New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 86
TUESDAY, NOVEMBER 3, 2015

State E-Discovery

New Developments in ESI Preservation and Spoliation

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BIGSTOCK

The art and science of a spoliation motion requires counsel to marshal one's evidence in an attempt to achieve the highest level of "sanction" possible, appreciating that it is generally unlikely that a court would grant the ultimate sanction of dismissing a party's pleading. In three recent trial court cases, in crafting the appropriate sanction, courts have had to balance one party's clear and admitted wrongful conduct, often involving the failure to preserve emails,[1] with the prejudice actually suffered by the moving party in order to achieve a result that appropriately "punishes" the infractor and awards the wronged party with a proportionate remedy.

In two cases, *United States Merchant Marine Academy Alumni Assoc. and Foundation v. Hicks*[2] and *Crocker C. v. Anne R.*,[3] the misconduct was so severe that the courts found that a negative inference and/or the production of the opposing party's computers were mandated. In *Crocker*, which involved the installation of spyware by a husband that apparently resulted in the husband being able to read his wife's privileged communications with her counsel, the court reserved the right to impose harsher sanctions, depending on the results of the forensic computer inspection, including the preclusion of evidence. In *Zacharius v. Kensington Publ.*,[4] where the misconduct was not as extreme and with far less prejudice suffered by the moving party, the motion court imposed the sanction of ordering the payment of the attorney fees and costs incurred by defendants in reviewing plaintiff's emails as well as the attorney fees and costs incurred by defendants in preparing their spoliation motion.

In *A.D. v. C.A.*,[5] where the court determined that the production of printouts of pictures, posts and other information posted on a party's Facebook pages may be relevant and material to the proceeding's ultimate determination, the court ordered an in camera review of such social media. In order to assist the court in its in camera review, the court required the objecting party to provide an affidavit describing the printouts and an authorization to the court permitting it access to the objecting party's Facebook postings. The above orders, as well as requiring the moving party to produce those postings of the other side that he had in his possession justifying the motion, appropriately sought to test the bona fides of both parties' assertions.

Negative Inference and the Production of the Opposing Party's Computers.

In *Hicks*, the defendant was unable to "account satisfactorily for the dearth of emails produced and testified that once the lawsuit was commenced, he 'made no proactive measure whatsoever' to maintain all the documents in his possession." The motion court found that, while the defendant neglected to properly preserve the documents required, the plaintiff did not establish that "defendants' failure left it prejudicially bereft of the ability to prosecute this action or defend against defendants' counterclaims." As such, the court denied plaintiff's motion to strike defendants' pleading. However, defendants were directed to produce the hard drives of any computers used by them for emails within 30 days and the court further ordered that, if defendants failed to produce them or if the hard drives failed to reveal any relevant documents, a negative inference charge would be issued at trial against defendants.

In *Crocker*, the matrimonial court ruled that an adverse inference against plaintiff husband was appropriate concerning his installation of spyware on his wife's iPhone, who then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney. The court then had to determine whether such apparent interception prejudiced the wife's ability to participate in the action. The wife asserted that given the husband's invocation of the Fifth Amendment regarding all questions surrounding purchases of spyware and whether he used it to intercept her privileged communications, the only way to ascertain whether the husband actually violated the wife's attorney-client privilege is to be able to review the documents and data records on her husband's computing devices.

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The court noted that "parties and their attorneys must continue, even in this digital era, to be able to communicate without fear of interception and to simply permit an adverse inference and permit no further inquiry invites opposing parties into the other attorneys law office through digital means." The court found it imperative that the wife know the extent to which her "attorney-client communications were intercepted by husband so that she can seek the appropriate remedy whether it be an application for sanctions, an application to limit [the husband's] future discovery, an application to preclude the [husband] from introducing at trial any evidence or testimony for which he cannot establish a legitimate source unrelated to any confidential communications he obtained by illegitimate means and/or any other remedy that may be appropriate once the facts and circumstances are known." As such, the court found the only method available to ascertain the degree to which the wife's privilege had been invaded was for there to be an inventory of the documents on the husband's computing devices.

Payment of Attorney Fees.

In *Zacharius*, shortly after the commencement of the action, defendants sent plaintiff a preservation notice. Thereafter, defendants in their interrogatories asked plaintiff to identify "each and every email account … used during the relevant time period." Plaintiff identified only two email accounts in her response—a Yahoo! account and an account with Kensington. Plaintiff in her deposition testified that she may have "inadvertently" deleted discoverable documents. Defendants then sought to compel plaintiff to conduct additional searches of her email accounts, including searches for inadvertently deleted emails, and to make any computers, hard drives, and communication devices under plaintiff's possession, custody or control available for inspection. Nearly one year after defendants' first document requests were served, plaintiff allowed defendants access to her computers and Yahoo! email account. Defendants contended that they discovered "numerous" documents in plaintiff's Yahoo! account that were responsive to their discovery requests. In addition, defendants contended that the emails recovered from plaintiff's Yahoo! account contained admissions by plaintiff that she intentionally deleted and that plaintiff also had a separate Gmail account that had not been disclosed to defendants.

Plaintiff contended that she had no obligation to preserve emails that were irrelevant to the action. However, the motion court noted: "It is well settled that a party must suspend its automatic-deletion function or otherwise preserve emails as part of a litigation hold."[6] The motion court found that there was no dispute that plaintiff had control over her Gmail account during the entirety of the discovery period. The court further found that defendants satisfied the "culpable state of mind" element as to the Yahoo! account as plaintiff conceded that she intentionally deleted emails from that account while the action was pending. However, in light of plaintiff's admittedly intentional destruction of the Yahoo! account emails, the court stated that relevance may be presumed as to those emails. The motion court then deemed the presumption of relevance partially rebutted as to the Yahoo! emails to the extent that plaintiff deleted only junk emails. The court further found that defendants' highlighting of emails in their papers demonstrated that plaintiff's conduct had not deprived them of the ability to present their defense.

In determining the appropriate relief to be awarded, the motion court considered the delays and costs to defendants resulting from plaintiff's testimony that she may have inadvertently deleted emails related to the litigation and the motion practice required in order to obtain the Yahoo! emails revealing plaintiff's deletions. Based on these considerations, the motion court denied defendants' motion to dismiss the complaint, but ordered that plaintiff pay the attorney fees and costs incurred by defendants in reviewing plaintiff's Yahoo! account, as well as the attorney fees and costs incurred by defendants in preparing the motion.

In 'Crocker', the matrimonial court ruled that an adverse inference against plaintiff husband was appropriate concerning his installation of spyware on his wife's iPhone.

Production of Facebook Posting of Both Sides Ordered.

In *A.D.*, a contested matrimonial custody battle, plaintiff husband sought an order directing defendant to turn over printouts of all pictures, posts and information posted on her Facebook pages over four years or, in the alternative, should defendant not voluntarily produce said records, that defendant be directed to turn over to plaintiff's retained expert all computer hard drives, data storage systems, flash drive/memory sticks and CD/DVDs created by defendant, as well as an order directing defendant to turn over a copy of the SD card from defendant's smartphone or iPhone.

The parties were challenging the amount of time the other had spent with their child since his birth. During this time frame, plaintiff worked locally as a social worker counselor and defendant worked as a medical doctor and psychiatrist. It was undisputed that the wife had been required to travel frequently outside of New York for work. Plaintiff thus contended that the data sought would demonstrate that he had spent the majority of time with the child during the past four years. Plaintiff alleged that defendant would upload pictures and post comments to her Facebook page as to her travels and that these postings would confirm her time away from the child. Plaintiff contended that defendant recently deactivated her Facebook account, thus removing or eliminating the proof of her time away. The motion court stated:

> A person's use of privacy settings on social media, such as Facebook, restricting the general public's access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action.

The court held that the time spent by the parties with the child may be relevant and material to its ultimate determination of custody. As such, the court ordered defendant to produce for an in camera review printouts of her Facebook postings depicting or describing her whereabouts, outside the New York City area, from the time of the child's birth through the commencement of the proceeding, whether of her alone, or together with the parties' child. To assist in its review, the court required that defendant provide an affidavit describing the printouts in general terms and confirming that she had provided the entirety of the postings relevant to her whereabouts during such time frame. The court also required defendant to provide an authorization permitting the court to have access to her Facebook postings during the applicable time frame. Finally, the motion court sua sponte directed plaintiff to produce all of defendant's postings that he possessed or had access to with an affidavit stating that they represent all such Facebook postings possessed by or available to defendant in their entirety during such time period.

1. See *Jaffe & Asher v. Horizon Bus, Fundin*, 2015 N.Y. Slip Op. 31853(U), 2015 N.Y. Misc. LEXIS 3627 (Sup. Ct. N.Y. Co. Oct. 6, 2015) (notwithstanding that defendants had sent plaintiff law firm a preservation notice, the motion court denied defendants' cross-motion for an order requiring plaintiff law firm to preserve internal emails where defendants failed to assert that the law firm had failed to comply with any discovery or preservation obligations, nor had the defendants made any showing that any such noncompliance or spoliation was likely to occur).

2. Index No. 6230/2103 (Sup. Ct. Nassau Co. Sept. 16, 2015).

3. 49 Misc. 3d 1202(A) (Sup. Ct. Kings Co. 2015).

4. 2015 N.Y. Slip Op. 31698(U), 2015 N.Y. Misc. LEXIS 3251 (Sup. Ct. N.Y. Co. Sept. 1, 2015).

5. 2015 N.Y. Slip Op. 25283, 2015 N.Y. Misc. LEXIS 3060 (Sup. Ct. Westchester Co. Aug. 13, 2015).

6. *VOOM HD Holdings v. Echostar Satellite*, 93 A.D.3d 33, 44 (1st Dep't 2012).