

Constantine Cannon e-Discovery Practice Group Client Alert

The New York State Unified Court System Issues Groundbreaking Recommendations on Electronic Discovery in State Litigation

In February 2010, the New York State Unified Court System issued a report to the state's Chief Judge and Chief Administrative Judge on the need for improvements in New York courts' handling of electronic discovery ("e-discovery"). The report sets forth recommendations to courts to "manage e-discovery in a more expert, efficient and cost effective manner within the framework of existing law."

New York courts have already adopted Commercial Division Uniform Rule 8(b) and Uniform Trial Court Rule 202.12(c)(3) directing parties to meet and confer to resolve issues regarding electronically stored information ("ESI") before the preliminary conference. These rules are not having the desired effect of early resolution of e-discovery issues, however, because parties routinely ignore them. Rather than having meaningful discussions regarding ESI before the preliminary conference, litigants are frequently having disputes over spoliation claims and sanction motions that unnecessarily delay cases.

Moreover, the costs of e-discovery have often reached levels "far out of proportion" to the value of claims in dispute. The report's authors note the following factors, among others, that warrant the need for New York courts to act quickly to improve e-discovery practices.

The Report's Key Recommendations:

1) Establish an E-Discovery Working Group. The Chief Administrative Judge should appoint a working group of e-discovery experts to develop training curricula for judges and court staff; adopt practices and pilot programs to address e-discovery problems; monitor trends in e-discovery law and technology; and review bar association proposals and e-discovery programs from other jurisdictions to see if they would assist New York State courts.

2) Improve the Preliminary Conference.

- Require counsel appearing at the preliminary conference to have sufficient knowledge about clients' IT systems (counsel may bring client representatives or outside experts, where appropriate).
- Add an "**insert sheet**" to every preliminary conference form where parties would record the results of their discussions addressing e-discovery issues.

- Provide an **Initial Disclosure Form** (pilot program beginning in April 2010) to be jointly signed by counsel relating to e-discovery issues before the preliminary conference including details regarding:
 - the parties’ efforts to preserve relevant ESI;
 - witnesses the party is likely to call who are likely to possess ESI;
 - the identities of key IT personnel and the types of computer systems used by the party; and
 - whether the parties expect to claim that any ESI relevant to the case is “inaccessible.”
- Provide an **Affirmation of E-Discovery Compliance** (pilot program beginning in April 2010) to be jointly signed by counsel for the parties before the preliminary conference describing the parties’ meet and confers, and describing:
 - e-discovery issues that have been resolved by meeting and conferring;
 - outstanding e-discovery issues that require judicial intervention; and
 - any additional issues that haven’t been addressed.

3) Judicial Training. The Judicial Institute should sponsor more e-discovery law and technology training programs for judges and court staff.

4) Court Attorney Referees. Courts should designate referees in select pilot locations to resolve e-discovery disputes.

5) Sedona Conference Representative. The Chief Administrative Judge should appoint a representative, ideally a judge, to the Sedona Conference to learn from other judges experienced with e-discovery and to report back to the New York judiciary and bar.

6) E-discovery Journal. The court system should publish an e-discovery journal to report on New York State court e-discovery decisions and trends.

7) Law School Education. Work with law schools to develop ESI-related courses.

8) Alternative Dispute Resolution Programs. Increase reliance on ADR programs by creating a network of trained volunteer e-discovery mediators who will help resolve disputes referred to them by courts with high volumes of e-discovery cases.