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New York e-Discovery and Evidence: An Overview

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Electronic Discovery – Everybody Makes ESI

2006 e-Discovery Amendments

- **Fed. R. Civ. P. 16:**
  - Scheduling orders may:
    - provide for disclosure or discovery of ESI
    - 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."
    - Burden on responding party to show that requested information is not reasonably accessible because of undue burden or cost.
  - Provides basic procedure for a party to claim privilege or work product protection of ESI.
    - Once notified of privilege claim related to unintentionally produced documents, must "promptly return, sequester or destroy" the specified documents.
    - The receiving party must take reasonable steps to retrieve privileged information if already disclosed.
    - The producing Party must preserve privileged information until claim is resolved
  - Discovery Planning Conference should address any issues about disclosure or discovery of ESI, including the form of production.

2006 e-Discovery Amendments

- **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 — either directly or, if necessary, after translation by the responding party into a reasonably usable form.
  - Implies that the request may specify the form in which ESI is to be produced but, 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:**
  - Requires the party to produce ESI in response to subpoenas.
  - Adds a provision protecting against production of ESI that is not reasonably accessible.
  - Also incorporates changes which track the Rule 26(b)(5)(B) provision for asserting a claim of privilege after information is produced.

2008 Amendment to Rules of Evidence: Fed. R. Evid. 502

502(b):

- Limits waivers of attorney-client privilege and work product protection to facilitate efficiency of document productions and reduce costs associated with discovery.
- Inadvertent disclosures of privileged information will not waive privileges if (1) the holder takes reasonable steps to prevent disclosure and (2) promptly takes steps to rectify the error.
- Was intended to address the problem of increasing costs associated with disputes over waiver of privilege.
- Because the new rule depends in part upon "reasonable" steps taken in advance, it would be prudent for clients and their counsel to develop procedures now that can benefit them in future proceedings.

502(c):

- Inadvertent disclosure occurring in state court litigation does not operate as a waiver in a federal proceeding if the disclosure either (1) would not constitute a waiver under the Rule had it first been made in a federal proceeding, or (2) would not be a waiver under the law of the state where the disclosure occurred.

502(d):

- provides that a court may issue a non-waiver order, which protects the confidentiality of any privileged information inadvertently disclosed in "the litigation pending before the court" so that "the disclosure is also not a waiver in any other Federal or State proceeding."

502(e):

- Codifies that without a court order, agreements on nonwaiver are only binding amongst signatory parties.

502(f):

- The Rule extends its full protections to all state proceedings, thus negating an adversary's ability to offer privileged materials in a related state court litigation originally disclosed in a federal proceeding. This is important to class-action, derivative and other civil litigations that often follow federal proceedings.

CPLR Silent on e-Discovery

- **22 NYCRR § 202.70(g)**
  - Commercial Division Rule 1(b) modification (August, 2010)
  - Commercial Division Rule 8 (2006)
- **22 NYCRR § 202.12(c)(3)**
  - Uniform Rules of the Supreme and County Courts governing Preliminary Conferences (2009)
- **Nassau, Suffolk, Westchester and Onondaga County Preliminary Conference Orders**
- **Electronic Discovery Guidelines - Nassau County, Commercial Division (2009)**

Comparison of Federal and State e-Discovery Rules

Duty to Preserve and Litigation Hold: Federal

Zubulake v. UBS Warburg LLC et. al. ("Zubulake IV")

- **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 the *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 its routine document retention and destruction policy 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 to Preserve and Litigation Hold: Federal

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs et. al.

- **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.

- **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.

Duty to Preserve and Litigation Hold: New York State

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
- The plethora of standards in State courts.
  - 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.

Duty to Preserve and Litigation Hold: New York State Cases

Conderman v. Rochester Gas & Elec. Corp.

- **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.

Duty to Preserve and Litigation Hold: New York State Cases

Einstein v. 357 LLC

- **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.

Meet and Confer

Meet and Confer: Federal

- **Fed. R. Civ. P. 26(f)**
  - The discovery planning conference should address any issues about disclosure or discovery of ESI, including the form or forms in which it should be produced.
  - The conference should address any issues about claims of privilege or of protection as trial-preparation material, including - if the parties agree on a procedure to assert these claims after production whether to ask the court to include their agreement in an order.
  - Should include a discussion as to what ESI is available, where it resides, the difficulties and costs associated with collecting ESI, the schedule and format for producing ESI and the preservation of ESI.
- **Fed. R. Civ. P. 16(b)**
  - Scheduling orders may:
    - provide for disclosure or discovery of ESI
    - include any agreements the parties reach for asserting claims of privilege after information is produced."

Meet and Confer: New York State

Uniform Rules of the Supreme and County Courts Governing Preliminary Conferences

- **22 NYCRR § 202.12(b)**
  - 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.

- **22 NYCRR § 202.12(c)(3)**
  - 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.

Meet and Confer: Commercial Division Rule 1 and 8

22 NYCRR § 202.70(g)

- **Rule 1(b)**
  - 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.
- **Rule 8(b)**
  - Before a preliminary conference, attorneys should become knowledgeable about and be prepared to discuss all e-discovery aspects of an individual case.
  - 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.

Duty of Cooperation: Federal

Is there a "duty of cooperation?"

- **Sedona Conference® Cooperation Proclamation**
  - ***William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.***
    - Case dealt with disputes over alleged defects in the construction of the Bronx County Hall of Justice. In the course of litigation, one party agreed to produce relevant documents of a non-party.
    - Disagreement arose regarding appropriate search terms to segregate project related emails from unrelated emails.
    - The third party, despite being in the best position to contribute, suggested no potential search terms and the court was forced into the "uncomfortable position" of crafting a search without adequate information.
    - "the best solution in the entire area of electronic discovery is cooperation among counsel."
    - It "strongly endorsed" The Sedona Conference® Cooperation Proclamation.
  - ***Capitol Records v. Mp3tunes***

Role of Cooperation: New York State

New York Rules of Professional Conduct (2009)

- **1.1(a)**: A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- **3.3(f)(3)**: In appearing as a lawyer before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence.
- **3.4(a):**A lawyer shall not: (1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce; (2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein; (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal; (4) knowingly use perjured testimony or false evidence; (5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or (6) knowingly engage in other illegal conduct or

New York Standards of Civility (1997)

- **Compare:**
  - Old New York Disciplinary Rule 7-101(A) “Representing a Client Zealously”
  - Bill E. Boie, The Non-Cooperation Proclamation at
    - http://e-discoveryteam.com/2009/10/25/the-non-cooperation-proclamation

Form of Production: Federal

- **Fed. R. Civ. P. 34 and 45:**
  - Request and subpoena "may specify the form or forms in which electronically stored information is to be produced."
  - "Need not produce the same electronically stored information in more than one form."
  - Responding Party may object to form requested.

- **Proposed Form of Production:**
  - Documents should be produced in the form in which they are maintained.
  - Electronically stored information ("ESI") should be produced in TIFF format with load file. Native format with metadata should be preserved and maintained, and plaintiffs reserve the right to seek native format of ESI on a particularized basis where relevant and/or necessary to discover relevant metadata or evidence.

Metadata

- **What is metadata?**
- **Federal Court** – Fed. R. Civ. P. 34(b) and 45(d) permit selection of form but Rules do not address metadata
- **State Court** – not addressed directly
    - "After vigorous debate, the Joint Committee decided not to address the issue of metadata. "
    - Described as "controversial issue on which viewpoints continue to evolve."
    - "More time is needed to allow the issue to evolve."
    - N.Y.S.B.A. Comm. on Prof'l Ethics Op. 749
    - N.Y.S.B.A. Comm. on Prof'l Ethics Op. 738
    - A.B.C.N.Y. Comm. on Prof'l and Judicial Ethics Formal Op. 2003-04
- **How to avoid unwitting disclosure**
- **When is metadata helpful?**
    - Drafting history
    - When document was accessed
    - Authentication

Inaccessibility

- **Fed. R. Civ. P. 26 and 45:**
  - "Need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost."

- ***Zubulake I***
  - Range of accessible to inaccessible:
    1. Active, online data;
    2. Near-line data;
    3. Offline storage/archive;
    4. Back-up tapes; and
    5. Erased fragmented or damaged data.
  - 7 factor "guidance" for cost shifting as to inaccessible data only

Producing ESI: New York State

Lipco Elec. Corp. v. ASG Consulting Corp.,

- 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

Facts:

- Defendants demanded additional discover based on allegations that the 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.

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."

Compare Bearing Costs of ESI

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 discovery on the requesting party's payment of discovery costs. 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 party then must employ the 7 factor test from *Zubulake III* to determine if the cost of discovery should be shifted 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.*

Inadvertent Production

Inadvertent Production: Federal

Fed. R. Evid. 502(b)

- Limits waivers of attorney-client privilege and work product protection to facilitate efficiency of document productions and reduce costs associated with discovery.
- Inadvertent disclosures of privileged information will not waive privileges if (1) the holder takes reasonable steps to prevent disclosure and (2) promptly takes steps to rectify the error.
- Was intended to address the problem of increasing costs associated with disputes over waiver of privilege.
- Because the new rule depends in part upon "reasonable" steps taken in advance, it would be prudent for clients and their counsel to develop procedures now that can benefit them in future proceedings.

Fed. R. Evid. 502(d)-(f)

- Permits parties to enter into agreements to address non-waivers, courts to order them and, if in federal court, enforceable in both state and federal courts

Inadvertent Production: New York State

John Blair Communications, Inc. v. Reliance Capital Group, L.P.

- **Facts:**
  - Appellant sought disclosure of material claimed by respondent to be protected by the attorney-client and/or work product privilege.
  - Appellant sought review of an order entered in the Supreme Court which granted respondent corporation's cross-motion for a protective order protecting the inadvertent disclosure of a draft complaint and a letter from counsel.
- **Holding:**
  - The Court affirmed the protective order protecting the inadvertently produced documents.
- **Rationale:**
  - The Court will not generally waive the privilege of inadvertent production as long as:
    - The disclosing party intended to maintain confidentiality
    - Reasonable steps were taken to prevent disclosure
    - Party asserting privilege acted promptly to remedy the situation
    - Recipient will not suffer undue prejudice from protective order.
  - It is also the burden of the proponent of the privilege to prove non-waiver.
  - The court also noted that some information fits within the attorney-related privileges by its nature, including draft pleadings, communications or advice in connection with those pleadings, or work product for which plaintiffs submitted an affirmation of counsel showing that the information was generated by plaintiffs' attorneys solely for the purpose of the litigation.

NonParty Production of ESI: Federal

Fed. R. Civ. P. 26(b)(1)

- For good cause shown, a court may order discovery of any matter relevant to the subject matter involved in the action.
- This is equally applicable to both party and non-party discovery.

Fed. R. Civ. P. 45

- A party may issue a subpoena to compel a non-party to produce documents, books, ESI, and other tangible items.
- Requires the party to produce ESI in response to subpoenas.
- Adds a provision protecting against production of ESI that is not reasonably accessible.
- Also incorporates changes which track the Rule 26(b)(5)(B) provision for asserting a claim of privilege after information is produced.

NonParty Production of ESI: New York State

Finkelman v. Klaus

- **Facts:**
  - Plaintiff sought an order compelling non-party law firm to comply with a subpoena ducestecum and appear for a deposition.
  - Court ordered non-party to comply with subpoena and produce emails.
- **Conclusion:**
  - Attorneys' fees incurred by a non-party to comply with a subpoena are recoverable.
- **Rationale:**
  - the Practice Commentaries and legislative history to CPLR 3122 support the holding
  - Also cite to analogous federal provision permitting such reimbursements.

Ethical Issues – Email

- **Governing New York Rules of Professional Conduct**
  - NYRPC 1.6(a) – "A lawyer shall not knowingly reveal confidential information."
  - NYRPC 1.6(c) – "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing … confidential information of a client."
- **CPLR 4548**
  - "No communication loses its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

Ethical Issues - Email

Useful New York State Bar Association Ethics Committee Opinions

- N.Y.S.B.A. Comm. on Prof'l Ethics Op. 709 (1998) – attorney should use reasonable care in email, depends on likelihood of interception.
  - A lawyer does not need to use encrypted email, but if the confidential information at issue is of such an extraordinarily sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer's control, the lawyer must select a more secure means of communication than unencrypted e-mail.

- N.Y.S.B.A. Comm. on Prof'l Ethics Op. 782 (2004) – "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."
  - A lawyer must assess the risks attendant to the use of technology and the disclosure of metadata and determine if the mode of transmission is appropriate under the circumstances

- N.Y.S.B.A. Comm. on Prof'l Ethics Op. 749 (2001) – Use of metadata "deceitful."
  - Prohibiting the intentional use of computer technology to surreptitiously obtain privilege or otherwise confidential information is entirely consistent with the ethical restraints on uncontrolled advocacy as the disclosure is "inadvertent" or "unauthorized."

- N.Y.S.B.A. Comm. on Prof'l Ethics Op. 738 (2008) – Searching inadvertently sent metadata
  - While the Committee agrees that every attorney has an obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistake occur and an attorney may not ethically search the metadata in those electronic documents with the intent to find privileged information.

A.B.C.N.Y. Committee On Professional and Judicial Ethics Opinion 1998-2

- "A law firm need not encrypt all e-mail communications containing confidential client information, but should advise its clients and prospective clients communicating with the firm by e-mail that security of communications over the Internet is not as secure as other forms of communications."

Guiding Case law on the Ethical Use of Email

Scott v. Beth Israel Medical Center Inc.

Facts:

- Dr. Scott sought an order requiring his employer, Beth Israel, to return emails he and, seemingly, his attorneys sent based on claims of privilege and work-product.
- All were sent from or to Dr. Scott's employer-issued e-mail, and accordingly, over Beth Israel's e-mail server.
- The e-mails were sent during a time when Beth Israel's e-mail policy was in effect that said employees had no personal privacy rights in their email.

Holding:

- The court denied the motion, holding that the attorney-client privilege was waived by using employer email system because the employer had published policies prohibiting personal use of email system.

Rationale:

- Looked to *In re Asia Global Crossing, Ltd.*, a federal case, forfour factors to determine whether an employee's e-mail communications with his or her attorney remains confidential: (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?"
- The Court found no confidentiality because of the published policies and notification to employees.

Streamline Capital, L.L.C. v. Hartford Casualty Ins. Co.

- courtesy copy to non-employee precludes assertion of privilege unless party can provide evidence non employee was acting as an agent.

Resources for More Information

***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

***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

Bisceglie, LexisNexis® Practice Guide: New York e-Discovery and Evidence (2010) – call to order: 1-800-223-1940

Arkfeld, Best Practices Guide for Electronic Discovery and Evidence (2009)

- **www.sedonaconference.org**

***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

Meet our distinguished presenter, Kyle C. Bisceglie