

Litigation Alert: Business Litigation Session “Pilot Project” To Reduce Spiraling Discovery Costs Takes Flight

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In response to the growing burden that the discovery of electronically stored information (ESI) has placed on corporate litigants, the Massachusetts Superior Court’s Business Litigation Session (BLS) has implemented a voluntary Pilot Project intended to reduce discovery costs and streamline the discovery process, especially with respect to ESI. Parties may elect to participate in the Pilot Project in all cases filed in the BLS between January 4 and December 31, 2010 and in all BLS cases with a Case Management Conference scheduled during that time period. Participants in the Pilot Project will be asked to provide feedback so that the Pilot Project’s efficacy may be analyzed, evaluated, and refined for future use.

Guiding Principles of the Pilot Project

The BLS has established a set of guiding principles for the Pilot Project.¹ One of the most important principles of the project is that discovery efforts must be proportional to the claims at issue in the case. In making this proportionality assessment, the court will consider several factors, including:

- the needs of the case
- the amount in controversy
- the parties’ resources
- the complexity and importance of the issues at stake.

Consistent with the proportionality requirement, the court (with appropriate input from the parties) will consider techniques for narrowing pre-trial discovery, such as limitations on the nature and extent of discovery requests and on the number of custodians whose files must be searched.

The Pilot Project will also adopt a procedure similar to the initial disclosure requirement under the Federal Rules. At the beginning of each case, each party will be required to produce all reasonably available, non-privileged materials that may be used to support that party’s claims, counterclaims, or defenses. The parties will have an ongoing duty to supplement this disclosure prior to the close of discovery. In addition, discovery will be staged to ensure that the parties produce all materials related to a potentially dispositive issue first, so that issue may be adjudicated as early as possible in the case.

After the parties have exchanged initial disclosures and a pre-trial discovery order has been entered, the Pilot Project principles prohibit litigants from conducting additional discovery absent agreement or a court order, which will be made only after a showing of good cause and proportionality.

Electronic Discovery

Under the Pilot Project, the parties will be expected to reach agreement about the preservation of ESI and on the scope of electronic discovery promptly after litigation has commenced. The factors governing the scope of electronic discovery permitted under the Pilot Program will include:

- the nature and scope of the case
- the relevance of the electronic materials sought
- the importance of the electronic materials to the court's adjudication
- the expense and the burden associated with the discovery and production of the electronic material.

If the parties cannot agree on these issues, the court will conduct a hearing to address the preservation of ESI, the allowable scope of electronic discovery, and the appropriate allocation of costs for that discovery.

Is the Pilot Project Right for Your Case?

Corporate litigants must bear in mind that the Pilot Project will only be an option for cases accepted into the BLS.² Once a party's case is accepted into the BLS, numerous factors should inform a party's decision on whether it should participate in the Pilot Project. These factors include:

- **The number of employees potentially implicated.** If a large number of employees, spread across multiple offices, possess potentially relevant discovery materials in electronic or paper form, a measured approach to discovery, and cooperation with opposing counsel to limit the number of custodians whose materials are collected and reviewed, may help to reduce discovery costs and expedite the discovery process. Such a case might be a compelling one to consider for the Pilot Project, which will encourage proportionality and limited discovery.
- **The relevant span of years.** If the relevant period for the litigation extends back many years, the amount of material potentially discoverable—and the number of current and former employees or third parties involved—will likely be monumental. Combined with the likelihood that much of the archived data is likely housed on obsolete servers or outdated back-up tapes, an expansive timeline creates the potential for a very expensive discovery process. Such a case would likely benefit from the more streamlined approach to discovery espoused by the Pilot Project.
- **The media on which discoverable material exists.** If much of the relevant data or discoverable information is contained in complex computer models or obscure data formats, discovery costs can grow quickly. Judicial intervention and negotiation between the parties, as encouraged by

the Pilot Project, will likely help the parties establish the appropriate balance between the necessity of the information and the cost of retrieving and producing that information.

- **The ability to segregate dispositive issues.** If your case presents preliminary, potentially dispositive issues, such as the interpretation of a contract, the Pilot Project may focus the initial discovery process on those dispositive issues, thereby eliminating—or at least delaying—expansive discovery on more fact-intensive issues.

In any case brought before the BLS, corporate litigants and their counsel should consider the potential utility of the Pilot Project, which aims to establish a fair and balanced approach to discovery in the electronic age, where even simple discovery requests can lead to extremely expensive and time-consuming document productions.

About Mintz Levin's Discovery Practice

Building on our experience as litigators, Mintz Levin's discovery team consults with clients who are preparing for specific litigation. We provide these services in cases where Mintz Levin is handling the litigation, or as an independent consultant, advising in-house lawyers or other outside counsel. In both situations, Mintz Levin's attorneys and dedicated IT professionals work with clients to tailor an effective and responsive process which encompasses extracting the appropriate documents, reviewing them for privilege and relevance, managing production, and responding to opposing counsel and the court in the event of a dispute. Our process is carefully tailored to each client's specific needs, addressing and finding appropriate solutions to concerns about costs and resources.

Endnotes

¹ The Pilot Project principles are available at: <http://www.mass.gov/courts/press/superior-bls-pilot-project.pdf>.

² Additional information relevant to seeking to have a case accepted into the BLS is contained in Superior Court Administrative Directive No. 09-1 available at: <http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/09-1.pdf>.

For assistance in this area, please contact one of the professionals listed below or any member of your Mintz Levin client service team.

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