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GUIDELINES TO HELP LAWYERS PRACTICING IN THE COURT OF CHANCERY

The vast majority of attorneys who litigate in and appear before the Court conduct themselves in accordance with the highest traditions of Chancery practice. These Guidelines are intended to ensure that all attorneys are aware of the expectations of the Court and to provide helpful guidance in practicing in our Court. These Guidelines are not binding Court Rules, they are intended as a practice aid that will allow our excellent Bar to handle cases even more smoothly and to minimize disputes over process, rather than the substantive merits. These Guidelines do not establish a "standard of conduct" or a "standard of care" by which the performance of attorneys in a given case can or should be measured. The Guidelines are not intended to be used as a sword to wound adversaries. To the contrary, they are intended to reduce conflicts among counsel and parties over non-merits issues, and allow them to more efficiently and less contentiously handle their disputes in this Court. Accordingly, the Court does not intend that these Guidelines, or the sample forms attached hereto, be cited as authority in the context of any dispute before the Court.

These guidelines reflect some suggested best practices for moving cases forward to completion in the Court of Chancery. They have been developed jointly by the Court and its Rules Committee to provide help to practitioners. The members of the Court and its Rules Committee recognize that a particular situation may call for the parties to proceed in a different manner. Likewise, a member of the Court may prefer in the context of a given case that the parties proceed in a different manner.

The guidelines are subject to change. Please check the Court of Chancery website to make sure you have the most recent version. The Court maintains a separate set of guidelines regarding best practices for e-Filing, which are also available on the Court's website.

I. GUIDELINES FOR PRACTITIONERS FOR IN-COURT HEARINGS AND TRIALS IN THE COURT OF CHANCERY

1. Hearing Protocols

The Court of Chancery is a court of equity and the proceedings here are important to the parties. The judges of this Court and all of its staff take their duties seriously. A court proceeding is a dignified and important one. Please act accordingly and with the respect that our system of justice deserves.

Side conversations, reactive facial expressions or outbursts, or other disturbances will not be tolerated.

If you have to exit for any reason while court is in session, please do so quietly and discreetly.

Attorneys should be mindful of their obligation to stand whenever they address the Court. Similarly, any person who is in attendance should stand when being introduced to the Court. And of course, everyone should stand whenever the judge enters or leaves the courtroom.

Arrive early. The Court strives to start on time. You need time to set up. Before the hearing, the court clerks and reporters need to obtain information from counsel.

2. Respect for the Court and Court Staff

Throughout the litigation process, you will deal regularly with our court clerks and reporters. The Court expects them to treat you with courtesy and respect, and to make the process as easy for you as possible while complying with the Court's rules and schedule. Please show them the same courtesy as you show the judges of the Court. Please realize that when you do not, the judges usually hear about it.

Clerks of the Court of Chancery have a key role in helping ensure that hearings and trials run smoothly and in a dignified fashion. Part of their job is to review with you some of the judges' basic expectations for how the case will proceed. If you believe that any of the expectations are unfair or inappropriate, you should make a motion to the judge. Until your motion is granted, you are expected to comply.

3. Respect for the Courthouse Facility

When you leave the courtroom, clean up and straighten your area. Remove or throw away your trash. Replace any chairs that were moved and slide them under the tables.

For the convenience of the bar and their clients, each side has access to a small conference room just outside the courtroom. This room can be used during breaks and before and after trial. The Court asks that you not have conversations in the rooms during trial, because the noise can be heard in the courtroom.

You are permitted to have food and refreshments delivered to the conference room so that you can eat lunch there while preparing for the next part of the hearing.

You also may rent the large conference room at the north end of the 12th Floor or a conference room on another floor of the Courthouse. Arrangements can be made with the Administrative Office of the Courts. Additional information and a copy of the application for reserving a room can be found online at http://courts.Delaware.gov/AOC/RoomRequest.stm.

Use of the conference rooms is a privilege. When your use is completed, remove or throw away all trash and straighten up the room. The room should look as neat at the end of the day as at the beginning.

The courtroom staff has been instructed to inform the judges about any litigation teams or lawyers that fail to clean up their area.

4. PDAs, Cell Phones, and Other Devices

The Court prohibits the possession of hand-held electronic devices of any kind in the courtroom itself. That includes blackberries, cell phones, smartphones, and PDAs of any kind, aircards and wireless or "Bluetooth" adapters or connectors, and any recording device. There are several important reasons for this. First, their use in court is disruptive, demeaning to the dignity of the proceeding, and unfair to those actually concentrating on the proceeding. Second, the signals from these devices can interfere with the courtroom reporting systems. Therefore, these devices must be put in the "off position" and left in your side's conference room in the vestibule of the courtroom.

If you fail to comply and it becomes apparent that you have a device in your possession—typically because you have failed to put it in the off position—do not expect a kind reaction. The device may be confiscated or you may be sanctioned. If you fail to comply twice, the possible consequences will be even more unpleasant, and, at a minimum, you should not expect to participate in the remainder of the proceeding.

The Court recognizes that many attorneys use their handheld device as a calendar. If it becomes necessary to discuss scheduling, please advise the Court that you need your handheld device. The Court likely will permit you to retrieve your device for purposes of the scheduling discussion.

5. Laptops for Trial or Hearing Use Only

The Court permits attorneys to bring laptops into court with the expectation that they will be used for purposes related to the trial or hearing. If they create noise, cause interference, or become a distraction, you may be asked to remove them.

If you intend to use your laptop to obtain a live transcript of the proceedings, your laptop must be preloaded with software to decode the Realtime feed from the court reporter. Examples of such software include Live Note and Summation Blaze. You should have a working knowledge of the features of your software and the options that must be enabled in order to obtain the feed. Laptops also must come equipped with either a 9 pin COM port (serial) adapter or a USB to COM port (serial) adapter, and any additional software drivers necessary to utilize such ports. Questions should be addressed to the Court of Chancery court reporters before arrival at the courthouse.

6. Consult About Technology Needs the Week Before

Too often attorneys plan to use technology in a trial or hearing, only to discover it does not work. Other times the attorneys ask to delay the start of a proceeding while they try to straighten out their technology.

If you plan to use technology, contact the Register in Chancery and the Court of Chancery court reporters approximately one week before to make arrangements to set up and check your equipment.

Do not ask to have technology resources made available if you do not intend to use them. The courthouse has a limited number of portable technology carts. If you have reserved it and then do not use it, you are wasting the Court's resources and potentially preventing someone else from using the equipment.

7. Proper Attire

Counsel should wear a formal business suit or dress with a formal business shirt or blouse. Counsel is not restricted to, nor does the Court have any preference for, any particular color.

II. GUIDELINES ON BEST PRACTICES FOR LITIGATING CASES BEFORE THE COURT OF CHANCERY

Sample forms are attached as exhibits. Downloadable and editable rich-text-file versions are available on the Court of Chancery website.

1. Role of Delaware Counsel

a. The concept of "local counsel" whose role is limited to administrative or ministerial matters has no place in the Court of Chancery. The Delaware lawyers who appear in a case are responsible to the Court for the case and its presentation.

b. If a Delaware lawyer signs a pleading, submits a brief, or signs a discovery request or response, it is the Delaware lawyer who is taking the positions set forth therein and making the representations to the Court. It does not matter whether the paper was initially or substantially drafted by a firm serving as "Of Counsel."

c. The members of the Court recognize that Delaware counsel and forwarding counsel frequently allocate responsibility for work and that, in some cases, the allocation will be heavily weighted to forwarding counsel. The members of the Court recognize that forwarding counsel may have primary responsibility for a matter from the client's perspective. This does not alter the Delaware lawyer's responsibility for the positions taken and the presentation of the case.

d. Non-Delaware counsel shall not directly make filings or initiate contact with the Court, absent extraordinary circumstances. Such contact must be conducted by Delaware counsel.

e. It is not acceptable for a Delaware lawyer to submit a letter from forwarding counsel under a cover letter saying, in substance, "Here is a letter from my forwarding counsel."

2. Courtesy Copies

a. Counsel should provide Chambers with two courtesy copies of any filing that they want the judge to read or that otherwise requires judicial action, such as letters, motions, and briefs. Counsel need not provide copies of routine filings, such as short motions that do not contain argument (because a supporting brief will be filed separately), motions for admission *pro hac vice*, motions for commission, or Rule 4(dc) certifications. As discussed below, moving counsel should promptly determine and advise the Court as to whether or not a motion for admission *pro hac vice* or for commission is opposed.

b. Courtesy copies of motions and briefs should be submitted with a transmittal letter devoid of argument. In addition to listing what is being transmitted, the transmittal letter should (i) recite the briefing schedule if the parties have agreed on one, or otherwise state that no agreement on scheduling has been reached, and (ii) note the date and time at which a hearing has been scheduled, or otherwise that no argument date has yet been set. Once that information has been provided in a letter, subsequent transmittal letters need not recite the information unless it has changed.

c. In expedited matters, it may be necessary to deliver papers to a judge's home. Please deliver only one copy and do not serve compendia of unreported cases unless requested. *Two* Chambers copies of all papers, including compendia and appendices, should still be delivered to the courthouse immediately when it next opens.

3. Contacting Chambers

a. Calls to Court: The Big Picture Issue

i. Counsel who calls Chambers and asks one of the judges' judicial assistants to schedule a matter has a special responsibility to the Court and to his adversaries. The Court expects that counsel who seeks a date is doing so on behalf of all parties and with their authority, absent an explicit indication to the contrary. Absent extraordinary circumstances, counsel should seek dates from the Court with all counsel on the line or only after obtaining authority from all parties to seek a list of available dates from the Court. Regrettably, the Court has experienced situations when counsel for the moving party has sought a date, not told the Court that he had not spoken to his adversaries, and then implied that the Court had insisted on the date by its own desire, rather than in response to a request by moving counsel. That puts the Court, its judicial assistants, and all the parties in an awkward and inappropriate situation. In those instances when the Court itself gives dates for argument on a motion where briefing is completed or soon to be completed, the judicial assistant will often attempt to get all parties on the line. In some situations, that is not practical and the moving party's counsel is given the dates and expected to share them

with all relevant parties, and the parties, through some chosen mechanism of their own, are expected to confirm that the dates are acceptable to all concerned. There have been instances that create concern about whether dates have been shared fairly.

b. Calls to Court: Specific Guidance

i. When counsel calls Chambers, absent extraordinary circumstances counsel for all parties should be on the call.

ii. If counsel for all parties are not on the call, then the lawyer(s) making the call must have made all reasonable efforts to contact the other parties before calling Chambers to both: (i) confer regarding scheduling; and (ii) inform them that the call is going to be made and invite them to participate.

iii. If counsel calls without other parties on the line, make clear to the judicial assistant that not all parties are on the line and be clear as to why and who knows what.

iv. When a judicial assistant gives a lawyer possible dates for a hearing, the lawyer must share all such dates with all relevant counsel and be fair in finding a date acceptable to all concerned. Unless a judicial assistant has expressly indicated that the Court prefers a specific date, do not give other counsel the impression that the Court has a preference.

v. The judicial assistants work hard to be fair to all concerned and to accommodate the needs of counsel. Please do what you can to make their lives easier by being fair to your adversaries in the scheduling process. Disputes between counsel involving scheduling should be presented directly to the Court for resolution, not to judicial assistants.

c. Letters

i. Letters should provide updates to the Court or address logistical and scheduling issues. They should not request substantive relief.

ii. The members of the Court do not want ongoing exchanges of letters. After a letter response and perhaps a letter reply, if warranted, it is time to schedule a conference. It even may be prudent to forego the response and reply and go straight to a conference.

iii. Letters are to be double spaced and Times New Roman 14-point typeface should be utilized. The text count should not exceed 1,000 words.

4. Scheduling Guidelines

a. The members of the Court expect counsel to work together to manage the case and prepare it in an appropriate fashion for the Court's consideration. In carrying out this task, counsel have a dual role both as officers of the Court and as client representatives.

b. The members of the Court expect counsel to work together to reach agreement on a fair briefing schedule given the scheduling requirements of the case. The Court of Chancery Rules do not have a default briefing schedule because counsel are expected to work together responsibly to craft a fair briefing schedule.

c. Before a scheduling dispute is brought to the Court, a good-faith direct effort—in-person or telephonic conversation—to work out the schedule by the senior Delaware lawyers is expected.

d. Guidance for scheduling in non-expedited cases:

i. In a non-expedited case, the general expectation for briefing a merits-related motion, such as under Rule 12(b), Rule 12(c), or Rule 56, is for the opening brief to be due 30 days after the motion is filed, the answering brief to be due 30 days later, and the reply 15 days after that.

ii. In a non-expedited case, the general expectation for briefing a discovery motion or non-case-dispositive procedural motion is for the motion to be a speaking motion. If, instead, the motion is to be briefed, the opening brief should be filed with the motion. The opposition would generally be due two weeks after the motion is filed and the reply one week after that.

iii. When negotiating schedules in non-expedited cases, counsel should be considerate and respectful of each other's legitimate professional and personal commitments. There may be good cause for a schedule that departs from these guidelines.

e. Guidance for scheduling in expedited cases:

i. Expedited cases are unique. The Court gives them priority. Counsel should give them similar priority.

ii. Briefing schedules should reflect the priority given to expedited cases. For non-case-dispositive motions, the time for responses and replies should generally be measured in days.

iii. Parties in expedited proceedings should attempt to facilitate third-party discovery involving their non-party agents, such as investment banks.

f. Guidance for scheduling in summary proceedings:

i. Summary proceedings generally can be completed in 45-60 days. A faster or slower schedule may be warranted based on external events or the complexity of the case. Director information cases and stock list cases will move faster.

ii. Because summary proceedings are by statute, "summary," dispositive motion practice is often wasteful and delays final resolution. The Court will therefore typically enter a schedule culminating in a prompt trial at which all arguments, factual and legal, can be presented summarily. When discussing scheduling, parties should keep this in mind.

iii. As a general rule, parties should allocate approximately one third of the total calendar time allotted for a summary proceeding to closing the pleadings and engaging in written discovery, one third for depositions and (if necessary) expert discovery, and one third for pre-trial preparation and trial, including briefing and the pre-trial order.

iv. Because many summary proceedings can be decided on a short, largely undisputed record, parties should consider ways to present summary proceedings on a paper record, such as by a trial with oral argument on a stipulated paper record.

g. Scheduling stipulations:

i. Case scheduling stipulations are helpful because they inform the Court that a case or motion is being addressed.

ii. Minor modifications to a briefing schedule or scheduling order that do not affect the date of the last brief or the hearing date do not require a stipulation. Counsel may agree in a letter or email, which will have the same import as a formal stipulation.

iii. The following exhibits provide sample scheduling stipulations:

(a) Exhibit 1 – A sample scheduling stipulation for a Rule 12(b)(6) motion.

(b) Exhibit 2 – A sample scheduling stipulation for cross-motions on summary judgment.

(c) Exhibit 3 – A sample case scheduling stipulation for a summary proceeding.

(d) Exhibit 4 – A sample scheduling stipulation for a preliminary injunction.

(e) Exhibit 5 – A sample case scheduling stipulation for a plenary action.

h. Recurring scheduling issues:

i. Identification of witnesses so they can be deposed during the period for discovery: Parties should generally use their reasonable best efforts to ensure that all witnesses who will testify at trial are deposed before trial. But parties sometimes fail to ask the standard interrogatory asking the other side to identify prospective trial witnesses. Then, they complain of unfairness if their adversary identifies a trial witness who was not deposed. This problem, which is one of the complaining party's own making, is avoided by using the standard interrogatory. One way to avoid disputes about this is to pose an interrogatory early in the case asking the other side to identify prospective trial witnesses. The party responding to that type of interrogatory should also facilitate efficient case processing by making a good faith effort to identify those persons under serious consideration to be trial witnesses, update the answer when required, and communicate in good faith with opposing counsel so that unnecessary deposition practice does not occur, but necessary depositions do. Because parties can avoid the problem of having discovery-style examination at trial by using the standard interrogatory, parties who fail to do so run the risk of not being able to depose a witness before trial.

ii. Expert reports:

(a) In general, more confusion than efficiency arises when parties do not build in rebuttal reports, or even reports when necessary. It is usually more efficient and less controversial in terms of generating disputes for the parties to have their experts exchange all of their reports, and only then be deposed. Although there are a variety of ways to achieve the objective, the goal is that all experts should have completed their reports and analysis before they are deposed and before trial. Absent extraordinary circumstances, no new expert analysis should be presented at trial. Rather, all expert analysis should be subject to fair testing through the pre-trial rebuttal or reply process and at deposition, so that parties and the Court have a reliable record on which to try the case.

(b) In general, the Court prefers that parties stipulate to limit expert written discovery to the final report and materials relied on or considered by the expert. Counsel should be aware that the Court understands the degree of involvement counsel typically has in preparing expert reports. Cross-examination based on changes in drafts is usually an uninformative exercise.

(c) Scheduling orders generally should contain a provision:

(i) Requiring the parties to identify any expert witnesses and the topics the expert(s) will offer testimony on; and

(ii) Specifying a schedule for the submission of expert reports.

(d) A sample expert discovery stipulation can be found at Exhibit 6.

iii. The temporal relation of dispositive motions to the trial:

(a) Parties often provide for summary judgment motions to be filed at the end of discovery with briefing to be completed on the motions very shortly before the pre-trial briefs and the pre-trial stipulation are due, and trial is to commence. This creates inefficiency and a false exigency in non-expedited cases. If the parties genuinely believe that a set of *undisputed* facts may exist on which a dispositive legal ruling may be made, then they should build time in for the Court to resolve the motion on a non-emergency basis.

(b) Litigants should consider whether summary judgment is an efficient or appropriate vehicle if the "undisputed" facts arrive in boxes from each side containing hundreds of exhibits with briefs arguing different versions of events. Likewise, if only a subset of issues is susceptible of resolution on summary judgment, the parties should consider whether the delay in trial is worth the cost, as opposed to including all the legal and factual arguments in the trial briefs.

5. Pleadings

a. Answers:

i. An answer should repeat the allegations of the complaint and then set forth the response below each allegation. Otherwise the Court has to look back and forth from answer to complaint to see what is being denied.

ii. Parties should take seriously the provisions of Rule 8(b) and not aggressively deny basic facts without a good faith basis for doing so.

iii. It should go without saying that parties must have a Rule 11 basis for affirmative defenses. Parties should not rotely recite a laundry list of affirmative defenses, without carefully considering the applicability of each defense to the facts of the case.

iv. The same principles apply to replies to counterclaims.

b. Amendments to pleadings:

i. If a party intends to oppose an amended pleading because the amendment would be futile, the Court prefers for the parties to stipulate to the amendment while reserving the right to challenge the sufficiency of the

amended pleading at the time a response is due or through an appropriate motion. Although it is not improper to oppose a motion to amend because the amendment would be futile, it is cumbersome because it results in briefing that is to some extent duplicative of a motion to dismiss, but with the party who would normally bear the burden on such a motion filing only one brief.

ii. An amended pleading should be filed as a separate docket entry. Do not simply refer back to the version that was attached to the motion to amend. That version is hard to find. It is also often unsigned and unverified and therefore does not comply with Rules 2(aa) and 11.

6. Motions

a. Non-Merit Related Motions

i. All Non-Merit Related Motions shall be filed with a supporting brief.

ii. Word limits for motions and for oppositions shall not exceed 3,000 and are limited to 2,000 for a reply.

b. 12(b)(6) or 12(c) Motions:

i. A Bound Copy of the Complaint and its Exhibits: Please submit two properly bound copies of the operative complaint and its exhibits when dismissal briefing is proceeding, as these are the key documents.

ii. Motions That Are Not 12(b)(6) or 12(c) Motions: It is a jarring experience for new law clerks to be given a box containing huge appendices that support a 12(b)(6) or 12(c) motion. For the judges of the Court of Chancery, that experience is also eyebrow raising as a challenge to a complaint must accept the well-pled facts as true and rely in addition only on the unambiguous terms of certain discrete kinds of documents (e.g., the contract in a contract case). Given the settled procedural standard, counsel should consider whether a 12(b)(6) or 12(c) motion is really appropriate if a large appendix is required. More typically, the need for an appendix signals a desire to argue a different set of facts, implicating at best Rule 56 and usually opening the door to at least some discovery before the motion can be considered. As such, counsel should think before filing a 12(b)(6) or 12(c) motion about conferring with the other side about an approach to discovery that would facilitate an early summary judgment motion instead.

c. Motions to expedite:

i. Although a motion to expedite historically has sometimes been viewed as

superfluous for a summary proceeding, a short motion can provide the Court with helpful context. The motion to expedite in a summary proceeding need not justify the need for expedition. Rather, it can simply make reference to the statutory authority for summary treatment, then address the desired schedule, including any external events that would make a particular schedule appropriate.

ii. The response to a motion to expedite should be in the form of an opposition to a motion. By statute, summary proceedings must be held promptly. Your opposition should therefore focus on what is a reasonable schedule given the circumstances facing the parties.

iii. Parties should outline their respective preferred schedules in the motion to expedite and opposition. The Court should not be left in the dark until the teleconference. To the extent parties can agree on all or a portion of an expedited schedule, they should do so.

iv. For initial case scheduling issues, if a plaintiff has sought expedited treatment or filed a summary proceeding, and if the plaintiff has made a good-faith effort to provide copies of the papers to the defendant(s) or their counsel and to speak directly to them if possible, then the plaintiff can and should contact Chambers to obtain a scheduling conference.

(a) The fact that the default date to respond to the complaint has not passed will not affect the Court's willingness to entertain the scheduling conference.

(b) The need for a defendant to obtain Delaware counsel will not affect the Court's willingness to entertain the scheduling conference. The Court generally will permit non-Delaware counsel, including in-house counsel, to appear for purposes of the initial scheduling conference. Regardless, there is a sufficient pool of quality Delaware lawyers available that a delay in securing Delaware counsel should be rare.

d. *Pro Hac Vice* Motions: Opposing counsel should contact Chambers promptly with any objection to a *pro hac vice* motion. Otherwise, the motion will be deemed unopposed.

e. Motions for Commission: Moving counsel should advise Chambers whether a motion is opposed or unopposed. Opposing counsel should respond by a single copy of a short letter promptly when asked by moving counsel if a motion for commission is opposed.

f. Substantive cross-motions:

i. If substantive cross-motions are contemplated, such as for judgment on the pleadings or for summary judgment, the parties shall work to reduce the

number of briefs. A four-brief sequence rather than a six-brief sequence is preferred.

ii. If there are multiple parties, the parties should consider the commonality of issues and attempt to come up with a logical sequence and coordination that reduces the number of briefs. In cases with large numbers of parties who each intend to file motions, the parties should consider filing briefs with colored covers like those used in the Supreme Court to help all concerned collate and use the briefs efficiently.

iii. Take note of the caution, set forth above, regarding the scheduling of dispositive cross-motions close to trial.

7. Discovery

a. Preservation of Electronically Stored Information

i. All counsel (including Delaware counsel) appearing in any case before this Court are reminded of their common law duty to their clients and the Court with respect to the preservation of electronically stored information ("ESI") in litigation. A party to litigation must take reasonable steps to preserve information, including ESI, that is potentially relevant to the litigation and that is within the party's possession, custody or control. ESI takes many forms and may be lost or deleted absent affirmative steps to preserve it. As set forth below, at the very minimum that means that parties and their counsel must develop and oversee a preservation process. Such a process should include the dissemination of a litigation hold notice to custodians of potentially relevant ESI.

ii. Counsel oversight of identification and preservation processes is very important and the adequacy of each process will be evaluated on a case-by-case basis. Once litigation has commenced, if a litigation hold notice has not already been disseminated, counsel should instruct their clients to take reasonable steps to act in good faith and with a sense of urgency to avoid the loss, corruption or deletion of potentially relevant ESI. Failing to take reasonable steps to preserve ESI may result in serious consequences for a party or its counsel.

iii. What steps will be considered to be reasonable will vary from litigation to litigation. In most cases, however, a party and its counsel (in-house and outside) should:

(a) Take a collaborative approach to the identification, location and preservation of potentially relevant ESI by specifically including in the discussion regarding the preservation processes an appropriate representative from the party's information technology function (if applicable);

(b) Develop written instructions for the preservation of ESI and distribute those instructions (as well as any updated, amended or modified instructions) in the form of a litigation hold notice to the custodians of potentially relevant ESI; and

(c) Document the steps taken to prevent the destruction of potentially relevant ESI.

iv. Experience has shown that some of the potential problem areas regarding preservation of ESI include business laptop computers, home computers (desktops, laptops, tablets and mobile devices), external or portable storage devices such as USB flash drives (also known as “thumb drives or key drives”) and personal email accounts. While this list is not exhaustive, it is meant to be a starting point for parties and their counsel in considering how and where their clients and their employees might store or retain potentially relevant ESI. Counsel and their clients should discuss the need to identify how custodians store their information, including document retention policies and procedures as well as the processes administrative or other personnel might use to create, edit, send, receive, store and destroy information for the custodians. Counsel also should take reasonable steps to verify information they receive about how ESI is created, modified, stored or destroyed.

v. While the development and implementation of a preservation process after litigation has commenced may not be sufficient by itself to avoid the imposition of sanctions by the Court if potentially relevant ESI is lost or destroyed, the Court will consider the good-faith preservation efforts of a party and its counsel. Counsel are reminded, however, that the duty to preserve potentially relevant ESI is triggered when litigation is commenced or when litigation is "reasonably anticipated," which could occur before litigation is filed.

vi. Parties and their counsel can agree with opposing parties and their counsel to limit or forego the discovery of ESI. Whether or not parties enter into such an agreement, however, it is beneficial for parties and their counsel to confer regarding the preservation of ESI early in the litigation. It is also recommended that after preservation has been addressed, counsel for all parties confer about the scope and timing of discovery of ESI. Some of those issues are addressed in further detail below.

b. Collection and Review of Documents in Discovery

i. Practitioners are reminded about the importance of the careful collection and review of documents (which, for the purposes of these Guidelines, includes electronically stored information) in proceedings before the Court of Chancery. The Court has been, and remains, reluctant to adopt a “one-size-fits-all” approach to the collection and review of documents,

especially given the variety of cases that come before the Court, where the issues, complexity, timing, relief sought and resources of the parties may differ dramatically. The Court also is mindful of the considerable burdens of collecting documents for review and production, and the potential leverage that these obligations can create in litigation. Thus, it seeks to remain flexible, reasonable and efficient in resolving discovery disputes. To help practitioners, a few observations and problem areas are discussed below.

ii. The Court encourages counsel to meet and confer promptly after the start of discovery to develop a discovery plan that includes electronic discovery. Transparency to the other parties regarding the process and parameters used to collect documents (*e.g.*, the custodians, electronic search terms, cutoff dates used, and steps taken) is essential to (i) identify potential areas of disagreement early in the process, and (ii) provide some protection to parties if problems later arise. 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.

iii. When interested persons are responsible for the collection or review of their own documents for purposes of production, the reliability of the process is more likely to be questioned. Accordingly, experienced outside counsel should 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. In addition, as a general matter, the Court prefers that, whenever practicable, outside counsel or professionals acting under their direction will conduct document collection and review. As with many discovery issues, a goose and gander discussion often helps parties reach a reasonable balance fitting to the particular case.

iv. Among other things, the procedures used to collect and review documents generally should include interviews of custodians who may possess responsive documents to identify how the custodians maintain their documents and the potential locations of responsive documents, including the files and computers of administrative or other personnel who prepare, send, receive or store documents on behalf of the custodians.

v. Unlike paper documents, electronically stored information is susceptible to modification or deletion during collection. Therefore, counsel should exercise care in developing appropriate collection procedures. In that regard, counsel should be mindful of the obligation to take reasonable steps to preserve information, including electronically stored information, which is potentially relevant to the litigation. Counsel also should consider issues of burden and expense, taking into account the needs of

the case, the amount in controversy, limitations on the parties' resources, and the relative importance of the various issues at stake in the litigation.

The Court is aware that in order for litigation to produce justice, the costs of the litigation must be proportionate to what is at stake. That awareness applies with special force to the subject of electronic discovery. Precisely because the extent of electronic discovery that is appropriate depends on case-specific factors, the Court has been reluctant to adopt mandatory requirements that may be unjust because they require expenditures that are unduly costly given the subject of a particular case. But because the Court has eschewed a mandatory approach, it is essential and not optional that the parties discuss this subject directly and try to reach a case-specific accord based on a candid appraisal of the information base each side has, the costs of employing various electronic discovery techniques, and the stakes at issue in the case. Through this process of good faith information sharing and give and take, plus application of the goose and gander rule, counsel should usually be able to fashion an effective, if necessarily imperfect approach. Given the reality of how most business is conducted and even how most of us generate information in our personal lives, it is unlikely that the subject of electronic discovery can be avoided in any class of cases altogether. Most relevant evidence will have been created electronically in the first instance and in the case of e-mails often never printed out in paper form. But the extent to which the parties will go to retrieve information electronically is a subject for good faith, case-specific consideration and counsel are expected to apply common sense judgment. And that especially applies when one party in a case has virtually no discovery burden. That advantaged position does not license the party to expect the other party that will have substantial production burdens to use means of electronic discovery that are disproportionate to the economics of the matter.

vi. The Court expects Delaware counsel to play an active role in the discovery process, including in the collection, review and production of documents, and in the assertion of privilege. If Delaware counsel does not directly participate in the collection, review and production of documents, Delaware counsel should, at a minimum, discuss with co-counsel the Court's expectations. In addition, Delaware counsel should be involved in making important decisions about the collection and review of documents and should receive regular updates, preferably in writing, regarding the decisions that are made on key issues, such as the selection of custodians and search terms. The Court expects Delaware counsel to be able to answer questions regarding the manner in which the document collection and review was conducted. It is therefore recommended that Delaware counsel and co-counsel collectively maintain a written description of the discovery process, including detailed information regarding efforts to preserve documents, custodians identified, search terms used, and what files were searched. A document can be found at Exhibit 10 that is

intended to assist counsel in developing a sound document collection process. Exhibit 10 is not intended to mandate issues to consider in every case, nor is it intended to be an exhaustive list of all issues that should be considered in any particular case.

vii. One of the most difficult parts of the discovery process involves reviewing documents for privilege, determining under the time pressure of discovery deadlines whether a document is privileged, and preparing the resulting privilege log. In the first instance, more junior lawyers typically are required to make the initial judgment calls about which documents might be subject to a claim of privilege. Understandably, lawyers are concerned about making a mistake and producing a privileged document. This often leads to a tendency to overdesignate documents as privileged, including by designating as privileged every document received or sent by anyone who is an attorney or any document that refers to an attorney, even though the attorney may not have been acting as an attorney and the communication may not have been for the purpose of facilitating the provision of legal advice. Likewise, preparing a privilege log is a professionally difficult task, because it requires the lawyer to describe the basis for the application of the privilege sufficiently so that the party seeking disclosure can understand the basis of the privilege assertion, but without disclosing the very information the privilege legitimately protects.

(a) Precisely because of these difficulties, and because disputes about the improper assertion of privilege are common, the senior lawyers in the case, especially senior Delaware lawyers, must provide guidance about how the privilege assertion process should unfold. That includes guidance about: 1) the Delaware standards for asserting any privileges the client wishes to assert; 2) protocols for identifying the initial cut of documents that warrant a closer review for privilege; 3) protocols for ensuring that the Delaware standards are applied with fidelity when determining that specific documents are exempt from production on privilege grounds; and 4) the Delaware requirements for setting forth on a privilege log sufficient information about the document to enable the opposing party and the court fairly to assess whether privilege properly has been asserted. Senior lawyers, including senior Delaware lawyers, should make the final decisions on difficult privilege questions. As important, senior lawyers, including senior Delaware lawyers, must ensure that the guidance provided was actually put into practice and followed. Although this does not mean that senior lawyers must personally conduct the privilege review or prepare the privilege log, they must take reasonable steps to ensure that privilege only has been asserted in accordance with a good faith reading of Delaware law, that there has not been systematic overdesignation, and that the privilege log contains sufficient descriptions of the documents in question. One possible approach

to fulfilling this duty would be for a senior Delaware lawyer to review a representative sample of the entries on the privilege log and associated documents in order to assess compliance with Delaware law and practice. By this or other means, the senior Delaware lawyers must personally assure themselves that the privilege assertion process has been conducted with integrity. What does this mean in practice? It means that when there is a hearing in the Court, a senior Delaware lawyer must be able to take the podium, explain the basis for the assertion of a disputed claim of privilege, and be knowledgeable about the privilege assertion process.

(b) Even more so than with other areas of discovery, it is essential to communicate with clarity about the assertion of privilege with your friends on the other side of the "v." Through the process of give-and-take, the parties often can minimize some of the burdens and the common misunderstandings in the privilege assertion process that lead to motion practice. Here are some suggestions:

i. The Court generally does not expect parties to log post-litigation communications. Although there may be exceptions, particularly in an injunction proceeding in a still-developing situation, frequently parties should be able to use the date on which suit was filed as a cutoff for privilege review.

ii. It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial.

iii. There are different approaches to logging email chains and email attachments. Some lawyers typically log only the top email in the chain. Others log every email in the chain. Some lawyers describe the attachment separately. Others allow the logging of the e-mail to suffice. Parties should attempt to agree on the procedures that both sides will use.

iv. Different cases may warrant different approaches to redactions. Often redacted copies are produced and a redaction log provided. Depending on what is at stake and

is cost-effective, the parties may agree that each side will withhold the entirety of a document if any part of the document is subject to a bona fide claim of privilege. Parties also may agree to dispense with a log for partially redacted emails or other communications where the face of the document provides the factual information that otherwise would appear on a log.

(c) When logging documents on a document-by-document basis, parties should bear in mind that a privilege log must describe the document being withheld in such a way that, without revealing information that is itself privileged or protected, the opposing party and the Court can assess the propriety of the asserted basis for withholding the document. It is the exceedingly rare, perhaps apocryphal, description that actually reveals the substance of underlying legal advice. The guiding principle for privilege logs is to provide opposing parties with sufficient information to allow them to challenge decisions to withhold documents for privilege. It is therefore inconsistent with that principle, and with the spirit of these guidelines, for parties who receive a proper privilege log to use it as the basis for a claim that the generation of the privilege log waived privilege in any way. The Court discourages use of a short list of repetitive descriptions. Descriptions should be document-specific, and should provide context so that the reader can understand the basis for the claim of privilege. Therefore, if the privilege in question is the attorney-client privilege, the log should explain the basis for the assertion of privilege and provide a brief identification of the issue involved. Whether the information provided in a privilege log is sufficient may depend on the nature of the claims in the litigation. Rote repetition of "Communication for the purpose of providing legal advice" is not adequate. "Communication for the purpose of providing legal advice regarding securities laws," on the other hand, might be adequate. Similarly, in a case challenging a merger, where both legal and business issues are in play, "Communication for the purpose of providing legal advice regarding merger" is not adequate. But "Communication for the purpose of providing legal advice regarding terms of draft merger agreement" might be adequate. If the individuals drafting and reviewing the log have difficulty describing the role of the lawyer or why the issue is primarily a legal one on which legal advice was sought or given, that may be an indication that the communication is not privileged. It may instead be a general business discussion on which a lawyer was included, a factual update, a cover email attaching documents, or an effort to schedule a conference call or a meeting. The requirement of a meaningful description thus not only provides necessary information to the other side, but also serves as a check

on over-designation.

(d) The parties should provide information about the individuals identified on the log, including whether they are attorneys, their titles, and their affiliations. The members of the Court have seen too many logs containing names without any identifying information about who is a lawyer and who works for whom. If third parties are recipients or authors of a document, the privilege assertion should address how their relationship with the client or counsel justifies maintaining the privilege (*e.g.*, is there a common interest exception or is the third-party a qualified advisor whose access to privileged communications is permissible). Additional detail and context will be necessary in certain other situations, such as, if someone is acting both as a business person and lawyer. In many situations where lawyers have mixed roles, counsel will have to segregate the privileged portions of communications from those that are non-privileged.

(e) To prepare a privilege log with integrity requires the involvement of senior lawyers who know the applicable standards, understand the precise roles played by the client representatives, and have the relationship and stature with the client to discuss documents frankly and make principled assertions of privilege. This is particularly true of the *many* common situations when a document is only partially subject to a claim of privilege (such as a portion of corporate minutes) and where the bulk of the document should be produced if responsive.

viii. The goose and gander rule is typically a good starting point for constructive discovery solutions. Through good faith discussion, the parties will better understand the basis for each other's production of privileged documents, reduce disputes based on misunderstandings, and foster a more efficient production process.

c. Expedited Discovery in Advance of a Preliminary Injunction Hearing

i. The Court routinely handles cases in which a preliminary injunction is requested on an expedited basis. The time constraints inherent in expedited litigation necessarily limit both the scope and timing of discovery and can impose considerable burdens on the parties. Accordingly, the Court expects the parties to work together in good faith to facilitate the timely completion of the discovery necessary for a fair presentation of the preliminary injunction application to the Court. The following guidelines set forth typical practice as to the conduct of expedited discovery in advance of a preliminary injunction hearing in high stakes commercial and corporate litigation. The Court encourages the parties and counsel to consider the practices described below, while

recognizing that it may be appropriate for the parties to proceed in a different manner in a particular situation, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

ii. Written Discovery. Although all types of written discovery may be used in the appropriate circumstances, in expedited cases seeking a preliminary injunction, written discovery typically is limited to document requests, as well as narrowly-tailored interrogatories intended primarily to identify persons with relevant knowledge. The parties' initial written discovery requests should be focused on the key issues relevant to the resolution of the matters presented in the application for a preliminary injunction. If further proceedings are necessary after the application is heard, there will be the opportunity for additional, non-duplicative discovery. To facilitate prompt responses to written discovery requests and the production of documents (which, for purposes of these Guidelines, includes electronically stored information), the plaintiff should serve its initial written discovery requests with the complaint or a motion to expedite (or if not feasible, as soon as possible thereafter), and the defendant should propound any requests it may have promptly.

The parties should agree upon a schedule so that initial written discovery and document production is completed before the start of depositions. Due to the nature of expedition, such a schedule usually will require the parties to respond to written discovery in a shorter time period than the default period set forth in the Court of Chancery Rules. In some cases, the parties may decide to forego formal responses in favor of informal communications regarding document production. To avoid misunderstandings or delays, the responses and objections to document requests, whether formal or informal, should make clear what categories of documents will be produced. The parties should meet and confer promptly to attempt to resolve any disputes regarding the scope of document production, with the understanding that time constraints necessarily limit the scope of discovery, including the ability to search and review documents extensively. In addition, the Court encourages documents to be produced on a "rolling basis" and for the parties to agree that certain significant documents (as discussed more below in "Document Collection") will be produced as soon as feasible after the start of discovery (typically subject to an agreement that they will be treated as "attorneys eyes only" until a confidentiality order is entered).

iii. Document Collection. When responding to written discovery requests, the parties are obligated to conduct a reasonable search for relevant and responsive documents. The expedited nature of preliminary injunction applications necessarily affects what is deemed to be "reasonable" by the Court. Although each party ultimately is responsible for its own document collection and production, the Court expects the parties to discuss

limitations on expedited discovery. In connection with the foregoing, the Court expects the parties to freely exchange information concerning the scope of their respective document collections (*e.g.*, what documents are being collected, how they are being collected, what computers or other electronic devices are being searched, and any search terms or other restrictions being utilized to collect documents).

After a request for a preliminary injunction is filed, the parties should collect and produce the "core documents" associated with that application promptly. Although every dispute is unique, attorneys who frequently practice before the Court generally can identify the documents that are most likely to contain relevant information. For example, where a corporate transaction (*e.g.*, a merger) is being challenged, the "core documents" typically include, at least, (i) the minutes of the relevant meetings of the board of directors and any board committees, (ii) the materials provided to the directors related to the transaction, (iii) the working group lists associated with the transaction, and (iv) the engagement agreements and fee arrangements with investment advisors.

The parties should identify the key custodians and focus their document collection efforts on those custodians. Typically, parties agree to limit the number of custodians from which each party collects. In connection with any such negotiations, each party should make a good faith, reasonable attempt to identify the custodians who are reasonably likely to possess relevant documents. Notwithstanding any agreement to limit the number of custodians, unless otherwise agreed, parties should collect from any centralized document repository or system that is likely to contain relevant documents (*e.g.*, document management systems, sharepoints, central files).

Parties typically agree to limit the computer devices and systems from which they collect, the date range associated with various document requests, and the file types collected (*e.g.*, excluding ".exe" files). Parties also typically agree that they will not produce documents created after the date that the complaint was filed, unless post-complaint events are or become relevant to the dispute.

Even in expedited discovery, counsel should interview the custodians from whom they have collected to understand, among other things, any potential sources of relevant documents (*e.g.*, centralized document repositories or systems, PDAs, work and home computers), determine the records that are kept in the ordinary course, and identify any relevant jargon, acronyms or code names.

Outside litigation counsel should actively oversee the collection of documents. As in any other case, the Court expects Delaware counsel to play an active role in the collection, review and production of documents

in expedited litigation. The role that the Court expects Delaware counsel to play is set forth above in the general discussion of document collection and review. Those expectations are not lessened in expedited litigation, and if anything become more important because of the absence of any room in the schedule to redress discovery shortcomings.

If search terms are utilized to identify potentially relevant documents, the parties should make a good-faith, reasonable attempt to negotiate those terms with the opposing parties. In any such discussions, the Court expects the parties to exchange relevant information, such as statistics concerning the number of documents or "hits" associated with particular search terms and examples of documents that are responsive to particular search terms but are not relevant to the case.

iv. Document Review and Production. The Court expects outside litigation counsel actively to oversee document collection, review and production pursuant to a reasoned process designed to result in the prompt production of the documents necessary for a fair presentation of the dispute to the Court.

The Court does not require documents to be produced in a particular format. The parties are expected to cooperate to produce documents in a format that is usable to the parties. Typically, the parties agree to produce most documents as single- or multiple-page image files, and to produce spreadsheets, audio and video files, etc., in their native format. The parties also typically agree to provide standard load files (*e.g.*, a data file for metadata and an image file for images), certain metadata (if reasonably available) and text-searchable documents. Absent agreement, the parties typically do not provide OCR (optical character recognition) data.

Eliminating the production of duplicate, substantively identical documents (both within and across custodians) is a standard practice that the Court encourages. In connection with the foregoing, parties typically record the custodians possessing duplicate copies and provide that information as a separate field in the production load files.

As mentioned above, the parties usually agree to produce significant documents as soon as possible, and all other documents on a rolling basis, and the Court encourages this practice.

v. Privilege and Redaction Logs. In expedited litigation, the Court encourages the parties to make agreements that reduce the time, expense and burden associated with conducting a document-by-document privilege review and preparing privilege and redaction logs so that the merits of the application may be developed in the limited time available and fairly presented to the Court.

For example, the parties may agree to limit the types of documents that will be logged (*e.g.*, to include only documents from a certain time frame or relating to certain subjects, or to exclude communications post-dating the filing of the complaint or solely between attorneys). The parties also may agree to defer a privilege log until later stages of the litigation.

The parties also frequently agree to forego a redaction log if the information in such a log would be redundant of information provided in the redacted documents—for example, if the redacted document identifies the sender and recipients of the communication, the general subject matter (*e.g.*, through a "subject" line on an email), and the basis for the redaction (*e.g.*, the redacted material is stamped "Redacted—attorney-client privilege").

Finally, the parties sometimes agree to forego a full document-by-document privilege review before production and, instead, enter into a "quick peek" agreement whereby the party seeking discovery is permitted to review responsive documents without effectuating a waiver of privilege by the producing party. Whether a quick peek agreement is appropriate depends on the facts and circumstances of each case, and counsel and client should confer to make an informed decision about whether to enter into such an agreement. A sample quick peek agreement is attached as Exhibit 11. This sample does not necessarily ensure that documents produced pursuant to the agreement will not be considered a waiver of privilege in other jurisdictions, and this risk should be discussed between counsel and client.

vi. Discovery from Third Parties. Expedited litigation often involves discovery of third parties, such as investment advisors. The Court expects that the parties will (i) encourage the third parties that they have retained or with which they have relationships to respond promptly to discovery requests, and (ii) help facilitate the completion of third party discovery in accordance with the expedited schedule.

d. Discovery Disputes

i. Parties should meet and confer before bringing discovery disputes to the Court's attention. The Court will not be inclined to consider arguments or authorities that have not previously been presented to the other side. If the argument or authority had been presented, perhaps the dispute would have been resolved.

ii. If one party moved to compel or seeks a protective order, the responding party should not cross-move on the identical issue just to get the last (and fourth) brief. In ruling on a motion to compel, the Court can grant any relief that would be sought by way of protective order. *See* Rules 26(c) & 37(a)(4)(B) & (C). Likewise, in ruling on a motion for protective order,

the Court can grant any relief that would be sought by way of a motion to compel. *See* Rule 26(c).

e. Confidentiality Stipulations and Orders

i. Confidentiality stipulations and orders should recognize that proceedings in open court are generally public and that materials used in open court become part of the public record. These stipulations also typically cover more than the topics covered by Rule 5 and should typically reference Rule 26 as well. A stipulation should not provide that confidentiality restrictions would "continue to be binding throughout and after the conclusion of the Litigation, including without limitation, any appeals therefrom" without making any exception for information that becomes part of the public record. Such a restriction as drafted is overbroad and an invalid prior restraint.

ii. If counsel believes that certain limited and highly confidential information requires that the courtroom be closed, then counsel should make an application well in advance of the hearing in question. In some circumstances, it may be appropriate for counsel to agree on a more limited procedure to protect confidentiality (for example, agreeing to use aliases to refer to certain non-parties in court), and inform the Court of that agreement.

iii. Responsibilities of Parties Obtaining Access To Confidential Information: Litigation in the Court of Chancery often involves the production in discovery of very sensitive, non-public information. When litigants and their counsel and advisors obtain access to such information, it is their responsibility to abide strictly by the terms of the confidentiality order in place. Particularly troubling have been situations when litigants have had access to confidential, non-public information about the value of a public corporation and have traded in the securities of that corporation. If a litigant or a litigant's advisor engages in such trading, they should expect to be subject to intensive scrutiny and, at minimum, to face the requirement of reporting themselves to the Securities and Exchange Commission and possibly even worse sanctions, including the mandatory disgorgement of any trading profits and a potential bar to acting as a class representative in future class or derivative actions in this Court. To avoid these situations, counsel for litigants and their advisors who receive access to confidential, non-public information should discuss these principles with them and advise them that procedures need to be in place to avoid violations of the order and trading in securities on the basis of confidential, non-public information. More generally, litigants and non-litigants who access confidential discovery material under a confidentiality order of this Court should be reminded by counsel that their use and handling of such confidential information may also be subject to other laws and regulations of the State of Delaware and other jurisdictions

protecting personal privacy and other public policy purposes.

iv. Two sample confidentiality stipulations are attached as Exhibits 7 and 8, and available on the Court's website.

8. Compendia and Appendices

a. The compendium is counsel's opportunity to provide the Court with authorities that the Court otherwise does not have at its fingertips.

i. Each member of the Court has in Chambers a set of the Delaware case reporters and the Delaware statutes. Hence a compendium need not include these authorities.

ii. Rule 171(h) calls for a party to provide unreported decisions because these decisions are not in the books that are readily available to the Court. Authorities from non-Delaware jurisdictions are similarly not readily available to the Court and must be pulled from Westlaw or Lexis. Well-advised practitioners will include the key non-Delaware authorities, even if they are formal, published decisions.

iii. The Court has ready access to the major Delaware treatises. If you are relying on excerpts from other treatises or practitioner pieces, consider including these materials in the compendium.

v. A compendium that includes every single unreported or non-Delaware authority will be large and cumbersome. The members of the Court often carry compendia with them. Include the decisions that the Court should read. As a rough guideline, if a case is cited only once, consider leaving it out of the compendium. If a case already has been provided in an earlier compendium, simply note that fact. You need not provide an additional copy.

v. Use your judgment. If you are confident enough to compile a shorter compendium of what you consider the key authorities, feel free to submit it, and even include the key Delaware published materials. Counsel who give the Court and its law clerks handy-to-use compilations of the key legal sources are likely to best ensure that the Court understands their arguments. This is also true of the key factual exhibits.

b. The appendix is counsel's opportunity to provide the Court with the documentary information necessary to decide a motion. As with compendia, members of the Court often carry appendices with them. To the extent possible, parties responding to a motion or opening brief should avoid duplicating materials in their own appendices. The Court does not need multiple copies of large documents. Cite to the document that appeared in the appendix that accompanied the opening brief.

c. Use tabs. For some reason, the advent of e-Filing has led some practitioners to believe that an untabbed appendix or compendium is useful. It is not. To find Exhibit 13, a tab is still necessary. If you want the judge and law clerk to read your papers, it is critical to touch and feel the final version yourself with a view toward considering how reader-friendly it is.

d. Avoid the Manhattan Phonebook. If a submission is huge, uncomfortable to hold, and likely to fall apart, please break it into separate usable volumes.

9. Trial Procedure

a. Pre-trial orders:

i. Parties should consider submitting the pre-trial order after the close of pre-trial briefing so that the parties can take into account the other side's briefs when negotiating stipulated issues of fact and drafting proposed issues of fact. In the sections of the pre-trial order setting forth proposed findings of fact, a party may opt to include quotations from the other side's briefs or expert reports with supporting citations. If one side has made an assertion and the other side wants to adopt it, the Court likely will treat it as fact unless it appears completely contrary to the evidence or the opposing party changes its position and shows good cause for doing so.

ii. All witnesses, including potential rebuttal witnesses, should be identified.

b. Trial exhibits:

i. Parties should prepare and submit Joint Exhibits. Parties should not submit separate Plaintiffs' Exhibits or Defense Exhibits. Giving a document a "JX" number does not mean you are stipulating to its admissibility; it just helps eliminate redundancy and allows everyone to work off one original set of exhibits.

ii. Exhibits should be in chronological order. If the matter is highly expedited, such that chronological ordering is not feasible, parties should give the Court a chronological list of exhibits as soon as practicable.

iii. Binders containing all exhibits that examining counsel expects to refer to in examining a particular witness, and only those exhibits, are helpful to the Court in cases with a substantial number of trial exhibits.

iv. Parties should work together to avoid duplication. If a duplicate is discovered, it should be eliminated.

v. Each side should plan its case so as to avoid deluging the Court with exhibits. It is not acceptable to simply dump in every deposition exhibit.

vi. Parties should deliver four copies of tabbed exhibit binders to the Register

in Chancery not later than the day before trial begins. The copies are allocated as follows: Court, Witness Stand, Court Reporter, Judicial Clerk. The Court Reporter's copy should become the official copy after trial for purposes of appeal and should remain free of annotations. Binders should have rings that measure no more than 2" in circumference. A binder with 2" rings will measure 3" across the spine. The Court, its staff, and the Court Reporters have found that larger binders are cumbersome.

vii. Parties should meet and confer regarding and attempt to resolve as many evidentiary issues as possible.

(a) Any objections to proposed exhibits or witnesses shall be identified in the pre-trial order.

(b) Major evidentiary issues should be raised by motion in *limine*.

(c) Minor evidentiary issues should be addressed during trial or reserved for post-trial briefs.

(d) Any evidentiary objections not raised as set forth above will be deemed waived.

c. Trial procedure:

i. Parties should expect to divide trial time equally.

(a) If your side is talking, it comes out of your time. This includes questioning witnesses, making objections, and arguing points.

(b) Parties should track time usage. Beginning with day two of a multi-day trial, the parties should confer and agree at the lunch break or at the end of each day on time usage to date and the anticipated time remaining for each side.

ii. As a general principle, whoever has the burden of proof should present their case first and control the call of the witnesses. This means that the party with the burden of proof may call an opposing party's witness as part of its case-in-chief.

iii. As a general principle, witnesses should appear only once unless recalled in the rebuttal case. If both sides are calling a witness, then the party with the burden of proof has the option of how to proceed. The Court generally finds that it is more efficient and comprehensible to hear witnesses tell their own story first and then be cross-examined. If the party with the burden of proof elects to proceed in that fashion, then at the time the witness is called, the party controlling the witness would present the witness first, then the other side would cross-examine the witness without

any limitation to the scope of direct. Alternatively, the party with the burden of proof may elect to proceed with a hostile examination of the witness. If this course is followed, then the party controlling the witness will be permitted to follow with a complete direct examination.

10. Forms of Order

a. Parties should work cooperatively to agree upon forms of order.

b. An order may be agreed as to form so as to avoid any argument that a party has waived a right to appeal or to revisit an issue that has been determined preliminarily for purposes of an injunction, discovery, or similar pre-trial purpose.

c. If parties are truly unable to agree, then the prevailing party should submit a form of order under a cover letter that identifies the issues between the parties and explains why the proposed form of order addresses them appropriately.

i. Under the principle that letters should be short, a party should submit a motion for entry of order if there are a large number of issues.

ii. The non-prevailing party should respond by letter or opposition and provide a mark-up of the prevailing party's proposed form of order. The non-prevailing party should not respond with a completely different form of order.

iii. The prevailing party should then reply.

iv. If a motion or relief was granted in part and the Court has not otherwise directed a party to take the lead on submitting a form of order, then the movant is the prevailing party for purposes of initiating the submissions.

d. If the Court has requested a form of order, then unless otherwise directed, a form of order should be submitted within one week of the ruling.

11. Representative Actions

a. Parties to representative actions who are aware of other proceedings involving the same subject matter should (i) advise the Court promptly of the existence of the other matters and (ii) regularly update the Court regarding the status of the other matters.

b. Settlements:

i. If a settlement has been reached in representative litigation challenging a pending transaction, the parties should advise the Court promptly and submit the memorandum of understanding. The settlement should be presented promptly for approval following the closing of the transaction.

ii. The scheduling order for a representative action settlement should provide for the following:

(a) Mailing of a notice at least 60 days before the hearing date, with a shorter time only upon application and for good cause shown;

(b) A brief in support of the settlement and any supporting documents to be filed 15 days before the hearing date;

(c) Objections to be filed 10 days before the hearing date, and

(d) A short reply in support of the settlement and in response to any objections five days prior to the hearing date.

(e) A sample settlement scheduling order appears as Exhibit 9.