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EDISCOVERY ALERT

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eDiscovery Pilot Programs Illustrate Opportunities to Avoid Unnecessary Cost

by Wendy Butler Curtis, Patricia Alberts and Logan Herlinger

Electronic discovery, or eDiscovery, "is a major, if not the predominant, factor behind rising litigation costs and delays and presents serious challenges to the court system's ability to resolve disputes ranging from commercial matters to personal injury cases, in an efficient, cost-effective manner."[i] Responses to eDiscovery challenges are taking many different forms: as the focus of court opinions,[ii] in changes to state and federal discovery rules,[iii] as the topic of prestigious academic conferences,[iv] and in the creation of e-discovery pilot programs.[v] This alert summarizes recent eDiscovery reforms in two jurisdictions and provides practical suggestions on how to implement these ideas to reduce the costs of eDiscovery.

SEVENTH CIRCUIT PILOT PROGRAM

The Seventh Circuit is proactively confronting some of the challenges presented by electronic discovery. The Seventh Circuit Electronic Discovery Committee ("E-Discovery Committee") consists of trial judges, in-house counsel, private practitioners, government attorneys, academics, and expert litigation consultants. Roughly five months after its first meeting, the E-Discovery Committee published its initial report and commenced the Seventh Circuit Electronic Discovery Pilot Program.

The E-Discovery Committee focused the pilot program on three high-impact areas for reform: preservation, early case assessment, and education.[vi] Their overarching mandate was to reshape the state of discovery "to assist courts in the administration of Federal Rule of Civil Procedure 1, to secure the just, speedy, and inexpensive determination of every civil case, and to promote whenever possible, the early resolution of disputes regarding the discovery of electronically stored information [ ] without Court intervention."[vii]

The Committee created guiding principles (the "Principles") that decry the use of vague and overly broad preservation and discovery requests,[viii] and emphasize the importance of good faith efforts, proportionality, and cooperation in the areas of preservation and discovery.[ix] The Principles specifically:

- Underscore the importance of a meaningful 'meet-and-confer', along with the possibility of sanctions in the event that a party does not cooperate and participate in good faith during a 'meet-and-confer'. (Principle 2.01)
- Require the appointment of e-discovery liaison(s) by the parties during the 'meet-and-confer' in the event that there is an impasse in the cooperative effort. (Principle 2.02)
- Call for the elimination of overly broad preservation requests and preservation orders. (Principle 2.03)

Contact a Team Member

Wendy Butler Curtis
eDiscovery of Counsel
Washington, D.C.
wcurtis@orrick.com
(202) 339-8584

Siobhan Handley
Partner
New York
shandley@orrick.com
(212) 506-3757

Kenneth Herzinger
Partner
San Francisco
kherzinger@orrick.com
(415) 773-5409

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- Further define the scope of preservation, adding the rebuttable presumption that certain types of ESIx (deleted or fragmented data on hard drives, RAM or ephemeral data, on-line access data, automatically updated metadata fields, duplicative backup data, etc.) are not discoverable. (Principle 2.04)
- Require counsel to educate themselves before every 'meet-and-confer' on the applicable e-discovery rules. (Principle 3.01)

After the Principles were published, the E-Discovery Committee took a phased approach to implementing the pilot program. In the first phase, participating judges from the Seventh Circuit agreed to adopt the Principles and implement them in selected cases from October 2009 to May 2010; the attorneys in those particular cases were also asked to participate.

The results of Phase One were published in a 425-page report which analyzed the reactions of the program participants. Thirteen judges and 285 attorneys were included in the first phase, and these judges and about half of the attorneys completed the concluding questionnaire. The judiciary unanimously acknowledged that the Principles had a positive impact on the discovery process. The attorneys reaction was positive, but not overwhelmingly so: one-third of the attorneys surveyed said that they noticed positive affects during the test phase, and the vast majority of the rest claimed they noticed no impact on discovery.

The second phase of the pilot program began in June and is scheduled to run until May 2011. Orrick will publish the results and analysis of Phase Two when they become available next year.

NEW YORK STATE E-DISCOVERY REPORT

As the Seventh Circuit concluded the first stage of its E-Discovery Pilot Program, the New York State Unified Court System received a report recommending that New York state implement e-discovery pilot programs of its own. In a March 16, 2010 press release, Chief Judge Jonathan Lippman and Chief Administrative Judge Ann Pfau announced the release of this report entitled, *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts* (the "New York Report").[xi]

Even before the publication of the New York Report, New York had state court rules encouraging 'meet-and-confers' between parties.[xii] The authors of the report conclude that this was an insufficient effort, and that "the reasonable, proportional and cooperative resolution of most e-discovery issues" is still not being achieved.[xiii] While recognizing that eDiscovery requires cooperation between lawyers and the courts, the report states that eDiscovery is "in large part, a judicial management issue."[xiv]

The New York Report expressed concern about the impact of the lack of uniform guidance in the area of e-discovery. Attorneys in New York courts often stipulate to exclude electronic discovery citing the exorbitant costs, length of time required, and the lack of experience of many attorneys and judges with the subject.[xv] The New York Report offers several key recommendations including the creation of an E-Discovery Working Group, facilitating a more effective Preliminary Conference, improving e-discovery education and training, designating court-attorney referees, and establishing an institutional presence at the Sedona Conference®.[xvi]

In the months since the release of the report, the New York State Court System has begun to implement some of the report's recommendations. Nassau Supreme Court Justice Ira B. Warshawsky was designated to serve as New York's institutional presence at the Sedona Conference®. Additionally, changes to the Uniform Rules of Trial Courts went into effect on August 18, 2010.[xvii] Finally, an E-Discovery Working Group was created. The Working Group consists of twenty-six members and its first meeting is scheduled for mid-October 2010. The Court system anticipates that the Working Group will take over management of the New York Report's recommendations, especially with regard to two long-term pilot programs.[xviii]

The New York Report's pilot programs focus on judicial management to foster cooperation between litigants on discovery issues. The first program involves the supplementation of the initial disclosures, as required by New York CPLR § 3101.[xix] The initial disclosures, information the parties share in advance of the preliminary conference, would require the following additional information:

- Identification of key IT personnel
- Whether preservation measures have been implemented
- Identification of computer systems that might contain relevant information
- Whether a party intends to claim that certain relevant ESI is inaccessible[xx]

The second program creates an "Affirmation of E-Discovery Compliance," to be jointly signed and certified by counsel, and submitted to the court prior to the preliminary conference.[xxi] The affirmation would include three lists: (1) e-discovery topics and disputes discussed and resolved at the parties' 'meet-and-confer'; (2) eDiscovery disputes that the parties could not resolve on their own; and (3) any miscellaneous issues that demand the court's attention.[xxii] These lists would help courts address e-discovery issues as early as possible and would allow for the early appointment of "court-attorney referees" to assist in the resolution of any lingering disputes.[xxiii]

The New York Report concludes by stressing the need for a "long term commitment on the part of the court system and its users, particularly the bar, to work together not only to address new e-discovery case management challenges as they arise but also to change the present litigation culture as it relates to e-discovery."[xxiv]

THE COOPERATION PROCLAMATION

The Sedona Conference® Cooperation Proclamation ("The Proclamation")[xxv] significantly influenced the direction of both the Seventh Circuit and New York State efforts. The Proclamation, published in July 2008, "promote[s] open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery."[xxvi] In so doing, the Sedona Conference hopes to lessen adversarial conduct in pre-trial discovery and to "refocus litigation toward the substantive resolution of legal disputes."[xxvii]

The Cooperation Proclamation has been cited explicitly in over a dozen cases in just the past year and endorsed by more than 100 federal and state judges.

THE TAKE-AWAY

These initiatives emphasize the need to address eDiscovery issues in the meet and confer and then memorialize agreements in ESI stipulations or protocols. When applied effectively, this trend can avoid expensive and risky motions practice, improve efficiency and reduce cost. Although these recommendations may not be suitable for every matter, it is never productive to ignore the challenges of ESI or wait to address e-discovery disputes until motions practice, after production is already underway. Accordingly, the following best practices should be considered:

- Raise potential discovery issues in your earliest communications with opposing counsel; some remedies, like cost shifting, may become unavailable if your position is not timely raised. *See Orrick's Alert on Fed. R. Evid. 502*.
- The corporate client should consider developing a standard ESI protocol template to avoid inefficiency and inconsistency amongst outside counsel; discovery counsel can assist in making a comprehensive, client-specific template. This template should address:
    - Obligations related to inaccessible data and other challenging technologies such as instant messaging and text messages;
    - Limitations on the number custodians;
    - The procedure for agreeing to, or objecting to, a list of search terms;
    - De-duplication specifications;
    - Data production specifications;
    - Native format production;
    - The production of metadata;
    - The production of documents containing source code;
    - The scope of privilege and confidentiality;
    - The creation of privilege logs;
    - The timing and sequence of electronic discovery; and
    - Clawback agreements for inadvertently produced privileged information.
- The corporate client should consider developing a standard 'meet and confer' checklist for its outside counsel to ensure consistent levels of preparation; discovery counsel can assist in making a comprehensive, client-specific checklist. Also consider reviewing the Sedona Conference "Jumpstart" outline, available on their Working Group 1 website: http://www.thesedonaconference.org/content/miscFiles/publications_html?grp=wgs110 (last visited August 26, 2010). The meet and confer checklist should ensure counsel:
    - Have a working understanding of the client's technology infrastructure and protocols (*e.g.*, email format, data retention policies, back-up or disaster recovery practices);
    - Know the client's preferences with respect to production format;

- Conduct IT and custodian interviews to allow informed discussion of tiered discovery starting first with the most probative custodians and data sources; and
- Evaluate the value of the case and the likelihood of settlement to determine what scope of discovery is proportional to the value of the case.

- Be aware of the potential need to preserve and produce emerging forms of technology (*e.g.*, instant messages, social media and data hosted in the "cloud"). *See Orrick's June 2010 Alert on Cloud Computing.*
- Consider keeping a trusted vendor or client IT expert available or on-call to consult during the 'meet and confer'.
- Be aware of local court protocols and rules regarding stipulations. For example:
  - Maryland Rule of Civil Procedure 2-402(e)(4) states that "clawback" or "quick peak" agreements are binding on the parties to the agreement but not on other persons; on the other hand, if the agreement is adopted by court order, that order governs all persons or entities, whether or not they are or were parties; and
  - The Nassau County Commercial Division in New York requires parties to report on ESI issues in their Preliminary Conference Stipulation and Order.[xxviii] (Section 12(b)(ii) of the order gives parties the option to agree to ignore ESI altogether.)

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[i] *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts,* 5 (February 2010), http://www.nycourts.gov/courts/comdiv/PDFs/E-DiscoveryReport.pdf (last visited August 9, 2010).

[ii] *See, e.g., Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Rimkus Consulting Group Inc. v. Cammarata,* H-07-0405, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010).

[iii] *See, e.g.,* 2006 Amends. to Fed. R. Civ. P. (revisions to Rules 16, 26, 33, 34, 37, and 45 - attempting to define discoverable electronic information, control the costs associated with electronic discovery, and protect privileged information); 2008 Amends. to the Md. R. Civ. P. 2-422 (modeled after the 2006 Federal Amendments); Cal. Code Civ. Proc. § 2031.210(d) (part of the California Electronic Discovery Act – the burden is on the responding party to demonstrate inaccessibility because of undue burden or expense).

[iv] For example, the 2010 Conference on Civil Litigation held at Duke University, which included many of the country's leading judges, professors and lawyers, focused many of its panel discussions on the wide range of issues generated by the explosion of electronically stored information (ESI) and its impact on the increasing costs and burdens of litigation.

[v] *See A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts*, *supra* note 1; *Seventh Circuit Electronic Discovery Pilot Program, Phase One October 1, 2009 – May 1, 2010, Statement of Purpose and Preparation of Principles* (October 1, 2009), http://www.7thcircuitbar.org/associations/1507/files/Statement1.pdf (last visited August 9, 2010) ("Seventh Circuit Statement of Purpose").

[vi] Seventh Circuit Statement of Purpose, *supra* note 5, at 9-10.

[vii] *Id.* at 11.

[viii] *Id.* at 13.

[ix] *Id.* at 11-12.

[x] Electronically Stored Information.

[xi] *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts*, *supra* note 1.

[xii] *See* Commercial Division Uniform Rule 8(b); Uniform Trial Court Rule 202.12(c)(3).

[xiii] *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts*, *supra* note 1, at 1.

[xiv] *Id.* at 6.

[xv] *Id.* at 8.

[xvi] *Id.* at 11-22.

[xvii] NYCRR §202.12(b) and §202.70(g). (The new amendments state that attorneys must have sufficient knowledge of their clients' information technology systems and come to the preliminary conference prepared to discuss all issues relating to electronic discovery. Attorneys are also allowed to bring IT experts to the preliminary conference to better address technical questions.)

[xviii] The New York Courts were not able to meet the report's aggressive deadline for implementing the pilot programs, but they plan on implementing them in the future.

[xix] *A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts*, *supra* note 1, at 16.

[xx] *Id.*

[xxi] *Id.* at 17.

[xxii] *Id.*

[xxiii] *Id.* at 21.

[xxiv] *Id.* at 24.

[xxv] *The Sedona Conference® Cooperation Proclamation* (July 2008), http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf (last visited August 11, 2010).

[xxvi] *Id.* at 1.

[xxvii] *Id.*

[xxviii] Preliminary Conference Stipulation and Order § 12, http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf (last visited Aug. 22, 2010).