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State E-Discovery

Litigation Holds and Preservation

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SHUTTERSTOCK

A series of well-reasoned decisions recently issued by the New York County Supreme Court plumbed the nature of litigation holds and the preservation of electronically stored information (ESI), giving guidance to litigators with excellent practice tips. Some of the issues addressed were somewhat unusual, such as whether to require a litigation hold to a foreign company which did little business in New York state, and an entity's partners' personal responsibility to fund ESI expenses. Or they dealt with the more common concerns of preserving text messages and tape recordings stored on cell phones, the forensic review of a server when a litigation hold had not been implemented, the timing of when a litigation hold should have been put in place, or the insufficiency of the record to move for spoliation sanctions.

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Foreign Company's Preservation Trigger

In *Global Access Inv. Advisor v. Lopes*, 2017 NY Slip Op. 31173(U) (Sup. Ct. N.Y. Co. May 31, 2017) (J. Kalish), the court noted that the spoliation motion presented a "unique question" on the issue of what constitutes "notice" of an impending lawsuit upon a foreign company which did not have an extensive presence in New York or that solicited business as a general matter in New York, sufficient to trigger a potential party's duty to preserve evidence in accordance with the statutory discovery requirements of New York. Plaintiffs asserted that Banif's duty to preserve was triggered as of when a certain email was sent that a legal action was being commenced against it. The motion noted that Banif is a corporation organized under the laws of the Cayman Islands with its principal place of business there. Further,

although the email informed Banif that plaintiff had commenced such a lawsuit, it did not indicate that Global had commenced the lawsuit in New York and did not direct Banif to preserve any evidence relevant to the lawsuit. As such, the court denied the spoliation motion, ruling that "there is no basis to conclude that Banif had any reason to believe that it would ever be subject to the discovery laws of the state of New York, had knowledge of or should have had knowledge of the discovery laws of the state of New York."

Cellphones, Text Messages And Gmail

In *Simons v. Petrarch*, 2017 NY Slip Op 30457(U) (Sup. Ct. N.Y. Co. March 1, 2017) (J. Hagler), the motion court was confronted with a series of spoliation applications and ruled as follows:

• Plaintiff secretly made recordings on her iPhone and then transferred them to her computer. The court ruled that plaintiff had an obligation to preserve both the computer and the iPhone and should thus "be precluded from introducing the undated audio recording into evidence," noting that where "the computer and iPhone have been discarded, defendants have no way to identify when or how the recording was made and whether it had been altered."

• Plaintiff selectively saved screen shots of text messages on her cell phones that she believed would support her claims. When plaintiff switched her phone from an iPhone to a Galaxy, she lost all of the data stored on her iPhones. The court ruled that "plaintiff had a duty to preserve her phones and complete text messages which were in her control." "By throwing away her phones, plaintiff has deprived defendants from viewing the complete and original text messages from where the screen shots were taken. As defendants were deprived of this opportunity, plaintiff 'should be precluded from entering the [screen shots] into evidence or having a witness testify to [their] contents.'"

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• Had plaintiff "preserved the computer where she inputted her [l]og of harassment, defendants would have been able to review the metadata to determine whether the log was inputted when plaintiff stated it was, or whether, as defendants allege, it was fabricated after, plaintiff's termination." The court thus ruled that defendants "are entitled to an adverse inference charge as to the computer and the corresponding typewritten [l]og and that all disputed issues related to the [l]og shall be resolved in defendants' favor."

• As to two deleted recordings that did not support plaintiff's claims, the court ordered that defendants "are entitled to the presumption that the recordings would have been favorable to them, regardless of whether or not plaintiff intends to use them or claims that they contained nothing to support her claim."

• A "limited and narrowly tailored forensic search of plaintiff's gmail account(s), based on agreed upon search terms, was warranted where plaintiff worked for defendants for at least four years and "testified that she communicated with supervisors and other co-workers by means of her personal gmail account." The court noted that "as a result of plaintiff's testimony and her alleged conduct of tampering with evidence, there is reason to believe that she failed to produce all responsive documents included in electronic form from her gmail account."

Forensic Inspection of Server

While defendants failed to issue any litigation hold, the motion court in as in *Kohan v. Nehmadi*, 2017 NY Slip Op. 31202(U) (Sup. Ct. N.Y. Co. June 6, 2017) (J. O'Neill Levy), noted that such "omission is less insidious than it sounds because it appears that there was no mechanism by which defendants' documents were being automatically destroyed." However, due to the nature of the allegations and plaintiff's failure to comply with its discovery obligations, the court

found "that it would be useful and reasonable that defendants be compelled to make their allegedly damaged computer tower available for inspection by plaintiffs' computer forensics expert," noting that the inspection "holds a reasonable possibility of providing plaintiffs with relevant documents concerning the management of the subject building." The motion further ordered that defendants are "to make available a copy of their outdated RAISH software program so that plaintiffs' computer forensics expert may examine it at the inspection."

Timing of Litigation Hold and Limited Adverse Inference

In as in *Brook v. Peconic Bay Med. Ctr.*, 2017 NY Slip Op 31728(U) (Sup. Ct. N.Y. Co. Aug. 14, 2017) (J. Scarpulla), the motion court held that defendant's "failure to institute a formal litigation hold as early as July, 2010, did not necessarily amount to gross negligence per se and is instead one factor that to consider in making a determination as to the alleged spoliator's culpable state of mind." The court observed that a formal litigation hold had been issued six months after defendants should have reasonably anticipated litigation, and one month after plaintiff instituted his lawsuit. The court found that, while evidence existed that emails had been created during the period when no hold had been in place which would support plaintiff's claim, independent evidence also existed that would allow the affected party to adequately prepare its case. As such, where depositions may produce" sufficient, alternative evidence" of the subject matter of the missing communications, the court nevertheless ruled that an adverse inference charge would be appropriate, but only concerning the emails generated during the limited period of time when no litigation hold was in place as "defendants were unable to produce the Rubenstein email or any other communication between PMBC administrators and physicians relating to the investigation into Dr. Brooks made during that time frame"

Spoliation Motion Timing and Partner Responsibility

The motion court in as in *RSSM CPA v. Bell*, 2017 NY Slip Op. 30020(U) (Sup. Ct N.Y. Co. Jan. 8, 2017) (J. Kornreich) addressed available remedies for spoliation, stating that it possesses "broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence, including the preclusion of proof favorable to the spoliator, requiring the spoliator to pay costs to the injured party for the development of replacement evidence, or an adverse inference instruction at trial." Nevertheless, the court denied a spoliation motion with leave to renew after the close of discovery, observing that the "state of mind of RSSM and the Partner TPDs cannot be determined on the factual record before the court" and "[g]iven the lack of depositions concerning how the hard drives came to be lost, what hard drives are extant, and what has been imaged, it is impossible to know whether more than negligence was involved, what if anything was lost and whether what was lost was the sole means of proving, or fatally compromised, any of Bernstein's claims or defenses."

However, significantly, with respect to ESI other than email, the court found that plaintiff's partners were financially responsible for its discovery obligations, as well as their own, as its partners "controlled the decision to bring the litigation" and "[h]aving done that, they must fund reasonable ESI searches and production where the ESI stipulation was agreed to by the partners." The court, however, found that "[g]iven the limitation on the issues left to try and the importance of proportionality when crafting ESI discovery, the court will revisit the scope of ESI searches and limit them to what is reasonably necessary to prepare for trial, at the next discovery conference."

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