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Voicemails, Spoliation And Work Product

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Often taken for granted as admissible evidence (which may not be the case), helpful guidance can be found in the motion court decision in *I.M. Operating v. Younan* on the admissibility of voicemail messages. 2018 N.Y. Misc. LEXIS 63, 2018 NY Slip Op 30025(U) (Sup. Ct. N.Y. Co. Jan. 2, 2018).

In *Crocker C. v. Anne R*, which contains a well-reasoned spoliation analysis of the New York Court of Appeals decision in *Pegasus Aviation I v. Varig Logistica S.A.*, the trial court engages in a detailed analysis of proportionate spoliation sanctions balancing the misconduct and harm to the movant, focusing on both the remedial and punitive nature of spoliation sanctions. 2018 N.Y. Misc. LEXIS 430, 2018 NY Slip Op 50182(U) (Sup. Ct. Kings Co. Feb. 5, 2018).

SHUTTERSTOCK

Thinking outside of the box in *Elmaleh v. Vroom*, although denied, a movant sought spoliation sanctions for loss of data from a car's "Electronic Data Recorder." This case is a reminder that relevant electronically stored information (ESI) may be collected and stored in atypical places, and that counsel needs to be creative when seeking to obtain such information, as well as the concomitant requirement that timely notice must be provided in order to ensure ESI is preserved. 2018 N.Y. App. Div. LEXIS 2703, 2018 NY Slip Op 02743 (1st Dep't April 19, 2018).

Finally, back before the First Department (twice within a year) is *Peerenboom v. Marvel Entertainment*, a decision that highlights that careful reviews need to be made to determine whether particular ESI fails within the protections of the work product doctrine. 2018 N.Y. App. Div. LEXIS 2364, 2018 NY Slip Op 02401 (1st Dep't April 5, 2018).

Voicemail Messages

In *Younan*, the motion court, relying on *People v. Lynes*, 49 N.Y.2d 286 (1980), addressed whether certain voicemail messages were admissible, noting that:

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while in each case the issue is one to be decided upon its own peculiar facts, in the first instance the Judge who presides over the trial must determine that the proffered proof permits the drawing of inferences which make it improbable that the caller's voice belongs to anyone other than the purported caller.

The motion court noted that a "caller's own self-identification is not enough to establish the identity of the caller, but the caller's identity may be sufficiently established from surrounding facts and circumstances" and that the "surrounding facts and circumstances can be enough to establish a caller's identity where, for example, the caller makes reference to facts of which he alone is likely to have knowledge, or where the number called back was listed in a directory and the person answering the phone confirmed they are the person whose name is listed with the number in the directory."

The motion court, however, found that "the facts and circumstances surrounding the voicemails were insufficient … to find that it was likely that the telephone calls were made by a representative" of defendant where, among other things: (1) defendant demonstrated that it had employed no one with the name claimed by plaintiff; (2) the telephone number plaintiff called back was not defendant's number and plaintiff had not submitted evidence that such number was registered to defendant or an affiliate, as well as that defendant submitted evidence that such telephone number did not belong to it; and (3) plaintiff's contention that the caller knew information that would only be known by someone from defendant was only supported by conclusory statements and did not provide details regarding the conversations allegedly held with defendant's representatives or that they were related to the subject matter of the case that the caller specifically referenced.

Spoliation

In *Crocker*, the trial court asked "[w]hat remedies are available to an innocent spouse and her counsel when a marriage gets 'hacked' and what remedies are available to the court when the 'hacking' included intercepting the innocent spouse's attorney-client privileged communications and the 'hacking' spouse then purposefully engaged in spoliation of the evidence while simultaneously asserting his Fifth Amendment right against self-incrimination?" The trial court noted that:

> A review of the New York case law related to the remedies correlating to the state of mind of the spoliator support a general approach that as the culpability of the spoliating party decreases (from bad faith and intentional to negligent and unintentional) so too does the appeal of the punitive and deterrent purpose underlying the spoliation doctrine. The rational is obvious: where a party intentionally destroys evidence the conduct raises a strong inference that the party thought the evidence would be so harmful to its case that the risk of getting caught destroying the evidence outweighed the risk of the opposing party obtaining the evidence and the possibility that the Court could have the evidence to consider. It appears that the Court of Appeals decision in *Pegasus* intended to draw the distinction in a way that corresponds the sanction to the intent of the spoliator when possible so that less drastic sanctions are possible for spoliators who were not acting in bad faith so long as the spoliation did not result in insurmountable prejudice to the innocent party.

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The trial court noted that the Court of Appeals decision in *Pegasus* narrowed the spoliation "inquiry focusing on whether spoliator's conduct was intentional and presuming the relevance based upon the intentional conduct" and "[b]ased upon whether the spoliator's conduct was unintentional, negligent, intentional or in 'bad faith' the Court can determine the appropriate remedy." The trial court further indicated that spoliation remedies range from

"the drawing of the adverse inference, issue preclusion, striking of pleadings and, in the most egregious cases, dismissal of the action." The trial court stated that an "adverse inference is intended to have remedial, punitive and deterrent objectives: the remedial effect is designed to restore the prejudiced party to its previous position, as if the spoliation had not occurred and the punitive and deterrent effect is supposed to discourage and punish spoliation by placing the risk of an erroneous judgment on the party who wrongfully created the risk by destroying the evidence." Finally, the trial court explained that "[p]laintiff's invocation of his *Fifth Amendment* privilege against self incrimination related to any and all questions of alleged spyware use and any violation of defendant's attorney-client privilege posed the following questions for the Court: 1) what is the extent of the adverse inference to be drawn against the plaintiff for using the *Fifth Amendment*; and 2) what spoliation remedy is available to the Court to ensure that defendant's ability to participate in this litigation on a level playing field is not prejudiced." In the end, the trial court held that "plaintiff's spoliation of evidence effectively obfuscated any chance for the defendant to know the extent of his violation of her attorney-client privilege and for the Court to be able to assess how much the violation may have actually prejudiced the defendant … [h]owever, plaintiff's purposeful spoliation of the primary evidence, together with his continued assertion of his *Fifth Amendment* right against self incrimination, leave the Court with no option but to draw the most stringent of adverse inferences against the plaintiff and to consider the most drastic spoliation sanctions" under *Pegasus*.

In *Elmaleh*, the motion court reversed a grant of spoliation sanctions to the extent of precluding defendant from "testifying at trial or offering evidence in an affidavit in substantive motion practice," where defendant was not on notice that the Electronic Data Recorder (EDR) in his car "would be needed for future litigation." The motion court held that the failure to preserve the car or the EDR "did not constitute negligent spoliation of evidence" especially where plaintiff did not promptly make a demand for either the EDR or an opportunity to inspect the car.

'Peerenboom' highlights that careful reviews need to be made to determine whether particular ESI fails within the protections of the work product doctrine.

Work Product

The First Department in *Peerenboom* held there to be neither any attorney-client privilege nor any marital privilege over certain documents and noted that, "[g]iven the lack of evidence that Marvel viewed any of [the employee's] personal emails and the lack of evidence of any other actual disclosure to a third party, [the employee's] use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections." As such, the action needed to be remanded for an in camera review to determine whether certain documents were protected as attorney work product. After remand and again before the First Department, the court found that certain documents were entitled to protection as work product or materials prepared in anticipation of litigation where: (1) emails had discussed changes to pleadings, (2) documents contained discussions between attorneys regarding topics related to a pending action between petitioner and Perlmutter, (3) detailed invoices prepared by Perlmutter's attorneys contained summaries of "legal research, analysis, conclusions, legal theory or strategy," and (4) emails among and between Perlmutter's investigator and his counsel discussed an investigation undertaken by it in connection with the pending action.

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