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STATE E-DISCOVERY ISSUES

Recent Decisions Stress Need To Preserve Electronic Data

A recent New York state Supreme Court decision, *Ahroner v. Israel Discount Bank of New York*, continues the trend of cases reminding counsel of the need to take an active role in the preservation of electronically stored information (ESI).¹ Litigators and in-house counsel need to be fully familiar with their clients' document retention policies and practices as well as be cognizant of their clients' ESI preservation obligations. Appropriate measures must be taken by counsel and client alike to ensure compliance in order to avoid sanctions for the destruction of potentially relevant evidence.

As *Ahroner*² makes clear, a "litigation hold" on ESI that is not properly effectuated or insufficiently complied with will not immunize a party for spoliation sanctions.

Further, a recent trial court decision highlights the requirement, when seeking preliminary injunctive relief, for the need to come forward with specific evidence to support an allegation that a party improperly gained access to computers or wrongfully downloaded ESI.

Finally, bloggers who want to maintain their anonymity need to be cautious as evidenced by a recent trial court decision permitting pre-action disclosure seeking the identity of a defendant for purposes of a plaintiff pursuing a cause of action for defamation.

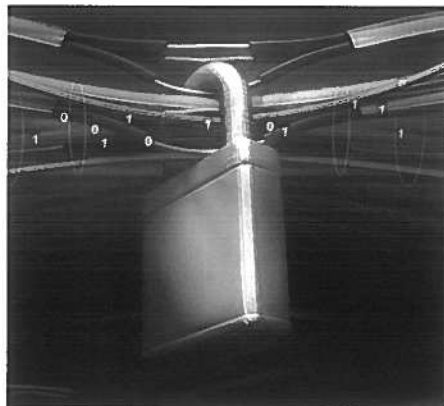
In *Ahroner*, an employment discrimination action in which plaintiff alleged a hostile work environment and discrimination based upon age, race and national origin, plaintiff's counsel sent a letter to the defendant bank 10 days after plaintiff's termination advising that the bank "must undertake all efforts to preserve from spoliation all documents and other records

By
**Mark A.
Berman**



pertaining to [plaintiff's] employment, as well as any unlawful conduct of [the Bank] or its employees."

Shortly thereafter, a second letter was sent to the bank's counsel requesting that "all documents from plaintiff's desk should be returned and that all evidence related to [plaintiff's] claims be preserved."



In response, the bank by letter acknowledged that it "was aware of its obligations in this regard."

After the court ordered production of all e-mails relating to plaintiff's discharge, the bank, in response, produced no additional e-mails, asserting that its employees searched their "computer files and archived files" and were unable to locate any additional responsive documents. The bank provided affidavits from its employees in support of such position.

The bank's information technology witness testified that the bank was in the process of upgrading its computers and hard drives and that same were not then being preserved unless requested, at which point plaintiff's counsel requested such preservation. The witness also testified that e-mails were routinely saved to a server, of which a back-up tape was preserved for one year.

The court thereafter expanded its prior ESI order and directed that all "emails, notes and correspondence regarding [plaintiff] be produced," and that the subject hard drive of a certain bank employee be preserved.

Then, despite a representation from counsel that a mirror image had been taken of that hard drive that "would be put aside to ensure no purging until the litigation was completed," no mirror image was made. The bank's information technology witness changed his testimony, stating that, during the upgrade of the bank's subject computer, the subject hard drive had been "wiped clean" and the computer donated to a charitable organization, without any prior preservation of the hard drive having taken place.

All records, including company and personal e-mails that might have been stored on the local hard drive, were thus unavailable. The bank's information technology witness also testified that no one had asked that archival e-mails be searched for responsive materials.

The court appointed forensic expert also found that the subject "documents folder on the [defendant's] file server and mail on the mail server are no longer available" and that back-up tapes had not been preserved.

Plaintiff sought spoliation sanctions predicated upon the destruction of the hard drive and the bank's back-up tapes, including seeking an adverse inference at trial that the missing documents would have proven his claims.

The court held that the destruction of the hard drive occurred in bad faith or, at the very least, as a result of gross negligence, "so that the relevance of the email[s] stored on the hard drive can be inferred."

MARK A. BERMAN, a partner at commercial litigation firm Ganfer & Shore, is secretary of the e-discovery committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

The court further found that, despite the bank's control over the hard drive and server, and notwithstanding its obligation to preserve it, evidence was destroyed or permitted to be written over before the plaintiff had an opportunity to review it.

The court further noted that, although a "litigation hold" had been imposed before the action was commenced, and further preservation instructions had been given, "there is no evidence of 'overseeing compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents.'"

While the court found that there was nothing in the record to suggest that defendants' counsel knew of the destruction of the hard drive or its image prior to the court-ordered forensic inspection, it was highly critical of the contradictory statements in the record by counsel and his clients regarding the preservation of the hard drive.

The court found that plaintiff's counsel's initial letter to defendant bank prior to the litigation being commenced was "sufficient to put defendants on notice to preserve emails relating to discriminatory conduct or derogatory remarks as to [plaintiff]" and that defendants' multiple memoranda relating to the preservation of documents were not privileged from disclosure.

The court further noted that the defendant bank's document retention policy did not indicate that, among other things, the "wiping" of hard drives in connection with an upgrade is a procedure that might have occurred in the "ordinary course of business."

The court noted that defendants did not satisfy their obligation to preserve electronic data on a "continuing basis" by its initial search of electronic and paper files and the production of electronic documents, and the record evidence did not indicate that "all searches occurred before the destruction or writing over of electronic evidence."

As such, the court held that plaintiff was entitled to an adverse inference charge that the e-mails contained on the missing hard drive would not support a certain defense of defendants, and further that reimbursement to plaintiff was required of fees paid to the forensic expert and of any attorney's fees expended in pursuing the forensic examination.

However, because plaintiff did not show through testimony or other record evidence that the e-mails deleted from defendant's server were relevant, and the record was insufficient to establish that their destruction was the result of bad faith or gross negligence, no adverse inference charge was granted with respect to the allegedly missing e-mails from the company's server.

Proof Not Provided

In *Saperstein Agency Inc. v. Concord Brokerage of L.I., Ltd.*,³ plaintiff sought to prevent a defendant from disclosing or otherwise using its confidential and proprietary information.

Plaintiff claimed defendants had access to its customer lists, and gained access to its computers and Web sites, using a password without permission, and also allegedly downloaded from plaintiff's computer information constituting purported trade secrets.

The court declined to grant preliminary injunctive relief finding that plaintiff "has not provided documentary proof to support its allegation that Defendants improperly downloaded information from its computer."

Anonymous Bloggers

As a follow up to the article entitled "'Electronic' Defamation: Difficulties Identifying Source,"⁴ in *Cohen v. Google Inc.*,⁵ a special proceeding seeking pre-action disclosure, Google Inc., and its subsidiary, Blogger. Com, were directed to reveal the identity of an anonymous blogger, who allegedly posted defamatory blogs about petitioner.

Google objected to the application on the grounds that the relief requested was overbroad, vague and ambiguous, and it refused to provide petitioner with any of the information or documents she had requested without a court order.

Bare allegations of the misuse of ESI, standing alone, will be insufficient evidence to support an application for preliminary injunctive relief.

Indeed, because it has become so easy to allege the wrongful use of ESI, courts are requiring evidentiary support to justify the granting of injunctive relief on such basis.

The blogger appeared anonymously through counsel.

The court found that petitioner had sufficiently established the merits of her proposed cause of action for defamation and that the information sought was material and necessary in order to identify the potential defendant.

In granting petitioner's application directing the disclosure of the name of the anonymous blogger, the court rejected:

the Anonymous Blogger's argument that this court should find as a matter of law that Internet blogs serve as a modern day forum for conveying personal opinions, including invective and ranting, and that statements in this action when considered in that context, cannot be reasonably understood as factual assertions. To the contrary... "[i]n that the Internet provides a virtually unlimited, inexpensive, and almost immediate means of communication with tens, if not hundreds, of millions of people, the dangers of its misuse cannot be ignored. The protection of the right to communicate anonymously must be balanced against

the need to assure that those persons who choose to abuse the opportunities presented by this medium can be made to answer for such transgressions. Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights."⁶

Conclusion

Litigators must be mindful of their continuing obligation to ensure that appropriate "litigation holds" are imposed, that relevant ESI is preserved and that ESI is available for possible production to opposing counsel.

Clients need guidance on issues concerning ESI preservation, and New York decisional authority is requiring counsel to actively work with their clients' information technology departments to ensure that ESI is preserved and available for production.

Moreover, bare allegations of the misuse of ESI, standing alone, will be insufficient evidence to support an application for preliminary injunctive relief. Indeed, because it has become so easy to allege the wrongful use of ESI, courts are requiring evidentiary support to justify the granting of injunctive relief on such basis.

Finally, on the issue of blogging, as electronic means of communication become more and more widespread, bloggers should be aware that their right to free speech comes with the same responsibilities to others as does ordinary speech or the written word, and that the veil of anonymity conferred by the internet may disappear when a defamation claim is brought.

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1. See Mark A. Berman, "Counsel Must Take Active Role in Preserving, Retrieving ESI," NYLJ, Vol. 241, No. 104, June 2, 2009.

2. Index No. 602192/2003 (Sup. Ct. N.Y. Co., July 9, 2009).

3. Index No. 020877/2008 (Sup. Ct. Nassau Co., June 12, 2009).

4. See Mark A. Berman, NYLJ Vol. 240, No. 42, Aug. 28, 2008.

5. Index No. 100012/2009, 2009 WL 2883410 (Sup. Ct. N.Y. Co., Aug. 17, 2009).

6. Id. at *4 (quoting *In re. Subpoena Duces Tecum to America Online Inc.*, 2000 WL 1210372 (Va. Cir. Ct.), rev'd on other grounds, 261 Va 350, 542 S.E.2d 277 (Va. Sup. Ct. 2001)).

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Ganfer
& Shore, LLP

360 Lexington Avenue
New York, New York 10017
212.922.9250
mberman@ganfershore.com