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STATE E-DISCOVERY

Cases Stress Need to Be Clear On Storage, Retention Policies

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A recent Manhattan Supreme Court, Commercial Division, decision, *Einstein v. 357, LLC*,[1] addressed the need to properly preserve and implement a "litigation hold" of e-mails. This decision, like the one in *Ahroner v. Israel Discount Bank of New York*,[2] from last year,[3] should remind counsel of the drastic perils, including the issuance of an adverse finding or preclusion order, that could result from not being aware of or not fully understanding a client's policies regarding e-mail retention and storage, and not ensuring that responsive e-mails are properly searched for and appropriately produced.

On the other hand, not every matter is ripe for e-discovery, and the decision in *Kaiser v. Raoul's Rest. Corp.*,[4] is illustrative of the fact that one still needs to sufficiently justify a request for e-discovery, and that overbroad demands will not be countenanced.

The production of non-party records that would indicate whether on a certain relevant date and time a person was accessing the Internet or using a BlackBerry and cellphone device is increasingly being litigated in car accident cases, and these decisions should be reviewed when seeking the production of such usage documents in commercial disputes.

In *Einstein*,[5] in the context of a case involving the failure to produce e-mails, a trial court recently set out when a "litigation hold" of e-mails needs to be implemented and the consequences of a failure to do so:

> Typically, the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation…
>
> It is well established that the "utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent." A showing of gross negligence is "plainly enough to justify sanctions at least as serious as an adverse inference."

Moreover, when a party establishes gross negligence in the destruction of evidence, that fact alone suffices to support a finding that the evidence was unfavorable to the grossly negligent party. Similarly, if evidence is destroyed after such evidence has been requested by another party or after a party has requested that such evidence be preserved, New York State courts have found such destruction to be contumacious.

Courts have held that "[a] party seeking an adverse inference instruction or other sanctions based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a 'culpable state of mind'[;] and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense."[6]

After setting out the above standard, the court found that: "[t]here is no dispute that the… Defendants intentionally discarded e-mails in the ordinary course of business. While the deletion of e-mails is not per se improper, particularly when such deletions occur in the ordinary course of business, the matter is quite different when litigation has commenced or is reasonably anticipated. At that point, a party must take additional steps to preserve potentially relevant e-mails."

As a result, the court held that "the actions of the…Defendants entitle Plaintiffs to an adverse inference that any deleted e-mails were unfavorable to the…Defendants. The failure to suspend the deletion policy or to investigate the basic ways in which e-mails were stored and deleted constitutes a serious discovery default on the part of the… Defendants and their counsel rising to the level of gross negligence or willfulness."

The court noted that "[h]ad the Plaintiffs and this Court known that the individual brokers were continuing to delete e-mails throughout the course of this litigation, a preservation solution could have been implemented. By disclosing this fact for the first time 18 months into the litigation, however, the…Defendants willfully and unnecessarily caused extensive motion practice and delay without any reasonable justification. In addition, this Court has found that the utter failure to implement a litigation hold constitutes a separate discovery violation warranting sanctions."

The court, in lieu of striking the answer, imposed an order that went directly to the merits of defendants' defense, finding[7] that certain defendants be "deemed to have known of the water infiltration problem and to have willfully misled the Plaintiffs by concealing that condition from them during the sales process."[8]

Demand for ESI Insufficient

In *Raoul's Restaurant*,[9] the court held that just because e-discovery is permitted "is not sufficient to allow plaintiff to obtain copies of e-mails and/or mirror images of all computers used by the individual defendants and/or the restaurant." The court found that "plaintiff has not justified the need for this discovery. Moreover, this issue has

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been raised on numerous occasions and plaintiff has never justified such extensive intrusion into the personal computers of the individual defendants."

Usage Records

Recent decisions in the context of automobile accident litigation have addressed the situation where a party seeks information in order to demonstrate that a person was electronically communicating with others on a particular date and time. Such materials would include, among other records, cellphone and BlackBerry bills, as well as wireless computer usage records.[10] The case law, however, is unclear whether there needs to be evidence and, if so, the type and weight of same, to justify compelling the production of such records from a non-party provider of such communication services.[11]

In *Detraglia v. Grant*,[12] the Appellate Division, Third Department, recently affirmed a trial court's decision ordering the production of billing records for defendant's cellular telephones and the Verizon wireless air card[13] for his company-issued laptop computer, all of which were in his car at the time of the automobile accident, for the date of the accident for a four-hour period.

The court noted that the record contained information indicating that defendant may have been distracted while driving immediately before the car accident, through the use of a cellphone or computer.[14] The Appellate Division, however, required the documents to be reviewed in camera,[15] directing that the trial court provide the parties "with only relevant information redacted to protect defendants' privacy interests."

Further, because the subject cell phones and laptop had been returned to defendant's employer, as they had been upgraded for new models, and where they would "possibly" contain information concerning whether they were in use at the time of the accident, the Appellate Division affirmed that trial court's ruling that directed the deposition of the employer.

In *Leboy v. Verizon New York Inc.*,[16] plaintiff sought the production of cell phone records of all cell phones and/or BlackBerrys for the date of the accident during a certain time period, contending that defendant "used a BlackBerry provided by the defendant Verizon New York to either report his work activities and/or to receive communications from Verizon as to work assignments."

Defendant stated in an affidavit that he had a "BlackBerry provided by the defendant Verizon that could be used for personal calls in addition to work related communications but that he was not using the BlackBerry at the time of the accident in issue."

The trial court ruled, notwithstanding the statement by a witness, who was an employee of Verizon, that "subsequent to the accident defendant used the BlackBerry," a review of the "respective submission and in particular the deposition transcripts of the plaintiff, defendant and the witness" demonstrated that the "requested discovery is not material and necessary to the facts in litigation."

Three other recent trial court decisions addressed the production of cell phone records as they relate to defendant's[17] usage at the time of an automobile accident. See *Kaur v. Saliba*,[18] (granting production of cell phone records); *Franzese v. Katz*,[19] (although defendant took the position that there is no evidence that he was using the cell phone at the time of the accident, the court found that "cell phone records may contain information material and necessary to the prosecution of this action."); and *McAvoy v. Iacano*,[20] ("[w]here there is evidence that a party was seen using a cell phone at the time of an accident, limited disclosure of phone records is permissible. This case presents a stark contrast in which the plaintiffs claim they observed the defendant with a cell phone while the defendant denies even having a phone. In light of the unusual circumstances of this case, the liberal interpretation regarding discovery and the limited nature of the request, the plaintiffs have demonstrated that the requested discovery is reasonably calculated to result in the disclosure of facts necessary to prosecute their case.").

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1. Index No. 604199/2007, 2009 WL 4543044 (Sup. Ct. N.Y. Co., Nov. 12, 2009).
2. Index No. 602192/2003 (Sup. Ct. N.Y. Co., July 9, 2009).
3. See Mark A. Berman, Recent Decisions Stress the Needs to Preserve Electronic Data, NYLJ, Vol. 242 No. 58, Sept. 22, 2009, for an analysis of such decision.
4. Index No. 112674/2007 (Sup. Ct. N.Y. Co., Nov. 13, 2009).
5. Index No. 604199/2007, 2009 WL 4543044.
6. Id. at 8 (citations omitted).
7. The sanction imposed in *Ahroner*, supra, was similarly harsh and entitled plaintiff to an adverse "inference charge at trial that the e-mails on the hard drive would not support defendants' defense that [plaintiff] was terminated as part of an overall plan to reorganize to help the Bank remain profitable and because his position was being eliminated, and would not contradict evidence introduced by [plaintiff] that he was terminated as the result of discrimination based on his age and religion."
8. In *Pourqui M.P.S. Inc. v. Worldstar Intern., Ltd.*, Index No. 4883/2005 (Sup. Ct. Queens Co., Oct. 16, 2009), a court recently found certain information "highly material" and plaintiff's failure to possess same caused its summary judgment motion to be denied. However, with respect to discovery of, among other things, such information, where defendant had failed to provide sufficient responses to certain e-discovery requests, the court issued an order that defendant submit an affidavit that she had "searched the pertinent computer, its hard drive or any other storage device discovery" for such information. The order also contained the following language: "To the extent that no documents or an explanatory Affidavit is produced in connection with a particular document request, Defendants shall be precluded from entering into evidence testimony or documents on the particular topic." Accordingly, where defendant's affidavit, when ultimately provided, failed to quote that the above electronic media had been searched, the court issued a preclusion order finding that defendants' conduct to be "willful and contumacious acts designed to thwart defendant's ability to defend this action and has been designed to frustrate the disclosure scheme provided by the New York Civil Practice Law and Rule."
9. Index No. 112674/2007 at 6.
10. See *Einstein v. Douso*, Index No. 13254/2004 at 4 (Sup. Ct. Nassau Co., Oct. 3, 2006) ("[c]oncerning the production of [defendant's] cell phone records, such records will aid in determining whether she was using her cell phone at the time of the accident and whether its use was a contributing cause of the accident."); *Pepitone v. Orwasher*, Index No. 5395/2001 at 1 (Sup. Ct. Nassau Co., July 12, 2002) ("certainly evidence of cell phone usage by the Defendant at the time of the subject motor vehicle accident is material and necessary to Plaintiff's prosecution of her action").
11. In *Morano v. Slattery Skanska Inc.*, 18 Misc. 3d 464, 475, 846 N.Y.S.2d 881, 888 (Sup. Ct Queens Co. 2007), the court held that "the mere fact that a defendant was in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, would not entitle the plaintiff to said defendant's cell phone records, since such a discovery request would amount to nothing more than a fishing expedition."). See *Elgort v. Fedele*, Index No. 2659/2001 at 1 (Sup. Ct. Nassau Co., July 26, 2002) ("That branch of the motion requesting the defendant's cellular telephone records is denied. The defendant testified that she was not using her cell phone prior to the happening of the incident, nor did she use it while she was parked. The Court finds that the fact that defendant owned a cell phone, and indeed had it with her at the time of the incident, insufficient to compel production of the records for the day in question.").
12. 2009 WL 4672741 (3rd Dept. Dec. 10, 2009).
13. "A wireless air card allows a laptop computer to connect to the Internet, as long as the device is in an area where the company provides service." Id.
14. See *Monahan v. Callow*, Index No. 4184/2004 at 1 (Sup. Ct. Nassau Co., March 6, 2006) (production of cellphone records granted: "plaintiffs claim that the defendant was on her cell phone at or around the time of the accident and refers to a statement made by a witness identified on the police report. The witness apparently states that he saw the defendant holding something small in her hand prior to impact. The defendant testified that she had a cell phone in her car at the time of impact and evidences using it at the time of the accident").
15. See *Francis v. Gomez*, Index 10896/2006 at 2 (Sup. Ct. Nassau Co., Dec. 19, 2007) ("defendant's motion to compel production of all the plaintiffs cell phone records granted to the extent that the Court will conduct an in camera review") and Index 10896/2006 at 1 (Sup. Ct. Nassau Co., July 2, 2008 ("[a]fter a review of the prospective records, the Court finds the records discoverable, with a provision that the phone numbers be redacted.")
16. Index. No. 1660/2008 at 2 (Sup. Ct. N.Y. Co., Nov. 9, 2009).
17. Requests in car accident cases are not limited to the production of cellphone records of the defendant driver. See *Berthold v. Guevara*, Index No. 18987/2004 at 1 (Sup. Ct. Suffolk Co., April 5, 2006) (where plaintiff testified that she was not using her cellphone at the time of the accident, the court held that "defendant has not provided a sufficient basis to warrant disclosure of plaintiff's cellular phone records").
18. Index No. 6312/2007 at 3 (Sup. Ct. Queens Co., Sept. 24, 2009).
19. Index No. 11926/2008 at 2 (Sup. Ct. Nassau Co., Oct. 5, 2009).
20. Index No. 8377/2007 at 2 (Sup. Ct. Suffolk Co., Oct. 26, 2009).

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