c), and if so, a brief statement concerning the need for a protective order.
- G. The joint report must state whether there are any issues concerning claims of privilege or protection of trial preparation materials pursuant to Rule 26.1(f).

**(f) Motions.** A judge of the commercial court with notice to the parties may modify the formal requirements of Rule 7.1(a) and adopt a practice for efficient and prompt resolution of motions.

**In the Superior Court of the State of Arizona  
In and For the County of \_\_\_\_\_**

Case Number \_\_\_\_\_

**CIVIL COVER SHEET- NEW FILING ONLY**  
(Please Type or Print)

Plaintiff's Attorney \_\_\_\_\_

Attorney Bar Number \_\_\_\_\_

Plaintiff's Name(s): (List all)  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Plaintiff's Address:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(List additional plaintiffs on page two and/or attach a separate sheet).

Defendant's Name(s): (List All) \_\_\_\_\_  
\_\_\_\_\_

(List additional defendants on page two and/or attach a separate sheet)

EMERGENCY ORDER SOUGHT:     Temporary Restraining Order     Provisional Remedy     OSC  
 Election Challenge     Employer Sanction     Other \_\_\_\_\_  
(Specify)

RULE 8(i) COMPLEX LITIGATION DOES NOT APPLY. (Mark appropriate box under **Nature of Action**)

RULE 8(i) COMPLEX LITIGATION APPLIES. Rule 8(i) of the Rules of Civil Procedure defines a "Complex Case" as civil actions that require continuous judicial management. A typical case involves a large number of witnesses, a substantial amount of documentary evidence, and a large number of separately represented parties.  
(Mark appropriate box on page two as to complexity, **in addition** to the Nature of Action case category).

**NATURE OF ACTION**

(Place an "X" next to the **one** case category that most accurately describes your primary case.)

**TORT MOTOR VEHICLE:**

- Non-Death/Personal Injury
- Property Damage
- Wrongful Death

**TORT NON-MOTOR VEHICLE:**

- Negligence
- Product Liability – Asbestos
- Product Liability – Tobacco
- Product Liability – Toxic/Other
- Intentional Tort
- Property Damage
- Legal Malpractice
- Malpractice – Other professional
- Premises Liability
- Slander/Libel/Defamation
- Other (Specify) \_\_\_\_\_

**MEDICAL MALPRACTICE:**

- Physician M.D.     Hospital
- Physician D.O.     Other

**CONTRACTS:**

- Account (Open or Stated)
- Promissory Note
- Foreclosure
- Buyer-Plaintiff
- Fraud
- Other Contract (i.e. Breach of Contract)
- Excess Proceeds-Sale
- Construction Defects (Residential/Commercial)
  - Six to Nineteen Structures
  - Twenty or More Structures

**OTHER CIVIL CASE TYPES:**

- Eminent Domain/Condemnation

- Eviction Actions (Forcible and Special Detainers)
- Change of Name

**OTHER CIVIL CASE TYPES : (Continued)**

- Transcript of Judgment
- Foreign Judgment
- Quiet Title
- Forfeiture
- Election Challenge
- NCC- Employer Sanction Action (A.R.S. §23-212)
- Injunction against Workplace Harassment
- Injunction against Harassment
- Civil Penalty
- Water Rights(Not General Stream Adjudication)
- Real Property
- Sexually Violent Person (A.R.S. §36-3704)  
(Except Maricopa County)
- Minor Abortion (See Juvenile in Maricopa County)
- Special Action Against Lower Courts  
(See lower court appeal cover sheet in Maricopa)
- Immigration Enforcement Challenge (§§1-501, 1-502, 11-1051)

**UNCLASSIFIED CIVIL:**

- Administrative Review  
(See lower court appeal cover sheet in Maricopa)
- Tax Appeal

**COMPLEXITY OF THE CASE:**

If you marked the box on page one indicating that Complex Litigation applies, place an “X” in the box of no less than one of the following:

- Antitrust/Trade Regulation
- Construction Defect with many parties or structures
- Mass Tort
- Securities Litigation with many parties
- Environmental Toxic Tort with many parties
- Class Action Claims
- Insurance Coverage Claims arising from the above-listed case types
- A Complex Case as defined by Rule 8(i) ARCP

Additional Plaintiff(s)

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Additional Defendant(s)

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(All other tax matters must be filed in the AZ Tax Court)

- Declaratory Judgment
- Habeas Corpus
- Landlord Tenant Dispute- Other
- Restoration of Civil Rights (Federal)
- Clearance of Records (A.R.S. §13-4051)
- Declaration of Factual Innocence (A.R.S. §12-771)
- Declaration of Factual Improper Party Status
- Vulnerable Adult (A.R.S. §46-451)
- Tribal Judgment
- Structured Settlement (A.R.S. §12-2901)
- Attorney Conservatorships (State Bar)
- Unauthorized Practice of Law (State Bar)
- Out-of-State Deposition for Foreign Jurisdiction
- Secure Attendance of Prisoner
- Assurance of Discontinuance
- In-State Deposition for Foreign Jurisdiction
- Eminent Domain– Light Rail Only
- Interpleader– Automobile Only
- Delayed Birth Certificate (A.R.S. §36-333.03)
- Employment Dispute- Discrimination
- Employment Dispute-Other
- Other \_\_\_\_\_

(Specify)

**COMMERCIAL COURT: (Maricopa only)**

This case is a “commercial case” [Rule 8.1] because it concerns either:

- Business organizations OR
- A business contract or transaction

AND the case is eligible for assignment to the commercial court because the following section of Rule 8.1 applies:

- |                                 |                                 |
|---------------------------------|---------------------------------|
| <input type="checkbox"/> (b)(1) | <input type="checkbox"/> (c)(1) |
| <input type="checkbox"/> (b)(2) | <input type="checkbox"/> (c)(2) |
| <input type="checkbox"/> (b)(3) | <input type="checkbox"/> (c)(3) |
| <input type="checkbox"/> (b)(4) | <input type="checkbox"/> (c)(4) |
| <input type="checkbox"/> (b)(5) | <input type="checkbox"/> (c)(5) |
| <input type="checkbox"/> (b)(6) |                                 |
| <input type="checkbox"/> (b)(7) |                                 |
| <input type="checkbox"/> (b)(8) |                                 |
| <input type="checkbox"/> (b)(9) |                                 |

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:	)	
	)	
AUTHORIZING A COMMERCIAL	)	Administrative Order
COURT PILOT PROGRAM IN THE	)	<b>No. 2014-_____</b>
SUPERIOR COURT OF MARICOPA	)	
COUNTY	)	
_____	)	

On May 8, 2014, this Court entered Administrative Order 2014-48, which established the Business Court Advisory Committee. The Order required the committee to submit its recommendations to this Court and to the Arizona Judicial Council by December 11, 2014. The committee has now done so, and the committee’s recommendations have been adopted by the Arizona Judicial Council.

The committee’s report proposes the establishment of a pilot commercial court in the superior court of Maricopa County. The report suggests establishing this pilot court for three years to permit a reasonable period for its evaluation. The report recommends that at the end of three years, the Supreme Court determine the advisability of adopting a commercial court as a permanent feature of the superior court. The report proposes that an evaluation committee monitor the pilot during its three-year phase, and that the evaluation committee submit annual progress reports to the Arizona Judicial Council. The committee’s report also proposes new rules of civil procedure and forms, including a new form that parties would use to identify cases that are eligible for the pilot program.

Now, therefore, pursuant to Article VI, Section 3, of the Arizona Constitution.

IT IS ORDERED authorizing the superior court of Maricopa County to establish a pilot commercial court as follows:

1. **Pilot Program:** The pilot commercial court shall run for a period of three years, beginning July 1, 2015 and ending June 30, 2018.
2. **Rules of Procedure and Forms:** The Rules appearing in Appendix A attached hereto shall apply to cases in pilot commercial court.

3. **Authority to Establish Additional Local Rules and Procedures:** In furtherance of the purpose and goals of the pilot project, the presiding judge of the Superior Court in Maricopa County is authorized to establish additional rules and procedures for the pilot program.

IT IS FURTHER ORDERED that the terms of the Business Court Advisory Committee and its members, who were appointed pursuant to Administrative Orders numbered 2014-47 and 2014-58, are extended until December 31, 2018. On or before December 1 of calendar years 2016, 2017, and 2018, the committee shall submit a progress report to the Arizona Judicial Council that addresses the following:

- A. An analysis of any superior court data that was collected for the purpose of monitoring cases assigned to the pilot commercial court;
- B. Levels of user satisfaction with the pilot commercial court;
- C. Views of judges concerning the effectiveness and benefits of the pilot commercial court;
- D. Recommendations concerning new eligibility criteria for assignment of cases to a pilot commercial court, adoption of additional measurements to evaluate the performance of this pilot court, and proposed changes to rules and forms; and
- E. Any other matter that the committee wishes to bring to the attention of the Arizona Judicial Council.

DATED this \_\_\_ day of December 2014

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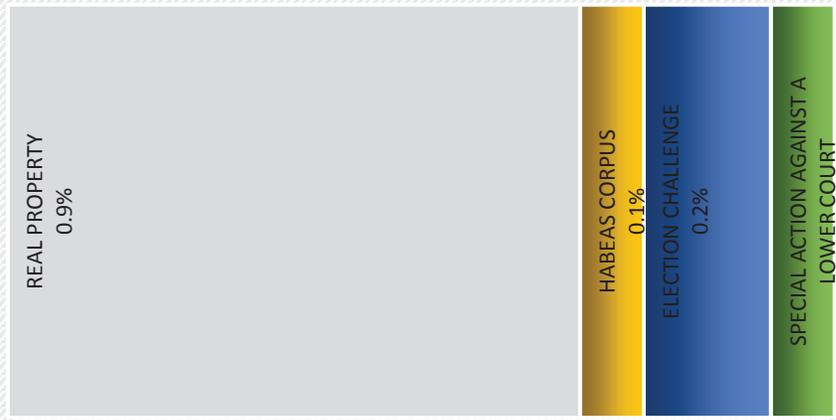
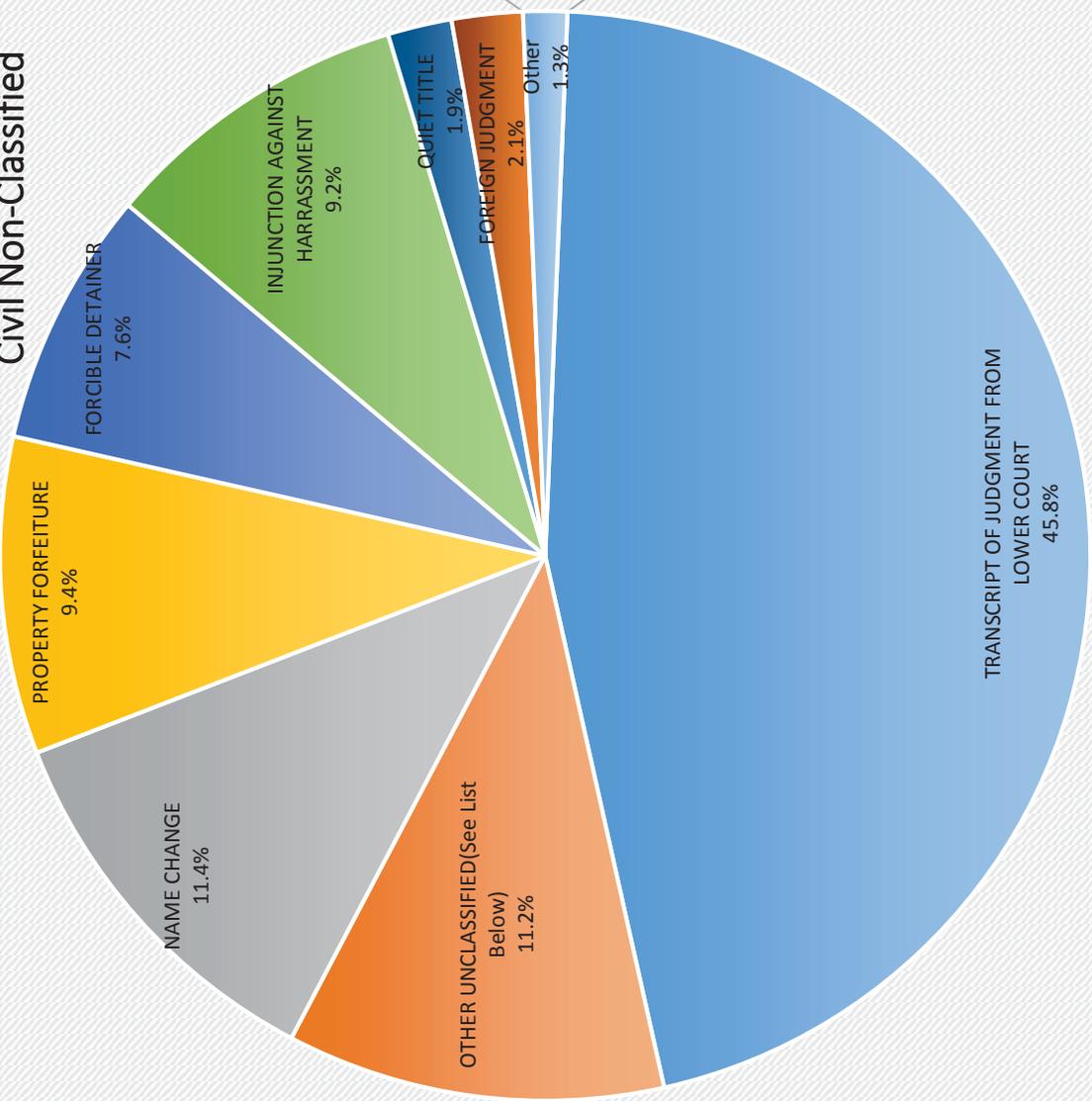
SCOTT BALES  
CHIEF JUSTICE

<b>Filing Case Types Reported Under Civil Non-Classified</b>	
<b>Case Type Description</b>	<b>Percent of Total Filings</b>
TRANSCRIPT OF JUDGMENT FROM LOWER COURT	45.8%
<b>OTHER UNCLASSIFIED(See List Below)</b>	<b>11.2%</b>
NAME CHANGE	11.4%
PROPERTY FORFEITURE	9.4%
FORCIBLE DETAINER	7.6%
INJUNCTION AGAINST HARRASSMENT	9.2%
QUIET TITLE	1.9%
FOREIGN JUDGMENT	2.1%
REAL PROPERTY	0.9%
HABEAS CORPUS	0.1%
ELECTION CHALLENGE	0.2%
SPECIAL ACTION AGAINST A LOWER COURT	0.1%
<b>Total Civil Non-Classified</b>	<b>100.0%</b>
Note: Percent of Total Filings is based on FY13 and FY14 filings.	
Data Source: Maricopa, Pima and AJACS Superior Courts. FY2013 Civil Non-Classified Filings was 34,904.	

<b>Case Types Reported Under Other Unclassified</b>	<b>Percent of Total Filings</b>
ADMINISTRATIVE REVIEW	3.0%
ASSURANCE OF DISCONTINUANCE	1.6%
ATTORNEY CONSERVATORSHIPS	1.2%
CIVIL EMERGENCY PROTECTIVE ORDER	0.4%
DECLATORY JUDGMENT	4.5%
DELAYED BIRTH CERTIFICATE	3.0%
EMINENT DOMAIN-LIGHT RAIL ONLY	2.4%
EMPLOYMENT DISPUTE - DISCRIMINATION	0.6%
EMPLOYMENT DISPUTE - OTHER	0.1%
EMPLOYMENT DISPUTE-OTHER	1.0%
EMPLYMENT DISPUTE-DISCRIMINATION	3.2%
HABEAS CORPUS	5.0%
IN-STATE DEPOSITION FOR FOREIGN JURISDIC	3.1%
INTERPLEADER-AUTOMOBILE ONLY	6.5%
LANDLORD/TENANT DISPUTE - OTHER	3.5%
OTHER	3.1%
OUT-OF-STATE DEPOSITION FOR FOREIGN JURI	4.1%
PRISON CONDITIONS-WRIT	2.4%
PUBLIC HEALTH	2.3%
SECURE ATTENDANCE OF PRISONER	5.6%
SEIZED CASH	3.9%
SEIZED OTHER	4.6%
SEIZED VEHICLE	5.8%
STRUCTURED SETTLEMENT	3.5%
TAX	4.8%
TRIBAL JUDGMENT	6.7%
UNAUTHORIZED PRACTICE OF LAW (STATE BAR)	5.7%
VULNERABLE ADULT	1.4%
WRIT-OTHER	7.1%
<b>TOTAL OTHER UNCLASSIFIED</b>	<b>100.0%</b>

Data Source: AJACS Courts.

# Filing Case Types Reported Under Civil Non-Classified



**Maricopa Superior Court  
Filing Case Types  
Reported Under Civil Non-Classified**

Case Type Description	Percent of Total Filings
TRANSCRIPT OF JUDGMENT FROM LOWER COURT	55.4%
INJUNCTION AGAINST HARRASSMENT	10.3%
OTHER UNCLASSIFIED (See List Below)	10.1%
NAME CHANGE	10.0%
PROPERTY FORFEITURE	5.2%
FORCIBLE DETAINER	4.7%
FOREIGN JUDGMENT	2.7%
QUIET TITLE	0.8%
REAL PROPERTY	0.6%
ELECTION CHALLENGE	0.2%
HABEAS CORPUS	0.0%
SPECIAL ACTION AGAINST A LOWER COURT	0.0%
<b>Total Civil Non-Classified</b>	<b>100.0%</b>

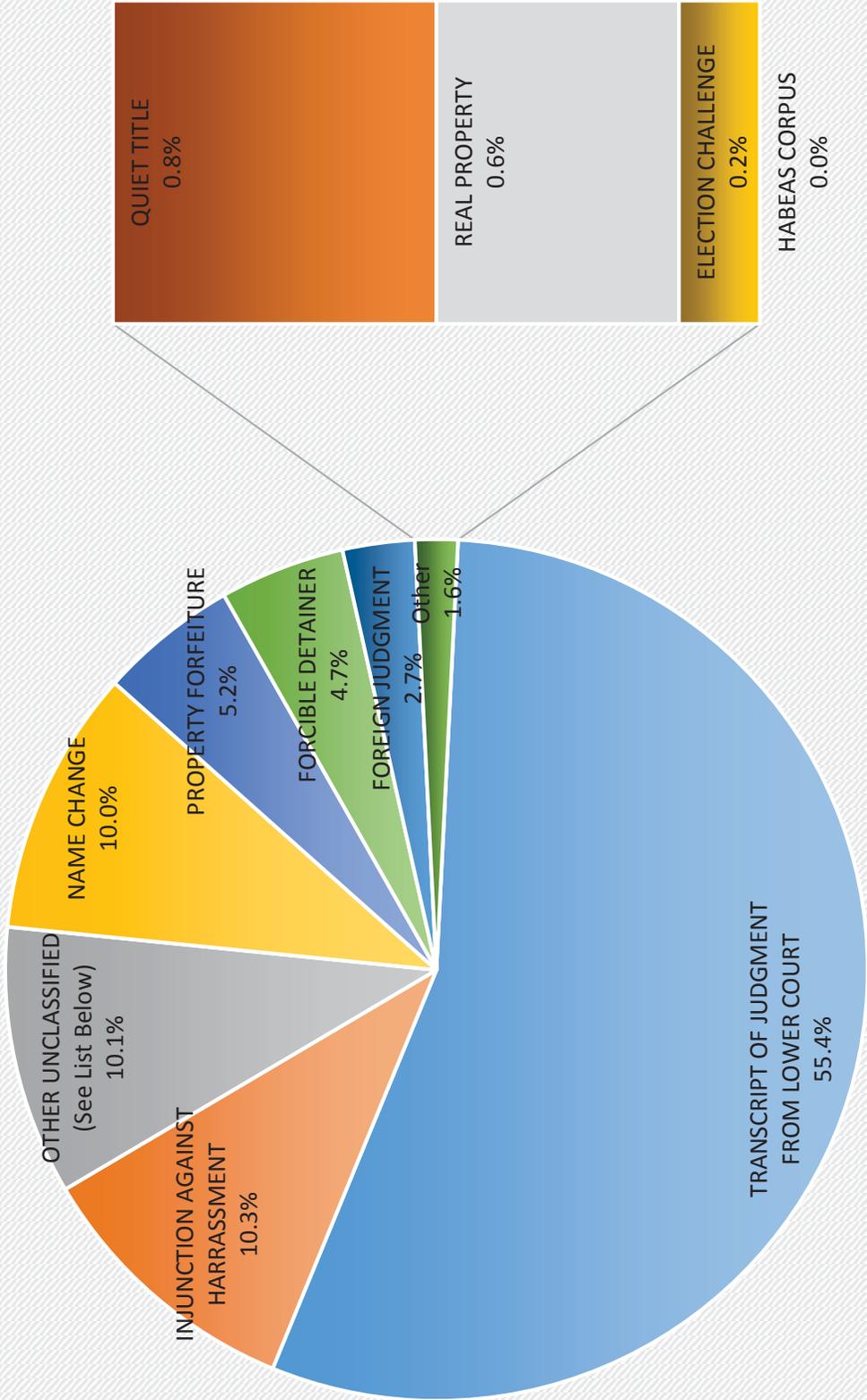
**Note: Percent of Total Filings is based on FY14 filings.**

Data Source: Maricopa Superior Court. FY2013 Civil Non-Classified Filings was 23,913.

Case Types Reported Under Other Unclassified	Percent of Total Filings
163 - Other	53.0%
155 - Declaratory Judgment	12.1%
167 - Structured Settlement (A.R.S. §12-	9.5%
168 - Failure to Attend Jury Service	3.6%
195(b) - Amendment for Birth Certificate	3.6%
156 - Eminent Domain/Condemnation	3.3%
185 - Employment Dispute - Other	2.9%
195(a) - Amendment for Marriage License	2.8%
177 - Interpleader (Automobile Only)	2.1%
183 - Employment Dispute - Discriminatio	1.1%
184 - Landlord Tenant Dispute - Other	1.1%
193 - Vulnerable Adult (A.R.S. §46-451)	0.7%
159 - Clearance of Record (A.R.S. §13-40	0.6%
159 - Restoration of Civil Rights (Feder	0.6%
182 - Civil Penalty	0.5%
134 - Other Contract - Breach of Contrac	0.4%
173 - Assurance of Discontinuance	0.4%
101 - Non Death Injury	0.3%
150 - Tax (Appeal)	0.2%
174 - In State Deposition of Foreign Jur	0.2%
102 - Property Damage	0.1%
116 - Other/Specify	0.1%
131 - Account (Open or Stated)	0.1%
135 - Real Property Excess Proceeds	0.1%
169 - Attorney Conservatorships (State B	0.1%
170 - Unauthorized Practice of Law (Stat	0.1%
178 - Delayed Birth Certificate (A.R.S.	0.1%
118 - Slander/Libel/Defamation	0.0%
122 - Physician - DO	0.0%
132 - Promissory Note	0.0%
139 - Fraud	0.0%
165 - Tribal Judgment	0.0%
<b>TOTAL OTHER UNCLASSIFIED</b>	<b>100.0%</b>

Data Source: Maricopa Superior Court.

**MARICOPA COUNTY**  
**Filing Case Types**  
**Reported Under**  
**Civil Non-Classified**



**Pima Superior Court  
Filing Case Types  
Reported Under Civil Non-Classified**

<b>Case Type Description</b>	<b>Percent of Total Filings</b>
PROPERTY FORFEITURE	26.2%
INJUNCTION AGAINST HARRASSMENT	23.0%
NAME CHANGE	21.4%
OTHER UNCLASSIFIED(See List Below)	10.7%
FORCIBLE DETAINER	10.5%
TRANSCRIPT OF JUDGMENT FROM LOWER COURT	4.1%
REAL PROPERTY	1.6%
QUIET TITLE	1.3%
SPECIAL ACTION AGAINST A LOWER COURT	0.9%
FOREIGN JUDGMENT	0.1%
ELECTION CHALLENGE	0.1%
HABEAS CORPUS	0.0%
<b>Total Civil Non-Classified</b>	<b>100.0%</b>

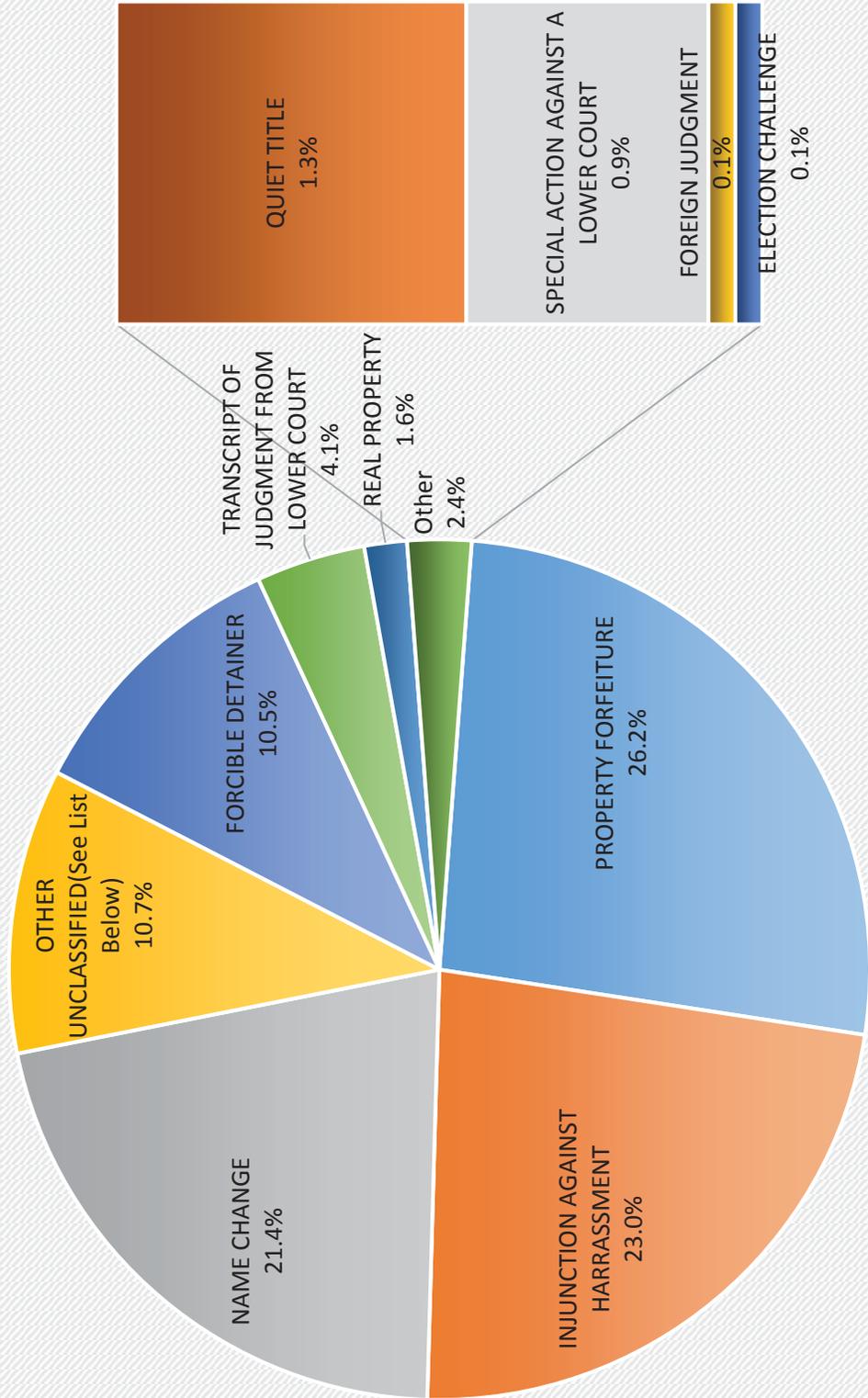
**Note: Percent of Total Filings is based on FY14 filings.**

Data Source: Pima Superior Court. FY2013 Civil Non-Classified Filings was 3,711.

<b>Case Types Reported Under Other Unclassified</b>	<b>Percent of Total Filings</b>
Other	69.4%
Structured Settlement	11.4%
Vulnerable Adult	4.2%
Employment Dispute - Other	3.9%
Employment Discrimination	3.3%
Minor Abortion (MA)	2.8%
Admin RV	2.5%
Tenant-Landlord Dispute	0.8%
Tax Appeal	0.6%
Tribal Judgment	0.3%
Clearance of Record	0.3%
Interpleader - Auto Only	0.3%
Unclassified - Default	0.3%
<b>TOTAL OTHER UNCLASSIFIED</b>	<b>100.0%</b>

Data Source: Pima Superior Court.

**PIMA COUNTY**  
**Filing Case Types**  
**Reported Under**  
**Civil Non-Classified**



**SUPERIOR COURT - AJACS RURAL COUNTIES**  
**Filing Case Types**  
**Reported Under Civil Non-Classified**

<b>Case Type Description</b>	<b>Percent of Total Filings</b>
TRANSCRIPT OF JUDGMENT FROM LOWER COURT	38.6%
OTHER UNCLASSIFIED (See List Below)	14.5%
FORCIBLE DETAINER	14.3%
PROPERTY FORFEITURE	12.6%
NAME CHANGE	10.7%
QUIET TITLE	5.5%
FOREIGN JUDGMENT	1.6%
REAL PROPERTY	1.3%
HABEAS CORPUS	0.6%
SPECIAL ACTION AGAINST A LOWER COURT	0.2%
ELECTION CHALLENGE	0.1%
INJUNCTION AGAINST HARRASSMENT	0.0%
<b>Total Civil Non-Classified</b>	100.0%

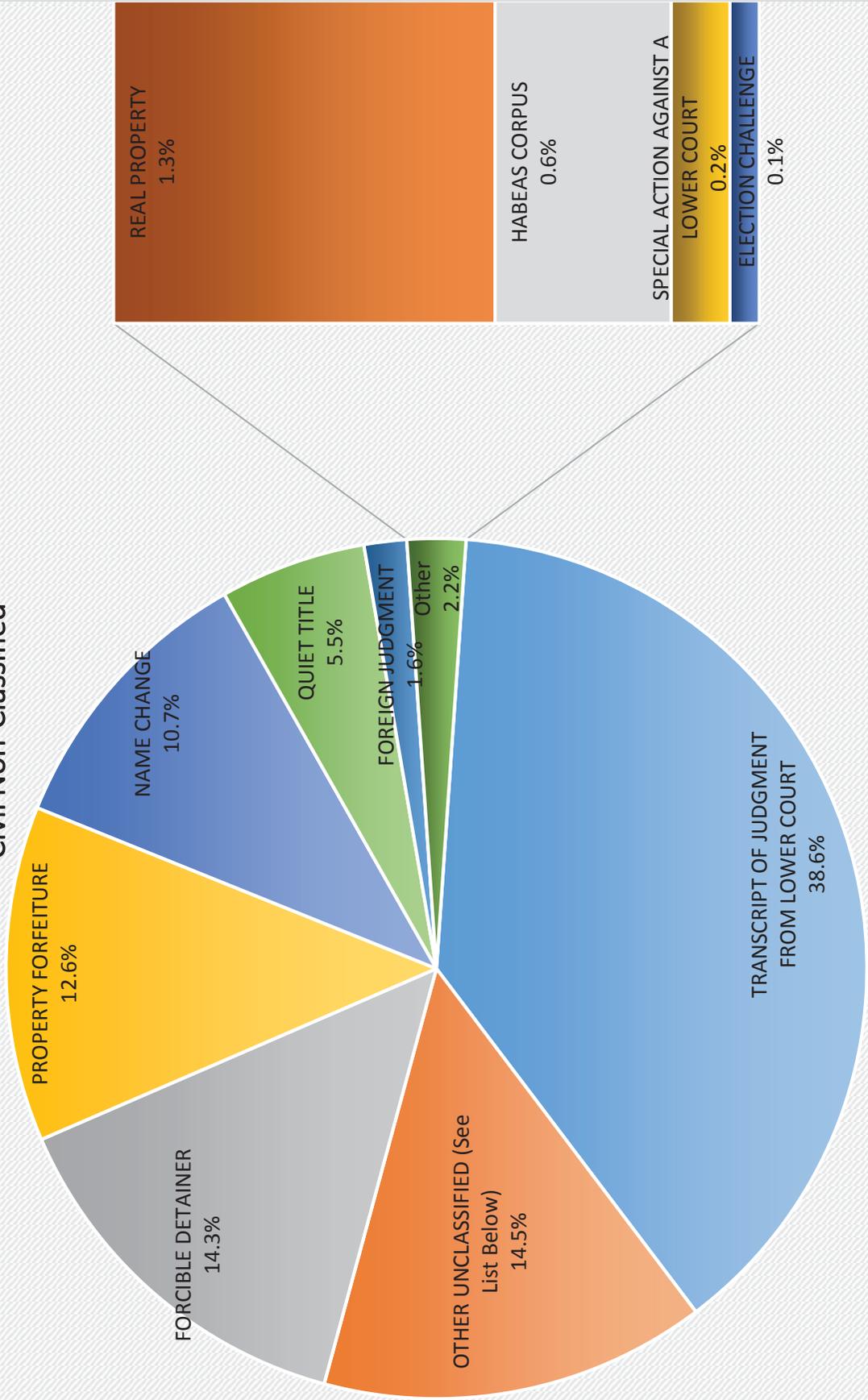
**Note: Percent of Total Filings is based on FY14 filings.**

Data Source: AJACS Superior Courts. FY2013 Civil Non-Classified Filings was 7,280.

<b>Case Types Reported Under Other Unclassified</b>	<b>Percent of Total Filings</b>
ADMINISTRATIVE REVIEW	3.0%
ASSURANCE OF DISCONTINUANCE	1.6%
ATTORNEY CONSERVATORSHIPS	1.2%
CIVIL EMERGENCY PROTECTIVE ORDER	0.4%
DECLATORY JUDGMENT	4.5%
DELAYED BIRTH CERTIFICATE	3.0%
EMINENT DOMAIN-LIGHT RAIL ONLY	2.4%
EMPLOYMENT DISPUTE - DISCRIMINATION	0.6%
EMPLOYMENT DISPUTE - OTHER	0.1%
EMPLOYMENT DISPUTE-OTHER	1.0%
EMPLYMENT DISPUTE-DISCRIMINATION	3.2%
HABEAS CORPUS	5.0%
IN-STATE DEPOSITION FOR FOREIGN JURISDIC	3.1%
INTERPLEADER-AUTOMOBILE ONLY	6.5%
LANDLORD/TENANT DISPUTE - OTHER	3.5%
OTHER	3.1%
OUT-OF-STATE DEPOSITION FOR FOREIGN JURI	4.1%
PRISON CONDITIONS-WRIT	2.4%
PUBLIC HEALTH	2.3%
SECURE ATTENDANCE OF PRISONER	5.6%
SEIZED CASH	3.9%
SEIZED OTHER	4.6%
SEIZED VEHICLE	5.8%
STRUCTURED SETTLEMENT	3.5%
TAX	4.8%
TRIBAL JUDGMENT	6.7%
UNAUTHORIZED PRACTICE OF LAW (STATE BAR)	5.7%
VULNERABLE ADULT	1.4%
WRIT-OTHER	7.1%
<b>TOTAL OTHER UNCLASSIFIED</b>	100.0%

Data Source: AJACS Superior Courts.

**RURAL COUNTIES**  
**Filing Case Types**  
**Reported Under**  
**Civil Non-Classified**



United States District Court  
Northern District of California

CHECKLIST FOR RULE 26(f) MEET AND CONFER  
REGARDING ELECTRONICALLY STORED INFORMATION

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In cases where the discovery of electronically stored information (“ESI”) is likely to be a significant cost or burden, the Court encourages the parties to engage in on-going meet and confer discussions and use the following Checklist to guide those discussions. These discussions should be framed in the context of the specific claims and defenses involved. The usefulness of particular topics on the checklist, and the timing of discussion about these topics, may depend on the nature and complexity of the matter.

**I. Preservation**

- The ranges of creation or receipt dates for any ESI to be preserved.
- The description of data from sources that are not reasonably accessible and that will not be reviewed for responsiveness or produced, but that will be preserved pursuant to Federal Rule of Civil Procedure 26(b)(2)(B).
- The description of data from sources that (a) the party believes could contain relevant information but (b) has determined, under the proportionality factors, should not be preserved.
- Whether or not to continue any interdiction of any document destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically-recorded material.
- The names and/or general job titles or descriptions of custodians for whom ESI will be preserved (e.g., “HR head,” “scientist,” “marketing manager,” etc.).
- The number of custodians for whom ESI will be preserved.
- The list of systems, if any, that contain ESI not associated with individual custodians and that will be preserved, such as enterprise databases.
- Any disputes related to scope or manner of preservation.

**II. Liaison**

- The identity of each party’s e-discovery liaison.

**III. Informal Discovery About Location and Types of Systems**

- Identification of systems from which discovery will be prioritized (e.g., email, finance, HR systems).
- Description of systems in which potentially discoverable information is stored.
- Location of systems in which potentially discoverable information is stored.
- How potentially discoverable information is stored.
- How discoverable information can be collected from systems and media in which it is stored.

**IV. Proportionality and Costs**

- The amount and nature of the claims being made by either party.
- The nature and scope of burdens associated with the proposed preservation and discovery of ESI.

- The likely benefit of the proposed discovery.
- Costs that the parties will share to reduce overall discovery expenses, such as the use of a common electronic discovery vendor or a shared document repository, or other cost-saving measures.
- Limits on the scope of preservation or other cost-saving measures.
- Whether there is potentially discoverable ESI that will not be preserved consistent with this Court's Guideline 1.03 (Discovery Proportionality).

**V. Search**

- The search method(s), including specific words or phrases or other methodology, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery.
- The quality control method(s) the producing party will use to evaluate whether a production is missing relevant ESI or contains substantial amounts of irrelevant ESI.

**VI. Phasing**

- Whether it is appropriate to conduct discovery of ESI in phases.
- Sources of ESI most likely to contain discoverable information and that will be included in the first phases of Fed. R. Civ. P. 34 document discovery.
- Sources of ESI less likely to contain discoverable information from which discovery will be postponed or avoided.
- Custodians (by name or role) most likely to have discoverable information and whose ESI will be included in the first phases of document discovery.
- Custodians (by name or role) less likely to have discoverable information and from whom discovery of ESI will be postponed or avoided.
- The time period during which discoverable information was most likely to have been created or received.

**VII. Production**

- The formats in which structured ESI (database, collaboration sites, etc.) will be produced.
- The formats in which unstructured ESI (email, presentations, word processing, etc.) will be produced.
- The extent, if any, to which metadata will be produced and the fields of metadata to be produced.
- The production format(s) that ensure(s) that any inherent searchability of ESI is not degraded when produced.

**VIII. Privilege**

- How any production of privileged or work product protected information will be handled.
- Whether the parties can agree upon alternative ways to identify documents withheld on the grounds of privilege or work product to reduce the burdens of such identification.
- Whether the parties will enter into a Fed. R. Evid. 502(d) Stipulation and Order that addresses inadvertent or agreed production.

United States District Court  
Northern District of California

GUIDELINES FOR THE DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION

---

**GENERAL GUIDELINES**

**Guideline 1.01 (Purpose)**

Discoverable information today is mainly electronic. The discovery of electronically stored information (ESI) provides many benefits such as the ability to search, organize, and target the ESI using the text and associated data. At the same time, the Court is aware that the discovery of ESI is a potential source of cost, burden, and delay.

These Guidelines should guide the parties as they engage in electronic discovery. The purpose of these Guidelines is to encourage reasonable electronic discovery with the goal of limiting the cost, burden and time spent, while ensuring that information subject to discovery is preserved and produced to allow for fair adjudication of the merits. At all times, the discovery of ESI should be handled consistently with Fed. R. Civ. P. 1 to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

These Guidelines also promote, when ripe, the early resolution of disputes regarding the discovery of ESI without Court intervention.

**Guideline 1.02 (Cooperation)**

The Court expects cooperation on issues relating to the preservation, collection, search, review, and production of ESI. The Court notes that an attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. Cooperation in reasonably limiting ESI discovery requests on the one hand, and in reasonably responding to ESI discovery requests on the other hand, tends to reduce litigation costs and delay. The Court emphasizes the particular importance of cooperative exchanges of information at the earliest possible stage of discovery, including during the parties’ Fed. R. Civ. P. 26(f) conference.

**Guideline 1.03 (Discovery Proportionality)**

The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(iii) should be applied to the discovery plan and its elements, including the preservation, collection, search, review, and production of ESI. To assure reasonableness and proportionality in discovery, parties should consider factors that include the burden or expense of the proposed discovery compared to its likely benefit, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in adjudicating the merits of the case. To further the application of the proportionality standard, discovery requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable.

**ESI DISCOVERY GUIDELINES**

**Guideline 2.01 (Preservation)**

- a) At the outset of a case, or sooner if feasible, counsel for the parties should discuss preservation. Such discussions should continue to occur periodically as the case and issues evolve.
- b) In determining what ESI to preserve, parties should apply the proportionality standard referenced in Guideline 1.03. The parties should strive to define a scope of preservation that

is proportionate and reasonable and not disproportionately broad, expensive, or burdensome.

- c) Parties are not required to use preservation letters to notify an opposing party of the preservation obligation, but if a party does so, the Court discourages the use of overbroad preservation letters. Instead, if a party prepares a preservation letter, the letter should provide as much detail as possible, 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.
- d) If there is a dispute concerning the scope of a party's preservation efforts, the parties or their counsel should meet and confer and fully discuss the reasonableness and proportionality of the preservation. If the parties are unable to resolve a preservation issue, then the issue should be raised promptly with the Court.
- e) The parties should discuss what ESI from sources that are not reasonably accessible will be preserved, but not searched, reviewed, or produced. As well as discussing ESI sources that are not reasonably accessible, the parties should consider identifying data from sources that (1) the parties believe could contain relevant information but (2) determine, under the proportionality factors, should not be preserved.

#### **Guideline 2.02 (Rule 26(f) Meet and Confer)**

At the required Rule 26(f) meet and confer conference, when a case involves electronic discovery, the topics that the parties should consider discussing include: 1) preservation; 2) systems that contain discoverable ESI; 3) search and production; 4) phasing of discovery; 5) protective orders; and 6) opportunities to reduce costs and increase efficiency. In order to be meaningful, the meet and confer should be as sufficiently detailed on these topics as is appropriate in light of the specific claims and defenses at issue in the case. Some or all of the following details may be useful to discuss, especially in cases where the discovery of ESI is likely to be a significant cost or burden:

- a) The sources, scope and type of ESI that has been and will be preserved --considering the needs of the case and other proportionality factors-- including date ranges, identity and number of potential custodians, and other details that help clarify the scope of preservation;
- b) Any difficulties related to preservation;
- c) Search and production of ESI, such as any planned methods to identify discoverable ESI and filter out ESI that is not subject to discovery, or whether ESI stored in a database can be produced by querying the database and producing discoverable information in a report or an exportable electronic file;
- d) The phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information and is postponed or avoided from sources less likely to contain relevant and discoverable information;
- e) The potential need for a protective order and any procedures to which the parties might agree for handling inadvertent production of privileged information and other privilege waiver issues pursuant to Fed. R. Evid. 502(d) or (e), including a Rule 502(d) Order;
- f) Opportunities to reduce costs and increase efficiency and speed, such as by conferring about the methods and technology used for searching ESI to help identify the relevant information and sampling methods to validate the search for relevant information, using agreements for truncated or limited privilege logs, or by sharing expenses like those related to litigation document repositories.

The Court encourages the parties to address any agreements or disagreements related to the above matters in the joint case management statement required by Civil Local Rule 16-9.

**Guideline 2.03 (Cooperation and Informal Discovery Regarding ESI)**

The Court strongly encourages an informal discussion about the discovery of ESI (rather than deposition) at the earliest reasonable stage of the discovery process. Counsel, or others knowledgeable about the parties' electronic systems, including how potentially relevant data is stored and retrieved, should be involved or made available as necessary. Such a discussion will help the parties be more efficient in framing and responding to ESI discovery issues, reduce costs, and assist the parties and the Court in the event of a dispute involving ESI issues.

**Guideline 2.04 (Disputes Regarding ESI Issues)**

Disputes regarding ESI that counsel for the parties are unable to resolve shall be presented to the Court at the earliest possible opportunity, such as at the initial Case Management Conference. If the Court determines that any counsel or party in a case has failed to cooperate and participate in good faith in the meet and confer process, the Court may require additional meet and confer discussions, if appropriate.

**Guideline 2.05 (E-Discovery Liaison(s))**

In most cases, the meet and confer process will be aided by participation of e-discovery liaisons as defined in this Guideline. If a dispute arises that involves the technical aspects of e-discovery, each party shall designate an e-discovery liaison who will be knowledgeable about and responsible for discussing their respective ESI. An e-discovery liaison will be, or have access to those who are, knowledgeable about the location, nature, accessibility, format, collection, searching, and production of ESI in the matter. Regardless of whether the e-discovery liaison is an attorney (in-house or outside counsel), an employee of the party, or a third party consultant, the e-discovery liaison should:

- a) Be prepared to participate in e-discovery dispute resolution to limit the need for Court intervention;
- b) Be knowledgeable about the party's e-discovery efforts;
- c) Be familiar with, or gain knowledge about, the party's electronic systems and capabilities in order to explain those systems and answer related questions; and
- d) Be familiar with, or gain knowledge about, the technical aspects of e-discovery in the matter, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology.

**EDUCATION GUIDELINES**

**Guideline 3.01 (Judicial Expectations of Counsel)**

It is expected that counsel for the parties, including all counsel who have appeared, as well as all others responsible for making representations to the Court or opposing counsel (whether or not they make an appearance), will be familiar with the following in each litigation matter:

- (a) The electronic discovery provisions of the Federal Rules of Civil Procedure, including Rules 26, 33, 34, 37, and 45, and Federal Rule of Evidence 502;
- (b) The Advisory Committee Report on the 2006 Amendments to the Federal Rules of Civil Procedure, available at [uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf](https://uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf); and
- (c) These Guidelines and this Court's *Checklist for Rule 26(f) Meet and Confer Regarding ESI and Stipulated E-Discovery Order for Standard Litigation*.

**Suggested Protocol for  
Discovery of Electronically Stored Information (“ESI”)**

In light of the recent amendments to the Federal Rules of Civil Procedure regarding discovery of electronically stored information (“ESI”), a joint bar-court committee consisting of Magistrate Judge Paul W. Grimm and members of the Bar of this Court as well as technical consultants has developed a proposed protocol for use in cases where ESI may be involved. This is a working model that has not been adopted by the court but may be of assistance to counsel. It is the intent of the joint committee to review the Proposed Protocol periodically to determine if revisions would be appropriate, and after a sufficient period of time to evaluate the proposed protocol has passed, to determine whether to recommend to the Court that more formal guidelines or local rules relating to ESI be considered for adoption. To further this process, any comments and suggestions may be e-mailed to: **mdd\_voyager@mdd.uscourts.gov**.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

IN RE: ELECTRONICALLY STORED  
INFORMATION

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SUGGESTED PROTOCOL FOR DISCOVERY OF  
ELECTRONICALLY STORED INFORMATION

1. On December 1, 2006, amendments to Fed.R.Civ.P. 16, 26, 33, 34, 37, and 45, and Form 35, became effective, creating a comprehensive set of rules governing discovery of electronically stored information, (“ESI”).

Given these rule changes, it is advisable to establish a suggested protocol regarding, and a basic format implementing, only those portions of the amendments that refer to ESI. The purpose of this Suggested Protocol for Discovery of Electronically Stored Information (the “Protocol”) is to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention.

While this Protocol is intended to provide the parties with a comprehensive framework to address and resolve a wide range of ESI issues, it is not intended to be an inflexible checklist. The Court expects that the parties will consider the nature of the claim, the amount in controversy, agreements of the parties, the relative ability of the parties to conduct discovery of ESI, and such other factors as may be relevant under the circumstances. Therefore not all aspects of this Protocol may be applicable or practical for a particular matter, and indeed, if the parties do not intend to seek discovery of ESI it may be entirely inapplicable to a particular case. The Court encourages the parties to use this Protocol in cases in which there will be discovery of ESI, and to resolve ESI

issues informally and without Court supervision whenever possible. In this regard, compliance with this Protocol may be considered by the Court in resolving discovery disputes, including whether sanctions should be awarded pursuant to Fed.R.Civ.P. 37;

### **SCOPE**

2. This Protocol applies to the ESI provisions of Fed.R.Civ.P. 16, 26, 33, 34, or 37, and, insofar as it relates to ESI, this Protocol applies to Fed.R.Civ.P. 45 in all instances where the provisions of Fed.R.Civ.P. 45 are the same as, or substantially similar to, Fed.R.Civ.P. 16, 26, 33, 34, or 37. In such circumstances, if a Conference pursuant to Fed.R.Civ.P. 26(f) is held, it may include all parties, as well as the person or entity served with the subpoena, if said Conference has not yet been conducted. If the Conference has been conducted, upon written request of any party or the person or entity served with the subpoena, a similar conference may be conducted regarding production of ESI pursuant to the subpoena. As used herein, the words “party” or “parties” include any person or entity that is served with a subpoena pursuant to Fed.R.Civ.P. 45. Nothing contained herein modifies Fed.R.Civ.P. 45 and, specifically, the provision of Rule 45(c)(2)(B) regarding the effect of a written objection to inspection or copying of any or all of the designated materials or premises.

3. In this Protocol, the following terms have the following meanings:

- A. “Meta-Data” means: (i) information embedded in a Native File that is not ordinarily viewable or printable from the application that generated, 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 or otherwise manipulated by a user of such system. Meta-Data is a subset of ESI.

B. “Native File(s)” means ESI in the electronic format of the application in which such ESI is normally created, viewed and/or modified. Native Files are a subset of ESI.

C. “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 computer systems. In the absence of agreement of the parties or order of Court, a Static Image should be 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 should be produced together with Static Images.

#### **CONFERENCE OF PARTIES AND REPORT**

4. The parties are encouraged to consider conducting a Conference of Parties to discuss discovery of ESI regardless of whether such a Conference is ordered by the Court. The Conference of Parties should be conducted in person whenever practicable. Within 10 calendar days thereafter, the parties may wish to file, or the Court may order them to file, a joint report regarding the results of the Conference. This process is also encouraged if applicable, in connection with a subpoena

for ESI under Fed.R.Civ.P. 45. The report may state that the parties do not desire discovery of ESI, in which event Paragraphs 4A and B are inapplicable.

- A. The report should, without limitation, state in the section captioned “Disclosure or discovery of electronically stored information should be handled as follows,” the following:
  - (1) Any areas on which the parties have reached agreement and, if any, on which the parties request Court approval of that agreement;
  - (2) Any areas on which the parties are in disagreement and request intervention of the Court.
  
- B. The report should, without limitation, if it proposes a “clawback” agreement, “quick peek,” or testing or sampling, specify the proposed treatment of privileged information and work product, in a manner that, if applicable, complies with the standard set forth in *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), and other applicable precedent. On-site inspections of ESI under Fed.R.Civ.P. 34(b) should only be permitted in circumstances where good cause and specific need have been demonstrated by the party seeking disclosure of ESI (the “Requesting Party”), or by agreement of the parties. In appropriate circumstances the Court may condition on-site inspections of ESI to be performed by independent third party experts, or set such other conditions as are agreed by the parties or deemed appropriate by the Court.

- C. Unless otherwise agreed by the parties, the report described by this provision should be filed with the Court prior to the commencement of discovery of ESI.

**NEED FOR PRIOR PLANNING**

5. Insofar as it relates to ESI, prior planning and preparation is essential for a Conference of Parties pursuant to Fed.R.Civ.P. 16, 26(f), and this Protocol. Counsel for the Requesting Party and Counsel for the party producing, opposing, or seeking to limit disclosure of ESI (“Producing Party”) bear the primary responsibility for taking the planning actions contained herein. Failure to reasonably comply with the planning requirements in good faith may be a factor considered by the Court in imposing sanctions.

**EXCHANGE OF INFORMATION BEFORE RULE 26(f) CONFERENCE**

6. Insofar as it relates to ESI, in order to have a meaningful Conference of Parties, it may be necessary for parties to exchange information prior to the Fed.R.Civ.P. 26(f) Conference of Parties. Parties are encouraged to take the steps described in ¶7 of this Protocol and agree on a date that is prior to the Fed.R.Civ.P. 26(f) Conference of Parties, on which agreed date they will discuss by telephone whether it is necessary or convenient to exchange information about ESI prior to the conference.

- A. A reasonable request for prior exchange of information may include information relating to network design, the types of databases, database dictionaries, the access control list and security access logs and rights of individuals to access the system and specific files and applications, the ESI

document retention policy, organizational chart for information systems personnel, or the backup and systems recovery routines, including, but not limited to, tape rotation and destruction/overwrite policy.

- B. An unreasonable request for a prior exchange of information should not be made.
- C. A reasonable request for a prior exchange of information should not be denied.
- D. To the extent practicable, the parties should, prior to the Fed.R.Civ.P. 26(f) Conference of Parties, discuss the scope of discovery of ESI, including whether the time parameters of discoverable ESI, or for subsets of ESI, may be narrower than the parameters for other discovery.
- E. Prior to the Fed.R.Civ.P. 26(f) Conference of Parties, Counsel should discuss with their clients and each other who will participate in the Fed.R.Civ.P. 26(f) Conference of Parties. This discussion should specifically include whether one or more participants should have an ESI coordinator (*see* Paragraph 7.B) participate in the Conference. If one participant believes that the other should have an ESI coordinator participate, and the other disagrees, the Requesting Party should state its reasons in a writing sent to all other parties within a reasonable time before the Rule 26(f) Conference. If the Court subsequently determines that the Conference was not productive due

to the absence of an ESI coordinator, it may consider the letter in conjunction with any request for sanctions under Fed.R.Civ.P. 37.

**PREPARATION FOR RULE 26(f) CONFERENCE**

7. Prior to the Fed.R.Civ.P. 26(f) Conference of Parties, Counsel for the parties should:
  - A. Take such steps as are necessary to advise their respective clients, including, but not limited to, “key persons” with respect to the facts underlying the litigation, and information systems personnel, of the substantive principles governing the preservation of relevant or discoverable ESI while the lawsuit is pending. As a general principle to guide the discussion regarding litigation hold policies, Counsel should consider the following criteria:
    - (1) Scope of the “litigation hold,” including:
      - (a) A determination of the categories of potentially discoverable information to be segregated and preserved;
      - (b) Discussion of the nature of issues in the case, as per Fed.R.Civ.P. 26(b)(1);
        - (i) Whether ESI is relevant to only some or all claims and defenses in the litigation;
        - (ii) Whether ESI is relevant to the subject matter involved in the action;
      - (c) Identification of “key persons,” and likely witnesses and persons with knowledge regarding relevant events;

- (d) The relevant time period for the litigation hold;
- (2) Analysis of what needs to be preserved, including:
- (a) The nature of specific types of ESI, including, email and attachments, word processing documents, spreadsheets, graphics and presentation documents, images, text files, hard drives, databases, instant messages, transaction logs, audio and video files, voicemail, Internet data, computer logs, text messages, or backup materials, and Native Files, and how it should be preserved:
  - (b) the extent to which Meta-Data, deleted data, or fragmented data, will be subject to litigation hold;
  - (c) paper documents that are exact duplicates of ESI;
  - (d) any preservation of ESI that has been deleted but not purged;
- (3) Determination of where ESI subject to the litigation hold is maintained, including:
- (a) format, location, structure, and accessibility of active storage, backup, and archives;
    - (i) servers;
    - (ii) computer systems, including legacy systems;
    - (iii) remote and third-party locations;

- (iv) back-up media (for disasters) vs. back-up media for archival purposes/record retention laws;
  - (b) network, intranet, and shared areas (public folders, discussion databases, departmental drives, and shared network folders);
  - (c) desktop computers and workstations;
  - (d) portable media; laptops; personal computers; PDA's; paging devices; mobile telephones; and flash drives;
  - (e) tapes, discs, drives, cartridges and other storage media;
  - (f) home computers (to the extent, if any, they are used for business purposes);
  - (g) paper documents that represent ESI.
- (4) Distribution of the notification of the litigation hold:
- (a) to parties and potential witnesses;
  - (b) to persons with records that are potentially discoverable;
  - (c) to persons with control over discoverable information; including:
    - (i) IT personnel/director of network services;
    - (ii) custodian of records;
    - (iii) key administrative assistants;
  - (d) third parties (contractors and vendors who provide IT services).

- (5) Instructions to be contained in a litigation hold notice, including that:
- (a) there will be no deletion, modification, alteration of ESI subject to the litigation hold;
  - (b) the recipient should advise whether specific categories of ESI subject to the litigation hold require particular actions (*e.g.*, printing paper copies of email and attachments) or transfer into “read only” media;
  - (c) loading of new software that materially impacts ESI subject to the hold may occur only upon prior written approval from designated personnel;
  - (d) where Meta-Data, or data that has been deleted but not purged, is to be preserved, either a method to preserve such data before running compression, disk defragmentation or other computer optimization or automated maintenance programs or scripts of any kind (“File and System Maintenance Procedures”), or the termination of all File and System Maintenance Procedures during the pendency of the litigation hold in respect of Native Files subject to preservation;

- (e) reasonably safeguarding and preserving all portable or removable electronic storage media containing potentially relevant ESI;
  - (f) maintaining hardware that has been removed from active production, if such hardware contains legacy systems with relevant ESI and there is no reasonably available alternative that preserves access to the Native Files on such hardware.
- (6) Monitoring compliance with the notification of litigation hold, including:
- (a) identifying contact person who will address questions regarding preservation duties;
  - (b) identifying personnel with responsibility to confirm that compliance requirements are met;
  - (c) determining whether data of "key persons" requires special handling (*e.g.*, imaging/cloning hard drives);
  - (d) periodic checks of logs or memoranda detailing compliance;
  - (e) issuance of periodic reminders that the litigation hold is still in effect.
- B. Identify one or more information technology or information systems personnel to act as the ESI coordinator and discuss ESI with that person;

- C. Identify those personnel who may be considered “key persons” by the events placed in issue by the lawsuit and determine their ESI practices, including those matters set forth in Paragraph 7.D, below. The term “key persons” is intended to refer to both the natural person or persons who is/are a “key person(s)” with regard to the facts that underlie the litigation, and any applicable clerical or support personnel who directly prepare, store, or modify ESI for that key person or persons, including, but not limited to, the network administrator, custodian of records or records management personnel, and an administrative assistant or personal secretary;
- D. Become reasonably familiar<sup>1</sup> with their respective clients’ current and relevant past ESI, if any, or alternatively, identify a person who can participate in the Fed.R.Civ.P. 26(f) Conference of Parties and who is familiar with at least the following:
- (1) Email systems; blogs; instant messaging; Short Message Service (SMS) systems; word processing systems; spreadsheet and database systems; system history files, cache files, and cookies; graphics, animation, or document presentation systems; calendar systems; voice mail systems, including specifically, whether such systems

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<sup>1</sup> As used herein, the term “reasonably familiar” contemplates a heightened level of familiarity with any ESI that is identified by opposing counsel pursuant to Paragraph 6 of this Protocol, however, that level of familiarity is conditioned upon the nature of the pleadings, the circumstances of the case, and the factors contained in Fed.R.Civ.P. 26(b)(2)(C).

include ESI; data files; program files; internet systems; and, intranet systems. This Protocol may include information concerning the specific version of software programs and may include information stored on electronic bulletin boards, regardless of whether they are maintained by the party, authorized by the party, or officially sponsored by the party; provided however, this Protocol extends only to the information to the extent such information is in the possession, custody, or control of such party. To the extent reasonably possible, this includes the database program used over the relevant time, its database dictionary, and the manner in which such program records transactional history in respect to deleted records.

- (2) Storage systems, including whether ESI is stored on servers, individual hard drives, home computers, “laptop” or “notebook” computers, personal digital assistants, pagers, mobile telephones, or removable/portable storage devices, such as CD-Roms, DVDs, “floppy” disks, zip drives, tape drives, external hard drives, flash, thumb or “key” drives, or external service providers.
- (3) Back up and archival systems, including those that are onsite, offsite, or maintained using one or more third-party vendors. This Protocol may include a reasonable inquiry into the back-up routine, application, and process and location of storage media, and requires

inquiry into whether ESI is reasonably accessible without undue burden or cost, whether it is compressed, encrypted, and the type of device on which it is recorded (*e.g.*, whether it uses sequential or random access), and whether software that is capable of rendering it into usable form without undue expense is within the client's possession, custody, or control.

- (4) Obsolete or "legacy" systems containing ESI and the extent, if any, to which such ESI was copied or transferred to new or replacement systems.
- (5) Current and historical website information, including any potentially relevant or discoverable statements contained on that or those site(s), as well as systems to back up, archive, store, or retain superseded, deleted, or removed web pages, and policies regarding allowing third parties' sites to archive client website data.
- (6) Event data records automatically created by the operation, usage, or polling of software or hardware (such as recorded by a motor vehicle's GPS or other internal computer prior to an occurrence), if any and if applicable, in automobiles, trucks, aircraft, vessels, or other vehicles or equipment.

- (7) Communication systems, if any and if applicable, such as ESI records of radio transmissions, telephones, personal digital assistants, or GPS systems.
- (8) ESI erasure, modification, or recovery mechanisms, such as Meta-Data scrubbers or programs that repeatedly overwrite portions of storage media in order to preclude data recovery, and policies regarding the use of such processes and software, as well as recovery programs that can defeat scrubbing, thereby recovering deleted, but inadvertently produced ESI which, in some cases, may even include privileged information.
- (9) Policies regarding records management, including the retention or destruction of ESI prior to the client receiving knowledge that a claim is reasonably anticipated.
- (10) “Litigation hold” policies that are instituted when a claim is reasonably anticipated, including all such policies that have been instituted, and the date on which they were instituted.
- (11) The identity of custodians of key ESI, including “key persons” and related staff members, and the information technology or information systems personnel, vendors, or subcontractors who are best able to describe the client’s information technology system.

- (12) The identity of vendors or subcontractors who store ESI for, or provide services or applications to, the client or a key person; the nature, amount, and a description of the ESI stored by those vendors or subcontractors; contractual or other agreements that permit the client to impose a “litigation hold” on such ESI; whether or not such a “litigation hold” has been placed on such ESI; and, if not, why not.
- E. Negotiation of an agreement that outlines what steps each party will take to segregate and preserve the integrity of relevant or discoverable ESI. This agreement may provide for depositions of information system personnel on issues related to preservation, steps taken to ensure that ESI is not deleted in the ordinary course of business, steps taken to avoid alteration of discoverable ESI, and criteria regarding the operation of spam or virus filters and the destruction of filtered ESI.

**TOPICS TO DISCUSS AT RULE 26(f) CONFERENCE**

- 8. The following topics, if applicable, should be discussed at the Fed.R.Civ.P. 26(f) Conference of Parties:
  - A. The anticipated scope of requests for, and objections to, production of ESI, as well as the form of production of ESI and, specifically, but without limitation, whether production will be of the Native File, Static Image, or other searchable or non-searchable formats.

- (1) If the parties are unable to reach agreement on the format for production, ESI should be produced to the Requesting Party as Static Images. When the Static Image is produced, the Producing Party should maintain a separate file as a Native File and, in that separate file, it should not modify the Native File in a manner that materially changes the file and the Meta-Data. After initial production in Static Images is complete, a party seeking production of Native File ESI should demonstrate particularized need for that production.
- (2) The parties should discuss whether production of some or all ESI in paper format is agreeable in lieu of production in electronic format.
- (3) When parties have agreed or the Court has ordered the parties to exchange all or some documents as electronic files in Native File format in connection with discovery, the parties should collect and produce said relevant files in Native File formats in a manner that preserves the integrity of the files, including, but not limited to, the contents of the file, the Meta-Data (including System Meta-Data, Substantive Meta-Data, and Embedded Meta-Data, as more fully described in Paragraph 11 of this Protocol) related to the file, and the file's creation date and time. The general process to preserve the data integrity of a file may include one or more of the following procedures: (a) duplication of responsive files in the file system (*i.e.*,

creating a forensic copy, including a bit image copy, of the file system or pertinent portion), (b) performing a routine copy of the files while preserving Meta-Data (including, but not limited to, creation date and time), and/or (c) using reasonable measures to prevent a file from being, or indicate that a file has been, modified, either intentionally or unintentionally, since the collection or production date of the files. If any party desires to redact contents of a Native File for privilege, trade secret, or other purposes (including, but not limited to, Meta-Data), then the Producing Party should indicate that the file has been redacted, and an original, unmodified file should be retained at least during the pendency of the case.

- B. Whether Meta-Data is requested for some or all ESI and, if so, the volume and costs of producing and reviewing said ESI.
- C. Preservation of ESI during the pendency of the lawsuit, specifically, but without limitation, applicability of the “safe harbor” provision of Fed.R.Civ.P. 37, preservation of Meta-Data, preservation of deleted ESI, back up or archival ESI, ESI contained in dynamic systems<sup>2</sup>, ESI destroyed or overwritten by the routine operation of systems, and, offsite and offline ESI (including ESI stored on home or personal computers). This discussion

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<sup>2</sup> A “dynamic system” is a system that remains in use during the pendency of the litigation and in which ESI changes on a routine and regular basis, including the automatic deletion or overwriting of such ESI.

should include whether the parties can agree on methods of review of ESI by the responding party in a manner that does not unacceptably change Meta-Data.

- (1) If Counsel are able to agree, the terms of an agreed-upon preservation order may be submitted to the Court;
- (2) If Counsel are unable to agree, they should attempt to reach agreement on the manner in which each party should submit a narrowly tailored, proposed preservation order to the Court for its consideration.

D. Post-production assertion, and preservation or waiver of, the attorney-client privilege, work product doctrine, and/or other privileges in light of “clawback,” “quick peek,” or testing or sampling procedures, and submission of a proposed order pursuant to the holding of *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D.Md. 2005), and other applicable precedent. If Meta-Data is to be produced, Counsel may agree, and should discuss any agreement, that Meta-Data not be reviewed by the recipient and the terms of submission of a proposed order encompassing that agreement to the Court. Counsel should also discuss procedures under which ESI that contains privileged information or attorney work product should be immediately returned to the Producing Party if the ESI appears on its face to have been inadvertently produced or if there is prompt written notice of

inadvertent production by the Producing Party. The Producing Party should maintain unaltered copies of all such returned materials under the control of Counsel of record. This provision is procedural and return of materials pursuant to this Protocol is without prejudice to any substantive right to assert, or oppose, waiver of any protection against disclosure.

- E. Identification of ESI that is or is not reasonably accessible without undue burden or cost, specifically, and without limitation, the identity of such sources and the reasons for a contention that the ESI is or is not reasonably accessible without undue burden or cost, the methods of storing and retrieving that ESI, and the anticipated costs and efforts involved in retrieving that ESI. The party asserting that ESI is not reasonably accessible without undue burden or cost should be prepared to discuss in reasonable detail, the information described in Paragraph 10 of this Protocol.
- F. Because identifying information may not be placed on ESI as easily as bates-stamping paper documents, methods of identifying pages or segments of ESI produced in discovery should be discussed, and, specifically, and without limitation, the following alternatives may be considered by the parties: electronically paginating Native File ESI pursuant to a stipulated agreement that the alteration does not affect admissibility; renaming Native Files using bates-type numbering systems, *e.g.*, ABC0001, ABC0002, ABC0003, with some method of referring to unnumbered “pages” within each file; using

software that produces “hash marks” or “hash values” for each Native File; placing pagination on Static Images; or any other practicable method. The parties are encouraged to discuss the use of a digital notary for producing Native Files.

- G. The method and manner of redacting information from ESI if only part of the ESI is discoverable. As set forth in Paragraph 11.D, if Meta-Data is redacted from a file, written notice of such redaction, and the scope of that redaction, should be provided.
- H. The nature of information systems used by the party or person or entity served with a subpoena requesting ESI, including those systems described in Paragraph 7.D above. This Protocol may suggest that Counsel be prepared to list the types of information systems used by the client and the varying accessibility, if any, of each system. It may suggest that Counsel be prepared to identify the ESI custodians, for example, by name, title, and job responsibility. It also may suggest that, unless impracticable, Counsel be able to identify the software (including the version) used in the ordinary course of business to access the ESI, and the file formats of such ESI.
- I. Specific facts related to the costs and burdens of preservation, retrieval, and use of ESI.
- J. Cost sharing for the preservation, retrieval and/or production of ESI, including any discovery database, differentiating between ESI that is

reasonably accessible and ESI that is not reasonably accessible; provided however that absent a contrary showing of good cause, *e.g.*, Fed.R.Civ.P. 26(b)(2)(C), the parties should generally presume that the Producing Party bears all costs as to reasonably accessible ESI and, provided further, the parties should generally presume that there will be cost sharing or cost shifting as to ESI that is not reasonably accessible. The parties may choose to discuss the use of an Application Service Provider that is capable of establishing a central repository of ESI for all parties.

- K. Search methodologies for retrieving or reviewing ESI such as identification of the systems to be searched; identification of systems that will not be searched; restrictions or limitations on the search; factors that limit the ability to search; the use of key word searches, with an agreement on the words or terms to be searched; using sampling to search rather than searching all of the records; limitations on the time frame of ESI to be searched; limitations on the fields or document types to be searched; limitations regarding whether back up, archival, legacy or deleted ESI is to be searched; the number of hours that must be expended by the searching party or person in conducting the search and compiling and reviewing ESI; and the amount of pre-production review that is reasonable for the Producing Party to undertake in light of the considerations set forth in Fed.R.Civ.P. 26(b)(2)(C).

- L. Preliminary depositions of information systems personnel, and limits on the scope of such depositions. Counsel should specifically consider whether limitations on the scope of such depositions should be submitted to the Court with a proposed order that, if entered, would permit Counsel to instruct a witness not to answer questions beyond the scope of the limitation, pursuant to Fed.R.Civ.P. 30(d)(1).
- M. The need for two-tier or staged discovery of ESI, considering whether ESI initially can 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 latter stage or stages. Absent agreement or good cause shown, discovery of ESI should proceed in the following sequence: 1) after receiving requests for production of ESI, the parties should search their ESI, other than that identified as not reasonably accessible without undue burden or cost, and produce responsive ESI within the parameters of Fed.R.Civ.P. 26(b)(2)(C); 2) searches of or for ESI identified as not reasonably accessible should not be conducted until the prior step has been completed; and, 3) requests for information expected to be found in or among ESI that was identified as not reasonably accessible should be narrowly focused, with a factual basis supporting each request.
- N. The need for any protective orders or confidentiality orders, in conformance with the Local Rules and substantive principles governing such orders.

- O. Any request for sampling or testing of ESI; the parameters of such requests; the time, manner, scope, and place limitations that will voluntarily or by Court order be placed on such processes; the persons to be involved; and the dispute resolution mechanism, if any, agreed-upon by the parties.
- P. Any agreement concerning retention of an agreed-upon Court expert, retained at the cost of the parties, to assist in the resolution of technical issues presented by ESI.

### **PARTICIPANTS**

- 9. The following people:
  - A. Should, absent good cause, participate in the Fed.R.Civ.P. 26(f) Conference of Parties: lead counsel and at least one representative of each party.
  - B. May participate in the Fed.R.Civ.P. 26(f) Conference of Parties: clients or representatives of clients or the entity served with a subpoena; the designated ESI coordinator for the party; forensic experts; and in-house information system personnel. Identification of an expert for use in a Fed.R.Civ.P. 26(f) Conference of Parties does not, in and of itself, identify that person as an expert whose opinions may be presented at trial within the meaning of Fed.R.Civ.P. 26(b)(4)(A, B).
  - C. If a party is not reasonably prepared for the Fed.R.Civ.P. 26(f) Conference of Parties in accordance with the terms of this Protocol, that factor may be

used to support a motion for sanctions by the opposing party for the costs incurred in connection with that Conference.

### **REASONABLY ACCESSIBLE**

10. No party should object to the discovery of ESI pursuant to Fed.R.Civ.P. 26(b)(2)(B) on the basis that it is not reasonably accessible because of undue burden or cost unless the objection has been stated with particularity, and not in conclusory or boilerplate language. Wherever the term “reasonably accessible” is used in this Protocol, the party asserting that ESI is not reasonably accessible should be prepared to specify facts that support its contention.

### **PRINCIPLES RE: META-DATA**

11. The production of Meta-Data apart from its Native File may impose substantial costs, either in the extraction of such Meta-Data from the Native Files, or in its review for purposes of redacting non-discoverable information contained in such Meta-Data. The persons involved in the discovery process are expected to be cognizant of those costs in light of the various factors established in Fed.R.Civ.P. 26(b)(2)(C). The following principles should be utilized in determining whether Meta-Data may be discovered:

- A. Meta-Data is part of ESI. Such Meta-Data, however, may not be relevant to the issues presented or, if relevant, not be reasonably subject to discovery given the Rule 26(b)(2)(C) cost-benefit factors. Therefore, it may be subject to cost-shifting under Fed.R.Civ.P. 26(b)(2)(C).
- B. Meta-Data may generally be viewed as either System Meta-Data, Substantive Meta-Data, or Embedded Meta-Data. System Meta-Data is data that is

automatically generated by a computer system. For example, System Meta-Data often includes information such as the author, date and time of creation, and the date a document was modified. Substantive Meta-Data is data that reflects the substantive changes made to the document by the user. For example, it may include the text of actual changes to a document. While no generalization is universally applicable, System Meta-Data is less likely to involve issues of work product and/or privilege.

- C. Except as otherwise provided in sub-paragraph E, below, Meta-Data, especially substantive Meta-Data, need not be routinely produced, except upon agreement of the requesting and producing litigants, or upon a showing of good cause in a motion filed by the Requesting Party in accordance with the procedures set forth in the Local Rules of this Court. Consideration should be given to the production of System Meta-Data and its production is encouraged in instances where it will not unnecessarily or unreasonably increase costs or burdens. As set forth above, upon agreement of the parties, the Court will consider entry of an order approving an agreement that a party may produce Meta-Data in Native Files upon the representation of the recipient that the recipient will neither access nor review such data. This Protocol does not address the substantive issue of the duty to preserve such Meta-Data, the authenticity of such Meta-Data, or its admissibility into evidence or use in the course of depositions or other discovery.

- D. If a Producing Party produces ESI without some or all of the Meta-Data that was contained in the ESI, the Producing Party should inform all other parties of this fact, in writing, at or before the time of production.
- E. Some Native Files contain, in addition to Substantive Meta-Data and/or System Meta-Data, Embedded Meta-Data, which for purposes of this Protocol, means the text, numbers, content, data, or other information that is directly or indirectly inputted into a Native File by a user and which is not typically visible to the user viewing the output display of the Native File on screen or as a print out. Examples of Embedded Meta-Data include, but are not limited to, spreadsheet formulas (which display as the result of the formula operation), hidden columns, externally or internally linked files (*e.g.*, sound files in Powerpoint presentations), references to external files and content (*e.g.*, hyperlinks to HTML files or URLs), references and fields (*e.g.*, the field codes for an auto-numbered document), and certain database information if the data is part of a database (*e.g.*, a date field in a database will display as a formatted date, but its actual value is typically a long integer). Subject to the other provisions of this Protocol related to the costs and benefits of preserving and producing Meta-Data (see generally Paragraph 8), subject to potential redaction of Substantive Meta-Data, and subject to reducing the scope of production of Embedded Meta-Data, Embedded Meta-Data is generally discoverable and in appropriate cases, *see*

Fed.R.Civ.P. 26(b)(2)(C), should be produced as a matter of course. If the parties determine to produce Embedded Meta-Data, either in connection with a Native File production or in connection with Static Image production in lieu of Native File production, the parties should normally discuss and agree on use of appropriate tools and methods to remove other Meta-Data, but preserve the Embedded Meta-Data, prior to such production.

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5 **UNITED STATES DISTRICT COURT**  
6 **NORTHERN DISTRICT OF CALIFORNIA**

7 ) Case Number: C xx-xxxx

8 ) [MODEL] STIPULATED ORDER RE:  
9 ) DISCOVERY OF ELECTRONICALLY  
10 ) STORED INFORMATION FOR  
11 ) STANDARD LITIGATION

9 Plaintiff(s),

10 vs.

12 Defendant(s).

13  
14 **1. PURPOSE**

15 This Order will govern discovery of electronically stored information (“ESI”) in this  
16 case as a supplement to the Federal Rules of Civil Procedure, this Court’s Guidelines for the  
17 Discovery of Electronically Stored Information, and any other applicable orders and rules.

18 **2. COOPERATION**

19 The parties are aware of the importance the Court places on cooperation and commit to  
20 cooperate in good faith throughout the matter consistent with this Court’s Guidelines for the  
21 Discovery of ESI.

22 **3. LIAISON**

23 The parties have identified liaisons to each other who are and will be knowledgeable  
24 about and responsible for discussing their respective ESI. Each e-discovery liaison will be, or  
25 have access to those who are, knowledgeable about the technical aspects of e-discovery,  
26 including the location, nature, accessibility, format, collection, search methodologies, and  
27 production of ESI in this matter. The parties will rely on the liaisons, as needed, to confer  
28 about ESI and to help resolve disputes without court intervention.

1           **4. PRESERVATION**

2           The parties have discussed their preservation obligations and needs and agree that  
3 preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the  
4 costs and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- 5           a) Only ESI created or received between \_\_\_\_\_ and \_\_\_\_\_ will be preserved;
- 6           b) The parties have exchanged a list of the types of ESI they believe should be  
7 preserved and the custodians, or general job titles or descriptions of custodians, for  
8 whom they believe ESI should be preserved, e.g., “HR head,” “scientist,” and  
9 “marketing manager.” The parties shall add or remove custodians as reasonably  
10 necessary;
- 11           c) The parties have agreed/will agree on the number of custodians per party for whom  
12 ESI will be preserved;
- 13           d) These data sources are not reasonably accessible because of undue burden or cost  
14 pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be  
15 preserved but not searched, reviewed, or produced: [e.g., backup media of [named]  
16 system, systems no longer in use that cannot be accessed];
- 17           e) Among the sources of data the parties agree are not reasonably accessible, the  
18 parties agree not to preserve the following: [e.g., backup media created before  
19 \_\_\_\_\_, digital voicemail, instant messaging, automatically saved versions of  
20 documents];
- 21           f) In addition to the agreements above, the parties agree data from these sources (a)  
22 could contain relevant information but (b) under the proportionality factors, should  
23 not be preserved: \_\_\_\_\_.

24           **5. SEARCH**

25           The parties agree that in responding to an initial Fed. R. Civ. P. 34 request, or earlier if  
26 appropriate, they will meet and confer about methods to search ESI in order to identify ESI  
27 that is subject to production in discovery and filter out ESI that is not subject to discovery.

28           **6. PRODUCTION FORMATS**

          The parties agree to produce documents in  PDF,  TIFF,  native and/or  paper or  
a combination thereof (check all that apply)] file formats. If particular documents warrant a  
different format, the parties will cooperate to arrange for the mutually acceptable production of  
such documents. The parties agree not to degrade the searchability of documents as part of the  
document production process.





ADMINISTRATIVE ORDER OF THE  
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby adopt, effective September 2, 2014, Rule 11-b of section 202.70(g) of the Uniform Rules for the Supreme and County Courts (Rules of Practice for the Commercial Division), to read as follows:

**Rule 11-b. Privilege Logs.**

(a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Categorical Approach or Document-By-Document Review.

(1) The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.

(2) In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the

document-by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.

(3) To the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients – together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.

  
\_\_\_\_\_  
Chief Administrative Judge of the Courts

Dated: July 8, 2014

AO/114/14