



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #14

REQUESTED ACTION: Approval of the report and recommendations of the Commercial and Federal Litigation Section with respect to e-discovery.

Attached is a report from the Commercial and Federal Litigation Section entitled Best Practices in E-Discovery in New York State and Federal Courts, Version 2.0. These Guidelines are intended to provide practical advice to practitioners on managing e-discovery in New York State and federal courts. They are intended to help lawyers recognize e-discovery issues and provide a framework for analysis of those issues. The Section first published guidelines in 2011; this revision incorporates developments in the law governing e-discovery.

There are fourteen separate guidelines, as follows:

GUIDELINE NO. 1: The law defining when a pre-litigation duty to preserve ESI (electronically stored information) arises is not clear. 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.

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.

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, and should include: a description of the subject matter; the date ranges of the ESI to be preserved; a statement that all ESI, regardless of location or storage medium, should be preserved unless other written instructions are given; instructions on how to preserve the ESI and/or whom to contact regarding how ESI is preserved; and the name of a person to contact if questions arise. Counsel should monitor compliance with the legal hold at regular intervals.

GUIDELINE NO. 4: Counsel should endeavor to make the discovery process more cooperative and collaborative.

GUIDELINE NO. 5: Counsel should be familiar with their client's information technology, sources of ESI, preservation, and scope and form of production, as soon as litigation is anticipated, but in no event later than any "meet and confer" or preliminary conference.

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 requested and the relevant time period of the ESI. Objections to requests for ESI should plainly identify the scope and limitations of any responsive production. Boilerplate language which obscures the particular bases for objections and leaves the requesting party with no clear idea of what is or is not being produced should be avoided. If necessary, counsel should meet and confer to resolve any outstanding disputes about the scope or format of production.

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 before producing ESI. In requests for production of documents or subpoenas and objections to requests to produce or subpoenas, the form of production of responsive ESI should be clearly stated. If the parties have previously agreed to the form of production, the agreement and the form should be stated. In any event, counsel should not choose a form of production based on its lack of utility to opposing counsel.

GUIDELINE NO. 8: Producing ESI should be conducted in a series of five steps: (1) initial identification and preservation of potentially relevant ESI; (2) collection of ESI in a manner that is forensically sound; (3) processing and culling of ESI to reduce volume; (4) review by counsel; and (5) production in a format that is reasonably usable or agreed to by the parties.

GUIDELINE NO. 9: Parties should carefully evaluate how to collect ESI because certain methods of collection may inadvertently alter, damage, or destroy ESI. In considering various methods of collecting ESI, parties should balance the costs of collection with the risk of altering, damaging, or destroying ESI and the effect that may have on the lawsuit.

GUIDELINE NO. 10: Parties may identify relevant ESI by using technology tools to conduct searches of their ESI. In most cases, parties may search reasonably accessible sources of ESI, which include 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. The steps taken in conducting the search and the rationale for each step should be documented so that, if necessary, the party may demonstrate the

reasonableness of its search techniques. Counsel should consider entering into an agreement with opposing counsel, if appropriate, regarding the scope of the search and the search terms.

GUIDELINE NO. 11: Counsel should conduct searches using technology tools to identify ESI that is subject to the attorney-client privilege, the work product immunity and/or material prepared in anticipation of litigation. 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. To avoid the situation in which an inadvertent production of privileged ESI may possibly be deemed a waiver of the privilege, counsel should consider, as appropriate, entering into a non-waiver agreement and having the court incorporate that agreement into a court order.

GUIDELINE NO. 12: Counsel should take reasonable steps to contain the costs of e-discovery. To that end, counsel should be knowledgeable of developments in technology regarding searching and producing ESI and should be knowledgeable of the evolving custom and practice in reviewing ESI. Counsel should evaluate whether such technology and/or such practices should be used in an action, considering the volume of ESI, the form of ESI and other relevant factors.

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. If counsel expects that the client will incur disproportionate, significant costs for e-discovery or that e-discovery will otherwise present a financial burden to the client, counsel should endeavor to enter into an agreement with opposing counsel to allocate the costs of e-discovery or, if necessary, seek a court order as early in the case as possible and before the costs are incurred, allocating the costs of e-discovery and identifying which party pays for what e-discovery costs.

GUIDELINE NO. 14: Courts may issue sanctions for spoliation, or the intentional or negligent destruction or failure to preserve relevant ESI.

This report was published for comment on February 13, 2013. The New York County Lawyers' Association has submitted comments from its Federal Courts Committee, which generally supports the Guidelines but makes several recommendations for changes. In addition, House member Ira B. Warshawsky has submitted comments supporting the Guidelines. Both sets of comments are attached.

The report will be presented at the April 5 meeting by Tracee Davis, chair of the Commercial and Federal Litigation Section, and Gregory K. Arenson, the section's chair-elect.