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STATE E-DISCOVERY

Getting and Using That ESI

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Recent e-discovery decisions continue to address the "nuts and bolts" of how to prove your case using electronically stored information (ESI). The decisions discussed below address the up-front issue of ESI preservation, and whether ESI, under various circumstances, should have been preserved and whether its deletion is an appropriate basis to find that spoliation has occurred. As decisions make clear, simply because ESI was deleted does not necessarily justify a spoliation finding, and whether spoliation took place is case specific and may be a question for the jury as opposed to a decision made by a judge.

As practitioners are well aware, how to acquire relevant ESI, which may be "ephemeral" social media ESI, presents its own set of challenges. A party for a variety of reasons may not have "retained" such ESI and, thus, courts may direct a party to execute an authorization, which would then be provided to, for instance, a social network website, in order for the ESI to be turned over.

However, as precedent continually makes clear, a party's request for social media ESI may not be overbroad, and such ESI may have to be first produced in camera before opposing counsel has the opportunity to review responsive ESI.[1] The decisions discussed below also address the ever-present issue that lurks behind many e-discovery disputes—the allocation of costs for an ESI production—as well as the use of notices to admit when seeking to authenticate social media postings.

Social Media ESI Preservation

In *Carr v. Bovis Lend Lease*,[2] a personal injury case, plaintiff sought a protective order, vacating or striking defendants' notice to admit and demand for authorizations from plaintiff for certain social media, while defendants moved to compel plaintiff to preserve ESI. This motion practice was commenced, following plaintiff's deposition, in response to defendants serving plaintiff with a 28-question notice to admit seeking to have him admit to postings on Facebook, MySpace, Twitter, YouTube video or YouTube channel, and seeking authorizations for certain of these social media websites as well as others.

Plaintiff objected that the authorizations sought were "unduly burdensome, excessive and improper as discovery tools," and without factual predicate, but nevertheless provided an authorization for his Facebook account. Plaintiff further objected to the notice to admit on the grounds that it too was an improper discovery tool and without factual predicate for the items sought to be admitted. In addition, defendants served a demand for broad preservation of ESI, including "[a]ll electronic [e]vidence, [i]ncluding but not limited to; [t]he BlackBerry cellular phone, including memory card..." and "[a]ny and all videos, recording devices, and metadata, including memory cards used in the connection of uploading information onto Facebook and other social sites." Plaintiff objected to such demand as cumulative, having already provided his authorization for his Facebook account, and as an invasion of privacy.

The court noted recent Appellate Division precedent that "[o]nline postings, are not shielded from discovery, regardless of the use of privacy settings, if they are relevant to the issues in the case" and that a party seeking such authorizations "in the context of a personal injury action, is required to specify the evidence sought and 'establish a factual predicate with respect to the relevancy of the evidence.'"

The court struck the notice to admit where no issue was raised concerning social media at plaintiff's deposition or after service of the bill of particulars and, "[a]lthough not seeking an admission to a material issue, [it] is being used solely as a disclosure device and is duplicative of the demand for authorizations." The court noted that a notice to admit "may not be used as a 'subterfuge for obtaining additional discovery.'" The court, however, directed plaintiff to provide a supplemental response to the demand for authorizations and to comply with the demand for the preservation of ESI, as plaintiff did not deny that he had other social media accounts and he had not produced an affidavit denying their existence. The court noted that plaintiff "has posted information on Facebook which may contradict assertions made concerning the extent of his injuries."[3] The court held that "[d]efendant's need for access to relevant information outweighs plaintiff's concerns of privacy."

Further, the court noted that:

> since plaintiff claims that he cannot recall all of his user names for authorizations to obtain access to other social media accounts, and this information may be maintained on the memory card or other metadata, plaintiff shall be required to maintain and preserve videos, and metadata, including memory cards, [used] in connection with uploading information onto all social media sites from the date of the accident to the present.

The court, however, held that defendant did not state a basis for maintaining and preserving plaintiff's cellular phone, BlackBerry or recording devices "in addition to preserving the data."

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Spoliation or Valid Deletion?

In *Saperstein Agency v. Concorde Brokerage of L.I.*,[4] plaintiff sought a judgment in its favor claiming spoliation of evidence. Plaintiff alleged that defendant attempted to eliminate relevant evidence by purging files that were maintained by the parties' joint remote cloud server, and that the lack of documentation of defendant's customers in the files stored on the parties' remote server, which information was allegedly required to be maintained by state regulations, was evidence of purging and spoliation.

Counsel for the cloud server company submitted an affidavit that he reviewed the file dates and files sizes in each copy of defendant's back-up data as of Aug. 1, 2010, and that "the data had not been altered." The affidavit indicated that in order to make "the data viewable in a legible format," the cloud server company "had to convert certain information, such as email, into Microsoft Word files, and in the process created entirely new files that 'nonetheless contain [defendant's] back-up exactly as it existed on August 1, 2010'" and that the "'[d]ata itself had not been modified. Rather it was merely copied into new formats in order to accommodate the parties' requests in the most efficient manner possible.'" The court found that it "cannot conclude that the absence of documentation from digital files establishes that Defendants destroyed evidence, whether intentionally or negligently." In sum, the court found that:

> [t]he question whether any spoliation of evidence actually occurred should thus be presented to the jury, along with any inferences to be drawn from such spoliation.

In *Errico v. Concepts in Time*,[5] an employment discrimination case, defendant moved for an order dismissing the complaint due to spoliation of evidence or, in the alternative, requesting that an adverse inference be drawn against plaintiff. The court found that plaintiff had no obligation to preserve the laptop at the time it was destroyed where she had "wiped" its contents 11 months before she had commenced her discrimination action. The court noted that plaintiff did not destroy the information with a "culpable state of mind," as she alleges that she deleted the information after her former employer threatened to bring a criminal complaint against her regarding corporate information that had remained on her laptop and that she "wiped" her laptop in order to remove any information defendants did not want her to have. The court noted that another judge in an action commenced by the former employer against plaintiff (alleging violations of the Computer Fraud and Abuse Act) which was dismissed had found that plaintiff "had not breached any laws by downloading information that defendant's agreed '[s]he was permitted to access.'" The court concluded that plaintiff "could not have known at that time that defendants would request [the deleted ESI] in order to defend against plaintiff's employment discrimination lawsuit." As such, the court denied defendant's request for an adverse inference charge, although without prejudice to be made at trial.

In *Scarola Ellis v. Padeh*,[6] plaintiff law firm moved to strike its former client's answer on the basis of spoliation of evidence. Defendant noted that he had "feared" litigation due to the tenor of the law firm's emails, and saved certain of the emails, but allowed others to be "purged" from his system long before litigation had commenced. The court held that plaintiff failed to carry its burden on its spoliation motion and the court expressly noted that it was not reaching any conclusion as to whether the documents that plaintiff seeks "were in fact ever in [defendant's] possession and/or [whether they existed and/or whether they were] highly significant." The court stated that it "is unable to make these findings on this record and any such findings should in any event be left to the trier of fact." The court noted that, with respect to the emails sought, plaintiff was a party to them and thus should be in possession of or be able to obtain some or all of the material it seeks.

Proportionality of Costs

In *Aldrich v. Northern Leasing Systems*,[7] in a putative class action, defendants sought to limit the scope of emails to be produced to those relating to the four named plaintiffs or to require plaintiffs to pay all costs related to producing the requested emails. The parties agreed to use the same protocol for the email production that had been previously utilized in a related federal court action as well as to the scope of the email search. The only unresolved issue was which party would bear the ESI production costs. Defendant had submitted two written estimates of $61,943 and $104,641, exclusive of attorney review time. Defendants contended that plaintiffs' discovery is irrelevant to the four named plaintiffs' claims, and the cost of the production would far exceed the total amount of the damages these plaintiffs sought to recover. Plaintiffs indicated that the emails would not be needed in connection with their motion for class certification, but were material to defendants' liability for willful violations of the Fair Credit Reporting Act and its New York counterpart.

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The court denied class certification and various counts of the complaint, including those alleging willful and/or intentional violations of statute, and thus noted that many of the emails sought would therefore be irrelevant. Accordingly, with only the individual plaintiffs' claims remaining in the case, the court found that:

> a comparison of the cost of production with the amount in controversy does not warrant imposing this expense upon defendants at this time.

Since the scope of the emails to be produced was circumscribed due to the court's various rulings, the court issued a protective order, which was "without prejudice to plaintiffs' right to serve a subsequent demand for production of emails tailored to reflect the case's present status."

1. See Mark A. Berman and Anne Taback, "Metadata Meets Facebook E-Discovery," NYLJ, Vol. 247, No. 83 (May 1, 2012); Berman and Taback, "Recent Case Law Provides Guidance for ESI Production," NYLJ, Vol. 246, No. 85 (Nov. 1, 2011).
2. Index No. 107413/10 (Sup. Ct. N.Y. Co. Sept. 5, 2012).
3. See *Kregg v. Maldonado*, 98 A.D.3d 1289, 951 N.Y.S.2d 301 (4th Dept. 2012) (motion granting disclosure of the "entire contents" of all social media accounts maintained by or on behalf of the injured party reversed, subject to a "more narrowly-tailored disclosure request," where there is "no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life").
4. Index No. 020877/08 (Sup. Ct. Nassau Co. Sept. 13, 2012).
5. Index No. 116098/10 (Sup. Ct. N.Y. Co. Oct. 9, 2012).
6. Index No. 113781/09 (Sup. Ct. N.Y. Co. May 25, 2012). The motion court's earlier decision on plaintiff's spoliation motion was discussed in this author's column entitled "State E-Discovery: First Department Weighs In on ESI Preservation" NYLJ, Vol. 247, No. 38 (Feb. 28, 2012).
7. Index No. 602803/07 (Sup. Ct. N.Y. Co. Aug. 20, 2012).

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