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E-Discovery in New York State

Electronic or "e-discovery" and problems relating to it are no longer the exclusive domain of federal courts, but are increasingly becoming part of New York State court litigation.

[See e.g., *Weiller v. New York Life Ins. Co.*, 6 Misc3d 1038(A), 2005 NYSlipOp 50341(U), 2005 WL 3245345 (Sup. Ct. N.Y. Co. March 16, 2005); *Etzion v. Etzion*, 2005 NYSlipOp 25115, 2005 WL 689468 (Sup. Ct. Nassau Co. Feb. 17, 2005); *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc3d 1019, 2004 NYSlipOp 50967(U), 2004 WL 1949062 (Sup. Ct. Nassau Co. Aug. 18, 2004).]

Recognizing this, the commercial division of the New York State Supreme Court is in the process of promulgating new rules, one of which would require that prior to a preliminary conference taking place, "counsel shall confer with regard to anticipated electronic discovery issues."[1]

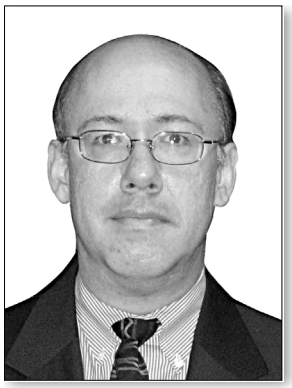
Proposed Rule 8(b)

Proposed Rule 8(b) indicates that the following areas "shall" be addressed at the preliminary conference:

> (1) implementation of a data preservation plan; (2) identification of relevant data; (3) anticipated cost of data recovery and proposed initial allocation of such cost; (4) disclosure of the programs and manner in which the data is maintained; (5) identification of computer system(s) utilized; (6) identification of the individual(s) responsible for data preservation; (7) confidentiality and privilege issues; and (8) designation of experts. Id.

In addition, the proposed new Preliminary Conference Order, which is currently being used in some court parts, provides that:

> For the relevant periods relating to the issues in this litigation, each party shall maintain and preserve all electronic files, other data generated by and/or stored on the party's computer system(s) and storage media (i.e., hard disks, floppy disks, backup tapes), or



other electronic data. Such items include, but are not limited to, e-mails and other electronic communications, word-processing documents, spreadsheets, databases, calendars, telephone logs, contact manager information, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information.[2]

The Commercial Division is promulgating new rules, one of which would require that prior to preliminary conferences, counsel confer about electronic discovery issues.

It is imperative that attorneys who litigate in New York State courts be aware of the new proposed rules and Preliminary Conference Order as well as recent New York State decisions that address e-discovery.

One of the most significant questions regarding e-discovery often is not whether the materials are physically capable of being produced, but rather, given the form, location and the manner in which they are stored, whether their production would be unduly burdensome and, if not, whether the requesting or the producing party should be burdened with the expense of such production. Unlike in federal litigation, where the Bar on a daily basis is being educated through decisions relating to e-discovery, thus far, there is comparatively little precedent in New York addressing e-discovery and which party should bear the burden of such expense.

Case Law

In *Lipco*, 2004 WL 1949062, a party sought discovery of, inter alia, electronic files, back-up tapes, accounting records and cash disbursement information. The Nassau County Supreme Court, commercial division, held that "[o]nce the court has determined that the electronic data is subject to discovery the issue becomes who should bear the cost of discovery" and further "whether the party seeking the discovery is willing to bear the cost of production of the electronic material." Id., at *8, 9. The court held that "[u]nder New York law, the party seeking discovery must bear the cost of production of the items for which discovery is sought." Id. The court further noted that "cost shifting in electronic discovery is not an issue in New York since the courts have held that, under the CPLR [Civil Practice Law and Rules], the party seeking discovery should incur the costs incurred in the production of discovery material." Id. The court specifically observed that "[e]lectronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR." Id., at *6.

The parties failed to establish the costs to be incurred and the willingness of the requesting parties to bear the cost of production. Notwithstanding the above, the court held that, before it could determine if the requested materials "should be produced…[t]he parties must provide the Court with an appropriate and detailed analysis indicating whether the material is on the hard drive or back-up tape, the actual procedures involved in extracting this material and the costs that will be incurred." Id., at *9. In denying the motion to compel, the court further held that, if the requesting party still wanted the sought after materials, it would require "a statement that [the requesting parties] are willing to bear the initial cost involved for the extraction and production of such material" and that apportionment of such expenses would be considered by the court at a later date "on proper application." Id., at *10.

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Cost Shifting

E-discovery cost-shifting was also recently addressed by the Nassau County Supreme Court in *Etzion*, 2005 WL 689468. In *Etzion*, a matrimonial action, plaintiff, in a document request that the court characterized as "all-encompassing," sought a variety of computer data, including, inter alia, e-mails, calendars, and word-processing files. Id., at *3. Plaintiff specifically sought an order permitting plaintiff to "impound, clone and inspect [defendant's] computer servers, hard drives, individual workstation PC, laptops and other items containing digital data,"…"directing that [p]laintiff and her computer forensic experts 'gain access'" to certain computer equipment, and "directing that [d]efendant 'cease the rotation, alteration and/or destruction of electronic media that would result in the inability to recover the sought over computer data.'" Id., at *1. Defendant objected to the document request contending that, inter alia, it was overbroad, intrusive, burdensome and that it would result in the disclosure of irrelevant, proprietary and privileged materials.

The court in *Etzion* granted plaintiff's motion, in part, with certain limitations imposed to protect defendant's privileged and non-relevant materials. The court ordered that defendant was to disclose the location of his computers. The court also directed that plaintiff's appointed computer expert, accompanied by defendant's expert and the court referee, go to such locations and that "[p]laintiff's expert shall clone or copy the hard drives of such computers. The resultant hard drive shall be immediately turned over to the Referee." Id., at *4. The hard drives would then be examined and "hard copies" would be made of any materials that the court permitted production of and copies distributed to counsel. The court did not permit copying or transmission to any attorney of personal records, e-mails or other correspondence between defendant and third parties and/or defendant and counsel. As part of plaintiff's application to the court, she also sought $15,000 in counsel fees and an additional $15,000 for her computer expert. Defendant requested that plaintiff be ordered to post a bond to cover any potential damage to his computer system and/or diminution in value to his company resulting from the work performed by plaintiff's expert on defendant's computers.

The court denied plaintiff's request for attorney's and expert's fees and defendant's request for a bond. The court "determine[d] that [p]laintiff shall bear the costs of the production of the business records she seeks, subject to any possible reallocation of costs at trial." Id. It should be noted that the court held "[d]efendant shall be responsible for the expense of his own expert(s) who are present to oversee the cloning or copying process." Id. Accordingly, notwithstanding the court's traditional view of cost allocation under New York law, costs were immediately allocated to defendant to absorb to the extent that defendant's experts were required to participate in the "cloning or copying" of defendant's own computers that, at plaintiff's request, the court ordered reviewed.

New Case Law

In the latest case on e-discovery cost shifting, early this year, the Supreme Court, New York County, Commercial Division, required that a producing party initially bear the cost associated with compliance with a preservation order. In *Weiller*, 2005 WL 3245345, plaintiff sought an order requiring the preservation of, inter alia, "all databases, electronic materials, tape media, electronic media, hard drives, computer disks and documents" as it related to certain categories of documents. Id., at *7. Defendants argued that these materials were covered by preservation orders entered in other litigations in various courts and therefore an additional preservation order was not warranted. Defendants further asserted that the cost of preserving materials in the related litigations cost more than one million dollars.

The court ordered the preservation of the requested materials at defendant's expense, finding "this request is proper, in light of today's technological realities." Id. However, the court also stated that it was "not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or part of the costs of the e-discovery it seeks, or will seek, herein." Id. The court further noted that "the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost." Id.

Until changes are made to the CPLR or the Court of Appeals addresses the issue, a court would likely rule that costs associated with obtaining e-discovery, absent untoward conduct by the producing party and/or their counsel, should still initially be borne by the party requesting the materials, but, as required by *Lipco*, obtaining such materials may be conditioned on the requesting party affirmatively agreeing to pay such costs. However, as in *Etzion* and *Weiller*, a court may under certain circumstances require that the producing party initially bear certain costs associated with e-discovery production or the preservation of such materials or both.

Decisions on motions, often made at the initial stages of an action, relating to the production of e-discovery and a determination of who will be required to pay for such discovery, which costs often total in the tens or hundreds of thousands of dollars, will impact how an action proceeds through trial or settlement, and may be outcome-determinative for the party successful in litigating these issues.

Broad Preservation Orders

Moreover, if the new Preliminary Conference Order is adopted, even before an e-discovery motion is made, New York attorneys, in addition to having to fulfill their obligation relating to their client's preservation of electronically stored materials and the software needed to utilize such materials, must be cognizant of there being a broad preservation order in effect early in an action, and recognize the possibility that the failure to preserve materials could constitute a violation of a court order.

Because it may well be raised by the court, counsel must now be prepared to consider entering into an agreement regarding the allocation of e-discovery costs. Further, if a requesting party is ordered to pay for e-discovery expenses, such discovery may ultimately not be sought by the requesting party or the requesting party may narrow the scope of its request to reduce such expenses. In addition, because cases frequently settle prior to trial, if a court requires a party to initially pay e-discovery costs, subject to a motion to shift those costs back to the other side, the opportunity to seek to re-allocate such costs may never in actuality come. Accordingly, in the absence of an agreement, counsel for a producing party must now anticipate that a client may be required to incur certain e-discovery expenses in responding to e-discovery requests that may never be recouped.

Conclusion

It is important from the commencement of an action for counsel in cases where e-discovery will take place to anticipate the making of or defending an e-discovery cost-shifting motion, and to plan accordingly in an attempt to shift the expense of e-discovery to the opposing party. Indeed, the commercial division's proposed rules, if adopted, put counsel on notice that e-discovery and cost allocation of such discovery will need to be discussed before the Preliminary Conference.

1. Rules of the Justices of the Commercial Division, 10th draft, dated Dec. 14, 2004.

2. Supreme Court of the State of New York, County of Nassau, Commercial Division: IAS Part __ Preliminary Conference Order, at §12.

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