

NEW YORK
CITY BAR

COUNCIL ON JUDICIAL ADMINISTRATION

June 24, 2010

JAY G. SAFER

CHAIR

3 WORLD FINANCIAL CENTER
NEW YORK, NY 10281
Phone: (212) 812-8305
Fax: (212) 812-8365
Jsafer@lockelord.com

E-discovery Working Group c/o Jeremy Feinberg, Esq.
State of New York,
Unified Court System 25
Beaver Street
New York, N.Y. 10004

DAVID I. WAX

SECRETARY

3 WORLD FINANCIAL CENTER
NEW YORK, NY 10281
Phone: (212) 812-8326
Fax: (212) 812-8396
dwax@lockelord.com

Re: Electronic Discovery in the New York State Courts

Dear Honorable Members of the E-discovery Working Group:

Thank you for giving your time and expertise to assist the courts in addressing e-discovery. The New York City Bar Association's Council on Judicial Administration ("Council") has reviewed the recent report: "A Report to the Chief Judge and Chief Administrative Judge: Electronic Discovery in the New York State Courts" (the "Report"). As Chair of the Council, I write to provide some of the Council's thoughts on the Report and the continuing challenges of e-discovery generally.

One of the stated purposes of the Working Group is "to adopt best practices to address the practical and technical problems of e-discovery." In so doing, the Council hopes you will address and endorse necessary changes to the CPLR which were proposed in our August, 2009 report "Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in the CPLR," a copy of which is enclosed (<http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf>). The Council believes that such practices should be supported by enforceable rules contained in the CPLR. The Council concluded that changes to the CPLR discussed in our report are essential to establishing consistency and predictability for lawyers and litigants. Predictability will reduce both costs to litigants and burdens on the courts when confronted with e-discovery issues on a case-by-case basis.¹ If the federal courts' experience is any guide, then modification of the CPLR with established e-discovery rules will help achieve this predictability. A recent Seventh Circuit study aimed at finding ways to reduce the "massive costs" of electronic discovery confirmed that when judges and attorneys know the civil procedure rules, it

¹ We recognize that the Report specifically was not intended (nor is the Working Group specifically intended) to focus on CPLR issues, but we believe it is helpful and important to refer you to our report and the other sources contained herein, as you decide what best practices should be adopted and how they should be implemented and supported.

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improved the process.²

Many resources are available to assist the Working Group and the courts in addressing e-discovery issues. In particular, we urge you to consider distributing the City Bar's "Manual For State Trial Courts Regarding Electronic Discovery Cost-Allocation" (copy enclosed) (<http://www.nycbar.org/pdf/report/uploads/20071733-ManualforStateTrialCourtsRegardingE-DiscoveryCostAllocation.pdf>) to judges and staff to assist them in addressing e-discovery issues. This Manual was created after extended consultation with practitioners and technical experts who possessed actual experience, technical knowledge, and familiarity with anticipated changes in computer technology.

Similarly, we believe the Working Group could identify other resources, already developed, and recommend them to judges and staff. We urge the Working Group to review the Sedona Conference's "Best Practices Recommendations & Practices for Addressing Electronic Document Production." We hope you will look to the important recommendations of the New York State Bar Association, endorsed by the City Bar, which would integrate electronic discovery into the CPLR, contained in New York State Bar Association Commercial and Federal Litigation Section's Report Recommending Certain Amendments to the CPLR Concerning Electronic Discovery (approved by the House of Delegates June 21, 2008). See also Jones, Leigh, "Federal Pilot Program Curbs E-discovery Fights", Law Technology News, May 14, 2010.

We fully endorse the Report's third proposal regarding initial disclosure. The New York City Bar's Committee on State Courts of Superior Jurisdiction made just this recommendation in its October 2004 report entitled "Report on Proposed New York Court Rule Regarding Interrogatories," http://www.abcny.org/pdf/report/StateCourts_interrogatories_rpt.pdf. However, as our report noted, implementation of a pilot project is complicated by New York's RJI system, where no judge is assigned with commencement of the action. We hope this report will be of assistance in establishing your pilot project.

We fully endorse education and training and volunteer to discuss our reports at the Judicial Institute, during judge school, or at any other teaching opportunity. We believe that extensive education and training would be materially enhanced and greatly simplified if the CPLR were modified along the lines we have recommended. We endorse a plan to address proportionality through education and training. We believe that our Manual which focuses on proportionality would be a useful resource to the judges and their staff and we stand ready to assist in training on proportionality.

We suggest that the proposal for court-attorney referees be viewed as an interim solution. Court-attorney referees would likely become unnecessary once the recommended CPLR changes are enacted. We are concerned that were the

² See Jones, Leigh, "Federal Pilot Program Curbs E-discovery Fights," Law Technology News, May 14, 2010, Seventh Circuit Electronic Discovery Program - Report on Phase One (2010), available at <http://www.7thcircuitbar.org/associations/1507/files/05-2010%20Phase%20One%20Report%20and%20Appendix%20with%20Bookmarks.pdf>

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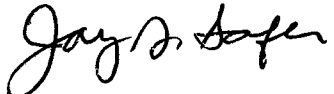
court to engage IT personnel for pending cases, it would raise funding issues which our current budget crisis will not allow. We believe the burden of complying with electronic discovery obligations should primarily lie with the lawyers and secondarily with the courts. The role of the courts should be to apply appropriate rules.

The proposed amendments to the CPLR will give clear and consistent guidance to litigants on what they must do. This would begin with the initial disclosures that require litigants to report to their court at the Preliminary Conference on how they have addressed electronic discovery, what technical experts they have retained to assist them, what problem areas they have defined, and how they have otherwise planned discovery.

With statutory provisions providing consistent outcome predictability, e-discovery dispute resolution will become simplified, enhancing the efficiency and fairness of the judicial system for all parties.

Thank you for your consideration of our comments.

Sincerely,



Jay G. Safer