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BENCH BOOK
FOR NEW YORK STATE JUDGES
PERTAINING TO THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION (“ESI”)

(August 2015 Edition)

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PREFACE

This Bench Book is the product of the New York State Unified Court System's E-Discovery Working Group. The Working Group serves as an on-going resource for the court system and supports its efforts at improving the management of electronic discovery in New York State courts. This Bench Book is a product of the cooperative effort of the members of the bench and bar comprising the Working Group, and in particular, its Education Sub-Committee.

This Bench Book does not purport to be a treatise or text book on the subject of electronically stored information ("ESI"). Rather, it is intended to serve as a ready reference for New York State judges to assist them in the management of cases involving the discovery of ESI, and to guide them in their research with respect to this ever-expanding subject.

This Bench Book draws from many sources and the expertise of the Working Group members. While the efforts of these individuals have been extensive, this Bench Book is by no means an exhaustive or definitive statement. Because the field of electronic discovery continues to grow at an exponential rate, this Bench Book will benefit from the recommendations, suggestions or criticisms to be submitted by members of the bench, all of which are welcome. Please submit them to ediscovery@nycourts.gov.

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INTRODUCTION

This Bench Book pertains to electronic discovery ("e-discovery") which deals with what is commonly referred to as "electronically stored information" or "ESI." This term was adopted in the Federal Rules of Civil Procedure ("FRCP") when they were amended in 2006 to implement rules pertaining directly to ESI.

The Civil Practice Law Rules ("CPLR") have not adopted the term "electronically stored information," but the Appellate Division appears to have done so.[1] ESI will therefore be the term used throughout this Bench Book to describe the type of information encompassed by the concept of "e-discovery."

ESI is commonplace in our personal lives and in the operation of businesses, public entities and private organizations. It takes but a moment of reflection to appreciate the enormous volume of information that is created, exchanged and stored electronically. For example, virtually every document in the modern-day world is created and stored electronically. Documents are typically transmitted by e-mail, as are millions of communications between or among individuals every day. This is not to mention the changes made to those documents when accessed, or the e-mail chains created through replies which incorporate the messages previously sent. Greater yet, are the instant or text messages, smartphone contents, Facebook pages, blogs, tweets, digital photographs, E-Z pass records, "cookies," cache files, etc. The ESI that may be sought in any particular lawsuit pending in New York State courts is perhaps unlimited, except by the imagination of the attorney seeking its production.

The courts understandably defer to the parties involved in each litigation to chart their own course and manage their discovery as they see fit. However, given the enormous availability of ESI, the potential for expensive preservation, retrieval and production costs, and the differences in experience of state courts and counsel in dealing with e-discovery, it is highly likely that the parties may not be able to manage and/or agree upon all issues involving ESI and e-discovery on their own. Instead, they will increasingly look to the courts for guidance, management and decisions when issues arise involving e-discovery. This Bench Book should provide a sufficient outline for the courts to begin to address these issues.

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[1] *Pegasus Aviation I, Inc. v Varig Logistics S.A.*, 118 AD3d 428 (1st Dept 2014); *Strong v City of New* York, 112 AD3d 15 (1st Dept 2013); *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 (1st Dept 2012); *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33 (1st Dept 2012); *Tener v Cremer*, 89 AD3d 75 (1st Dept 2011).

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WHAT IS ESI?

ESI is digital information stored in any medium from which it can be obtained, either directly, or if necessary, after translation by the responding party into a reasonably usable form. ESI includes, among other things, e-mail, electronic files such as word-processing documents, spreadsheets and PowerPoint presentations, databases and web pages, which may be stored on servers or media such as magnetic disks (*i.e.*, computer hard drives and floppy disks), optical disks (*i.e.*, DVDs and CDs), and flash memory (*i.e.*, "thumb" or "flash" drives). ESI differs from conventional paper information in at least the following ways:

A. The volume is vastly greater and ESI is typically located in multiple places. There may be different drafts of a single document, all of which are electronically stored, and such documents may be stored on company servers, computers, laptops, home computers, or even in the cloud. ESI also is routinely backed up on storage devices such that even if a file is permanently deleted from one source, it is possible that a copy of the file, or a portion thereof, still exists on another storage device.

B. ESI is dynamic in that computer systems automatically recycle and reuse memory space, altering potentially relevant information without any specific direction or even knowledge of the operator. Merely opening, moving or copying an electronic file may change information about that file.

C. ESI frequently contains hidden information such as metadata and embedded data. Metadata provides information about an electronic file, such as the date it was created, its author and when and by whom it was edited. Data also may be embedded in a particular document such as edits or comments, formulas in a spreadsheet or a link to a website, and may be unreadable unless the document is examined in its native format using the appropriate software program.

D. ESI also is often not deleted by merely hitting the "delete" button. This action does not typically dispose of the file, but rather, makes that space available to be overwritten by other information at a later date.[2] To the extent that the initial electronic file or parts of it have not been overwritten, it may still remain in existence and be potentially recoverable. The existence of cached files and temporary copies of ESI can make permanent and complete deletion of ESI less likely as well.

[2] *Tener v Cremer*, 89 AD3d 75, 79 (1st Dept 2011) ("ESI is difficult to destroy permanently. Deletion usually only makes the data more difficult to access.").

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STATE AND FEDERAL RULES REGARDING ELECTRONIC DISCOVERY

New York State courts have few rules and regulations governing electronic discovery and ESI per se. While CPLR § 3120 has generally been interpreted to encompass ESI, the courts have not, at this point, been provided with specific statutory or regulatory guidance for the preservation, retrieval and production of ESI during the disclosure process.

Uniform Rules Sections 202.12[b] and [c] contain specific provisions for consideration of issues pertaining to ESI at the preliminary conference, "[w]here a case is reasonably likely to include electronic discovery." In such cases, counsel must meet and confer prior to the preliminary conference with respect to matters involving ESI. Further, "[w]here the court deems appropriate," the method and scope of any electronic discovery may be established during the preliminary conference (Uniform Rules § 202.12[b]).

The rules for the Commercial Division (Uniform Rules § 202.70[g]), have a number of provisions governing ESI issues: Rule 1 requires that counsel who will appear at the preliminary conference be sufficiently versed in matters relating to their clients' technological systems or bring a client representative or outside expert who is knowledgeable; Rule 8(b) requires that counsel meet and confer prior to the preliminary conference with respect to matters involving ESI; Rule 9(d) sets forth parameters for electronic discovery in accelerated actions; Rule 11-b pertains to privilege logs, including electronic data; and Rule 11-c governs discovery of ESI from non-parties.

The CPLR and the Uniform Rules contain the more general provisions pertaining to disclosure. These have been applied by New York State courts to ESI and issues involving e-discovery. These issues typically arise under CPLR § 3101 with respect to the scope of disclosure, CPLR § 3103 pertaining to protective orders, CPLR § 3104 pertaining to the supervision of disclosure by the courts, CPLR § 3120 as to the form of production, CPLR § 3124 pertaining to authorizations and consents, and CPLR § 3126 for penalties for refusing to comply with an order or otherwise failing to disclose ESI. CPLR § 4548 provides that a privileged communication does not lose its privileged character solely because it was communicated by electronic means.

The Office of Court Administration, in conjunction with various committees, is in the process of proposing amendments to the CPLR pertaining to ESI and e-discovery.

The FRCP may provide guidance in this area. Effective December 1, 2006, the FRCP were amended in a variety of ways to address issues involving e-discovery and ESI. Under FRCP 16, scheduling orders may include provisions for the discovery of ESI (FRCP16(b)(3)(B)(iii)). FRCP 26(b) was amended to require disclosure of ESI, but excused a producing party from producing such ESI if the information was not reasonably accessible because of undue burden or cost (FRCP 26(b)(2)(B)). FRCP 26(b) also was amended to recognize the issue of inadvertent disclosure of ESI by affording parties a procedure for asserting a privilege for information after it was inadvertently disclosed (FRCP 26(b)(5)(B)). Rule 502 of the Federal Rules of Evidence ("FRE 502"), effective September 19, 2008, further provides that under certain circumstances, such inadvertent disclosure of privileged information does not constitute a waiver of the privilege (FRE 502(b)).

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FRCP 26(f) provides that conferences between the parties should address the preservation and production of ESI, as well as any claims of privilege (FRCP 26(f)(3)(C) and (D)). FRCP 33(d) includes ESI within its definition of "business records." FRCP 34(a)(1)(A) defines "electronically stored information," FRCP 34(b)(2)(D) prescribes the manner of objecting to a form of production of ESI and FRCP 34(b)(2)(E) provides the default form of production where the parties fail to agree and the court does not order one. FRCP 34(b)(2)(E)(ii) requires production of ESI in a reasonably useable form or as kept in the usual course of business. FRCP 45 was amended to allow subpoenas on non-parties demanding the production of ESI. Finally, FRCP 37 was amended to authorize sanctions for the failure to comply with an order to disclose ESI.

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PRESERVATION OF ESI

As a general matter, the court may become involved in determining the following three issues involving the preservation of ESI:

A. At what point does the duty to preserve attach?

B. Whether and when to order the preservation of ESI?

C. What is the scope of the duty to preserve, including the relevant custodians, time frames and data sources?

As there is no specific statutory guidance and no definitive ruling from the Court of Appeals, the New York courts have not taken a consistent approach as to when the duty to preserve ESI attaches. Ordinarily, however, a party must preserve evidence upon being placed upon notice: (1) that the evidence might be needed for future litigation; or (2) of pending litigation; or (3) that the circumstances of an accident may give rise to enough of an indication for defendants to preserve the physical evidence for a reasonable period of time.[3] The courts are not usually called upon to define the initiation of the duty to preserve until it is too late, *i.e.*, in retrospect, upon a motion for spoliation sanctions. It was in this context that the Appellate Division has held that "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."[4]

The question that is more likely to arise for the court early in the litigation, perhaps even pre-commencement, is when and whether the court should order preservation. The CPLR provides the unique opportunity to seek a preservation order pre-commencement. CPLR § 3102(c) authorizes pre-commencement discovery to aid in bringing an action or to preserve information. The rule is most often invoked to perpetuate testimony, such as when a key witness is *in extremis* or about to depart the state. However, there is no prohibition against the use of this mechanism to preserve ESI of a party or non-party.[5] With respect to disclosure to aid in bringing the action, the plaintiff must still establish that it has a cause of action and cannot use the results of such motion to determine whether it has one.

[3] *Mosley v Conte*, 2010 NY Slip Op 32424[U] (Sup Ct, New York County, Aug. 17, 2010); *Einstein v 357 LLC*, 2009 NY Slip Op 32784[U] (Sup Ct, New York County, Nov. 12, 2009).

[4] *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 41 (1st Dept 2012).

[5] *Matter of Pakter v New York City Dept. of Educ.*, 2010 NY Slip Op 32451[U] (Sup Ct, New York County, Aug. 20, 2010); *Matter of Cohen v Google, Inc.*, 25 Misc 3d 945 (Sup Ct, New York County, Aug. 17, 2009); *Public Relations Socy. of Am., Inc. v Road Runner High Speed Online*, 8 Misc 3d 820 (Sup Ct, New York County, May 27, 2005).

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Preservation of ESI also may be sought after the action is commenced, such as through a motion for an injunction,[6] or perhaps, under CPLR § 3103 for a protective order or under CPLR § 3104 for an order supervising disclosure.[7] While imprecise as to the issue of ESI and e-discovery, these mechanisms to require the preservation of ESI are available for the court's use, where necessary.

The critical question then becomes the scope of the duty to preserve ESI, including the terms of a preservation order if one is issued. On the one hand, the failure to preserve relevant ESI will hamper the party in prosecuting or defending its action. On the other hand, an expansive duty to preserve may impose significant expense and burden on the party subject to the duty. Additionally, movants seeking an overly-broad preservation order may be attempting to employ a strategic weapon to achieve an early settlement.

The courts have defined, in part, the scope of the duty to preserve by describing the efforts which should be undertaken to preserve relevant ESI. The Appellate Division has held that a "litigation hold" is "not limited to avoiding affirmative actions of destruction" and a party must "suspend a system's automatic deletion function and otherwise preserve emails."[8] The Appellate division further noted:

> [r]egardless of its nature, a hold must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee. The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over e-mails cease, and describe the consequences for failure to so preserve electronically stored evidence. In certain circumstances, like those here, where a party is a large company, it is insufficient, in implementing such a litigation hold, to vest total discretion in the employee to search and select what the employee deems relevant without the guidance and supervision of counsel.[9]

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[6] *Walsh v Frayler*, 26 Misc 3d 1237[A], 2010 NY Slip Op 50435[U] (Sup Ct, Suffolk County, Feb. 24, 2010); *JFA Inc. v Docman Corp.*, 2010 NY Slip Op 30369[U] (Sup Ct, New York County, Feb. 22, 2010).

[7] *House of Dreams, Inc. v Lord & Taylor*, 2004 NY Misc LEXIS 3040 (Sup Ct, New York County, March 15, 2004).

[8] *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 41 (1st Dept 2012).

[9] *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 41-42 (1st Dept 2012); *see also 915 Broadway Assoc. LLC v Paul, Hastings, Janofsky & Walker, LLP*, 34 Misc 3d 1229[A] (Sup Ct, New York County, Feb. 16, 2012) ("[a] party's mere circulation of a litigation hold is insufficient to meet its discovery obligations under New York law; a party must take affirmative steps to ensure that potentially relevant evidence is diligently identified and preserved.").

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With respect to preservation orders, judges are cautioned against entering a preservation order without more fully understanding the types of ESI that must be preserved, the format of their preservation, the costs to be imposed by such preservation and the extent to which such preservation will interfere with the ordinary course of the responding party's business operations.

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METHOD AND FORM OF PRODUCTION

While the general perception is that this subject arises only in complex commercial matters, this is becoming increasingly incorrect. As the bar becomes more adept at handling ESI and more knowledgeable about the types of information available through e-discovery, and as the courts continue to gain experience in handling these issues, the likelihood is that issues involving ESI and e-discovery will multiply. For example, demands for ESI are on the rise in matrimonial matters,[10] and will become commonplace in cases involving medical issues,[11] as the medical profession completes the process of converting to electronic medical records ("EMR"). The section on "Social Media" later in this book discusses the steady increase in the demands for access to social networking sites, particularly in personal injury cases and matrimonial and family matters. The availability of ESI and EMR also will necessarily increase the use of electronic evidence in motion practice and at trial. At a minimum, issues involving ESI and electronic discovery are not going away.

Absent an early application for a preservation order, the most likely time the court will first become involved with ESI and e-discovery is at the preliminary conference. During a preliminary conference at which e-discovery is discussed, or upon a motion to compel or for a protective order involving ESI, the method and form of production of the ESI may come to the forefront. ESI can be produced in a variety of forms or formats and each has its own distinctive advantages and disadvantages.[12] For example, ESI may be produced as a TIFF or PDF image, which is essentially a photograph of an electronic document. The images may or may not be produced with accompanying "load files" containing metadata fields that make the ESI searchable and more readily sortable. In the alternative, ESI may be produced in "native form," that is, in the form in which the information was originally created and is maintained in the ordinary course of operations.

Attorneys and the courts will need to be able to discuss the advantages and disadvantages of each form, as well as the burden and expense involved. The court will evaluate the available alternatives, as well as the benefits and drawbacks for the requesting and responding parties. Courts also will need to be cognizant of whether the information being

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[10] *Scaba v Scaba,* 99 AD3d 610 (1st Dept 2012); *Willis v Willis*, 79 AD3d 1029 (2d Dept 2010); *Schreiber v Schreiber*, 29 Misc 3d 171 (Sup Ct, New York County, June 25, 2010); *R.C. v B.W.*, 2008 NY Misc LEXIS 10783, 239 NYLJ 64 (Sup Ct, Kings County, Mar. 26, 2008); *Byrne v Byrne*, 168 Misc 2d 321 (Sup Ct, Kings County, Apr. 25, 1996).

[11] *Karam v Adirondack Neurological Specialists, P.C.,* 93 AD3d 1260 (4th Dept 2012); *Lamb v Maloney*, 46 AD3d 857 (2d Dept 2007); *DeRiggi v Kirschen*, 2010 NY Slip Op 33599[U] (Sup Ct, Nassau County, Dec. 17, 2010); *Karim v Natural Stone Indus., Inc.*, 19 Misc 3d 353 (Sup Ct, Queens County, Jan. 18, 2008).

[12] *Irwin v Onondaga County Resource Recovery Agency*, 72 AD3d 314 (4th Dept 2010); *150 Nassau Assocs. LLC v RC Dolner LLC*, 2011 NY Slip Op 30337[U] (Sup Ct, New York County, Feb. 14, 2011); *Blue Tree Hotel Investments (Canada) Ltd. v Starwood Hotels & Resorts Worldwide, Inc.*, C 604295-00 (Slip Op) (Sup Ct, New York County, July 29, 2003).

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produced is in a form usable and searchable by the requesting party and, if not, how that issue will be resolved and who will pay for it.[13] Finally, courts may be called upon to resolve disputes about whether metadata needs to be produced, and if so, which metadata fields are necessary to resolve particular substantive or authenticity issues, or to make the ESI useable by the requesting party.[14]

The complexity of the issues surrounding the preservation and production of ESI is intensified by the fact that software and operating systems are constantly in flux. Access to ESI frequently depends on the availability of the platform on which it was created. Moreover, backup media are typically not designed to ensure the easy or orderly retrieval of particular files.

In this context, it may be worthwhile to review FRCP 34, which was amended to provide a procedure for addressing the form of ESI. It permits the requesting party to designate the form in which the ESI is to be produced, and it requires the responding party to identify the form in which it intends to produce the information if the requesting party does not specify a form, or if the responding party objects to the form in which the information has been requested.

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[13] *Feldman v New York State Bridge Auth.*, 40 AD3d 1303 (3d Dept 2007); *Matter of Link*, 24 Misc 3d 768 (Sur Ct, Westchester County, Apr. 20, 2009); *New York Pub. Interest Research Group, Inc., v Cohen,* 188 Misc 2d 658 (Sup Ct, New York County, July 16, 2001).

[14] *Hinshaw & Culbertson, LLP v e-Smart Tech., Inc.*, 2012 NY Slip Op 30751[U] (Sup Ct, New York County, Mar. 26, 2012).

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ALLOCATION OF COSTS

The costs of preserving, retrieving and producing ESI in an appropriate format, particularly if the volume of ESI is great, are typically very high. For the past decade, the federal courts have frequently evaluated factors for determining how the costs will be allocated between the requesting and the responding parties. The New York courts also have issued a number of decisions on this subject.[15]

With respect to parties to the litigation, the Appellate Division has held that "it is the responding party that is to bear the costs of the searching for, retrieving and producing documents, including electronically stored information."[16] This holding has resolved, at least for the time being, the previous debate among the trial courts as to whether the requesting party or the producing party is presumptively required to pay ESI production costs.[17] In the absence of a decision from the Court of Appeals, or a contrary decision of a different department, this decision of the Appellate Division is controlling authority throughout New York.[18]

Irrespective of whether the Court of Appeals ultimately requires the requesting or the producing party to initially bear the cost of production, trial courts maintain wide discretion over how the costs of ESI production will be allocated. This discretion is exercised, as in any other case, under CPLR §§ 3103 and 3104. CPLR § 3103(a) specifically authorizes the court to prevent abuse and "at any time on its own initiative, or on the motion of any party or any other person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device." One of the factors in granting such an order is the expense to any person. CPLR § 3104 also authorizes the court to supervise disclosure or to appoint a referee to do so.

In cases involving large volumes of ESI and well-heeled parties desiring to litigate the cost-allocation issue, reference to the FRCP and federal decisions may be appropriate. FRCP 26(b)(2)(C) identifies the factors the court should consider in making determinations of proportionality and in cost allocation. Two major cases – *Rowe Entertainment, Inc. v William Morris Agency, Inc.*[19] and *Zubulake v UBS Warburg LLC*[20] – have introduced multi-factor tests

[15] *Tener v Cremer*, 89 AD3d 75 (1st Dept 2011) (declining to presumptively exempt inaccessible data from discovery and opting for a "cost/benefit analysis" having "the benefit of giving the court flexibility to determine literally whether the discovery is worth the cost and effort of retrieval"). The appendix of New York State court decisions accompanying this Bench Book is indexed by topic, including "costs."

[16] *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 62 (1st Dept 2012).

[17] *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 27 Misc 3d 1061 (Sup Ct, New York County, Jan. 14, 2010); *Lipco Elec. Corp. v ASG Consult. Corp.*, 4 Misc 3d 1019[A], 2004 NY Slip Op 50967[U] (Sup Ct, Nassau County, Aug. 18, 2004).

[18] *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 (2d Dept 1984).

[19] 205 FRD 421 (SDNY 2002).

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to determine when cost shifting is appropriate. *Rowe* adopted eight factors: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.

The *Zubulake III* case, on which FRCP 26(b)(2)(C) is based, identifies the following factors in descending order of importance: (1) the extent to which the 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. The Appellate Division has stated that *Zubulake III* "presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI."[21]

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[20] 217 FRD 309 (SDNY 2003) (this decision is commonly referred to as "*Zubulake III*").

[21] *U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 63 (1st Dept 2012).

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DISCOVERY FROM NON-PARTIES

Similar issues with respect to the form of production and the allocation of costs may arise when a subpoena is served upon a non-party for ESI.[22] Because non-parties are involved, the issue is not likely to arise during a preliminary conference unless the court affirmatively raises it. Courts should consider raising the issue of ESI in the possession of non-parties, particularly issues involving scope, burden and cost, whenever there is any suggestion that it might be sought. Addressing the issue at the preliminary conference with the parties might avert or at least focus future motion practice involving non-parties. At least considering the question of whether ESI will be sought from non-parties during the preliminary conference is likely to get the parties and the court thinking about whether additional time may be necessary for such non-party disclosure, whether there is a more efficient way to procure such production, and whether requests are appropriately limited in scope. In cases assigned to the Commercial Division involving non-parties, Rule 11-c directs parties and non-parties to Appendix A to the Commercial Division Rules, "Guidelines for Discovery of Electronically Stored Information ('ESI') from Nonparties" (Uniform Rules § 202.70[g]).

[22] *Young Woo & Assoc., LLC v Kim,* 115 AD3d 534 (1st Dept 2014) (affirming contempt order against non-party for failure to allow forensic investigation of electronic devices); *Tener v Cremer*, 89 AD3d 75 (1st Dept 2011) (specifically addressing whether a non-party must search for potentially inaccessible data); *Klein v Persaud*, 25 Misc 3d 1244[A], 2009 NY Slip Op 52582[U] (Sup Ct, Kings County, Dec. 21, 2009); *Finkelman v Klaus*, 17 Misc 3d 1138[A], 2007 NY Slip Op 52331[U] (Sup Ct, Nassau County, Nov. 28, 2007); *Blue Tree Hotel Investments (Canada) Ltd. v Starwood Hotels & Resorts Worldwide, Inc.*, C 604295-00 (Slip Op) (Sup Ct, New York County, July 29, 2003); *Carrick Realty Corp. v Flores,* 157 Misc 2d 868 (Civ Ct, New York County, Mar. 26, 1993).

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PROPER PROTECTION OF PRIVILEGES

The volume of ESI searched and produced in response to a discovery request can be enormous, and characteristics of certain types of ESI (*e.g.*, metadata, embedded data, e-mail threads and e-mail attachments) make it difficult to review for privilege and work product prior to production. Thus, the inadvertent disclosure of privileged or protected material during production is a substantial risk that persists even if expensive and time-consuming steps are taken to identify and segregate such privileged material.[23]

The courts are in a unique position to make neutral suggestions to assist the parties and the attorneys in protecting their privileged materials at a reasonable cost. One option is to suggest what is commonly referred to as a "quick peek" agreement, whereby the responding party provides requested material without a thorough review for privilege or work-product protection, but with the explicit understanding – enforced by court order – that its production does not waive any privilege or protection. Alternatively, under "clawback" agreements, the parties typically review the materials for privilege or work-product protection before it is produced, but agree to a procedure for the return of privileged or protected information that is inadvertently produced, within a reasonable time of its discovery, without waiver of any privileges or protections that may apply to it in the case at bar. In Rule 11-b (Uniform Rules § 202.70[g]), the Commercial Division has adopted a preference for categorical logging of privileged documents, as opposed to document-by-document logging, which may be a cost-effective option to be suggested in other cases.

By suggesting stipulated protective orders providing for such arrangements, the court protects the parties and the attorneys from making inadvertent errors which could penalize the parties strategically, and potentially cause an ethics or conflict issue with the attorneys.[24] Moreover, because the protection is mutual between or among the parties, such arrangements can ease the burden and cost of the electronic discovery process and begin to build a framework for a more efficient and cooperative production process.

Once the parties have fully identified the requested documents for which a privilege is asserted, the parties should be further encouraged to agree upon a methodology for submitting disputed documents to the court for an *in camera* review.[25] In such a situation, the parties might agree to submit the *in camera* review to a referee pursuant to CPLR § 3104.

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[23] *Scott v Beth Israel Med. Ctr, Inc.*, 17 Misc 3d 934 (Sup Ct, New York County, Oct. 17, 2007); *Galison v Greenberg*, 5 Misc 3d 1025[A], 2004 NY Slip Op 51538[U] (Sup Ct, New York County, Nov. 8, 2004).

[24] *Parnes v Parnes*, 80 AD3d 948 (3d Dept 2011); *Forward v Foschi*, 27 Misc 3d 1224[A], 2010 NY Slip Op 50876[U] (Sup Ct, Westchester County, May 18, 2010); *Current Med. Directions, LLC v Salomone*, 26 Misc 3d 1229[A], 2010 NY Slip Op 50315[U] (Sup Ct, New York County, Feb. 2, 2010).

[25] *AllianceBernstein L.P. v Atha*, 100 AD3d 499 (1st Dept 2012); *Beach v Touradji Capital Mgt., LP*, 99 AD3d 167 (1st Dept 2012).

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Agreements with respect to the methodology of submission of an *in camera* review to the court will also assist the court in giving the privilege assertions a more efficient and timely review. The court should not be stymied by an unreadable document, or by debates as to whether the document submitted for review has been otherwise unchanged during the discovery process.

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SPOLIATION / SANCTIONS

In the federal courts, there have been hundreds of decisions over the past decade involving motions for sanctions based on spoliation of ESI. In New York, the issue typically arises under CPLR § 3126. The statute applies where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." Pursuant to the statute, the court is authorized to "make such orders with regard to the failure or refusal as are just," and specifies a few possible options. Among the specified options are: (1) order that the issues to which the information is relevant shall be deemed resolved in accordance with the claims of the party obtaining the order; (2) issue a preclusion of evidence order; or (3) issue an order striking out pleadings or parts thereof, dismissing an action or entering a judgment by default. These are not the court's only options, as the court is authorized to make such orders "as are just."

New York courts are well-versed with respect to the implementation of these discovery sanctions and there are numerous New York decisions involving the spoliation of evidence generally.[26] While there are relatively few New York decisions with respect to the spoliation of ESI as compared to federal courts, the number of decisions is steadily increasing.

Nevertheless, the general standards applied by New York courts for the spoliation of evidence apply equally to ESI.[27] In addition to the options outlined above, as drawn from the statute, New York courts also have frequently evaluated whether a spoliation jury charge is appropriate and, if so, when it is best to design the phraseology of such a charge.

The key issue for New York courts when considering a spoliation sanction is the degree of willfulness with respect to the refusal or failure to disclose information which the court finds ought to have been disclosed.[28] The statute incorporates the word "willfully," but New York courts have not limited spoliation sanctions solely to situations where willfulness is evident. New York courts also have imposed spoliation sanctions where the failure to produce was negligent, as is frequently the case with respect to ESI.[29] It is not unusual for ESI to be inadvertently deleted or altered prior to commencement of litigation when such litigation is

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[26] *See e.g.*, *Metlife Auto & Home v Joe Basil Chevrolet, Inc.*, 1 NY3d 478 (2004).

[27] *Strong v City of New York*, 112 AD3d 15 (1st Dept 2013).

[28] *Hameroff and Sons, LLC v Plank, LLC,* 108 AD3d 908 (3d Dept 2013); *Suffolk P.E.T. Mgt., LLC v Anand,* 105 AD3d 462 (1st Dept 2013); *see e.g. Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 (2010); *American Bus. Training, Inc. v American Mgt. Assn.* (Sup Ct, New York County, Apr. 11, 2005, Index No. 603909/02), *affd* 50 AD3d 219 (1st Dept 2008), *lv denied* 10 NY3d 713 (2008); *Ingoglia v Barnes & Noble Coll. Booksellers, Inc.*, 48 AD3d 636 (2d Dept 2008); *Williams v New York City Tr. Auth.*, 26 Misc 3d 1207[A], 2010 NY Slip Op 50011[U] (Sup Ct, Kings County, Jan. 5, 2010).

[29] *Squitieri v City of New York*, 248 AD2d 201 (1st Dept 1998); *Kirkland v New York City Hous. Auth.*, 236 AD2d 170 (1st Dept 1997); *Einstein v 357 LLC*, 2009 NY Slip Op 32784[U] (Sup Ct, New York County, Nov. 12, 2009).

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anticipated, or even by parties or their attorneys once litigation is commenced. In those situations where the courts conclude that the sanctionable conduct was not willful, the courts generally refrain from imposing severe sanctions such as dismissal or a default judgment, and tend to focus on preclusion orders with respect to particular issues or a spoliation jury charge.[30] The courts also should consider the prejudice caused by the spoliation.[31] In essence, the less willful or prejudicial the conduct, the less severe the sanction.

[30] *Ahroner v Israel Discount Bank of N.Y.* (Sup Ct, New York County, Sept. 30, 2010, Index No. 602192/03); *Einstein v 357 LLC*, 2009 NY Slip Op 32784[U] (Sup Ct, New York County, Nov. 12, 2009); *Hunts Point Realty Corp. v Pacifico*, 16 Misc 3d 1122[A], 2007 NY Slip Op 51543[U] (Sup Ct, Nassau County, July 24, 2007).

[31] *Harry Weiss, Inc. v Moskowitz,* 106 AD3d 668 (1st Dept 2013); *Merrill v Elmira Hgts. Cent. School Dist.*, 77 AD3d 1165, 1167 (3d Dept 2010).

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SOCIAL MEDIA

Within the past few years, the courts have generated an increasing number of decisions involving requests for production seeking discovery of social media accounts such as Facebook, Myspace and Twitter.[32] The Appellate Division has applied the usual standards under the CPLR in deciding whether to allow such access, *i.e.*, whether the discovery will disclose relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims or defenses.[33] The Appellate Division also has required the establishment of a "factual predicate" showing the relevance of the information sought, and the courts, of course, prohibit "fishing expeditions" into social-networking accounts.[34] Parties should be encouraged to target their requests for social media information to particular time frames, subject matters, events and individuals.

In situations where the courts have granted access to the non-public portions of social-networking sites, parties generally have been directed to provide written authorizations.[35] Consent and/or authorization for access to deleted portions of such sites also has been directed, including to comply with the Stored Communications Act (18 USC § 2702[b][3]).[36] Courts have not been bound by the privacy settings established by the user of the social-networking site,[37] although courts have frequently required an *in camera* review.[38]

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[32] The appendix of New York State court decisions accompanying this Bench Book is indexed by topic, including "social media."

[33] *Patterson v Turner Constr.* Co., 88 AD3d 617 (1st Dept 2011); *Abrams v Pecile,* 83 AD3d 527 (1st Dept 2011).

[34] *Pecile v Titan Capital Group, LLC,* 113 AD3d 526 (1st Dept 2014); *Kregg v Maldonado,* 98 AD3d 1289 (4th Dept 2012); *McCann v Harleysville Ins. Co.*, 78 AD3d 1524 (4th Dept 2010); *see also Caraballo v City of New York*, 2011 NY Slip Op 30605[U] (Sup Ct, Richmond County, Mar. 4, 2011); *Romano v Steelcase, Inc.*, 30 Misc 3d 426 (Sup Ct, Suffolk County, Sept. 21, 2010); *Cohen v Google, Inc.*, 25 Misc 3d 945 (Sup Ct, New York County, Aug. 17, 2009).

[35] *Imanverdi v Popovici,* 109 AD3d 1179 (4th Dept 2013); *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 (1st Dept 2013); *Diana v Manfre* (Sup Ct, Nassau County, Jan. 24, 2012, Index No. 13713/2011); *Lawler v City of New York* (Sup Ct, Nassau County, Oct. 3, 2011, Index No. 8873/10).

[36] *Romano v Steelcase, Inc.*, 30 Misc 3d 426 (Sup Ct, Suffolk County, Sept. 21, 2010).

[37] *Patterson v Turner Construction* Co., 88 AD3d 617 (1st Dept 2011); *Loporcaro v City of New York*, 35 Misc 3d 1209[A], 2012 NY Slip Op 50617[U] (Sup Ct, Richmond County, April 9, 2012).

[38] *Richards v Hertz Corp.,* 100 AD3d 728 (2d Dept 2012); *Johnson v Ingalls*, 95 AD3d 1398 (3d Dept 2012); *Newman v Johnson v Johnson* (Sup Ct, New York County, Jan. 18, 2012, Index No. 104403/09); *O'Connor v Gin Taxi, Inc.* (Sup Ct, New York County, Oct. 14, 2011, Index No.

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ADMISSIBILITY OF ESI

The presumed end result of the discovery of ESI is that at least some of it will be offered into evidence on motion or at trial. During the course of discovery, the parties and the court should keep the trial in mind when they consider the relevancy or materiality of what is requested and the form of production. Moreover, ESI must be preserved and produced in a form, whether by the requesting party or the responding party, such that it can be used as evidence at trial. Typically, the parties will have their first opportunity to evaluate the usefulness of the form in which the ESI is produced during examinations before trial, where the information may be shown to witnesses. For example, in a case where there are questions concerning the authenticity of a document (*i.e.*, its authorship and/or whether the document has been altered), the parties will need to determine how to display the metadata or embedded data to the witness, and ultimately to the trier of fact.

The fundamental processes in determining the admissibility of ESI are no different than with written information. ESI must still be authentic and relevant, and should not contain information that is otherwise inadmissible. One federal district court case is frequently cited under the FRE as authority for evaluating the admissibility of ESI.[39]

New York courts should have no difficulty in treating ESI the same as written material when it comes to such issues as relevancy and hearsay.[40] However, issues may arise more frequently with respect to the authenticity of ESI, and whether it is in the same condition as it existed when the facts occurred, as opposed to when it was produced during discovery or offered into evidence at trial. For example, the court may be called upon to evaluate a situation where a party offers ESI improperly procured from a computer. Similarly, the court may be required to evaluate the admissibility of a document where it is undisputed that the metadata or embedded data has been altered since it was initially created. Evidence collected from smartphones, social-media sites, and SharePoint may present unique challenges because they are dynamic in nature and may be accessed by many people, and are therefore easily manipulated. The courts will need to harken back to their fundamental role as gatekeepers of the evidence at trial to determine whether there is a sufficient showing that the ESI offered is authentic.[41]

11092/07); *Sanocore v HSBC Securities* (Sup Ct, New York County, Aug. 16, 2011, Index No. 101947/2008).

[39] *Lorraine v Markel Am. Ins. Co.*, 241 FRD 534 (D Md 2007); Grimm, Zicardi and Major, *Back to the Future: Lorraine v Markel, American Insurance Co. and New Findings on the Admissibility of Electronically Stored Information*, 42 Akron L Rev 357 (2009).

[40] *Johnson v Ingalls*, 95 AD3d 1398 (3d Dept 2012). The appendix of New York State court decisions accompanying this Bench Book is indexed by topic, including "admissibility."

[41] A useful guide for the admissibility of ESI is *The Sedona Conference® Commentary on ESI Evidence and Admissibility* (Mar. 2008), *available at* https://thesedonaconference.org/publications.

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RESEARCH AND GUIDANCE

The amount of written guidance pertaining to e-discovery and ESI is expanding about as quickly as the number of court decisions being generated on the subject across the country. A quick reference for judges, and a document that served as a model for this Bench Book, is *Managing Discovery of Electronic Information: A Pocket Guide for Judges* (2d Ed), Rothstein, Hedges & Wiggins (Federal Judicial Center 2012).[42]

In 2012, the New York State Bar Association published a set of guidelines titled *Best Practices in E-Discovery in New York State and Federal Courts Version 2.0* (Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, Dec. 2012), that also may serve as a useful reference.

Various federal courts have developed guidance pertaining to the discovery of ESI. The Seventh Circuit Electronic Discovery Pilot Program, initiated in May 2009, has produced several very helpful reports setting forth various principles relating to the discovery of ESI. and other useful materials.[43] Among many others, the districts of Delaware, Kansas and Maryland have adopted guidelines or protocols for dealing with ESI and e-discovery issues.[44] The Commercial Division in Nassau County also has issued its own set of guidelines for the discovery of ESI.[45]

The Sedona Conference®, a nonprofit 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights, has issued numerous commentaries pertaining to e-discovery issues and is a treasure trove of useful information on the subject. The papers, which are available for free, online, provide neutral commentary on various subjects including principles of cooperation among counsel, best practices on document retention and production, and ESI evidence and admissibility, among many others.[46]

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[42] http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt2d_eb.pdf/$file/eldscpkt2d_eb.pdf.

[43] http://www.discoverypilot.com.

[44] Ad Hoc Committee for Electronic Discovery of the United States District Court for the District of Delaware, *Default Standard for Discovery of Electronic Documents*, http://www.fjc.gov/jet-wg/home.nsf/pdf/USDC_DE_CivDis.pdf/$File/USDC_DE_CivDis.pdf; U.S. District Court for the District of Kansas, *Guidelines for the Discovery of Electronically Stored Information [ESI]*, http://www.ksd.uscourts.gov/guidelines-for-esi/; *U.S. District Court for the District of Maryland, Suggested Protocol for Discovery of Electronically Stored Informati*on, http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf.

[45] http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf; *Tener v Cremer*, 89 AD3d 75 (1st Dept 2011) (favorably citing the "Nassau Guidelines").

[46] http://www.thesedonaconference.org/publications.

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Lastly, there are also several helpful commercial treatises, including *Arkfeld on Electronic Discovery and Evidence* (3d Ed.), Michael R. Arkfeld (Law Partner Publishing 2013); and *Electronic Discovery Law and Practice* (2d Ed.), Adam I. Cohen and David J. Lender, (Aspen Publishers 2011).

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CONCLUSION

Judges are encouraged to take a proactive interest in issues arising before them pertaining to ESI and e-discovery. They are in an excellent position to encourage the parties and their counsel to take seriously their obligations to discuss ESI and e-discovery at the preliminary conference. Judges can encourage parties to narrowly target requests for ESI and to make these requests as early as possible in the litigation. They may need to encourage or order tiered discovery and sampling to determine the relevance, need and cost of more expansive discovery. Judges need to help ensure that the cost of e-discovery remains proportional to what is at stake in the matter, that ESI is produced in a usable form, and to facilitate the implementation of cost-effective procedures to protect privileged information.

The age of ESI and e-discovery is here to stay. Issues involving ESI and e-discovery will only continue to multiply. Accordingly, active judicial management and awareness of ESI-related issues is essential.