



E-discovery Law Alert

Developments in e-discovery law

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New York court system increases the pressure on attorneys and parties regarding e-discovery competence

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Recently, the New York State's Unified Court System released a report containing recommendations to improve courts' and attorneys' handling of electronic discovery issues. Underlying the recommendations is a message to judges and litigators alike: e-discovery practice in the New York State courts lags that of federal and other state jurisdictions. The recommendations are designed to increase awareness of e-discovery issues and to prompt judges, court staff, and practitioners to address such issues more forthrightly and thus reduce confusion, unnecessary conflict, and expense. This alert summarizes the recommendations and discusses how New York parties and lawyers can get ahead of the e-discovery curve.

Background

Presently, New York courts are generally only required to address e-discovery issues in individual actions at their discretion—i.e., when they “deem [it] appropriate.” (22 NYCRR 202.12(c)(3)). The exception is for cases in the Commercial Division, where courts and counsel are mandated to address e-discovery issues at the preliminary conference, and counsel are required to confer on these issues before the conference. (22 NYCRR 202.70(g)(8)(b)).

Despite these rules, judges and attorneys in New York courts are lax in complying. The report's authors conducted interviews with leading judges, court staff, and practitioners about their experiences with e-discovery issues. The authors report an overwhelming perception that attorneys ignore or at least procrastinate on addressing e-discovery issues in their cases. Judges and court staff, for their part, fail to prod or guide the attorneys to address such issues early on. Both groups' failures stem from insufficient understanding of the issues and technologies involved in e-discovery and from insufficient attention to these issues early in litigation. The result, the authors conclude, is confusion and unnecessarily increased litigation costs that are otherwise avoidable. The authors are particularly concerned about the potential loss of New York's reputation as a leader in legal thought and innovation.

The recommendations

To remedy this, the report makes a number of recommendations. While these are merely proposals, without the force of mandate, litigators are well-advised to get ahead of the curve and incorporate some of the recommendations into their practice now. For example:

- Before a preliminary conference, attorneys should become knowledgeable about all e-discovery aspects of an individual case. They should be familiar with the nine items of 22 NYCRR 202.12(c)(3) and how each applies in the circumstances of their case. Those items are:
 - The retention of electronic data and implementation of a data preservation plan;
 - The scope of electronic data review;
 - The identification of relevant data;
 - The identification and redaction of privileged electronic data;
 - The scope, extent, and form of production;
 - The anticipated cost of data recovery and proposed initial allocation of such cost;
 - The disclosure of the manner in which the data is maintained;
 - The identification of the computer system(s) utilized; and
 - The identification of the individual(s) responsible for data preservation.
- At the preliminary conference, attorneys should utilize a form memorializing their agreement on an e-discovery plan. A sample form is appended to the report. Better still, attorneys should utilize the more detailed form supplied by the Nassau County Commercial Division (available at <http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf>).
- Attorneys appearing at the preliminary conference should be sufficiently versed in their client's information technology systems so as to speak knowledgeably about it at the conference. They should consider including the client's IT representative at the conference and facilitating a discussion between parties' respective IT representatives whose superior knowledge of the technical issues may help cut through initial confusion.
- Attorneys may anticipate increased appointments, under CPLR 3104, of court-appointed referees specializing in e-discovery and increased use of court-appointed ADR mediators specializing in e-discovery.

The report proposes two pilot projects, one each in selected branches of the Commercial Division. The nature of these proposals reveals where the court system may head with e-discovery:

- One pilot project would require mandatory initial disclosures at the outset of litigation, akin to those required under FRCP 26(a)(1), relating to e-discovery issues. Required disclosures would include information regarding the nature, format, and location of relevant electronically stored information (ESI).

- A second project would require attorneys to sign joint affirmations that they in good faith attempted to resolve e-discovery issues and which would specify those issues on which there is and is not agreement.

The report's authors recognize that in some small-value cases, imposing e-discovery obligations may drive discovery costs above case value—unnecessarily so where the parties agree that ESI is not germane to their case. In light of this, the report recommends flexibility on the part of judges affected by the pilot projects to allow the parties to opt out of e-discovery obligations.

Finally, several proposals relate to education, general awareness, and guidance to the courts regarding e-discovery issues and have less direct effect on practice. For example, the report proposes:

- Vast expansion in training programs for judges and court staff relating to e-discovery legal and technical issues.
- Establishment of a statewide e-discovery journal containing relevant decisions and modeled on the *Commercial Division Law Report*.
- Establishment of a large and diverse “working group” of New York e-discovery experts tasked with, e.g., creating educational programs for judges and staff, monitoring the pilot programs discussed above, and tracking e-discovery trends. The working group would include a role for general counsel of companies with heavy ESI components, particularly in the financial services and health care industries, as well as forensic computer/e-discovery specialists.
- Appointment of an official representative of the New York Unified Court System to the Sedona Conference, a legal educational organization that is at the leading edge of e-discovery issues.

The report avoids more difficult issues such as the thorny issue of cost allocation for e-discovery burdens among parties. The authors note that it is already the subject of conflicting and confusing trial court rulings and that it is best addressed through appellate clarification or amendments to the Civil Practice Law and Rules.

Conclusion

The leadership of the New York State Unified Court System believes that, as a whole, the New York courts and attorneys practicing there are behind the e-discovery curve. In order to get ahead of that curve, clients and attorneys are well-advised to heed the report's recommendations and begin incorporating them into their processes and practice.

The complete report may be accessed at <http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf>.

Contact us

If you are interested in learning more about the report, or potentially becoming involved in the working group, please contact your regular Nixon Peabody lawyer or:

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