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Email Spoliation and Service Of Process by Social Media

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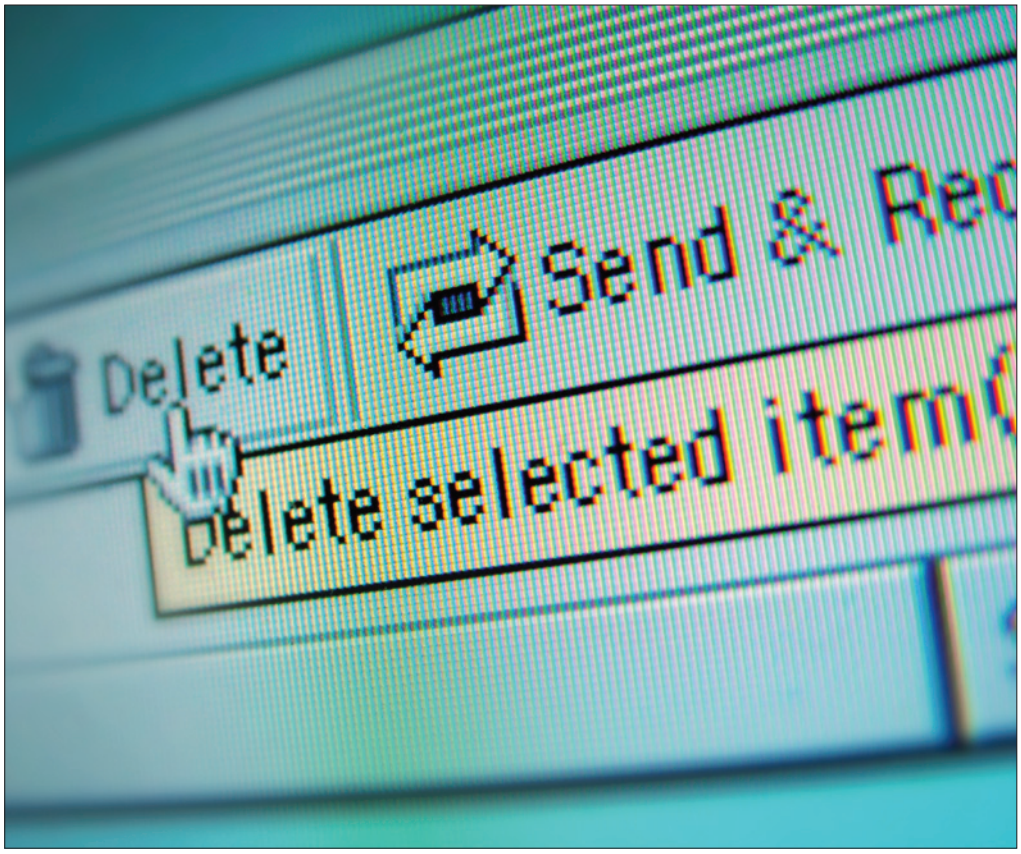

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Do not fancy that an email spoliation motion will be unsuccessful, and two recent, well-reasoned Manhattan Commercial Division decisions on the issue are *AJ Holdings Group v. IP Holdings*[1] and *L&L Painting v. Odyssey Contr.*[2] The lessons learned from these decisions are not new, but clients and counsel need to heed them. *First*, at least, an oral litigation hold must be implemented. *Second*, a litigation hold applies to personal emails, as well as to emails sent over, for instance, a company's AOL or Gmail account. *Third*, a client's information technology professional should be involved in effectuating the litigation hold which must apply to automatic email deletion features. *Fourth*, it is prudent to also involve counsel in discussions concerning implementing a litigation hold. *Fifth*, litigators should not count on a court finding "gross negligence" in the failure to implement a litigation hold and therefore rely on the concept that the relevance of destroyed emails will be presumed, but should be prepared to actually demonstrate to the court the relevance of such missing emails to specific issues in controversy.

It is inevitable that service of process over social media will be permitted under specific circumstances, and recent decisions in *Matter of Support Proceeding Noel B v. Anna Maria A*[3] and in *Anonymous v. Anonymous Jane Does*[4] authorized same. *Anonymous* also addressed the thorny issue of what relief, on default, an individual is entitled to

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in an anonymous Internet defamation lawsuit where the relief sought may constitute an improper prior restraint on speech.

Spoliation Sanctions Are Serious

In *AJ Holdings*,[5] after holding a four-day evidentiary hearing, the motion court granted spoliation sanctions. The motion court reviewed each of the three factors set forth in *Zubulake v. UBS Warburg*,[6] which states that the "party seeking an adverse inference instruction … based on the spoliation of evidence must establish the following three elements: (1) 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." Adopting from *Zubulake* the concept of "key players" who are "likely" to possess relevant information, the motion court found certain individuals fell into such category and therefore had an obligation to "preserve their email relevant to a potential lawsuit during the relevant time frame."

The motion court found that such individuals permitted the destruction of relevant emails with a "culpable state of mind" by "taking no steps during the relevant time frame to implement a litigation hold or to collect or preserve their emails from automatic deletion by the servers, despite having received repeated warnings from counsel" and that there further had not been any preservation of emails from the AOL accounts maintained by plaintiff. Although a verbal litigation hold had been discussed, it had never been implemented. Plaintiff's IT manager had not been informed of the litigation until the day before his deposition and he had not kept records of the location of the computers used by the "key players" during relevant time period. A forensic examination revealed that plaintiff had no backups of emails and that the key custodians made no adjustment to their "routine" deletion of emails after litigation was anticipated or after their first meeting with counsel. Although the "key players" were sophisticated, frequent users of emails, they preserved "merely a fraction" of emails sent and received. In sum, the "key players" were found grossly negligent in failing to implement a litigation hold" and, as such, the relevance of the destroyed emails would be "presumed."

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In weighing what sanction to impose, the motion court rejected striking the complaint, but ordered there to be an adverse inference both on summary judgment and at trial that plaintiff failed to preserve relevant emails, and that the missing emails would have favored defendants. In addition, the motion court ordered plaintiff to pay for the cost of defendants' forensic examination and reasonable attorney fees in twice moving for spoliation sanctions.

In *L&L Painting*,[7] the court denied defendant's motion for sanctions for spoliation of evidence based on L&L's failure to preserve emails from the personal email accounts of certain employees that were used for business purposes relating to the subject project. The motion court found that there was no dispute that plaintiff had an obligation, at least upon the filing of this lawsuit, to preserve emails; that there was no litigation hold in place at such time; and plaintiff did "not explain what, if any, steps it otherwise took or was advised to take to preserve potentially relevant electronically stored documents." The emails, transmitted through personal email accounts not connected to plaintiff's main office computer network, were deleted by an automatic delete feature. The motion court, however, rejected the notion that a failure to institute a "litigation hold" constitutes gross negligence per se, and noted that "the better approach is to consider [the failure to adopt good preservation practices] as one factor in the determination of whether discovery sanctions should issue."[8] The motion court stated that "even

a finding of gross negligence does not, in all cases, obviate the need to demonstrate the relevance of the evidence sought." The motion court concluded that while

> [plaintiff] was negligent in failing to institute a litigation hold or otherwise act in a timely manner to preserve the emails in question, the facts do not support a finding of bad faith or gross negligence against [plaintiff]. Nor has [defendant] made an adequate showing of the relevance of the missing emails to its remaining counterclaims or how they would support its defenses; its reliance on the presumption of relevance is insufficient to establish a right to sanctions.

Service Over Social Media

In *Noel B.*,[9] in a support proceeding, the court authorized substituted service of process by transmitting a digital copy of the summons and petition to respondent's Facebook account, and then following up with a physical mailing to respondent's last known address. The court ordered such service where petitioner, under oath, described his efforts to try to locate his former wife, including that he telephoned and sent text messages to his emancipated daughter and his son concerning respondent's location, to which he received no response; conducted a Google search; and inquired of the occupant of respondent's last known address, who advised that he was unaware where respondent could be located.

Petitioner advised that he is "aware" that respondent "maintains an active social media account with Facebook" and that his "current spouse maintains her own Facebook account, and has posted photos that have been 'liked' by the [r]espondent as recently as July, 2014." The court then described what is "liking" on Facebook:

> 'Liking' on Facebook is a way for Facebook users to share information with each other. The 'like' button, which is represented by a thumbs-up icon, and the word "like" appear next to different types of Facebook content ... [a]ny Facebook user who 'likes' a specific Page or posted content remains in control of his or her 'like' at all times and is free to "unlike" the Page or content by clicking an "unlike" button provided by Facebook.[10]

Accordingly, the court ordered service of process over a known "active" Facebook account where service under traditional methods were "impracticable" and "despite the absence of a physical address," petitioner had a "means by which he can contact" the respondent and provide her with "notice" of the proceedings.

In *Anonymous*,[11] a defamation suit alleging that anonymous individuals posted a series of false and disparaging comments on the website www.dirtyphonebook.com, plaintiff moved for a default judgment. The motion court had previously permitted plaintiff to serve process upon defendants by publication on such website.

In ruling on the default motion, the court:

- denied plaintiff's request for a trial by jury on all issues contained in the complaint;
- denied, as an unconstitutional prior restraint on speech, plaintiff's request for injunctive relief prohibiting the restrained parties from any further acts of defamation or publishing of false statements, comments or information regarding plaintiff;
- granted plaintiff's request that the restrained parties take all action including, but not limited to, requesting www.dirtyphonebook.com, to remove all defamatory, disparaging, libelous, and false statements about plaintiff that defendants posted on the above-named website;
- denied, as an unconstitutional prior restraint on speech, the requested prohibition that the restrained parties be prevented from posting or publishing false and defamatory statements similar to those outlined in the complaint, regarding plaintiff on other websites;

In 'Anonymous', the court noted that although the "CDA leaves victims with no hope of relief where the true tortfeasors cannot be identified or are judgment proof," the CDA "does not bar defamation suits against those who post libelous speech online."

• granted plaintiff's request for a declaratory judgment that defendants' comments posted on the website www.dirtyphonebook.com regarding plaintiff are false and defamatory;

• denied plaintiff's request for reimbursement of plaintiff's expenses incurred in retaining a private cyber investigative service to investigate the identity of defendants;

• denied plaintiff's demand for exemplary and punitive damages;

• denied plaintiff's demand for monetary damages for emotional distress; and

• denied plaintiff's demand to be awarded its attorney fees, court costs and other costs associated with bringing her action.

In granting plaintiff's default motion, the motion court stated that:

> [u]nfortunately, this case is a prime example of the procedural limitations §230 of the Communications Decency Act ("CDA") places on a plaintiffs' legal right to litigate against online defamation. Generally, Internet service providers are not legally required to disclose the identities of its users given the compelling interest of the First Amendment and immunity granted under §230 of the CDA … . Furthermore, this statute preempts state law by providing that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

The motion court noted that, although the "CDA leaves victims with no hope of relief where the true tortfeasors cannot be identified or are judgment proof," the CDA "does not bar defamation suits against those who post libelous speech online."

In conclusion, the motion court observed that

> [w]hile it is not up to the Court to write the laws, which is a job for the Legislature, the Court can offer suggestions regarding online defamation. One suggestion is to adopt a rule similar to "the right to be forgotten" in the European Union's May 13, 2014 case Google Spain SL, Google Inc. v. Agenda Espanola de Proteccion de Datos (AEPD), Mario Costeja Gonzalez (Case C-131/12).

The motion court noted that "the European Union Court held individuals have the right, under certain conditions, to ask search engines to remove links with personal information about them" and it would include "information that is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing." The motion court noted that the European Union Court "found that the interference with a person's right to data protection could not be justified merely by the economic interest of the search engine." Finally, the motion court noted that the "right to be forgotten" "offers greater protections" than the CDA as the "right to be forgotten," "under certain conditions, gives plaintiffs the opportunity to attain the redress they deserve."

1. Index No. 600530/2009 (Sup. Ct. N.Y. Co. Sept.19, 2014) (Scarpulla, J.).
2. 2014 N.Y. Misc. LEXIS 4300; 2014 NY Slip Op. 32511(U) (Sup. Ct. N.Y. Co. Sept. 25, 2014) (Bransten, J.).
3. 2014 N.Y. Misc. LEXIS 4708 (Fam. Ct. Rich. Co. Sept. 12, 2014).
4. Index No. 151769/2013 (Sup. Ct. N.Y. Co. Dec. 3, 2014).
5. Index No. 600530/2009.
6. 200 F.R.D. 212, 220 (S.D.N.Y. 2003).
7. 2014 N.Y. Misc. LEXIS 4300; 2014 NY Slip Op 32511(U).
8. Id. at *33 (quoting *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012)).
9. 2014 N.Y. Misc. LEXIS 4708.
10. Id. at *3 (quoting *Mattocks v. Black Entertainment Television*, 2014 U.S. Dist. LEXIS 115829, 2014 WL 410594 (S.D. Fla. 2014)).
11. Index No. 151769/2013.

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