



## NJSEA Opposes E-Discovery

As a member of the Supreme Court Municipal Court Practice Committee, I opposed the proposed amendment to N.J. Court Rule 7:7-7 to permit the exchange of discovery by electronic means in the municipal courts. That rule now provides "Unless otherwise ordered by the judge, the parties may exchange discovery through the use of e-mail, internet or other electronic means." I emphasize the word "may." Now that that change has occurred my unwillingness seems prescient.

That license has been seized upon by the New Jersey State Police to issue a memorandum to all prosecutors that it will no longer supply paper discovery with respect to the numerous foundational documents necessary to support a breath test reading obtained by an Alcotest machine. Some municipal police departments have followed suit. What they have done is to put every conceivable document relating to a particular Alcotest machine on line and invited the prosecutor to view them, decide which of those are relevant to the State's case, print those out and send them to the defense. Not unexpectedly, and not unlike the rest of us always eager to reduce our workload, some prosecutors have tried to pass that task on to the defense bar.

When I say every conceivable document, I mean just that. It includes the entire history of the machine, certificates for every simulator ever used in conjunction with that machine, every temperature probe married to that simulator, every NIST traceable digital temperature probe used to test its temperature, every simulator solution that was ever used in that machine, the qualifications of every officer who ever calibrated, changed the solution in, or ran a test on that machine, etc. And every day those lists grow longer and longer. The State cannot remove even the oldest of documents because it has no idea of how old your case is. You may have vacated an ancient prior conviction, or your client may have been a fugitive for the last ten years. Just as an experiment - and because I do not know how to print selected pages - I printed out one entire file. I would estimate it consumed a half of a ream

of paper. From that mass, I was expected to divine those documents the State would deem relevant to the prosecution of my client. Often times I believe something to be relevant and the State doesn't agree. The converse is equally true. In fact it can be said that that is what many trials are about.

Additionally, I can just see the transcript:

**Prosecutor** "I offer this."

**ANF** "Objection!"

**Court** "Foundation?"

**ANF** "Not provided in discovery."

**Prosecutor** "It was on line."

**ANF** "It was not."

**Prosecutor** "I saw it!"

**ANF** "I couldn't find it!"

**Prosecutor** "Where do you think I got it?"

**ANF** "I printed everything that was there, and it's not here."

**Prosecutor** "It's there now."

**ANF** "When was it posted?"

**Prosecutor** "When did you look?"

**ANF** "When you told me to."

**Chorus** "And so on, and so on, and so on, ad infinitum, etc, ...."

The real harm is that it turns the defense attorney into an agent of the State. If you as a creative defense attorney are able to fashion a reason to require your adversary to prove something it is not prepared to prove, you should not be placed in the position of proving it for him. Besides, when you receive a package of discovery that includes some unexpected discovery, it alerts an experienced attorney to the way the other side intends to prove the elements of the offense. While I can understand why the prosecution in an abundance of caution will err on the side of inclusiveness, it should not be allowed to obfuscate its plans through the indiscriminate posting of documents. Would the

court countenance the defense sending the phone book with a letter explaining that our witnesses are in there? You figure out which ones. Just as the State is entitled to know how the defense will carry its burden on an affirmative defense, the defense is entitled to be put on notice as to how the State will attempt to proceed in its case-in-chief. That is the *raison d'être* for discovery. It permits realistic attorneys to evaluate the strengths and weaknesses not only of their side but the other side as well. The hope is that the knowledge will facilitate the amicable resolution of the litigation. Without that information a defense lawyer cannot look his client in the face and advise him to plead guilty. His only alternative is to proceed to trial and see how it goes. Absent settlements, the courts come to a screeching halt.

I don't want to be misunderstood; I have no problem with eliminating work. If the defense does not object to getting case discovery electronically it should

Continued on page 5

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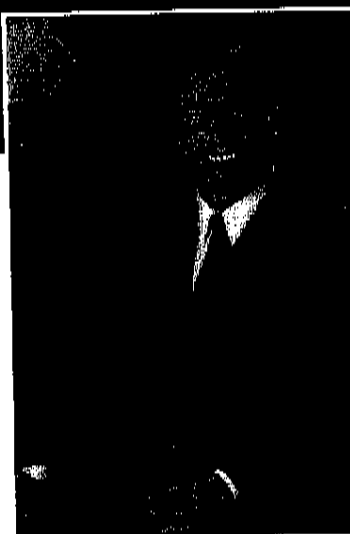
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(Continued from page 4) be permitted to do so. If, however, there is an objection, the State should be required to select those documents upon which it intends to proceed and allow the defendant to assess its position. E-Discovery should not be foisted upon any attorney against his will.

*Following is a summary of actions taken at the November 5, 2009 meeting of the New Jersey State Bar Association Board of Trustees at the St. Regis Hotel in San Francisco. This summary does not constitute official minutes.*

#### MCLE

The Board of Trustees voted to add its voice to what is expected to be the final round of comments before the start of the mandatory continuing legal education program. In a letter to the Court from President Allen A. Etish, the New Jersey State Bar Association applauded the majority of the state Supreme Court's plan to impose requirements that all lawyers continue their education throughout their legal career. However, the State Bar encouraged the Court to look outside the box for non-traditional learning experiences.

Under the proposed plan, attorneys would get legal education credits for participating in Inns of Court or teaching a seminar, but not for teaching law school or graduate-level class, writing scholarly works, working on district ethics or fee arbitration committees or taking part in New Jersey State Bar Foundation educational events. Should the Court be unprepared to allow those kind of opportunities when the program begins Jan. 1, the Bar Association asked it to direct an advisory board to "explore these opportunities for credit and to grant the board the authority to develop criteria for allowing for some credits to be earned through these non-traditional activities."

The State Bar raised several other key issues in its letter to the Court:

- Since the education program will be a permanent fixture of New Jersey's legal landscape, the Association should have a seat as a permanent member on the Board on Attorney Certification to monitor and offer suggestions for improvements.
- Attorneys who teach should receive three credits for every hour of instruction, because of the preparation required.
- Some credit should be given for pro bono work on the cases attorneys handle outside of their normal expertise.
- Some non-legal classes should be eligible for credit, such as medical courses for personal injury lawyers or forensic science classes for criminal defense attorneys.
- New attorneys who have completed some portion of the skills and methods courses, which will be eliminated under the new plan, should receive credit for the completed class work.

#### Amicus matters

The Supreme Court granted permission to the State Bar to file a friend-of-the-court brief in *Stengart v. Loving Care Agency*, which questions whether an e-mail sent by an employee to her attorney using her employer's computer is privileged. The brief was filed. The Association also filed a motion seeking amicus status in *Guido v. Duane Morris*, a malpractice case filed two years after settlement in which a client claimed the settlement was not what had been expected.

#### Law Center construction

The \$6 million project to upgrade the New Jersey Law Center is progressing smoothly and the work is meeting its time and cost targets. Already, two rooms, the Board Room and Strong Lounge, are complete and have been returned to active service. Work is now underway elsewhere on the first level and throughout the second level.

#### Minority judges' reception

New Jersey Administrative Office of the Courts Administrative Director Glenn Grant, who runs the day-to-day operation of the courts, was the featured speaker at this year's 8th Annual Minority Judges Reception. Grant reported the past decade has brought substantial changes to the face of the courts. Ten years ago, there were 39 minority judges. Today, there are 66. Yet, he said, more work remains.

#### Pro Bono Week celebration

In honor of National Pro Bono Week, the State Bar's Pro Bono Committee dedicated a plaque to honor its past and future award winners. It will hang in the Law Center when construction is complete.

#### Upcoming events

- State Bar Night in Cumberland County on Nov. 30.
- The semi-annual New Attorney Swearing-In will be held Dec. 2 at the Trenton War Memorial. The ceremony includes about 800 newly minted attorneys and their families. For the first time, the State Bar is joining together with the Rutgers University law schools to host a reception following the event.
- The State Bar is holding a second event to reach out to lawyers displaced due to the economic conditions. "Suddenly Successful: Making the Transition to Solo Practice" will be held on Dec. 5 in Livingston. The event is free.

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