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Developments in New York Electronic Discovery Law

New York State courts, until recently, have not encountered the multitude of electronic discovery issues that the federal courts have long since faced. They are, however, increasingly becoming involved in e-discovery disputes.

Recent decisions, including the rulings reviewed below, reflect New York courts' pragmatic approach to resolving e-discovery disputes and the multitude of issues endemic to electronic discovery that parties are addressing, whether real, perceived or manufactured, when litigating such issues.

Cost Shifting[1]

The First Department in *Waltzer v. Tradescape Inc.*, 31 AD3d 302, 819 N.Y.S.2d 38 (1st Dept. July 20, 2006), recently entered the fray of e-discovery cost shifting. The court initially reiterated the New York rule that "generally" under the CPLR the party seeking discovery bears the cost of production. The court then noted that the "cost of an examination by defendants' agents to see if [electronic materials] should not be produced due to privilege or on relevancy grounds should be borne by [the producing] defendants" where such discovery was readily available, the cost to provide such materials to the other side was "inconsequential," and "did not deal[ ] with the retrieval of deleted electronically stored material."[2] Defendants refused to produce certain electronic materials because they contended that they could not afford the cost of such production (over 160,000 pages) and due to plaintiff's insistence that the nonparty law firm who had originally maintained such documents review them prior to production. In its ruling, the court noted, inter alia, that defendants were taking advantage of disputes they were having with their counsel to avoid their discovery obligations.[3]

Review of Electronic Backup Tapes

In *Delta Fin. Corp. v. Morrison*, __NYS2d__, 2006 WL 2403437 (Sup. Ct. Nassau Co. Aug. 17, 2006), a New York State court decision provided a detailed analysis addressing the production of electronic discovery contained on backup tapes and associated cost-shifting.[4] As an initial matter, the court noted that, while federal precedent is not controlling on New York State courts, it is instructive, especially in light of the absence of CPLR guidance relating to disclosure of electronic records.[5] The court held that whether a party "would be entitled to discovery of the requested documents"

depends on if they were "relevant to the issues in the action."[6] The court stated, however, that:

> [T]he caveat to this principle is that the demands for additional searches of electronic documents are not without limitation as the request for additional searches *must also be reasonably likely to lead to the discovery of relevant evidence*. In other words, a demanding party must have some basis that is not pure conjecture, for its assertion that additional searches may lead to the discovery of relevant documents.[7]

Non-E-Mail Backup Tape Review

In *Delta*, defendant sought additional searches of non-e-mail electronic documents from previously restored backup tapes on the grounds that, while plaintiff's prior production of electronic materials yielded "responsive, highly probative documents,"[8] it was "substandard,"[9] and defendant's follow-up request for electronic materials merely sought similar documents. Defendant contended that it was neither obligated to identify documents missing from plaintiff's prior productions nor was there a need to demonstrate that a "gold mine"[10] lies within the universe of the yet-to-be-searched documents. Defendant also asserted that plaintiff's prior production was deficient because outside counsel was not involved in the process of collecting documents, search terms were not used in seeking to identify relevant electronic documents, and no guidelines existed controlling the process used to identify documents.[11] Defendant further alleged that plaintiff's outside counsel had failed to issue or oversee the dissemination of a written "litigation hold," and that plaintiff's information technology (IT) professional was unaware of any "litigation hold."[12]

Plaintiff objected on the grounds that, inter alia, its backup tapes are maintained for disaster recovery purposes, not for storage of electronic information for routine retrieval and, therefore, it does not have an automatic duty to produce information on its backup tapes due to the difficulty of producing information contained on archival backup tapes and the duplicative nature of such information.[13] Plaintiff contended that it had searched all relevant servers for materials[14] and that, prior to defendant's additional request, plaintiff had voluntarily searched certain restored backup tapes for relevant e-mails.[15] Plaintiff also objected because defendant failed to make a showing that any documents were missing from its prior productions. Plaintiff's retention policy for non-e-mail electronic documents was that they were not routinely deleted and were maintained on shared company servers, which plaintiff asserted had been previously searched.[16] Plaintiff argued that a search of backup tapes should only be required if the need for relevance outweighs the costly and time-consuming burden of producing documents from disaster recovery tapes, especially given the already substantial discovery made by plaintiff and defendant's failure to show that "significant" materials had not been produced.[17]

The court, relying on federal precedent and the fact that certain archival backup had already been restored, ruled that the "best solution" was to direct plaintiff "to search and produce responsive documents from a small sample of the restored data of non-e-mail documents. [Defendant] will be permitted to choose a total of four months of restored data for the search process…after [plaintiff] has searched the hard drives for the months chosen…for responsive documents, applied a de-duplication process[18] and reviewed any relevant documents for privilege, [plaintiff] shall produce relevant, nonprivileged documents."[19] The court then held with respect to cost-shifting that:

> *Because the Court is not entirely convinced that relevant and responsive documents will be found, [defendant] will be initially responsible for one hundred percent of the costs and expenses of the search process, de-duplication process, as well as attorneys' fees and costs for the privilege review process*. In addition, Counsel for [plaintiff] shall prepare an affidavit detailing the results of its search, which among other things, shall include the number of responsive documents found and the costs and expenses associated with the processes including but not limited to attorneys fees for privilege review. This affidavit will assist the Court in determining whether a full search is necessary and whether further cost-shifting is warranted.[20]

E-Mail Backup Tape Review

Defendant also sought to require plaintiff to search certain previously restored *monthly* backup tapes that presumptively would contain relevant e-mails, where plaintiff had previously only searched its backup tapes

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made approximately every 90 days, and thus defendant asserted that plaintiff had not searched "all accessible data."[21] Plaintiff opposed this request on the grounds that it had searched for relevant e-mails for each day during the relevant period and those maintained on its 90-day backup tapes. Accordingly, it claimed that a monthly tape search would result in e-mails that would be "virtually" duplicative of its prior production.[22] The dispute devolved into what additional relevant e-mails, if any, may be contained on plaintiff's monthly backup tapes. In issuing a limited order of production, the court ruled:

> Although the Court is mindful that there is a theoretic possibility that relevant information may exist on a monthly backup tape that was not captured on a 90-day tape, it is not enough to justify a full search of all the monthly back-up tapes. However, the proximity of the two months that [defendant] specifically mentions…raise the odds that there is a possibility that relevant information may be contained on those monthly tapes that were not contained on the ninety day tapes which were searched by [plaintiff]. However, those odds are not raised very high because a certain set of events…must occur before any relevant documents will be found on the monthly tapes that are not already on the 90-day tapes….
>
> However, given the time frame of the two months that [defendant] specifically requests the restored data to be searched…the Court directs a sample search of these two months *only*, applying [plaintiff's] search terms to the restored data, and a de-duplication process to take place. After the search terms are run and the de-duplication process has occurred, [plaintiff] shall review all relevant documents for privilege.[23]

Relevant Time Period

Defendant sought to expand the period for which plaintiff should be required to search for e-mails. Plaintiff objected on the grounds of relevance and argued that the time period for which it had already searched for e-mails was "reasonable" and that, for such time period, it had already searched for relevant electronic and hard documents that it maintained as well as for e-mails maintained on its restored e-mail backup tapes.[24] The court ruled:

> that because [plaintiff] has produced responsive documentation as far back as Jan. 1, 1999, it is possible that responsive e-mails may be found on the backup tapes from that timeframe. Therefore, the court directs a sampling of three monthly backup tapes from the period of Jan. 1, 1999 through Dec. 31, 1999 to be chosen by [defendant]. Thereafter, the three back up tapes are restored, a search will be conducted for responsive documents based upon the application of [plaintiff's] search terms, a de-duplication process shall be run and a review for privilege performed. In addition, [defendant] shall choose two months of restored data from Jan. 1, 2000 through July 12, 2000 to be searched, de-duplicated, and reviewed for privilege.[25]

Forensic Examination of a Computer Hard Drive[26]

In *In the Matter of Jeevan Padiyar v. Yeshiva University*, Index No. 110578/05 (Sup. Ct. N.Y. Co. June 12, 2006), petitioner sought an examination of respondent's computer hard drive attempting to establish the veracity of an e-mail that contained a certain relevant memorandum. In opposing that request, respondent submitted an affidavit by the presumptive author that he never issued such memorandum, he would never have written such a memorandum, and no documents expressing the sentiments contained therein ever existed.[27] Also submitted to the court was an affirmation from counsel that detailed the search conducted of respondent's files and computer records for such memorandum, indicating that such memorandum had not been located. Respondent also retained Kroll OnTrack, a forensic computer firm, to analyze, subject to a confidentiality agreement, the hard drives of certain of respondent's computers, as well as to review selected e-mails and "erased" documents, which, according to such firm, did not reveal the existence of such memorandum.[28] Nonetheless, the court ruled that petitioner should have the opportunity to retain his own forensic computer analyst, subject to that same confidentiality agreement, to search respondent's hard drives.[29] The court ordered that such computers would not be turned over to petitioner and access would only be given to petitioner's analyst and the analyst's report be submitted to the court.[30]

> Notwithstanding the lack of a specific CPLR or court rule, recent N.Y. decisions reflect the courts' appreciation of the search, production, de-duplication and privilege review costs that may be incurred in addressing e-discovery requests and the importance in fairly determining who should bear the expense, including counsel's time in reviewing documents for privilege.

Summary

The above decisions evidence New York courts' coming of age with respect to electronic discovery and their healthy respect in understanding the nuances associated with e-discovery. Notwithstanding the lack of a CPLR or court rule specifically electronic disclosure, the above decisions reflect the courts' appreciation of:

(i) the search, production, de-duplication and privilege review costs that may be incurred by a party in addressing e-discovery requests and the importance in fairly determining who should bear such expense, including counsel's time in reviewing electronic documents for privilege,

(ii) the legal and business burden on the party producing electronic documents, taking into account, among other things, the purpose for which backup tapes were made and issues relating to their restoration,

(iii) a party's claimed relevance of and need for the requested electronically stored materials,

(iv) the process utilized by the producing party to identify, search for and gather electronic materials,

(v) the likelihood of whether yet-to-be searched for electronic materials actually exist and, if so, would they be duplicative of documents already produced,

(vi) a party's "true" justification for seeking and/or objecting to producing electronic documents, and

(vii) both sides to a dispute having the opportunity to retain appropriate expert forensic computer experts prior to a court ruling on e-discovery issues.

1. The author previously published an article entitled "E-Discovery in New York State," New York Law Journal, Vol. 233 No. 19, June 22, 2005, which discussed the then nascent New York case law addressing e-discovery cost shifting.
2. Id., 31 AD3d at 304, 819 N.Y.S.2d at 40.
3. See Id. at 304-5, 819 N.Y.S.2d at 40.
4. In *EBC I, Inc. v. Goldman, Sachs & Co.*, Index No. 601805/02, at *1 (Sup. Ct. N.Y. Co. June 12, 2006), a judicial hearing officer reviewed the federal case law and limited New York case law on cost-shifting with respect to a "disaster recovery system." The court ordered that a sample be reviewed so that the cost of a full search may be projected and so the court can determine "whether such a search is likely to produce results that would justify the probably considerable expense of such a search."
5. Id. at *3.
6. Id.
7. Id. (emphasis added.)
8. Id. at *2.
9. Id. at *4.
10. Id. at *2.
11. See Id. at *4.
12. Id.
13. See Id. at *4.
14. See Id. at *4.
15. See Id. at *2.
16. See Id. at *4.
17. See Id. at *5.
18. Duplication or "de-duplication" refers to a process undertaken to determine what documents have already been produced and are therefore not produced again.
19. Id. at *5. The court similarly ruled with respect to cost shifting and plaintiff's obligation to submit such an affidavit, when determining, as discussed below, that defendant is entitled to a limited production of e-mails from plaintiff's monthly backup tapes and the time period for which plaintiff's e-mails were required to be produced should be expanded.
20. Id.
21. Id. at *6.
22. Id.
23. Id. at *7 (emphasis in original.)
24. See Id. at *8.
25. Id. at *8.
26. The author previously wrote an article entitled "Forensic Inspection of Computer Hard Drives Under New York Law," New York Law Journal, Sept. 1, 2005, Vol. 23 No. 44.
27. See *Padiyan*, at *2.
28. See Id.
29. Id.
30. Id. at *3.

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