Electronic Discovery, Evidence and Claims in New York

2008 Emerging Issues 2938

Bisceglie on Electronic Discovery, Evidence and Claims in New York

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October 1, 2008

SUMMARY: This emerging issue commentary summarizes the legal developments in New York related to electronically stored information ("ESI") or "electronic discovery", as it is called in New York state courts. This commentary emphasizes New York state law in this emerging area, referencing federal precedent only as necessary to guide state practice, and treats ESI evidentiary issues and new substantive claims that merit the practitioners attention.

ARTICLE: New York generally has been a forward-looking jurisdiction in dealing with electronic discovery. New York courts held ESI discoverable as early as 1979. *See* *Ball v. State*, 101 Misc. 2d 554, 421 N.Y.S.2d 328 (Ct. Cl. 1979) (finding that computer information, including printouts and tapes containing raw data, is discoverable). New Yorks early adoption of a meet and confer requirement for electronic evidence in its Commercial Division rules, development of evidentiary standards for authentication, and amendment to the CPLR to preserve privileged communications over email provide additional evidence that electronic discovery has been part of practice in New York since long before the December 2006 amendments to the Federal Rules of Civil Procedure governing discoverability of ESI. *See* 2006 Amendments and Advisory Committee Notes to Fed. R. Civ. P. 16(b), 26(a)(b) and (f), 33(d), 34(a), 37(e) and 45(a)(b)(d) and (e).

However, like most states, New Yorks rules of civil procedure do not expressly address electronic discovery: the CPLR contains no specific provisions governing the *discovery* of electronic documents. *Lipco Elec. Corp. v ASG Consulting Corp.*, 4 Misc. 3d 1019A (N.Y. Supr. Ct. 2004). Instead, courts and practitioners rely on the general pre-trial disclosure provisions of Article 31 of the CPLR, specifically CPLR 3120, for disclosure of electronic records, and often look to the Federal Rules of Civil Procedure and federal case law for guidance. *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908, 911 (N.Y. Supr. Ct. 2006).

This commentary addresses the following areas that are important for the New York practitioner to evaluate when considering electronic discovery: (I) preservation and litigation holds; (II) court ordered preservation; (III) the meet and confer; (IV) the allocation of costs between the parties and cost shifting; (V) spoliation of electronic discovery; (VI) use of E.S.I. as evidence; (VII) the impact of electronic data on substantive claims available under New York law; (VIII) preservation of the attorney-client privilege; and (IX) third party discovery. The meet and confer requirement has been addressed briefly, and this commentary does not address at length technical issues of ESI including format of exchanges (*e.g.*, TIFF, PDF, native, PST, etc.), document management systems (Concordance, Summation, Ringtail, etc.) and presentation of evidence at trial.

I. Preservation

New York state courts impose a duty on the part of the party in possession and control of evidence to see that it is preserved. *Amaris v. Sharp Electronics Corp.*, 304 A.D.2d 457, 758 N.Y.S.2d 637 (1st Dept. 2003). The obligation to preserve evidence arises only when a party should have known that the evidence may be relevant in future litigation. *Kroniscvh v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). This duty often predates the filing of the suit. In *Zubulake IV*, the court found the duty arose before any written complaint was made because the evidence indicated that the employees of defendant who worked with the plaintiff recognized the possibility she might sue. *Zubulake v. UBS Warburg et al.*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (*Zubulake IV*).

Zubulake IV articulated a Summary of Preservation Obligations that is observed in all New York courts:

A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter

The scope of a partys preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedules set forth in the companys policy. On the other hand, if backup tapes are accessible (*i.e.,* actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.

However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of key players to existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.

Zubulake IV, 220 F.R.D. at 218 (*emphasis original*).

The duty to preserve applies not only to the party but also to the partys outside and inside counsel. *Zubulake v. UBS Warburg LLC, et al.*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004) (*Zubulake V*). The requirements of this duty are fairly commonly understood and much has been written about them; only a brief summary is due here. Counsel must become familiar with a clients document retention policy and data retention architecture by speaking with key players in the litigation, and information technology personnel who can explain system-wide backup procedures. *Id.* at 432. Counsel also can preserve data based on broadly drawn system-wide keyword searches and preserve those documents for anticipated discovery demands. It is not sufficient to simply issue the legal hold; counsel must take *some reasonable steps* to ensure compliance. *Id.* And there are certain steps counsel should take to continue the litigation hold and preservation during the pendency of the action, *id.* at 433, which steps include periodically reissuing the litigation hold, speaking to key players (again) about the hold and obtaining custody of backup tapes, if necessary. *Id.* at

433-34.

As a practical matter, counsel applying these rules learns quickly that while these rules are not intended to be difficult or onerous, it is the role of outside counsel to make sure in-house counsel and business persons appreciate the danger in failure to comply. Unless the client has had the misfortune of a prior bad experience, some persistence may be required. Additionally, plaintiffs counsel may include in a demand letter notice to preserve certain types of evidence, and the more specific the instruction as to the individuals involved and the type of evidence they have, the harder it will be to argue later that the duty to preserve did not arise. It is more common to see such a preservation request in suits brought by individual plaintiffs than in suits brought by an institution, perhaps because in the former there is a lower likelihood that onerous demands will be turned around on counsel.

II. Court Ordered Preservation

New York State approaches preservation requirements differently than federal courts. Rule 26(f), the only preservation rule in the Federal Rules of Civil Procedure, requires counsel to discuss any issues relating to preserving discoverable information. Substantive law, the best known of which may be the Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-4 (the PSLRA), also may impact preservation of evidence under federal law. Under PSLRA, a defendant shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure. 15 U.S.C. 78u-4(b)(3)(C)(i). All of these requirements matter little in New York state court, the federal protections are not directly binding [on New York courts]. It is true that the federal court could, and probably would, enforce the PSLRA, but New York courts cannot independently enforce a breach of PSLRA. *Weiller v. New York Life Ins. Co.*, 6 Misc. 3d 1038A, 800 N.Y.S.2d 359, (N.Y. Supr. Ct. 2005). The Advisory Committee points out two important assumptions about federal preservation: (1) The operation of computers involves both the automatic creation and automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes, and (2) [t]he requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders.

A. Preservation and Disclosure Prior to Commencing Litigation

Under New York law, preservation orders are divided into those orders issued before and those issued after commencing litigation. Unlike federal law, New York expressly provides for pre-litigation preservation and discovery. CPLR 3102(c) governs and provides a mechanism to compel disclosure of electronic records: [b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony. However, simply because relief is available does not mean that it is freely granted: the prospective plaintiff must demonstrate, by affidavits and evidentiary facts, the existence of a prima facie cause of action. *Barash v. Waldorf Astoria*, 2003 N.Y. Misc. LEXIS 245 (N.Y. Supr. Ct. 2003). *See, e.g., Quad/Graphics, Inc. v. Southern Adirondack Library System*, 174 Misc. 2d 291, 29294, 664 N.Y.S.2d 225, 22628 (N.Y. Supr. Ct. 1997) (denying pre-litigation disclosure of library computer records to petitioner corporation that sought the data to determine which

of its employees were utilizing company computers to access the Internet via the library).

It is important to note that practitioners seeking discovery before commencement of litigation must purchase and use a separate index number for each and every amendment made. This includes seeking pre-action discovery from additional parties or to establish additional substantive claims. Failure to do so can have significant consequences. In *Harris v. Niagara Falls Board of Education*, 6 N.Y.3d 155, 157, 811 N.Y.S.2d 299, 300 (2006), plaintiff commenced a special proceeding to obtain permission to serve a late notice of claim, pay a filing fee and obtain an index number. The application was successful, but plaintiff was compelled to bring a second proceeding seeking permission to serve a late notice of claim on additional entities. After receiving permission and serving the notices of claim, plaintiff commenced the action by filing a summons and complaint with the county clerk that used the same index number for the papers in the two special proceedings and the initial action. The defendants waited until after the statute of limitations had expired before seeking dismissal without an adjudication of the merits. *Id*. at 158. The Appellate Division then dismissed the complaint and the Court of Appeals affirmed. *Id*. at 150.

B. Preservation and Disclosure After Commencing Litigation

The Commercial Division rules require parties to discuss implementation of a data preservation plan, and practitioners may seek preservation orders for electronic information after commencing litigation under the CPLR. Specifically, CPLR 3103(a) governs post commencement orders and states: The court may ... make a protective order ... regulating the use of any discovery device. Such order shall be designed to prevent unreasonable annoyance, expense, ... or other prejudice to any person.

Weiller v. New York Life Ins. Co., 6 Misc. 3d 1038A, 800 N.Y.S.2d 359 (N.Y. Supr. Ct. 2005), provides a telling example of how the rules work in New York state practice. In *Weiller*, the defendant insurance corporations allegedly engaged in an elaborate scheme to drastically limit its liability to policyholders by denying meritorious claims based on economic factors having nothing to do with insureds actual qualifications under the policies. *Id*. at *1. The plaintiffs sought what was in substance, a motion for a preliminary injunction, in that it sought to restrain the defendants from discarding [a]ll databases, electronic material, tape media, electronic media, hard drives, computer disks and documents, asserted to be of possible probative value. *Id*. at *6. Even though a federal court had previously issued an almost identical order, the court issued such a preservation order with respect to all material requested by the plaintiffs and without any cost shifting (although it noted that it might address it later). *See also* *School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, 771 N.Y.S.2d 804, 813 n.8 (N.Y. Supr. Ct. 2003) (In a previous oral ruling, the Court enjoined [defendant] from destroying or erasing any files from her home computer and directed [her] to give the computer to her lawyer so as to preserve potential evidence).

III. Meet and Confer

The meet and confer requirement is perhaps the one significant area of ESI where New York state court and other federal jurisdictions offer clearer guidance than New York federal court. While Fed. R. Civ. P. 26(f) was amended to require counsel to discuss preservation as part of his or her discovery plan, none of the Southern,

Eastern or Northern Districts prescribes any rules governing the meet and confer. This is in contrast to federal courts in Kansas, Maryland and Delaware, each of which provide local rules governing ESI generally and the meet and confer specifically. *See* Guidelines for Discovery of Electronically Stored Information for the U.S. District Court for the District of Kansas, Default Standards for Discovery of Electronic Documents (E-Discovery) for the District of Delaware and District of Marylands Suggested Protocol for Discovery of Electronically Stored Information**.** It is not uncommon for litigants in the Southern District to look to these guidelines as a starting point in preparation for the meet and confer.

Effective January 17, 2006, the Commercial Division of the Supreme Court amended Part 202 of the Uniform Civil Rules of the Supreme and County Courts by adding Section 202.70 to include a meet and confer requirement. This Section contains Rule 8(b), which governs practice in the Commercial Division statewide. Rule 8(b) provides:

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 (i) implementation of a data preservation plan; (ii) identification of relevant data; (iii) the scope, extent and form of production; (iv) anticipated cost of data recovery and proposed initial allocation of such cost; (v) disclosure of the programs and manner in which the data is maintained; (vi) identification of computer system(s) utilized; (vii) identification of the individual(s) responsible for data preservation; (viii) confidentiality and privilege issues; and (ix) designation of experts.

To date, no published opinion of the Commercial Division interprets this rule. Additionally, practice experience suggests that this rule although adopted well before the better-known ESI amendments to the Federal Rules of Civil Procedure has not been as actively managed as the federal meet and confer requirement. This may be due in part to the heavy volume of cases and lack of magistrates in the Commercial Division. Nevertheless, pro-active counsel have had a new weapon to wield in the appropriate cases. S*ee* Berman, Outside Counsel E-Discovery in New York, N.Y.L.J., June 25, 2005, at 4, col. 4 (noting that the rule will make cost allocation a primary strategic consideration).

IV. Cost Shifting and Allocation for Both Parties

Once discovery is pending, practitioners must next consider who bears the cost. There are significant differences between New York and federal courts as relates to the cost of discovery of ESI. While the Supreme Court has instructed that in federal courts the presumption is that the responding party must bear the expense of complying with discovery requests, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380, 2393 (1978), Fed. R. Civ. P. 26(b)(2)(B) modifies this presumption as to electronically stored information by requiring:[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Examples of accessible data include data on PCs, servers and local drives, and inaccessible data may include backup tapes, erased, fragmented or damages tapes. Thus, in federal court the practitioner must employ the seven-factor test articulated in *Zubulake v. UBS Warburg, LLC,* 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake III*) as to inaccessible data, to determine if the cost of discovery should be shifted to the requesting party: (1) The extent to which the discovery request is specifically tailored to discover

relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Id.* at 322. New York federal courts still maintain the presumption that the responding party pays, the cost shifting analysis must be neutral and close calls should be resolved in favor of the presumption. *Id.* at 320.

It is unclear whether the New York state courts will employ this cost shifting analysis. In New York, although courts have often looked to federal cases for guidance on the issues of electronic discovery, *In re Maura*, 17 Misc.3d 237, 842 N.Y.S.2d 851 (N.Y. Supr. Ct. 2007), the presumption is that each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their [reproduction]. *Rosado v Mercedes-Benz of N. Am.*, 103 A.D.2d 395, 398, 480 N.Y.S.2d 124 (2d Dept 1984). This is nearly a diametrically opposite starting point from federal rules and derives from CPLR 3120, which provides for Notice of Discovery and Inspection. CPLR 3120 requires a party to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served. In other words, the producing party has no obligation to produce any documents but simply must make them available for inspection. This approach to discovery has its obvious limitations in the electronic era, but certainly explains why New Yorks starting point is fundamentally different from the federal standard.

Courts have interpreted this and similar CPLR provisions (*e.g.,* CPLR 3114 imposing translation cost on examining party) as making cost shifting not an issue in New York, as the party seeking discovery should incur the costs incurred in the production of discovery material. *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019(A), 798 N.Y.S.2d 345, *9 (N.Y. Supr. Ct. 2004); *In re Maura*, 17 Misc.3d 237, 842 N.Y.S.2d 851, 859 (2007); *Etzion v. Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844 (N.Y. Supr. Ct. 2005). There has been some recognition that electronic discovery presents additional issues not present in traditional discovery. The *Lipco* court observed that [r]etrieving computer based records or data is not the equivalent of getting the file from a file cabinet or archives. *But see* *Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d at 846 (Courts have held that the contents of a computer are analogous to the contents of a filing cabinet.). Nevertheless, New York state case law is evolving to meet the new demands of electronic discovery. In a later decision in *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 819 N.Y.S.2d 908 (N.Y. Supr. Ct. 2006), the court found that it was not bound by the *Zubulake* decision but still expressly followed its cost shifting analysis. After the *Delta Financial* decision, the Commercial Division amended its Rules of Practice in 2006 to require counsel to confer with each other regarding anticipated electronic discovery issues, including (i) the scope, extent and form of production and (ii) the anticipated cost of data recovery and proposed initial allocation of such cost, thus opening the door for a cost shifting analysis.

Reflecting the New York presumption that the party seeking electronic discovery should incur the cost, several cases have allocated some of the costs associated with electronic discovery to the responding party or reserved the right to reallocate costs at a later date. One such case is *Etzion*, 7 Misc.3d 940, 796 N.Y.S.2d 844. In *Etzion*, a matrimonial action, plaintiff sought production of computerized business records

and hard drives belonging to defendant. Finding the information relevant, the court allowed the hard drive of the defendant to be cloned because the husband had deleted and altered information on the computer. The court also found that the party seeking production shall bear the cost of the production of the business records she seeks, subject to any possible reallocation of costs at trial. *Id.* at 847.

New York courts have not required the party seeking discovery to bear the cost of discovery if the cost is inordinately low. In *Waltzer v. Tradescape & Co.*, L.L.C., 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept 2006), the court first noted that as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery material, but then did not require the seeking party to pay because the information sought was already on CD and the cost of copying and giving them to plaintiff would have been inconsequential. *Id.* at 40. Of note to the practitioner, the court also required the defendant to bear the cost of examining them to see if they should not be produced due to privilege or on relevancy grounds. *Id*.

New York state courts, also, may defer the decision on costs as secondary to moving forward with production. In *Weiller*, defendants claimed they had incurred more than $1 million in preserving computer hard drives under a federal order. *Weiller.*, 6 Misc. 3d 1038(A) at *6. The court stated that it is not insensitive to the cost entailed in electronic discovery, and would, at the appropriate juncture, entertain an application by defendants to obligate plaintiff, the requesting party, to absorb all or a part of the cost of the e-discovery it seeks, or will seek, herein. *Id*. Note the state courts de-emphasis on the allocation of costs: the court will not constrain the production of possibly relevant evidence on account of the later need to allocate the cost. *Id*.

Of course, parties are free to reach an agreement as to allocation. *See* *Samid v. Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 773 N.Y.S.2d 116 (2d Dept 2004) (plaintiff agreed that all costs related to the recovery of defendants' hard drive data would be borne solely by plaintiff to ascertain whether relevant, deleted emails could be recovered).

An additional issue addressed by the courts related to cost shifting is who must pay if a client seeks work product that is stored electronically. In *Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn*, 294 A.D.2d 190, 743 N.Y.S.2d 72 (1st Dept 2002), plaintiff asked defendant firm to produce work product it had created as plaintiffs lawyers. The defendant law firm initially refused to produce the documents claiming it would be too costly because the documents were on data tapes, but the court found that barring a substantial showing by the Proskauer firm of good cause to refuse client access, petitioners should be entitled to inspect and copy work product materials, for the creation of which they paid during the course of the firms representation. *Id*. at 191. However, the court found that because it was work product, the assemblage and delivery of documents to a client is properly chargeable to the client. *Id*. at 191-92.

V. Spoliation of Electronic Information

Under New York law, spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir.1990).

The determination of an appropriate sanction, if any, for spoliation is confined to the sound discretion of the court and is assessed on a case-by-case basis. *Zubulake IV*, 220 F.R.D. at 217. In one of the best known federal cases, the court ordered re-depositions, attorneys fees and an adverse jury instruction. *Zubulake v. UBS Warburg LLC, et al.*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004)(*Zubulake V*). Perhaps tellingly, before ordering the adverse instruction, the *Zubulake* court issued four time-consuming decisions involving tedious and difficult fact finding that great[ly] burden[ed] the courts resources. The court noted in postscript that since the case began much has changed pointing to a flood of recent opinions, guidance from professional groups, the American Bar Association and the Sedona Conference and proposed revisions to the Federal Rules of Civil Procedure. Now the Federal Rules of Civil Procedure have been amended, and it is doubtful that federal courts in New York (and elsewhere) are going to be as patient as the Zubulake court was.

Federal courts in New York have not hesitated to impose sanctions in appropriate circumstances both before and after *Zubulake IV*. *See De Espana v. American Bureau of Shipping*, No. 03 Civ. 3573 (S.D.N.Y. June 6, 2007) (court imposed costs for spoliation but did not allow an adverse inference because plaintiff could show only that defendant was negligent and could not establish the relevance of the spoliated evidence); *In re NTL, Inc. Sec. Litig.*, No. 02 Civ. 3013, 7377 (S.D.N.Y. Jan. 30, 2007) (court imposed adverse jury inference and costs for defendants gross negligence in allowing ESI to be destroyed); *Metropolitan Opera Assn, Inc. v. Local 100 Hotel Employees and Restaurant Employees Inter. Union*, 212 F.R.D. 178 (S.D.N.Y. 2003) (court entered judgment as to liability finding defendants utter failure to preserve ESI and related behavior aggressively willful.)

New York state courts have addressed allegations of spoliation and ordered severe sanctions in a number of cases. The movant must demonstrate that the party alleged to have spoliated the evidence was on notice of a potential lawsuit. *Travelers Indemnity Co. v. C.C. Controlled Combustion Co., Inc.*, 2003 N.Y. Misc. LEXIS 1477 (N.Y. City Civ. Ct. 2003). CPLR 3126 provides that the court may make such orders with regard to the failure or refusal as are just for willful failure to disclose relevant information. *Sage Realty Corps., et al. v. Proskauer Rose LLP, et al.*, 713 N.Y.S.2d 155, 159 (1st Dept 2000) (citations omitted) (involving destroying tapes of critical business conversations). Spoliation sanctions are appropriate under New York law for both intentional and negligent spoliation. *Travelers Indemnity Co.*, 2003 N.Y. Misc. LEXIS 1477, at *3. Penalties for a refusal to comply with disclosure requests are explicitly provided for in CPLR 3126. That section allows for such sanctions as the following: (a) having the matter resolved against the party who destroyed or failed to preserve the significant evidence [CPLR 3126(1)]; (b) prohibiting the disobedient party from supporting or opposing claims based on such spoliated evidence [CPLR 3126(2)]; or (c) striking the pleadings of the disobedient party [CPLR 3126(3)]. New York state courts have broad discretion to impose sanctions under CPLR 3126 when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversarys inspection. *Sage Realty Corps.*, 713 N.Y.S.2d at 160. The party seeking disclosure bears the burden of showing wilfullness; the non-disclosing party must demonstrate an excuse. *Id.* at 160-61 (citations omitted). In upholding dismissal of the complaint, the *Sage Realty Corporation* court recognized the very destruction of the evidence diminishes the ability of the deprived party to prove relevance directly. *Id.* at 160.

Based on the CPLR and these standards, state courts have ordered the most severe remedy available for spoliation of electronic data dismissal of the complaint. *See,*

e.g., *Long Island Diagnostic Imaging, P.C. v. Stony Brook Diagnostic Associates*, 286 A.D.2d 320, 728 N.Y.S.2d 781 (2d Dept 2001) ([s]triking of a partys pleading is a proper sanction for a party who spoliates evidence by purging a computer database despite several court orders directing the defendant to produce the evidence.); *Ingoglia v. Barnes & Noble College Booksellers, Inc.*, 48 A.D.3d 636, 852 N.Y.S.2d 337 (2d Dept 2008) (reversing the trial court on abuse of discretion and dismissing complaint when plaintiff installed a software program designed to permanently remove data from the computer's hard drive and numerous files, images, and folders, as well as some history of the plaintiff's internet usage, had been deleted between the date the defendant demanded inspection of the plaintiff's computer and the date of the inspection); *see also* *Sage Realty Corps.*, 713 N.Y.S.2d 155 (involving tape recordings). Alternatively, at least one state court has awarded attorneys fees where there was insufficient evidence that the lost emails were relevant. *Hunts Point Realty Corp. v. Pacifico*, 16 Misc.3d 1122(A), 847 N.Y.S.2d 902 (Table) (Sup. Ct., Nassau County July 24, 2007).

VI. Use of ESI as Evidence

Litigators have and, apparently, will continue to expend a tremendous amount of time, effort and clients money in obtaining ESI through discovery. Likewise, jurists, commentators and third-party legal support service providers have written extensively on electronic discovery. There is limited guidance on how to use ESI as evidence in motion practice or at trial once it has been obtained.

The evidentiary issues presented by ESI are essentially the same evidentiary issues presented by traditional documentary evidence. With respect to ESI, trial lawyers most commonly encounter four evidentiary hurdles: (1) is the ESI relevant; (2) is it authentic; (3) if the ESI is offered for the truth of the matter asserted, is it hearsay, and if so, is it covered by an applicable exception; and (4) is the form of the ESI that is being offered as evidence an original or a duplicate of the original writing?

New York does not have written evidence rules but depends on a hodgepodge of court rules, CPLR, statutes and case law. This has significant implications for the practitioner including greater importance of case law interpretation, less uniformity and substantially more trial court discretion. In federal court, the jury determines questions of relevance and authentication under Fed. R. Evid. 104(b), and the court determines questions of hearsay under Fed. R. Evid. 104(a). In New York state courts, the court determines relevance, authentication, hearsay and best evidence.

While many New York federal and state cases address discoverability of ESI, only a handful of cases involve ESI evidence. Most of the New York cases address the use of computer records in cases involving credit card disputes or accounts stated although there are a few cases involving admissibility of instant messages, emails, websites and chat room content. These cases provide limited instruction and vary in the amount of required foundation.

As a result, to date, the best guidance for practitioners seeking to admit ESI into evidence in a motion, hearing or trial in New York is their own fingerspitzengefuhl to establish a foundation, as well as reliable evidence treatises including Edward J. Imwinkelried, Evidentiary Foundations (LexisNexis 6th Ed. 2005) and Jack B. Weinstein & Margaret A. Berger, Weinsteins Federal Evidence (Joseph M. Laughlin ed., Matthew Bender 2d ed. 1997). In terms of case law guidance, *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) provides a summary of best

evidentiary practices and a survey of state and federal decisions nationwide on all significant and recurring issues associated with foundation for ESI in each of its different flavors: email; internet website postings; text messages and chat room content; computer stored records and data; computer animation and computer simulations; and digital photographs. Significantly, *Lorraine* does not cite to any authority in New York nor has the decision been cited in New York. However, it is a good starting place for practitioners preparing to submit ESI evidence to a court because it provides guidance as to best practices. As the *Lorraine* court wisely observed in the context of authentication, but applicable to all evidentiary foundations:

[T]here is wide disparity between the most lenient [and demanding] position[s] courts have taken in accepting records Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although it may be better to be lucky than good, as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

Lorraine, 241 F.R.D. at 558-59.

New York case law suggests that this observation about lenient and demanding camps is no less true here. Certainly, New York courts are far more amendable to admitting electronic evidence than the Southern District of Texas which, in ruling on the authenticity of a print-out of a posting on the U.S. Coast Guards website, noted the following:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in Fed. R. Evid. 807. Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form from the United States Coast Guard or discover alternative information verifying what Plaintiff alleges.

St. Clair v. Johnnys Oyster and Shrimp, Inc., 76 F. Supp. 2d 773 (S.D. Tex. 1999).

In that spirit, this commentary outlines the issue as it pertains to ESI, and notes any New York or other helpful precedent. It is beyond the scope of this commentary to provide a treatise-like dissertation on New York evidence.

A. Relevance

There have been few, if any, cases in New York dealing with the relevance of ESI possibly because the threshold is fairly easy to establish. Under New York law all relevant evidence is admissible unless its admission violates some exclusionary rule and has any tendency in reason to prove the existence of a material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence. *People v. Scarola*, 71 N.Y.2d 769 (1988); *see* *Hoya Saxa, Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179, 180 (1st Dept 1991) (Multiple Dwelling Law § 328(3) provides that printed computerized violation files of a department shall be relevant evidence for the enforcement of State housing standard laws.) This is largely consistent with Fed. R. Evid. 401 which provides: Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. While it is not difficult to establish that ESI is relevant, the practitioner should attempt to articulate multiple grounds of relevance carefully identifying each potential basis for admissibility rather than putting all his or her eggs in a single evidentiary basket. *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 541 (D. Md. 2007). The more relevant purposes the practitioner can establish, the greater latitude he or she will have in laying other foundations (like hearsay, authentication, etc.) or establishing a permissible use.

B. Authentication of E.S.I. in New York

Authentication issues in New York are complicated by the fact that every type of record seems to have its own authenticating provision or statute. For example, here are some of the various authenticating provisions found in the CPLR: CPLR 2105 (Certification by attorney); CPLR 4518 (business records exception); CPLR 4520 (Certificate or Affidavit of public officer); CPLR 4532 (self-authentication of newspapers and periodicals of general circulation); CPLR 4536 (proof of writing by comparison of handwriting); CPLR 4538 (Acknowledged, proved or certified writing; conveyance of real property without the state); CPLR 4540 (Authentication of official record of court or government office of the US); CPLR 4541: (proof of proceedings before a justice of the peace); CPLR 4542 (Proof of Foreign Records and Documents); CPLR 4543 (Proof of facts or writing by methods other than those authorized in this article). Statutes providing for authentication include: Business Corporation Law § 107 (corporate seal is prima facie evidence of authentication); Domestic Relations Law § 14-a (town and city clerks can authenticate marriage certificates) and the Uniform Commercial Code.

In New York, the court determines if there is clear and convincing evidence that the document is authentic. The jurys role is to determine if the evidence is genuine. As a result, New York state courts are invested with greater decision-making power than federal courts which, under Fed. R. Evid. 104(b), are permitted to enter the evidence only if a reasonable jury could rationally conclude based on a preponderance of evidence that it is authentic.

One New York court permitted authentication of instant messages through circumstantial evidence, which included a close friend and cousin testifying to the defendants screen name and sending a message to that screen name. *People v. Pierre*, 838 N.Y.S.2d 546, 548-49 (1st Dept 2007). The court also noted there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name.

As to emails, two New York cases demonstrate that emails can be admitted

circumstantially and by sworn statements. In one case, the court admitted a series of email exchanges based on the content of the exchanges, in particular the detail about meetings and about progress on construction sites and the fact that they were produced by a third party in response to a subpoena. *U.S. Information Systems, Inc. et al., v. International Brotherhood of Electrical Works Local Union Number 3, AFL-CIO, et al.*, 2006 U.S. Dist. LEXIS 52870 (S.D.N.Y. August 1, 2006); *see also* *Monte v. Ernst & Young LLP*, 330 F. Supp.2d 350, 359 (S.D.N.Y. 2004) (admitting email messages based on sworn statements attesting to their authenticity and overruling an objection that the emails are suspect on the basis of having been preserved for so long). The *Lorraine* decision, *supra*, states that the most common ways to authenticate include person with personal knowledge, expert testimony or comparison with authenticated exemplar, distinctive characteristics, including circumstantial evidence, self-authenticated trade inscriptions (*viz*., the auto signature) and certified copies of business records. All of these should be viable means of authentication in New York.

One New York court ruled inadmissible print-outs of websites obtained from the Wayback Machine service maintained by the Internet Archive Company, which service allows a user to obtain an archived website as it appeared at a particular period in time. *Robert Novak d/b/a Petswarehouse.com, v. Tucows, Inc., Opensrs and Nitin Networks, Inc.,* 2007 U.S. Dist. LEXIS 21269 (E.D.N.Y. 2007). The Eastern District found insufficient plaintiffs declaration lacked sufficient personal knowledge to set forth with any certainty that the documents obtained via third-party websites are, in fact, what he proclaims them to be. *Id*. At *5. The court suggested that plaintiff should have provided testimony or sworn statements from an employee of the companies hosting the sites from which plaintiff printed the pages. The court excluded the documents for absence of authentication and as hearsay. The court suggested that testimony from employees of Internet Archive might be insufficient. Rather, because the webpages came from third-parties who donate the data to the Internet Archive, only testimony from employees of the companies that originally hosted the sites would be sufficient. *But see* *Telewizja Polska USA, v. Echostar Satellite Corp.,* 2004 U.S. Dist. LEXIS 20845 (N.D.Ill. October 15, 2004)(affidavit from representatives of Internet Archive Company sufficient where opposing party did not present any evidence that Internet Archive is unreliable or biased).

Lorraine, supra, identifies the following ways to authenticate internet websites: witness with personal knowledge, expert testimony, distinctive characteristics, public records, system or process capable of producing reliable result and official publication. Nearly all of these should be viable methods in New York.

C. Hearsay

Another common issue raised by ESI is hearsay. When ESI is offered into evidence, it is often a statement, made by a declarant out of court offered for the truth of the matter asserted. In 2000, New York enacted New York State Technology Law § 306, which states: In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules. This still requires that the proponent articulate why the evidence is not hearsay or find an applicable exception. The most commonly used exceptions are the business and public records exceptions and, particularly for emails, excited utterances, state of mind and present state of mind.

1. Business Records (CPLR 4518)

There has been a long-line of cases providing guidance on the admission of print-outs of computer data usually in the area of account stated or claims involving credit card statements. Beginning in 1974 with *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 451, 358 N.Y.S.2d 367, 374 (1974), the business records exception has been used to admit computer documents. In *Gingold*, the City of Syracuse attempted to avoid changes to real estate tax assessments by arguing that the computer printouts of the supporting statistical evidence could not come in under the business entry rule (CPLR 4518). *Id.* at 451. The court rejected this argument, holding that: [e]ssentially, the business entry exception to the hearsay rule is based on the concept of routineness. The routineness of the entry in the usual course of business tends to guarantee truthfulness because of the absence of motivation to falsify. Certainly, compiling and feeding data into a computer in the context we have before us would seem to be as routine a function as could be imagined and should be included under CPLR 4518. *Id*. *See also* *Federal Exp. Corp. v. Federal Jeans, Inc.*, 14 A.D.3d 424, 788 N.Y.S.2d 113 (1st Dept 2005) (holding that computer-generated invoices and billing records of amounts due were admissible as business records in an account stated action, since plaintiff established that information contained therein was entered into computer in regular course of business); *Education Resources Institute, Inc., v John S. Piazza*, 794 N.Y.S.2d 65 (2d Dept 2005) (opining that computer printouts are admissible as business records if data stored in normal course of business as shown by affidavit from an individual with personal knowledge as to the care and maintenance of the computer system); *Citibank (S.D.) N.A. v. Jones*, 272 A.D.2d 815, 708 N.Y.S.2d 517 (3d Dep't 2000) (summary judgment appropriate where plaintiff submitted an affidavit from manager familiar with creation and maintenance of computer records); *Wayne County Dept. of Social Services ex rel. Van Dusen v. Petty*, 273 A.D.2d 943, 709 N.Y.S.2d 791 (4th Dep't 2000) (certified computerized records kept in the ordinary course of business are admissible as evidence); *Schneider Fuel Oil, Inc. v. DeGennaro*, 238 A.D.2d 495, 656 N.Y.S.2d 668 (2d Dep't 1997) (In an action for goods sold and delivered and account stated, the court held that computer records of the plaintiff-creditor demonstrating that the defendant received and retained accounts without objection and made partial payments sufficient evidence to support summary judgment in favor of the plaintiff.); *Matter of Thomma*, 232 AD2d 422, 648 NYS2d 453 (2d Dept 1996) (Computer printouts are admissible as business records if the data was stored in the normal course of business.).

In 2002, CPLR 4518(a), which governs admission of any writing or recording kept in the regular course of business, was amended to specify that electronic records are to be treated the same as any other business record. The 2002 Amendment added:

An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record.

2. Public Records (CPLR 4520)

Another common way of admitting E.S.I. over a hearsay objection is CPLR 4520,

which states: Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated. One example of using this public records exception to admit ESI is *People v. Baker*, 183 Misc.2d 650, 705 N.Y.S.2d 846 (Oneida Co. Ct. 2000). In *Baker*, the defendant objected to the admission of a computer printout of a Department of Motor Vehicles abstract of his driving record. The court disagreed, finding that a computer generated abstract is properly authenticated by simultaneous affixation of seal and certifying signature of Department of Motor Vehicle Records and the insertion of the individual's driving information on the abstract. *Id*. at 654. The court reasoned that [t]echnological advances have permitted simultaneous reprinting of information and transmitting of same that overcome the objections occasioned by improper authentication. In many ways, the present procedure serves to overcome the possibility of human error that might result from improper comparison prior to separate affixation of the seal and signature. *Id*. at 655. Further, the court noted that it has been advised that access to the computer generation of the information is strictly limited. Accuracy, which is the intent of the authentication rules, is satisfied by the simultaneous printing process. *Id*.

D. Original Documents and Reproductions

With the widespread use of E.S.I. by almost every business and governmental agency, New York courts relaxed the Best Evidence Rule considerably, and allow computer printouts of electronic business records to be admitted if the underlying business records were kept in the regular course of business. *In re Thomma*, 232 A.D.2d 422, 648 N.Y.S.2d. 453 (2d Dept 1996). The traditional rationale held that printouts of the data are summaries of the records. *See Ed Guth Realty v. Gingold, supra,* 34 N.Y.2d at 451.

To determine how to admit E.S.I., the practitioner must first determine if the information was originally in electronic form (such as documents stored in a database or word processing system) or if it was derived from an optically scanned image that was originally in document form. If the information was originally in electronic form, the document may be admissible as a business record under CPLR 4518 and the practitioner need not be concerned about the Best Evidence Rule. If it was not originally in electronic form and is an optically scanned image, the practitioner should proceed under CPLR 4539(b).

CPLR 4539(b) was added in 1996 to extend the statutes coverage to electronic data imaging, that is scanning original documents into electronic copies. CPLR 4539(b) allows [a] reproduction created by any process which stores an image of any writing, entry, print or representation and which does not permit additions, deletions, or changes without leaving a record of such additions, deletions, or changes . . . [to be] admissible in evidence as the original. This broadly worded statute seemingly allows practitioners to admit electronic copies of documents that are not business records, such as deposition testimony or other exhibits.

Of note to the practitioner, N.Y. State Technology Law § 306 references CPLR 4539. Section 306 authorizes the admission of electronic records pursuant to CPLR Article 45, including, but not limited to CPLR 4539. The implication of this cross-reference is that tangible forms of information stored in computer databases, such as

documentary printouts, qualify as copies or reproductions within the meaning of CPLR 4539(a). Though section 306 speaks only of the admissibility of the electronic record itself, the definition of electronic record requires that such record be capable of being accurately reproduced in forms perceptible by human sensory capabilities. State Technology Law § 302(2). Thus, there should be no need for the proponent to produce, as an exhibit, the hard drive or other electronic medium in which the electronic record is stored. Also, CPLR 4539(a) seems to preclude printouts of non-business records. As noted above, courts have treated printouts as summaries of voluminous records. *See* *Ed Guth Realty, Inc. v. Gingold, supra.*

VII. Substantive Claims

New York has revisited and given new meaning to centuries-old substantive claims because of the widespread use and importance of electronically stored information. In particular, the torts of conversion of property and trespass to chattel have been applied in ways that the original prosecutors of such claims would never have imagined. Both are examples of the growing trend of adapting existing law to meet the needs of the electronic age.

A. Conversion of Intangible Property or Electronic Data

The tort of conversion in New York requires the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owners rights. *Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex.*, 87 N.Y.2d 36, 44, 637 N.Y.S.2d 342 (1995). New York law permits conversion of intangible property, which creates a property right that may or may not be represented by something tangible, but that itself has no intrinsic value apart from the right it represents. *United States v. Bellomo*, 263 F. Supp. 2d 561, 573 (E.D.N.Y. 2003). Traditionally, electronic data was not considered intangible property. That changed with *Thyroff v. Nationwide Mutual Insurance Company*, 8 N.Y.3d 283 (2007).

In *Thyroff*, the plaintiff was an insurance agent who leased his computer equipment as an independent contractor. Upon termination of the agreement, defendant confiscated its equipment, along with all of the information the plaintiff had stored on his computer, including personal correspondence and email, customer information, and personal documents and data. *Thyroff v. Nationwide Mutual Insurance Company*, 460 F.3d at 403 (2d Cir. 2006). The plaintiff sued, claiming the taking of his electronic data constituted conversion. The Court of Appeals permitted plaintiffs claim to proceed, and, thereby, expanded the scope of conversion, finding it cannot be seriously disputed that societys reliance on computers and electronic data is substantial, if not essential. *Thyroff*, 8 N.Y.3d at 291. On this basis, *Thyroff* accorded the supposedly intangible electronic information the same treatment as a paper document kept in a file cabinet. *Id.* at 292. *See also* *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (S.D.N.Y. 2003), *Shmueli v Corcoran Group*, 9 Misc. 3d 589 (N.Y. Supr. Ct. 2005), and a Ninth Circuit decision, *Kremen v Cohen*, 337 F.3d 1024 (9th Cir. 2003). Subsequent decisions suggest that the ability to copy electronic data will limit the use of this tort because it requires actual exclusion of the owner. *See* *A & G Research, Inc. v. GC Metrics, Inc.*, 2008 NY Slip Op 51016U (N.Y. Sup. Ct. May 21, 2008) (stating copied computer data does not exclude the proper owner); *Leser v. Karenkooper.com*, 2008 NY Slip Op 50135U (N.Y. Sup. Ct. 2008) (stating the use of an image from a webpage does not exclude the proper owner). *See generally* Bisceglie, Kyle C., Kyle C. Bisceglie on Thyroff v. Nationwide

Insurance Company. *LexisNexis Expert Commentary* (July 2008), 2008 Emerging Issues 2495.

B. Trespass to Chattel

Trespass to chattel, an old and rarely-used common law tort action, requires interference with a person's property. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487, 448 N.E.2d 1324 (1983). While the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness. *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249, 250-51 (1954). Though this violation was originally intended to protect physical property, beginning with *School of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, N.Y.S.2d 804 (N.Y. Supr. Ct. 2003), the tort was extended to electronic information.

In *School of Visual Arts*, a former employee posted false job postings on the internet, causing unsolicited job applications and pornographic emails to be sent to the director of human resources of her former employer. *Id.* at 807. These actions caused large volumes of unsolicited job applications and pornographic emails to be sent to plaintiff by way of their computer system without their consent. *Id.* at 808. The plaintiff argued that the unsolicited material depleted hard disk space, drained processing power, and adversely affected other system resources. The court agreed, ruling that the complaint stated a valid cause of action for trespass to chattels. *Id*. *See also* *Davidoff v. Davidoff*, 12 Misc.3d 1162A, *10, 819 N.Y.S.2d 209 (N.Y. Supr. Ct. 2006) (Defendants alleged tortuous conduct, that is, sending to plaintiffs Website unsolicited content, and causing a depletion or deletion of information therein, thereby adversely affecting the effectiveness of his website, constitutes a claim for trespass to chattel.) (complaint dismissed on other grounds). And, as a result, a tort originally designed to address a partys misappropriation of the use of anothers horse or cow is now a means to combat spam.

VIII. Attorney-Client Privilege

Another important electronic discovery issue faced by practitioners involves preserving the attorney-client and work-product privileges. This issue typically arises in two contexts: document production and email communications.

There has been significant discussion of the document production at the federal level. Litigants may inadvertently produce documents or, in the interest of efficiency, the parties may agree to produce documents in advance of a privilege review with the understanding that the producing party can either claw back the documents or the examining party sneaked-a-peak subject to subsequent privilege review. The concern is that production or such agreements could lead to waiver. The 2006 amendments to Fed. R. Civ. P. 16 attempt to give some protection against inadvertent disclosure by stating that a scheduling order can include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production. However, there is still concern whether such agreements would be binding outside of that particular litigation and, as a result, would result in subject matter wavier. A proposed amendment to Fed. R. Evid. 502 would make the court-ordered agreement enforceable in all courts, state and federal, in order to avoid subject matter waiver. *See* S. 2450 passed by the U.S. Senate on February 27, 2008.

In New York state, CPLR 4503(a) states that a privilege exists for confidential communications made between attorney and client in the course of professional employment, and CPLR 3101(b) vests privileged matter with absolute immunity. *Spectrum Sys. Intl Corp. v. Chemical Bank*, 575 N.Y.S.2d 809, 814, N.E.2d 1055, 1060 (1991). The party asserting the privilege must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). With electronic communications, the main issue is whether the communication was intended to and is in fact confidential.

New York ensures that emails do not lose their privileged character simply because the email travels through multiple servers and ISPs. CPLR 4548 provides: no communication under this article shall lose 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.

The leading New York case on attorney-client privilege and electronic documents is *Scott v. Beth Israel Medical Center Inc.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007)**.** In *Scott*, the court denied the motion of a hospital administrator for a protective order that would have required his employer, Beth Israel Medical Center, to return email correspondence between Dr. Scott and his attorneys that were sent through Beth Israels email system and presumably found on Beth Israels server during discovery. The *Beth Israel* Court reasoned that sending the emails through the hospitals system with knowledge of the hospitals restrictive email policy destroyed any reasonable expectation of confidentiality and, thereby, waived the attorney-client privilege. *See generally* Bisceglie, Kyle C., Kyle C. Bisceglie on Privilege Issues in E-discovery under New York Law in Scott v. Beth Israel Medical Center Inc*. LexisNexis Expert Commentary* (August 2008)*,* 2008 Emerging Issues 2112.

One argument made by the administrator was that CPLR 4548 protected the confidentiality of his communications. The court rejected this argument, noting that CPLR 4548 simply acknowledges the widespread use of email and that use of email by itself will not abrogate the privileged nature of a communication. However, CPLR 4548 does not absolve an attorney of his or her responsibilities to assess the risk of communicating by email with a client. The holder of the privilege and his or her attorney must protect the confidential communication if they expect it to remain privileged.

IX. Non-party Disclosure

Discovery rules apply equally to subpoenas. As the Advisory Committee Notes for the 2006 Amendments explain: Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. However, Fed. R. Civ. P. 45 requires issuing counsel to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Fed. R. Civ. P. 45(c)(1). Any compliance order must protect the responding party from significant expense resulting from compliance. Fed. R. Civ. P. 45(c)(2)(B). Under the burden-shifting framework of Fed. R. Civ. P. 45(d)(1)(D), the initial burden is on the responding party to show the ESI is not reasonably accessible. *Auto Club Family Insur. Co. v. Ahner*, 2007 U.S. Dist. LEXIS

63809, *8-9 (E.D.La. Aug. 29, 2007). The burden then shifts to issuing counsel to show good cause.

While the subpoena provision of the CPLR has not been amended to explicitly address electronic discovery, there is no reason to believe electronic evidence cannot be subpoenaed.

While New York does not recognize a tort for negligent third-party spoliation, *see Ortega v. City of New York*, 9 N.Y.3d 69, 2007 N.Y. LEXIS 2715 (2007), contempt is available under NY CLS Jud § 773 and Fed. R. Civ. Proc. R. 45, respectively. *See generally* Bisceglie, Kyle C., Kyle C. Bisceglie on Ortega v. City of New York. *LexisNexis Expert Commentary* (March 2008), 2008 Emerging Issues 2858.

CROSS-REFERENCES: Federal Judicial Center, Managing Discovery of Electronic Information: A Pocket Guide for Judges, Federal Judicial Center, 2007; The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age; Paul R. Rice, Electronic Evidence: Law and Practice (ABA Publishing 2005); Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?,* 41 B.C. L. Rev. 327, 335-41 (2000)

Additional Federal Cases Interpreting December 2006 Amendments to Fed. R. Civ. P. on ESI: Rule 26(b)(2)(B) and (C): *W.E.Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007) (construing Rule 26(b)(2)(B) in light of *Zubulake*s distinction between accessible and inaccessible formats); *Veeco Instruments, Inc. Securities Litigation*, 2007 U.S. Dist. LEXIS 23926 (S.D.N.Y. April 2, 2007) (finding good cause under Rule 26(b)(2)(C) to restore backup tapes); *Best Buy Stores, LP v. Developers Diversified Realty Corp.*, 247 F.R.D. 567 (D. Minn. 2007) (finding no duty to preserve and no requirement to produce a now inaccessible searchable database under Rule 26(b)(2)(C) and (D)); *National Union Fire Insurance Co. v. Clearwater Insurance Co.*, 2007 U.S. Dist. LEXIS 52770 (S.D.N.Y. July 21, 2007) (denying order to restore backup tapes given inadequate showing); *Columbia Pictures Industries v. Bunnell*, 2007 U.S. Dist. LEXIS 46364 (C.D. Cal. May 29, 2007) (ordering production of data from the RAM memory on partys website); *Peskoff v. Farber*, 240 F.R.D. 26 (D.D.C. 2007) (imaged hard drives accessible and produced at the expense of producing party); *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007) (ordering production of inaccessible backup tapes under Rule 26(b)(2)(B) because responding party failure to issue a litigation hold); *Woodburn Construction Co. v. Enron Pacific, LLC*., Civ. No. C07-1620 (W.D. Wash. April 30, 2007) (denying motion to compel where parties had agreed to discovery protocol for ESI and requesting party sought formats at variance with protocol); *Hubbard v. Potter*, 247 F.R.D. 27 (D.D.C. 2008) (ordering further discovery but largely rejecting argument based on a partys unsupported assumptions about the volume of responsive documents that should have been produced); *Peskoff v. Faber*, 244 F.R.D. 54 (D.D.C. 2007) (ordering further discovery where witness testified to frequent use of email); *KnifeSource, LLC v. Wachovia Bank, N.A.*, 2007 U.S. Dist. LEXIS 58829 (D.S.C. August 10, 2007) (motion to compel under Rule 26(b)(2)(B) granted because data sought was non-physical but accessible); *Seattle v. Professional Basketball Club, LLC*, Civ. No. C07-1620MJP (W.D.Wash. February 25, 2008) (a bald assertion that discovery will be burdensome is insufficient in light of Rule 26(b)(2)(B)); *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 13723 (N.D.Ga. February 25, 2008) (motion to compel denied given ESI was

inaccessible); *U&I Corp. v. Advanced Medical Design, Inc.*, 2008 U.S. Dist. LEXIS 27931 (M.D.Fla. March 26, 2008) (involving parties discovery obligations, meet and confer, IT conference, burden shifting, and potential sanctions); *Asset Funding Group, LLC v. Adams & Reese, LLP*, 2008 U.S. Dist. LEXIS 30348 (E.D.La. April 4, 2008) (ordering a responding party to hire IT consultant and certify methods used to perform satisfactory search of various ESI data sources); *Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.*, 2008 U.S. Dist. LEXIS 27455 (W.D.Wash. April 21, 2007) (protective order denied because responding party did not meet and confer properly, and did not support its allegation of burdensomeness).

Rule 26(b)(5)(B): *Muro v. Target Corp.*, 243 F.R.D. 301 (N.D.Ill. 2007) (finding that, to preserve privilege, a party must describe each privileged string entry of emails on the privilege log rather than describing the entire string email as only one entry); *Garcia v. Berkshire Life Ins. Co. of America*, 2007 U.S. Dist. LEXIS 86639 (D.Colo. November 13, 2007) (technical incompetence is no defense for failure to produce ESI where the producing party had been put on notice of its obligations).

Rule 26(f)(4): *eBay Seller Antitrust Litigation*, 2007 U.S. Dist. LEXIS 75498 (N.D. Cal. October 2, 2007) (Court ordered responding party to produce IT witness to testify about responding partys ESI preservation and collection based on Advisory Committee Note to Rule 26(f).); *RLI Insurance Co. v. Indian River School District*, 2007 U.S. Dist. LEXIS 78419 (D. Del. October 23, 2007) (motion to compel denied as discovery was not made in initial meet and confer).

Rule 34(a) and (b): *Calyon v. Mizuho Secur. USA Inc.* 2007 U.S. Dist. LEXIS 36961 (S.D.N.Y. May 18, 2007) (rejecting partys request to inspect and image hard drives under Rule 34 for inadequate showing); *Scotts Company LLC v. Liberty Mutual Insur. Co.*, 2007 U.S. Dist. LEXIS 43005 (S.D. Ohio June 12, 2007) (same); *Ferron v. Search, LLC*, 2008 U.S. Dist. LEXIS 34599 (S.D. Ohio April 28, 2008) (permitting imaging of partys hard drive given qualifying reason(s) including failure to preserve and produce); *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. September 7, 2007) (responding party ordered to pay for reproduction of thousands of emails originally produced without attachments); *DOnofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43 (D.D.C. 2008) (interpreting if necessary language of Rule 34(a) to shield responding party from converting inaccessible data); *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D. Ill. 2008) (motion to compel reproduction of metadata denied because it was not in original request); *Michigan First Credit Union v. Cumis Insur. Society, Inc.*, 2007 U.S.Dist. LEXIS 84842 (E.D. Mich. Nov. 16, 2007) (citing *Williams v. Sprint*, 230 F.R.D. 640 (D. Kan. 2005) for the proposition that there is a general presumption against production of metadata); *3M Co. v. Kanbar*, 2007 U.S. Dist. LEXIS 45232 (N.D. Cal. June 14, 2007) (applying the requirement of Rule 34 to producing ESI in ordinary course of business or labeled to correspond to each request and finding that the responding party produce in a searchable format); *Palgut v. City of Colorado Springs*, 2007 U.S. Dist. LEXIS 91719 (D. Colo. December 3, 2007) (denying motion to compel restoration where responding party lacked hardware to access inaccessible data).

Rule 37(f): *Cache la Poudre Feeds, LLC v. Land OLakes, Inc.*, 244 F.R.D. 614, 623 (D. Colo. 2007) (addressing when duty to preserve arises in context of letter containing equivocal statement of discontent); *Doe v. Norwalk Community College*, 248 F.R.D. 372 (D. Conn. 2007) (rejecting good faith protection of Rule 37(f) because party did not have a routine system in place and ordering sanctions

including adverse inference and costs for spoliation); *Seroquel Products Liability Litig.*, 244 F.R.D. 650 (M.D. Fla. 2007) (imposing sanctions for multiple discovery shortcomings in response); *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D.Cal. 2008) (sanction of attorneys fees and costs in the amount of $8,568,633.24 for withholding tens of thousands of emails); *The Southern New England Tel. Co., v. Global Naps, Inc.*, 2008 U.S. Dist. LEXIS 47986 (D. Conn. June 23, 2008) (deliberate destruction of computer files using Window Washer and other discovery violations results in $5.2 million default judgment against defendant); *Keithley v. The Home Store.com, Inc.*, 2008 U.S.Dist.LEXIS 61741 (D. N. Cal. August 12, 2008) (Court ordered adverse inference and $320,000 in costs because responding party did not satisfy their duty to preserve ESI including source code.)

Rule 45: *United States v. Three Bank Accounts*, 2008 U.S. Dist. LEXIS 29992 (D. S. Dak. April 2, 2008) (denying motion to quash given bare-bones allegation of burden; the Court enforced a subpoena that resulted in the identification of 250,000 electronic documents and would require three employees working full-time for four weeks with the proviso that the parties work in good faith to reduce its scope); *Guy Chemical Co., Inc. v. Romaco AG*, 243 F.R.D. 310 (N.D. Ind. 2007) (issuing counsel ordered to pay costs for production as non-party status is significant factor in finding undue burden).

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