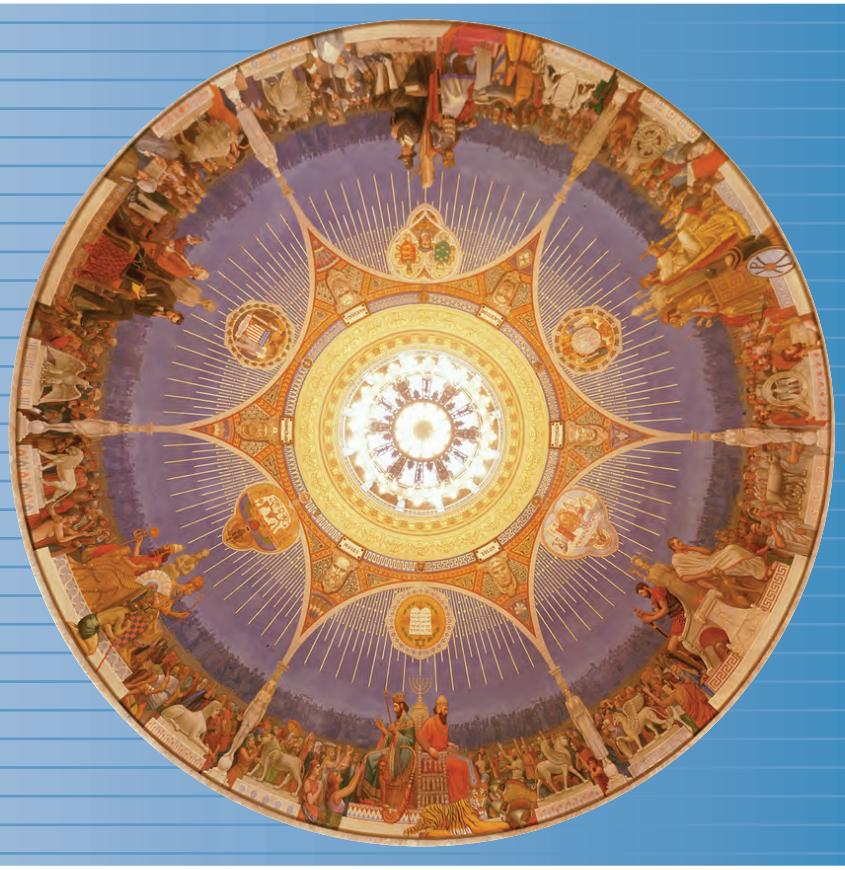
A REPORT TO THE
CHIEF JUDGE AND CHIEF ADMINISTRATIVE JUDGE

Electronic Discovery *in the* New York State Courts



THE NEW YORK STATE UNIFIED COURT SYSTEM

February 2010

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EXECUTIVE SUMMARY

Our society's ubiquitous reliance on the creation, transmission and storage of digital information has generated an exponential increase in the number of electronic records, such as e-mail messages, that are potentially relevant to a legal dispute. It frequently is costly and time-consuming to identify, preserve and produce what can often amount to thousands or even millions of electronic records. Moreover, the traditional adversarial approach to civil discovery only tends to foster additional delay and motion practice where electronically stored information ("ESI") is concerned, further contributing to excessive litigation costs. These problems are not limited to commercial litigation. They are increasingly evident in the full range of civil, family, and criminal cases that routinely involve the evidence contained in electronic records.

Among lawyers and judges familiar with the current state of electronic discovery ("e-discovery") in New York, there is a strong consensus that the court system should act now to ensure that e-discovery is handled as expertly, expeditiously and inexpensively as possible. Meeting these challenges and strengthening judicial management of e-discovery is critical to the New York State court system's standing as a leading national and international litigation forum.

The court system has already taken some steps to improve the management and resolution of e-discovery issues. For example, the court system adopted Commercial Division Uniform Rule 8(b) and Uniform Trial Court Rule 202.12(c)(3) to get the parties to meet-and-confer on ESI-related issues before the preliminary conference ("PC"). These rules are intended to promote the reasonable, proportional and cooperative resolution of most e-discovery issues and to encourage early court intervention where that is not possible. Unfortunately, these goals are not being met. Very few meaningful discussions are taking place at or before the PC, and protracted disputes over issues such as spoliation and sanctions continue to arise much too frequently. Judges and court staff often feel ill-equipped or powerless to avoid these roadblocks.

This report makes a number of recommendations to address these problems by generally increasing awareness of what is at stake, and giving judges and court staff the enhanced training, tools and procedures they need to take an early, active role in e-discovery. Such a role is key to fostering communication and cooperation among the parties, preventing avoidable disputes that escalate costs and delay, narrowing the scope of discovery; and, ultimately, ensuring that e-discovery costs remain proportionate to the matters in dispute. As the PC marks the first point in the case when e-discovery issues can be addressed most effectively, this report also proposes several initiatives to improve the court's ability to handle ESI-related issues at the PC, including both short term changes and longer term pilot projects that should be studied and implemented.

The findings and recommendations in this report are based on extensive research and interviews with many of the State's leading e-discovery experts, including judges, practicing attorneys and law clerks. Notably, this report does not address certain unresolved legal and policy issues particularly associated with e-discovery, such as the allocation of e-discovery costs between the parties. Such policy issues are beyond the scope of this report, although it is important that they be addressed in the near future through clarifying amendments to the CPLR or the development of definitive case law.

Rather, the recommendations in this report focus on how the courts can manage e-discovery in a more expert, efficient and cost-effective manner within the framework of existing law. This is an eminently achievable goal, and one that is critical to ensuring that the New York State courts remain at the forefront of jurisdictions addressing the emerging challenges presented by e-discovery.

Key Recommendations

- Establish an E-Discovery Working Group

  The Chief Administrative Judge should appoint a working group of experts to serve as a statewide resource and to support the court system's efforts to develop education and training curricula for judges and court staff; adopt best practices to address the practical and technical problems of e-discovery; evaluate the progress of pilot programs to improve e-discovery; and monitor relevant trends and developments.

- Improve the Preliminary Conference

  Short Term Changes

  1. To improve the parties' preparedness, an insert sheet specifically targeting e-discovery issues (see Appendix A) should accompany every PC form to call attention to the parties' ESI responsibilities and the applicable Uniform Trial Court Rules.

  2. Court rules should be amended to require that counsel appearing at the PC possess sufficient knowledge about client technology systems to competently discuss them with the court and opposing counsel; counsel may, as appropriate, associate themselves with and bring client representatives or outside experts with knowledge of the issues.

Long Term Pilot Projects (to be piloted separately and evaluated in selected courts for a period of eight months, beginning April 2010)

1. Initial Disclosure. Before the PC, counsel should sign and certify an Initial Disclosure form that addresses, among other things: identification of the parties' key IT personnel; efforts undertaken to preserve ESI and avoid spoliation; substantive witnesses likely to possess relevant ESI and the location of that ESI; types of computer systems and technologies in use; and potential claims that certain potentially relevant ESI is inaccessible.

2. Affirmation of E-Discovery Compliance. Counsel should jointly sign and certify an Affirmation of E-Discovery Compliance, to be submitted before the PC, that provides the court with three distinct lists: (1) e-discovery issues the parties conferred about and resolved; (2) issues that the parties could not agree upon or resolve and need the court's involvement; and (3) issues the parties have not yet addressed because they depend on the issues in the second list. The Affirmation would chronicle the parties' attempts to meet-and-confer, and indicate which client personnel/IT specialists or outside experts, if any, were involved.

- Education and Training

  The Judicial Institute should sponsor more e-discovery law and technology programs and offer them regionally to foster smaller classes and in-depth learning. One-hour "lunch and learn" webcasts should be presented on key e-discovery topics. Technical and practical issues should be balanced with broader themes such as early court involvement, cooperation, and proportionality.

- Court-Attorney Referees

  The court system should designate court-attorney referees to serve as e-discovery specialists in select pilot locations to help supervise and resolve protracted e-discovery disputes. Where resources permit, court-attorney referees should team with IT personnel to combine their skills, and strengthen the quality and efficiency of e-discovery supervision.

- Establish an Institutional Presence at The Sedona Conference®

  The Chief Administrative Judge should appoint an official representative to The Sedona Conference®, a nonprofit think tank dedicated to studying e-discovery issues and developing best practices and other authoritative guidance and resources for the legal system. The designee ideally should be a judge to get the most out of the opportunity to network and learn from other judges who are knowledgeable and experienced in this area.

- Improve the Quality of E-Discovery Practice
  To improve the bar's familiarity with e-discovery, the court system should publish a periodic e-discovery journal that reports relevant New York State court decisions and trends. The court system should also bring to bear its ADR programs: identifying and training volunteer attorney mediators who can help resolve court-referred e-discovery disputes.

I. INTRODUCTION

A. Impact of Electronic Discovery on the Courts and the Legal Profession

Electronic discovery ("e-discovery") has for some time been changing the face of modern litigation. It 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.

Over the last decade, unprecedented advances in digital information technology have revolutionized how people and businesses all over the world communicate and exchange information. Only ten years ago, we communicated primarily by telephone, fax and letter. Today, e-mail and text messages are the dominant methods by which we communicate and exchange information. At the same time, improvements in digital technology have made it both easy and inexpensive to store vast quantities of electronic information (a $200 terabyte hard drive can store the equivalent of 1,000 volumes of the Encyclopedia Britannica). Moreover, technological growth has broadened the types of information that can be stored digitally, and the mobile means in which it can be transported and accessed.

As a result, the volume of electronically stored information ("ESI") has increased exponentially over the last decade, along with the amount of ESI potentially relevant to legal disputes. But while it is inexpensive to store immense quantities of ESI, it can be extremely expensive in the context of litigation to identify, preserve, and collect potentially relevant ESI and to have it reviewed for responsiveness and privilege by attorneys and paralegals prior to production to another party.

The high costs and burdens of conducting e-discovery are driven not only by the sheer volume of available ESI, but by its wide dispersal and complexity. For example, e-mail accumulates in prodigious quantities, in part because it can be shared, forwarded, and replicated among many different users. Similarly, a specific electronic document can reside in multiple locations: a hard drive, network server, laptop, blackberry, disaster recovery backup media, etc. In addition, ESI is much more difficult to dispose of than paper records. A shredded paper document is virtually irretrievable, but a deleted computer file can sometimes be recovered, albeit with some difficulty, through forensic methods. The digital revolution also has created new types of evidence not previously presented in litigation, including E-Z pass records, ATM records, and smart cards with embedded data such as Metrocards.

Unlike paper, ESI often changes over time because many digital systems automatically update, move, overwrite and purge data on a continuing basis. ESI can be very complex and difficult to access, depending on how it was created and maintained. Some ESI means nothing without, and must be retrieved from, unique, proprietary software, or from obsolete software or hardware. Some ESI resides in systems that have security features like encryption, and much ESI, known as

"metadata," or data about data, is typically hidden or embedded information about the generation, history, or management of files and documents, and not readily apparent to the average user.

All of these characteristics make it virtually impossible to be able to locate and produce all potentially relevant ESI in an easy and cost-effective manner. Given these realities, the traditional adversarial approach to discovery can be a recipe for disaster in the context of e-discovery, fostering delay, driving litigation costs to unacceptable levels, and forcing judges to issue multiple written decisions to advance the case to trial.[1] Practitioners and judges confirm that e-discovery costs in New York often reach levels that are far out of proportion to the actual value of the matters in dispute. And although these costs are most commonly associated with commercial litigation, where e-discovery can quickly run into the millions of dollars, it is equally problematic in the full range of civil, family, and criminal cases involving electronic records.[2]

It is clear from discussions with judges and practitioners well versed in e-discovery issues that the courts and the legal profession in New York must work together to develop a stronger framework for the efficient management of these types of cases. E-discovery is, at least in large part, a judicial management issue. It benefits the bench and bar alike for judges and court staff to receive the training, tools and procedures that will enable them to take an early and active role in getting the parties to communicate and cooperate on an e-discovery plan, in narrowing the scope of discovery, and in ensuring that the costs and burdens of e-discovery are proportionate to the value of the case. It is particularly important that the parties begin discussing and addressing e-discovery before the preliminary conference ("PC"), or as early in the life of the case as practicable. In the electronic world, factors such as the automatic purging of ESI through the normal operation of computer systems can make it much more difficult and expensive (if not impossible) to address ESI-related disputes later on.

Judges and court staff also need to be better educated about the unique issues, concepts, and technologies associated with e-discovery, so that when called upon courts can make fair, well-informed decisions on key issues such as preservation, narrowing the scope of requests, reasonable accessibility of ESI, shifting of costs, etc. Courts need to be prepared to address certain problems that are unique to e-discovery, from the heightened risk that privileged data will be disclosed inadvertently during production of vast amounts of ESI, to the prospect that a requesting party will use the staggering costs of e-discovery as a litigation tactic to extract a favorable settlement from the party that possesses all, or the vast majority, of the relevant ESI.

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[1] *See e.g.*, *Delta Fin. Corp. v Morrison, et al.*, 21 Misc 3d 1118(A) at 1-3 (Sup Ct, Nassau County 2008); *Delta Fin. Corp. v Morrison*, 17 Misc 3d 1113(A) at 8 (Sup Ct, Nassau County 2007).

[2] *See e.g.*, *Etzion v Etzion,* 7 Misc 3d 940 (Sup Ct, Nassau County 2005) (in matrimonial matter, court permitted imaging of defendant-husband's hard drive to ascertain extent of his business holdings); *In re Maura*, 17 Misc 3d 237 (Sup Ct, Nassau County 2007) (denying motion to quash subpoena on non-party law firm, and requiring production of ESI relating to creation of prenuptial agreement in Surrogate's Court proceeding).

In short, there is a strong consensus among lawyers and judges familiar with the current state of e-discovery in New York that the court system should take immediate steps to improve judicial management of e-discovery.

B. Why E-Discovery Practices and Procedures Must Change in New York

In order to best understand the need for prompt action in the New York State courts, it is helpful to consider past efforts undertaken to address the many unique challenges that e-discovery poses for the courts and the legal system. Steps have already been taken, but there is much more that can and should be done to address e-discovery.

To be sure, our courts have been aware of the problems that flow from ESI, and the corresponding need for court rules and procedures to guide the efficient management and resolution of cases involving e-discovery. Indeed, the Commercial Division Focus Groups ("Focus Groups"), conducted from December 2005 through February 2006, identified the severe challenges of e-discovery in commercial litigation. One senior New York County-based litigator lamented that e-discovery would have a major impact on the litigation process from beginning to end, including whether to litigate at all.[3] Similarly, a Justice of the Commercial Division noted that e-discovery issues were here to stay, and that judges, like practitioners, would have to adapt and adjust to the new reality.[4]

At the time of the Focus Groups, nearly all participants suggested that the Commercial Division's Uniform Rule 8(b) ("Rule 8(b)"), requiring that the parties come prepared to discuss nine enumerated e-discovery issues at the PC, should be applied to other case types throughout the court system.[5] Another consensus view that emerged from the Focus Groups was the importance of addressing e-discovery issues early in the case and particularly at the PC. While that approach ran the risk of filling every case with battles over electronic evidence, early court intervention would no doubt ease the cost and burden of issues that were likely to arise anyway.

To further study the problems of e-discovery, the New York State court system held the "Colloquium on the Future of Commercial Litigation in New York: Developing a Cost-Efficient Judicial Process for the Electronic Age" on December 1, 2008.[6] There, a half-day panel of national and New York-based e-discovery experts spoke about the importance of judicial leadership and early

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[3] Report to the Chief Judge on the Commercial Division Focus Groups (July 2006), at 9. (Available at http://www.nycourts.gov/reports/ComDivFocusGroupReport.pdf.)

[4] *Id.*

[5] *Id.* (referring to 22 NYCRR 202.70[g][8][b]).

[6] Materials and the agenda for the Colloquium are available at http://www.nycourts.gov/ji/commercial-litigation/.

court intervention in limiting the negative effects that ESI can have on the litigation process and culture. Keynote speaker Ken Withers, Esq., the Director of Judicial Education and Content for The Sedona Conference®, provided concrete examples of how the volume and complexity of ESI are contributing directly to large increases in the amounts of time and money that must be expended by litigants and the courts in managing and resolving e-discovery disputes.[7] The subsequent panel discussion covered many themes and strategies intended to improve the e-discovery process, including early and meaningful court conferences and promotion of cooperative and productive meet-and-confer sessions between the parties to discuss ESI issues. Attendees also heard about the need for a culture change – moving away from a "gotcha" game prevalent in other types of discovery disputes, toward a more transparent and cooperative enterprise where the parties and court work together to minimize the costs and delay involved in these disputes.

Early in 2009, the Administrative Board of the Courts took a significant step to improve the handling and adjudication of e-discovery disputes in New York by promulgating Uniform Trial Court Rule 202.12(c)(3) ("Rule 202.12(c)(3)"). This rule, as the Focus Groups had recommended, seeks to export to cases outside the Commercial Division the requirement that the parties address a list of enumerated e-discovery issues in advance of the PC. Nonetheless, it is clear that neither Rule 8(b) nor its new counterpart in Rule 202.12(c)(3) are solving the problems of e-discovery on their own. Reports from both lawyers and judges indicate that, with a few exceptions involving seasoned lawyers who routinely litigate ESI-heavy cases, counsel generally ignore or seek to avoid dealing with pre-PC obligations related to ESI. According to judges and law clerks, it is very common for the parties to say at the PC that they will "work it out on their own," or "will worry about that stuff later." On the other hand, many lawyers interviewed for this report believe that e-discovery knowledge and experience levels among some judges and court staff could be improved, particularly with regard to focusing on the right questions to ask and the key issues to consider at the outset of the case. As a result, many of the problems that lead to protracted disputes (and that early intervention could avoid) – spoliation, sanctions, disagreement on forms of production, over-broad requests, or seek ESI that is not reasonably accessible – continue to arise much more often than necessary.

Addressing e-discovery optimally and efficiently transcends the importance of any particular litigation. Interviews with leading judges, law clerks, and practicing lawyers from around the state strongly suggest that the New York court system's standing as a leading forum of both national and international litigation is at stake. Many frequent state-court litigants and lawyers have expressed concern about the lack of predictability and consistency in handling e-discovery. Those same parties and lawyers appear to be turning away from New York State courts for the greater sense of certainty and ability to handle massive e-discovery disputes that the Federal courts, and to a lesser extent, other state courts with more developed e-discovery practices, can provide.

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[7] Journal of Court Innovation, Spring 2009, at 15, 17-18 (hereafter, "Court Innovation, at _____") (available upon publication at: http://www.courtinnovation.org/journal.html).

Judges and practitioners alike expressed the view that it is unacceptable for the New York state courts to be a national leader in so many areas, including commercial litigation, and yet remain behind the curve on this all-too-important issue.

This report makes numerous recommendations designed to insure that New York remains at the forefront of jurisdictions addressing e-discovery. The data-gathering process which informed these recommendations is described in the next section.

C. The Process Underlying This Report

The Chief Judge and Chief Administrative Judge determined that it would be in the best interests of the court system to engage in some fact-gathering on e-discovery – both to learn what was currently happening within the New York State courts and to consider what could or should be done in the future. The goal of this fact-gathering exercise was to identify ways in which the court system could take action on its own initiative (without legislation) to improve the management and resolution of the growing number of cases that involve e-discovery.

The process began with an extensive review of the literature addressing e-discovery, and proceeded to a series of individual interviews with leading judges, law clerks, and practicing attorneys from around the state. In each of these sessions, the interviewee was given the opportunity to provide both general views on what could be done better in the New York State courts (and how it may be done better in other jurisdictions), with specific discussion about possible ways to remedy identified shortcomings. Interviewees also provided the names of other persons whom they believed would be helpful to the process. Interviewees were encouraged to stay in contact and offer additional suggestions on a continuing basis.

The product of this fact-gathering process is a set of specific action items that should be implemented to improve judicial management of e-discovery in the New York State courts. The balance of this report addresses these recommendations, and calls for their implementation in the order in which they appear. Some are simple and can be implemented easily and quickly. Others will require additional study and development and, though no less a priority, should not be adopted without careful evaluation.

In preparing this report, it became clear that it would not be appropriate to address the issue of "cost-shifting." The allocation of e-discovery costs between the parties are legal and policy issues beyond the scope of this report. There are conflicting trial court decisions on this subject (not to mention a separate body of federal case law), and virtually all interviewees noted that this remains a "confusing" or "unsettled" area of law in urgent need of clarification, either through amendments to the CPLR or definitive appellate court rulings.[8]

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[8] *Compare T.A. Ahern Contr. v Dormitory Auth.,* 24 Misc 3d 416, 423 (Sup Ct, NY County 2009) *and Lipco Elec. Corp. v ASG Consult. Corp*., 4 Misc 3d 1019(A) at 8-9 (Sup Ct, Nassau County 2004) *with Delta Fin. Corp. v Morrison, et al*., 13 Misc 3d 604, 616 (Sup Ct, Nassau County 2006).

Finally, in issuing these recommendations, the report recognizes that working with e-discovery issues is akin to shooting at a moving target. Who, for example, could have predicted the very recent rise of Facebook and Twitter, among other social media, and their concomitant impact on litigation? Even two years ago, well after e-discovery's effects on litigation were well known, neither social media platform was as widely used. Thus, the suggestions contained below are intended to be dynamic – capable of both repetition and adaptation to technological changes. They will allow for the ongoing examination of, and adjustment to, future developments.

II. FINDINGS AND RECOMMENDATIONS

A. Establish an E-Discovery Working Group

To keep up with the rapid rate at which e-discovery law and technology is changing, lawyers and judges expressed strong support for the creation of a working group of e-discovery experts that would serve as a resource for the court system and support its efforts to improve the management of e-discovery. Although some respondents suggested that one or more judges or court employees should be designated to serve as statewide point persons, most respondents thought a better approach would be to appoint a statewide working group of practitioners, judges, court staff and persons with technology backgrounds that could jointly approach dynamic changes in the e-discovery landscape going forward.

The working group would not duplicate the work of the CPLR Advisory Committee, an official standing committee that, pursuant to Judiciary Law § 475, annually proposes a program of legislation and court rules affecting practice and procedure in New York's courts of civil jurisdiction. The CPLR Advisory Committee is actively considering legislative and rule-based proposals affecting e-discovery. While the e-discovery working group would be expected to have suggestions and recommendations for the Committee's consideration, its mission would take it in other directions, as set forth below:

- Developing comprehensive, up-to-date education and training programs for judges and court staff, including training for neutrals and specially-designated court positions related to e-discovery;

- Evaluating the progress of the pilot programs recommended in Section II B to determine whether they are improving court management of e-discovery and should be expanded to other courts around the state;

- Monitoring changes and trends in e-discovery law and technology; and

- Reviewing proposals by bar associations as well as e-discovery programs and innovations from other jurisdictions to assess whether they would assist the New York State courts in managing e-discovery more efficiently and cost-effectively.

A working group wholly focused on e-discovery would be helpful immediately because the bench and bar alike are eager for suggestions and best practices that could help them address the rapidly emerging practical and technical problems e-discovery presents.

The e-discovery working group would report to the Chief Administrative Judge, and its members would be appointed by him or her, with the court system providing staffing. For the working group to have credibility and perform its role effectively, its composition must be balanced

between lawyers who typically request ESI and those who typically produce ESI. The members generally should have extensive e-discovery experience and strong technical backgrounds, including judges and court staff with hands-on experience in managing e-discovery. Of course, the overall membership must also represent the full diversity of New York's legal community, including a cross-section of geographic backgrounds, legal practice specialties, and law firm sizes. The many judges and lawyers who discussed the working group recommended that the following types of people and interests should be involved, to the extent practicable:

- Judges, court attorneys, and court clerks drawn from both the Commercial Division and other courts around the state that handle e-discovery issues (and perhaps one or more judges/court personnel with little or no e-discovery experience);
- Lawyers with extensive experience litigating cases involving large volumes of ESI;
- One or more CPLR Advisory Committee members with an e-discovery background;
- Medical malpractice, matrimonial, criminal, mass tort, and employment law practitioners, because of the increasing frequency and importance of e-discovery in these practice areas;
- General counsel familiar with the issues affecting corporate clients who are heavy-ESI producers, particularly in the financial services and health care industries;
- Forensic computer/e-discovery specialists who typically are hired for large e-discovery productions, but can share their substantive technical knowledge and familiarity with the latest technological/forensic trends;
- A mix of newer and more experienced practitioners, including one or two more experienced practitioners with limited technical proficiency;
- Bar association representatives who have studied and issued reports on e-discovery;
- Federal practitioners and/or federal magistrates to offer the federal courts' perspective;
- An academic who has studied and written about e-discovery;
- Representatives of the Advisory Group to the New York State and Federal Judicial Council, which works to promote awareness about differences and commonalities in law practice between the state and federal judiciaries;

- A member of The Sedona Conference®, a national group of jurists, lawyers, experts and academics considered to be at the cutting edge of e-discovery issues; and

- Representatives of the Attorney General's and/or District Attorneys' Offices who are familiar with how e-discovery is affecting their caseloads.

B. Improve the Preliminary Conference

The judges and lawyers interviewed for this report were unanimous in stating that the current approach to addressing e-discovery at the PC has been disappointing and largely ineffective. Although many pointed to "success stories" involving well-seasoned litigators used to working with ESI in both the Federal and state courts, all respondents made clear that the parties usually show up at the initial conference with little to no preparation regarding e-discovery, and the subjects that are required to be covered by rule are merely glossed over. Clearly, Rule 8(b) and Rule 202.12(c)(3) need fine-tuning to fulfill their intended purposes.

No one, however, suggested giving up on the PC as the focal point for discussing these issues. Indeed, there remains substantial agreement that e-discovery disputes are best addressed when raised early on in the case, with judicial oversight and involvement. Simply put, well-trained judges, or court employees, can be much more effective if they are made aware of e-discovery problems early on and have the tools to respond effectively. Relatedly, if the parties and their counsel are forced to examine e-discovery issues from the outset, there are more opportunities to avoid the more complex and potentially intractable disputes that can arise later in the case.

The respondents also pointed out several arguments, some familiar and some new, against increasing the pressure on lawyers and parties to address e-discovery at the outset. First, they repeatedly noted the concern, particularly in courts likely to have cases of smaller size and dollar value, that not every case should be forced to confront e-discovery issues, and that doing so may force cases to settle (or not be commenced) due to lack of proportionality between the amount in controversy and e-discovery costs. The respondents raising these concerns suggested some sort of "opt out" procedure, so that parties who do not want to address e-discovery can stipulate accordingly, or alternatively proposed that judges should have the ability to set an "e-discovery budget" that keeps costs within reasonable limits given the size of the case. Indeed, Rule 202.12(c)(3), by its own terms, requires the parties to have discussions at the PC about e-discovery "[w]here the court deems appropriate."[9] In light of the concerns raised about the effect of e-discovery throughout this report, the resulting question may well be, "when is it not appropriate" to have those discussions at the PC?

[9] It is the view of this report, and of most of the interviewees, that Rule 202.12(c)(3) was intended to require the discussion of e-discovery at the PC in virtually all cases – but allowing the judge to forego the requirement when needed because of proportionality or other concerns. The Administrative Board may wish to consider clarifying this rule, if the current language leads to inconsistent application.

Second, respondents noted that many lawyers (and their clients) may not have sufficient time between the filing of an RJI and the scheduled PC (within 45 days), to learn what they need to know, particularly if the RJI is filed contemporaneously with the complaint.[10] E-discovery issues, particularly those included in the list to be addressed at the PC, may not be resolved in a single phone call with the client, or even a couple of meetings with the client's IT staff. The respondents raising these concerns suggested that judges (explicitly through court rule) be invested with the discretion to delay the time in which parties must comply with their e-discovery obligations, perhaps at a second, later conference. Other respondents, however, noted that such a flexible approach could lead to abuse by lawyers seeking to manipulate the system, and would necessarily require re-writing many of the deadlines agreed upon at the PC for other matters.

Finally, a few respondents expressed concern over the lack of "teeth" for the current provisions and asked what a judge (or law clerk) can or should do if the parties simply fail to comply. Sanctioning attorneys or parties, to these respondents, seemed like an unworkable remedy, given that any abuses would have occurred very early on in the case, and without any opportunity to make amends. Of course, should the offending lawyer or party be given time to correct any shortcomings, before being sanctioned, the very purpose of the rules (addressing the e-discovery issues at or before the PC) will have been defeated.

Against this backdrop, the judges and lawyers interviewed nonetheless provided a variety of potential solutions to these problems. These solutions can be grouped into two general camps: (1) short term, minor changes, that should be adopted immediately and can make a difference in the conduct of PCs with respect to e-discovery, and (2) longer term pilot projects that should be implemented and observed closely by the newly-formed e-discovery working group. The working group should recommend to the Chief Administrative Judge whether to continue, discontinue, or modify these programs based on results of the pilot projects.

1. Short Term Changes

Many of the complaints of judges and knowledgeable practitioners about the way e-discovery is handled at the PC center around preparedness to address issues. Although preparedness can be improved through additional training of judges and court personnel (see Section II C), much of the concern is targeted at the way lawyers approach the PC. In many anecdotes shared during the interview process, respondents indicated that lawyers often claim ignorance of the ESI-related requirements, or state that someone else not present at the PC has the knowledge needed to address e-discovery issues. Some interviewees pointed out that there is also a wide range of forms for PCs, ranging from a highly detailed e-discovery checklist for the Nassau County Commercial Division, to many other forms that contain no space (other than perhaps, a generic blank extra page) to address e-discovery issues.

[10] 22 NYCRR 202.12(b).

Although reasonable minds may differ as to what level of detail should appear concerning e-discovery on a PC form, there can be little doubt that omitting any mention of it is not optimal. Thus, this report concludes that an insert sheet specifically targeted at e-discovery issues should be designed and included as a "minimum best practice" for every PC form used in the New York State courts. The insert sheet, a model of which is attached in Appendix A, could be supplemented by courts locally, or entirely supplanted if existing, more thorough materials are in place.[11] The insert will specifically call the parties' attention to Rule 8(b) and Rule 202.12(c)(3) and leave ample space for the parties to address those issues in what is discussed and submitted to court. At a minimum, this revised PC form language will greatly increase the awareness of the rules by both the bench and the bar, and give judges and law clerks something additional to point to in an effort to ensure compliance.[12]

Respondents also indicated in their interviews that the entire process can be frustrated if an attendee at the PC, otherwise prepared to discuss everything from settlement to a note of issue date, does not have the knowledge of and experience with the client's technological systems to address e-discovery issues. Attempting to work through these issues under these conditions can be particularly wasteful of limited court resources.

To address this problem, this report concludes that new language should be added to Commercial Division Uniform Rule 1 and, to the extent there is no comparable provision in the Uniform Trial Court Rules, to Rule 202.12(c)(3).[13] The revision should add in a new subsection language stating that:

> Counsel appearing at the PC should be sufficiently versed in matters relating to their client's technological systems to competently discuss with the court and opposing counsel all issues relating to e-discovery. Counsel may, in appropriate cases, supplement their ability to address these issues at the PC by bringing a client representative or outside expert with such knowledge.

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[11] See http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf (Nassau County Commercial Division PC Form).

[12] Indeed, at a recent CLE program offered to law clerks and court attorneys at the Judicial Institute, a poll of the audience revealed that less than a third of attendees were aware of Rule 202.12(c)(3) and its requirements.

[13] *See* 22 NYCRR 202.70(g)(1) ("Counsel who appear in the Commercial Division must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients. Counsel should also be prepared to discuss any motions that have been submitted and are outstanding. Failure to comply with this rule may be regarded as a default and dealt with appropriately. *See* Rule 12. It is important that counsel be on time for all scheduled appearances.")

This language will again provide a helpful "hook" for the Court to focus counsel's attention on their e-discovery obligations. Moreover, the approval to bring knowledgeable client representatives (*i.e.*, IT personnel) or outside experts to the PC may give the court an additional avenue to help resolve issues. Many interviewees indicated that allowing each side's technical support staff to speak to each other could lead to quicker resolution of e-discovery issues, reaching solutions that perhaps lawyers might not have considered.

2. Long Term Pilot Projects

If the short-term changes described above have the net result of raising awareness and removing excuses for not complying with the parties' e-discovery obligations, the New York State court system will already have taken a step forward. But it is clear that consciousness raising exercises are not enough. The burden that e-discovery places on the entire adjudicative process is sufficiently large that it requires more. As such, this report proposes two additional steps, each to be piloted in a different Commercial Division court for a period of eight months, beginning in April 2010. Each Justice selected to pilot this approach would be asked, together with his/her Administrative Judge, to make a report to the e-discovery working group as of December 31, 2010, describing the court's experience with the pilot project and recommending whether it should be continued, discontinued, or modified. The working group will then make a report to the Chief Administrative Judge.

A. Pilot Project One: Initial Disclosures

Most interviewees – particularly those who are also experienced Federal court litigators – agreed that requiring the parties to share information in advance of the PC would help resolve e-discovery issues at or before that date. This report, consistent with those sentiments, concludes that one pilot project should require an Initial Disclosure (comparable in concept and form to that of Federal Rule of Civil Procedure 26[a][1]) for all parties relating to e-discovery issues. That Initial Disclosure, which would be established by Uniform Trial Court Rule, and must be signed and certified by the attorneys, would require the parties to detail the following for each other, in advance of the PC:

- Who the party's key IT people are;
- Whether, and to what extent, the party has implemented preservation measures to avoid spoliation of the information relevant to this case;
- Which substantive witnesses the party is likely to call who are likely to possess ESI, and the location of that ESI (*e.g.*, laptops, wireless handheld devices);
- What types of computer systems (including e-mail, word processing and spreadsheet software) and other technologies the party uses that may have created documents relevant to the litigation; and

- Whether the party expects to claim that certain ESI relevant to the case is inaccessible due to the form in which it is maintained (*e.g.*, disaster recovery backup tapes, legacy data).

Many, if not all, of these issues are important to the resolution of e-discovery disputes and were specifically flagged by lawyers and judges interviewed for this report. The exercise of gathering this limited information for a discovery document will meaningfully advance the parties' (and their lawyers') efforts to address these issues at an early stage of the case. At the least, the Initial Disclosure will provide a helpful basis for counsel to focus their own clients on e-discovery issues early on in the litigation. The Initial Disclosure is not intended to be unduly burdensome to the parties, and should provide judges and law clerks at the PC with a helpful roadmap of the issues that need to be resolved.

B. Pilot Project Two: Affirmation of E-Discovery Compliance

Rule 202.7 of the Uniform Trial Court Rules currently requires that the parties submit, with their papers on a standard discovery motion, an Affirmation of Good Faith, in which the moving attorney attests to the efforts to meet-and-confer with the other side of the case about the issues before the court.[14] A similar device, targeted at e-discovery issues, and to be submitted to the court in advance of the PC, should make a meaningful difference in evaluating and resolving disputed issues early in the case. This would have the effect of putting some "meat" on the skeletal outline of topics to be discussed at the PC, as provided for in Rule 8(b) and Rule 202.12(c)(3).

Specifically, the Affirmation of E-Discovery Compliance would be jointly signed and certified by the lawyers for each party, and provide the court with three lists. The first list would contain those e-discovery matters, contained in Rule 8(b) or Rule 202.12(c)(3), which the parties were able to meet-and-confer about and resolve. The second list would contain similar matters that, despite meeting and conferring, the parties could not agree upon or resolve and that need the court's involvement. The third list would be any additional issues that, because of the disagreements described in the second list, the parties could not yet reach and resolve. The document would also chronicle the parties' attempts to meet-and-confer, and indicate whether, and to what extent, client personnel and IT specialists were involved.

Respondents were by and large positive about testing this concept in a pilot project. One law clerk noted that this could simplify e-discovery disputes in the same way that Commercial Division Uniform Rule 19-a has made summary judgment motions easier to review and process, by requiring statements and counter-statements of facts that the parties believe to be uncontested (or contested).[15] A practitioner commented that this extended type of certification could help crystalize many issues for the court at the outset of the case.

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[14] See 22 NYCRR 202.7.

[15] 22 NYCRR 202.70(g)(19[a]).

C. Making Both Pilot Projects Work

Those interviewed for this report raised three common concerns about these pilot projects: they wanted to know how the new obligations will be enforced, and whether lawyers will have sufficient time to work with their clients to come up with the necessary information. They also wanted to ensure that, particularly in smaller cases, the parties could jointly stipulate to opt out of e-discovery altogether. Although each is a valid concern, none should present an insurmountable problem. In the end, if the judges overseeing these pilot projects are active in working with the parties to get through the issues, most (if not all) of the concerns should be resolved.

As to enforcement, several respondents pointed out that lawyers generally take seriously any documents that they need to certify. Those same interviewees recognized that the certification would raise the level of attention to detail and serious thought given to the discovery devices, and therefore decrease the likelihood of noncompliance. There was more of a split among the respondents on whether sanctions at this early stage of litigation would be an effective deterrent to noncompliance, however. Many felt that it would be an unduly harsh result to apply sanctions so early in the case, particularly when the attorneys might not have had sufficient time to absorb what they need to know from their clients before the PC.

It is beyond the scope of this report to decide whether and to what extent sanctions are appropriate in these circumstances. The judges overseeing these pilot projects are well-suited to apply the facts of a particular case to the appropriate standard and make the correct determination in the normal course. That said, Hon. John. L. Carroll, Dean of the Cumberland School of Law at Samford University, and a participant in the December 2008 Colloquium, offered one meaningful alternative to sanctions in his remarks. "A judge has value not necessarily sanctioning, but telling lawyers when they have done the wrong thing, and that they expect them do it the right way the next time. Sanctions are valuable in the egregious situation. The lawyer and the judge jawboning is much more valuable."[16] Indeed, having a judge express his/her expectations and displeasure with a lawyer's or client's failure to comply, on the record, and perhaps even requiring the lawyer to purchase the transcript and share it with the client, can be a helpful means of changing the culture, without the use of outright sanctions. In appropriate settings, the judge (or law clerk) can also discuss at conference ways in which the lawyers might have better complied with their obligations.

As to the need for sufficient time to complete the new obligations prior to the PC, interviewees again had a number of different views. Some offered that lawyers should simply be allowed to have extra time (*i.e.*, delay the PC), whether by stipulation or otherwise. Others countered that doing so could simply allow lawyers to manipulate the system and delay case management. Here, too, there is no one-size-fits-all answer. Judges can and should be trusted to make the correct and appropriate decisions about when more time to complete discovery obligations is necessary based on

[16] Court Innovation, at 43.

individual circumstances. Accordingly, in appropriate situations, judges should use their discretion to adjourn conferences or call additional conferences on a short timetable to assist with resolving e-discovery issues generally, or the new pilot obligations specifically. In all cases, courts should allow parties to supplement their responses when needed, provided that they understand that they are under a continuing obligation to do so.

Finally, particularly in upstate jurisdictions, respondents expressed concern that e-discovery costs can easily outpace the amount in controversy in smaller cases, and that making every case into an e-discovery case (through these pilot projects or otherwise) could be particularly problematic. Those same practitioners and judges suggested that parties should retain the ability to "waive" or "opt out" of e-discovery in a particular case, and that judges should be attuned to that possibility. These are sensible approaches that recognize that there are many cases where no relevant information is likely to be found on computers, or where the effort to extract evidence from computers needlessly interjects disproportionately large costs and complex issues into the case. It appears that the discretionary language contained in Rule 202.12(c)(3) was intended to strike this very balance. Thus, judges should retain and make use of their discretion in managing cases to evaluate and approve the parties' decisions on whether to opt out of e-discovery. But to do so, the judge should be satisfied, after conferencing with the parties, that this is the correct decision for the case. Merely accepting and so ordering a stipulation without discussion is the antithesis of the kind of judicial involvement necessary to manage e-discovery effectively. Here, too, it is vital that the lawyers and court address the issues early.

C. Training, Resources, and Tools for Judges

1. Education and Training

Electronic discovery presents significant challenges for judges and court staff, not the least of which is understanding new concepts and technologies. Practitioners appearing in New York State courts complained of inconsistent levels of knowledge and experience among judges and court staff in handling ESI-related issues. Although a growing number of judges and court attorneys are ahead of the curve in this area and are familiar with cutting-edge trends and the latest developments in case management techniques, most judges remain generally unfamiliar with these issues, including the underlying terminology. Practitioners pointed out that this uneven state of knowledge is a leading factor retarding the growth of a consistent and uniform body of substantive and procedural e-discovery law in New York. Fear of ill-crafted e-discovery rulings that can impose major costs and burdens is causing many litigants to settle cases prematurely or avoid raising e-discovery issues in a timely manner, with some litigants avoiding the New York State courts altogether.

The New York State court system's Judicial Institute has to date offered a number of helpful training programs featuring some excellent, nationally recognized experts on e-discovery. Nonetheless, the consensus view among lawyers and judges interviewed is that there is a need for even more programs, about a broader range of topics – or put differently, that the excellent one-off

program at a yearly training program for judges or court attorneys should be supplemented. In order to provide more in-depth training covering practical, technical and theoretical aspects of e-discovery, it is recommended that future programs be offered on a regional basis, perhaps by Appellate Department. This would allow for smaller classes, encourage more intensive question and answer sessions, and enable the participants to focus on the e-discovery trends that judges are actually seeing and experiencing at their local level. In addition, the Judicial Institute should develop and administer a series of one-hour "lunch and learn programs," each of which focuses on a different aspect of e-discovery starting with terminology, to be broadcast around the state and stored as reference in the CLE video library on the Judicial Institute's website.

At a minimum, training programs should (1) convey a basic understanding of information technology, including terms of art; (2) address issues affecting the production phase, including the different forms in which documents may be produced, protecting privileged information, reasonableness, and proportionality; (3) examine technical protocols, including different search techniques and sampling methodologies; (4) discuss the substantive law of ESI, including key statutes, rules and case law on cost-shifting, preservation, spoliation, etc; and (5) offer a comparative look at decisions from other states and federal courts on select issues.

Many interviewees urged that in addition to conveying information about substantive and procedural law and technology issues, education and training programs should emphasize the broad themes of early court involvement, cooperation between counsel, proportionality, and controlling e-discovery costs. Providing practical approaches, as well as theories, should make a meaningful difference.

Training is, of course, not only an exercise in spending time in a classroom environment. Interviewees also expressed interest in increasing the resources available to judges and court staff to educate themselves on a day-to-day basis about e-discovery issues. To this end, the e-discovery working group should design, and the court system should implement, an e-discovery home page on the court system's intranet website to provide judges and law clerks with model forms or language, case management tips, a glossary of relevant terms, and other helpful information. Some of the necessary information already exists on the website created for the December 1, 2008 Colloquium.[17]

Many respondents felt that, once constituted, the e-discovery working group would serve as an excellent vehicle for developing an effective training curriculum tailored for New York judges and court personnel. To the extent possible, judges and court attorneys should be surveyed ahead of time to ensure that the training programs are designed to address their needs and expectations. The working group, or a subcommittee of that group, should then work with the Judicial Institute to create and implement the training programs.

[17] http://www.nycourts.gov/ji/commercial-litigation/.

2. Court-Attorney Referees

Under CPLR § 3104, judges are authorized to appoint referees, including court attorneys, to supervise discovery in actions where the parties' claims or the information being sought is technical in nature. Interviewees strongly recommended that judges make greater use of this discretion in connection with e-discovery, and that the court system designate a number of court-attorney referees to receive special training on e-discovery matters to help supervise and resolve protracted disputes. These referees would serve as a valuable resource for judges and relieve them of some of the more complex and technical e-discovery matters. With some notable exceptions, respondents preferred the use of court personnel to private attorneys in this role, as the former both have the imprimatur of the court system and would keep litigation costs down. Many litigants are uncomfortable with private referees because of expense and privacy concerns.[18]

It is important for practitioners to have confidence in the quality and skills of court-attorney referees assigned to supervise e-discovery. The referees should thus be trained and knowledgeable about the key legal and technical issues surrounding disclosure of ESI. They also should possess strong dispute resolution and mediation skills to foster compromise and cooperation between the parties, which are essential to moving e-discovery forward. Practitioners opined that court-attorney referees could be helpful not only in supervising e-discovery but in helping lawyers and parties who are unfamiliar with these issues to understand their ESI obligations from the outset.

It would be particularly helpful to team a court-attorney referee with a court-employed IT person to strengthen the court system's ability to supervise e-discovery. Many judges and law clerks are computer literate, but, even if they attend regular training programs, do not have the time to keep abreast of constantly changing technology. More importantly, they generally do not have the degree of technical expertise that an IT person would bring to the many difficult technical problems that can arise during e-discovery. An IT person, in the appropriate case, could be well-equipped to help judges and court attorneys craft solutions to these problems and help the parties resolve the most complex ESI issues. Combining these legal and technology skill sets should improve the quality and efficiency of e-discovery supervision.

Thus, the court system should designate court-attorney referees to receive training and then serve as e-discovery specialists in select pilot locations. Where resources permit, the court-attorney referees should team with IT personnel, to serve as a helpful resource for judges in courts with a heavy volume of e-discovery. E-discovery referees would be given the authority to hear and report, with the appointing judge retaining ultimate authority over discovery issues. The working group should, after a reasonable time, evaluate the benefits of this approach and report to the Chief Administrative Judge about whether and to what extent this program should be expanded.

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[18] This does not mean that in an appropriate case, with a high amount of money at stake, that a court cannot and should not make use of a paid outside special master. Increasingly, however, as e-discovery disputes reach cases with a lower amount in controversy, finding less expensive or free alternatives has become more important.

D. Establish an Institutional Presence at The Sedona Conference®

The Sedona Conference® is a nonprofit educational and research institute consisting of judges, lawyers, technical experts and academics from around the country who are dedicated to the advanced study of new and emerging areas of law and policy. Sedona has been influential in developing authoritative best practices and guidelines for the bench and bar. The "Sedona Principles," which set forth a consensus of what the law should be with regard to e-discovery, have been cited favorably by many federal and state courts as persuasive authority. The Sedona Conference®'s "Cooperation Proclamation" strongly encourages lawyers and judges to rethink the contentious and adversarial practices traditionally associated with civil discovery on the grounds that they are driving e-discovery costs and burdens to untenable levels.

Judges and practitioners applauded the work of The Sedona Conference®, particularly its emphasis on changing the litigation culture and fostering dialogue, cooperation, and transparency in e-discovery. Hundreds of lawyers and dozens of judges nationwide (including several New York State judges) have officially "signed on" to the Cooperation Proclamation, pledging to move away from the kind of adversarial discovery that drives up costs and delays justice and toward facilitating cooperative discovery. Many observers feel that judges are in the best position to promote these goals by emphasizing the importance of cooperation and transparency at the outset of the case.

Several respondents recommended that the court system appoint an official representative to The Sedona Conference®. The designee ideally should be a judge to get the most out of the opportunity to network and learn from other judges who are knowledgeable and experienced in this area. Informal inquiries have indicated that no other judiciary has appointed a person to serve as its official representative. Greater participation in and awareness of the work of The Sedona Conference® would help the court system stay ahead of the latest e-discovery developments and respond to them more effectively.

Appointment of a representative to The Sedona Conference® should not be interpreted to mean that the court system necessarily endorses that organization's work and proposals. Rather, the court system's appointee would bring back materials for consideration here in New York, to be accepted, rejected, or modified, as appropriate. Participation in this organization would also enable the court system to share its own experiences on a national level.

E. Improve the Quality of E-Discovery Practice

The focus on improving the court system's proficiency in e-discovery matters should not obscure the fact that many practitioners are equally unfamiliar with these issues. Indeed, if more lawyers were knowledgeable and competent about e-discovery issues, many of the problems facing judges and law clerks would be mitigated. The court system should take a more active role in educating lawyers (and clients) on expectations and the substance of e-discovery law as well. To this end, this report has three recommendations.

First, the court system should prepare and publish a periodic statewide e-discovery journal (modeled on the popular Commercial Division Law Report) that reports relevant New York State court e-discovery decisions.[19] The inaugural issue should contain the leading e-discovery decisions issued to date, and going forward judges should be invited to submit relevant decisions for publication in future editions. The e-discovery report should be published as often as the number of scholarly and helpful decisions will support. A subcommittee of the e-discovery working group should serve as the editorial board for preparing the text of the issue and determining which decisions should be accepted for publication.

Second, the court system can and should play a meaningful difference in improving awareness of e-discovery issues at the law school level. Despite e-discovery's implications for the future of law practice, several respondents expressed surprise at the lack of attention that law schools and law professors have generally devoted to this topic. The court system (perhaps partnering with interested committees of the organized bar) should work with the law school community to encourage the development of ESI-related courses to train future generations of New York lawyers. Ken Withers, who served as keynote speaker for the December 1, 2008 Colloquium, has described the "Net-Generation" of current and future lawyers born between 1978 and 1994, as the generation of young lawyers that "will lead us out of purgatory" because of their comfort level and experience at using information technology generally.[20] Whatever the court system can do to encourage the growth and use of those talents will be for the good. One place to start might be in partnering with law schools that possess relevant clinical programs.[21]

Third, and finally, Alternative Dispute Resolution ("ADR") programs are another way in which the bench and bar can collaborate to improve case management. Many respondents who discussed the importance of cooperation pointed to New York's good fortune in having a strong network of court-annexed ADR programs. Mediation is a very effective mechanism for resolving e-discovery disputes, particularly for parties of limited means. The court system should take full advantage of its ADR programs by creating a network of trained volunteer e-discovery mediators who could help resolve disputes referred to them by courts with a high volume of e-discovery cases. Increased reliance on and use of ADR would be well-timed. With the April 1, 2009 passage of the New York Rules of Professional Conduct for lawyers, the Administrative Board of the Courts

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[19] The Commercial Division Law Report is published four times yearly, and can be found online at http://www.nycourts.gov/courts/comdiv/lawreport.shtml.

[20] Court Innovation, at 24.

[21] *See, e.g.*, the Columbia Law School Lawyering in the Digital Age Clinic: http://www.law.columbia.edu/focusareas/clinics/digital. This clinic has previously assisted the NY State Unified Court System with projects in Civil Court. *See, e.g.*, http://www.nycourts.gov/admin/stateofjudiciary/soj2005.pdf (discussing clinic's work with the Housing Court).

removed from the ethics rules any express mention of "zealous advocacy" of a lawyer's client – a common reason, from an ethics standpoint, why lawyers have resisted the concept of ADR (or cooperation generally) for resolution of e-discovery disputes. Absent that ethical constraint, the time may be ripe for more lawyers to act cooperatively in this setting, making the ADR process more efficient and effective.

Toward this end, the court system's Office of ADR Programs should evaluate existing court-annexed ADR Programs and identify those neutrals who possess the appropriate skills and training to specialize in the resolution of e-discovery matters cutting across a wide range of disciplines. Where necessary, the ADR Office should partner with others to provide additional training tailored to the unique digital technology and other technical issues associated with e-discovery, including the issues involved in identifying, collecting, reviewing and producing ESI, so that trained mediators can be prepared to assist judges and law clerks, when needed, in appropriate cases.

III. CONCLUSION

Improving the way that e-discovery is handled in the New York State court system is not a task undertaken lightly, or one that can be completed with a few short term improvements. In addition to implementing the recommendations described above, there must be 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. To that end, the Chief Administrative Judge, whether through the e-discovery working group or otherwise, should encourage an ongoing collaborative process between the bench and bar to best address this difficult, rapidly developing issue – an issue that unquestionably will affect the future of litigation in the New York State courts.

APPENDIX A

MODEL PRELIMINARY CONFERENCE INSERT SHEET

SUPREME COURT, COUNTY OF _____

JUSTICE _____

PART:

Pursuant to Uniform Trial Court Rule 202.12(c)(3) [22 NYCRR 202.12(c)(3)] and Uniform Commercial Division Rule 8(b) [22 NYCRR 202.70(g)(8)(b)], counsel are required to have met and conferred regarding certain matters relating to electronic discovery, before the Preliminary Conference.

In the space provided below, and upon additional sheets if necessary, detail the efforts to address such issues and the results of same.

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Dated:

SO ORDERED:

J.S.C.