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STATE E-DISCOVERY

Recent Case Law Provides Guidance for ESI Production

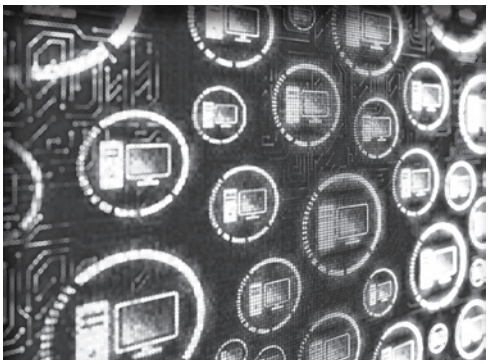
By **Mark A. Berman**

Production of electronically stored information (ESI) is now an expected part of the discovery process, and it is important for counsel to be aware of the recent First Department decision in *Tener v. Cremer*[1] which addressed a variety of issues concerning a nonparty's obligation to produce ESI. In light of this decision, which was issued in the context of a contempt motion against a nonparty, counsel should review it as guidance in seeking to understand how courts may view the critical and often issue-dispositive defense of "inaccessibility" to the requested ESI. A recent trial court decision from Monroe County, *Dartnell Enter. Inc. v. Hewlett Packard Co.*,[2] held that a party must index its ESI to each specific document demand and ordered that responsive materials need to be produced in electronic form (including its metadata), even if "hard" copies of such materials have been produced already. Finally, recent court decisions have found social media ESI to be particularly relevant with respect to the issue of damages, and have authorized its production.

Determining "Inaccessibility"

In *Tener*, the First Department addressed "the obligation of a nonparty to produce ESI deleted through normal business operations"[3] in connection with an underlying discovery dispute in which the nonparty asserted, as a defense to production, that it "did not have the ability to produce the materials plaintiff demanded" and that "it believed it could not, as a nonparty, be required to install forensic software on its system" that could arguably access such information.

Plaintiff served a subpoena seeking the identity of all persons who accessed the internet on a certain day via a particular IP address in furtherance of prosecuting her defamation claim. The subpoena, accompanied by a preservation letter, was served more than one year after the date in question. The First Department noted that "plaintiff's only chance to confirm the identity of the person who allegedly defamed her may lie with [the nonparty]." Movant's computer forensic expert opined that the nonparty could "access the information using software designed to retrieve deleted information." The First Department found that because "good cause" had been shown, a cost-benefit analysis was necessitated "to determine whether the needs of the case warrant retrieval of the data."



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Reversing the motion court's decision, the First Department held:

> [T]he cases that [the nonparty] cites to support its assertion that it need not install forensic software are outdated…. [T]here are several unanswered questions regarding [the nonparty's] ability to produce the requested documents…. In this day and age the discovery of ESI is commonplace. Although the CPLR is silent on the topic, the Uniform Rules of the Trial Courts, several courts, as well as bar associations, have addressed the discovery of ESI and have provided working guidelines that are useful to judges and practitioners. Indeed, in 2006, the Conference of Chief Justices approved a report entitled "Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information." New York's Uniform Rules for the Trial Courts specifically contemplate discovery of ESI. Rule 202.12(c)(3) allows a court, where appropriate, to establish the method and scope of electronic discovery (Uniform Rules for Trial Courts [22 NYCRR] §202.12[c][3]).

The court continued, stating that [t]o exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches. A cost/benefit analysis, as the Nassau Guidelines[4] provide, does not encourage data destruction because discovery could take place regardless. Moreover, similar to [Federal Rule of Civil Procedure] 26(b)(2)(C)(iii), the approach of the Nassau Guidelines, has the benefit of giving the court flexibility to determine literally whether the discovery is worth the cost and effort of retrieval.[5]

The First Department noted that the Nassau Guidelines define ESI as "not to be deemed 'inaccessible' based solely on its source or type of storage media. Inaccessibility is based on the burden and expense of recovering and producing the ESI and the relative need for the data." The court, in addressing "inaccessibility," also relied on the Sedona Conference,[6] which notes that:

> [t]he relative accessibility of a source of potentially discoverable information is best evaluated by assessing the burdens involved in viewing, extracting, preserving, and searching the source as well as other relevant factors imposed by the location, including the dispersion and the volumes involved.[7]

As such, the First Department remanded the case for a hearing to determine the following issues:

> (1) whether the identifying information was written over, as [the nonparty] maintains, or whether it is somewhere else, such as in unallocated space as a text file;
>
> (2) whether the retrieval software plaintiff suggested can actually obtain the data;
>
> (3) whether the data will identify actual persons who used the internet on April 12, 2009 via the IP address plaintiff identified;
>
> (4) which of those persons accessed [the website at issue in the case]; and
>
> (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to [the nonparty] for the disruption.

The First Department noted that because certain of the above involved "credibility determinations," a court "'cannot assess burden and expense of

MARK A. BERMAN, *a partner at commercial litigation firm Ganfer & Shore, is secretary of the e-discovery committee of the Commercial and Federal Litigation Section of the New York State Bar Association.* ANNE TABACK, *an associate at the firm, assisted in the preparation of this article.*

recovering and producing the ESI and the relative need for the data' and concomitantly whether the data is so 'inaccessible' that [the nonparty] does not have the ability to comply with the subpoena." The Appellate Division further noted that:

> CPLR 3111 and 3122(d) require the requesting party to defray the "reasonable production expenses" of a *nonparty*. Accordingly, if the court finds after the hearing that [the nonparty] has the ability to produce the data, the court should allocate the costs of this production to plaintiff and should consider whether to include in that allocation the cost of disruption to [the nonparty's] normal business operations. In this latter consideration, the court should also take into account that plaintiff waited one year before sending the subpoena and preservation letter.

Indexing and Metadata

In *Dartnell*, the Supreme Court, Monroe County, directed that defendant provide an index to its responsive electronic files "identifying the document produced in response to each demand,"[8] as required by CPLR 3122(c), which requires documents to be produced as "they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request." Defendant had previously produced hard copies of its electronic documents and e-mails, but no index had been provided indicating which documents were responsive to which document demand.

The court also ordered defendant to produce the requested documents in their native electronic format, including metadata. The court noted that plaintiff's document requests had sought ESI and had requested that it be produced in its native format. Among other grounds, defendant objected that it had already produced voluminous hard copies of its electronic documents. The court noted that "[e]lectronic documents in their native form may be discoverable even when a hard copy has been provided."

The court found that plaintiff had demonstrated that some of the "hard" copy documents, "when obtained in their native electronic format, contained additional relevant, material and necessary information" and that there were "inconsistencies as to the information available from the hard copy and the native electronic format." The court further held that the "metadata that was stripped from the documents when printed into a hard copy is appropriate information for disclosure in this action."

Relevance of Social Media ESI

Given the ubiquitous use of Facebook and other forms of social media today, litigants may need, under certain circumstances, to gain access to the other side's social media for use as evidence, especially where it relates to damages.[9] The requirement for disclosure of "all matter material and necessary in the prosecution or defense of an action"[10] indisputably extends to Facebook, MySpace, Twitter, YouTube accounts and other social media.

However, in *Patterson v. Turner Construction Co.*,[11] in seeking to ensure an order requiring the production of social media was not overbroad, the First Department reversed an order that compelled an authorization for "all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived" and remanded for a "more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

The First Department found that, although the motion court's in camera review established that at least some of the discovery sought "'will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims,' it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action." Significantly, the court noted that "the postings on plaintiff's online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access, just as relevant matter from a personal diary is discoverable."

'Tener' holds: "To exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before…litigation begins and the duty to preserve it attaches."

In a personal injury action, *O'Connor v. Gin Taxi Inc.*,[12] where plaintiff alleged that her injuries prevented her from performing certain physical activities, defendant sought certain ESI from plaintiff's social media accounts, as well as plaintiff's instant message logs and text messages. The court found that, due to the nature of the case, where plaintiff had placed "her ability to perform the activities of her daily living and her ability and capacity to work at issue," plaintiff's status updates, photographs, and videos were both material and necessary to the defense… and/or could lead to admissible evidence."[13] However, taking into account plaintiff's privacy concerns, the court agreed to conduct an in camera review[14] of plaintiff's Facebook accounts and YouTube videos prior to their production. The court noted that plaintiff was to have preserved all relevant ESI in light of a litigation hold that defendant had asserted.

Once a requesting party has shown "good cause" demonstrating the need for ESI, counsel should be aware that courts may apply a cost-benefit analysis to determine whether the needs of the case warrant retrieval of "inaccessible" data. A producing party and nonparty should be aware that ignoring a request seeking the production of responsive materials in electronic form may have negative implications, including that it may need to reproduce "hard" copy materials in electronic form, including metadata. Such producing party or nonparty may also need to index such ESI to the corresponding document demand. Finally, parties should be aware that their social media accounts are "in play" when litigating, and a court may require production of social media ESI, albeit after an in camera review, which review, under recent First Department precedent, will be circumscribed to only allow for the production of ESI truly relevant to the claim at issue.

1. *Tener v. Cremer*, __N.Y.S.__, 2011 WL 4389170 (1st Dept. Sept. 22, 2011).

2. 33 Misc. 3d 1202(A), 2011 WL 4486937 (Sup. Ct. Monroe Co. Sept. 13, 2011).

3. *Tener*, 2011 WL 4389170, at *1.

4. The "Commercial Division, Nassau County Guidelines for Discovery of Electronically Stored Information (the Nassau Guidelines) can be found at http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf.

5. *Tener*, 2011 WL 4389170, at *2.

6. Id. at *3 n.4. (quoting The Sedona Conference Working Group, "The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information That Are Not Reasonably Accessible," at 9 (July 2008)).

7. Id. at *3, n.4.

8. *Dartnell*, 2011 WL 4486937 at *4.

9. See *Sanacore v. HSBC Securities*, Index No. 101947/2008 (Sup. Ct. New York Co. Aug. 16, 2011).

10. CPLR §3101 (McKinney 2011).

11. 2011 NY Slip Op 07575, __A.D.2d__, __N.Y.S.2d__ (1st Dept. Oct. 27, 2011).

12. Index No. 110192/2007 (Sup. Ct. New York Co. Oct. 14, 2011).

13. See *Lawlor v. Venezia*, Index No. 8873/2010 (Sup. Ct. Nassau Co. Oct. 3, 2011) (ordering that plaintiff provide authorization to her Facebook and MySpace accounts for photographs posted by plaintiff of her trip to the Bahamas on the basis that plaintiff's personal injury action placed her physical and emotion condition at issue, and denying plaintiff's access to defendant's Facebook account where plaintiff failed to establish that the information sought was relevant).

14. See *Sanacore*, Index No. 101947/2008 (Sup. Ct. New York Co. Aug. 16, 2011).