

New York Law Journal

Technology Today

WWW.NYLJ.COM

VOLUME 256—NO. 85

An ALM Publication

TUESDAY, NOVEMBER 1, 2016

State E-Discovery

The Awesome Power of ESI

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Electronic communications, including social media, can be extremely powerful tools in a litigation and, concomitantly, the wrongful loss or destruction of such electronically stored information (ESI) can be equally as devastating in a legal dispute. Recently, in *Crocker C. v Anne R.*,¹ a “war of the roses” custody battle, the incredible power of digital evidence, if obtained in accordance with law, was underscored where a wife accused her husband of installing a spyware application on her iPhone to surreptitiously monitor and record non-telephonic conversations she had with others, including with her attorney and psychiatrist, track her whereabouts, and “steal” her passwords to gain access to her other electronic communications. In *Matter of J.T.*,² the court harnessed the benefits and power of email communication and authorized the service of process by email in a proceeding seeking to terminate parental rights. Lastly, in connection with a spoliation motion, in *Oorah v Covista Communications*,³ the court addressed the disastrous implication of a defendant which sold its assets, including its computer servers containing responsive ESI, during the pendency of a litigation without having first preserved such ESI.

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In *Crocker*, a wife sought to compel her husband to disclose spyware used and/or purchased by him or on his behalf including evidence of “actual utilization, what he learned or recorded, the people he shared the information with as well as all other relevant and material information.” The spyware allegedly installed on the wife’s iPhone:

- could turn her iPhone into an open microphone allowing the husband to surreptitiously eavesdrop on room conversations and record them;
- could monitor her emails, texts, telephone calls and physical location using the GPS feature of the iPhone and it would create detailed log files on her iPhone showing when the open microphone and other features were in use to, among other things, purposefully listen in on specific conversations;

• has GPS features which would enable the husband to monitor and remotely turn on the feature permitting him to listen to and record conversations so that he could pinpoint when and where those conversations had taken place;

• would allow the husband to have access to his wife’s calendar, GPS location and the open microphone so he could cross-reference her location, calendared activities and meetings; and

• would allow the husband to, in effect, “steal” the wife’s passwords using the keystroke recording feature permitting the husband access to all of his wife’s password protected accounts, including her email, and thereby be able to log into his wife’s emails and gain access to her confidential or privileged communications.

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The wife asserted that the husband purposefully used the spyware to listen in on her conversations with her counsel and her psychiatrist in violation of the attorney-client privilege and doctor-patient privilege.

The husband invoked his Fifth Amendment right against self-incrimination and refused to disclose the spyware installed on his wife's iPhone and whether or not he used it to monitor her confidential or privileged communications. The court noted that the husband, while continuing to exercise his Fifth Amendment right against self-incrimination, was simultaneously attempting to interfere with his wife's ability to obtain information in support of her position in the litigation. As such, the court held that:

[t]o permit plaintiff to do so would be to restrict defendant, who is because of plaintiff's choice, forced to take a completely defensive posture as it relates to the allegations of extensive spyware use by plaintiff against her. Plaintiff cannot refuse to answer and simultaneously deny defendant an opportunity to present relevant evidence for consideration on the underlying issue. A party's choice to assert his or her Fifth Amendment right against self-incrimination does not unilaterally terminate the other party's right to continue the inquiry by discovery and presenting his or her case especially where significant documentary proof is provided to allege that the spyware intrusion may have been significantly greater than previously alleged.

Accordingly, the court ruled that the husband's assertion of his Fifth Amendment privilege did not bar the wife from presenting to the court-appointed attorney referee the logs uncovered on her own iPhone, which was, under the facts and circumstances presented, tantamount to document discovery in a civil matter.

Service of Process by Email

Family services petitioned the court in *J.T.* to terminate parental rights and sought

an order authorizing service by email of its petition on the non-party father. Upon ruling that personal service on the father was legally "impracticable," the court held that it has broad discretion in determining an alternative means of service that comports with due process. The court stated that "[a]lthough not directly set forth in the CPLR as a means of service, there is no prohibition [to service by email] provided appropriate circumstances exist." Finding that the father had acknowledged receipt of multiple email communications with the caseworker and that no email communications to

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him had been returned as undeliverable, and where the father had asked the caseworker for information about the proceeding and did not provide any information concerning his physical address other than that he was living in the city of Madaba, Jordan, or other means of communicating with him, service of process by email was held to be appropriate.

Spoliation From Sold Computer Servers

In *Oorah*, plaintiff sought spoliation sanctions against the defendant due to the destruction of ESI contained on computer servers sold during the pendency of the litigation. As a result, plaintiff contended that it was unable to prove its breach of fiduciary duty and breach of contract claims. In response to plaintiff's document requests, defendant had produced some documents and stated that it would continue to search for and would produce responsive documents if they are located. Thereafter, the defendant sold its assets including its servers on which all of its ESI had been stored. Defendant did not

disclose such sale until six months later in response to the court granting plaintiff's motion to compel the production of documents.

The motion court held that defendant should have been aware of its preservation obligations and failed to institute a litigation hold, and then sold its computer servers to a third-party whose "standard protocol" was to erase the servers' content. The court found that the "transfer of the servers without a litigation hold in this context clearly was done with a 'culpable state of mind,' since this element is satisfied by a showing of mere 'ordinary negligence'—a threshold that [defendant's] actions clears easily. In fact, [defendant's] actions here were 'grossly negligent, if not intentional.'" Even though the court found that the overwhelming majority of documents pertaining to the action were located on the sold servers, plaintiff was not left "prejudicially bereft" or without the "sole means" necessary to establish its breach of contract and breach of fiduciary duty claims. As such, the court did not strike defendant's pleading, but instead ordered that an "adverse inference instruction to be read at trial in connection with [plaintiff's] claims for breach of fiduciary duty and damages for breach of contract."

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1. 2016 N.Y. Misc. LEXIS 3356, 2016 NY Slip Op 51330(U) (Sup. Ct. Kings Co. Sept. 19, 2016).
2. 37 N.Y.S.3d 846 (Fam. Ct. Onondaga Co. Sept. 2, 2016).
3. 2016 N.Y. Misc. LEXIS 3104, 2016 NY Slip Op 31618(U) (Sup. Ct. N.Y. Co. Aug. 23, 2016).

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