



STATE OF NEW YORK
UNIFIED COURT SYSTEM
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A. GAIL PRUDENTI
Chief Administrative Judge

JOHN W. McCONNELL
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MEMORANDUM

January 7, 2013

TO: All Interested Persons

FROM: John W. McConnell

RE: Proposed amendments of the Uniform Rules of the Trial Courts (22 NYCRR §202.12(b) and (c)(3)) and the Rules of the Commercial Division (22 NYCRR §202.70(g)) (Rule 8), requiring counsel to confer prior to the preliminary conference in cases reasonably likely to involve electronic discovery.

The Unified Court System's E-Discovery Working Group ("Working Group") has proposed amending 22 NYCRR § 202.12(b) of the Uniform Rules of the Trial Courts to require counsel to confer on e-discovery issues prior to the preliminary conference whenever a case is "reasonably likely" to involve electronic discovery (Exhibit A). Such a requirement exists in the Commercial Division, where all cases presumptively involve discovery of electronically stored information. The Working Group's proposal would extend this requirement to non-Commercial Division cases in Supreme or County Court. The proposal also would add a new subsection in section 202.12(b), setting forth a non-exhaustive list of considerations intended to guide the court and counsel in determining whether a case is reasonably likely to involve e-discovery.

The Working Group further proposes amending section 202.70(g) (Rule 8) of the Rules of the Commercial Division (Exhibit B) and section 202.12(c)(3) of the Uniform Rules of the Trial Courts (Exhibit A) to ensure that the lists of e-discovery topics addressed by the parties are uniform in both Commercial Division and non-Commercial Division cases. Finally, the Working Group proposes adding the topic of "clawback agreements" (which govern the inadvertent disclosure of electronic data) to the uniform list of e-discovery issues.

Persons wishing to comment on this proposal should e-mail their submissions to OCArule202-12b@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004.

Comments must be received no later than March 8, 2013.

EXHIBIT A

**ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend, effective immediately, sections 202.12(b) and 202.12(c)(3) of the Uniform Rules for the Supreme and County Courts, to read as follows:

§ 202.12 Preliminary Conference.

* * *

(b) The court shall notify all parties of the scheduled conference date, which shall be not more than 45 days from the date the request for judicial intervention is filed unless the court orders otherwise, and a form of a stipulation and order, prescribed by the Chief Administrator of the Courts, shall be made available which the parties may sign, agreeing to a timetable which shall provide for completion of disclosure within 12 months of the filing of the request for judicial intervention for a standard case, or within 15 months of such filing for a complex case. If all parties sign the form and return it to the court before the scheduled preliminary conference, such form shall be "so ordered" by the court, and, unless the court orders otherwise, the scheduled preliminary conference shall be cancelled. If such stipulation is not returned signed by all parties, the parties shall appear at the conference. Except where a party appears in the action pro se, an attorney thoroughly familiar with the action and authorized to act on behalf of the party shall appear at such conference. Where a case is reasonably likely to include electronic discovery counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues. Further, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

1. A non-exhaustive list of considerations that a court may use for determining whether a case is reasonably likely to include electronic discovery is:
 - A. Does potentially relevant electronically stored information ("ESI") exist;
 - B. Do any of the parties intend to seek or rely upon ESI;
 - C. Are there less costly or burdensome alternatives to secure the necessary information without recourse to discovery of the ESI;
 - D. Is the cost of preserving and producing ESI proportionate to the amount in controversy; and
 - E. What is the likelihood that discovery of ESI will aid in the resolution of the dispute

* * *

(c) The matters to be considered at the preliminary conference shall include:

(1) simplification and limitation of factual and legal issues, where appropriate;

(2) establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed within the timeframes set forth in subdivision (b) of this section, unless otherwise shortened or extended by the court depending upon the circumstances of the case;

(3) Where the court deems appropriate, it may establish the method and scope of any electronic discovery. In establishing the method and scope of electronic discovery the court may consider the following non-exhaustive list, including but not limited to:

(a) identification of potentially relevant types or categories of data;

(b) disclosure of the applications and manner in which the data is maintained;

(c) identification of potentially relevant servers, workstations or devices and their locations, whether maintained on site or off site;

(d) implementation of a preservation plan for potentially relevant electronically stored information;

(e) identification of the individual(s) responsible for preservation;

(f) the scope, extent and form of production;

(g) identification, redaction, labeling, and logging of privileged or confidential electronically stored information;

(h) claw-back or other provisions for privileged or protected electronically stored information;

(i) scope or method for searching and reviewing electronically stored information;
and

(j) anticipated cost of data recovery and proposed initial allocation of such cost.

Chief Administrative Judge of the Courts

Dated:

EXHIBIT B

**ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS**

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend, effective immediately, section 202.70 Rule 8 of the Uniform Rules for the Supreme and County Courts, to read as follows:

Rule 8. Consultation prior to Preliminary and Compliance Conferences.

(a) Counsel for all parties shall consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery and any other issues to be discussed at the conference; and (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation. Counsel shall make a good faith effort to reach agreement on these matters in advance of the conference.

(b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to (i) identification of potentially relevant types or categories of data; (ii) disclosure of the applications and manner in which the data is maintained; (iii) identification of potentially relevant servers, workstations or devices and their locations, whether maintained on site or off site; (iv) implementation of a preservation plan for potentially relevant electronically stored information; (v) identification of the individual(s) responsible for preservation the scope, extent and form of production; (vi) identification, redaction, labeling, and logging of privileged or confidential electronically stored information; (vii) claw-back or other provisions for privileged or protected electronically stored information; (viii) scope or method for searching and reviewing electronically stored information; (ix) anticipated cost of data recovery and proposed initial allocation of such costs; and (x) designation of experts.

Chief Administrative Judge of the Courts

Dated: