

NY Biz Court Floats E-Discovery Rules For Non-Parties

By **Pete Brush**

Law360, New York (April 09, 2014, 1:47 PM ET) -- New York commercial lawyers were asked Wednesday to assess proposed new rules to guide litigants on how to procure electronic evidence from non-parties, as courts and businesses seek ways to cut down on often costly and time-consuming discovery tangles.

The state court system published the new rules, which embrace a philosophy of good faith and early action, for its Commercial Division. A period for public comment lasts until May 28.

"They encourage meeting and conferring and operating in good faith to resolve these matters," said Buffalo-based Bond Schoeneck & King PLLC litigator Sharon M. Porcellio, who helped craft the proposal along with New York City-based Hoguet Newman Regal & Kenney LLP litigator Joshua L. Blosveren.

The guidelines, which mesh with existing New York rules and case law, encourage lawyers "to engage in discussions regarding the [Electronically Stored Information] to be sought as early as permissible in an action."

Non-parties, meanwhile, are asked to take litigation holds seriously until the scope of the request is determined.

A good deal of responsibility is placed on lawyers, according to the proposal, to make sure the requests on a non-party are not out of kilter with the nature of the litigation, the amount in controversy and the expected value of the information to the case.

The idea is to head off the production of volumes of email or other electronic information, a process that can cost hundreds of thousands of dollars or more, for a case where the amount in controversy may not be comparable.

If a non-party finds an information request to be too burdensome, it is asked under the proposal to be particular about its concerns as opposed to flatly rejecting the request.

Parties and non-parties are asked to use motions practice to resolve such disputes "only as a last resort" and are encouraged to use meet-and-confer and other processes including mediation instead.

At some level the proposal — like **many recent ideas** being considered to streamline the functioning of the state's busy Commercial Division — puts a high premium on good faith actions between warring lawyers. Such efforts may not always succeed, according to Porcellio and Blosveren, but they never hurt.

The latest proposal also stresses that those requesting such information from non-parties can be made to pay for the non-party's expenses in vetting the scope of the request and finding and holding the information, as well as costs tied to any disruption of normal business operations.

"We're hoping with these rules that, by encouraging people to think about these issues as early as possible, that parties will focus on how to reduce the burden on everybody," Blosveren said.

--Editing by Emily Kokoll.