APPENDIX OF CASES TO BENCH BOOK FOR NEW YORK STATE JUDGES PERTAINING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION ("ESI")

(AUGUST 2015 EDITION)

APPENDIX

(Please note that not all of the cases described below are footnoted in the Bench Book.)

NEW YORK COURT DECISIONS PERTAINING TO ESI AND ELECTRONIC DISCOVERY

150 Centreville, LLC v Lin Assoc. Architects, PC, 39 Misc 3d 513 (Sup Ct, Queens County 2013)

Judge(s): Ritholtz. The issue was "whether there should be any consequences to plaintiffs who commenced a litigation, but failed to preserve and safeguard the documents necessary to provide responses to defendants during discovery, and what ramifications and/or sanctions should flow from the failure." The Motion Court held that:

> the issue here is a party's gross negligence in not preserving essential records, papers, and documents, and repeated violations of court orders mandating discovery, accompanied by dilatory, wasteful motion practice. While this action is not a spoliation of evidence case per se, reference and citation to spoliation cases are, nevertheless, helpful, since courts have talked of a party placing a "litigation hold" on papers, records, documents, emails, and videotaped evidence the moment that litigation either has commenced or is contemplated.

The Motion Court stated that plaintiffs "should have secured their papers in a safe place and should certainly have done so at the first hint of an alleged problem with their former landlord. Most plaintiffs, in addition, in garden variety civil litigation, at the start of a lawsuit—and even before an action is filed—usually make a copy of all pertinent documents for their counsel."
Topic(s): Preservation, Litigation Hold.

150 Nassau Assocs. LLC v RC Dolner LLC, 2011 NY Slip Op 30337[U] (Sup Ct, New York County, Feb. 14, 2011)

Judge(s): Gische. Plaintiff sought to compel access to defendant's accounting records which are maintained in electronic form. In opposition to the motion, defendant maintained that there was no way to duplicate and provide in a raw, electronic form the information from its database. Rather, the database is only capable of generating reports, which have been produced to plaintiff. In denying the motion seeking information in its raw, electronic or "native" language form, the Court noted that since defendant has already produced the information in the same form it uses the information, *i.e.*, reports, and in the absence of anything other than a bald assertion that defendant maybe has something to hide, defendant should not have to provide the information in raw, electronic form "just so [plaintiff] can more easily reconcile the amounts."
Topic(s): Form of Production, Scope.

150 Nassau Assocs. LLC v RC Dolner LLC, 2012 NY Slip Op 5242 (1st Dept June 28, 2012)

Judge(s): Andrias, Friedman, Moskowitz, Freedman, Manzanet-Daniels. Plaintiff, in its reply on its own motion, sought to compel production of certain documents in their "native" file format. The Court denied the motion since defendant had already produced the information multiple times in various formats, the last of which was a searchable PDF format, and the only benefit of requiring reproduction would be plaintiff's convenience.
Topic(s): Form of Production.

In re 381 Search Warrants Directed to Facebook, Inc., 2014 NY Slip Op 06201 (1st Dept July 21, 2015)

Judge(s): Renwick. The Appellate Division held that "Facebook cannot litigate the constitutionality of the warrant pre-enforcement on its customers' behalf" as there is "no constitutional or statutory right to challenge an alleged defective warrant before it is executed." Supported by a 93-page affidavit, the Supreme Court issued 381 substantially identical digital search warrants for Facebook accounts that sought information in 24 separate categories, "essentially comprising every posting and action the 381 users identified had taken through Facebook." Each of the warrants contained a nondisclosure provision, which prevented Facebook from disclosing the warrants to the users. Upon being served with the warrants, Facebook contacted the District Attorney's Office and requested that it voluntarily withdraw them, or, alternatively, consent to vacate the nondisclosure provisions. The District Attorney's Office declined.

The Supreme Court had denied Facebook's motion to quash and upheld the warrants as issued, requiring Facebook to comply. The Supreme Court had ruled that Facebook could not assert the Fourth Amendment rights of its users and that Facebook had to wait until the warrants were executed and the searches conducted at which time the legality of the searches could be determined.

The Appellate Division noted that within the context of digital information, "a search occurs when information from or about a data is exposed to possible human observation, such as when it appears on a screen, rather than when it is copied by the hard drive or processed by the computer.'" (citation omitted) The Appellate Division further noted that

> when applied to information stored online, the Fourth Amendment's protections are potentially far weaker. In part, this is because computer records are stored in a technologically innovative form, raising the question whether they are sufficiently like other records to engender the "reasonable expectation of privacy" required for Fourth Amendment protection.

Topic(s): Fourth Amendment, Warrants, Stored Communications Act.

915 Broadway Assoc. LLC v Paul, Hastings, Janofsky & Walker, LLP, 34 Misc 3d 1229[A], 2012 NY Slip Op 50285[U] (Sup Ct, New York County, Feb. 16, 2012)

Judge(s): Fried. Dismissal of complaint on spoliation grounds granted, as well as the granting of attorneys' fees and costs incurred in making the motion. The Motion Court noted that:

> [g]iven the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct, courts will usually reject an argument that the deprived party cannot establish the relevance of the evidence.

The Motion Court further stated that:

> [a] party's mere circulation of a litigation hold is insufficient to meet its discovery obligations under New York law; rather, a party must take affirmative steps to ensure that potentially relevant evidence is diligently identified and preserved:
>
> A party's discovery obligations do not end with the implementation of a "litigation hold" -- to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least sources of relevant information) is discovered; (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

The Motion Court held that:

> [D]ismissal is the only remedy capable of addressing the prejudice imposed upon Paul Hastings as a result of 915 Broadway's conduct, as no other remedy can rectify the gaps in the evidentiary record resulting from 915 Broadway's own misconduct. If the amended complaint is not dismissed, Paul Hastings will have to defend itself against 915 Broadway's claims without the benefit of a full and complete record. Dismissal is warranted not only because 915 Broadway's intentional and reckless destruction of electronic evidence has been so widespread that it precludes Paul Hastings from fairly litigating its claims and defenses, but also because the destruction persisted months after Paul Hastings raised its concerns about 915 Broadway's preservation efforts, and the incompleteness of the evidentiary record in this case.

Topic(s): Spoliation, Sanctions.

Abizeid v Turner Const. Co. (Sup Ct, Nassau County, Sept. 5, 2012, McCormack, J., Index No. 23538/2010)

Judge(s): McCormack. In an action seeking damages for emotional distress and chronic pain as a result of a slip and fall, plaintiff claimed "I am constantly in pain, very, very depressed…. I don't want to do anything." Defendants asserted that before they served plaintiff with their notice to admit and demand for authorizations, they accessed the public portion of plaintiff's Facebook page and obtained several pictures of plaintiff on vacation, engaged in strenuous activities, such as off-road ATV riding, participating in a wedding as a bridesmaid and drinking a large cocktail in a restaurant. The Court noted that "[a]lthough it is clear…that many of the postings and pictures may…relate to the events which gave rise to the plaintiff's claims and the conditions from which she now suffers, her mere use of Facebook should not give rise to an online 'fishing expedition.'" The Court directed that to the extent defendants were able to identify plaintiff's presence on Facebook, and the images and comments "appear to contradict claims made by the plaintiff, those areas of the plaintiff's Facebook account should be accessible to the defendants." The Court ruled to "avoid overreaching" that it would review the contents of the Facebook page *in camera* and disclose "images and text that are relevant to the conditions the plaintiff has put in controversy."
Topic(s): Social Media, *In Camera* Review, Relevance.

Abrams v Pecile, 83 AD3d 527 (1st Dept 2011)

Judge(s): Tom, Mazzarelli, Acosta, Renwick, Freedman. In an action involving conversion and intentional infliction of emotional distress, the Appellate Division, in revering the Trial Court's decision, denied defendant's request for access to plaintiff's social networking accounts, as "no showing has been made that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims."
Topic(s): Social Media.

Ackerman v Lori Realty (Sup Ct, New York County, Nov. 21, 2011, Index No. 107982/2009)

Judge(s): Wright. Disclosure of Facebook page denied as the records were "palpably irrelevant and [defendant had] not made any contrary argument."
Topic(s): Social Media, Relevance.

Acosta v MTA Bus Co. (Sup Ct, Queens County, June 4, 2013, McDonald, J., Index No. 1355/2012)

Judge(s): McDonald. Defendant MTA failed to produce a certain videotape, even though its report of an accident indicated that "investigation of security cameras in area showed incident never occurred." Each MTA employee swore that they had not viewed such tape. The Court noted that while "it is clear that a party may not be held responsible for the spoliation of evidence that it never actually possessed or controlled and then destroyed," it is "inconceivable" that the MTA had not timely raised such issue. Nevertheless, as a prophylactic measure, the Court, while denying the motion to strike

defendant's pleading, held that the MTA shall be "barred from making any reference to, or offering into evidence at trial, any purported surveillance tape(s) showing, or failing to show, the alleged incident in question, unless said surveillance tapes are provided to plaintiff's counsel within thirty (30) days."
Topic(s): Sanctions, Spoliation, Preclusion, Videotape.

Advanced Global Tech., LLC v Sirius Satellite Radio, Inc., 44 AD3d 317, 318 (1st Dept 2007)

Judge(s): Andrias, Buckley, Catterson, Malone, Kavanagh. The Trial Court erred when it relied upon an "e-mail" "that was not otherwise admissible, and thus [it] cannot serve as documentary evidence which conclusively establishes a defense."
Topic(s): Admissibility.

Advanstar Comm. Inc. v Pollard, 2014 NY Slip Op 32398[U] (Sup Ct, New York County, Sept. 10, 2014)

Judge(s): Oing. Employer remotely "wiped" the entire contents of the employee's personal iPhone from which the employee had been able to send and receive emails from his employer's email account and communicate with business contacts. As a result, the employee claimed that he "lost his personal and business contacts, personal and business notes, text messages, instant-messaging messages, voice mails, several hundred photographs of his family and friends, personal journals, videos, and music." The employee moved for partial summary judgment on counterclaims alleging trespass to chattel, violation of the Stored Communications Act and for conversion predicated upon the loss of his personal information and data from his personal iPhone. The Motion Court ruled that "[b]ased on the lack of any inspection of [defendant's] iPhone or any meaningful account of what exactly [the employee] lost when his iPhone was allegedly remotely wiped clean, a factual issue exists as to what information, if any, [the employee] lost."

Summary judgment was granted in favor of the employer on the Stored Communication Act claim as the Motion Court found that cell phones are not a "facility through which and electronic communication service is provided." The court held that data, including emails, text messages and pictures stored on a hard drive or cell phone, does not fall within the definition of "in electronic storage" as required under the Stored Communication Act. The Motion Court specifically noted that the employee did not allege that the employer "accessed the information or data on his iPhone that he had not yet read or received. Rather, [the employee] is claiming that the [employer] conducted a remote sweep of his cell phone, thus wiping out information and data he had stored on his phone."
Topic(s): Conversion, Stored Communications Act.

Ahroner v Israel Discount Bank of N.Y., 2009 NY Slip Op 31526[U] (Sup Ct, New York County, July 9, 2009), *affd* 79 AD3d 481 (1st Dept 2010)

Judge(s): Tom, Andrias, Sweeny, DeGrasse, Roman. In an employment discrimination case, the hard drive of one of the employees of defendant was wiped clean and not

imaged, despite the presence of a litigation hold. The Court applied the three-part test from *Zubulake v. UBS* and granted spoliation sanctions to the extent that the plaintiff would be entitled to an adverse inference instruction at trial with respect to certain e-mails and a missing documents charge. The Court further directed the defendants to reimburse the plaintiff's forensic expert for certain costs incurred in the inspection of a particular hard drive. The Court also awarded the plaintiff reasonable attorneys' fees expended in pursuing the forensic examination of the hard drive and struck two affirmative defenses. This decision was affirmed by the Appellate Division, which found that the Trial Court had properly exercised its discretion in limiting its sanction against the defendants to an adverse inference charge permitting the jury to infer that any e-mails would not support defendants' defense or contradict plaintiff's claims, not that the e-mails would support plaintiff's claims.
Topic(s): Sanctions, Spoliation.

Ahroner v Israel Discount Bank of N.Y. (Sup Ct, New York County, Sept. 30, 2010, Index No. 602192/03)

Judge(s): Madden. The Court, in denying renewal, indicated that United States District Judge Shira Scheidlin of the Southern District of New York described three types of adverse inference instructions, the harshness of which should be based on "the nature of the spoliating party's conduct-the more egregious the conduct the more harsh the instruction." *Pension Comm. of Univ. of Montreal Pension Plan v Banc of Am. Sec., LLC*, 685 F Supp 2d 456, 470 (SD NY 2010). The Trial Court noted that Judge Scheidlin wrote that:

> In the most harsh form, when a spoliating party acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory presumption, however, is considered to be rebuttable. The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating parties evidence must be considered by the jury, which must decide whether to draw an adverse inference against the spoliating party.
>
> The Court noted it had imposed an appropriate sanction by directing that the following adverse be given at trial: "'the emails on the hard drive would not support defendants' defense that Ahroner was terminated as part of an overall plan to reorganize and help the Bank remain profitable and because his position was being eliminated, and would not contradict evidence introduced by Ahroner that he was terminated as a result of discrimination based on age and religion."(original decision, at 22). The Court indicated that such charge is fashioned in accordance with CPLR 3126(a) and is consistent with the charges contained in New York Pattern Jury Instructions. "Notably, neither the PJI charges nor the original decision precludes the defendants from presenting evidence that the emails

> on [the] hard drive were not relevant to Abroner's claims. Thus, the original decision is not at odds with the *Pension* decision's clarification that the spoliating party should have an opportunity to rebut the inference created by the bad faith or grossly negligent destruction of evidence."

The Court next noted that, "while the *Pension* decision held that under certain circumstances, the presumption of relevance and prejudice can be rebutted by the spoliating party as a matter of law, this court finds that a jury should determine the issue in the instant case, particularly given the circumstances involved, which include the wiping clean of a hard drive that the Bank specifically agreed to preserve and to have examined by a forensic expert, and defendants' reliance on their own self-serving testimony as to the relevance of the emails at issue."
Topic(s): Sanctions, Spoliation.

AJ Holdings Group, LLC v IP Holdings, LLC, 2015 NY Slip Op 04943 (1st Dept June 11, 2015)

Judge(s): Tom, Renwick, Andrias and Manzanet-Daniels. Appellate Division reversed the grant of spoliation sanctions even though it found that "[p]laintiff's failure to ensure that its principals, who were all involved in the instant transactions, preserved their emails on various accounts used by them, and its failure to implement any uniform or centralized plan to preserve data or even the various devices used by the 'key players' in the transaction, demonstrated gross negligence with regard to the deletion of the emails." The Appellate Division held that, while "gross negligence gave rise to a rebuttable presumption that the spoliated documents were relevant," plaintiff "sufficiently rebutted that presumption by demonstrating that the defenses available to defendants all necessarily turned on communications to or with them, not plaintiff's [deleted] internal communications." The Appellate Division noted that since "defendants can have only relied on communications they received from plaintiff to establish [the subject] defense," then the deleted internal emails of plaintiff would be irrelevant.
Topic(s): Spoliation, Gross Negligence, Rebuttable Presumption, Relevance, Emails.

AJ Holdings Group LLC v IP Holdings, LLC (Sup Ct, New York County, Sept. 19, 2014, Index No. 600530/2009)

Judge(s): Scarpulla. Adopting from *Zubulake* the concept of "key players" who are "likely" to possess relevant information, the motion court found certain individuals fell into such category and therefore had an obligation to "preserve their email relevant to a potential lawsuit during the relevant time frame." The Motion Court found that such individuals permitted the destruction of relevant emails with a "culpable state of mind" by "taking no steps during the relevant time frame to implement a litigation hold or to collect or preserve their emails from automatic deletion by the servers, despite having received repeated warnings from counsel" and that there further had not been any preservation of emails from the AOL accounts maintained by plaintiff. Although a verbal litigation hold had been discussed, it had never been implemented. Plaintiff's IT manager had not been informed of the litigation until the day before his deposition and he had not kept records of the location of the computers used by the "key players" during

relevant time period. A forensic examination revealed that plaintiff had no backups of emails and that the key custodians made no adjustment to their "routine" deletion of emails after litigation was anticipated or after their first meeting with counsel. Although the "key players" were sophisticated, frequent users of emails, they preserved "merely a fraction" of emails sent and received. In sum, the "key players" were found grossly negligent in failing to implement a litigation hold" and, as such, the Motion Court held that the relevance of the destroyed emails would be "presumed." The Motion Court ordered there to be an adverse inference both on summary judgment and at trial that plaintiff failed to preserve relevant emails, and that the missing emails would have favored defendants. In addition, the Motion Court ordered plaintiff to pay for the cost defendants' forensic examination and reasonable attorneys' fees for having to twice moving for spoliation sanctions.

Topic(s): Spoliation, Emails, Litigation Hold, Custodians, Forensic Examination, Adverse Inference, Attorneys' Fees.

Alberta Ltd. v Fossil Indus., 2014 NY Slip Op 32506[U] (Sup Ct, Suffolk County, Sept. 8, 2014)

Judge(s): Whelan. Motion Court directed, that e-mails be provided in their native electronic format, together with their associated meta-data, which the defendant failed to furnish." Defendant's president claimed that it used a specific software that "bundles" emails into a "contacts" file upon sending, and then transfers the emails from a particular contact into a "note field," and that this is "native format" and that "metadata is not preserved in this format." The Motion Court found defendant's responses "inadequate under the circumstances" and that "such inadequacy warrant[ed] the drawing of an inference of willful conduct on the part of the defendant which frustrated the schedule of discovery agreed to by counsel and fixed in an order of the court." Accordingly, the Motion Court ordered that "the answer served by the defendant shall be dismissed unless it furnishes the e-mails in the format agreed to and full and complete responses to the discovery demands of the plaintiff."

Topic(s): Metadata, Spoliation, Adverse Inference, Emails.

Aldrich v Northern Leasing Sys., Inc., 2012 NY Slip Op 32194[U] (Sup Ct, New York County 2012)

Judge(s): Shulman. In a putative class action, defendants sought to limit the scope of e-mails to be produced to those relating to the four named plaintiffs or to require plaintiffs to pay all costs related to producing the requested e-mails. The parties agreed to use the same protocol for the e-mail production that had been previously utilized in a related Federal Court action as well as the same scope of the e-mail search. The only unresolved issue was which party would bear the ESI production costs. Defendant had submitted two written estimates of $61,943 and $104,641, exclusive of attorney review time. Defendants contended that plaintiffs' discovery is irrelevant to the four named plaintiffs' claims, and the cost of the production would far exceed the total amount of the damages these plaintiffs sought to recover. Plaintiffs indicated that the e-mails would not be needed in connection with their motion for class certification, but were material to defendants' liability for willful violations of the Fair Credit Reporting Act and its New York counterpart. The Court denied class certification and various counts of the

complaint, including those alleging willful and/or intentional violations of statute, and thus noted that many of the e-mails sought would therefore be irrelevant. Accordingly, with only the individual plaintiffs' claims remaining in the case, the court found that a comparison of the cost of production with the amount in controversy does not warrant imposing this expense upon defendants at this time.
Topic(s): Relevance, Costs, Class Action.

Alevy v Facebook (Sup Ct, NY County, Jan. 06, 2012, Mills, J., Index No. 114471/2011)

Judge(s): Mills. Facebook agreed to provide "reasonably available basic subscriber information it may have associated with the creator of the Facebook Group 'I Hate Steven Alevy.'" Facebook agreed to provide notice to the affected user, who was given twenty days to file an objection or motion in opposition to the petition or for a protective order. The Motion Court noted that absent any such filing, under the stipulated order, Facebook was to conduct its "standard query for basic subscriber information, including for records of logins and logouts. This basic information, to the extent it was provided by the user to Facebook, may include the current Facebook account status; any available payment information; e-mail address; available IP address(es); registration date; user-provided names; and any user-designated vanity URL."
Topic(s): Social Media, Pre-Action Discovery.

Alfano v LC Main, LLC, 2013 NY Slip Op 30519[U] (Sup Ct, Westchester County 2013)

Judge(s): Connolly. Metadata associated with a digital photograph established that it had not been taken at the time of the event, and thus was not probative of the condition of the scene at the time of the accident. Defendants submitted an affidavit from a forensic computer examiner who performed a forensic analysis of the metadata associated with plaintiffs' photographs and, as a result, concluded that plaintiffs' photographs were taken 12 days after the snowstorm, and therefore did "not accurately depict the scene of the accident as it appeared at the time of the accident, as plaintiff claims."
Topic(s): Metadata, Forensic Review, Relevance, Photograph.

AllianceBernstein L.P. v Atha, 100 AD3d 499 [1st Dept 2012]

Judge(s): Friedman, Sweeny, Moskowitz, Freedman and Roman. The Appellate Division held that the Trial Court's order directing defendant to turn over his iPhone was beyond the scope of plaintiff's request, which was for the "iPhone's call logs from the date he left plaintiff's employ." The Appellate Division found the order was "too broad for the needs of this case" holding:

> ordering production of defendant's iPhone, which has built-in applications and Internet access, is tantamount to ordering the production of his computer. The iPhone would disclose irrelevant information that might include privileged communications or confidential information. Accordingly, the iPhone and a record of the device's contents shall be delivered to the court for an in camera review to determine what if any information contained on

the iPhone is responsive to plaintiff's discovery request. In camera review will ensure that only relevant, non-privileged information will be disclosed.

Topic(s): Smart Phones, Relevance, In Camera Review.

American Bus. Training, Inc. v American Mgt. Assn. (Sup Ct, New York County, Apr. 11, 2005, Index No. 603909/02), *affd* 50 AD3d 219, 225 (1st Dept 2008), *lv denied* 10 NY3d 713 (2008)

Judge(s): Ramos (Supreme Court); Saxe (Appellate Division). The defendant, among other things, was alleged to have been on notice of the subject dispute and then failed to appropriately preserve the physical computer of a former critical employee, but instead created a compact disk ("CD") containing the computer's contents and produced such CD. The Court, apparently acknowledging that negligent spoliation took place, stated that "while there is evidence that defendant and/or its counsel took an irresponsible attitude to complying with discovery obligations, plaintiff has failed to establish that defendant engaged in willful or contumacious behavior, or that plaintiff has suffered extreme prejudice so that the harsh remedy of striking defendant's answer is required as a matter of fundamental fairness." "Where spoliation does not result in prejudice, it will be disregarded." The Appellate Division held that that the record supported the Motion Court's finding that plaintiff failed to demonstrate either prejudice to itself or willful or contumacious behavior on defendant's part with respect to discovery.

Topic(s): Spoliation.

American Express Centurion Bank v Badalamenti, 30 Misc 3d 1201[A], 2010 NY Slip Op 52238[U] (Nassau Dist Ct, Dec. 21, 2010)

Judge(s): Ciaffa. In determining whether the custodian of records' affidavit laid a proper evidentiary foundation for summary judgment, the Court reviewed, among other statutes, CPLR Rule 4518 (the Business Record Rule) and CPLR Rule 4539(b), as well as State Technology Law § 306. The Court found plaintiff's affidavit insufficient where, while it stated that the copies generated in support of the motion were "exact duplicates of the documents delivered to defendant," it failed to establish "when, how or by whom" the electronically-stored documents were created, nor did the affidavit set forth whether the record-keeping system permits "additions, deletions or changes without leaving a record" of them, and how plaintiff prevents "tampering or degradation" of the reproduced records. As such, the affidavit was insufficient, as it did not offer "personal knowledge of the care and maintenance" of plaintiff's electronic records.

Topic(s): Admissibility.

Aniello v McKenna (Sup Ct, Nassau County, Mar. 13, 2002, Index No. 705/01)

Judge(s): Galasso. In an unpublished decision, the Trial Court granted plaintiff's motion for summary judgment and deemed admitted, pursuant to plaintiff's notice to admit, defendant's Internet screen name, that a particular "conversation" over the Internet had taken place, and that a transcript of such "instant message" "conversation" was true and accurate.

Topic(s): Admissibility.

Art & Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436 (1st Dept 2014)

Judge(s): Moskowitz, Richter, Manzanet-Daniels, Clark, and Kapnick. "Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1)," but "the emails, when read in their entirety, do not conclusively refute plaintiffs' allegations."
Topic(s): Emails, Documentary Evidence.

Ashley MRI Mgt. Corp. v Perkes, 2010 NY Slip Op 30248[U] (Sup Ct, Nassau County, Jan. 26, 2010)

Judge(s): Driscoll. In a dispute pertaining to agreements related to a MRI facility on Long Island, Plaintiff's counsel asserted that the Court should strike defendants' answer because the defendants had failed to produce hard drives from their computers. The Court distinguished the situation from that in *Einstein v. 357, LLC* and declined to strike the answer in part because the Court had not previously issued directions or admonitions to one or more of the parties. Plaintiff was nevertheless given leave to argue at trial "as to any adverse inferences to be drawn from Defendants' conduct, if the testimony establishes that Defendants have willfully failed to comply with their discovery obligations." The Court declined to impose sanctions on plaintiff's counsel, concluding that there were factual disputes regarding the extent to which the defendants had complied with their discovery obligations and therefore that the motion to strike the answer was not frivolous.
Topic(s): Sanctions.

Austin Blvd. Rest. Corp. v Iacono, 2010 NY Slip Op 31558[U] (Sup Ct, Nassau County, June 10, 2010)

Judge(s): Warshawsky. This action involved the failure of two franchise restaurants and the subsequent lawsuit regarding the sale of the alleged fraudulent inducement leading to the sale. Plaintiffs argued that they were precluded from proving their case because defendant discarded or deleted documents and computer records. The Court noted that this was not a situation where a litigation hold was in place or where the defendant should have known that there was a need to preserve these records. The Court did note that the acts were of "circumstantial value." The Court also noted that the wiping of the MICROS system (a system used to record, among other things, sales data for the restaurants) was a common thing to do, but the cleaning of the hard drive "beyond recovery" was unusual. The Court again found that it could not draw a negative inference from pre-litigation acts, but that it was also "of circumstantial value of fraud." Conversely, the Court refused to hold that Plaintiffs' failure to uncover this deleted information during their due diligence was evidence of inadequate due diligence as Plaintiffs could not have known of the need to drill down for this level of information.
Topic(s): Preservation.

Baidoo v Blood-Dzraku, 5 NYS 3d 709, 2015 NY Slip Op 20596 (Sup Ct, New York County, 2015)

Judge(s): Cooper. Motion Court concluded that under the circumstances "service by Facebook, albeit novel and non-traditional, is the form of service that most comports with the constitutional standards of due process." To effectuate the requested service, the Motion Court ordered that, because litigants cannot serve each other, plaintiff's counsel shall log into plaintiff's Facebook account and message the husband by first identifying himself, and then including a web address identifying where the summons could be viewed or attaching an image of the summons. The Motion Court stated that such transmittal must be performed once a week for three consecutive weeks, and that plaintiff and her attorney are to call and text the husband informing him that the summons had been sent to him via Facebook.
Topic(s): Social Media, Service of Process.

Ball v State, 101 Misc 2d 554 (Ct Cl 1979)

Judge(s): Moriarty. Claimants sought access to information on a computer tape owned by the State containing a five-year accident history of a highway intersection. The Court held that the information is recoverable and that the State must produce a printout of the computer information for inspection and copying by the claimants. The claimants were required to pay the cost of retrieval of the computer information.
Topic(s): Costs.

Bank of Am., N.A. v Friedman Furs & Fashion, 38 Misc 3d 1201[A], 2012 NY Slip Op 52306[U] (Sup Ct, Kings County 2012)

Judge Schmidt. The Court denied plaintiff's motion for summary judgment under a line of credit, where, among other grounds: (i) "there was no indication that the [loan history report upon which plaintiff was relying] was made in the regular course of business," since the report was not generated until after the action was commenced, and thus is "not a record of the transactions…as they occurred, but is instead a summary prepared for the purpose of this litigation"; and (ii) the loan history report was "not self-explanatory, since the entries are confusing" and the accompanying affidavit was not from an individual with "'personal knowledge of the care and maintenance' of plaintiff's electronic business records," and therefore plaintiff was unable to satisfy its burden, under State Technology Law 306 and CPLR 4539(b), of laying a proper foundation for submitting the subject "reproductions."
Topic(s): Authentication.

Bardy v Staples, Inc. (Sup Ct, Queens County, Dec. 17, 2012, Elliot, J., Index No. 0214/2011)

Judge(s): Elliot. Defendant sought to strike plaintiff's complaint for failure to produce photographs and a video re-enactment of the accident recorded on a cellphone. Plaintiff testified that he took the photographs and video in the event he chose to later sue for his injuries. Plaintiff testified that the cellphone became damaged and contents were not preserved, but that, as a "layman," he did not understand the consequences of his actions

on the litigation. The Court noted that, while defendant demonstrated that the cell phone was disposed of, at least, negligently, and that plaintiff thought it might later be needed for litigation purposes, defendant did not establish that it was "prejudicially bereft" of a means of defending the action simply by being deprived of the opportunity to view the video. The Court found that defendant offered no evidence to support its position that plaintiff sought to "hide" evidence from defendant. The Court, exercising its discretion and "given the circumstances of the case," held that an adverse inference charge may be appropriate, but reserved the matter to the Trial Judge who would be in a "better position to determine whether it is warranted after hearing the evidence as well as the testimony of the witnesses."

Topic(s): Sanctions, Spoliation, Adverse Inference, Photograph, Video.

Baron v Suissa, 44 Misc 3d 1229[A], 2014 Slip Op 51379[U] (Sup Ct, Suffolk County, 2014)

Judge(s): Mayer. "Generally, printed materials such as letters and e-mails are not considered 'undeniable' or out-of-court transactions which are equivalent to documentary evidence. . . ."

Topic(s): Emails, Documentary Evidence.

Beach v Touradji Capital Mgt., LP, 99 AD3d 167 (1st Dept 2012)

Judge(s): Abdus-Salaam. After a special referee denied defendants' motion to have plaintiff's computers forensically examined, plaintiff's counsel arranged for a forensic analyst to review his client's computers. The forensic examination identified additional e-mails, which plaintiff thereafter produced, and the special referee then, in lieu of granting defendants' motion seeking the turnover of plaintiff's computers for their own forensic examination, ordered the deposition of plaintiff's forensic analyst. The forensic analyst testified that he had prepared a written report, and reviewed it prior to his deposition. As a result, defendants sought to compel its production on the grounds that it was not privileged and, even if it was, the privilege was waived when the analyst testified that he used the report to refresh his recollection. The Appellate Division ruled that the "only portion of the analyst's reports that could be attorney work product would be impressions, directions, etc., of counsel" and held that the Motion Court should have conducted an *in camera* review to ascertain whether any portion of the report is protected attorney work product. The Appellate Division held that the:

> information in the reports as to how the search was conducted, what was found, what was deleted, when it was deleted, etc., is material prepared for litigation, and defendants have demonstrated a substantial need for the reports and are unable to obtain the information by any other means. Additionally, the conditional privilege that attaches to material prepared for litigation is waived when used by a witness to refresh a recollection prior to testimony. To the extent that any portion of the reports prepared by the forensic analyst is attorney work product, the privilege protects the reports notwithstanding that the analyst reviewed the reports prior to his deposition.

Topic(s): Forensic Review, *In Camera* Review, Privilege.

Matter of Benincaso, 2012 NY Slip Op 30015[U] (Sur Ct, Nassau County 2012)

Judge(s): McCarty III. The Court denied petitioner's motion seeking the "cloning" of certain computer hard drives as "premature" where the petitioner, as of such date, had not reviewed the ESI already produced and "cloned," and therefore could not demonstrate that the information provided was "incomplete." Nevertheless, the Court ordered that respondents refrain from removing or deleting any data contained within the subject computers. The Court further concluded that the "cloned" records could not be accessed without purchasing a certain software license. In so finding, the Court found that the CPLR provides that the party seeking discovery "should incur the costs incurred in the production of discovery material."
Topic(s): Preservation, Cloning, Costs.

Bianco v North Fork Bancorporation, 2012 NY Slip Op 32611[U] (Sup Ct, New York County 2012)

Judge(s): Ling-Cohan. Based upon "plaintiff's deposition testimony, as well as his broad claims as to the alleged impact of the subject accident to his life style and alleged loss of enjoyment of life claim," the Court ordered the production of "plaintiffs Facebook content for *in camera review*, to be supervised by a Special Referee." The Court further noted that "[t]o the extent possible, such documentary discovery shall be "Bates-stamped" (or the equivalent), so that each document will be easily identified by number, for easy reference."
Topic(s): Social Media, *In Camera* Review, Form of Production.

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)

Judge(s): Ramos: In this case, the plaintiff hotel owners subpoenaed non-party Arthur Anderson who had provided audit services at the request of the managing agent, defendant, Starwood Hotels & Resorts Worldwide, Inc. The Court agreed with the hotel owners that ". . . Anderson has done nothing to demonstrate just how time consuming and expensive" it would have been to retrieve the ESI requested. Even though the non-party objected to producing ESI based on the expense, the Court, citing *Zubulake*, required the non-party to produce "readily accessible documents such as 'active, on-line data'" within ten days, and further required it produce within thirty days an affidavit "outlining the steps that must be taken to comply with Blue Tree's subpoena, including the format in which the data is stored and projected costs and time and retrieval."
Topic(s): Costs.

Bohrer v International Banknote Co., 150 AD2d 196 (1st Dept 1989)

Judge(s): Murphy, Milonas, Kassal, Wallach and Rubin. Petitioner was a shareholder in respondent corporation and sought shareholder records held on computer tapes for use in soliciting proxies. The Court ordered the respondent to furnish petitioner with the computer tapes and computer processing data necessary to make use of the tapes and printouts of the tapes, with the petitioner bearing respondent's expense in providing the materials.

Topic(s): Costs.

Boress v 200 Park L.P. (Sup Ct, New York County, Oct. 29, 2013, Feinberg, Special Ref., Index No. 113804/2011)

Special Referee: Feinberg. Special referee was referred an *in camera* review of "plaintiff's Facebook page" for a "determination of what materials on that page are discoverable." The Special Referee ordered:

> Counsel for all parties appeared . . . [and p]laintiff's counsel used plaintiff's user ID and password to access Facebook on a court-issued laptop computer and connected to the Internet via the publicly-available wireless system. At my direction, counsel reviewed plaintiff's page, noting on a chart that I had provided them which portions of the page they could stipulate to and which, if any, required a ruling. Counsel noted such material on the chart (enclosed herewith) and at the end of the review, stipulated to everything that will be a part of discovery.
>
> Counsel are commended for working together to efficiently and expeditiously resolve this dispute. The matter took far less time than it would have if the parties had not cooperated. It is thus my report and recommendation that the Court *sua sponte* confirm this report and so order the accompanying stipulation, without requiring a formal motion of the parties.

Topic(s): Social Media, Cooperation.

Brandofino Communications, Inc. v Augme Tech. Inc., 42 Misc 3d 1218[A], 2014 NY Slip Op 50077[U] (Sup Ct, New York County 2014)

Judge(s): Oing. Plaintiff asserted that defendants should be compelled to produce documents in an accessible format and that the absence of a Concordance load file "has made the task of any review of their production, which consisted of predominantly emails and their attachments, more difficult and burdensome by removing the reviewer's ability to ascertain readily how many pages a document contains, or the association between the pages of the production." Plaintiff also asserted that "defendants' conversion of its ESI into PDF files resulted in the absence of critical metadata from their production." Plaintiff contended that "metadata is essential to organizing and accessing the thousands of documents that have already been produced, and those that defendants have yet to produce, because it allows for the easy sorting of documents by date, author, or

recipient." Defendants had made no objection to providing text-searchable TIFF files with a Concordance load file and associated metadata in its document responses. The Motion Court found that:

> plaintiff's initial document requests contained specific instructions that responsive documents should be "produced with the metadata normally contained with such documents, and the necessary Concordance load files." As such, defendants cannot claim that plaintiff is now for the first time requesting the documents to be produced in this format for the sake of convenience. Indeed, defendants' initial production was made in accordance with these instructions, without any objection. To complain otherwise, is disingenuous. To change unilaterally the parties' rules of discovery in the middle of the process, without judicial intervention, is not prudent. Furthermore, and critically important, plaintiff's argument is compelling due to the sheer volume of documents at issue the production should be made in an accessible format that allows for easy sorting of the documents. Defendants merely proffer a token challenge to this assessment, which in and of itself is questionable given that they continue to receive documents on the Concordance platform from plaintiff, but seek now to deny plaintiff access to this same benefit.

Topic(s): Form of Production.

Byrne v Byrne, 168 Misc 2d 321 (Sup Ct, Kings County, Apr. 25, 1996)

Judge(s): Rigler. In a matrimonial action, plaintiff wife took a laptop computer owned by her husband's employer that she believed to have financial information from the marital residence and gave it to her attorney. She argued that the laptop was used for business as well as for personal family financial matters and that she should therefore have access to its memory. The Court held that the computer's memory is similar to a file cabinet and since she would have access to the contents of a file cabinet left in the marital residence, she should have access to the computer's contents. The Court ordered that the parties' computer experts should meet at a mutually agreeable time for downloading memory files of the computer, so the documents could be deposited to the court and a list of documents made for defendant's counsel to review before turning over to Plaintiff.

Topic(s): Scope.

Caban v Plaza Constr. Corp. (Sup Ct, Queens County, August 8, 2013, McDonald, J., Index No. 15557/2007)

Judge(s): McDonald. Plaintiff opposed defendant's request for his Facebook screen name and passwords and objected to a request for social media evidence on the ground that defendant's request for access to his "entire" Facebook record is a "fishing expedition." The Court denied without prejudice defendant's motion seeking a "downloaded zip or compressed file of the plaintiff's Facebook page or any other social media accounts," subject to serving a new demand that seeks "more specific identification" of plaintiff's Facebook information that "is relevant, in that it contradicts

or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." The Court directed that plaintiff appear for an additional deposition with respect to the "types of information" which he posted so that defendant may establish a factual predicate with respect to the relevancy of the information.
Topic(s): Social Media, Discovery, Relevance.

Canon U.S.A., Inc. v Giordano, 2010 NY Slip Op 31733[U] (Sup Ct, Nassau County, July 1, 2010)

Judge(s): Driscoll. In this post-employment, non-compete, non-disclosure, non-solicitation action, plaintiff moved for sanctions against two of its former employees for spoliation of evidence. Specifically, one of the defendants failed to produce two thumb drives allegedly used to abscond with confidential and proprietary information of Canon. The Court (citing New York State law exclusively) denied plaintiff's application for sanctions at that time, holding that because of (1) factual disputes regarding when the specific defendant became aware plaintiff wanted the drives, (2) factual disputes concerning the contents of and the significance of the drives, and (3) the extent to which that defendant attempted to comply with plaintiff's request. The Court left open the possibility of future sanctions against the defendants if additional information became available.
Topic(s): Spoliation, Scope.

Capitano v Ford Motor Co., 15 Misc 3d 561 (Sup Ct, Chautauqua County, Feb. 26, 2007)

Judge(s): Marshall. Plaintiff filed a motion to compel production of "suspension orders" by Ford Motor Company ("Ford") before trial on the grounds that Ford has been unable to produce certain documents that may be relevant to the litigation. Ford in-house counsel issues "suspension orders" in the face of pending litigation or other special circumstances that suspend normal document retention policies which direct those in charge of document retention to set aside and retain specific documents. The Court held that although the documents were posted on Ford's intranet, they are privileged communications from attorney to client relating to legal advice and thus are protected as attorney-client privileged documents under New York State law and denied the motion to compel.
Topic(s): Privilege.

Caraballo v City of New York, 2011 NY Slip Op 30605[U] (Sup Ct, Richmond County, Mar. 4, 2011)

Judge(s): Aliotta. In a personal injury action, defendant sought to compel authorizations from plaintiff to access his current and historical Facebook, Myspace and Twitter pages and accounts, including all deleted pages and related information. In support of the motion, defendant maintained that the information was "just as relevant as plaintiff's medical records to the extent that there are photographs, status reports and videos that depict plaintiff engaging in activities that contradict his injury claims." As authority, defendant relied on an unpublished decision in an unrelated action, *Fernandez v Metropolitan Tr. Auth.* (Index No. 102662/09), wherein the plaintiff had testified at her

deposition as to the types of information she posted on the networking site Myspace. In denying the present application, the Court noted that unlike *Fernandez*, the defendant here "failed to establish a factual predicate with respect to the relevancy of the information the sites may contain."
Topic(s): Social Media.

Carpezzi-Leibert Group Inc. v Henn, 2015 NY Slip Op 30132[U] (Sup Ct, New York County, Jan. 28, 2015)

Judge(s): Rakower. Privilege log did not provide sufficient detail to determine whether the redactions of text messages and iphone calendar entries were proper. Accordingly, defendants were directed to provide a more detailed privilege log, identifying the names of the individuals with whom the person exchanged the redacted text messages and providing non-conclusory, explanations as to whether such individuals, as well as the individuals identified in the redacted iphone calendar entries, are clients, prospects, employees, or former employees.
Topic(s): Privilege Log.

Carr v Bovis Lend Lease, 2012 NY Slip Op 33171[U] (Sup Ct, New York County 2012)

Judge(s): Mendez. Plaintiff sought a protective order, vacating or striking defendants' notice to admit and demand for authorizations from plaintiff for certain social media, while defendants moved to compel plaintiff to preserve ESI. Such motion practice was commenced, following plaintiff's deposition, in response to defendants serving plaintiff with a twenty-eight question notice to admit seeking to have him admit to postings on Facebook, MySpace, Twitter, YouTube video or YouTube channel, and seeking authorizations for certain of these social media websites as well as others.

Plaintiff objected that the authorizations sought were "unduly burdensome, excessive and improper as discovery tools," and without factual predicate, but nevertheless provided an authorization for his Facebook account. Plaintiff further objected to the notice to admit on the grounds that it was an improper discovery tool and without factual predicate for the items sought to be admitted. In addition, defendants served a demand for broad preservation of ESI, including "[a]ll electronic [e]vidence, [i]ncluding but not limited to; [t]he Blackberry cellular phone, including memory card . . ." and "[a]ny and all videos, recording devices, and metadata, including memory cards used in the connection of uploading information onto Facebook and other social sites." Plaintiff objected to such demand as cumulative, having already provided his authorization for his Facebook account, and as an invasion of privacy.

The Court struck the notice to admit where no issue was raised concerning social media at plaintiff's deposition or after service of the bill of particulars and, "[a]lthough not seeking an admission to a material issue, [it] is being used solely as a disclosure device and is duplicative of the demand for authorizations." The Court noted that a notice to admit "may not be used as a 'subterfuge for obtaining additional discovery.'" The Court, however, directed plaintiff to provide a supplemental response to the demand for authorizations and to comply with the demand for the preservation of ESI, as plaintiff did

not deny that he had other social media accounts and he had not produced an affidavit denying their existence. The Court noted that plaintiff "has posted information on Facebook which may contradict assertions made concerning the extent of his injuries." The Court held that "[d]efendant's need for access to relevant information outweighs plaintiff's concerns of privacy." Further, the Court noted that "since plaintiff claims that he cannot recall all of his user names for authorizations to obtain access to other social media accounts, and this information may be maintained on the memory card or other metadata, plaintiff shall be required to maintain and preserve videos, and metadata, including memory cards, [used] in connection with uploading information onto all social media sites from the date of the accident to the present." The Court, however, held that defendant did not state a basis for maintaining and preserving plaintiff's cellular phone, Blackberry or recording devices "in addition to preserving the data."
Topic(s): Social Media, Preservation, Notice to Admit.

Carrick Realty Corp. v Flores, 157 Misc 2d 868 (Civ Ct, New York County, Mar. 26, 1993)

Judge(s): Gans. A judgment in favor of Plaintiff Carrick Realty was entered against defendant Flores and plaintiff served post judgment subpoenas on parties unrelated to the original suit, namely two national payroll processing companies, to obtain information on Flores and others. The payroll processing companies stated that to obtain the information, they would need to create new computer programs or perform inordinately time consuming and costly searches of their records. The Court held that the companies could not be compelled to install new software or otherwise alter their existing computer systems to answer the subpoenas and that they are not required to incur the enormous costs of searching. Moreover, because plaintiff was unwilling to bear the cost of retrieval of the information, the court refused to consider potential modifications to provide the information sought.
Topic(s): Costs.

Clarendon Natl. Ins. Co. v Atlantic Risk Mgt, Inc., 59 AD3d 284 (1st Dept 2009)

Judge(s): Tom, Moskowitz, Acosta, Freedman. The Appellate Division saw no reason to deviate from the general rule of each party bearing its own discovery expenses, and directed plaintiff to produce all of its claims files for which defendants acted as a third-party administrator with each party bearing its own costs for production.
Topic(s): Costs.

Cohen v Google, Inc., 25 Misc 3d 945 (Sup Ct, New York County, Aug. 17, 2009)

Judge(s): Madden. Petitioner sought an order pursuant to CPLR 3102(c) to compel pre-action disclosure "to aid in bringing an action" directing Google to identify the person(s) who posted blogs containing defamatory statements about her. Google did not oppose the motion, but the blog's author appeared anonymously through counsel and submitted opposition papers. The Court found that petitioner had demonstrated that a cause of action existed and ordered Google to provide the petitioner with information as to the identity of the blogger.
Topic(s): Social Media.

Coldwell Banker Hunt Kennedy v Wolfson, 69 AD3d 492 (1st Dept 2010)

Judge(s): Gonzalez, Tom, Sweeny, Catterson, Abdus-Salaam. Appellate Division reversed grant of summary judgment to plaintiff when defendant's affidavit raised issues of fact concerning, *inter alia*, "whether e-mail exchanges relied on by plaintiff, which admittedly reflect agreement as to the selling price and commission rate, were intended by the parties to constitute the entire brokerage agreement."
Topic(s): Admissibility.

Consolidated Constr. Grp., LLC v RMCC, Inc. (Sup Ct, Suffolk County, Nov. 6, 2013, Baisley, Jr., J., Index No. 1638/2013)

Judge(s): Baisley, Jr. Question of fact existed as to whether and when notice was provided where "[u]nlike the presumption of receipt that attaches to the service of legal notices by mail, no such presumption attaches to email or facsimile transmissions."
Topic(s): Admissibility.

Consolidated Sewing Mach. Corp. v Sanford, 19 Misc 3d 1114[A], 2008 NY Slip Op 50715[U] (Sup Ct, New York County, Mar. 21, 2008)

Judge(s): Shulman. Based upon a prior disclosure order, defense counsel agreed to maintain custody and control of defendant's computer in his office to enable plaintiff's counsel to copy its hard drive for evaluation, provided that plaintiff's counsel identify its expert and arrange to copy the hard drive within two weeks, otherwise the computer would be returned to defendant. By letter defense counsel advised that since the two week period had elapsed without plaintiff's counsel taking any effort to obtain the requested discovery, plaintiff's right to obtain same is waived and counsel would be returning the computer to defendant. Thus, on plaintiff's motion to compel compliance with that order, the Court found that defendant was no longer required to comply.
Topic(s): Preservation.

County of Erie v Abbott Labs., Inc., 30 Misc 3d 837 (Sup Ct, Erie County, July 19, 2010)

Judge(s): Curran. The Court found that Plaintiff's failure to issue any litigation hold or establish a coordinated plan for document retrieval so grossly negligent as to warrant monetary sanctions. Plaintiff made no discernable effort for three and a half years while the litigation was pending to preserve documents that were potentially relevant to the action.
Topic(s): Sanctions, Preservation.

County of Suffolk v Long Island Power Auth., 2012 NY Slip Op 30943[U] (Sup Ct, Suffolk County 2012)

Judge(s): Emerson. The Court noted that:

> If the records are maintained electronically by an agency and are retrievable with reasonable effort, the agency is required to disclose the information. In such a situation the agency is merely retrieving the

> electronic data that it has already compiled and copying it onto another electronic medium. On the other hand, if the agency does not maintain the records in a transferable electronic format, then the agency should not be required to create a new document to make its records transferable. A simple manipulation of the computer necessary to transfer existing records should not, if it does not involve significant time or expense, be treated as the creation of a new document.

The Court in denying Suffolk County's request for e-mails held:

> The court finds that, in order to respond to the County's FOIL request, LIPA would need to compile the data in an electronic format in which LIPA does not maintain the records. LIPA's back-up tapes are maintained in an electronic format that LIPA no longer has the hardware to restore. Thus, they are not retrievable with reasonable effort. LIPA would have to create new documents using software or services that it would need to purchase from third parties in order to comply with the County's FOIL request. Any documents so produced could not be produced by a simple manipulation of the computer and would involve significant time and expense. Accordingly, the County's FOIL request was properly denied.

Topic(s): Article 78, Form of Production.

CreditRiskMonitor.com v Fensterstock, 2004 NY Misc LEXIS 3120 (Sup Ct, Nassau County, Aug. 30, 2004)

Judge(s): Warshawsky. Plaintiff employer alleged that a former employee took customer names and other information to his new employer, violating a non-compete clause in his employment contract. In a Stipulation of Settlement, the former employee agreed not to work with the new company for a specified period of time and the new company warranted that they did not possess the customer list and would not solicit any customers. A court-ordered forensic examination of the employee's new company's computers found hundreds of e-mails contradicting the Defendants' assertions. The Court held that defendants breached the non-compete agreement and settlement order, and thus were in contempt of court. The Court awarded over $820,000 in compensatory and punitive damages, plus legal fees and costs.

Topic(s): Sanctions.

Cuomo v 53rd & 2nd Assoc., LLC (Sup Ct, New York County, Aug. 27, 2012, Mendez, J., Index No. 111329/2010)

Judge(s): Mendez. Plaintiff returned to work following surgery to both knees, and testified at his deposition that he cannot play sports or do any physical activities and cannot dance. Where plaintiff made reference to his Facebook account at his deposition, the Court held that "[t]o the extent the Facebook account contains information that is relevant and contradicts or conflicts with his alleged restrictions, disabilities and losses, this information is discoverable." Defendants had requested production of plaintiff's "Internet and/or web based social networking sites maintained or used by [plaintiff]

including all photographs, video recordings, statements, emails, blogs, or other written communication concerning the allegations in the complaint," as well as authorizations for plaintiff's electronic communications maintained by such social networking sites.
Topic)(s): Social Media, Relevance, Photograph.

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)

Judge(s): Fried. In response to Plaintiff's motion *in limine*, the Court held that the attorney-client privilege did not apply to pre-acquisition e-mails between defendant and his attorney as plaintiff's employee using its e-mail system had no reasonable expectation of privacy in such communications. The Court found there to be no privilege where e-mails resided in plaintiff's computer servers were produced to defendant in response to document request and the record reflected that defendant had previously made no effort to delete the e-mails from the servers, nor did he diligently and carefully review the documents that were produced to him. Defendant did not assert any privilege (or seek a protective order) with respect to e-mails until plaintiff's motion in limine, and taken together, the Court held that defendant had not taken reasonable steps to prevent disclosure of his e-mails.
Topic(s): Privilege.

Dartnell Enters., Inc. v Hewlett Packard Co., 2011 NY Slip Op 51758[U] (Sup Ct, Monroe County, Sept. 13, 2011)

Judge(s): Stander. Plaintiff moved to compel production of documents in native format including metadata. Defendant asserted that CPLR 3122(c) only requires production of hard copies, which it had done. The Court rejected defendant's argument in part because plaintiff had "shown inconsistencies as to the information available from the hard copy and the native electronic format." Defendant also did not assert that production in native format would be "unduly difficult or burdensome to obtain and produce." The Court concluded that "[e]lectronic documents in their native language form may be discoverable even when a hard copy has been provided."
Topic(s): Form of Production.

Deer Park Enter., LLC v Ail Sys., Inc., 2010 NY Slip Op 30881[U] (Sup Ct, Nassau County, Apr. 14, 2010)

Judge(s): Warshawsky. This action involved a sale-leaseback agreement with Plaintiff as purchaser. Plaintiff moved (by cross-motion to a SJ motion) for sanctions alleging spoliation of evidence, and also sought an adverse inference against Defendant. Plaintiff argued that Defendant failed to properly secure computers and emails, failed to timely search for emails (that they were later unable to produce), and failed to issue a litigation hold notice. The Court held that there was no substantial claim that the material which Defendant was unable to produce was actually lost, or that its initial absence hampered Plaintiff's ability to conduct the litigation. All material was ultimately recovered. There was no evidence of willful non-compliance of a Court order or e-discovery rules. No

smoking gun was found (some recovered documents actually helped Defendant) so the implication was that the documents were not intentionally lost or destroyed. Plaintiff's motion was denied.
Topic(s): Sanctions, Spoliation.

Del Gallo v City of New York, 43 Misc 3d 1235[A], 50929[U] (Sup Ct, New York County, 2014)

Judge(s): Freed. Defendants sought the contents of plaintiff's "entire LinkedIn account" on the grounds that plaintiff testified at her deposition concerning "responses to former colleagues inquiries regarding her post accident condition and communication between [her] and employment recruiters are material to her damages claims." Defendants claimed that they were entitled to discovery of plaintiff's LinkedIn account to "learn about plaintiff's on-line description of her employment abilities, any employment offers she may have received, her acceptance of any offers, and so forth . . . [which] may help determine the amount of damages." The Motion Court granted disclosure concerning communications with recruiters, which plaintiff had agreed to produce. However, it denied discovery of plaintiff's communications with her former colleagues about her condition and held that "self-assessments" that did not contradict or conflict with her claims and that further "hoping" that same would be relevant to plaintiff's loss of enjoyment of life, do not justify the production of anything else from plaintiff's LinkedIn account or for access to plaintiff's "Luminosity" account, which is an on-line brain game site.
Topic(s): Social Media, Relevance.

Delta Fin. Corp. v Morrison, 13 Misc 3d 604 (Sup Ct, Nassau County, Aug. 17, 2006)

Judge(s): Warshawsky. In this case, involving alleged fraud with regard to an exchange of assets, defendant sought to obtain ESI from plaintiff from a number of sources. A discovery referee directed counsel for both parties to submit briefs on unresolved issues; however, the Court determined a formal judicial decision was warranted. The Court ordered plaintiff to search and produce responsive non-email documents from a four month period that defendant would select. Defendant would be responsible for 100% of the costs and expenses of the search process and "deduplication" process, as well as attorneys' fees and costs for the privilege review process. Plaintiff would be required to submit an affidavit with information on responsive documents found, costs, and expenses. The Court also held that plaintiff was required to search two months of emails and prepare an affidavit with results and costs and expenses for which defendant would bear 100% of costs and expenses. Finally, the court directed a sampling of three monthly backup tapes selected by defendant and preparation of an affidavit with costs and expenses for which defendant would also bear 100% of costs and expenses. For all searches, after the initial period, the court would use the affidavits to determine whether full searches were necessary and whether further cost shifting was necessary.
Topic(s): Costs.

DeRiggi v Kirschen, 2010 NY Slip Op 33599[U] (Sup Ct, Nassau County, Dec. 17, 2010)

Judge(s): Murphy. In a medical malpractice and products liability action, the Court declined to allow defendant surgical equipment manufacturer to copy the hard drive of plaintiff's personal computer in defendant's effort to establish that plaintiff never visited defendant's website prior to the fatal back surgery on his wife. The Court noted that the inquiry could not definitively establish whether or not the site had been visited, and that the defendant failed to establish that the information sought is "material and necessary". Moreover, the Court considered the potential risks of the proposed discovery, including violation of the right to confidentiality of attorney-client communications, in reaching the decision.
Topic(s): Privilege, Scope.

Diana v Manfre (Sup Ct, Nassau County, Jan. 24, 2012, Index No. 13713/2011)

Judge(s): Mahon. In a business dispute, the individual plaintiff demonstrated that, after he regained access to the corporate plaintiffs' offices, he had been locked out of the company's website, corporate passwords had been changed and the company's Facebook page had been deleted. The Court, after holding a preliminary injunction hearing, directed defendants to immediately provide to plaintiff the passwords to the company website, Facebook page and email accounts.
Topic(s): Social Media.

Donner v One Network Enters, Inc. (Sup Ct, New York County, Dec. 18, 2006, Index No. 601015/2004)

Judge(s): Moskowitz. In finding the destruction of e-mails concerning plaintiff's alleged "for cause" termination not to have "irreversibly prejudiced" plaintiff "because he appears to have sufficient documentation to prove his claims," the Court decided not to strike defendant's pleading, but instead found that defendant is "precluded from offering any evidence or testimony as to its defense that it fired [plaintiff] for cause."
Topic(s): Sanctions, Spoliation.

Duluc v AC & L Food Corp., 119 A.D.3d 450 (1st Dept 2014)

Judge(s): Friedman, Sweeny, Saxe and Freedman. Plaintiff requested preservation of video tape recordings that depicted the subject slip and fall accident and defendant preserved this video. Six weeks later, plaintiff made a second request for tapes. However, the tapes were no longer available because they had either been reused in the normal course of business or had been discarded after the system broke down. In finding that the destruction of the surveillance video did not warrant the imposition of spoliation sanctions, the Court held that "while it may have been a better practice to preserve any footage of the area from any camera for a period before and after the accident, that was not the request made to defendants, and it would unfair to defendant to penalize it for not anticipating plaintiff's additional requests."
Topic(s): Sanctions, Spoliation.

EBC I, Inc. v Goldman Sachs & Co. (Sup Ct, New York County, June 19, 2006, Index No. 601805-2002)

Judge(s): Branston. These are two unpublished opinions by a judicial hearing officer ("JHO") assigned to the Commercial Division. The JHO declined to follow the rationale in *Lipco Elec. Corp. v ASG Consult. Corp.*, 4 Misc3d 1019 (A), 2004 WL1949062 (Sup. Ct. Nassau Co. Aug. 18, 2004), characterizing *Lipco* as applying a bright-line rule to electronic discovery that is only appropriate for traditional paper discovery. Instead, the JHO applied the *Zubulake* factors in determining whether to deviate from New York's requester-pays rule, before determining that the requesting party should bear the costs of accessing inaccessible ESI. The JHO also applied *Zubulake* factors in determining that the parties should equally divide the producing party's legal fees for reviewing the ESI before producing it to the requesting party.
Topic(s): Costs.

Ecor Solutions, Inc. v State of New York, 17 Misc 3d 1135[A], 2007 NY Slip Op 52261[U], *7 (Ct Cl Oct. 31, 2007)

Judge(s): Milano. Ecor sued the State for wrongful termination of an environmental remediation contract. The State was in possession of various computers and hard drives which contained project information and e-mails. Ecor sought from the State's computers, among other electronic documents and data, a copy of a Department of Environmental Conservation internal investigation file. Ecor had reason to believe this file supported its wrongful termination claims against the State. After numerous discovery requests, the State notified Ecor that it had lost the file. Ecor sought a sanction against the State and requested that the State be precluded from any use of the file at trial, as well as an adverse inference against the State regarding any issues for which evidence was denied to Ecor. The Court granted the sanction, noting however that there had been partial discovery to Ecor of documents included in the file and that Ecor in fact possessed most of the file. Thus, the Court ruled that the State was entitled to use at trial only that part of the file that had been produced to Ecor. In addition, the Court stated an adverse inference was warranted against the State that the lost portion of the file did not support the State's claims against Ecor.
Topic(s): Sanctions.

Edelson v Doe (Sup Ct, Suffolk County, Jan. 16, 2014, Rebolini, J., Index No. 14824/2013)

Judge(s): Rebolini. After considering a variety of factors to weigh the need for disclosure against First Amendment interests, including: (1) a concrete showing of a *prima facie* claim of actionable harm; (2) specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) the party's expectation of privacy, the Court ordered the production of the internet protocol ("IP") address log records and other identifying subscriber information associated with a certain IP address concerning an anonymous user and provided such user with a reasonable opportunity to be heard so that opposition papers may be filed.
Topic(s): Social Media, First Amendment.

Einstein v 357 LLC, 2009 NY Slip Op 32784[U] (Sup Ct, New York County, Nov. 12, 2009)

Judge(s): Ramos. In an action for fraudulent inducement and violations of New York's Consumer Protection Act pertaining to an allegedly defective condominium, plaintiffs claimed that defendants' failure to produce certain emails was evidence of spoliation of evidence or selective editing of discovery responses. Specifically, plaintiffs moved to strike pleadings or to compel full responses to discovery demands, and presented evidence that defendants failed to produce certain emails. After hearing testimony from defendants' director of information technology, the court found that they failed to implement any change in its retention policy upon the commencement of the litigation with respect to the production of ESI. The Court concluded that the defendants had continued to delete e-mails according to their ordinary business practices, even after litigation had commenced and that requested documents had not been produced, and when produced had been produced selectively. In addressing the sanctions to be imposed, the Court held: "typically, the duty to preserve evidence attaches as of the date the action is initiated or when a party knows or should know that the evidence may be relevant to future litigation." The Court further found that "the CPLR and New York case law are silent on the obligations of parties and their counsel to effectuate a 'litigation hold.' In similar contexts, New York courts have turned to the Federal Rules of Civil Procedure and the case law interpreting them for guidance." The Court followed federal case law by concluding that "the utter failure to establish any form of litigation hold at the outset of the litigation is grossly negligent." The Court imposed the adverse inference that any deleted emails were unfavorable to defendants. While declining to strike the answers of the defendants, the Court issued findings of fact and conclusions of law that defendants knew of the defective condition alleged in the condominium and willfully misled Plaintiffs by concealing it. The Court also awarded plaintiff attorneys' fees and costs.

Topic(s): Preservation, Sanctions, Spoliation.

Errico v Concepts In Time LLC (Sup Ct, New York County, Oct. 4, 2012, Kern, J., Index No. 116098/2010)

Judge(s): Kern. Defendant moved for an order dismissing the complaint due to spoliation of evidence or, in the alternative, requesting that an adverse inference be drawn against plaintiff. The Court found that plaintiff had no obligation to preserve the laptop at the time it was destroyed where she had "wiped" its contents eleven months before she had commenced her discrimination action. The Court noted that plaintiff did not destroy the information with a "culpable state of mind," as she alleges that she deleted the information after her former employer threatened to bring a criminal complaint against her regarding corporate information that had remained on her laptop and that she "wiped" her laptop in order to remove any information defendants did not want her to have. The Court noted that another judge in an action commenced by the former employer against plaintiff (alleging violations of the Computer Fraud and Abuse Act, which was dismissed) had found that plaintiff "had not breached any laws by downloading information that defendant's agreed '[s]he was permitted to access.'" The Court concluded that plaintiff "could not have known at that time that defendants would request [the deleted ESI] in order to defend against plaintiff's employment discrimination

lawsuit." As such, the Court denied defendant's request for an adverse inference charge, although without prejudice to be made at trial.
Topic(s): Sanctions, Spoliation, Preservation, Adverse Inference.

Estee Lauder Inc. v One Beacon Ins. Group, LLC, 2013 NY Slip Op 30762[U] (Sup Ct, New York County 2013)

Judge(s): Edmead. Plaintiffs asserted that they were entitled to a negative inference at trial because an unknown quantity of relevant information had been destroyed due to defendant's affirmative failure to issue a "litigation hold." Defendants argued that its agent did not have an automatic deletion feature on its emails, and instead had a policy of maintaining all documents and correspondence relating to a particular claim. Defendant affirmatively stated that it would *not* issue a litigation hold because that would risk confusion with its policy to "preserve all documents in all formats for all files." Defendant asserted that it continually "verifies that all emails and electronic documents are stored on an active server." The Court found that the policy defendant "had in place is the functional equivalent of a litigation hold. If there is no automatic deletion, there is nothing to hold." The Court found that plaintiff "could not establish that documents were destroyed in bad faith, it is not entitled to sanctions."
Topic(s): Sanctions, Spoliation, Preservation, Litigation Hold.

Etzion v Etzion, 7 Misc 3d 940 (Sup Ct, Nassau County, Feb. 17, 2005)

Judge(s): Stack. In a matrimonial action, Plaintiff wife sought to obtain information contained in defendant husband's personal and business computers. The Court stated that "[c]ourts have held that the contents of a computer are analogous to the contents of a filing cabinet." The Court found that emails between Defendant and counsel are privileged and personal e-mails unrelated to business matters are not discoverable. To limit the disclosure, the Court stated that Defendant was to notify the Court-appointed referee of the locations of computers with business records, and then that plaintiff's expert, accompanied by defendant's expert, was to copy the hard drives and turn them over to the referee so they could be examined and business records could be turned over to both parties, and that the referee would retain possession of the hard drives until the end of the matter. With regards to cost, the Court stated that "[u]nder the CPLR, the party seeking discovery should incur the costs in the production of discovery material," so the plaintiff is to bear the cost of production of the business records she seeks, and to pay the expenses of her experts, whereas defendant is responsible for the expenses of his experts to oversee the process. The Court denied a request for a bond to reimburse defendant for any potential damage.
Topic(s): Costs.

Evans v New York City Transit Auth. (Sup Ct, New York County, Jan. 8, 2013, Stallman, J., Index No. 102654/2009)

Judge(s): Stallman. Where plaintiff tripped and fell on a sidewalk, the issue was whether the complaint should be stricken because plaintiff did not exchange in discovery photographs that she took with her cell phone on the date of the alleged accident.

Plaintiff claimed that she had lost her cell phone almost a year after the accident, but prior to commencement of the action, and that the computer to which she "may" have transferred the photographs had been returned as defective. Thus, as plaintiff claimed that she did not possess any other additional photographs and defendants could not demonstrate willful noncompliance with discovery, the motion to strike plaintiff's complaint was denied.
Topic(s): Sanctions, Spoliation, Strike Pleading, Photograph.

Falcon Envtl. Servs., Inc. v American Falconry Servs., LLC, 2013 NY Slip Op 33203[U] (Sup Ct, Wayne County 2013)

Judge(s): Nesbitt. "The parties have agreed to a forensic protocol for reviewing the EIS in all respects except two: (1) e-mails associated with [two] e-mail addresses . . . and (2) sub-folders listed on the "List of Disputed Subfolders," which has been submitted to the Court."

Plaintiff proposes the following protocol with regard to the review and disclosure of the disputed EIS:

a. Copies of the documents in the subfolders listed on the List of Disputed Subfolders, and the e-mails associated with the e-mail addresses Srossell61@rochester.rr.com and Srossell 61@cs.com, initially will be provided to counsel for Defendants counsel [sic];

b. Defendants' counsel will review these materials and remove only materials subject to the attorney-client privilege or attorney work product doctrine;

c. Defendants counsel will create a privilege log identifying the privileged documents with sufficient detail to allow Plaintiff, and the Court as necessary, to identify the document listed and assess the propriety of the privilege assertion;

d. Thereafter, counsel for Plaintiff may review the non-privileged documents, Plaintiff's counsel will notify Defendants' counsel of those documents it deems responsive to its discovery demands or relevant to this action;

e. Both parties than [sic] will be provided with copies of all discoverable documents and have an opportunity to assert any applicable objections;

f. Neither Plaintiff nor Plaintiff's counsel will be entitled to retain any documents that both parties agree pertain to Defendant Rossell's purely personal or private affairs. In the event of a dispute regarding the 'purely personal or 'purely private' nature of a document, the parties will endeavor in good faith to resolve the dispute and, if they are unable,

> present the dispute to the Court for resolution through appropriate procedural mechanisms (FAS's Position Statement p.2 [7/30/2013]).

Defendants' proposal with regard to an EIS review protocol differs as follows:

> a. Counsel for Defendants is to be provided with copies of all documents located in the Disputed Subfolders (the "Personal Documents") and with copies of all e-mails sent to or from the Personal Addresses (the "Personal E-Mails").
>
> b. Counsel for Defendants will review the Personal Documents and the Personal e-mails in consultation with Defendants. Copies of all non-privileged documents and/or e-mails which are discoverable will be provided to Counsel for Plaintiff, in accord with Defendants' discovery obligations and the Protective Order agreed to by the parties (Defendants' Memorandum of Law p. 3 [8/2/2013]).

"[T]he Court approves the protocol proposed by the defendants. Of course, the fact that the disputed EIS and e-mails will not be disclosed to plaintiff as a matter of course does not mean that they are not discoverable through the disclosure process set out in the CPLR. Counsel for defendants shall assiduously abide their obligations in this regard. Should any disputes arise, this Court will conduct an in-camera review of the challenged material upon proper application."
Topic(s): Relevance, Forensic Protocol, Privilege, Privacy.

Fawcett v Altieri, 38 Misc 3d 1022 (Sup Ct, Richmond County 2013)

Judge(s): Maltese. During the course of the litigation the defendants demanded full access to "Plaintiff's social media website pages, including but not limited to Facebook, MySpace, Friendster, Flickr, and any other social media websites." The Court re-evaluated the relevance of social media accounts in the pre-trial discovery phase of a civil action alleging personal injuries.

> A survey of cases dealing with the production of social media accounts, in both the criminal and civil contexts, reveals a two prong analysis before courts compel the production of the contents of social media accounts. This inquiry requires a determination by the court as to whether the content contained on/in a social media account is "material and necessary"; and then a balancing test as to whether the production of this content would result in a violation of the account holder's privacy rights.

Based on this two prong analysis, the Court denied defendants' demand for full access to Plaintiff's social media websites.
Topic(s): Social Media, Relevance.

Fed. Express Corp. v Fed. Jeans, Inc., 14 AD3d 424, 424-25 (1st Dept 2005)

Judge(s): Mazzarelli, Williams, Gonzalez, Sweeny, Catterson. In an action for an accounting, the Court stated, "the computer-generated invoices and billing records of the amounts due were properly admitted as business records since plaintiff established that the information contained therein was entered into the computer in the regular course of business."
Topic(s): Admissibility.

Feinberg v Silverberg (Sup Ct, Nassau County, Oct. 10, 2013, DeStefano, J., Index Nos. 3120/2011 and 7892/2012)

Judge(s): DeStefano. In a dissolution proceeding, respondent moved to compel production of certain disclosure, and it was granted to the extent of requiring the production of all "emails, correspondence and files located as hard copies or on the hard drives of the company and personal computers (including personal handheld devices) of [certain petitioners] which relate to bad faith . . . or the intentional bases for the specific allegations of deadlock purportedly existing [the parties] . . . or the intentional bases for the specific allegations of deadlock." The Court, however, limited, with respect to the computer discovery, petitioner's consultant to "'re-search the hard drives' to '20 search terms' within the discovery parameters outlined above," with such "re-search" to be completed within twenty days.
Topic(s): Search Terms.

Feldman v New York State Bridge Auth., 40 AD3d 1303 (3d Dept 2007)

Judge(s): Cardona, Crew III, Spain, Lahtinen and Kane. Plaintiff motorcycle rider was injured after colliding with a toll booth gate arm that allegedly lowered prematurely. Plaintiff sought from the State computer records of sensor and toll operator input that the state had previously said was no longer available. The Supreme Court granted the order, stating that the information might be critical to determining who was liable. The State produced the data, but in raw form, and the rider's expert termed it an indecipherable "data dump". The rider sought, *inter alia*, an order to depose the State's expert witness, and the Supreme Court denied the order. The Appellate Division affirmed, stating that it was not an abuse of discretion and that the Supreme Court "has broad discretion in supervising disclosure and its determination will not be disturbed on appeal absent an abuse of discretion." The Court further stated that if the information provided in response to plaintiff's request for specific, itemized information to interpret the files given is not decipherable, it is up to the Supreme Court to fashion an appropriate remedy or sanction, including compelling deposition or further disclosure by the defendant's expert or allowing Plaintiff to supplement his expert disclosure demand.
Topic(s): Form of Production.

Finkelman v Klaus, 17 Misc 3d 1138[A], 2007 NY Slip Op 52331[U] (Sup Ct, Nassau County, Nov. 28, 2007)

Judge(s): Bucaria. The Court held that under CPLR 3122 (d), a non-party may recover reasonable production expenses, including the cost of retrieving ESI and the attorneys' fees incurred in reviewing the ESI for privilege. In so doing, the Court noted that "the costs of producing electronic records can be very steep and while what constitutes reasonable production expenses has not been well defined by state courts, guidance can be obtained from federal court decisions." The Court further stated that "unanimity" is lacking: federal courts have held that the reasonable cost of labor expended to do a document production, including attorney's fees, are covered under Federal Rule of Civil Procedure 45 in addition to copying costs. The Court also recognized the "sound rationale behind the federal rule" that non-parties should not have to subsidize the costs of litigation and that "in fact, in the Practice Commentaries to CPLR 3122, it is noted that while reference to attorneys' fees is not made in that statute, '[t]he court would be empowered to direct such a payment, particularly where any substantial right of the non-party witness is involved and representation by an attorney is needed'."
Topic(s): Costs.

Fitzpatrick v Toy Industry Assn., Inc., 2009 NY Slip Op 30083[U] (Sup Ct, New York County, Jan. 5, 2009)

Judge(s): Goodman. In a wrongful termination suit, the Court denied plaintiff's motion pursuant to CPLR 3126 for sanctions (to strike the answer and award judgment in her favor) on the basis of destruction of ESI and withholding of relevant documents, with leave to renew the application at trial based on newly discovered evidence if it should arise. The Court stated that "the lynchpin for spoliation sanctions under New York law is prejudice" and that this had not been demonstrated by plaintiff. The Court's discussion refers to general principles of spoliation, sanctions and New York disclosure law and applies them to the alleged failure to preserve and produce electronically stored information. Specifically, the Court stated that "Only where destroyed or lost evidence is key to support a claim or defense is the drastic remedy of the striking of a pleading appropriate, and a less drastic sanction, appropriate to the circumstances, may be imposed where prejudice is less severe."
Topic(s): Sanctions, Spoliation.

Flores v Saravia (Sup Ct, Suffolk County, Dec. 4, 2013, Farneti, J., Index No. 12949/2011)

Judge(s): Farneti. Third party defendant sought an order compelling defendant to provide certain social media information. The Court found that, due to the paucity of information provided by movant, it was unable to conclude that the information sought is material and necessary or if the production would violate defendant's privacy rights. The Court found, because movant indicated in its demand that "if" defendant was not a registered user of certain social media platforms it required a statement under oath confirming same, the demand to be "overly broad and nonspecific." The Court held that such "conditional" demand evidenced that defendant "had no knowledge" as to relevant

use of such social media platforms.
Topic(s): Social Media, Relevance.

Forward v Foschi, 27 Misc 3d 1224[A], 2010 NY Slip Op 50876[U] (Sup Ct, Westchester County, May 18, 2010)

Judge(s): Scheinkman. Defendant sought disqualification of plaintiff's counsel after plaintiff accessed her personal and business e-mail accounts and downloaded e-mails therefrom without authorization, and then forwarded e-mails between defendant and her lawyer to his own attorney, and plaintiff's counsel failed to notify defense counsel or the court that he had been provided with such privileged e-mails. The Court declined to disqualify counsel in part because defendant continued to allow plaintiff to access her communications after a time when she knew that plaintiff was viewing them. The Court found, however, that there had been no waiver of the privilege prior to the date defendant learned that plaintiff had been accessing her e-mail accounts. As a result, the Court suppressed all such "privileged" e-mails and, as a sanction for plaintiff accessing defendant's e-mails "outside of the discovery process by engaging in self-help," non-privileged e-mails dated prior to when defendant learned that plaintiff had access to her e-emails were suppressed as well.
Topic(s): Privilege, Sanctions.

Front, Inc. v Khalil, 2013 NY Slip Op 31613[U] (Sup Ct, New York County 2013)

Judge(s): Mills. Employee alleged that his former employer improperly accessed an external hard drive belonging to him which contained his e-mails and confidential information. Employee alleged violation of the Stored Communications Act ("SCA"), 18 U.S.C. § 2707, and conversion, and sought declaratory and injunctive relief including, but not limited to, return of the employee's emails and confidential information and the preclusion of the use and destruction of such information. The Motion Court dismissed the causes of action asserted under the SCA because "accessing copies of emails stored by [the employee] on his office computer and downloaded by him to his external hard drive does not constitute a violation of the SCA."

The Court, however, denied dismissal of the employee's conversion claim where the employee alleged that "without authorization" the employer "accessed his external hard drive and reviewed its contents which contained personal emails, confiscated the external hard drive and exercised dominion and control over that hard drive and the information." The Court noted that even if the employee "might not have had a right to retain [his employer's] documents, he would presumably have a possessory right to his own personal documents." The Court noted that:

> even if [the employee] may have had some expectation of privacy with respect to his computer, it was not unreasonable for his employer to examine the contents of the external hard drive to determine whether any of [the employer's] documents were being downloaded by its employee, who had just tendered his resignation. It is undisputed that some emails which were originally sent or received through [the employee's] personal

> Gmail account were found, as well as others sent or received through [the employer's] work email account that were related to work [the employee] was performing for another employer while he was employed by [the employer], at least raising a question of work-related misconduct.

The Court held that "under the circumstances, any expectation of privacy [the employee] might otherwise have had that would have justified the suppression of the emails stored on his computer was overcome when he downloaded those emails, along with [employer] documents, to his external hard drive."
Topic(s): Privacy, Stored Communications Act, Conversion.

Galison v Greenberg, 5 Misc 3d 1025[A], 2004 NY Slip Op 51538[U] (Sup. Ct, New York County, Nov. 8, 2004)

Judge(s): Cahn. Citing to ethics opinions authored by the Association of the Bar of the City of New York and the New York County Lawyers Association Committee on Professional Ethics, the Court noted that "when receiving a communication or e-mail which the lawyer knows or should reasonably know contains privileged material, the attorney is obligated to 'promptly notify the sending attorney' thereof, to refrain from further review of the communication, and to return or destroy it if so requested. Counsel should be aware of their obligations in these circumstances, and promptly adhere to them, in order to avoid sanctions."
Topic(s): Privilege, Sanctions.

The Garden City Group, Inc. v Hughes (Sup Ct, Nassau County, Jan. 7, 2015, Index No. 602121/2014)

Judge(s): Bucaria. Request for the production of metadata denied, with leave to renew, until after defendants produced the ordered documents.
Topic(s): Metadata.

Gen. Motors Acceptance Corp. v NY Cent. Mut. Fire Ins. Co., 104 AD3d 523 (1st Dept 2013)

Judge(s): Andrias, Renwick, Freedman and Gische. After noting that defendant's actions were "willful and contumacious," the Appellate Division ruled that the Motion Court "did not abuse its discretion in finding that certain evidence may have existed, but was not produced by defendant either because it was destroyed or withheld." The Motion Court had imposed the sanction of an adverse inference charge as that would "prevent defendant from using the absence of these documents at trial to its tactical advantage." The Appellate Division, however, modified the Motion Court's order to make clear that "the conditional order of preclusion is limited to those documents identified therein as either missing, or not disclosed."
Topic(s): Sanctions, Spoliation, Preclusion.

Giuliano v 666 Old Country Rd., LLC, 100 AD3d 960 (2d Dept 2012)

Judge(s): Mastro, Skelos, Florio and Hall. The Motion Court found that, although plaintiff demonstrated that defendant intentionally or negligently disposed of the video recording of the underlying accident, plaintiff's ability to "prove her case without that recording was not fatally compromised." As such, the Appellate Division found that the appropriate sanction, rather than striking defendant's answer, was to direct that an adverse inference charge be given at trial against defendant with respect to the unavailable recording.
Topic(s): Sanctions, Spoliation, Adverse Inference, Video.

Gonzalez v City of New York, 2015 NY Slip Op 5072[U] (Sup Ct, Queens County, May 4, 2015)

Judge(s): Orlikoff-Flug. Court granted defendants' motion to compel plaintiff to provide authorizations to obtain records from plaintiff's social media accounts to the extent that an *in camera* inspection of copies of "all status reports, e-mails, photographs, and videos posted on plaintiff's social media site since the date of the subject accident" would be performed to determine which materials, if any, are relevant to plaintiff's claims and injuries. Defendants attached the results of an internet search which indicated that plaintiff had social media accounts and included several printouts revealing that plaintiff had made "several comments regarding the accident, how the accident happened, his injuries, his recovery, and his activities post-accident." The court found that such postings "clearly contradicts plaintiff's testimony," and that defendants "established that discovery of plaintiff's social media account will lead, or may reasonably be calculated to lead, to relevant evidence bearing on plaintiff's claims."
Topic(s): Social Media, In Camera Review, Relevance.

Gray & Assoc., LLC v Speltz & Weis LLC, 22 Misc 3d 1124[A], 2009 NY Slip Op 50275[U] (Sup Ct, New York County 2009)

Judge(s): Fried. "[P]revailing party may be able to recover some or all of these duplication costs and computer forensic fees as taxable disbursements at the conclusion of this case."
Topic(s): Costs, Forensic Review.

Hakim v Hakim, 99 AD3d 498 (1st Dept 2012)

Judge(s): Gonzalez, Friedman, Moskowitz, Acosta and Richter. The Appellate Division held that plaintiff's otherwise barred claims were "revived" by defendant's in-house counsel's emails referring to defendant's intent to provide plaintiff with an accounting of what he owed to his uncle. The Appellate Division held that "[v]iewing the emails in the light most favorable to [plaintiff] and drawing all reasonable inferences therefrom, they constitute an acknowledged obligation to furnish the accounting required for Isaac's purchase of his membership in the LLC."
Topic(s): Relevance.

Hameroff and Sons, LLC v Plank, LLC, 108 AD3d 908 (3d Dept 2013)

Judge(s): McCarthy. The Appellate Division held that, while defendant contended that certain emails were irrelevant, it provided no explanation for its failure to produce them. However, the Appellate Division noted that the "relevance of destroyed documents is presumed if the destruction was intentional or willful." Further, the Appellate Division found that their relevance was established by defendant's reliance on one of them in support of its motion for summary judgment. The Appellate Division indicated that, despite numerous deadlines and multiple court orders regarding discovery, defendant had not objected to plaintiff's demands and that such "pattern of noncompliance gave rise to an inference that the nondisclosure was willful." As such, the Appellate Division precluded defendant from offering evidence concerning the critical stipulation of settlement, which defendant alleged had been breached by plaintiff.
Topic(s): Sanctions, Spoliation, Preclusion.

Hameroff and Sons, LLC v Plank, LLC, 36 Misc 3d 1229[A], 2012 NY Slip Op 51553[U] (Sup Ct, Albany County 2012)

Judge(s): Lynch. The Motion Court noted that:

> since the settlement failed, the punch list was not completed and litigation was threatened, it finds [the administrator's] explanation that he simply destroyed all of his project e-mails as a standard practice completely implausible and violative of the *Zubalake* preservation standard. Worse yet, plaintiff has actually documented that [the administrator] had retained copies of his project e-mails as he had e-mailed copies of project e-mails to plaintiff's former counsel.

The Motion Court made such finding predicated on plaintiff having demonstrated through documents sent by defendant to his former counsel that defendant had retained e-mails at least as late as two weeks before plaintiff commenced a prior action in 2010 to enforce a 2009 stipulation of settlement, and where an e-mail produced in such action contained a notation indicating that it had been printed out in 2011. As such, the Court granted plaintiff's motion to the extent of precluding defendant from offering any documentation or the testimony of [the administrator] . . . or any other employee or former employee concerning the [settlement] upon the trial of this action with respect to both defendant's counterclaim and/or its defense to plaintiff's complaint."
Topic(s): Sanctions, Spoliation, Preclusion.

Harry Weiss, Inc. v Moskowitz, 106 AD3d 668 (1st Dept 2013)

Judge(s): Sweeny, Saxe, Moskowitz, Gische and Clark. Plaintiff's bookkeeper testified that "a litigation hold, either written or oral, was never issued directing him to preserve electronic data," which the Appellate Division held supported a finding that "plaintiff's disposal of the subject computer was, at the very least, grossly negligent." The Appellate Division noted that "by discarding the computer after its duty to preserve had attached without giving notice to defendants, plaintiff deprived defendants of the opportunity to

have their own expert examine the computer to determine if the deleted files could be restored." Defendants asserted that plaintiff's "spoliation of critical evidence compromised" defendants' ability to prosecute their counterclaims. In addressing plaintiff's argument that its disposal of the computer did not cause defendants prejudice because many of the files were printed prior to its disposal, the Appellate Division noted "converting the files from their native format to hard-copy form would have resulted in the loss of discoverable metadata." Accordingly, the Appellate Division sustained the Motion Court's ruling that "preclusion" was an appropriate spoliation sanction.
Topic(s): Litigation Hold, Sanctions, Spoliation, Preclusion.

Heins v Vanbourgondien (Sup Ct, Suffolk County, Sept. 25, 2012, Jones, Jr., J., Index No. 3967/2011)

Judge(s): Jones, Jr. The Court ruled that "Plaintiff shall comply with the demand served on behalf of defendant…with one exception. The plaintiff need not provide a list of all social networking accounts maintained or used, or the User ID and password for each of these accounts. After the plaintiff has been deposed, the defendants may renew their request for properly executed consent and authorizations as may be required by the operators of the social networking sites to which the plaintiff has subscribed since the day of the accident, permitting the defendants to gain access to such sites, including any records that may have been previously deleted or archived by such operators."
Topic(s): Social Media, Relevance.

Hines v Charles H. Greenthal Mgt. Corp., 2009 NY Slip Op 31631[U] (Sup Ct, Nassau County, July 13, 2009).

Judge(s): LaMarca. In this action against a homeowners' association, plaintiffs requested access to defendants' notes and emails, and if deleted, access to defendants' IT director. Alternatively, they requested that defendants' answer be stricken for failure to comply with electronic discovery requests. Defendants had previously claimed that ESI was unavailable but later found it, using a Google search. The Court ordered a forensic examination of defendants' computers under the supervision of a special referee.
Topic(s): Sanctions.

Hiney v City Ctr. of Music & Drama, Inc., 2014 NY Slip Op 32693[U] (Sup Ct, New York County, October 9, 2014).

Judge(s): Mills. In this action plaintiff sought production of the surveillance cameras that allegedly recorded the scene of the accident. Defendant claimed that there was no video to produce. Pursuant to the defendant's normal business practice, all live video surveillance was automatically deleted one week after recording. In granting the plaintiff's motion for spoliation sanctions, the court explained that:

> after the fall, ambulance personnel came to the scene and took plaintiff out on a stretcher, and security personnel for defendant filled out an incident report. Since defendant was on notice of a credible probability that it would become involved in litigation, plaintiff demonstrated that

> defendant's failure to take active steps to halt the process of automatically deleting surveillance video and to preserve it for litigation constituted spoliation of evidence.

Topic(s): Sanctions, Spoliation.

Hinshaw & Culbertson, LLP v E-Smart Technologies, Inc. (Sup Ct, New York County, Mar. 27, 2012, 113109/2009)

Judge(s): Gische. Plaintiff law firm sought production of defendant's meta-data on the ground that defendant's principal had allegedly altered highly relevant emails. Defendant denied this allegation, but offered to produce its meta-data if plaintiff law firm produced the meta-data associated with its own production. Plaintiff had not previously objected to the discovery of its own meta-data, but argued that it did have to produce ESI in native form because defendant could "not make a threshold showing that [plaintiff] altered any documents." In ordering reproduction of the ESI with metadata, the court explained that:

> [w]hile certainly meta-data is discoverable to determine if and when documents have been altered, that is not the only reason for production. General information about the creation of a document, including who authored a document and when it was created, is pedigree information often important for determining admissibility at trial. Moreover, in this case, although plaintiffs clearly required electronic information with metadata, no timely objection was ever raised. Nor is any valid reason raised as to its production at this time. Consequently, both parties are obligated to reproduce the electronically stored documents they originally produced, but this time in a format that includes the meta-data.

The Court held that, as neither party raised an issue about cost allocation, the producing party would bear the cost of reproduction.

Topic(s): Form of Production, Costs.

HMS Holdings Corp. v Arendt, 2015 NY Slip Op 50750[U] (Sup Ct, Albany County, May 19, 2015)

Judge(s): Platkin. With respect to one individual defendant's personal computer, the Motion Court found that plaintiff had been "denied the opportunity to determine the full extent to which [defendant] may have misappropriated and/or used [plaintiff's] confidential business information and adhered to his obligations under the Noncompetition Agreement." As to that defendant's external hard drive, the Motion Court found that "[e]ven if HMS could determine precisely the full scope of its confidential business information bulk-downloaded by [the defendant] on February 27, 2013, plaintiff has been deprived of valuable metadata that could show when and how the downloaded files were used and any changes that were made." With respect to a certain laptop, the Motion Court ruled that another individual defendant's "spoliation has made it impossible to determine what other HMS files existed only within [a certain] directory of her [new employer's] computer and when such files were accessed or modified."

The Motion Court held that it

> must consider the proportionality of the remedies sought by HMS. In particular, the Court is concerned that the order of preclusion requested by HMS would be tantamount to granting the broad, permanent injunctive relief requested in its complaint. Without prejudging the ultimate merits of the case, the Court believes that such relief, which implicates important public policies of the State, should be ordered only upon consideration of all available evidence, including any evidence that [the individual defendants] did not breach obligations owed to HMS or wrongfully acquire, access, distribute or use confidential HMS information. Indeed, a *de facto* terminating sanction generally is unwarranted where, as here, the spoliated evidence is not the sole means by which plaintiff can establish its claims.

The Motion Court held that "the trier of fact should be permitted to draw the strongest possible adverse inference from defendants' bad faith and intentional destruction, deletion and failure to produce relevant evidence. Thus, the trier of fact should be instructed as a matter of law that defendants engaged in the intentional and willful destruction of evidence, advised of the extent of each defendant's proven spoliation, and permitted to presume that the evidence spoliated by each defendant was relevant to this action, would have supported HMS's claims against the defendant and been unfavorable to the defendant." The Motion Court stated that while the precise wording of the requested adverse inference instruction "can await trial," issuing such a ruling is not premature as the sanction sought was issued on a pre-trial discovery motion. The Motion Court also ruled that it was appropriate for it to use such adverse inference in adjudicating HMS's pending motion for a preliminary injunction. Further, the Motion Court noted that where a preliminary injunction motion requires a determination of movant's ultimate likelihood of success, a "mandatory adverse inference at trial certainly is a factor to be considered in making that assessment." Finally, the Motion Court ordered that [the individual] defendants were required to pay HMS the "reasonable attorney's fees, costs and expenses incurred as a result of their intentional misconduct, and they shall not seek reimbursement or indemnification of such costs, fees and expenses from [their new employer]."
Topic(s): Evidentiary Hearing, Spoliation, Adverse Inference, Forensic Examination, Custodians, Metadata, Presumption of Relevance, Attorneys' Fees, Preliminary Injunction.

Holme v Global Minerals and Metals Corp., 90 AD3d 423 (1st Dept 2011)

Judge(s): Tom, Andrias, Catterson, Abdul-Salaam, Roman. Appellate Division affirmed the grant of an adverse inference charge against defendants due to spoliation of electronic records, holding that:

> [d]efendants had an obligation to preserve such records because they should have foreseen that the underlying litigation might give rise to the instant enforcement action; the records were destroyed with a culpable state of mind; and they are relevant to plaintiff's claims of fraudulent conveyances.

Topic(s): Spoliation.

House of Dreams, Inc. v Lord & Taylor, Inc., 2004 NY Misc LEXIS 3040 (Sup Ct, New York County, Mar. 15, 2004)

Judge(s): Kornreich. Plaintiff clothing vendor sued defendant department store for, *inter alia*, failing to honor purchase agreements. The plaintiff was unsatisfied with defendant's electronic discovery and alleged that the defendant engaged in spoliation because it did not suspend its automatic deletion schedule for e-mail despite being on notice of litigation. Plaintiff requested an order to permit its forensic technology expert to examine all of the defendant's information technology, including current systems and deleted files. The Court ruled that because all evidence demonstrated that the defendant had fully complied with discovery and had not willfully destroyed or altered any materials, and there was no evidence of bad faith on defendant's part, the motion was brought in bad faith and the plaintiff was not entitled to search the computer systems. However, the Court found that there was evidence that the defendant's automated deletion of old e-mails may have inadvertently excluded information from the information delivered to the plaintiff. Thus, the Court ruled that the plaintiff could, at its own expense, examine defendant's disaster recovery tapes within 10 days or be deemed to have waived this discovery.

Topic(s): Sanctions, Spoliation.

Howard-Banks v Flynn Meyer Hempstead, Inc. (Sup Ct, Nassau County, June 10, 2013, Murphy, J., Index No. 15906/2011)

Judge(s): Murphy. When defendant first became aware of the "possibility of legal action," defendant sought to have a surveillance tape copied onto a flash drive. Defendant then put the videotape back into its thirty day rotation schedule. The transferring to the flash drive was not successful and thus no tape then existed which would reflect the event. Plaintiff's motion to strike defendant's answer was denied, but defendant was ordered to produce the flash drive provided to its investigator, and that if "it cannot be located, the investigator and the insurance company representative who received it are to be produced and deposed concerning the flash drive as well as its content."

Topic(s): Sanctions, Preservation, Litigation Hold, Video.

Hulett v Niagara Mohawk Power Corp., 1 AD3d 999 (4th Dept 2003)

Judge(s): Pine, Hurlbutt, Kehoe, Lawton, and Hayes. Plaintiffs in this tort claim against a railroad were children injured when struck by a train. The Lower Court initially granted a motion to sanction the railroad for spoliation of evidence for failure to preserve a cartridge with data on trains. However, the railroad subsequently demonstrated that the

cartridge actually did contain electronic evidence that was mistakenly considered to be destroyed due to use of a defective reader. As a result, the Court granted the defendants' motion for reconsideration of the spoliation sanctions, and lifted the sanctions. The Appellate Division affirmed, noting that the showing of the evidence on the cartridge was sufficient to refute the spoliation allegation and the Lower Court did not abuse its discretion in granting the motion for reconsideration.
Topic(s): Sanctions, Spoliation.

Hunts Point Realty Corp. v Pacifico, 16 Misc 3d 1122[A], 2007 NY Slip Op 51543[U] (Sup Ct, Nassau County, July 24, 2007)

Judge(s): Warshawsky. Hunts Point Realty Corp. (HPRC) sued Vincent Pacifico for breach of contract, claiming Pacifico violated a Covenant-Not-To-Compete by bidding on a space previously rented by HPRC. Specifically, an HPRC bid was rejected subsequent to the submission of multiple bids by Pacifico. The Court, before trial, ordered Pacifico to preserve e-mails. Pacifico failed to preserve the emails, and HPRC sought a negative inference pursuant to the doctrine of spoliation. The Court held that Plaintiffs did not show that the destroyed e-mails were relevant in determining the appropriate amount of damages, so no negative inference could be granted. However, because defendant's "unabashed flaunting" of the Court's preservation order led to additional work by Plaintiffs' counsel, the Court awarded plaintiff attorneys fees and costs for all work related to defendant's failure to preserve the e-mails.
Topic(s): Sanctions, Spoliation.

Imanverdi v Popovici, 109 AD3d 1179 (4th Dept 2013)

Judge(s): Smith, Peradotto, Carni and Lindley. The Motion Court's decision directing plaintiff to produce her Facebook page for an *in camera* review and awarded costs and attorney's fees to defendant was affirmed.
Topic(s): Social Media, *In Camera* Review, Sanctions.

Ingoglia v Barnes & Noble Coll. Booksellers, Inc., 48 AD3d 636 (2d Dept 2008)

Judge(s): Mastro, Fisher, Dillon, McCarthy. In this defamation action, defendant appealed an order denying its motion to dismiss the complaint based on spoliation of evidence. In support of the motion to the Trial Court, defendant submitted a computer expert's affidavit stating that a software program designed to permanently delete data from a hard drive was installed on plaintiff's computer, and certain data was deleted even after the Court ordered production of the computer. Finding defendant was "severely prejudiced" by such spoliation of key evidence, the Appellate Division reversed, holding that the trial court abused its discretion in denying defendant's motion to dismiss.
Topic(s): Spoliation, Sanctions.

Irwin v Onondaga County Resource Recovery Agency, 72 AD3d 314 (4th Dept 2010)

Judge(s): Scudder, Centra, Fahey, Green, Gorski. Under the NY Freedom of Information Law, petitioner sought records involving use of his photo in an e-mail sent by the respondent agency, including the image file itself and associated metadata. Petitioner also sought unpublished photos of individuals other than the petitioner. The Court affirmed in part, holding that unpublished photos of individuals other than the petitioner and photos relating to active or ongoing law enforcement investigations were properly withheld. However, the Court held that it was appropriate to release photos of the petitioner and photos that do not depict individuals, together with the system metadata associated with those photos.
Topic(s): Scope.

In the Matter of Jeevan Padiyar v. Yeshiva University, Index No. 110578/05, slip. Op. At 2-3 (Sup Ct, New York County, June 12, 2006)

Judge(s): Edmead. The Court ruled that a petitioner was entitled to retain its own forensic analyst to search a defendant's hard drive for a disputed e-mail, even though the defendant had already used a respected forensic computer firm to search the drive.
Topic(s): Scope.

Jennings v Orange Reg'l Med. Ctr., 102 AD3d 654 (2d Dept 2013)

Judge(s): Rivera, Dillon, Leventhal and Chambers. Shortly after an incident, plaintiff's attorney sent a letter to defendant requesting that it preserve all records in its possession, including video footage. The letter was stapled to the back of plaintiff's incident file and never forwarded to defendant's Department of Risk Management. After joinder of issue, and after the defendant denied possessing video footage of the incident, plaintiff moved to strike defendant's answer on spoliation grounds. The Court held that "any videotape footage of the incident that may have existed was, in the ordinary course of business, overwritten by new videotape footage within approximately [thirty] days after the date of the recording." Based on such facts, the Appellate Division held that the Motion Court improvidently granted plaintiff's spoliation motion to the extent of precluding defendant from introducing evidence at trial that the alleged perpetrator was being supervised by its employees as plaintiff "can testify about how and where the incident occurred and subpoena other individuals who may have witnessed the incident." The Appellate Division determined that the appropriate sanction would be to direct that a negative inference charge be given at trial with respect to the unavailable video footage.
Topic(s): Sanctions, Spoliation, Adverse Inference.

Jennings v TD Bank, 2013 NY Slip Op 32783[U] (Sup Ct, Nassau County 2013)

Judge(s): Brown. After an internet search revealed that plaintiff's Facebook account had a picture of her in front of a cruise ship holding scuba gear on a beach, defendant moved to compel plaintiff to provide her Facebook postings. The Court held the information contained on plaintiff's Facebook account is "material and necessary, and plaintiff's privacy concerns are outweighed by defendants' need for the information." The Court

found that the photograph on "public, unblocked portions of plaintiff's profile through an internet search" "contradicts" plaintiff's verified bill of particulars as to "permanent and continuing physical injuries," "preventing [her] from enjoying normal fruits of social activities" and that the incident "contributed to plaintiff living a lesser quality of life, including loss of enjoyment of life than plaintiff would have otherwise experienced."

The Court found that the picture was indicative that "there may be more" relevant information on plaintiff's Facebook account. The Court noted that defendant's request was "narrowly tailored" because it only sought information regarding the "alleged incident." The Court held the review of such postings relevant because plaintiff not only put her "physical condition" at issue, but also her "enjoyment of life and social activities." Finally, the Court noted that because plaintiff "voluntarily and purposefully" posted such photograph, it is "reasonable to believe that there is relevant information in addition to that photograph." As such, the Court ordered an *in camera* review of "all current historical Facebook pictures, videos or relevant status postings from [plaintiff's] personal Facebook account since the date of the alleged incident, including any records previously deleted or archives and plaintiff shall not take steps to delete or alter existing information and posts of her Facebook accounts. If plaintiff is unable to recover any deleted material, plaintiff is directed to obtain her entire record from Facebook, including any records previously deleted or archives by the operators of Facebook."
Topic(s): Social Media, Relevance, *In Camera* Review.

JFA Inc. v Docman Corp., 2010 NY Slip Op 30369[U] (Sup Ct, New York County, Feb. 22, 2010)

Judge(s): Stallman. Plaintiff's motion for a preliminary injunction essentially sought a protective order to preserve electronic evidence, either in the form of an injunction prohibiting defendants from accessing their own computers until a backup could be performed, or in the form of an order of seizure directing the sheriff to take possession or control of any computer servers or storage media containing information belonging to plaintiff. Although the Court noted that motion is clearly related to discovery, and not provisional remedies, the Court did allow plaintiff access to perform a mirror bit stream backup of the hard drives and servers on defendants' premises, but denied the remainder of the relief requested.
Topic(s): Preservation, Scope.

Johnson v Edwards, 41 Misc 3d 756 (Sup Ct, Kings County 2013)

Judge(s): Pfau. Plaintiff alleged that a laboratory failed to timely provide the physician with the results of a blood serum test. Plaintiff sought the production of the "workstation" report, which reflected electronically transmitted test results and where, if there was an abnormal reading, it would be identified in the report. The Court found that:

> there is no indication that Enzo Laboratory had preserved the workstation report and destroyed it in response to this lawsuit or plaintiff's demand that it be produced, or otherwise acted wilfully to dispose of the report. The only "culpable state of mind" plaintiff can attribute to Enzo

> Laboratory is negligence in failing to preserve the report under the standard of care dictated by the Department of Health regulation.

The Court ruled that, under the applicable regulation, the "workstation" report only had to be retained for one year, and noted that the summons and complaint had been served upon the laboratory more than one year after the report was created. As such, the Court held:

> [s]ince there is no indication that Enzo Laboratory possessed a copy of the workstation report at the time the summons and complaint or demands for discovery were served, the Court does not reach the question of whether defendant breached its obligation to preserve the document under a litigation hold.

Topic(s): Sanctions, Preservation, Litigation Hold, Spoliation.

Johnson v Ingalls, 2012 NY Slip Op 3942 (3d Dept May 3, 2012)

Judges(s): Garry. The Appellate Division affirmed a defense jury verdict in a personal injury action and sustained the introduction into evidence, after an *in camera* review by the Trial Court, of post-accident photographs obtained from plaintiff's Facebook page to counter plaintiff's claimed injuries.

Topic(s): Social Media, Admissibility.

Juice v Twitter, Inc., 44 Misc 3d 1225[A], 2014 NY Slip Op 51335[U] (Sup Ct, Kings County, 2014)

Judge(s): Rivera. Motion Court, in a proceeding seeking pre-action disclosure, directed Twitter to disclose basic subscriber information and internet protocol addresses sufficient to identify the individuals who owned or operated a certain Twitter account and who logged into or tweeted from that account during a specified period and to preserve documents containing the information sought to be disclosed. Petitioner contended that he needed such disclosure in order to name defendants in an action alleging *prima facie* tort, intentional infliction of emotional distress, fraud and malicious prosecution.

The Motion Court found that in calling the account "LemonJuice@moseh718," the creator of the account gave the public the false impression that Lemon Juice was its owner and operator who had "obtained a digital image of the infant victim while she was testifying against her rapist in direct violation of a court order not to take such photographs and posted such image to the subject account for the "entire world to see." The Motion Court found that the "creator's conduct was especially heinous because it created the false appearance that Lemon Juice openly disregarded the privacy of an infant sex crime victim" and it created the "false impression that Lemon Juice was attempting to expose, humiliate and intimidate the infant victim while she was in the process of testifying against her tormentor." The Motion Court held that it "is a reasonable inference from these facts that the creator was seeking to humiliate Lemon Juice, tarnish his reputation and expose him to criminal prosecution by framing him." As such, the Motion Court held that "Lemon Juice had met his burden of demonstrating that he has a meritorious cause of action for intentional infliction of emotional distress" and therefore

was entitled to discovery from Twitter to determine who should be named as a defendant.
Topic(s): Pre-Action Disclosure, Social Media, Preservation, Intentional Infliction of Emotion Distress.

Karam v Adirondack Neurological Specialists, P.C., 93 AD3d 1260 (4th Dept 2012)

Judges(s): Centra, Fahey, Peradotto, Carni and Martoche. The Appellate Division affirmed dismissal of plaintiff's complaint for medical malpractice and wrongful death. Plaintiff sustained a head injury and was taken to the hospital, where a note regarding plaintiff's status was inputted into the computer system. Defendant presented evidence regarding computer problems with respect to the electronic note. The jury ultimately returned a verdict finding no negligence on the part of any defendant. The Appellate Division affirmed dismissal of plaintiff's complaint and noted that "Plaintiff failed to preserve for our review her contention that defendants' presentation of evidence regarding computer problems with respect to the 11:23 a.m. note denied her a fair trial."
Topic(s): Preservation, Scope, Admissibility.

Karim v Natural Stone Indus., Inc., 19 Misc 3d 353 (Sup Ct, Queens County, Jan. 18, 2008)

Judge(s): Kitzes. Plaintiff sued for employment-related injuries, alleging state labor law violations and common law negligence. The third-party defendant sought to compel discovery of materials relating to plaintiff's alleged cognitive deficiencies due to a brain injury, specifically a "clone" of the plaintiff's hard drive on the grounds that that various uses and materials in the computer would speak to the issue of whether plaintiff was actually cognitively deficient, or gravely injured. The Court denied the request ruling that the computer was not relevant in determining whether the plaintiff could engage in future work and noted that the plaintiff's mother and others used the computer and, therefore, it was impossible to determine to what extent the plaintiff had used the computer.
Topic(s): Scope.

Kennedy Assoc. v JP Morgan Chase Bank N.A, 2014 NY Slip Op 30025[U] (Sup Ct, New York County 2014)

Judge(s): Coin. Defendant JP Morgan Chase Bank "moved to compel plaintiff to shift costs of production of electronically stored information ("ESI"), to toll its time to produce, and for a protective order against production." In support of its application, defendant submitted an affidavit outlining the procedure and costs of production and plaintiff, arguing that defendant should bear the entire cost of production, provided "no expert affidavit of its own" and did "not provide any alternative calculations of the cost of production of the ESI discovery." The Court noted that the "presumption in New York is that the producing party must bear the costs of discovery for all reasonable requests" and relying upon the test for determining when cost-shifting is appropriate as set forth in *Zubulake v UBS Warburg* LLC, 217 FRD 309 (S.D.N.Y. 2003), held:

> The seven *Zubulake* factors weigh more heavily against cost-shifting. The first factor weighs against total cost-shifting because of the relevance of

the potentially found information. As noted, this factor is slightly mitigated by plaintiff's failure to provide evidence that makes such a finding more likely. The second factor weighs against cost-shifting, as defendant is the only possessor of the requested emails. The third factor weighs in favor of some cost-shifting, as the cost of production is high relative to estimated recovery costs for plaintiff. However, the fourth factor weighs firmly against cost-shifting, as defendant is a multi-national corporation that can commit significant resources to litigation, including discovery costs. Defendant corporation has the sole ability to control costs of the ESI production, the fifth factor, which militates against cost-shifting.

Thus, the balance of the factors requires some cost-shifting here. Three of the five most important factors weigh more heavily against cost-shifting, while only one of the five most important factors (cost versus amount in controversy) weighs strongly in favor of cost-shifting. Combining this analysis with the presumption that the producing party pay, the apportionment must weigh more heavily towards defendant. Therefore, the costs will be apportioned, with 20% ($36,506.40) preliminarily to be borne by plaintiff and 80% by defendant ($146,025.60).

Topic(s): Cost-Shifting.

Kerner v Lopiccolo (Sup Ct, Nassau County, Sept. 17, 2014, Index No. 12008/2013)

Judge(s): Jaeger. Discovery of private Twitter and Facebook messages was permitted in a breach of contact action where a review of plaintiff's public Twitter and Facebook messages revealed comments about the incident that formed the predicate for her breach of contract claim, including that plaintiff had posted comments about attending another event on the date of the incident while claiming that she was confined to bed for two days following the incident. The Motion Court found that the evidence submitted made it "reasonable to believe that the private portions of [plaintiff's] pages may contain further evidence relevant to [d]efendant's defense and prosecution of the counterclaims." The Motion Court ordered plaintiff to provide access to her private social media messages from the date of the incident to the present as well as cell phone records for the date of the incident.

Topic(s): Social Media, Relevance.

Klein v Persaud, 25 Misc 3d 1244[A], 2009 NY Slip Op 52582[U], (Sup Ct, Kings County, Dec. 21, 2009)

Judge(s): Schack. Following the Court's confirmation of petitioner's arbitration award, Chase Bank, a third party, sought expenses of $9,112.00 as "production expenses" ($4,550.00 for time spent locating and retrieving documents and $4,562.00 for printing). The Court reduced the amount to $1,192.10 for time spent locating and retrieving documents and $58.17 for printing. The Court noted that "[t]wo CPLR Rules deal with production costs for a non-party. CPLR Rule 3111 states that a deposition subpoena may require the production of books, papers, and other things in the possession, custody or

control of the person to be examined to be marked as exhibits, and used on the examination. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery. CPLR Rule 3122 (d) allows a non-party witness to provide, unless specifically directed to provide original documents, complete and accurate copies of the items to be produced. Further, the reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery. Production costs can include providing electronic discovery, such as e-mail."
Topic(s): Costs.

Klein Family Partnership, LP v AJW Manager, LLC (Sup Ct, Nassau County, Oct. 17, 2013, Bucaria, J., Index No. 21522/2010)

Judge(s): Bucaria. Plaintiff moved to compel defendant to identify certain individuals at its "e-discovery firm" and to "allow" those individuals to communicate with plaintiff's e-discovery firm. In response, the Court stated:

> The obligation of good faith to resolve discovery disputes applies with even greater force in the area of electronic discovery (22 NYCRR § 202.70, Rule 14). Thus, counsel should endeavor to make the electronic discovery process more cooperative and collaborative (Guideline 4, Best Practices in E-Discovery in New York State and Federal Courts). Counsel are encouraged to have a "meet and confer" to resolve e-discovery issues without court intervention (Guideline 4, Comments). It may be beneficial to have a knowledgeable IT person present to address questions that may arise at the meet and confer, or to explain detailed technical issues (Id). However, lawyers may be uncomfortable with the unpredictability of having a non-lawyer potentially speak for the client on discovery issues (Id). Accordingly, plaintiff's motion with respect to defendant's e-discovery firm is granted only to the extent that counsel shall meet and confer with respect to e-discovery within ten days after production of non-electronically stored documents. At the meet and confer, counsel shall be accompanied by an IT professional, familiar with their client's computer system. Within 20 days after the meet and confer, defendants shall produce all electronically stored documents showing withdrawals by plaintiff, or valuations of securities held by AJW. Partners.

Topic(s): Cooperation.

Kolchins v Evolution Mkts., Inc., 128 AD3d 47 (1st Dept 2015)

Judge(s): Renwick, Moskowitz, Richter, Feinman (majority) and Friedman (dissent). There is no "blanket rule by which email is to be excluded from consideration as documentary evidence under" CPLR Rule 3211(a)(1).
Topic(s): Emails, Documentary Evidence.

Kramer v Elrac, Inc. (Sup Ct, New York County, Jan. 18, 2012, Index No. 105273/2009)

Judge(s): Silver. Defendant did not inquire at plaintiff's deposition regarding her use of social media and did not establish a factual predicate with respect to the relevancy of the evidence sought, and the contention that plaintiff "must have" further electronic communications regarding her damages, in addition to what was produced, was insufficient to warrant discovery of plaintiff's Facebook and other social media accounts.
Topic(s): Social Media, Relevance.

Kramer v Macerich Prop. Mgt. Co. LLC, 2012 NY Slip Op 30805[U] (Sup Ct, Queens County 2012)

Judge(s): Weiss. Plaintiffs cross-moved to strike defendant's answer alleging spoliation of surveillance evidence. Recordings from the surveillance camera were stored on a hard drive, and periodically erased. In the event of an accident, company policy was to segregate the recording and preserve it. It was admitted that the recording showed at least part of the accident and that it was reviewed by a security supervisor and then disposed of. The Court denied a preclusion sanction holding that "plaintiffs did not come forward with any evidence that they sought to either preserve or inspect the surveillance video, that they [were] prejudiced by the destruction of the video, or that defendants acted in bad faith, willfully or contumaciously." The Court, however, found that, where plaintiff was available to testify, a witness existed and, photographs of the area were available, the appropriate sanction was an adverse inference to be given at trial.
Topic(s): Sanctions, Spoliation, Adverse Inference, Video.

Kregg v Maldonado, 98 AD3d 1289 (4th Dept 2012)

Judge(s): Scudder, Centra, Carni, Sconiers and Martoche. The Appellate Division unanimously reversed an order of the Supreme Court, Erie County, which granted disclosure of the "entire contents" of all social media accounts maintained by or on behalf of the injured party, subject to a "more narrowly-tailored disclosure request," where there is "no contention that the information in the social media accounts contradicts plaintiff's claims for the diminution of the injured party's enjoyment of life."
Topic(s): Social Media, Relevance.

Law Offices of Kenneth J. Weinstein, P.C. v Signorile (Sup Ct, Nassau County, Jan. 27, 2014, Murphy, J., Index No. 7623/2013)

Judge(s): Murphy. In an account stated cause of action, the presumption of receipt of bills is "inappropriate" where there is an issue of fact as to defendant's receipt of them as the bills were emailed monthly, but were delivered to the "spam box" of defendant's computer.
Topic(s): Admissibility.

Laddcap Value Partners, LP v Lowenstein Sandler PC, 2009 NY Slip Op 30540[U] (Sup Ct, New York County, Mar. 11, 2009)

Judge(s): Edmead. In setting the stage for this malpractice action, defendant law firm issued a litigation hold letter to plaintiff Laddcap in connection with a prior matter in which the law firm represented plaintiff. The firm then followed up the next day with an email reminding plaintiff to preserve relevant documents. The plaintiff in the prior action complained about Laddcap's discovery responses, specifically stating that Laddcap failed to produce six emails regarding Laddcap's director nominees. Laddcap had indicated that all emails had been deleted by the director prior to the institution of the lawsuit. The Court in the prior action held a hearing regarding the emails the next day. As a result of the hearing, the Court authorized plaintiff in the prior action to depose Laddcap's director regarding his computer usage and to obtain a computer forensics expert to take possession of Laddcap's computers. The director testified that he had a practice of deleting emails daily, but, post litigation, he retained relevant emails. He also testified that he did not use his home computers for work purposes. However, immediately thereafter, the director informed defendant law firm that his testimony regarding home computer usage was false. The next day the law firm filed a declaration on the director's behalf to clarify and supplement his testimony. After a spoliation charge was made against the director, the law firm searched the computers for missing emails and found one of them. It appeared that the others were deleted. In this subsequent malpractice action, Laddcap dismissed defendant attorneys and stated that the firm should have known about the six emails produced in a different action where the law firm was not representing Laddcap. The Court found that defendant attorneys did not have an obligation to obtain the emails from attorneys on a different case in a different state involving a lawsuit in which they were not involved.
Topic(s): Preservation.

Lamb v Maloney, 46 AD3d 857 (2d Dept 2007)

Judge(s): Spolzino, Krausman, Angiolillo, McCarthy. In a medical malpractice action, plaintiff sought to strike defendant's answer as a sanction for spoliation, claiming that defendant and/or his office staff destroyed office computers containing information relevant to the malpractice claim. The Trial Court denied the motion and also denied plaintiff's request to discover information relating to the alleged computer destruction. On plaintiff's appeal, the Appellate Division upheld the Trial Court's denial of the motion to strike the answer, ruling that plaintiff had not offered evidence sufficient to show spoliation. However, the Court reversed the Trial Court's denial of plaintiff's motion requesting production of information relating to the destruction of the computer and implementation of the new system. "Such additional discovery was reasonably calculated to produce relevant and material evidence and defendants failed to demonstrate any prejudice as a result."
Topic(s): Spoliation, Scope.

Lawlor v Venezia (Sup Ct, Nassau County, Oct. 3, 2011, Index No. 8873/2010)

Judge(s): Feinman. The Motion Court ordered that plaintiff provide authorization to her Facebook and MySpace accounts for photographs posted by plaintiff of her trip to the Bahamas on the basis that plaintiffs personal injury action placed her physical and emotional condition at issue, and denied plaintiffs access to defendant's Facebook account where plaintiff failed to establish that the information sought was relevant.
Topics(s): Social Media, Relevance.

Lefcort v Samowitz (Sup Ct, Nassau County, Jan. 23, 2015, Index No. 603365/2014)

Judge(s): Mahon. Motion Court enjoined defendant from denying "plaintiffs access to the customer information, e-mail accounts, invoices, telephone numbers and inventory of Expendables Plus LLC and to restore to the plaintiffs full access to customer information, e-mail accounts, invoices, telephone numbers and inventory in which the defendant has an ownership interest or over which the defendant maintains control." The Motion Court also directed defendant to "maintain, preserve and share all electronic files of Expendable Plus LLC" under defendant's control.
Topic(s): Preservation, Injunction.

Lennon v Fox (Sup Ct, Nassau County, Feb. 18, 2014, Feinman, J., Index No. 600876/2012)

Judge(s): Feinman. Plaintiff placed her physical condition at issue and defendants demonstrated that the photographs identified at plaintiff's deposition as posted on her Facebook account were probative of the issue and the extent of plaintiff's claimed injuries. Plaintiff's Facebook account was "disconnected" after her deposition. Defendants were denied access to plaintiff's Linked-In account because a proper showing had been made, but the Court ordered an *in camera* inspection of "*all* photographs, status reports, e-mails, and videos posted on plaintiff's Facebook account, including, but not limited to those deleted, from October 29, 2011 to the present, including any new account or account re-activated under a difference alias."
Topic(s): Social Media*, In Camera* Review, Relevance.

Matter of Link, 24 Misc 3d 768 (Sur Ct, Westchester County, Apr. 20, 2009)

Judge(s): Scarpino, Jr. Trustees in a contested accounting proceeding of a deceased patriarch's estate petitioned the Court to order nephew objectants' disclosure of ESI in electronic form and petitioned the Court to require the nephew to disclose the ESI in a paper format. The Court denied the trustees' objection and held that "While the relevant statute, CPLR 3122, does not explicitly authorize the production of documents by electronic files, such production is not prohibited. Under subdivision (c) of section 3122, a person is required to produce documents for inspection . . . as they are kept in the regular course of business or shall organize and label them to correspond with the categories in the request. Subdivision (d) of section 3122 states that unless required by a subpoena, 'it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced.' Such language does not limit the delivery of a complete and accurate copy to a paper copy." Thus, applying the

Court's broad discretion to regulate the use of any disclosure device (CPLR 3103), objectants were allowed to produce documents electronically. Such production was to be accompanied by an index identifying the document(s) produced in response to each demand and the electronic file where the document has been stored. "Without an index, it would be unduly burdensome to require the trustees to read 6,000 documents, some of which may not bear upon the objections."
Topic(s): Form of Production.

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)

Judge(s): Austin. Lipco sought ESI from ASG, including legacy backup tapes to which ASG objected. "Electronic discovery raises a series of issues that were never envisioned by the drafters of the CPLR . . . Some of the questions presented include: are the documents on the hard drive or are they on some form of back-up; have the documents been deleted; what software was used to create and store the documents; and is that software commercially available or was the software created and/or licensed specifically for the user." The Court noted key distinctions between paper and electronic record-keeping that affects discovery costs. The Court concluded that "cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material."
Topic(s): Costs.

LM Bus. Assoc., Inc. v State of New York, 214 AD3d 1215 (4th Dept 2015)

Judge(s): Centra, Fahey, Whalen and DeJoseph. Conversion not found where defendant had the proper authority to exercise control and where unchallenged search warrant specifically authorized law enforcement to "search for and seize" six categories of items, including "[a]ll computers and computer storage media and related peripherals, electronic or computer data," and it placed no time limit on the retention of the items seized, and where the authorization to "seize" the computers was not terminated until County Court ordered the property returned following the guilty plea.
Topic(s): Conversion.

LMO v "Younglawyer," 2015 NY Slip Op 30498[U] (Sup Ct, Kings County, Mar. 9, 2015)

Judge(s): Graham. Plaintiff law firm sought an order seeking leave to authorize alternative service of process on unknown defendants who allegedly made defamatory statements about plaintiff on websites that exist for the purpose of posting anonymous comments. Plaintiff alleged that defendants used fictitious names and non-traceable Internet Protocol addresses. Plaintiff requested that it be permitted to serve defendants by posting the summons and complaint on the website as "rebuttals" to defendants' allegedly defamatory posts. Plaintiff asserted that it expected the website would "provide notification of the submission of a rebuttal to the author of the original report." The Motion Court rejected such proposed method of service as movant relied upon inapposite precedent permitting service by email. The Motion Court noted that, while service of

process by email has been permitted, in those cases the parties had a prior history of communications with each other by email and the email address at issue was shown to be valid. The Motion Court noted that there "is very little assurance that the pleadings posted on these anonymous websites would be services on the defendants 'reasonable calculated to give them notice of the action.'" The Motion Court noted that, while it is sympathetic to the lack of viable methods to serve process, and thereby challenge the alleged defamation, "due to the specific nature of the websites at issue here, posting pleadings as a rebuttal does not conform to New York law."
Topic(s): Social Media, Service of Process.

Locks v PRC Indus., Inc. 2014 NY Slip Op 31933[U] (Sup Ct, Suffolk County, July 9, 2014)

Judge(s): Pastoressa. "To the extent that the e-mails contained in the CD ROM provided in response to document request numbered 32 are not in their 'native, and in a searchable and sortable format,' or without all attachments thereto, they are to be properly produced."
Topic(s): Native Format, Form of Production, Emails.

Long Island Diagnostic Imaging, P.C. v Stony Brook Diagnostic Assocs., 286 AD2d 320 (2d Dept 2001)

Judge(s): O'Brien, Friedmann, Feuerstein, Cozier. In an action for judgment declaring that the plaintiff did not default under an agreement with the defendants, the Court held that the defendant violated previous court orders directing them to produce billing records, including computer databases. Indeed, the defendants purged their databases in 1993. The back-up tapes, which were ultimately produced pursuant to court order, were compromised and unusable. The Appellate Division noted that the striking of a party's pleading is a proper sanction for a party who spoliates evidence. "Accordingly, under the circumstances of this case, the Supreme Court should have dismissed the defendants' counterclaims and the third-party complaint to the extent indicated."
Topic(s): Spoliation, Sanctions.

L&L Painting Co., Inc. v Odyssey Contr. Corp., 2014 NY Slip Op 32511[U] (Sup Ct, New York County, September 25, 2014).

Judge(s): Bransten. Defendant moved for sanctions based on plaintiff's failure to preserve personal email accounts of certain management employees. Defendant contended that the duty to preserve the subject emails arose, at the latest, on the date the action was commenced and that a litigation hold should have been implemented prior to the filing date. Plaintiff admitted that a litigation hold was not in place at this time, however, that sanctions were inappropriate because the destruction of emails was not willful or intentional. In refusing to impose sanctions on the plaintiff, the court held that while "L&L was negligent in failing to institute a litigation hold or otherwise act in a timely manner to preserve the emails in question, the facts do not support a finding of bad faith or gross negligence against L&L."
Topic(s): Spoliation, Sanctions.

Loporcaro v City of New York, 35 Misc 3d 1209[A], 2012 NY Slip Op 50617[U] (Sup Ct, Richmond County, Apr. 9, 2012)

Judge(s): Aliotta. "[M]oving defendant has sufficiently shown that information contained within plaintiffs Facebook account may contain information that is relevant to the claims made with regard to the effects of his injuries as alleged in their bill of particulars. These include plaintiffs claim to have been incapacitated and confined to bed or home during the first two months following the accident, as well as its permanent effects on his daily life. When a person creates a Facebook account, he or she may be found to have consented to the possibility that personal information might be shared with others, notwithstanding his or her privacy settings, as there is no guarantee that the pictures and information posted thereon, whether personal or not, will not be further broadcast and made available to other members of the public. Clearly, our present discovery statutes do not allow that the contents of such accounts should be treated differently from the rules applied to any other discovery material, and it is impossible to determine at this juncture whether any such disclosures may prove relevant to rebut plaintiffs' claims regarding, *e.g.,* the permanent effects of the subject injury. Since it appears that plaintiff has voluntarily posted at least some information about himself on Facebook which may contradict the claims made by him in the present action, he cannot claim that these postings are now somehow privileged or immune from discovery. Therefore, granting [defendant] access to portions of plaintiffs Facebook account, including access to certain deleted materials, may well prove relevant and necessary to the defense."
Topic(s): Social Media, Relevance.

Mancino v Fingar Ins. Agency, 2014 NY Slip Op 30005[U] (Sup Ct, New York County 2014)

Judge(s): Rakower. The Court found that plaintiff was entitled to the production of documents in native form with TIFF images and declined to shift costs to the requesting party. Plaintiff sought "to view document metadata, which includes information regarding the author(s), dates of creation, and dates of edits to determine whether the Activity Report entries were edited after their date of initial creation or commencement of litigation." Defendant opposed "contending that plaintiffs are not entitled to such a production as issues concerning metadata are not involved in this lawsuit and electronic document production is therefore not necessary."
Topic(s): Cost-Shifting, Native Format, Metadata.

Mangione v Jacobs, 37 Misc 3d 711 (Sup Ct, Queens County 2012)

Judge(s): Markey. Plaintiff, a passenger in a taxi that collided with another car in Queens, sued the driver, operator and owner of the taxi for injuries sustained in said collision. Defendants moved for summary judgment on the issue of liability in the personal injury action, contending that the collision was caused by the driver of the other car. In opposing the motion, plaintiff's counsel alleged that while driving, the driver of the taxi "continuously engaged in conversation with someone while using either an earpiece or a "hands free" telephone device" in violation of a New York City Taxi and Limousine Commission regulation that forbids "taxi and livery car drivers, from

engaging in any telephone conversations, even while using a "hands-free" device, except when the vehicle is parked." The Court denied defendants' summary judgment motion and further granted plaintiff's motion for the production of the cell phone records of the taxi driver defendant.
Topic(s): Smart Phones, Relevance.

Maria McBride Prods., Inc. v Badger, 46 Misc 3d 1221[A], 2015 Slip Op 50167[U] (Civ Ct, New York County, 2015)

Judge(s): d'Auguste. Emails "exchanged between counsel, which contained their printed names at the end, constitute signed writings (CPLR 2104) within the meaning of the statute of frauds and entitled [that party] to judgment."
Topic(s): Emails, Statute of Frauds.

Martin v Daily News LP, 2012 NY Slip Op 30731[U] (Sup Ct, New York County 2012)

Judge(s): Shulman. Plaintiff moved to compel answers to interrogatories concerning why defendant did not use certain "search terms" when searching for e-mails, and then sought production of such responsive documents. The Court found that the "search terms" that defendant used were sufficient to "generate e-mails relevant" to the action and that plaintiff's proposed "search terms" were either too broad or pertained to individuals who were peripheral to the action. The Court granted defendant's cross-motion to compel plaintiff to identify all searches he had made or that were conducted using certain "search terms" and to produce the documents identified in such searches. In addition, the Court denied plaintiff's request for the production of a certain hard drive from the computer used when identifying e-mails between two individuals on the basis that there was an insufficient showing for such "extraordinary relief." Finally, the Court denied as "overbroad" defendant's request for the production of any requests made by or on behalf of plaintiff to preserve relevant documentation.
Topic(s): Search Terms, Production of Hard Drive, Preservation.

In re Maura, 17 Misc 3d 237 (Surrogate's Court, Nassau County, June 28, 2007)

Judge(s): Riordan. In an estate claim, the Surrogate's Court refused to allocate the cost of imaging a non-party law firm's hard drive to the law firm on the basis that "[t]he CPLR provides that the party seeking discovery should incur the costs incurred in the production of discovery material." In reaching this conclusion, the Court observed that, "the New York courts have often looked at federal cases for guidance on the issues of electronic discovery." Because the matter concerned an alleged alteration of a prenuptial agreement, the Court ordered that a "direct clone" of the law firm's hard drive should be produced but declined to allocate the costs of that discovery to the non party "as has been done in certain circumstances, especially in the federal courts."
Topic(s): Costs, Scope.

MBIA Ins. Corp. v Countrywide Home Loans, Inc., 27 Misc 3d 1061 (Sup Ct, New York County, Jan. 14, 2010)

Judge(s): Bransten. In addressing the issue of cost shifting in a case involving voluminous documents, the Commercial Division of New York Supreme Court found that it is not "settled law" that the party requesting discovery must bear the cost of its production. Rather, the Court found that cost allocation (*i.e.*, the requesting party pays for the cost of production) is warranted only when the requested information is not readily available, such as the "retrieval of archived or deleted electronic information." Thus, the supposedly "settled" law that the requesting party should incur discovery costs does not apply when the information is readily available, and instead the producing party must bear the costs of such production. Accordingly, the Court denied defendant's motion for a protective order allocating the costs of discovery.
Topic(s): Costs.

MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC, 2014 NY Slip Op 31871[U] (Sup Ct, New York County, July 17, 2014)

Judge(s): Kornreich. In denying a motion to compel, the Motion Court stated that one "cannot reasonably expect to uncover every single instance" in which an employee says something about a particular subject. The Motion Court noted that "the very reason that [plaintiff] knows that so much inflammatory ESI exists is precisely because it has so much already. To be sure, in reviewing [defendant's] itemized justifications as to what constitutes relevant ESI, it appears that [defendant] may well have been somewhat overaggressive in determining the scope of relevance."
Topic(s): Relevance.

MBIA Ins. Corp. v Credit Suisse Secs (USA) LLC, 2014 NY Slip Op 32025[U] (Sup Ct, New York County, July 31, 2014)

Judge(s): Kornreich. Plaintiff, as the requesting party, shall pay non-party for the "reasonable cost" of production of emails.
Topic(s): Emails, Non-Party Production, Cost of Production.

McCann v Harleysville Ins. Co., 78 AD3d 1524 (4th Dept 2010)

Judge(s): Martoche, J.P., Lindley, Sconiers, Pine, and Gorski. In a personal injury action stemming from an automobile collision, defendant moved to compel an authorization for plaintiff's Facebook account. On the one hand, the Appellate Division affirmed the Supreme Court's denial of the motion, as defendant failed to establish a factual predicate with respect to the relevance of the evidence. The Appellate Division noted that indeed, the defendant essentially sought permission to conduct a Facebook "fishing expedition." However, it modified the order to delete the granting of a protective order to plaintiff, stating that the Lower Court "abused its discretion in prohibiting Defendant from seeking disclosure of Plaintiff's Facebook account at a future date."
Topic(s): **Scope.**

McCarthy v Philips Elecs. N. Am. Corp., 2005 WL 6157347 (Sup Ct, New York County, June 9, 2005)

Judge(s): Edmead. Plaintiff sued Philips Electronics for disability discrimination in connection with his termination and moved for production of (1) all e-mails covering the period of his disability through his termination; and (2) the hard drives, servers, and backup tapes of his superiors' computers. Philips claimed that it provided all available e-mails in hard copy form and that backup tapes were consistently overwritten, preventing retrieval of e-mails not provided in hard copy. Philips further objected to having a forensic analyst inspect the system because it was concerned about document alteration and the disclosure of proprietary information. The Court granted plaintiff's production request, stating that precedent indicated that computer systems may be examined to determine whether documents may be retrieved, and allowed plaintiff to designate an IT expert to examine the computers and other components. The Court noted that privacy concerns could be accommodated through stipulations for sensitive materials.
Topic(s): Scope.

Melcher v Apollo Med. Fund Mgt. LLC, 52 AD3d 244 (1st Dept 2008)

Judge(s): Cahn. Plaintiff failed to produce two items of correspondence from his computer relevant to the matter. The defendant alleged spoliation and the Trial Court ordered the production of a clone of plaintiff's hard drive. On appeal, the Appellate Division reversed, holding that (1) in the absence of proof that plaintiff intentionally destroyed or withheld evidence, (2) his assistant's testimony that she searched his computers and (3) the adequate explanation for failure to produce the two documents, the order directing cloning of his hard drives was improper.
Topic(s): Spoliation.

Melissa G v North Babylon Union Free Sch. Dist., 6 NYS 3d 405, 2015 NY Slip Op 25113 (Sup Ct, Suffolk County, 2015)

Judge(s): Rebolini. The Motion Court noted that, while "it has been suggested that an *in camera* review is appropriate to determine whether certain material on plaintiff's Facebook account is discoverable, an *in camera* inspection in disclosure matters is the exception rather than the rule, and there is no basis to believe that plaintiff's counsel cannot honestly and accurately perform the review function in this case." As such, the Motion Court directed plaintiff to "print out and to retain all photographs and videos, whether posted by others or by plaintiff herself, as well as status postings and comments posted on plaintiffs Facebook accounts, including all deleted materials." However, the Motion Court held that "not all of plaintiff's personal communications to others are subject to scrutiny in connection with her claims. Since there is a reasonable expectation of privacy attached to the one-on-one messaging option that is available through Facebook accounts, private messages sent by or received by plaintiff need not be reviewed, absent any evidence that such routine communications with family and friends contain information that is material and necessary to the defense."
Topic(s): Social Media Disclosure, *In Camera* Review, Form of Production.

Mendez v La Guacatala, Inc., 95 AD3d 1084 (2d Dept 2012)

Judge(s): Skelos, Florio, Belen and Sgroi. Defendant received a letter within two weeks of an assault, demanding preservation of surveillance video. Defendant testified that he did not review the surveillance video or make an effort to preserve it, as he did not understand the importance of the letter, a claim which the Motion Court found to be "unconvincing." Defendant was "certain" that the incident had been recorded by video, but testified that the police only required the video to be kept for thirty days. Although the video recorded "every area of the premises," it was automatically erased thirty days after the underlying incident. The Appellate Division agreed with the Motion Court that plaintiff demonstrated that defendants intentionally or negligently disposed of the video, but found, because plaintiff's ability to prove his case without the video was not fatally compromised, as plaintiff could testify at trial about the alleged assault by defendants' employees, the appropriate sanction was to direct that a negative inference charge be issued at trial against defendants with respect to the unavailable video surveillance.
Topic(s): **Sanctions, Spoliation, Adverse Inference, Video.**

Miriam Osborn Mem. Home Assn. v Assessor of City of Rye, 9 Misc 3d 1019 (Sup Ct, Westchester County, Aug. 29, 2005)

Judge(s): Dickerson. In a tax dispute between a home owners association and the City of Rye, the association sought to enter into evidence a compilation of an electronic printout from a state database. The database, made public through a web site, compiled real property information including sales and tax data. The City challenged the evidence on the basis of a disclaimer contained in the website stating that the state office compiling the information makes no guarantees with respect to reliability of the published information. The Court ruled that for numerous reasons, the document did not satisfy the hearsay exception for certain public records. However, the Court held that the document may be admissible under the common-law hearsay exception for public documents, provided a state employee could authenticate the manner and process by which the information was collected.
Topic(s): Admissibility.

Mosley v Conte, 2010 NY Slip Op 32424[U] (Sup Ct, New York County, Aug. 17, 2010)

Judge(s): York. In this defamation action, the parties vigorously disputed the permissible scope of electronic discovery, specifically with regard to fashioning appropriate keyword searches. The Court applied general principles of New York law pertaining to disclosure, concluding that those principles applied to computer discovery. Because the Court concluded that the defendant had failed to establish diligent efforts to retrieve the requested materials, it directed that certain key word searches be performed by the Defendant. The Court further authorized the plaintiff to conduct a search of all available computers through a forensic expert chosen by the plaintiff and to submit all documents retrieved to the Court for an *in camera* review. Simultaneously, the forensic expert was to provide a copy of those documents to the defendants for preparation of a privilege log. Finally, the Court directed the defendant to provide a detailed affidavit describing his search and explaining what, if any, measures were taken to preserve the

computers and/or ESI which may not have been preserved.
Topic(s): Scope, Preservation.

Newman v Johnson & Johnson (Sup Ct, New York County, Jan. 18, 2012, Index No. 104403/09)

Judge(s): Ling-Cohan. Plaintiff's decedent passed away following use of a non-prescription topical medication, and defendant's defense was that the decedent likely ingested the medication and committed suicide. In response to defendant's motion to compel production of decedent's Facebook content and e-mails during a specified period, and plaintiffs cross-motion for a protective order, the Court held that such documents should be produced for *in camera* review by a special referee to "make a determination as To whether such information is subject to disclosure and identify specific information that is discoverable."
Topic(s): Social Media, Relevance.

New York Eye Surgery Assoc., PLLC v Kim, 2014 NY Slip Op 31808[U] (Sup Ct, New York County, July 9, 2014)

Judge(s): Sherwood. Employer commenced an action alleging violation of a non-competition and non-solicitation agreement, and employee physician counterclaimed alleging, among other things, violation of: 18 U.S.C. § 1030, the Computer Fraud and Abuse Act ("CFAA") and of 18 U.S.C. § 2701, the Stored Communications Act ("SCA"). A private cause of action under the CFAA exists against anyone who, among other things, "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from any protected computer." The physician alleged that unauthorized activity resulted in the modification, or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment or care of one or more individuals, "as access to the data allowed the Counterclaim Defendants to contact [the physician's] patients and interfere with their treatment by [the physician]."

The Motion Court denied the motion to dismiss finding that "Counterclaim Defendants' argument argue that they lawfully had access to [the physician's] computer records, files, and activities" is a factual issue which is "more appropriately raised on summary judgment or trial." The physician also alleged that his telephone conversations were recorded and his emails and personal files on his office computer were accessed without his knowledge or consent, despite the fact that his "computer could only be accessed by logging in with a password that was unique to [him]." The physician also asserted that counterclaim defendants "intentionally, without authorization, accessed emails stored on an electronic communication service provider's system after they had been delivered, and thereby obtained access to the electronic communications while they were in electronic storage." Denying the motion to dismiss the physician's SCA claim, the Motion Court noted that courts "have held that allegations that an employer exceeded its authorized scope and accessed an employee's email are sufficient to survive a motion to dismiss."
Topic(s): Computer Fraud and Abuse Act, Stored Communications Act.

New York Pub. Interest Research Group, Inc., v Cohen, 188 Misc 2d 658 (Sup Ct, New York County, July 16, 2001)

Judge(s): Lehner. Pursuant to the New York Freedom of Information Law, the New York Public Interest Research Group (NYPIRG) petitioned the Department of Health for records showing lead poisoning levels in New York children. NYPIRG sought production in electronic form and the Department refused, stating that such production would require the writing of a new computer program. The Department thus agreed only to a paper document production, redacting the relevant confidential information by hand. The Court ordered the Department to see that the program was written and the information produced to NYPIRG, with NYPIRG paying the actual cost of reproduction. The Court stated "there is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record possessed or maintained by the agency." The Court also noted that the law was intended to adapt to available technology and that it was impractical to require NYPIRG to devote weeks and months to an effort that could be completed in a matter of hours.
Topic(s): Form of Production.

Matter of a Support Proceeding Noel B v Anna Maria A, 2014 N.Y. Misc. LEXIS 4708 (Fam Ct, Richmond County, Sept. 12, 2014)

Judge(s): Gliedman. Motion Court authorized service of process by substituted service by transmitting a digital copy of the summons and petition to respondent's known "active" Facebook account, where despite the absence of a physical address," petitioner had a "means by which he can contact" the respondent and provide her with "notice" of the proceedings, and then would follow up with a physical mailing to respondent's last known address. The Motion Court ordered such service where petitioner, under oath, described his efforts to try to locate his former wife, including that he telephoned and sent text messages to his emancipated daughter and his son concerning respondent's location, to which he received no response; conducted a Google search; and inquired of the occupant of respondent's last known address, who advised that he was unaware where respondent could be located. Petitioner had advised that he is "aware" that respondent "maintains an active social media account with Facebook" and that his "current spouse maintains her own Facebook account, and has posted photos that have been 'liked' by the [r]espondent as recently as July, 2014."
Topic(s): Social Media, Service of Process.

Oberman v Textile Mgt. Global Ltd., 2014 NY Slip Op 31863[U] (Sup Ct, New York County, July 11, 2014)

Judge(s); Madden. An email is not "documentary evidence" upon which a motion to dismiss predicated upon Rule CPLR 3211(a)(1) may be made.
Topics: Emails, Documentary Evidence.

O'Connor v Gin Taxi Inc. (Sup Ct, New York County, Oct. 14, 2011, Index No. 110192/2007)

Judge(s): Silver. Plaintiff alleged that her injuries prevented her from performing certain physical activities and defendant sought certain ESI from plaintiff's social media accounts, as well as plaintiff's instant message logs and text messages. The Court found that, due to the nature of the case, where plaintiff had placed "her ability to perform the activities of her daily living and her ability and capacity to work at issue, plaintiff's status updates, photographs, and videos were both material and necessary to the defense . . . and/or could lead to admissible evidence." However, taking into account plaintiff's privacy concerns, the Court agreed to conduct an *in camera* review of plaintiff's Facebook accounts and YouTube videos prior to their production. The Court noted that plaintiff was to have preserved all relevant ESI in light of a litigation hold that defendant had asserted.
Topics(s): Social Media, Relevance.

O'Neill v Weber (Sup Ct, Suffolk County, Nov. 16, 2011, Index No. 20459/2008)

Judge(s): Pitts. Defendant served plaintiff with a notice to admit, with each proffered admission relating to plaintiffs use of social media websites such as Facebook and Twitter. The Court struck the notice on the grounds that, among other things, a notice to admit is not to substitute for other discovery vehicles, such as depositions and interrogatories, and where the information sought by defendant concerning plaintiff's use of social media was available through other means. The Court also struck defendant's supplemental notice of discovery and inspection which sought production of all electronic and written data from plaintiff's computer, cell phone, personal digital assistant, and postings to his social media sites, as well as authorizations to access this information. Reiterating that "the test is one of usefulness and reason" and that "a party does not have the right to uncontrolled and unfettered disclosure," the Court held that defendant had failed to establish "any foundation" to warrant access to plaintiff's electronic writings or social media accounts. The Court noted that defendant had not deposed plaintiff on such issues, which "might" have provided the necessary foundation.
Topic(s): Social Media, Relevance.

Paccione v Bradica (Sup Ct, Nassau County, May 1, 2013, Marber, J., Index No. 12383/2011)

Judge(s): Marber. Plaintiff in his verified bill of particulars claimed that the injuries he suffered as a result of an accident were permanent in nature and caused limitation in motion, and, as a result, he has "chronic pain and discomfort, mental anguish and distress, anxiety, depression, mental and emotional suffering and impairment of ability." Where plaintiff changed his deposition testimony concerning physical altercations that occurred, as well as post-accident trips and vacations he took, defendant asserted that, based on such discrepancies, "private information sought from the Plaintiff's Facebook page are relevant and discoverable . . . as [plaintiff] has placed his physical condition in issue pertaining to his normal daily activities and enjoyment of life."

Plaintiff's change in testimony was predicated upon postings on plaintiff's public Facebook page. The Court found that defendants demonstrated that plaintiff's Facebook

profile contained information that was "probative" of the issue of the extent of plaintiff's alleged injuries and "it is reasonable to believe that other, private portions of his Facebook records may contain further evidence relevant to that issue." The Court found that since plaintiff's testimony "contradicted" what he stated in his Facebook postings, allowing defendants "access to other portions of the [p]laintiff's Facebook records is reasonably calculated to lead to discovery of relevant information." Accordingly, the Court ordered an *in camera* review of plaintiff's Facebook records from the date of the accident, including "private and public portions of the account, as well as any records previously deleted or archived."
Topic(s): Social Media, Relevance, *In Camera* Review.

Matter of Pakter v New York City Dept. of Educ., 2010 NY Slip Op 32451[U] (Sup Ct, New York County, Aug. 20, 2010)

Judge(s): Kern. Petitioner brought a special proceeding seeking pre-action discovery pursuant to CPLR 3102(c). Petitioner sought an order directing respondents to preserve evidence relating to the publication of a particular statement, including reporters' notes, e-mails and electronically stored information, upon which petitioner wanted to base a defamation action. Adhering to general principles of pre-action disclosure, the Court declined to direct production of the electronically stored information but directed the respondents to preserve it in anticipation of the petitioner's filing of a complaint.
Topic(s): Pre-Action Discovery, Preservation.

Pappas v Fotinos, 28 Misc 3d 1212[A], 2010 NY Slip Op 51300[U] (Sup Ct, Kings County, July 23, 2010)

Judge(s)**:** Battaglia. In an action seeking sale of property in lieu of partition, it was established that defendant destroyed financial and business records even after being put on notice that the evidence might be needed for future litigation. The Court held that "spoliation principles apply to financial and other business records, whether in hard copy or computer database form, particularly when a party was 'on notice that this evidence might be needed for future litigation.'" Here, however, there was no showing that the destroyed documents would have allowed petitioners to prove their claims. The essence of a spoliation claim is demonstrated prejudice, which the Court held was not established by destruction itself.
Topic(s): Spoliation.

Parker Waichman LLP v Mauro (Sup Ct, Nassau County, Dec. 13, 2013, Driscoll, J., Index No. 1215/2012)

Judge(s): Driscoll. Third party defendants claimed that, based on a review of defendants' emails produced pursuant to a subpoena served on Google, which emails defendants did not produce, defendants provided inaccurate or knowingly false information. The Court granted the third-party defendants' motion seeking to conduct a forensic examination of certain "temporary files" or fragments on defendants' local hard drives and/or storage media so that their expert could determine the user's activity in the Google web-based email account, including "what information was viewed in the account

and when it was viewed." The expert opined that a comparison of the Google production. with the information available in the temporary files or fragments identified through a forensic examination of defendants' computers and/or storage media, may provide forensic evidence 1) that the emails produced by Google were at one time viewed on defendants' computer system, 2) regarding the date and time that these emails were viewed, and 3) regarding where the emails were stored" on defendants' business and personal computer systems, including smartphones and tablets. The court also granted defendants' motion to examine plaintiff law firm's computer system concerning changes in case status in their proprietary case management software system.
Topic(s): Forensic Review, Relevance.

Parnes v Parnes, 80 AD3d 948 [3d Dept 2011]

Judge(s): McCarthy. The Court held that defendant had taken reasonable steps to keep the e-mails on his computer confidential, as exemplified by his setting up a new e-mail account which he only checked from his workplace computer. While defendant's leaving a note containing his user name and password on the desk in the parties' common office in their shared home was careless, it did not constitute a waiver of the privilege. Defendant was entitled to maintain a reasonable expectation that no one would find the note and use that information in a deliberate attempt to open, read and print his password-protected documents. Plaintiff admitted that after finding one page of an e-mail that had been printed out, she searched through defendant's papers to find the note, and then deliberately utilized the password to gain access to defendant's private e-mail account. Under the circumstances, there was no waiver of privilege.
Topic(s): Privilege.

Patterson v Turner Construction Co., 88 AD3d 617 (1st Dept 2011)

Judge(s): Tom, Saxe, DeGrasse, Freedman, Roman. The Appellate Division reversed an order that compelled an authorization for "all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived" and remanded for a "more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." The Appellate Division found that, although the Motion Court's *in camera* review established that at least some of the discovery sought "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims," "it is possible that not all Facebook communications are related to the events that gave rise to plaintiff's cause of action." The Appellate Division noted that the postings on plaintiff's "online Facebook account, if relevant, are not shielded from discovery merely because plaintiff used the service's privacy settings to restrict access, just as relevant matter from a personal diary is discoverable."
Topic(s): Social Media, Relevance.

Pecile v Titan Capital Group, LLC, 113 AD3d 526 (1st Dept 2014)

Judge(s): Mazzarelli, Friedman, Renwick, Moskowitz and Richter. "Regarding defendants' demand for access to plaintiffs' social media sites, they have failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress. Thus, the postings are not discoverable."
Topic(s): Social Media, Relevance.

Pegasus Aviation I, Inc. v Varig Logistica S.A., 2014 NY Slip Op 04047 [1st Dept June 5, 2014]

Judge(s): Friedman, Saxe and Sweeny (majority), Andrias (concurring in part and dissenting in part) and Richter (full dissent). "At issue on this appeal is whether the MP defendants exercised sufficient control over VarigLog during the period from April 1, 2008, until VarigLog's bankruptcy filing on March 3, 2009, to render the MP defendants — who are not alleged to have failed to meet their obligations to preserve or produce their own documents relevant to this action — liable to sanctions for spoliation based on VarigLog's loss of its relevant electronically stored information (ESI) during that period. Although VarigLog did not implement a litigation "hold" to preserve its ESI, it did install new information technology systems in March 2008 (the month after plaintiffs commenced the Florida action) that provided for daily, weekly and monthly backing-up of its ESI." "[A]s a result of computer system crashes that occurred in February and March of 2009, all of VarigLog's preexisting ESI was destroyed." The Motion Court struck VarigLog's answer and ruled that the jury would be instructed that "it may infer that the lost ESI would have supported the veil-piercing claim against the MP defendants." The Motion Court imposed sanctions against the MP defendants because:

> (1) the MP defendants' control of VarigLog obligated them to see to it that VarigLog preserved evidence relevant to this litigation and, in particular, that VarigLog institute a litigation hold on its ESI; (2) the MP defendants' failure to ensure that VarigLog implemented a litigation hold constituted gross negligence per se . . . , and (3) because VarigLog's culpability rose to the level of gross negligence, where prejudice to plaintiffs could be presumed.

The Appellate Division found that the MP defendants had a sufficient degree of control over VarigLog to trigger a duty to preserve ESI relevant to the litigation where the MP defendants, as the sole shareholders of VarigLog, selected VarigLog's directors, and, during the period in question, employees and consultants of the MP defendants were closely monitoring VarigLog's operations and were formulating its business strategy. The MP defendants admitted that they could obtain documents from VarigLog upon request. The Appellate Division noted that:

> even if it is true that VarigLog was legally and organizationally distinct from the MP defendants, in view of the latter's status as sole shareholder, determination of the membership of VarigLog's board and intimate involvement in directing VarigLog's business, "there seems to be little

> doubt that [VarigLog] would have complied with a timely request by [the MP defendants] to preserve its [ESI]," from which we conclude that VarigLog's ESI was sufficiently under the MP defendants' "practical control" to trigger "a duty [on their part] to ensure that those materials were adequately preserved."

The majority, however, reversed the Motion Court's ruling that the MP defendants' failure to discharge such duty was so egregious as to rise to the level of gross negligence. The majority rejected the concept that the "failure to institute a litigation hold, in all cases and under all circumstances, constitutes gross negligence per se." The majority disagreed with the full dissent, and found that only simple negligence had taken place and therefore "plaintiffs must prove that the lost ESI would have supported their claims," which the majority held that plaintiffs were unable to do.

The majority disagreed with the partially dissenting justice, who would have remitted the matter for a hearing to determine the extent of the prejudice to plaintiffs from the loss of VarigLog's ESI in order to determine whether sanctions should be imposed. The majority indicated that it was unwilling "to give plaintiffs what would amount to a second bite at the apple" where plaintiffs had an ample opportunity to attempt to demonstrate the relevance of the lost material to their claims against the MP defendants, but instead chose to rely upon a presumption to satisfy the relevance prong of the showing required on their motion for sanctions.

Topic(s): Preservation, Litigation Hold, Sanctions, Spoliation, Gross Negligence, Adverse Inference.

Pereira v City of New York, 40 Misc 3d 1210[A], 2013 NY Slip Op 51091[U] (Sup Ct, Queens County 2013)

Judge(s): Flug. Plaintiff objected to the production of authorizations for his Facebook and MySpace accounts on the grounds that such demands were overbroad and "no showing had been made that such discovery would result in relevant evidence bearing on the claims." In response, defendant submitted several photographs from plaintiff's Facebook account that were publicly available and depicted plaintiff playing golf and traveling, as well as other postings on a blog referring to plaintiff's sports abilities. While originally denying such activity, plaintiff, after being shown such post-accident photographs, changed his testimony. As such, the Court found that, where the publicly available postings were "probative of the issue of the extent of plaintiff's injuries," it is "reasonable to believe that other portions of his Facebook account may contain" further relevant information. Accordingly, the Court ordered an *in camera* review of photographs showing sporting activities as well as "all status reports, e-mails, photographs and videos posted on plaintiff's media sites since the date of the subject accident, to determine which of those materials, if any, are relevant to his alleged injuries."

Topic(s): Social Media, Relevance, *In Camera* Review.

Progressive Ins. Co. v Herschberg (Sup Ct, Nassau County, Jan. 12, 2012, Index No. 0014/2010)

Judge(s): Winslow. Petitioner insurance company sought to stay an uninsured motorist arbitration by asserting that the photos and information posted on respondent's Facebook page materially varied from his sworn testimony, thereby constituting a breach of his insurance policy. The insurance company argued that respondent's testimony regarding his damages were belied by photographs and statements posted on publicly available portions of respondent's Facebook account, and which purportedly evidenced respondent engaging in activities that he testified he was unable to perform. Respondent contended that "his Facebook pages contained puffery and fantasy, not actual statements." The Court held that to justify denial of insurance coverage, any misrepresented facts had to be "material" or that respondent engaged in "fraudulent conduct." The Court noted that respondent admitting that some of his sworn testimony had been incorrect did not satisfy the "heavy burden of proof" to demonstrate that the insurance policy had been breached.
Topic(s): Social Media, Relevance.

People v Foley, 257 AD2d 243, 254 (4th Dept 1999), *affd* 94 NY2d 668 (2000)

Judge(s): Pine, Pigott, Scudder, Balio. Trial "[C]ourt properly admitted into evidence a computer disk containing the [chat-room] conversations between the trooper and defendant, as well as the graphic images sent by defendant to the trooper. The contents of the computer disk were unique, and the trooper's identification of the disk was sufficient evidence of its accuracy and authenticity."
Topic(s): Admissibility.

People v Harris, 945 NYS2d 505 (Crim Ct, New York County, April 20, 2012)

Judge(s): Sciarrino, Jr. Criminal matter arising out of the arrest of an Occupy Wall Street protester. The District Attorney subpoenaed Twitter seeking the email address and tweets for a specific three-month period for a specific account believed to be used by the defendant. Defendant sought to quash the subpoena in his own right. The Court held that defendant lacked standing to challenge the subpoena, analogizing third-party online social networking service records to third-party bank records (where courts have consistently held that an individual has no right to challenge a subpoena issued to a third-party bank even if it is for that individual's own bank records). In registering a user account, defendant agreed to Twitter's terms which included the grant of a license for Twitter to "use, display and distribute defendant's Tweets to anyone and for any purpose it may have." Thus, the "account's Tweets were, by definition public." The Court also went on to the analyze the Stored Communications Act ("SCA")(18 USC 2701-2711) and its applicability to the subpoena at issue. In "so ordering" the subpoena, the Court held that Twitter is a service provider of electronic communication under the SCA and therefore could be compelled to disclose the "basic user information" that the subpoena seeks. The Court further ordered production of the "Tweets" for an *in camera* review based upon the factual showing made by the District Attorney.
Topic(s): Social Media.

People v Harris, 2012 NY Slip Op 22175 (Crim Ct, New York County, June 30, 2012)

Judge(s): Sciarrino, Jr. Criminal matter arising out of the arrest of an Occupy Wall Street protester. The District Attorney subpoenaed Twitter seeking the email address and tweets for a specific three-month period for a specific account believed to be used by the defendant. Following defendant's unsuccessful attempt, Twitter sought to quash the court ordered subpoena. Twitter argued that users should have standing to quash the subpoena, as to hold otherwise would place an undue burden on Twitter. Twitter also argued that privacy issues prevent disclosure. In rejecting those arguments, the Court noted that the burden faced by Twitter is the same as that placed on all other third-party respondents and that "there can be no reasonable expectation of privacy in a tweet sent around the world." With regard to the Fourth Amendment issues, in drawing a distinction between different types of electronic communication, the Court held that:

> If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the internet that now exist. Those private dialogues would require a warrant based on probable cause in order to access the relevant information.

Thus, the Court denied Twitter's motion in relevant part and ordered disclosure of the "non-content records," such as subscriber information, logs maintained by the network server, etc. and the tweets (*i.e.*, content records) covered by the three-month time period at issue. Any other tweets must be sought by a search warrant.
Topic(s): Social Media.

People v Hernandez, 31 Misc 3d 208 (Rochester City Ct, Jan. 26, 2011)

Judge(s): Morse. Criminal matter involving the authenticity of breath test foundational documents in DWI cases, three of which were found to be inadmissible. The documents did not have pen and ink signatures or raised seals over stamped inscriptions; instead they were digitally signed. The People asserted that the electronic signatures were copies of those in a database at a police forensic investigations center, and that the signer would upload the signature using a secure personal password after the appropriate information had been inserted into the document, and once the signature had been entered, the document could not be altered by anyone else who did not have access to the password. However, there was no testimony "regarding how the documents were created or if the authenticating certificate contained such information," which might have rendered the documents admissible pursuant to CPLR 4518.

Moreover, the documents failed to "indicate whether either party who e-signed the instrument calibration or chemical analysis document actually did the testing. If neither personally tested the instrument or chemicals, then the document should at least cite the source of the person's belief that the test was performed by an identified individual who had a business duty to conduct the test. In addition, since the instrument calibration

certificate in [one] case indicates repairs were performed by 'firmware,' an issue arises as to whether the instrument and the individual who tested it were even in the same room!" "Although remote testing may be perfectly permissible, if it has been employed then the business record should forthrightly state the human involvement in the testing just as a breath test operator describes the steps he or she performed using the breath test instrument."

With respect to the quality of the reproduced signature, "[a]lthough the People contend it is an original, it bears a greater resemblance to a copy of the copy of the electronic record kept in a state computer. When compared to the rest of the computer generated documents, the e-signatures of the forensic supervisor is so indistinct as to be unreadable.[Is this the end of the quote? It is unclear where the quote ends] Even though the rules of evidence allow for admission of copies under CPLR 4539(b), the authenticating certificates before the Court fail to pass the statutory test requiring it to set forth "the manner or method by which tampering or degradation of the reproduction is prevented."

Topic(s): Admissibility.

People v Horan, 19 Misc 3d 1145[A], 2008 NY Slip Op 51171[U] (Just Ct, Westchester County, June 11, 2008)

Judge(s): Shapiro. The matter involved two charges of driving while intoxicated. Defendant moved for suppression of the breath test results as a sanction for the deliberate failure to preserve or the willful destruction of evidence consisting of video recordings of the defendant at both the scene of his arrest and at police headquarters. Defendant sought a video of recordings made at the Town of Ossining Police Department, but was told that such recordings are only preserved if requested and any video footage is not preserved beyond 90 days. The Court held that the People received a discovery request for video in time for the People to instruct the Police Department to preserve the recordings. The Court went on to hold that so-called "open file discovery" does not excuse the prosecutor from the duty to instruct the police on the constitutional requirement of retaining and providing evidence which may be exculpatory to the Defendant. The Court held that the failure to preserve exculpatory evidence not only was prejudicial to defendant, but it violated his state and federal constitutional rights to due process and is subject to mandatory sanctions. The Court concluded that the People must be sanctioned, and that the only available sanction which properly fits the People's actions and/or inaction, is the suppression of the results of the defendant's chemical test.

Topic(s): Sanctions, Preservation.

People v Manges, 67 AD3d 1328 (4th Dept 2009)

Judge(s): Smith, Centra, Fahey, Carni, Pine. The Trial Court "erred in admitting into evidence a printout of electronic data that was displayed on a computer screen when defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule (*see* CPLR 4518[a]), which applies here (*see* CPL 60.10). The People presented no evidence that the data displayed on the computer screen, resulting in the

printout, was entered in the regular course of business at the time of the transaction (*see* CPLR 4518[a]). Indeed, the bank teller who identified the computer screen printout testified that 'anyone [at the bank] can sit down at a computer and enter information.' Because the computer screen printout was the only evidence establishing the identity of the purported true account owner upon which the check was drawn, we conclude that the evidence is legally insufficient to support the conviction."
Topic(s): Admissibility.

People v Markowitz, 187 Misc 2d 266 (Sup Ct, Richmond County, Feb. 9, 2001)

Judge(s): Rooney. Alleging that documents at trial were improperly admitted as business records, defendant moved to set aside his conviction for petit larceny and criminal possession of stolen property. The Court held that an employee of one business entity may provide foundation testimony sufficient for admission into evidence of a computer printout prepared by that entity and based, in part, on information provided by a second entity. Accordingly, in a prosecution for petit larceny and other crimes arising out of insufficient deposits made by defendant, a toll collector for the Port Authority, "Collector Tour of Duty Reports" were properly admitted into evidence as business records, where their admission was based upon the testimony of a tolls audit supervisor, and the defense did not raise an objection based upon inadequate foundation at the time the reports were offered. Assuming, arguendo, that such an objection was made, the reports were still properly admitted since the supervisor's testimony demonstrated that he was familiar with the procedures of the bank into which the deposits were regularly made, that the bank's entries were prepared on behalf of the Port Authority and in accordance with its requirements, and that the Port Authority routinely relied on the bank's entries. Moreover, the Court held that the supervisor's foundation testimony was buttressed by the subsequent testimony of a bank employee, which confirmed the regularity and contemporaneity of the bank's entries.
Topic(s): Scope, Admissibility.

People v Patterson, 93 NY2d 80, 84 (1999)

Judge(s): Bellacosa. "[W]e emphasize that relevant…technologically generated documentation are ordinarily admissible under standard evidentiary rubrics. Some reliable authentication and foundation (including technically acceptable self-authentication techniques) are, however, also still necessary. The decision to admit or exclude videotape evidence generally rests, to be sure, within a trial court's founded discretion. Moreover, this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated (Prince, Richardson on Evidence § 4-214 [Farrell 11th ed.]), and by the intermediate appellate court in the additional circumstance when it exercises its exclusive and plenary interest of justice power."
Topic(s): Admissibility.

People v Pierre, 41 AD3d 289 (1st Dept 2007), *lv denied* 9 NY3d 880 (2007)

Judge(s): Andrias, Friedman, Sweeny, McGuire, Kavanagh. The issue was whether an Internet "instant message" was properly received as an admission against the defendant. The Court noted that "[a]lthough the witness did not save or print the [instant] message, and there was no Internet service provider evidence or other technical evidence in this regard, the instant message was properly authenticated, through circumstantial evidence, as emanating from defendant." In additional, "[t]he accomplice witness, who was defendant's close friend, testified to defendant's screen name. The cousin testified that she sent an instant message to that same screen name, and received a reply, the content of which would make no sense unless it was sent by defendant. Furthermore, there was no evidence that anyone had a motive, or opportunity, to impersonate defendant by using his screen name."
Topic(s): Admissibility.

People v Rodriguez, 264 AD2d 690 (1st Dept 1999), *lv denied* 94 NY2d 828 (1999)

Judge(s): Williams, Tom, Lerner, Rubin, Saxe. The Appellate Division held that the Trial Court "properly exercised its discretion in admitting bank surveillance videotapes, and photographs made from those tapes, without expert testimony about the digitizing process used at the FBI laboratory to slow the tapes down and make still photos from them, since a bank employee responsible for making the original tapes at the bank testified that he compared the original and slowed-down tapes and that what was represented therein was identical except for speed…. [U]nder the circumstances, the bank employee was competent to testify on the basis of his own observations that the processing of the tape did not result in any prejudicial alteration."
Topic(s): Admissibility.

People v Sinha, 84 AD3d 35 (1st Dept 2011)

Judge(s): McGuire. A printout of an e-mail sent by defendant that was recovered from her laptop's hard drive, which the police seized from her apartment, was not a "written report or document—concerning a—scientific test or experiment" (CPL 240.20[1][c]) that the People were required to disclose and make available to the defense prior to trial…. Defendant's real claim is unfair surprise, premised on a report by a detective who analyzed the hard drive. That report and a mirror image of the hard drive were turned over to the defense prior to trial. In the report, the detective stated that he had "identified four relevant e-mails to the case" and attached those four e-mails, however the e-mail in question was not included. The detective's inclusion of four e-mails he considered relevant that he had recovered from the hard drive could not be "deemed a representation by the prosecution that it did not regard any other e-mails as relevant. The better practice for the prosecution would have been to make clear either prior to or earlier in the trial that the People intended to offer into evidence the [e-mail in question]. But especially because the better practice for the defense would have been to ask prior to or earlier in the trial which e-mails the People intended to offer into evidence," thus the Court rejected defendant's claim of misconduct.

However, when the prosecution belatedly disclosed e-mails that were construed as impeachment evidence, and witnesses were thus recalled to the stand, "the court properly informed the jury that the prosecution had, without legal excuse, delayed disclosure of certain materials that were relevant to [the witness's] cross-examination. In its final charge, theCcourt reminded the jury of the untimely disclosure of the e-mails, informed the jury that the late disclosure was "inexcusable," noted defense counsel's argument that the e-mails showed the witness's motive to lie, and instructed the jury that "in evaluating [the witness's] motive, you may consider the fact that the disclosure was untimely and you may, but are not required to, draw an adverse inference on the motive issue against the prosecution."
Topic(s): Scope, Sanctions.

Playball at Hauppauge, Inc. v Narotzky, 296 AD2d 449 (2d Dept 2002)

Judge(s): Krausman, McGinity, Miller, Adams. "The deletion of computer data by the plaintiff['s] . . . son left [defendant] without the ability to defend against the plaintiffs' allegations of mismanagement and waste of corporate assets" and accordingly, "[p]rior to trial, the plaintiffs' fiduciary claim against [defendant] was dismissed on spoliation of evidence grounds."
Topic(s): Sanctions, Spoliation.

Public Relations Socy. of Am., Inc. v Road Runner High Speed Online, 8 Misc 3d 820 (Sup Ct, New York County, May 27, 2005)

Judge(s): Payne. Petitioners sought to obtain pre-action discovery pursuant to CPLR 3102(c) to commence a defamation action against the sender of an alleged defamatory e-mail. However, the anonymous sender sought intervention to dismiss the action, arguing that petitioners failed to demonstrate a prima facie case of defamation and additionally, that his statements are constitutionally protected. The Court permitted discovery of the sender's identity on several grounds: (1) the petitioner stated a valid cause of action for libel; (2) the First Amendment did not preclude discovery of identity because the statements were not "pure opinion"; and (3) the five-factor disclosure evaluation test articulated in *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F.Supp.2d 556, 564, weighed in favor of the disclosure sought.
Topic(s): Pre-Action Discovery.

QK Healthcare, Inc. v Forest Laboratories, Inc., 2013 NY Slip Op 31028[U] (Sup Ct, New York County 2013)

Judge(s): Mills. Former vice-president of purchasing and current president of plaintiff company experienced a computer crash, and thus all of the president's electronic files created, sent, received, and stored were lost. This occurred before the litigation had begun, but after the subject dispute had arisen. In addition, another computer was purportedly reformatted by plaintiff's IT department three months after the litigation had begun. The Court found that the president's computer crash occurred at a time when litigation was reasonably anticipated since defendant already had denied plaintiff's request for credit for the return of merchandise, a finding that was further substantiated

by entries on plaintiff's privilege log. As such, the Court held that plaintiff's duty to preserve had been "triggered." Noting that a "culpable state of mind . . . includes ordinary negligence" for spoliation of evidence purposes, the Court found that "at a minimum, the deletion of [the president's] files and the destruction [of files of the person in charge of return goods] consisted of negligence." The Court then held that:

> given the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct, courts will usually reject an argument that the deprived party cannot establish the relevance of the evidence.

However, the Court found that the evidence "destroyed or lost" was "not crucial to defendant's defense." As such, the Court held that the appropriate sanction for spoliation would be an "adverse instruction at the time of trial against [defendant] with respect to its application to the returns at issue."
Topic(s): Sanctions, Preservation, Adverse Inference.

Ravit v Simon Property Group, Inc., 2012 NY Slip Op 33242[U] (Sup Ct, New York County 2012)

Judge(s): Goodman. Plaintiff sought the production of a surveillance tape that recorded her fall, and complained to the Court that defendant produced the tape in "native format," which plaintiffs contended was "unviewable," even though plaintiffs had been provided with instructions on how to download and install a free electronic media viewer to watch the tape. The Court found that defendant had turned over a copy of the video data in the "same" and "only" format that it had. As such, the Court held that defendant had materially complied with the requirements of the CPLR, except to extent that the copy provided might have been defective, and thus, ordered defendant to reproduce a new copy of the video in the same format in which it had originally produced the video.
Topic(s): Form of Production, Video.

R.C. v B.W., 2008 NY Misc LEXIS 10783, 239 NYLJ 64 (Sup Ct, Kings County, Mar. 26, 2008)

Judge(s): Adams. In a matrimonial action, plaintiff husband sought production of the home computer as well as any laptop or other notebook computer used by defendant wife in connection with wife's application for counsel fees and maintenance. Husband contended that wife, who is a lawyer, was doing most of the legal work herself such that the fees being sought were inflated and/or unreasonable. In denying the application, the Court noted that although electronic records are generally subject to disclosure, the information being sought was not material or necessary to husband's rebuttal to the application, as no matter how many hours wife spent on the case, her counsel would only bill for his own work.
Topic(s): Scope.

Response Personnel, Inc. v Aschenbrenner, 77 AD3d 518 (1st Dept 2010)

Judge(s): Sweeny, Freedman, Richter, Manzanet-Daniels, Roman. The Appellate Division affirmed the denial of plaintiff's motion for a protective order from producing its tax returns to defendant. However, the Court determined that requiring the plaintiff to pay for the production imposed an undue burden on plaintiff because the cost of creating electronic documents in this situation would have been substantial.
Topic(s): Costs.

Richards v Hertz Corp., 100 AD3d 728 (2d Dept 2012)

Judge(s): Dillon, Plummer, Lott, Roman, and Cohen. The Appellate Division held that "defendants demonstrated that plaintiff's Facebook profile contained a photograph that was probative of the issue of the extent of her alleged injuries, and it is reasonable to believe that other portions of her Facebook profile may contain further evidence relevant to that issue. Thus, with respect to [plaintiff's] Facebook profile, … defendants made a showing that at least some of the discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on her claim." Plaintiff's Facebook profile "may" contain items such as "status reports, e-mails, and videos that are relevant to the extent of her alleged injuries." However, due to the "likely presence" in plaintiff's Facebook profile of irrelevant "material of a private nature," the Motion Court was directed to conduct an *in camera* inspection of plaintiff's postings to determine if there was relevant information regarding plaintiff's alleged injuries.
Topic(s): Social Media, *In Camera* Review, Photograph.

Roberts v Corwin, 118 AD3d 571 (1st Dept 2014)

Judge(s): Mazzarelli, Renwick, Feinman, Gische and Kapnick. Appellate Division denied spoliation sanctions, as the record did not support that there was a "destruction of any evidence, let alone key evidence necessary for the defense of this action." The Appellate division noted that plaintiff had "no history of willful noncompliance with discovery, and his attorneys subsequently produced additional emails in response to a subpoena that, inter alia, was different in scope from the demand served on him."

The Motion Court had noted that the asserted discovery default was not a basis for sanctions inasmuch as the emails had been produced, albeit by Epstein Becker, well in advance of depositions, dispositive motion practice, and trial preparation. The Appellate Division noted that

> to the extent that Greenberg Traurig claims that Mr. Roberts' failure to produce the emails indicates that there must have been other documents that were not preserved and that it was therefore prejudiced by the destruction of documents with unknowable content …, this contention is unavailing. Although Greenberg Traurig has completed discovery, it makes no showing, through either deposition testimony or other documents, that any

> documents were destroyed. This case is therefore distinguishable from *VOOM*, where the innocent party was able to establish both that identified documents were not preserved and that the adverse party 'did not cease the automatic destruction of e-mails until four months after [the] action was commenced.'

Topic(s): Spoliation, Relevance, Emails.

Roberts v Corwin, 41 Misc 3d 1210[A], 2013 NY Slip Op 51637[U] (Sup Ct, New York County 2013)

Judge(s): Friedman. The failure to issue a litigation hold did not warrant the imposition of a spoliation sanction where, while the party did not provide the requested emails, they were eventually produced by the non-party law firm and the party did not have a "history of willful non-compliance" with discovery orders. The Court noted that:

> To the extent that Greenberg Traurig claims that Mr. Roberts' failure to produce the emails indicates that there must have been other documents that were not preserved and that it was therefore prejudiced by the destruction of documents with unknowable content . . . , this contention is unavailing. Although Greenberg Traurig has completed discovery, it makes no showing, through either deposition testimony or other documents, that any documents were destroyed.

No formal litigation written hold had been issued, but plaintiff represented that "[s]ince the beginning of [Greenberg Traurig's] representation of me, I saved emails and electronic documents in a personal folder on my computer, and retained all hard copies of documents in a file. This practice continued through the arbitration and post-arbitration proceedings." The Motion Court found that "no authority" was submitted that:

> the litigation hold must always be written and that the form of the litigation hold may not vary with the circumstances. Moreover, Greenberg Traurig makes no showing that an automatic email deletion protocol was in place at Epstein Becker or, as held above, that Mr. Roberts or Epstein Becker deleted any emails or otherwise destroyed any documents. Under these circumstances, a spoliation sanction is not appropriate.

Topic(s): Sanctions, Litigation Hold, Preservation.

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

Judge(s): Spinner. In a personal injury action, defendant sought access to the full history of plaintiff's Facebook and MySpace accounts, including deleted pages, on the grounds that the content therein was believed to be inconsistent with her claims, especially that for loss of enjoyment of life. Upon finding that the information was both material and necessary to the defense of the action, the Court ordered plaintiff to provide a properly executed consent and authorization, as may be required by Facebook and MySpace, permitting defendant to gain access to her social networking records. The Court held that plaintiff, by creating her online accounts, consented to sharing her personal information

and cannot now claim a reasonable expectation of privacy. Defendant furthermore established that its need for access to the information outweighed any privacy concerns of the plaintiff. Defendant had attempted to obtain the sought after information via other means such as deposition and notice for discovery; however, they proved to be inadequate since counsel thwarted defendant's attempt to question plaintiff in this regard.
Topic(s): Social Media, Scope.

Rombom v Weberman, 2002 NY Slip Op 50245[U] (Sup Ct, Kings County, June 13, 2002)

Judge(s): Jones. Defendants moved for a new trial and to set aside a judgment against them for libel and defamation. Plaintiffs, in the first trial, submitted evidence in the form of e-mail communication from defendants to plaintiffs. Defendants argued that, *inter alia*, the e-mails were unsworn and unauthenticated, and thus, were improperly admitted into evidence. The Court disagreed, stating that (1) since defense counsel did not object to admission of the e-mails sent to plaintiff, this argument may not serve as the basis for his motion for a new trial; (2) because the e-mails were submitted by plaintiff to attest to their effect upon him, and not to demonstrate the truth of their content, the e-mails were not hearsay; and (3) the e-mails were admissible because plaintiff testified that he personally retrieved them from a web site, printed them, and that they were true and accurate copies.
Topic(s): Admissibility.

Romero v Flores (Sup Ct, Queens County, Nov. 7, 2013, Lane, J., Index No. 702434/2012)

Judge(s): Lane. Plaintiff sought an order permitting service via Facebook in accordance with CPLR 308(5). The Court found that plaintiff failed to sufficiently establish that service is "impracticable," and noted that such alternative service would only be permitted if "plaintiff can demonstrate that service by conventional means is 'impracticable' by making diligent, albeit unsuccessful, efforts to obtain information regarding a defendant's current residence, business address, or place of abode."
Topic(s): Social Media, Service of Process.

Rosen v Evolution Holdings, LLC, 24 Misc 3d 1205[A], 2009 NY Slip Op 51275[U] (Nassau Dist Ct, June 24, 2009)

Judge(s): Fairgrieve. Where responding party failed to contest the validity of text messages that were offered by movant on Rule 3211(a) motion papers to prove the existence of a lease, the text messages were deemed admitted.
Topic(s): Admissibility.

R.P.I. Professional Alternatives Inc. v Kelly Servs. Inc., 26 Misc 3d 1213[A], 2010 NY Slip Op 50088[U] (Sup Ct, New York County, Jan. 19, 2010)

Judge(s): Edmead. The Trial Court held e-mails annexed to counsel's affidavit in opposition to plaintiff's motion for summary judgment as admissible evidence, where they were discussed and presented as an exhibit at plaintiff's principal's deposition.
Topic(s): Admissibility.

Rypkema v NY & Atlantic Railway Co. (Sup Ct, Queens County, Oct. 11, 2011, Index No. 26871/2009)

Judge(s): Weiss. Claim that plaintiff testified to having gone on post-accident vacations was insufficient to permit unlimited access to plaintiff's Facebook account, including deleted pages, and that it would lead to evidence that was material and necessary to defendant's defense.
Topic(s): Social Media, Relevance.

St. Paul's Sch. of Nursing, Inc. v Papaspiridakos, 42 Misc 3d 1216[A], 2014 NY Slip Op 50065[U] (Sup Ct, Queens County 2014)

Judge(s): Siegal. In ruling whether defendant was in civil or criminal contempt of a so-ordered stipulation, where defendant "initiated communications" in contravention of the stipulation, the Court found defendant in civil contempt by sending Facebook "requests to become friends" to certain prohibited individuals, noting that "Facebook serves to allow interaction through communications between individuals." The Court further found that defendant had a "constitutional right to post comments" on his public Facebook page, and found that since defendant's "Facebook posts were made to the public on defendant's public Facebook page" and "were not posted on anyone's specific Facebook page," such Facebook posts "were not directed" at a specific prohibited person and did not constitute harassment under the stipulation.
Topic(s): Social Media, Friending, Contempt.

Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn, LLP, 294 AD2d 190 (1st Dept 2002)

Judge(s): Abdus-Salaam. In a special proceeding against respondent law firm to recover outstanding files generated in connection with former representation, respondent moved for final judgment claiming it complied in good faith to the best of its ability. It had turned over 180 of 187 files identified pursuant to a Court of Appeals ruling, and claimed it could not locate the remaining seven. The Motions Court granted respondent's motion for a final judgment, while denying petitioner's cross motion for sanctions and a discovery order—inquiring into the nature of the respondent's computer system and technical details regarding data retrieval. The Supreme Court, however, reversed on the grounds that (1) petitioner's property interest translated into respondent's general duty to provide the material; and (2) the respondent's assessment of cost and burden was almost exclusively based on hearsay attributed to an outside computer consultant, and hence the Court erred in denying petitioner's requested discovery; and (3) the Motion Court improvidently exercised its discretion by requiring respondent to pay for the costs of providing the missing records: "The petitioner shall pay for the cost of any search and retrieval of the subject missing files…."
Topic(s): Privilege, Costs.

Samide v Roman Catholic Diocese of Brooklyn, 5 AD3d 463 (2d Dept 2004)

Judge(s): Hart. In an action to recover damages for sex discrimination, the Supreme Court had granted plaintiff's motion pursuant to CPLR 3124 to compel multiple defendants to produce the contents of their computer hard drives for *in camera* inspection. On appeal, beyond finding a separate order to produce tax returns and other financial returns to be overbroad and lacking a "strong showing of necessity," the Appellate Division directed that defendants had only to produce hard copies of email messages, including any deleted emails that could be recovered by a qualified expert, relating to allegations against a certain individual. The Plaintiff conceded that this portion of the order should have been modified.
Topic(s): Scope, Form of Production.

Sanacore v HSBC Securities (Sup Ct, New York County, Aug. 16, 2011, Index No.101947/2008)

Judge(s): Oing. After an *in camera* review, where the materials sought related exclusively to damages, the Court ordered delivery to defendant of plaintiff's Facebook records, including any records previously deleted or archived by Facebook or plaintiff.
Topic(s): Social Media, Relevance.

Saperstein Agency, Inc. v Concorde Brokerage of L.I., Ltd. (Sup Ct, Nassau County, Sept. 19, 2012, Driscoll, J., Index No. 20877/2008)

Judge(s): Driscoll. Plaintiff alleged that defendant attempted to eliminate relevant evidence by purging files that were maintained by the parties' joint remote cloud server, and that the lack of documentation of defendant's customers in the files stored on the parties' remote server, which information was allegedly required to be maintained by state regulations, was evidence of purging and spoliation. Counsel for [the cloud server company] submitted an affidavit that he reviewed the file dates and file sizes in each copy of defendant's back-up data as of August 1, 2010, and that "the data had not been altered." The affidavit indicated that in order to make "the data viewable in a legible format," the cloud server company "had to convert certain information, such as email, into Microsoft Word files, and in the process created entirely new files that 'nonetheless contain [defendant's] back-up exactly as it existed on August 1, 2010'" and that the "[d]ata itself had not been modified. Rather, it was merely copied into new formats in order to accommodate the parties' requests in the most efficient manner possible." The Court found that it "cannot conclude that the absence of documentation from digital files establishes that defendants destroyed evidence, whether intentionally or negligently." The Motion Court found that, "[t]he question whether any spoliation of evidence actually occurred should thus be presented to the jury, along with any inferences to be drawn from such spoliation."
Topic(s): Sanctions, Spoliation, Adverse Inference, Cloud.

Scaba v Scaba, 99 AD3d 610 (1st Dept 2012)

Judge(s): Tom, Andrias, Saxe, DeGrasse, Manzanet-Daniels. Defendant appeals the Supreme Court's decision which granted plaintiff's motion to direct defendant to allow plaintiff access to all digital storage media containing records of defendant's businesses and financial interests. Defendant's businesses provided the information sought by plaintiff in non-electronic form. Based on plaintiff's non-electronic production, the Supreme Court concluded that discovery was complete and the case was referred to a referee for trial. On appeal, the Court held that "to the extent defendant argues that plaintiff was required to identify specific electronic documents that would have been responsive to her requests, plaintiff's ability to do so was hampered by defendant's obstructive tactics…defendant's argument that plaintiff was required to submit, and the court promulgate, a protocol pursuant to which electronic discovery would be conducted, is unavailing."
Topic(s): Form of Production, Spoliation.

Scarola Ellis LLP v Padeh, 33 Misc 3d 1233[A], 2011 NY Slip Op 52224[U] (Sup Ct, New York County, Dec. 8, 2011)

Judge(s): York. After defendant advised that he possessed no additional documents, the Court "directed defendant to produce an affidavit from a system administrator or other similar computer systems specialist which stated there were no responsive documents and also detailed the search methods used." In response, defendant produced an affidavit from a computer engineer stating that he found no documents on the internal network or servers. The Court found the affidavit to be insufficient and directed that a supplemental affidavit be provided by the computer engineer,

> explaining which computers and system were searched, the date of the search, what kind and type of search or additional searches if necessary were performed, whether a search was made for other types of electronically stored documents other than emails, whether a search was made for deleted content, and what the origins were of the nine emails attached as exhibits in the opposition to the motion for summary judgment.

The Court further held that such an affidavit:

> must document a thorough search conducted in good faith. It should include details such as where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found.

Topic(s): Spoliation, Preservation.

Scarola Ellis, LLP v Padeh, 2012 NY Slip Op 31406[U] (Sup Ct, New York County 2012)

Judge(s): York. Plaintiff law firm moved to strike its former client's answer on the basis of spoliation of evidence. Defendant noted that he had "feared" litigation due to the tenor of the law firm's e-mails, and saved certain of the e-mails, but allowed others to be "purged" from his system long before litigation had commenced. The Court held that plaintiff failed to carry its burden on its spoliation motion and the Court expressly noted that it was not reaching any conclusion as to whether the documents that plaintiff seeks "were in fact ever in [defendant's] possession and/or [whether they existed and/or whether they were] highly significant." The Court stated that it "is unable to make these findings on this record and any such findings should in any event be left to the trier of fact." The Court noted that, with respect to the e-mails sought, plaintiff was a party to them and thus should be in possession of or be able to obtain some or all of the material it seeks.
Topic(s): Sanctions, Spoliation, Preservation, Strike Pleading.

Schreiber v Schreiber, 29 Misc 3d 171 (Sup Ct, New York County, June 25, 2010]

Judge(s): Thomas. The Court ruled that plaintiff was not "entitled to an unrestricted turnover of the computer hard disk drive in issue or in the form of its clone. Unlike a typical discovery demand which targets particular information, plaintiff's request… was overbroad as it [sought] general – as well as unlimited in time – access to the entirety of defendant's business and personal data stored in his office computer. Equally important, plaintiff [had] proposed no discovery/issue resolution protocol." As such, plaintiff's motion to compel was denied, with leave to renew, provided that plaintiff's "contain a detailed, step-by-step discovery protocol that would allow for the protection of privileged and private material."
Topic(s): Scope.

Scott v Beth Israel Med. Ctr., Inc.,17 Misc 3d 934 (Sup Ct, New York County, Oct. 17, 2007)

Judge(s): Ramos. In this employment contract dispute, plaintiff moved for a protective order requesting the return of all e-mail correspondence between plaintiff and his attorney, which were stored on defendant hospital's e-mail server. Plaintiff argued that the e-mails were covered by the attorney-client privilege and work product doctrine. Defendants argued they were not covered by the attorney-client privilege where defendants' e-mail policy clearly did not allow confidentiality. The Court applied the rule set forth in *Asia Global Crossing, Ltd.* (322 BR 247 [SD NY 2005]), holding that the e-mail correspondence was not covered by the attorney-client privilege where (1) the corporate e-mail policy banned personal or other objectionable uses; (2) the company monitored employees' e-mail use; (3) third parties have a right of access to the computer or e-mails, and (4) the defendant provided notice to every employee, including plaintiff, of such policies. The Court determined that the third factor in the *Asia Global Crossing* test, whether third parties have the right to access the e-mails, is irrelevant in this case where the NY legislature has determined that such access does not destroy privilege. The Court rejected plaintiff's argument that the e-mail correspondence was protected under the attorney work product doctrine, finding that defendants' e-mail policy eliminated the

expectation of privacy required in connection with such claims. The Court determined that the attorney's boilerplate statement at the end of each e-mail, warning that such e-mail was confidential, was an insufficient and unreasonable precaution to protect any attorney-client privilege given the nature of defendant's e-mail policy.
Topic(s): Privilege.

Sieger v Zak, 60 AD3d 661 (2d Dept 2009)

Judge(s): Prudenti, Dillon, Eng, Leventhal. In an action for breach of fiduciary duty, defendant sought to have classified as privileged certain e-mail communications between himself, his current defense counsel and a non-party consultant who performed a valuation of the company at issue which concerned the extent of the consultant's obligation to comply with the subpoenas served upon him by the plaintiffs. Since the defendants did not claim that the non-party consultant was a client of present defense counsel, nor did they allege that, at the time the communications were made, the non-party consultant was still serving as an agent of the defendant company (which had been sold prior to the commencement of this action), the attorney-client privilege did not attach.
Topic(s): Privilege.

Signature Med. Mgmt. Group, Inc. v Levy (Sup Ct, Nassau County, July 12, 2013, Bucaria, J., Index No. 11724/2009)

Judge(s) Bucaria. Plaintiff moved to strike defendant's answer on the basis that emails concerning source data sent to and by the individual attorney who represented it had been deleted by defendant law firm's outside computer consultant after the defendant attorney had left his law firm. Because plaintiff had not established that the emails could not be reconstructed where plaintiff itself may possess, or may have the ability to recover them, the Court denied plaintiff's motion to strike with leave to seek an appropriate sanction at trial. The Court held that a lesser sanction may be appropriate upon a showing that "defendants were responsible for the destruction of the emails and that plaintiff has been prejudiced."
Topic(s): Sanctions, Spoliation, Strike Pleading.

Signature Med. Mgmt. Group, LLC. v Levy (Sup Ct, Nassau County, Oct. 30, 2014, Index No. 11724/2009)

Judge(s): Bucaria. Plaintiff moved to strike defendant's answer on the basis that emails concerning source data sent to and by the individual attorney who represented it in the arbitration had been deleted by defendant law firm's outside computer consultant after the attorney had left the firm. Because plaintiff had not established that the emails could not be reconstructed as plaintiff may possess, or may have the ability to recover them, the Motion Court denied plaintiff's motion to strike with leave to seek an appropriate sanction at trial. The Motion Court held that a lesser sanction may be appropriate upon a showing that defendants were responsible for the destruction of the emails and that plaintiff had been prejudiced.

On plaintiff's cross-motion for summary judgment or, in the alternative, for an adverse inference based on the spoliation of evidence, the Motion Court found that once the malpractice action had commenced, the law firm "was under an obligation to place a litigation hold on its computer system to preserve [its former attorney's] emails." Noting that *Voom HD v. Echostar Satellite*, held that, under certain circumstances, it is insufficient in implementing a litigation hold to "vest total discretion" in an employee to search and select what ESI is relevant "without the guidance and supervision of counsel," the Motion Court found that the firm administrator required such guidance and supervision of counsel and that the defendant law firm had a duty at the time the emails were deleted from its computer system to have preserved them. However, because there was a triable issue of fact as to whether the emails were destroyed with a culpable state of mind where the firm's administrator's instructions to its outside computer consultant could be interpreted as directing that the emails be disabled as opposed to be destroyed, the Motion Court, for that reason among others, denied plaintiff's motion for spoliation sanctions with leave to renew at trial.
Topic(s): Spoliation, Preservation, Litigation Hold, Adverse Inference, Custodians, Prejudice, Emails.

Silverman v Shaoul, 30 Misc 3d 491 (Sup Ct, New York County, Nov. 3, 2010)

Judge(s): Bransten. Defendants moved to compel plaintiffs to pay for the costs of "collecting, processing and hosting electronic data" to be incurred in responding to plaintiff's request for disclosure. Defendants argued that New York law placed the burden of such costs on the party seeking production and further argued that the data requested was not readily available and therefore defendants should not be required to pay for its production. The Court noted that "precedent shows that the requesting party bears the cost of electronic discovery when the data sought is not readily available. Data is not readily available upon a showing of undue burden by the producing party to obtain the data." The Court determined that although the information sought was stored in a number of locations, it was readily available. Thus, in denying the motion, the Court concluded that the defendants should pay the cost incurred in processing the data, *i.e.*, the cost of examining the documents for privilege issues or on relevancy grounds, as those are costs normally borne by the producing party.
Topic(s): Costs.

Sinrich v Fernwood Enters., Inc., 2011 NY Slip Op 30165[U] (Sup Ct, New York County, Jan. 21, 2011)

Judge(s): Rakower. Plaintiff sought to compel production of additional emails that were first learned about during depositions. In response, defendants performed a further search and produced additional emails. Nevertheless, plaintiff asserted that there was potential spoliation of evidence because he felt that some emails may have been lost pursuant to defendants' email retention policies. In response to the motion, and in support of their motion for a protective order, defendants submitted a detailed affidavit describing all efforts taken to retrieve and produce all emails responsive to the request and averring that all responsive emails had been produced. In denying plaintiff's motion to compel and granting defendants' motion for a protective order, the Court found that there was

insufficient evidence in the record to do anything more than speculate that responsive documents had either been lost or destroyed by defendants.
Topic(s): Preservation, Spoliation.

Sipperley v Diaz (Sup Ct, Nassau County, Aug.15, 2014, Index No. 013885/2013)

Judge(s): Murphy. Motion Court held that the term "relevant" does not mean a "wholesale intrusion into the personal aspects of defendant's life, with no restriction as to the issues raised in the pleadings, and no indication that the material will contain, or lead to the discovery of admissible evidence" to justify seeking "all relevant electronically stored e-mails, from personal and business computers, cellular telephones and personal digital assistants." The Motion Court directed defendant not to "destroy or erase any communications which may relate to the issues raised in the complaint, pending termination of the litigation."
Topic(s): Social Media, Preservation, Relevance.

Smith v Charles, 964 NYS2d 63, 2012 NY Slip Op 52226[U] (Sup Ct, Kings County 2012)

Judge(s): Lewis. The Court held that plaintiffs' verified complaint annexing emails served as proper authentication for them, and that circumstantial evidence could:

> verify the emails just as such evidence authenticates a voice heard over the telephone when the message reveals the speaker had knowledge of the facts that only the speaker would likely know. [citation omitted] More importantly, though, courts have applied the same rule when judging whether instant messages are properly authenticated (*People v. Pierre*, 41 AD3d 289, 291-292 [2007], lv denied 9 NY3d 880 [2007], habeas corpus denied sub nom *Pierre v. Ercole*, 2012 WL 3029903, *9-10, 2012 U.S. Dist LEXIS 103874, *23-25 [S.D N.Y.2012] ["instant message was properly authenticated, through circumstantial evidence, as emanating from defendant"]). Here, the emails contain sufficient circumstantial evidence to authenticate defendant Charles as recipient and sender…. Enough circumstantial evidence therefore exists in the record, when taking these facts into account, to authenticate relevant emails as written and received by defendant Charles. Consequently, email authentication and admissibility exists to support the motion even if the plaintiffs' verified complaint proved insufficient.

Topics: Authentication.

Matter of Smith v New York State Off. of the Attorney Gen., 110 AD3d 1201 (3d Dept 2013)

Judge(s): Spain. In connection with the New York Attorney General's action against executives of American International Group alleging fraud concerning its publicly reported financial performance, petitioner sought the production through an Article 78 proceeding of, among other things, e-mails sent to or from then Attorney General Spitzer from his private e-mail account. The State argued that any "private email account that Spitzer may have had was not an account to which respondent had access and, therefore,

whatever emails were contained therein were not records within its possession." The Trial Court ruled that the State had "'both the responsibility and the obligation to gain access to' Spitzer's private email account in order 'to determine whether the documents contained therein should be disclosed to petitioner in accordance with its FOIL request.'" On appeal, the State argued that it had "no obligation to seek out documents not in its possession and not kept or held "by, with or for [it]" "and that it "presently lacks legal authority to gain access to such private documents." Without ruling on the merits of the dispute, the Appellate Division held that:

> [s]ince at this juncture the object of this proceeding is Spitzer's *private* email account(s), and the outcome of this appeal could be a directive to respondent to gain access to and review those private accounts, Spitzer would certainly be "inequitably affected by a judgment in th[is] [proceeding]" and "ought to be [a] part[y] if complete relief is to be accorded between the persons who are parties to [this proceeding]" (CPLR 1001[a]). As such, Spitzer is a necessary party herein.

Topic(s): Privacy, Intervention.

Soule v Friends of the Cold Spring Harbor Fish Hatchery, Inc. (Sup Ct, Nassau County, Jan. 8, 2014, Jaeger, J., Index No. 13505/2012)

Judge(s): Jaeger. Defendants produced over 1,800 pages of bates-stamped documents in PDF form without reference to plaintiff's numbered demands. The Court found defendants' production to be "insufficient" and ordered defendants to "provide the documents containing metadata with a spreadsheet and particularized objections that can be linked via the Bates stamp numbers."

Topic(s): Manner of Production.

Spearin v Linmar, L.P., 2015 NY Slip Op 05118 (1st Dept June 16, 2015)

Judge(s): Mazzarelli, Sweeny, Andrias, Saxe and Richter. Appellate Division reversed an order as "overbroad" which had directed plaintiff to provide an authorization for access to his Facebook account from the date of the accident to the present, and remanded the matter for an *in camera* review of plaintiff's "post-accident Facebook postings for identification of information relevant to plaintiff's alleged injuries." The Appellate Division noted that "[d]efendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile picture from his Facebook account, uploaded in July 2014, depicting plaintiff sitting in front of a piano, which tends to contradict plaintiff's testimony that, as a result of getting hit on the head by a piece of falling wood in July 2012, he can longer play the piano."

Topic(s): Social Media, *In Camera* Review, Relevance.

Sterling v May (Sup Ct, New York County, Nov. 22, 2011, Index No. 106943/2009)

Judge(s): Silver. Plaintiff's testimony that she had a Facebook account, in and of itself, was insufficient to establish a factual predicate necessary for disclosure of such records.
Topic(s): Social Media, Relevance.

Strong v City of New York, 112 AD3d 15 (1st Dept 2013)

Judge(s): Saxe. The Appellate Division was asked to:

> decide whether spoliation sanctions were merited for the failure of defendant City to take steps to prevent the automatic destruction of a recorded radio run that could have either confirmed or called into question its asserted "emergency operation" affirmative defense. . . .

The Appellate Division stated:

> we must determine the proper legal standards to be applied where the destroyed evidentiary material at issue is an audiotape of a radio communication. In particular, we must decide whether this spoliation claim can be fully addressed with the established New York spoliation doctrine, or whether we should apply, in this context, the *Zubulake* standard regarding spoliation of discoverable electronically stored information (ESI). . . .

In answering the above question, the Appellate Division held that:

> reliance on the federal standard is unnecessary in this context. *Zubulake* interpreted federal rules and earlier federal case law to adapt those rules to the context of ESI discovery. However, the erasure of, and the obligation to preserve, relevant audiotapes and videotapes, can be, and has been, fully addressed without reference to the federal rules and standards.

The Appellate Division ruled that the sanction of dismissal of the affirmative defense or preclusion was too severe because the recording was not "key to the proof of plaintiff's case in chief," although it could have been relevant to prove or disprove the City's defense. The Appellate Division noted that "[p]laintiffs' inability to establish whether the missing evidence would have been helpful to them cannot serve to support the City's opposition to sanctions, since that inability is the City's fault, not plaintiffs." As to the appropriate sanction, the Appellate Division held that the Motion Court's original order "preventing the City from introducing testimony as to the contents of the audio recording, is appropriate" and "[i]f warranted, an adverse inference charge at trial may be an appropriate additional sanction."
Topic(s): Sanctions, Spoliation, Preclusion, Adverse Inference.

Suazo v Linden Plaza Assoc., L.P., 102 AD3d 570 (1st Dept 2013)

Judge(s): Gonzalez, Mazzarelli, Acosta and Roman. The Appellate Division noted that, since defendants were "on notice of a credible probability that [they would] become involved in litigation, plaintiff demonstrated that defendants' failure to take active steps to halt the process of automatically recording over 30- to 45-day-old surveillance video and to preserve it for litigation constituted spoliation of evidence." However, because the loss of the video did not "leave[ ] [plaintiff] prejudicially bereft of appropriate means to confront a claim [or defense] with incisive evidence," the Appellate Division ruled that the Motion Court erred in striking defendants' answer and that the appropriate sanction is an adverse inference.
Topic(s): Sanctions, Spoliation, Preservation, Adverse Inference, Video.

Matter of Sucich, 47 Misc 3d 1209[A], 2015 NY Slip Op 50523[U] (Sur Ct, Dutchess County, 2015)

Judge(s): Pagones. The Motion Court then held that "electronic service is an acceptable method . . . 'once the impracticability standard is satisfied' that reasonable efforts to accomplish service according to the methods specified in CPLR §§308(1), (2) and (4) are not feasible." Then "[o]nce that standard is met, the method of service reasonably calculated, under all of the circumstances, to inform the subject party of the action or proceeding can be fashioned." The Motion Court held that service by publication, pursuant to SCPA §307(3)(a), "is entirely imprudent financially and practically based upon the record."
Topic(s): Social Media, Service of Process.

Suffolk P.E.T. Mgt., LLC Anand, 105 AD3d 462 (1st Dept 2013)

Judge(s): Andrias, Saxe, Abdus-Salaam and Gische. A "forensic study of defendants' computer hard drives revealed evidence that conflicted with defendants' assertions that all relevant documents, including electronic information, had been produced." The Appellate Division noted that "many of the records that plaintiffs sought and were not provided with were material to plaintiffs' case, and were required to be maintained by defendants," as per the parties' contract. In addition, the evidence demonstrated that "over [a] two-year period, defendants failed to conduct timely searches for requested documents, failed to preserve material documents despite awareness of the action, and otherwise affirmatively interfered with plaintiffs' efforts to collect discoverable material." The Appellate Division further noted that "defendants were alerted to the potential consequences of incomplete disclosure during the several hearings conducted by the [motion] court on the discovery issues." As such, the Appellate Division affirmed the Motion Court's confirmation of a report recommending that defendants' answer be stricken for noncompliance with discovery orders and that a default judgment be entered against defendants on liability. Based on the above, the Appellate Division held that the record supported the findings that defendants "engaged in willful and contumacious conduct by their failure to comply with the court's discovery orders and directives."
Topic(s): Sanctions, Spoliation, Preservation, Striking Pleading, Forensic Review.

T.A. Ahern Contrs. Corp. v Dormitory Auth. of State of New York, 24 Misc 3d 416 (Sup Ct, New York County, Mar. 19, 2009)

Judge(s): Rakower. Defendant agreed to produce archived e-mails requested by plaintiff, provided that plaintiff pay the estimated $35,000 cost for an ESI expert to perform the search. Plaintiff refused to bear this cost, moved to compel production, and asked the Court to apply the *Zubulake* "cost shifting model" to the dispute. However, the Court refused to apply *Zubulake* because it involved federal discovery, where the presumption exists that the responding party must bear the expense of complying with discovery requests and where, without cost shifting, the potential would exist to formulate overly broad discovery requests which have the effect – whether intended or otherwise – of placing unnecessary and oppressive (even prohibitive) costs upon the opponent. Instead, in following *Lipco*, the Court found that New York's existing "requesting-pay standard" adequately addressed this concern by giving a litigant "a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible." Noting that it was "not empowered by – statute or case law – to overturn the well-settled rule in New York State that the party seeking discovery bear the costs incurred in its production," the Court refused to order production of the e-mails "until such time as [Plaintiff] communicates that it is willing to bear the costs incurred for their production, subject to any possible reallocation of costs at trial."
Topic(s): Costs.

Tapp v New York State Urban Dev. Corp., 102 AD3d 620 (1st Dept 2013)

Judge(s): Gonzalez, Friedman, Moskowitz, DeGrasse and Freedman.

The Appellate Division held that the Motion Court correctly determined that plaintiff's mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the Court conduct an *in camera* inspection of the account's usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's Facebook account – that is, information that "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims."

Defendants' argument that plaintiff's Facebook postings "may reveal daily activities that contradict or conflict with" plaintiff's claim of disability amounts to nothing more than a request for permission to conduct a "fishing expedition."
Topic(s): Social Media, Discovery, Relevance.

Taylor v Argueta (Sup Ct, Suffolk County, Jan. 31, 2014, Pastoressa, J., Index No. 38111/2011)

Judge(s): Pastoressa. Defendants demonstrated that plaintiff's Facebook "may" contain information that is probative on the issue of the extent of her injuries and/or disabilities, and the Court found it "reasonable to believe" that her Facebook account may contain relevant evidence. Defendants provided descriptions of some activities contained on the public portion of plaintiff's Facebook account from the date of the accident to the present. The Court directed an *in camera* review inspection of Plaintiff's postings "due

to the likelihood that some information contained therein is of a private nature with no relevance to the subject action." The Court denied the production of the plaintiff's fiancée's Facebook account.
Topic(s): Social Media, *In Camera* Review, Relevance.

T.D. Bank, N.A. v J&T Hobby, LLC, 2010 NY Slip Op 32481[U] (Sup Ct, Nassau County, Sept. 1, 2010)

Judge(s): Warshawsky. In response to defendants' motion to dismiss, plaintiff cross-moved for an order to compel defendants to share in the cost of reproducing documents whose volume plaintiff contended was misrepresented by the defendants, resulting in $20,000 in copying expenses. The Court followed *MBIA Ins. Corp. v Countrywide Home Loans, Inc.* (27 Misc3d 1061) by noting that generally "each party should bear the expenses it incurs in responding to discovery requests." Yet the Court recognized "an exception to the general rule [that] allows discovery cost allocation determinations when the discovery costs at issue concern electronically stored information that is not readily available." On the other hand, readily available ESI was held to preclude discovery cost allocation determinations. Nevertheless, the Court emphasized that "cost shifting may be appropriate on proper application." In this case, "given the ambiguous nature as to which party was requesting production of the books and records of J&T Hobby," the Court split the cost of production between the plaintiff and the defendants.
Topic(s): Costs.

Temperino v Turner Constr. Co. (Sup Ct, Richmond County, Nov. 30, 2011, Index No. 101541/2010)

Judge(s): Minardo. Defendant in a personal injury action sought plaintiff's Facebook records after seeing the public portion of plaintiff's account, including a photograph of plaintiff. The Court found that defendant failed to proffer what, if anything, was contained in the Facebook account that was "relevant" to the issues, and "the mere claim that plaintiffs were members of Facebook, in and of itself, is not a sufficient basis to require the issuance of a commission."
Topic(s): Social Media, Relevance.

Tener v Cremer, 2011 NY Slip Op 6543 (1st Dept Sept. 22, 2011)

Judge(s): Gonzalez, Tom, Andrias, Moskowitz, Freedman. In a defamation action, plaintiff sought production of ESI from a nonparty pursuant to subpoena. Specifically, plaintiff sought the identification of all persons who accessed the Internet via the IP address for an NYU portal. NYU failed to produce the information and plaintiff moved for contempt. The Trial Court denied the motion in part because it found NYU did not have the ability to produce the requested information as the text file was allegedly overwritten and was otherwise irretrievable. On appeal, plaintiff established that the information could potentially be accessed using retrieval software. The Appellate Division reversed and remanded for a hearing on whether the information was inaccessible. The Appellate Division further instructed that, because NYU was a nonparty, the costs of production should be borne by the plaintiff and "should consider

whether to include in that allocation the cost of disruption to NYU's normal business operations."
Topic(s): Preservation, Costs.

Thyroff v Nationwide Mut. Ins. Co., 8 NY3d 283 (2007)

Judge(s): Graffeo. The United States Court of Appeals for the Second Circuit certified a question to the New York Court of Appeals concerning whether the common-law cause of action of conversion applies to certain electronic computer records and data. Defendant, an insurance agency and plaintiff's former employer, leased to the plaintiff a computer system to collect and transfer customer information. Upon the termination of the lease, defendant repossessed the computer and denied plaintiff access to any information stored in the computer, including customer files and the plaintiff's personal files. Plaintiff filed a conversion (misappropriation of private property) claim against defendant. The Federal Trial Court dismissed the conversion claim and plaintiff appealed to the Second Circuit, who then certified the question to the Court of Appeals. The Court answered in the affirmative, stating that electronic records stored on a computer are indistinguishable from printed documents ("A document stored on a computer hard drive has the same value as a paper document kept in a file cabinet"). The Court reasoned that it generally is not the physical nature of a document that determines its worth; it is the information memorialized in the document that has intrinsic value.
Topic(s): Scope.

Matter of Tilimbo v Posimato, 36 Misc 3d 1232[A], 2012 NY Slip Op 51579[U] (Sur Ct, Bronx County 2012)

Judge(s): Holtzman. Here, the plaintiffs identified the computer forensic expert they wished to use, indicated they wish to "examine" and "clone" the hard drive of Wynne's computer, and limited their ESI discovery to documents referring to Rose Tilimbo, her will dated September 25, 2000 and the disputed deed transfer. In response, Wynne asserts a broad attorney-client privilege which, presumably, refers to information relating to other clients. Although he also contends that he already produced hard copies of the information sought, the production of hard copies of information sought does not preclude the production of the ESI for the same documents (see *Dartnell Enters., Inc*., 33 Misc 3d 1202 [A], 938 N.Y.S.2d 226, 2011 NY Slip Op 51758 [U]). Other than producing the relevant deed, Wynne was unable to produce any other documents relating to the deed transfer by Rose Tilimbo whom Wynne allegedly represented at the time, and such documents are clearly material and relevant to the complaint in the transferred action commenced by Rose, his alleged former client, and the niece and nephew.

As the movants have not requested that anyone other than themselves should pay for the cost of retrieving the requested information, there is no need to discuss who will pay for the cloning. Furthermore, although the movants have not set forth the details involved in the cloning, it appears that the process only involves access to Wynne's computer(s) for a limited period of time and should not cause any significant disruption to Wynne's law practice. Nevertheless, Wynne is a solo practitioner and it would place an unreasonable burden upon him if he does not have the use of any of his computers for more than a few

hours during normal working hours or if his office is disrupted by the presence of employees of Computer Forensics Associates for any prolonged period on any day.
Topic(s): Cloning, Privilege, Form of Production.

Tuzzolino v Consolidated Edison Co. of N.Y., Inc., 2015 NY Slip Op 30872[U] (Sup Ct, New York County, May 20, 2015)

Judge(s): Mendez. Motion Court granted defendant's motion seeking to compel authorizations "permitting the release and completed copies of [plaintiff's] Facebook account(s) including all records, information, photographs, videos, comments, messages and postings, and shall include the name, username, screen name and email account used to create the Facebook account(s)." Plaintiff testified that he had a "Facebook account at the time of the accident; that he deleted the account a few months prior to his deposition; and that he did not recall whether he deleted posts or pictures from his Facebook account prior to deleting the account." Defendant submitted to the Motion Court a picture from plaintiff's girlfriend's Facebook page of plaintiff and she at a social gathering and the picture did not show a cane or any equipment needed to help him walk. Plaintiff further acknowledged that he attended two weddings with his girlfriend after his accident. Defendant asserted that its internet search also revealed two pictures of plaintiff at a party and out at a bar and the Motion Court held that they "contradict plaintiff's claim that since his accident he is unable to stand for more than twenty to thirty minutes without being in pain and/or that he cannot do anything for himself such as go grocery shopping, do laundry, and cook or clean."
Topic(s): Social Media, Relevance.

U.S. Bank Nat'l Assoc. v Greenpoint Mtge. Funding, Inc., 94 AD3d 58 (1st Dept 2012)

Judge(s): Acosta. The Appellate Division held that "it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information," subject to reallocation upon a proper showing. The Appellate Division noted that:

> the question of which party is responsible for the cost of searching for, retrieving and producing discovery has become unsettled because of the high cost of locating and producing electronically stored information (ESI). The CPLR is silent on the topic. Moreover, while our courts have attempted to provide working guidelines directing how parties and counsel should prepare for discovery, including ESI, these guidelines generally abstain from recommendations concerning the issue of cost allocation.

The Appellate Division held that it is "persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction" and that it "presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing ESI." The Appellate Division stated that:

> [w]hen evaluating whether costs should be shifted, the IAS courts, in the exercise of their broad discretion under article 31 of the CPLR ... may follow the seven factors set forth in *Zubulake*:
>
> > (1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party; (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and, (7) [t]he relative benefits to the parties of obtaining the information" *(Zubulake,* 217 FRD at 322).
>
> The motion courts should not follow these factors as a checklist, but rather, should use them as a guide to the exercise of their discretion in determining whether or not the request constitutes an undue burden or expense on the responding party. *(id.* at 322-23).

The Appellate Division noted that the:

> adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant.

The Appellate Division declined to determine whether there should be cost shifting because there was "no evidence in the record" supporting the expenses proposed and because the producing party failed to provide a sufficient reason for either limiting the requesting party's discovery requests and shifting some or all of the cost to it.
Topic(s): Costs.

VOOM HD Holdings LLC v EchoStar Satellite LLC, 93 AD3d 33 (1st Dept 2012)

Judge(s): Manzanet-Daniels. The Appellate Division 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," including ESI, and this is the case "whether the organization is the initiator or the target of the litigation." Such "hold" must suspend a system's automatic-deletion function, and otherwise preserve emails. The Appellate Division held that such a rule provides "litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered."

Defendant had not implemented a litigation hold on ESI until after litigation had actually been commenced, and the "hold" did not suspend defendant's automatic deletion of e-mails, which automatically and permanently purged after seven days any e-mails sent and deleted by an employee from defendant's computer servers. It was not, however, until four months after the commencement of the lawsuit, and nearly one year after defendant

was on notice of anticipated litigation, that defendant suspended the automatic deletion of relevant e-mails from its servers.

The Appellate Division held that:

> Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail (*see Pension Comm. of the Univ. of Montreal Pension Plan v. Bane of Am. Sec., LLC.,* 685 F Supp2d at 471).
>
> The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence; when the destruction of evidence is merely negligent, however, relevance must be proven by the party seeking spoliation sanctions. (*id*. at 467-468).

However, the Appellate Division held that such presumption of relevance is rebuttable:

> [w]hen the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required. (*Pension Comm. of Univ. of Montreal Pension Plan* at 468-469).

The Appellate Division noted that "[s]ince [defendant] acted in bad faith or with gross negligence in destroying the evidence, the relevance of the evidence is presumed and need not have been demonstrated by [plaintiff]." The Appellate Division held that "[i]n any event, the record shows that the destroyed evidence was relevant" where certain- "emails – a handful only fortuitously recovered, and highly relevant – certainly permitted the inference that the unrecoverable e-mails, of which the snapshots were but a representative sampling, would have also been relevant."

With respect to prejudice, the Appellate Division rejected defendant's assertion that "the missing e-mails were merely cumulative of other evidence, asserting that since [plaintiff] had other means to prove its case, it could not have suffered prejudice from the destruction of e-mails that occurred" and held that such assertion "is insufficient to rebut the presumption." Further, "[a]lthough [plaintiff] may have other evidence to point to, the missing evidence is from a crucial time period during which [defendant] appears to

have been searching for a way out of its contract. . . . Evidence from this vital time period is not entirely duplicative of other evidence."

The Appellate Division noted that "[i]n the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as e-mail, it is necessary for a party facing litigation to take active steps to halt that process." The Appellate Division further noted that:

> [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.

In rejecting the position that "'in the absence of pending litigation' or notice of a specific claim' defendant should not be sanctioned for discarding items in good faith and pursuant to normal business practices," The Appellate Division stated that "[t]o adopt a rule requiring actual litigation or notice of a specific claim ignores the reality of how business relationships disintegrate." The Appellate Division noted that in this case defendant's "reliance on its employees to preserve evidence 'does not meet the standard for a litigation hold.'"
Topic(s): Preservation.

VOOM HD Holdings LLC v EchoStar Satellite LLC, 2010 NY Misc LEXIS 6306 (Sup Ct, New York County, Nov. 3, 2010)

Judge(s): Lowe, III. In this breach of contract action, plaintiff moved for spoliation sanctions against defendant. Defendant failed to preserve documents when it first should have known that litigation was likely, but what the Court found even more egregious, was that defendant failed to preserve documents for up to four months after the case was commenced because they did not turn off the automatic delete function of the email system until that time. Further, once a litigation hold was established, defendant allowed employees to decide what information was relevant to the case and what information could and should be deleted. Defendant also failed to implement the mirror image capabilities of its email system at the same time the litigation hold was issued, which should have provided snapshots of all emails within the system, thus preserving even deleted emails. Additionally, during prior litigation, the defendant was made aware of its sub-par document retention policies and was sanctioned for such practices. The Court determined that at a minimum, even without the previous spoliation sanctions,

defendant's conduct in this case was grossly negligent. The Court allowed an adverse inference instruction because once actions are deemed to be grossly negligent, that finding alone is enough to warrant an inference that the spoliated evidence was unfavorable to the offending party, but here, due to other unrelated litigation, snapshots of relevant emails were found and thus further prove that defendant's actions placed plaintiff in an unfavorable position.
Topic(s): Sanctions, Spoliation.

W & W Glass, LLC v 1113 York Avenue Realty Co. LLC, 83 AD3d 438 (1st Dept 2011)

Judge(s): Andrias, Friedman, Catterson, Renwick, DeGrasse. The Appellate Division reversed the Lower Court's decision striking the answer as the "record fails to support the motion court's determination that defendants' failure to comply with discovery obligations was willful, or in bad faith. Absent such showing, the motion court erred in imposing the 'harshest available penalty' against defendants. Finally, we note that the record discloses no evidence of defendants' repeated failures to comply with the court's discovery orders. Indeed, there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature in this case."
Topic(s): Sanctions.

W & G Wines LLC v Golden Chariot Holdings LLC, 46 Misc 3d 1202[A], 2014 Slip Op 51781[U] (Sup Ct, Kings County, 2014)

Judge(s): Demarest. Internet printouts from Facebook page, Yelp, and other sources are not documentary evidence under CPLR Rule 3211(a)(1), as they are subject to interpretation, and where their reliability and authenticity have not been sufficiently established.
Topic(s): Social media, Documentary Evidence.

Walsh v Frayler, 26 Misc 3d 1237[A], 2010 NY Slip Op 50435[U] (Sup Ct, Suffolk County, Feb. 24, 2010)

Judge(s): Whelan. Plaintiff moved for a preliminary injunction aimed at preserving evidence in the nature of e-mails and other electronic files in the exclusive control of the defendants. The Court concluded that the application was rendered academic by service of the plaintiff's "First Demand for Inspection of Electronic Data and Preservation of Electronically Stored Information." The Court declined to "so order" the demand by holding that, if ESI became lost, eradicated or otherwise unavailable as a result of actual conduct on the part of the defendants or their agents, the plaintiffs may resort to any and all remedies afforded to them under the law governing spoliation of evidence. The Court also observed that the preservation of evidence is not the proper subject of a motion for a preliminary injunction in a tort action.
Topic(s): Preservation.

Walter v Walch, 2012 NY Slip Op 33067[U] (Sup Ct, Suffolk County 2012)

Judge(s): Baisley, Jr. In a personal injury action, the Court directed plaintiff to deliver a properly executed consent and authorization permitting defendants to gain access to plaintiff's Facebook records, including "any records previously deleted or archived." Defendants "made a sufficient showing that the material sought from the private profile section of Glidard's Facebook account is both material and necessary to the defense of the action and/or could lead to admissible evidence related to plaintiff's loss of enjoyment of life claim" where plaintiff alleged "that she is in constant pain and that her overall quality of life and sense of well-being has been severely impacted as a result of the injuries sustained in the accident."
Topic(s): Social Media, Discovery, Relevance.

Waltzer v Tradescape & Co., 31 AD3d 302 (1st Dept 2006)

Judge(s): Cahn. Defendants refused to produce personal documents and documents in the possession of law firms that had formerly represented them. The Supreme Court held that under these circumstances, the privilege and relevancy review costs incurred in connection with document production are to be borne by the responding party. While the general rule under the CPLR places the cost burden on the party seeking discovery, however, here the data sought "was on two CDs and readily available," and thus the cost of copying and giving them to the plaintiff "would have been inconsequential."
Topic(s): Costs.

Ware v Atlantic Towers Apt. Corp., 40 Misc 3d 1213[A], 2013 NY Slip Op 51177[U] (Sup Ct, Kings County 2013)

Judge(s): Battaglia. Plaintiff tripped on premises owned and operated by two co-defendants, and the Court held that these co-defendants "failed to preserve video surveillance footage by recording it on DVD or CD when it was 'on notice of a credible probability' that they would become involved in litigation as a result of Plaintiff's accident." A third co-defendant, however, had visited the premises, and he testified that he and the night security guard had watched a video that showed that plaintiff fell on her own. TheCcourt found that, where the third co-defendant would be prevented, under the "Best Evidence Rule," from testifying to what he saw on the video, the loss of the video deprived it of "key and incisive evidence" that would have rebutted plaintiff's testimony that sought to place liability on such third co-defendant. Accordingly, the Court struck defendants' cross-claims against the third co-defendant. With respect to the plaintiff, the Court held that an adverse inference charge would be the appropriate sanction. However, plaintiff failed to set forth the adverse inference sought. The Court deferred until trial to decide what may be the appropriate charge because to craft one earlier might prejudice the third co-defendant as it could allow for an inference contrary to the third defendant's testimony of what he observed on the video, which it was precluded from testifying to under the Best Evidence Rule.
Topic(s): Sanctions, Adverse Inference, Striking Pleading, Video.

Weiller v New York Life Ins. Co., 6 Misc 3d 1038[A], 2005 NY Slip Op 50341[U] (Sup Ct, New York County, Mar. 16, 2005)

Judge(s): Cahn. The Court ordered production of "all databases, electronic material, tape media, electronic media, hard drives, computer disks and documents" from defendants even though they objected that it would be cost-prohibitive. Defendants pointed specifically to a previous preservation order issued in the litigation, which resulted in a cost of over $1 million. The Court stated that it "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."
Topic(s): Costs.

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)

Judge(s): Miller. The Court held that striking a pleading was not appropriate when missing electronic data was ultimately produced, however, a monetary sanction representing the time spent in addressing the issue was granted.
Topic(s): Sanctions.

Willis v Willis, 79 AD3d 1029 [2d Dept 2010]

Judge(s): Rivera, Skelos, Chambers, Roman. In a matrimonial action in which plaintiff's claims were predicated upon publication of an allegedly defamatory e-mail to one of her children who had access to her personal e-mail account, plaintiff had no "a reasonable expectation of confidentiality" in the e-mail communications between herself and her attorneys, when such communications were freely accessible by her children (who were also the children of her adversary), her children knew the password to her e-mail account and regularly used the account. The Court also found there to be no evidence that the plaintiff requested that the children keep the communications confidential.
Topic(s): Privilege.

Wilson v Fantastic Trans Corp. (Sup Ct, Nassau County, June 24, 2013, Brown, J., Index No. 18563/2010)

Judge(s): Brown. Defendant asserted that because plaintiff claimed that she can no longer teach dance and perform at fundraisers due to the injuries she sustained in the accident, her photographs and postings on Facebook regarding her dance performance are relevant. The Court directed plaintiff to produce "any and all relevant pictures or postings from her personal Facebook account which demonstrate plaintiff dancing or instructing dance class after the date of the accident."
Topic(s): Social Media, Relevance.

Winchell v Lopiccolo, 38 Misc 3d 458 (Sup Ct, Orange County 2012)

Judge(s): Marx. While, "every bit of information Plaintiff enters onto her Facebook page demonstrates some level of cognitive functioning," decisions have not disclosed instances where "unfettered access was allowed, unless the requesting party first showed

that information on the other party's public page contradicted their claims of injury or damages." The Court noted the example that "if Plaintiff posted a message on Facebook saying that she has difficulty formulating the words to express her thoughts, the substance of the message is what should be considered to determine whether the message is relevant."
Topic(s): Social Media, Relevance.

Young Woo & Assoc., LLC v Kim, 115 AD3d 534 (1st Dept 2014)

Judge(s): Mazzarelli, Sweeny, Andrias, DeGrasse, and Richter. "The motion court properly found Rodriguez in contempt based on her defiance of the court's unequivocal directions as to plaintiffs' right to conduct a forensic investigation of certain electronic devices in the possession, control or custody of defendant and nonparty Sahn Eagle LLC."
Topic(s): Form of Production, Forensic Review.

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