



NEW YORK STATE E-DISCOVERY LAW

BY MARK A. BERMAN AND HAL N. BEERMAN

Scope Limits on E-Discovery Under Recent State Decisions

Electronic discovery, even more so than traditional paper discovery, offers the opportunity to burden unduly an opposing party with overbroad discovery requests, and three recent New York State court decisions have addressed over-reaching document requests seeking electronically stored information (ESI).

Responding to far-reaching requests for the production of e-mails and metadata, as well as electronic information contained on, among other things, hard drives, computer servers, backup tapes, voice mail and personal digital assistants (PDAs) can be very burdensome and extremely costly to the producing party.

Thus, as electronic discovery is becoming more prevalent in New York state practice, courts are taking note of these issues and are recognizing that certain situations do not justify the sometimes over-reaching requests that seek to obtain ESI, especially when requested from nonparties. See e.g., *L-J Communications Corp. v. Kelly*,¹ *Joyner v. Planned Parenthood Federation*,² and *In the Matter of the Application of John Maura, Jr.*³

Limiting Overbroad Demands for ESI

In *L-J Communications*, the court found that plaintiff was seeking “unfettered access” to confidential and proprietary information of two nonparty competitors of plaintiff, as well as access to one of the defendant’s personal computers. Specifically, plaintiff sought “all documents and e-mail messages contained on [defendant’s] personal computer, as well as all passwords and access codes in order to impound, clone, and inspect such computer.”⁴

This broad request was rejected by the court because the plaintiff “failed to provide the court with a compelling reason for such broad relief” and plaintiff had “not established its entitlement to the broad disclosure of documents and e-mails stored on, as well as the broad access to, [defendant’s] personal computer that it seeks.”⁵ Plaintiff further alleged that defendant had wrongfully deleted relevant ESI from his computer and was continuing to delete and destroy same after the court had issued



Mark A. Berman

Hal N. Beerman

a preservation order. The court, however, found that such contentions were “not supported by the record” and “that plaintiff had failed to meet its burden of proving how the document and e-mails in question were crucial to the prosecution of this matter or how the plaintiff was prejudiced by their loss.” The court further noted that such deletions took place before the preservation order was issued, and that allegations of continuing deletions was “entirely speculative.”⁶

Demands Must Be Tailored and Specific

In *Joyner*, plaintiff brought a wrongful termination suit against Planned Parenthood alleging that she was terminated due to, among other things, her complaints of racial pay disparity and repeated complaints about defendant’s pattern of alleged discrimination on the basis of race and national origin.⁷ During discovery, plaintiff sought, inter alia, information contained in “electronically maintained files,” but provided no date or a limitation on the scope for her requests.⁸ Defendant objected that the requested search for, and production of, materials would cause it to incur “significant costs.”⁹ Although plaintiff recognized that she would have to pay for the cost of production, she requested an estimate of the cost so as to be able to “make decisions on [its] scope.”¹⁰ The court noted that:

[d]efendant indicates a willingness to work with plaintiff, having previously provided plaintiff with a diagram of its computer system, the identity of software applications used, the identity of the person who maintains the system and other information. However, [defendant] has not provided [plaintiff] with an estimated cost for its search and neither party provides the court with any information as to the feasibility of tailoring an appropriate search. To

assist defendant in tailoring its search for electronically stored information, defendant requests that plaintiff first identify information of which she is aware that is stored on defendant’s computer system which has not already been produced.¹¹

The court held that it “must first determine whether the material sought is material and necessary to plaintiff’s prosecution of this action.”¹² With respect to plaintiff’s failure to include a date restriction, the court found that plaintiff’s requests for information relating to her termination and a certain human resources report were easily identifiable, but noted that such was not the case with respect to the alleged pattern of defendant’s purported discriminatory conduct.¹³

Next, the court reviewed each specific request for ESI to determine whether it sought relevant information and also whether it was proper in scope, overbroad or unduly burdensome. For example, a request for “[a]ll e-mails and information about e-mail[s] (including message contents, header information and logs of e-mail system usage)” from plaintiff and nine other employees to any other employee of defendant with knowledge of plaintiff’s termination was stricken as overbroad and unduly burdensome, where the request would “result in the production of material not relevant to the subject matter of the action, including personal e-mails, and potentially privileged and/or confidential information.”¹⁴ However, the same request that was limited to e-mails pertaining to particular subject areas was deemed appropriate.

Nonetheless, even where a request sought relevant information, that did not mean that such ESI discovery was appropriate. For example, even though another request was limited to four relevant subjects, the court struck the request for “entire” databases, as plaintiff failed to “demonstrate any need for obtaining copies of the extensive information contained in entire databases.”¹⁵ The court, however, did grant plaintiff’s motion to compel “[a]ll logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information about or related to the relevant subjects.”¹⁶ The court found that the “[p]roduction of such computer logs may arguably lead to relevant discovery and may also assist the parties in formulating specific requests and searches.”¹⁷

Mark A. Berman, a partner at *Ganfer & Shore*, has extensive experience in securities and general commercial litigation. **Hal N. Beerman** is an associate at the firm.

With respect to plaintiff's request for all word processing files, "deleted" files and file fragments concerning certain relevant subjects, the court granted such request as it applied to documents relating to plaintiff's departure and certain human resources report, but denied the request as overbroad with respect to prior discrimination complaints and pay equity issues, as the "plaintiff has not established at this juncture that hard copies of documentation on these subjects are insufficient."¹⁸ The court found that "[g]iven the potential volume of material sought to be produced and the cost attendant thereto, the court cannot conclude that plaintiff's need for such material and any probative value it might have outweighs the prejudice to defendant of searching for and providing duplicative word processing files, prior drafts and deleted files."¹⁹ For the same reason, the court denied requests that sought electronic data from computer programs that process financial, accounting and billing information and all data files relating to certain subject areas.²⁰

Significantly, the court ordered, prior to requiring defendant to produce any electronic discovery, that "defendant's counsel shall provide plaintiff's counsel with an estimate for conducting a computerized search for the items to be produced... and for the reproduction of same..."²¹

Discovery and Non-Parties

In *Maura*, a proceeding to determine the validity of a marital election, respondent sought electronic discovery from a law firm that had drafted the prenuptial agreement between respondent and decedent. Respondent moved for contempt against the law firm for its failure to respond to nonparty discovery and the law firm cross-moved to quash the subpoena and for a protective order.

Specifically, respondent sought "(i) to copy all existing and deleted records [related to the prenuptial agreement], (ii) to recreate any billing records of the decedent for estate planning and the prenuptial agreement, (iii) to copy all other records with respect to the estate planning; and (iv) to obtain sample copies of other prenuptial agreements prepared by [decedent's attorney] with privileged material redacted."²²

Respondent proffered a computer forensic expert, who he had agreed to pay for and who would undertake a cloning of the law firm's hard drive. Respondent proposed that the hard drive be removed from the law firm's offices because to clone it at the expert's office would be less expensive because the expert's office had the hardware and software necessary to perform such task in the most cost-effective manner.²³

The law firm opposed the subpoena asserting it was wrongfully "invasive" and that permitting its hard drive to be cloned would violate the Rules of the Code of Professional Responsibility.²⁴ The law firm further asserted that, if electronic discovery is permitted, the same information could be retrieved from its backup tapes, which would be less invasive.

The court denied respondent's application insofar as it sought the law firm's electronic billing records, which were found irrelevant, and electronic estate planning documents, because such documents were already provided in hard copy and "[t]here is no allegation that there is a need to determine whether the documents have been altered or deleted."²⁵ The court also denied respondent's request for "access to computer records to copy other prenuptial agreements," as such would not bear on the "authenticity" of the subject prenuptial agreement and would constitute a violation of the attorney-client privilege.²⁶

However, the court granted respondent's application for access to the computer "to copy all billing records related to the prenuptial agreement and all existing and deleted records concerning the prenuptial agreement," as such are "'material and necessary' to the prosecution of the action."²⁷ The court also found that an analysis of the law firm's backup tapes would not "yield deleted or altered information," which went to the gravamen of respondent's claim.²⁸

As such, the court ordered the hard drive of the law firm to be cloned, but rejected respondent's expert and "decline[d] to allocate the cost of the electronic discovery to the non-party," as it noted has been ordered in certain circumstances, especially in federal courts.²⁹ Noting that the CPLR provides that the party seeking discovery absorbs the cost incurred in the production of discovery material,³⁰ the court directed the law firm to proffer its own expert to clone the hard drive, to obtain a proposal from such expert, and to then submit it to opposing counsel. The court directed that respondent notify the law firm within 10 days whether it wishes to proceed with the requested electronic discovery, otherwise, it would be deemed waived.

Conclusion

Courts in New York state are analyzing and refining the appropriate scope of ESI discovery in each case, so that only "material and necessary" evidence is ordered produced, in order not to unfairly burden parties and nonparties with excessive costs and overbroad requests. As with paper discovery practice, and much more so with electronic discovery given the reluctance by courts to order discovery that could overwhelm a party with huge document review and production expenses, practitioners should strongly consider tailoring their specific ESI discovery requests. For example, it is imperative to include date and specific subject matter limitations in ESI requests.

Counsel should also be able to justify sufficiently the relevance and materiality for each ESI request, in the event motion practice ensues or risk that a request could be found overbroad and the entire request vacated, thereby foreclosing a party from obtaining relevant information.

Counsel should also use caution when seeking ESI so as to only request such materials where paper copy would be insufficient. Further, while a court may appe-

ciate a party's offer to absorb ESI costs, as New York state ESI discovery law is making clearer, that is only part of the balancing that a court needs to engage in before permitting such discovery. "Tiered" ESI discovery should also be considered when seeking different types of ESI, such that general requests are followed by more specific ones.

Finally, counsel must remain cognizant that courts may not subject a nonparty to the broad ESI discovery that might be permitted of a party and may, in fact, permit ESI discovery of a nonparty conditioned upon the requesting party's agreement to pay for all of it, as well as other terms the court feels necessary to protect the nonparty. Accordingly, it is imperative that, before propounding ESI discovery requests, the prudent practitioner carefully consider each request.

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1. Index No. 14971/05 (Suffolk Sup. Ct. April 23, 2007) (Emerson, J.).
2. Index No. 107154/06 (N.Y. Sup. Ct. June 8, 2007) (Shulman, J.).
3. File No. 326728 (Nassau Sup. Ct. June 28, 2007) (Riordan, J.).
4. *Id.*, at *3.
5. *Id.*
6. *Id.*
7. *Joyner*, at *1.
8. *Id.*, at *5.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*, at *6 (citing *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), 709 N.Y.S.2d 345 (Nassau Sup. Ct., 2004)).
13. *Id.*
14. *Id.*
15. *Id.*, at 7.
16. *Id.*
17. *Id.* (emphasis added).
18. *Id.*
19. *Id.*
20. *Id.*, at *7-8.
21. *Id.*, at *9.
22. *Id.*, at *5.
23. *Id.*, at *6.
24. *Id.*, at *7.
25. *Id.*, at *10.
26. *Id.*
27. *Id.*, at *11.
28. *Id.*, at *12.
29. *Id.*
30. *Id.* (citing *Lipco*).

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**Ganfer
& Shore, LLP**

360 Lexington Avenue
New York, New York 10017
212.922.9250
MBerman@ganshore.com