2010 Developments in New York e-Discovery

Kyle C. Bisceglie

December 15, 2010

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CPLR Still Silent on e-Discovery

- **22 NYCRR § 202.70(g)**
  - Commercial Division Rule 8 (2006)
  - Commercial Division Rule 1(b) modification (August, 2010)
- **22 NYCRR § 202.12**
  - § 202.12 of the Uniform Civil Rules for the Supreme Court and County Court governing Preliminary Conference (2009 and August 2010)
- **Nassau, Suffolk, Westchester and Onondaga County Preliminary Conference Orders**
- **Electronic Discovery Guidelines - Nassau County, Commercial Division (2009)**

Major Reports in 2009 and 2010

Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation **(Spring 2009)**

- Joint E-Discovery Subcommittee of The Association of the Bar of the City of New York
- http://www.nycbar.org/Publications/pdf/Manual_State_Trial_Courts_Condensed.pdf

Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR **(August 2009)**

- Joint Committee on Electronic Discovery of The Association of the Bar of the City of New York
- http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf

Electronic Discovery in the New York State Courts: A Report to the Chief Judge and Chief Administrative Judge **(Feb. 2010)**

- **New York State Unified Court System**
- http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf

Federal e-Discovery Rules – 2010

Fed. R. Civ. P. 16:

- Scheduling orders may provide for disclosure or discovery of ESI, and include any agreements the parties reach for asserting claims of privilege after information is produced.

Fed. R. Civ. P. 26:

- Requires a party to identify ESI in its initial disclosures. Excuses a party from producing ESI that "the party identifies as not reasonably accessible because of undue burden or cost." Provides for treatment of inadvertently produced privileged documents.
- With limited exceptions, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. (Effective December 1, 2010)

Fed. R. Civ. P. 33:

- Now includes ESI as a business record from which an answer to an interrogatory may be derived or ascertained.

Fed. R. Civ. P. 34:

- Requires production of any designated ESI stored in any medium from which information can be obtained. Permits a party to demand a form of production., and the producing party to object. If a form is not specified, directs that ESI must be produced "in the form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."

Fed. R. Civ. P. 37:

- Prohibits a court from issuing sanctions for failing to produce ESI lost as a result of routine, good-faith operation of an electronic information system.

Fed. R. Civ. P. 45:

- Incorporates ideas of ESI, form of production and inaccessibility in non-party subpoenas. Also adds "testing and sampling."

Fed. R. Evid. 502:

- Limits waivers of attorney-client privilege and work product protection. Addresses inadvertent disclosures occurring in state court litigation and its impact on litigation in federal courts. Clarifies the effect of a court issued non-waiver order.

Duty to Preserve and Litigation Hold 2003: Federal

Zubulake v. UBS Warburg LLC et. al. ("Zubulake IV") **(S.D.N.Y. 2003)**

Facts:

- Equities traders at UBS suing for sexual discrimination.
- Three prior decisions.
- Court ordered backup tapes restored, the parties became aware that some backup tapes were no longer available.
- Also determined that relevant emails created after *Zubulake I* had been deleted from UBS´s email system and were only accessible on backup tapes.

Holdings:

- The party in possession and control of evidence has a duty to ensure that such evidence is preserved.
- The duty to preserve arises once a party "reasonably anticipates" litigation.
- At a minimum, a party should suspend those parts of the routine document retention and destruction policy that affect relevant ESI and distribute a litigation hold.
- Duty to preserve includes a duty to oversee compliance with the hold and monitor efforts to retain and produce documents.
- Duty may fall on in-house and outside counsel.

Preservation, Holds and Sanctions 2010: Federal

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs et. al. **(S.D.N.Y. 2010)**

Facts:

- A group of investors sued to recover $550 million lost in the liquidation of two hedge funds.
- Following the close of discovery, defendants sought sanctions against 13 plaintiffs for failing to preserve and produce documents, including ESI, and for submitting false declarations regarding their collection and production efforts.
- 87 page opinion.

Holding:

- The court found some plaintiffs grossly negligent and others negligent.
- Most notably, Judge Scheindlin explicitly found gross negligence for the failure to issue a formal, written litigation hold at the time litigation is reasonably anticipated.

Rationale:

- The ruling makes clear that sanctions may be imposed for spoliation that is the result of negligent, grossly negligent, and willful and bad faith conduct.
- Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final *Zubulake* opinion was issued, the failure to issue a written litigation hold "constitutes gross negligence because that failure is likely to result in the destruction of relevant information."
- It appears that Judge Scheindlin applied sanctions under the Court's inherent power rather than under Fed. R. Civ. P. 37.

Preservation, Holds and Sanctions 2010: Federal

***Rimkus Consulting Group Inc. v. Nickie G. Cammarata, et al.*(S.D. Tex. 2010)**

Facts:

- a group of employees left and filed a suit against their former employer, Rimkus Consulting, to release them from their non-compete agreements. In a countersuit, Rimkus Consulting fired back that the former employees violated their non-competes and additionally made off with "trade secrets and proprietary information."
- Plaintiffs claimed Defendants and their counsel "conspiratorially engaged" in "wholesale discovery abuse" by destroying evidence, failing to preserve evidence after a duty to do so had arisen, lying under oath, failing to comply with court orders, and significantly delaying or failing to produce requested discovery.
- Even though *Pension Committee* is little more than a month old, Judge Rosenthal is deferential to Judge Scheindlin's opinion, but distinguishes it because this case involved allegations of intentional destruction.
- 139 page opinion.

Holding:

- A party seeking the sanction of an adverse inference instruction based on spoliation of evidence must establish that: (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) 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.

Importance:

- Explained that acceptable conduct turned on the concepts of reasonableness and proportionality with respect to the case. Analysis depends heavily on the facts and circumstances of each case.
- Granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of "bad faith."
- Unlike the 2d circuit, case law in the 5th Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant. Also unlike the 2d circuit, the 5th circuit has no case law allowing for the presumption that destroyed evidence was relevant or its loss prejudicial, even in the event that bad-faith is established.

Preservation, Holds and Sanctions 2010: Federal

Victor Stanley, Inc. v. Creative Pipe, Inc. **(D. M.D. 2010)**

Facts:

- Core allegations that Creative Pipe, Inc. principal and others repeatedly accessed plaintiff's website under a fictitious name and downloaded design drawings, which defendant then presented as its own in bids against defendant.
- Judge Grimm characterized the 3 year history of engaging in a cat and mouse game to hide harmful ESI from production during discovery as "the single most egregious example of spoliation" he ever encountered.
- In addition to cataloging multiple unsuccessful attempts to delete ESI (causing delay but no data loss), Grimm identified eight discrete ways defendant "willfully and permanently destroyed evidence related to the lawsuit," including failing to implement a litigation hold; deleting ESI soon after suit was filed; failing to preserve ESI following receipt of preservation demand ; and deleting ESI and using programs to erase files after several court issued preservation orders.
- 89 page opinion with 12 page "bonus" chart.

Holding:

- "the facts amply demonstrate the intentional, bad faith permanent destruction of a significant quantity of relevant evidence, to the Plaintiff's detriment" such that default judgment on liability was "clearly appropriate." The court also recommended a permanent injunction.

Importance:

- Judge Grimm uses this spoliation case as a vehicle for analyzing the general state of the law regarding preservation.
- extensive analysis of the law of preservation and spoliation in each circuit, provided in detail throughout the opinion, as well as in a 12-page chart identifying the relevant standards for common issues (including the scope of the duty to preserve, whether conduct can be culpable per se, culpability and prejudice requirements, what constitutes prejudice, and jury instructions on culpability). http://www.craigball.com/Spoliation%20Sanctions%20by%20Circuit%20090910.pdf.

Duty to Preserve and Litigation Hold: New York State

New York Standards

- As of 2010, state courts have adopted a variety of standards for a party's duty to preserve.
- The standards posit that a party must preserve evidence upon being placed on notice: (i) that the evidence might be needed for future litigation; or (ii) of pending litigation; or (iii) that the circumstances of an accident may give rise to enough of an indication for defendants to preserve the physical evidence for a reasonable period of time.
- Some New York courts have also sought guidance from federal case law to determine when a party's duty to preserve evidence attaches.
- Unfortunately, the variety of standards makes it difficult for parties to determine the precise attachment point at which their obligation to preserve evidence actually arises.
    - **Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR** (A.B.C.N.Y. Joint Comm. on Electronic Discovery (Aug. 2009))
    - http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf

Preservation, Holds and Sanctions 2010: New York State

***Conderman v. Rochester Gas & Elec. Corp.*(Sup. Ct. Monroe County 1998)**

Facts:

- 14 telephone poles fell into a street during an ice storm, causing multiple injuries and blocking the roadway.
- The defendant immediately dispatched emergency crews and its risk management department sent an experienced team of claims personnel to the accident site, who did not mark, identify, preserve or test the poles. The poles were thereafter destroyed, and the plaintiff claimed spoliation of evidence.

Holding:

- "In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices."

Rationale:

- Defendants were responding to an emergency situation that affected the public safety, and it would be unreasonable to have imposed upon them at the time the duty to preserve evidence, anticipating the possibility of future litigation. Distinguishable are the cases where a party destroys evidence, either willfully or negligently, once litigation is pending or where plaintiff destroys evidence prior to commencing an action.

Preservation, Holds and Sanctions 2010: New York State

Einstein v. 357 LLC **(Sup. Ct. N.Y. County 2009)**

Facts:

- Plaintiffs claimed that a condo they purchased was defective and that defendants fraudulently concealed defects. The broker was asked to produce e-mail. Broker responded that it had produced all responsive documents it could locate.
- Emails were actually being destroyed because the IT Director never advised anyone that in the ordinary course of business, individual users not only may, but had to, delete e-mails. The IT department also took no steps to prevent users, even those named as parties to such litigation, from deleting emails.

Holding:

- Even though New York law is silent on the obligations of parties to effectuate a litigation hold, when litigation has commenced or is reasonably anticipated, a party must take additional steps to preserve potentially relevant emails.

Sanctions:

- Striking the pleading and issuing an adverse inference instruction that the broker was deemed to have known of the core liability question in the litigation, which decided the case by virtue of a motion for sanctions.
- Also awarded fees and costs incurred in connection with the discovery motions and the fruitless review of the hard drives.

Preservation, Holds and Sanctions 2010: New York State

Ahroner v. Israel Discount Bank of New York(1st Dep't 2010)

Facts:

- Defendant controlled the hard drive in question, were aware of their obligation to preserve it, and were subsequently directed by the court to do so.
- Defendants informed the court that they would comply with their obligations and would produce the hard drive for inspection by a forensic expert. However, the hard drive was erased before plaintiff was able to inspect it.

Holding:

- Spoliation sanctions of an adverse inference instruction as to the relevance of the emails was properly granted because the motion court fairly inferred that defendants either intentionally erased the drive or that the drive was destroyed as the result of gross negligence.

Importance:

- The court properly exercised its discretion in limiting its sanction against defendants to an adverse inference charge.
- An adverse inference was proper and proportionate because it did not permit the jury to infer that any e-mails on the drive would support plaintiff's claims, but only that any e-mails would not support defendants' defense or contradict plaintiff's claims.
- The lesser inference was proper because plaintiff presented no evidence regarding the hard drives of the other individual defendants, and never sought to inspect them. Nor did defendants admit that they destroyed these other hard drives. Also, the plaintiff presented no evidence of attempting to access this information from the defendants' servers.

Meet and Confer 2010: Commercial Division Rule 1 and 8

22 NYCRR § 202.70(g) – amended in 2006 and August, 2010

- **Rule 8(b) –** added in 2006
  - Prior to the preliminary conference, counsel **shall** confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to:
    1. implementation of a data preservation plan;
    2. identification of relevant data;
    3. the scope, extent and form of production;
    4. anticipated cost of data recovery and proposed initial allocation of such cost;
    5. disclosure of the programs and manner in which the data is maintained;
    6. identification of computer system(s) utilized;
    7. identification of the individual(s) responsible for data preservation;
    8. confidentiality and privilege issues; and
    9. designation of experts.

- **Rule 1(b) –** added in August, 2010
  - Consistent with the requirements of Rule 8(b), counsel for all parties who appear at the preliminary conference shall be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery. Counsel may bring a client representative or outside expert to assist in such discussions.

Meet and Confer 2010:
New York State

Uniform Rules of the Supreme and County Courts Governing Preliminary Conferences

22 NYCRR § 202.12(c)(3) – added 2009

- The matters to be considered at the preliminary conference shall include, where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to:
  1. The retention of electronic data and implementation of a data preservation plan;
  2. The scope of electronic data review;
  3. The identification of relevant data;
  4. The identification and redaction of privileged electronic data;
  5. The scope, extent, and form of production;
  6. The anticipated cost of data recovery and proposed initial allocation of such cost;
  7. The disclosure of the manner in which the data is maintained;
  8. The identification of the computer system(s) utilized; and
  9. The identification of the individual(s) responsible for data preservation.

22 NYCRR § 202.12(b) – added August 2010.

- Where a case is reasonably likely to include electronic discovery, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery; counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

Bearing Costs of ESI in 2010

Federal Approach

- There is a presumption that a responding party must bear the expense of complying with discovery requests.
- A district court may issue an order protecting the responding party from undue burden or expense by conditioning or limiting discovery. Fed. R. Civ. P. 26(c).
- A party need not produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or costs. Fed. R. Civ. P. 26(b).
- The court employs 7 factor guidance from *Zubulake III* to determine if the cost of discovery should be shifted in whole or part to the requesting party.

New York State Approach (3 Distinct Approaches: No Consensus)

- Many state court decisions have adhered to the New York presumption that each party should shoulder the initial burden of financing his or her own suit and requires the party seeking discovery to pay the cost of production.
  - *See Lipco*; *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 294 A.D.2d 190 (1st Dep't 2002).
- Others have followed the cost shifting analysis employed by the federal courts since *Zubulake III*.
  - *See Delta Financial*.
- Still others have adopted a third approach and require the producing party to bear the cost of production if the ESI is readily available, but allowed for cost shifting when the ESI is not readily accessible. In this way, the retrieval of archived or deleted electronic information requires such additional effort as to warrant cost allocation.
  - *See MBIA Ins. Corp.*

Producing ESI: New York State

***Lipco Elec. Corp. v. ASG Consulting Corp.*(Sup. Ct. Nassau County 2004)**

First New York Case to provide an in-depth treatment of costs of electronic discovery

Facts:

- Plaintiff and defendant entered into a consulting contract for aid in preparing bids for public works projects.
- A dispute arose over whether the contract was modified, changing the billing from an hourly to a flat rate.
- Plaintiff sought past billing statements and correspondences that were kept electronically.

Holding:

- The party seeking discovery should incur the costs incurred in the production of discovery material.

Rationale:

- Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR.
- The cost of providing computer records can be rather substantial, in part because they are normally maintained for far longer periods than paper records.

Producing ESI: Delta

***Delta Fin. Corp. v. Morrison*(Sup. Ct. Nassau County 2006)**

Facts:

- Defendants demanded additional discovery based on allegations that plaintiffs failed to properly search for non-email electronic documents, that emails from the monthly (versus the ninety day tapes) were not captured by plaintiffs' searches, and that emails from the first half of 2000 were not captured by search processes.

Holding:

- For all three types of evidence, the Court required plaintiff to search and produce a small sample of restored documents from its backup tapes.
- The Court stated that defendants would bear 100% of the costs for this procedure, as the court was "not entirely convinced that relevant and responsive documents would be found".

Rationale:

- After finding that it was not bound by the *Zubulake*, the court considered the Federal Rules of Civil Procedure and applied the *Zubulake* principles.
- It allowed for limited discovery and expressly applied the *Zubulake* cost shifting analysis.

Producing ESI: MBIA

***MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*(Sup. Ct. N.Y. County 2010)**

Facts:

- From 2002 to 2007, plaintiff provided credit enhancements to defendant in the form of a guarantee of repayment for seventeen of defendants securitized mortgage loans.
- Disputes arose over the transaction and in the course of discovery, plaintiff requested that defendant produce relevant ESI.
- The parties disagreed as to who should bear the cost of such production; each felt the other should be responsible, and defendant moved for a protective order to require plaintiff to bear the cost of defendant's production of ESI,

Holding:

- Declining to follow the purportedly well settled rule in New York that the party seeking discovery should bear the cost, the court denied defendant's motion, found that cost allocation was not warranted, and required defendant to bear the cost of its own production.

Rationale:

- After analyzing *Clarendon Natl. Ins. Co. v. Atlantic Risk Mgt., Inc.*, 59 A.D.3d 284 (N.Y. App. Div. 2009) and *Waltzer v. Tradescape & Co., LLC,* 31 A.D.3d 302 (N.Y. App. Div. 2006), the court found that cost allocation should only occur if the ESI to be produced was not readily available.
- While producing readily available ESI will not warrant cost-allocation, the retrieval of archived or deleted electronic information has been held to require such additional effort as to warrant cost allocation.
- Reasoned that under CPLR 3103(a), the lodestar in granting a protective order granting allocation of discovery costs is the prevention of "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Seeking ESI from ISP's

Stored Communications Act 18 U.S.C. §§ 2701-2712

- Passed by Congress in 1986 as part of the Electronic Communications Privacy Act. The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address.

- The SCA prevents "providers" of communication services from divulging private communications to certain entities and individuals. It creates a set of Fourth Amendment-like privacy protections by statute, regulating the relationship between government investigators and service providers in possession of users' private information.

  (1) The statute limits the government's right to compel providers to disclose information in their possession about their customers and subscribers.

  (2) the statute limits the right of an Internet Service Provider ("ISP") to disclose information about customers and subscribers to the government voluntarily.

- The difficulty in interpreting the Stored Communications Act is compounded by the fact that the SCA was written prior to the advent of the Internet and the World Wide Web. As a result, the existing statutory framework is ill-suited to address modern forms of communication like Facebook and MySpace.

Seeking ESI from ISP's

Disclosing ESI to a Third party

Flagg v. City of Detroit **(E.D. Mich. 2008)**

- Defendants, a city and an employee, filed motions to preclude discovery of communications exchanged among certain officials and employees of the city via city-issued text messaging devices, arguing that the SCAwholly precluded the production of electronic communications stored by a non-party service provider in civil litigation.
- The court rejected this sweeping interpretation of the SCA, as this position would have permitted a party to defeat the production of ESI created by that party and still within its control simply by storing it with a third party.
- Allowed disclosure because although such language is lacking in the statute, action in compliance with court order is a "complete defense."

In Re Subpoena DucesTecum to AOL, LLC **(E.D. Va. 2008)**

- Two non-party witnesses in a case against an insurance company objected to production of their e-mails saved on AOL servers.
- The court quashed the subpoena, finding a corporation providing electronic communication services to the public may not disclose customer' e-mails because language of SCA does not include any exceptions for disclosing electronic communications pursuant to civil discovery subpoenas.
- Found that a civil discovery subpoena was not a disclosure exception under the SCA.

Viacom Int'l Inc. v. YouTube Inc. **(S.D.N.Y. 2008)**

- Plaintiffs moved to compel production of ESI, including private videos which can only be viewed by others authorized by the user who posted them.
- Youtube was prohibited from disclosing the private videos and the data which revealed their contents because the SCA contains no exception for disclosure of the content of communications pursuant to civil discovery requests.

Seeking ESI from ISP's

***Crispin v. Christian Audigier, Inc.*(C.D.Cal. 2010)**

Facts:

- Plaintiff claimed defendant violated an oral licensing agreement by reproducing plaintiff's artwork on apparel not bearing his logo and by failing to obtain his consent to sublicense his work for use on other merchandise.
- Plaintiff served subpoenas on third parties including Facebook and MySpace, seeking certain communications between defendant and another artist.
- Defendant's lawyers moved to quash the subpoenas, arguing in part that the SCA prohibits third-party ISPs from disclosing such communications. A magistrate judge initially rejected this argument.

Holding:

- The district court rejected the magistrate's ruling and quashed the portions of the subpoenas seeking private messages from Facebook and MySpace and characterized the social networks as "electronic communication services"—a designation that afforded such messages the same protections under the SCA as previous courts have given web-based e-mail.

Rationale:

- The information sought can be subpoenaed from the party whose Facebook profile you're looking to dig into, but you can't get it from Facebook.
- The district court also vacated the magistrate's decision on the Facebook wall posts and MySpace comments, which can be visible to the public if a user's privacy settings allow it, and remanded that issue for further development of the evidentiary record. It pointed out that analysis on this issue must be on a case-by-case basis, and that wall posts and comments are distinct from private messages or e-mails.
- "Unlike an email, there is no step whereby a Facebook wall posting must be opened, at which point it is deemed delivered. Thus a Facebook wall posting or a MySpace comment is not protectable as a form of temporary, intermediate storage."

Web 2.0: Issues Raised by Social Networking

"**Friending"**

- An attorney who "friend requests" a person represented by counsel in a pending matter may run afoul of NY Rule 4.2 ("Communication with Person Represented by Counsel").
- Creating a fake profile in order to get information may run afoul of N.Y. Rules 8.4(c) and 4.1 that forbid "conduct involving dishonesty, fraud, deceit or misrepresentation" and knowingly making false statements
- Counsel who instructs a private investigator or other third party to obtain information through such means may also violate N.Y. Rule 5.3(b)(1).
- Reviewing information publically visible on Facebook for informal investigation is fair game.

The Stored Communications Act

- Appears to preclude disclosure of the information in civil cases (but not criminal cases).
- *Crispin v. Christian Audigier, Inc.*: social networking sites and web hosting providers fall within SCA's protection.

Endorsing on LinkedIn

- Some social networking sites, such LinkedIn, allow users to "endorse" other users' professional skills.
- An attorney who accepts such endorsements may implicate New York's attorney advertising rules. *See* NY Rule 7.1.

BE CAREFUL!

- Judge recounted a tale of an attorney who asked for a continuance due to the death of her father
- Judge was "friend" of attorney on Facebook
- Witnessed Facebook status updates detailing her week of drinking, going out, and partying.
  - McDonough, Molly, *Facebooking Judge Catches Lawyer in Lie*, *Sees Ethical Breaches*, ABA Journal (July 31, 2009).

Web 2.0: Using the Web and Blogs

Advertising on the World Wide Web

- N.Y. Rule 7.1(f) requires the home page of any website containing advertisements to be labeled "Attorney Advertising."
- ABCNY Comm. On Prof'l and Judicial Ethics Formal Op. 1998-2 (1998) ("law firm website that seeks to interest existing or potential clients in retaining the firm constitutes 'advertising;'" firm must keep copy of its website for one year);
- NYSBA Comm. On Prof'l Ethics Op. 709 (1998) ("advertising via the Internet … is permissible as long as the advertising is not false, deceptive or misleading, and otherwise adheres to the requirements set forth in the Code").
- NY Rule 7.1 also bars, *inter alia*, testimonials from clients relating to pending matters, portrayals of judges or fictitious law firms, certain attention-getting techniques, and trade names or nicknames that imply an ability to get results.

Alexander v. Cahill (2d Cir. 2010)

- Many of the provisions governing lawyer advertising are an unconstitutional infringement of attorneys' First Amendment rights.
- Found that client testimonials are not inherently misleading, unless they suggest that past results indicate future performance.
- Upheld the restrictions on fictionalized law firms and the 30-day waiting period on targeted solicitation after an accident.

Web 2.0: Using the Web and Blogs

Blogs

- Blogs maintained by an attorney may fall within the definition of attorney advertising if they are deemed to be made for the primary purpose of retaining that attorney.
- Blogs typically seek to disseminate information rather than directly self-promote.
- Blogging attorneys should discuss a legal or business topic rather than themselves.
- Be careful about taking definitive legal positions on blogs or other Internet postings, as such positions could limit his/her ability to represent clients for whom it necessary to advocate a contrary legal position. (*See generally* NY Rule 1.7)
- Be careful about providing legal advice without being retained.

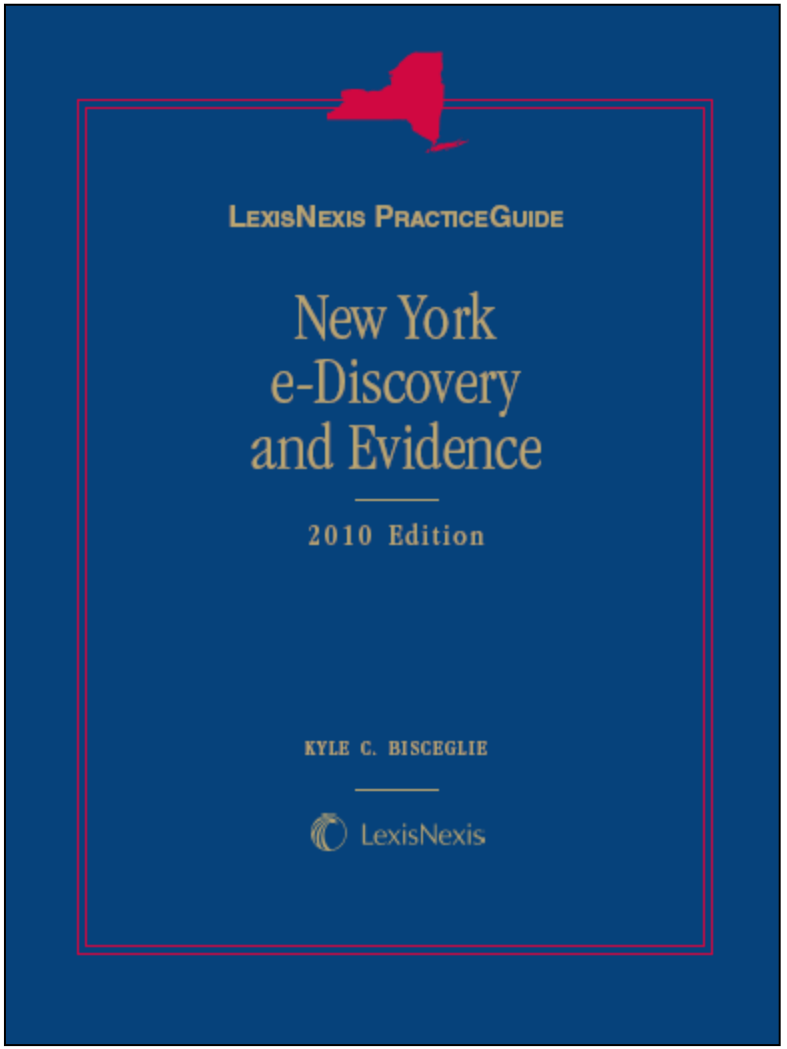
Websites and blogs may also Violate other states' equivalent of NY Rule 5.5

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court **(Cal. 1998)**

- Voiding part of law firm's fees due from California company because law firm engaged in unauthorized practice of law
- Noted that unauthorized practice may be based on advice given via "telephone, fax, computer, or other modern technological means"

Questions?

Meet our distinguished presenter, Kyle C. Bisceglie



OLSHAN GRUNDMAN FROME ROSENZWEIG & WOLOSKY LLP

Kyle C. Bisceglie

- Martindale-Hubbell "AV" rated litigation partner at Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City
- His practice focuses on complex commercial litigation, securities litigation, corporate governance disputes and electronic discovery.
- Mr. Bisceglie has recently litigated commercial cases venued in New York and five other states; won multi-week trial verdict for defense on all counts in California and multi-week $44 million verdict for plaintiff in New Mexico.
- ESI-related issues have played a significant role in the majority of Mr. Bisceglie's cases.
- Mr. Bisceglie is the author of **Bisceglie, LexisNexis® Practice Guide: New York e-Discovery and Evidence**, available now.
- Email: kbisceglie@olshanlaw.com

Thank you for attending.