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STATE E-DISCOVERY

# Counsel Must Take Active Role In Preserving, Retrieving ESI

By
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Every attorney needs to be aware that the Preliminary Conference Rule contained in the Uniform Rules of New York Trial Courts has recently been amended to specifically recognize electronic discovery. The need to address electronic discovery issues is now not just required by the Commercial Divisions, but all trial courts throughout the state.

Given the publicity engendered by recent cases of a company being sanctioned in one form or another for its failure to preserve and/or produce relevant electronically stored information (ESI), litigators and attorneys who counsel companies should be cognizant of a party's document preservation obligations, and be well informed of the client's protocols in maintaining ESI.

Also, the recent Manhattan Supreme Court decision in *Fitzpatrick v. Toy Industry Association Inc.*,[1] is must reading. It addresses such issues as the need to timely issue a preservation notice, techniques in preserving ESI, and the necessity for counsel to be actively involved in the preservation, retrieval and production of ESI.

On March 20, the Uniform Rules of the New York Trial Courts concerning preliminary conferences were amended to include a provision pertaining to electronic discovery.[2]

NYCRR §202.12(c)(3) now provides "[w]here the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to" (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation.

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These new provisions are similar to Rule 8(b) of the Uniform Rules of the Commercial Division. Rule 8(b) provides for counsel in advance of a preliminary conference to consult concerning electronic discovery issues, and then:

> Preservation notices and retention orders, as well as an application seeking a finding of spoliation, are accepted techniques that attempt to ensure full disclosure of all matters material and necessary in the prosecution or defense of an action.

[s]uch 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.[3]

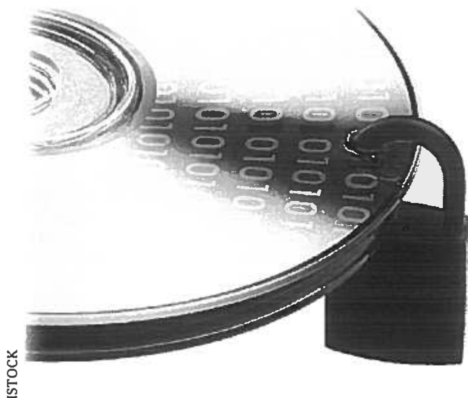
The state-wide amendments to §2.02.12 of the Uniform Rules of the New York Trial Courts arose in part from focus groups that the Commercial Divisions had conducted, and which reached a general consensus that electronic discovery issues were only going to grow in magnitude and frequency and that they were not going to go away any time soon. Participants recognized that "everybody has a computer," and there has been "an exponential explosion of evidentiary material," and that there is a "delicious and wonderful feeling" to be able to get damning evidence from a computer that might otherwise not have been available.[4]

The rules were a culmination of an effort to address the reality that electronic discovery is here to stay.[5]

In *Fitzpatrick*,[6] plaintiff, a former high level executive, alleged she was fired after complaining of a hostile work environment created by defendants and further claimed retaliatory termination allegedly resulting from her filing a complaint with the Equal Employment Opportunity Commission. More than a month after being alerted to plaintiff's intention to file a hostile work environment complaint with the EEOC, defendant entity sent a "preservation notice" e-mail to its information technology manager concerning the preservation of documents and data relative to plaintiff's charges, which addressed the importance of preserving relevant information, whether in paper or electronic form.

The "preservation notice" provided, among other things, that "all documents, including ESI, were to be retained regardless of any company document retention or destruction policy, and e-mails were to be reviewed for relevant documents and preserved in folders." Competing affidavits by the parties were submitted contesting whether ESI was properly preserved, deleted and/or overridden, and a finding of spoliation was not found.

The court sustained defendants' position that it had timely issued its "preservation notice," but noted that the "facts revealed hereafter may demonstrate that an earlier date is called for" in light of a certain "E-mail A" that was not originally turned over, which defendants characterized as a "response to a long stream of emails" relating to plaintiff's job performance. In reference to such e-mail, the court noted: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Still, the court is concerned about how disclosure has been conducted here. Conley's sworn statement and defendants' assertions about having preserved e-mails relevant to plaintiff's claim, may raise questions about their judgment as to relevance given that E-Mail A was not originally turned over to plaintiff and was not in Conley's box as of July 2005. E-mail A is derogatory and derisive, and contains search words contained in this court's July 12, 2007 order. That a member of defendants' law firm was on Email A's distribution list, and thus, presumably, had a copy of it, does not increase the court's confidence in this regard. Most troubling, however, is that defendants avoid directly addressing how Email A and E-mail B went missing from Conley's e-mail box, or why it was not initially turned over. While defendants argue that plaintiff merely speculates that their failure to produce Email A was due to either deletion of the document, or willful failure to produce it, it is defendants or their counsel who should have explained the reason why that e-mail was not turned over.

Nonetheless, the court denied plaintiff's motion to strike defendants' answer, but did so "without prejudice to renew at trial based on newly discovered evidence."

## Facebook Ruling

Also of interest is a recent pre-action discovery proceeding involving Facebook.com, on which it is not uncommon to find the posting of defamatory comments concerning an individual.

In *Cutaia v. Jane Doe*, 1746/2009 (Feb. 13, 2009), Suffolk County Supreme Court, on an unopposed application, directed Facebook to be "restrained from destroying, deleting, or otherwise removing or secreting any and all records in its possession that relate to petitioner's use, or the use by a person employing petitioner's name, of Facebook's website" in order for petitioner to be able to ascertain Jane Doe's identity, who had created a Web page in petitioner's name that contained libelous and demeaning statements about her.

In *G.S. Garritano & Associates CPAs, LLC v. Schaller*,[7] plaintiff, an accounting firm, sought a preliminary injunction against defendant, a former employee, who was subject to a non-competition agreement and an agreement not to communicate or perform work for plaintiff's clients, to prevent him from destroying electronic data, as well as confirmation of the temporary receiver to be permitted to seize and retain defendant's computer hardware, software and electronic records and data.

The records at issue were alleged, among other things, to contain transactions and services performed for companies by defendant that were formerly plaintiff's clients. The court granted injunctive relief and found that:

> plaintiff has established that proprietary information belonging to the firm may be contained within the laptop. Thus, the services of an expert will be necessary to examine and obtain copies of defendant's computer files from the seized laptop. The court finds that the information requested by plaintiff is material and necessary to the prosecution of the action as such information has a bearing on defendant's alleged use of plaintiff's software and client list. Raw computer data or electronic documents are discoverable. However, electronic discovery raises issues not presented with traditional paper discovery since deleted files may be retrieved by a person with sufficient computer savvy, who can also determine if data has been altered and reconstruct the originally entered data. ...Plaintiff, as the party seeking discovery shall pay the costs incurred in the production of this discovery material.

Accordingly, the court, confirmed the use of the receiver and directed the parties to jointly designate an expert in the field of computer forensic science to identify the data in the computer and other hardware in the receiver's possession, or for each party to submit to the court two names if no agreement could be reached.

## Index Required

In *Matter of Tamer*,[8] an accounting proceeding involving a revocable trust, an objectant sought to compel the trustees to accept the production of approximately 6,000 documents in electronic form, while the trustees cross-moved for production in paper form. The court noted that while CPLR §3122 does not explicitly authorize the production of documents in electronic form, subdivision (c) of §3122 provides for production of documents "as they are kept in the regular course of business," and does not limit production to paper copy.

The court further noted that "[i]t is implicit that where a party seeks electronic discovery, the responding party will produce the information sought by some form of electronic means."

The court permitted the production of the information in electronic form, but directed the objectant to furnish an index "identif[ying] the document(s) produced in response to each discovery demand and the electronic file where the document has been stored" so as to avoid "unduly burden[ing]" the trustees.

## Conclusion

The amended state-wide Preliminary Conference Rule mandates that counsel think about and confer in advance with their clients and adversaries in order that issues concerning electronic discovery are addressed as early as possible in order to streamline the process.

The rule was amended because, as it is now recognized, when electronic discovery issues are not addressed early in an action, they become increasingly difficult to deal with as the case proceeds, delay the case from being prosecuted expeditiously, and become unnecessarily more expensive.

*Fitzpatrick* highlights the problems counsel may encounter when addressing document preservation and production issues. Lawyers need to be proactive to ensure that ESI is properly maintained. Preservation notices and retention orders, as well as an application seeking a finding of spoliation, are accepted techniques that attempt to ensure full disclosure of all matters material and necessary in the prosecution or defense of an action.

As discussed in *Garritano*, upon a proper evidentiary showing, injunctive relief can be used to obtain ESI.

Finally, the index required in *Tamer* should be a warning that the production of ESI may need to be accompanied by some type of index or description of the ESI being provided. It is thus clear that courts are becoming more vigilant in their monitoring of the ESI disclosure process, and counsel should be guided accordingly.

1. Index No. 116548/2009, 2009 WL 159123 (Sup. Ct. New York Co., Jan. 5, 2009).
2. NYCRR §202.12(c)(3)(a)-(i) (2009).
3. NYCRR §202.70(g), Rule 8 (2006).
4. Report of the Office of Court Administration to the Chief Judge on the Commercial Division Focus Groups, July 2006 at p. 9.
5. Id.
6. Index No. 116548/2009, 2009 WL 159123.
7. Index No. 1901/2005 (Sup. Ct. Suffolk Co., Oct. 31, 2008).
8. No. 2001-380/B, 2009 WL 1058594 (Surr. Ct. West. Co., April 29, 2009).

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