New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 247—NO. 1
TUESDAY, JANUARY 3, 2012

STATE E-DISCOVERY

New E-Discovery 'Best Practices' and Rules

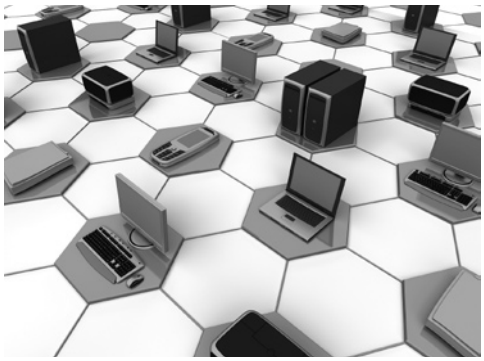
By **Mark A. Berman**

E-discovery "best practices" recently have been published by the New York State Bar Association (NYSBA) and, in state court, a pilot e-discovery preliminary conference order is now in effect in certain courts. Practitioners need to be versed in both. The NYSBA's Commercial and Federal Litigation Section's E-Discovery Committee (the Committee) has released a report entitled "Best Practices in E-Discovery in New York State and Federal Courts" (the Guidelines), which contains practical "hands-on" advice concerning the challenging electronic discovery landscape relating to, among other things, the preservation, collection and production of ESI.

In addition, a pilot project for complex civil cases has been implemented in the U.S. District Court for the Southern District of New York, effective Nov. 1, 2011, which provides, among other things, for counsel to submit to the court in connection with the Rule 16 conference a joint electronic discovery submission and proposed order (the e-discovery submission").[1]

Practitioners also should be aware that the New York State Unified Court System's E-Discovery Working Group (the working group)[2] will soon be releasing a draft e-discovery bench book that will be provided to the state judiciary and is putting together a multi-part course on various aspects of e-discovery that will be available to the state judiciary and its staff. The working group has adopted an electronic e-discovery order that has been piloted to several New York supreme court justices statewide and, in Manhattan, Commercial Division Justice Jeffrey K. Oing is utilizing this electronic discovery order.[3]

As e-discovery is a required part of case management, the Guidelines and the Southern District's e-discovery submission provide a paradigm that will enable counsel to be able to "early on" in an action address with the court and one's adversary potentially problematic e-discovery issues. The Guidelines emphasize that counsel should seek to make the e-discovery process



BIGSTOCK

"more cooperative and collaborative," where the failure to do so "can derail a case and may result in unanticipated, skyrocketing costs."

The NYSBA Guidelines

The Committee explained that:

> new developments in modalities of ESI are potentially significant to attorneys because any information relevant to a legal proceeding brings with it concomitant legal obligations. Whether ESI is stored on Facebook, in an iPad, or in the "cloud," counsel must understand the implications for attendant legal duties…Lawyers need not become computer experts; but they do need sufficient knowledge to represent clients completely in a world where "e-discovery" is fast becoming standard "discovery."
>
> Do not make assumptions! Never has this precept been more apt than in e-discovery. There is no exemption from legal duties based on the electronic source of the relevant information. A recorded conversation may not escape preservation obligations simply because it occurred by instant messaging.

As such, the Guidelines set out 14 "best practices," together with commentary containing explanations and illustrative examples that highlight critical considerations and challenges facing counsel when ESI is involved, excerpts of which are set forth below. Counsel are encouraged to read the Guidelines in their entirety and to seek to incorporate these teachings in their practices. For those unfamiliar with the technical terminology associated with ESI, the Guidelines include an extensive glossary and bibliography.

Guideline No. 1: "The duty to preserve arises, not only when a client receives notice of litigation or a claim or cause of action, but it may also arise when a client reasonably anticipates litigation or knew or should have known that information may be relevant to a future litigation." Here, the Committee notes that "efforts to define with specificity what events 'trigger' the duty to preserve may be limiting because they may not account for the particular facts and circumstances specific to individual cases" and advises that the best practice often is the conservative approach and to assume that a duty to preserve exists. A "best practice" would be to consider memorializing, in writing in a manner that protects legal privileges, the justification for implementing the "trigger" and that discusses the facts and circumstances known at the time of the decision and upon which the client and counsel relied.

Guideline No. 2: "In determining what ESI should be preserved, clients should consider: the facts upon which the triggering event is based and the subject matter of the triggering event; whether the ESI is relevant to that event; the expense and burden incurred in preserving the ESI; and whether the loss of the ESI would be prejudicial to an opposing party." The Committee notes that identifying key witnesses and record custodians early in the process is essential. "Preservation" does not necessarily equate to "discoverability" and the "better safe than sorry" adage should apply.

> The Guidelines and the Southern District's e-discovery submission provide a paradigm that will enable counsel to be able to address "early on" potentially problematic e-discovery issues.

Guideline No. 3: "Legal hold notices will vary based on the facts and circumstances but the case law suggests that, in general, they should be in writing, concise and clear….Counsel should monitor compliance with the legal hold at regular intervals." The goal of a legal hold should prohibit the destruction of ESI and include a process for monitoring preservation efforts, as well as ensuring that routine deletion of ESI is suspended

MARK A. BERMAN, *a partner at commercial litigation firm Ganfer & Shore, is secretary of the e-discovery committee of the Commercial and Federal Litigation Section of the New York State Bar Association.* ANNE TABACK, *an associate at the firm, assisted in the preparation of this article.*

for applicable custodians. The Committee suggests that counsel may consider issuance of a preservation notice to an adverse or potentially adverse party.

Guideline No. 6: "To the extent possible, requests for the production of ESI and subpoenas seeking ESI should, with as much particularity as possible, identify the type of ESI sought, the underlying subject matter of the ESI requests and the relevant time period of the ESI." The Committee recommends specificity to avoid objections that requests are burdensome and overly broad, and suggests that information needed in order to tailor document requests should be part of the parties' "meet and confer." The Committee notes that if no agreement is reached concerning fundamental aspects of e-discovery production, counsel should consider judicial intervention prior to production in an attempt to obviate the risk that, after production, the court might order search and production of different ESI or ESI in a different form.

Guideline No. 7: "Counsel should agree on the form of production of ESI for all parties prior to producing ESI. In cases in which counsel cannot agree, counsel should clearly identify their respective client's preferred form of production of ESI as early in the case as possible and should consider seeking judicial intervention to order the form of production prior to producing ESI." Considerations by counsel should include such inquiries into each party's computer system, the form in which the underlying ESI is maintained, whether document review applications are compatible with the ESI format requested or agreed to, whether metadata is sought, whether native ESI is required, and whether ESI will be produced with or without searchable text and image files.

Guideline No. 9: "Parties should carefully evaluate how to collect ESI because certain methods of collection may inadvertently alter, damage, or destroy ESI." Parties need to avoid the risk of spoliation of ESI, as well as the possibility that data could be inadvertently altered. The Committee notes that metadata may typically remain after "deletion" and forensic experts may be able to recover such ESI.

Guideline No. 10: "In most cases, parties may search reasonably accessible sources of ESI, which includes primarily active data, although if certain relevant ESI is likely to be found only in less readily accessible sources or if other special circumstances exist, less readily accessible sources may also need to be searched."

Guideline No. 11: "Counsel should document its privilege searches and verify the accuracy and thoroughness of the searches by checking for privileged ESI at the beginning of the search process and again at the conclusion of the process." Counsel should consider entering into an agreement that the inadvertent production of privileged ESI shall not constitute a waiver.

Guideline No. 13: "Parties should discuss the expected costs and potential burdens, if any, presented by e-discovery issues as early in the case as possible." Observing that there is often a divergence between the size and financial means of parties to a litigation, and that one party may incur disproportionate costs that could present a financial burden, the Committee suggests that such party consider seeking agreement of opposing counsel to share in the cost of search and/or production or, alternatively, making an application to the court for cost allocation. The Committee notes that the law on cost allocation is different if the case is pending in the federal courts versus the New York State Courts, as generally the producing party pays in federal court, whereas "some" New York State Courts "have found that the 'New York rule is that the party requesting the ESI generally pays.'"

The Pilot Project

The Southern District's pilot project was adopted to "improve the quality of judicial case management," and the discussion below highlights some of the Southern District's initiatives as they relate to e-discovery.[4]

The pilot project seeks to provide an expedited procedure for addressing privilege disputes with respect to documents, which include ESI. For the purposes of a privilege log, a party "need include only one entry on the log to identify withheld e-mails that constitute an uninterrupted dialogue; provided, however, that disclosure must be made that the e-mails are part of an uninterrupted dialogue." In addition, "the beginning and ending dates and times of the dialogue, the number of e-mails, and the other requisite privilege log information is required to be disclosed."

> Identifying key witnesses and record custodians early in the process is essential. "Preservation" does not necessarily equate to "discoverability" and the "better safe than sorry" adage should apply.

Also significant is the new "Initial Pretrial Conference Checklist" and e-discovery submission, which includes a checklist of e-discovery issues that must be addressed at the Rule 26(f) conference and with the court. The submission recognizes that the "electronic discovery process is iterative," and that the joint proposed order is predicated on the facts and circumstances known at the time of the order's preparation, which may necessitate future additions and/or modifications. The e-discovery submission instructs counsel to advise the court as to the terms of any agreement reached relating to e-discovery. The e-discovery submission provides, among other things, that:

- Counsel must certify that they are "sufficiently knowledgeable in matters relating to their clients' technological systems to discuss competently issues relating to electronic discovery, or have involved someone competent to address these issues on their behalf."
- Counsel are required to "meet and confer" regarding electronic discovery issues before the initial pretrial conference. This would include a discussion of, among other things, the obligation to preserve ESI and the "methodologies or protocols for the search and review of [ESI], as well as the disclosure of techniques to be used," which may include keyword search lists, "hit reports" and/or "responsiveness rates," limitations on fields/files to be searched, "concept searches," date restrictions, searching archived, legacy and/or deleted data, and sampling. Counsel are to have addressed potential sources of ESI, including e-mails, word processing documents, databases, social media, spreadsheets, ephemeral data, blogs, and websites.
- Counsel have addressed limitations on production, such as the number and identity of custodians, timing of production (including phased or rolling productions), "date ranges for which potentially relevant data will be drawn," and locations of ESI in the custody or control of non-parties.
- Counsel have addressed the form of production and specified any exceptions to it "(e.g., word processing documents in TIFF with load files, but spreadsheets in native form)."
- Counsel have addressed issues related to privilege and inadvertent production, including utilizing "quick peek" or non-waiver agreements, as well as a court order pursuant to F.R.E. 502(d).
- Counsel have estimated the cost of production of ESI, and have considered cost-shifting or cost-sharing.

In addition to standard status conferences, periodic conferences would be held and/or status reports filed, as determined by the parties and the court, depending on the complexity of the matter, to update the court on the parties' electronic discovery issues. The parties also have the option of advising the court that "a sufficient number of e-discovery issues, or the factors at issue are sufficiently complex, that such issues may be most efficiently adjudicated before a Magistrate Judge."

1. The Guidelines can be found at http://www.nysba.org/e-discovery, and the pilot project can be found at http://www.nysd.uscourts.gov/cases/show.php?db=notice_bar&id=261.
2. The author of this article is a member of the Education Subcommittee of the Working Group.
3. The electronic discovery order can be found at http://www.nycourts.gov/ip/ediscovery/ModelE-DiscoveryPC_Order.pdf.
4. The pilot project directs that, upon the service of a motion to dismiss pursuant to F.R.C.P. 12(b)(6) or 12(c) (if made immediately after the filing of an answer), there is a stay of all discovery other than the discovery of documents, tangible things and *ESI*, unless the court orders otherwise.