



OCA Proposes Amendments to Extend the Discussion of e-Discovery Issues to non-Commercial Division Cases

January 15, 2013

In a memorandum issued on January 7, 2013, the New York Office of Court Administration (“OCA”) proposed amendments to both 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)). The amendment to § 202.12(b) will extend the requirement that counsel discuss e-discovery issues prior to the preliminary conference from the Commercial Division to the non-Commercial Division cases in Supreme or County Court. The amendments to § 202.12(c)(3) and § 202.70(g) will make certain that there is uniformity in the e-discovery topics discussed by the parties in both Commercial and non-Commercial Division cases.

The Uniform Rules of the Trial Courts § 202.12(b) will be amended to require counsel to discuss anticipated e-discovery issues before the preliminary conference when a case is “reasonably likely” to include e-discovery. The amendment to this section provides guidelines for the court in determining whether a case is reasonably likely to include e-discovery. Considerations are (i) whether “potentially relevant electronically stored information (‘ESI’) exist,” (ii) whether any of the parties expect to use ESI, (iii) whether there are “less costly or burdensome alternatives to secure the necessary information” without resulting in use of ESI, (iv) whether the “cost in preserving and producing ESI [is] proportionate to the amount in controversy,” and how likely it is that the “ESI will aid in the resolution of the dispute.” This list is meant to serve as a guide and is not exhaustive.

The amendments to § 202.12(c)(3) and § 202.70(g) address which e-discovery topics should be anticipated as issues and therefore discussed prior to the preliminary conference. These two amendments are similar in order to create uniformity between the Commercial and non-Commercial Division cases. Both provide a non-exhaustive list of issues to be discussed, such as: (i) identifying “potentially relevant types or categories of data,” (ii) “disclosure of the applications and manner in which the data is maintained,” (iii) identifying possible computer servers, (iv) enacting methods to preserve relevant ESI, (v) identifying those persons responsible for preserving relevant ESI, (vi) the procedure for searching and reviewing ESI, and (vi) the estimated cost and how to allocate that cost. Both amendments also provide for the discussion of a claw-back procedure to be used by parties when privileged information is inadvertently provided. This uniform list guides both the Commercial and non-Commercial Division cases in creating procedures for the use of e-discovery.

OCA has posted these amendments on its webpage at [http://www.nycourts.gov/rules/comments/PDF/Rule202-12\(b\)PC-packet.pdf](http://www.nycourts.gov/rules/comments/PDF/Rule202-12(b)PC-packet.pdf). OCA will be seeking comments on the proposed amendments until

March 8, 2013.

If you or your company has any questions or concerns regarding these proposed amendments, contact James G. Ryan at jryan@cullenanddykman.com or via his direct line at 516-357-3750.