

New Rules for Electronic Discovery in New York Courts: What You *Must* Know Before Appearing at a Preliminary Conference

By Allison J. Schoenthal

Recently, New York state courts implemented new rules and guidelines for the discovery of electronically stored information (“ESI”). This Alert is intended to serve as a primer on ESI, and a preemptive warning to all attorneys practicing in the New York courts.

Overview

Recognizing that the CPLR does not specifically address ESI (having been created when only “hard-copy” documents existed), the New York courts have strived to establish their own rules to govern ESI and e-discovery.

The Commercial Division of the New York State courts, and particularly the Commercial Division in Nassau County, is at the forefront of fashioning such rules. Their focus has been on addressing e-discovery issues early in the case, encouraging practitioners to “meet and confer” prior to the preliminary conference with the Court (the “PC Conference”), and ensuring that counsel arrive at the PC Conference knowledgeable about ESI and e-discovery.

Practitioners risk prejudicing their clients, and possible sanctions, should they not comply with the rules discussed below.

The New Preliminary Conference Stipulation and Order

Effective February 1, 2009, the Nassau County Commercial Division implemented a new Preliminary Conference Stipulation and Order (the “PC Order”) which expands the topics addressed at the PC Conference.¹ Specific to ESI, the PC Order now contains important new requirements:

(1) Parties Must “Meet and Confer” Regarding “All ESI-Related Discovery Issues”

By entering into the PC Order, the signatories to the PC Order represent to the Court that they have engaged in a good faith meet and confer before appearing for the PC Conference. This provision serves as further encouragement to counsel and parties to discuss, and try to resolve, ESI issues as early in the case as possible, and serves judicial efficiency as litigants are expected to arrive at the PC Conference prepared to address only unresolved e-discovery issues.

(2) Parties Must Confirm That They Have Entered into a “Written Plan/Stipulation” for the Preservation of ESI-Related Documents, or Agreed to Forgo the Discovery of ESI or Portions of ESI

Notably, the PC Order does not provide any guidance to litigants about the content or form of the “plan/stipulation;” rather, it is left to the discretion of the parties, as long as it is in writing.

The PC Order now specifically allows parties the option of forgoing the discovery of ESI. This provision demonstrates the Court’s recognition that some parties may not wish to engage in costly electronic discovery, depending on the amount at stake or the claims and defenses at issue.

(3) Parties Must Implement Appropriate “Litigation Holds,” and Can Be Sanctioned for Failure to Do So

A litigation hold is typically triggered when litigation is “reasonably foreseeable.” A litigation hold therefore must be implemented at least as of the commencement of the action, and sometimes before the case is filed.

To be clear, however, a litigation hold must be in place prior to the PC Conference. If the hold is enacted after the conference, it may be too late. Because important ESI may be lost if there is a delay in issuing a litigation hold, the Court has left the door open to sanction counsel and parties who fail to timely stop document destruction policies and procedures.²

(4) Parties Must Identify the Format for the Production of ESI in the PC Order

The PC Order contains places to “check off” the format for production of ESI, such as TIFF format or Native format. Recognizing that some parties may wish to produce different types of documents in different formats, the PC Order contains space for the parties to write in the types of documents to be produced in each format.

(5) Parties Must Promptly Bring Issues Regarding Cost-Shifting to the Court’s Attention

The Nassau justices do not state a firm rule on whether the producing or requesting party bears the cost of all e-discovery. Instead, if a party wishes to shift the cost of

e-discovery to the opposing party, or share the cost, it should be brought to the Court's attention at the PC Conference, and counsel should be prepared to explain why cost-shifting is appropriate.

As one of the more detailed PC Orders, it is reported to be "closely watched by the Office of Court Administration" for possible use in other New York courts.³

Counsel are cautioned that the PC Order is both a stipulation among the parties and an Order by the Court and thus breaching its provisions may lead to sanctions or other punitive actions by the Court.⁴ Therefore, counsel not familiar with a client's ESI should discuss the PC Order with IT personnel prior to the PC Conference, and/or bring a person with expertise regarding the party's ESI to the PC Conference.

The New Electronic Discovery Guidelines

Effective June 1, 2009, Nassau County's Commercial Division posted detailed "Guidelines for Discovery of Electronically Stored Information" (the "Guidelines") to supplement and provide further instruction to counsel and parties regarding the new PC Order discussed above.⁵ The Guidelines are the most comprehensive explanation by any New York State court of the Court's expectations for the parties as it relates to ESI, and with respect to the PC Conference. The Guidelines are intended to serve as "practical suggestions" to counsel and parties, and are not a mere "checklist."

Key issues addressed by the Guidelines are highlighted below:

(1) Preparation for and Appearance at the PC Conference

Emphasizing the requirements contained in the PC Order, the Guidelines identify three specific tasks related to ESI that should be completed prior to the PC Conference: (1) completion of the form PC Order, (2) engaging in a "meet and confer" and (3) preparing the written stipulation/plan regarding electronic data preservation.

To assist counsel and parties with the "meet and confer," the Guidelines identify various topics which counsel and parties are advised to discuss *prior to the PC Conference*, including: "implementing litigation holds; ...each party's document or record retention policies; and...their respective clients' current and relevant past ESI and policies regarding ESI." Counsel are to become familiar with those policies or identify a person familiar with the client's electronic systems. If each of these topics is discussed before appearing at the PC Conference, it is expected that counsel will come to Court prepared to discuss only outstanding issues, having resolved other issues without Court intervention.

The Guidelines identify fifteen (15) topics which counsel *must* be prepared to address *at the PC Conference*, including:

- (1) disagreements between the parties regarding ESI;
- (2) scope of ESI requests;
- (3) form of production of ESI;
- (4) ESI which is not reasonably accessible;
- (5) Bates-stamping ESI;
- (6) Redacting ESI and redaction logs;
- (7) ESI custodians;
- (8) Cost-sharing and cost-shifting;
- (9) Search methodologies;
- (10) Depositions of IT personnel;
- (11) Need for two-tiered discovery of ESI;
- (12) Protective or confidentiality orders;
- (13) Need for forensic experts to assist with searches for ESI;
- (14) Privilege logs;
- (15) Preservation of Metadata.⁶

The listed items are issues which frequently arise during discussions or debates about ESI. For example, litigants typically run into difficulty when (i) determining how to production-stamp electronic documents; (ii) evaluating the necessity versus the expense of preparing privilege logs in cases involving millions of e-mails; (iii) strategizing as to the need for a deposition of IT personnel to determine whether a search of ESI was properly performed; (iv) determining whether parties should engage in a "first tier" of discovery of accessible and less costly ESI, before deciding to perform a broader "second tier" of discovery. If counsel discuss these sorts of issues before or at the PC Conference, they should avoid or certainly narrow any subsequent e-discovery disputes.

(2) The Format of Production of ESI

The Guidelines clarify that the parties must agree upon the format of the production of ESI and that ESI need only be produced in that agreed-upon format. By way of example, parties and counsel can agree that Excel spreadsheets shall be produced in Native file format, and e-mails produced in TIFF format. Unless the parties agree, the same Excel spreadsheets need not also be produced in a second format. The Guidelines warn that counsel must not "scrub" ESI so as to intentionally make it unusable by an adversary.

Counsel should carefully consider the desired format for production of ESI before the PC Conference. If a party or counsel later decides that it requires the production of ESI in a second format, and a possibly more expensive format, there is a risk that the Court will not agree to order the producing party to produce the same documents again in the second format, and/or that the Court will require the requesting party bear the cost for producing those documents.

(3) Cost-Shifting/Sharing

Several courts have taken a stance on “cost-shifting” in the area of e-discovery. The Guidelines do not state a definitive rule on cost-shifting; rather they encourage counsel to review six decisions. While the decisions must be read in their entirety for context, the holdings are summarized as follows:

- a. *Finkelman v. Klaus*, 17 Misc. 3d 1138(A), 856 N.Y.S.2d 23 (N.Y. Sup. Ct., Nassau Co. 2007): subpoenaing party must bear “the costs incurred in producing the e-mail records.”
- b. *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Sup. Ct., Nassau Co. Aug. 17, 2006): requesting party must pay the cost of searching restored backup tapes for e-mail and electronic documents. ca. *Weiller v. New York Life Ins.*, 6 Misc. 3d 1038(A), 800 N.Y.S.2d 359 (N.Y. Sup. Ct. N.Y. Co. 2005): producing party must bear cost of preserving ESI, but the court “would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein.”
- d. *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 798 N.Y.S.2d 345 (N.Y. Sup. Ct., Nassau Co. 2004): the “party seeking discovery must bear the cost of production of the items for which discovery is sought.”
- e. *Waltzer v. Tradescape*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dep’t 2006): as a “general rule,” the party seeking discovery bears the cost of production; however the “cost of an examination by defendants’ agents to see if [ESI] should not be produced due to privilege or on relevancy grounds should be borne by” the producing party.
- f. *Etzion v. Etzion*, 7 Misc. 3d 940, 796 N.Y.S.2d 844 (N.Y. Sup. Ct., Nassau Co. 2005): requesting party bears cost for the production of requested documents.

New York courts, including those in the Nassau County Commercial Division, have not reached consen-

sus on whether the producing or receiving party must pay for the discovery of ESI. Nor is there consensus on what costs or expenses can be shifted, i.e., the cost to copy and produce the documents, the labor costs involved to gather and review the documents, or the attorneys’ fees incurred in performing a privilege review.

Parties should bring any issues concerning the cost of e-discovery to the Court’s attention early, e.g., at the PC Conference, and particularly before significant costs are incurred. Litigants may also wish to consider seeking a protective order pursuant to CPLR 3103 to protect from costly discovery.

(4) Sanctions Available Against Counsel and/or Parties

The Guidelines specifically state that sanctions may be imposed against counsel and/or a party when ESI is “demanded, withheld or destroyed” in bad faith or with gross negligence and when parties fail to maintain and preserve ESI as required.

Giving more “teeth” to the rules on e-discovery, the Guidelines further note that sanctions are also available under Rule 12 of the Commercial Division Rules, and under the PC Order if a party or counsel fails to maintain and preserve ESI as required by the PC Order.

Only time will tell if the Court will sanction counsel or parties who appear at the PC Conference unprepared, but in light of such rules, litigants are strongly advised to arrive at the PC Conference well-informed about ESI.

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In sum, the Guidelines serve as a “free CLE” for counsel and parties on ESI, and on the expectations of the Court for parties and counsel appearing at the PC Conference. It is strongly recommended that litigants review the Guidelines at the outset of litigation, whether or not the case is pending in the Nassau County Commercial Division, as the Guidelines may serve as a model for other New York State courts.

Conclusion

While there has been some movement toward amending the CPLR to address e-discovery issues on a statewide basis, the expectation is that it will be a long time before the legislature approves any such amendments. Until then, or until the Court of Appeals addresses e-discovery issues, the above rules will continue to govern ESI.

It is therefore imperative that litigants in New York State courts be fully aware of the new rules and appear before the Court knowledgeable about their client’s ESI policies and procedures.

Endnotes

1. All counsel should be aware that the Uniform Rules of New York Trial Courts was also recently amended to expressly include e-discovery as a subject for the PC Conference. Effective **March 20, 2009**, Rule 202.12(c)(3) now provides that counsel should confer regarding e-discovery issues, including data preservation plans, the format and scope of electronic production, and the anticipated costs.

An additional rule applies to PC Conferences in Commercial Division matters. Rule 8 of Uniform Rules of the Commercial Division (22 N.Y.C.R.R. § 202.70) (2006), titled "Consultation Prior to Preliminary and Compliance Conferences," specifically requires counsel to confer regarding e-discovery issues prior to the PC Conference. The Rule lists issues which "shall be addressed with the court" at the PC Conference including the implementation of a data preservation plan, scope and form of production, anticipated costs and the proposed allocation of same, and confidentiality and privilege issues.

2. As a practical tip, counsel are reminded that they should take steps to monitor a client's implementation of a litigation hold, and revise, supplement or redistribute the hold as may be appropriate.
3. Vesselin Mitev, *Nassau Commercial Courts Adopt New E-Discovery Requirements*, *New York Law Journal* (Feb. 19, 2009). Additional Commercial Division courts currently employ PC Orders which address e-discovery, with varying levels of detail. For example, the PC Order for the Commercial Division in Onondaga County requires counsel to identify the date on which they "consulted ... in a good faith effort to reach agreement on the issues identified" in Rule 8, discussed *supra*, and on "e-discovery." The Commercial Division in Queens County implemented Rule 5, titled "Consultation among counsel prior conferences."

Section (b) requires that counsel confer regarding "anticipated electronic discovery issues" prior to the PC Conference, including those topics identified in Rule 8 of the Commercial Division rules. Suffolk County's PC Order contains a section addressing the preservation of electronic evidence, provides a format for production of ESI and clarifies that a demand for books, records and other writings includes audiotapes, videotapes, computer disks and e-mail. The PC Order in Westchester County contains a space for counsel to describe the extent to which they will engage in e-discovery.

4. See also Rule 1 of the Commercial Division Rules requiring that counsel who appear in the Commercial Division be fully familiar with the case and authorized to enter into agreements on behalf of their clients. Failure to comply with Rule 1 risks "default," among other consequences.
5. The Guidelines can be found at http://www.nycourts.gov/courts/comdiv/nassau_rules.shtml.
6. The Guidelines contain definitions of ESI-related terms, including "Metadata."

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