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Amending the CPLR to Reflect Changes to the Information Landscape: The Association of the Bar of the City of New York's Proposals

The rise of electronically stored information ("ESI") has had a tremendous impact on the early phases of litigation. Parties are able to retain more information than ever before for little cost, and that information is often stored in formats that did not yet exist when New York's discovery rules were last drafted. Accordingly, corporations and individuals are often confused by exactly what must be retained for potential litigation, when the obligation to retain information begins, and what they must produce to their adversaries during the discovery process. Moreover, the costs of undertaking each of those steps can be immense. The Federal Rules of Civil Procedure ("FRCP") were updated in 2006 to address some of these issues.

Up until now, the New York Civil Practice Law and Rules ("CPLR") have not been similarly modified. As a result, the Association of the Bar of the City of New York ("ABCNY") convened a Joint Committee on Electronic Discovery ("Joint Committee") to study the effects of ESI on the discovery process. The Joint Committee issued its report in August 2009, recommending several amendments to the CPLR to reflect the changed nature of the information landscape. The Joint Committee observed that litigants have been left in a state of confusion and that ambiguity in the law has forced judges to "apply rules forged long ago in a 'document only' world to time-consuming ESI disclosure disputes," increasing the cost of litigation dramatically. Ass'n of the Bar of the City of New York Joint Comm. on Elec. Discovery Report, *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR*, at 1 (August 2009), *available at* http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf (hereinafter, the "Report") (internal citation omitted).

The Joint Committee was guided by the FRCP revisions and the principles put forth by the Sedona Conference Working Group, which has worked for years to examine how the rules for traditional document discovery ought to be applied to ESI. The Joint Committee's proposals specifically address the following issues: the duty to preserve and when it attaches,

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the scope of the preservation obligation, the scope of the production obligation, the forms production may take, and the inadvertent disclosure of privileged materials. This article will summarize the proposed changes to the CPLR, and highlight key takeaways for practitioners.

The Duty to Preserve

It is well known that relevant documents must be preserved in anticipation of litigation. But when does the duty to preserve begin under New York state law? Up until now, the law has been unsettled. The CPLR does not address this issue, and state courts have developed varying standards to determine when the preservation obligation triggers. New York courts have held that a party is under a duty to preserve when it has notice "(i) that the evidence might be needed for future litigation; or (ii) of pending litigation; or (iii) that the circumstances of an accident may give rise to enough of an indication for defendants to preserve the physical evidence for a reasonable period of time." The Report at 7.

The Joint Committee believes that "because there are severe ramifications from a party's failure (negligent or otherwise) to preserve potentially relevant evidence, a statutory standard should be enacted to provide clearer guidance on the attachment point of the duty to preserve." The Report at 7. Thus, the Report proposes a new section of the CPLR, section 3119(a), which would require a party to begin preserving evidence when it becomes aware that "the evidence is likely to be material and necessary to future litigation." *Id.* at 11. According to the proposed rule, a party becomes aware that evidence is likely to be material and necessary when it is aware of a lawsuit, a discovery request, or of "circumstances which would lead a reasonable person in the party's position to believe that *future litigation is likely.*" *Id.* at 12 (emphasis added). The Joint Committee interprets "likely" as a greater than 50% chance. The Joint Committee believes that its standard "provides better guidance and a somewhat higher threshold for triggering a duty to preserve" than the standard in many federal courts, which typically requires that preservation begin when litigation becomes "reasonably anticipated." The Report at 11. The Report also proposes advisory notes to the new section that would help practitioners to determine when a threat of litigation is credible. *Id.* at 11-12.

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The Scope of Preservation

Once a party is under an obligation to retain evidence, what exactly must be preserved? Storing extensive amounts of electronic information in varying formats can be time consuming and costly. Therefore, once the preservation obligation is triggered, parties need guidance to determine what to safeguard. The CPLR does not address the scope of preservation, and thus far resolution of this issue has been left to the courts. When addressing what the scope of preservation should be, the Joint Committee considered federal court opinions, including *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (Scheindlin, J.) and *Convolve v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (Francis, Mag. J.). The Joint Committee also considered the principles put forth by the Sedona Conference Working Group in 2002, as well as its 2007 Commentary on Legal Holds. The Report at 9.

The Joint Committee believes that the CPLR should address the scope of the preservation obligation in order to assist potential litigants as they draft litigation holds and preservation orders. *Id.* at 17. Therefore, the Joint Committee recommends adopting portions of the Sedona Principle and Commentary as CPLR 3119(b). The new provision would require that a potential litigant use "reasonable and good faith efforts to retain information that may be material and necessary to pending or threatened litigation," and allows parties to consider factors such as the nature of the issues, the party's experience with similar issues and the amount in controversy when determining the scope of the preservation obligation. *Id.* at 17-18. According to the Joint Committee, the proposed rule would "allow parties to undertake a good-faith analysis of their litigation risks and use a sliding-scale approach to preserve ESI." *Id.* at 18. Parties would thus be able to consider the scope of the potential litigation as well as the likelihood that it will reach the discovery phase when determining their preservation obligations. *Id.*

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Scope of Production

Once discovery is underway, disputes often arise over the scope of what must be produced. What should litigants and courts look to in order to determine the proper scope of production? The CPLR does not specifically address the scope of production. Some New York courts treat the production of ESI just as they would the production of paper documents. For example, the court in *Etzion v. Etzion*, 7 Misc. 3d 940, 943 (Sup. Ct. Nassau Co. 2005), likened a computer to "a filing cabinet" and required the restoration of deleted data. Other courts have considered the special problems inherent to ESI, and have placed more weight on the burden the producing party will have to bear. For example, in *Lipco Elec. Corp. v. ASG Consulting Corp.*, 4 Misc. 3d 1019(A), *21 (Sup. Ct. Nassau Co. 2004), the court recognized that unlike paper documents, electronic "records are kept not because they are necessary but because the cost of storage is nominal," and that, "electronic records are not stored for the purposes of being able to retrieve an individual document" but "to permit recovery from catastrophic computer failure." Thus, the court concluded that "retrieving computer based records or data is not the equivalent of getting the file from a file cabinet." Unlike the CPLR, the FRCP was amended in 2006 to address issues specific to ESI preservation and production. The Joint Committee has proposed that the CPLR be similarly amended to address the role of ESI and to provide guidance to potential litigants. The proposed rule would incorporate language from FRCP 26, as well as from the Sedona Principles, and would focus on three problem areas: accessibility, duplicativeness, and proportionality.

With regard to accessibility and the high cost of recovering ESI from back up tapes and other data recovery systems, the Joint Committee proposes that the CPLR adopt the language used in the FRCP to limit the scope of ESI production. The rule states that parties "need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." FRCP 26(b)(2)(B). The FRCP goes on to note that a court can order the production of such inaccessible data for good cause. The Joint Committee also proposes adopting the FRCP's advisory notes, which provide examples of inaccessible data, including "back-up tapes intended for disaster recovery purposes . . . legacy data from obsolete systems. . . [and] 'deleted' data that . . . would require [a] forensic specialist for reconstruction."

Regarding the problem of duplication, which arises from requests for ESI from multiple sources and often results in significant overlap, increased costs, and unnecessary delay, the Joint Committee observed, "if parties are allowed to request e-mails containing a key word from multiple sources at different levels of accessibility, the costs of production could skyrocket without yielding any new information." The Report at 32. Thus, the Joint Committee proposes incorporating FRCP 26(b)(2)(C)(i) into the CPLR, which provides that a court can limit a discovery request when it is "unreasonably cumulative or duplicative or can be obtained from some other source that is more convenient, less burdensome, or less expensive." This can be done by motion, or on the court's own initiative. *Id.*

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Finally, the Joint Committee addressed the issue of proportionality, or the need to balance the importance of the discovery with the burden on the producing party. Both the FRCP and the Sedona Principles have addressed the concept of proportionality. The CPLR has no such provision; however, section 3101 deals with general disclosure obligations and requires disclosure of "all matter material and necessary in the prosecution or defense of an action." *Id.* at 20. In determining proportionality, many courts look to this "material and necessary" standard. *Id.* at 33. The New York Court of Appeals has instructed that the burden

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on the producing party should be considered; however, not all New York courts have followed its direction. *Id*. at 34. Thus, the Joint Committee proposes adding language to CPLR 3101 to incorporate the New York Court of Appeal's decision in *Kavanaugh v. Ogden Allied Maintenance Corp*. The addition would instruct courts that, "once relevance has been established, competing interests shall be balanced; the need for discovery shall be weighed against the burden to be borne by the opposing party." The Report at 34-35 (citing *Kavanaugh v. Ogden Allied Maintenance Corp*., 92 N.Y.2d 952, 954 (1998) (internal citations omitted)).

In addition, the Joint Committee has proposed that the advisory notes to CPLR 3103 be amended to include language from the FRCP. The new language would allow a court dealing with an ESI discovery dispute to consider "whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues." The Report at 35. Furthermore, the Joint Committee recommends that courts ensure that production requests are reasonable by taking steps such as ordering "a sampling of requested data, limiting production to identified custodians, "keyword" searches, particular dates, or any other method." *Id*. at 36.

The new language would allow a court dealing with an ESI discovery dispute to consider "whether the burden or expense of the proposed discovery outweighs its likely benefit . . ."

Form of Production

Once the relevant documents have been identified, what form should the ESI take? Currently, there are no rules in New York specifying the permissible forms of production, and the Joint Committee does not suggest adding any. Rather, the committee proposes an addition to the CPLR to guide parties through the process of requesting and objecting to the form of ESI that is produced. *Id*. at 49. The Report recommends amending CPLR 3120(a) based on FRCP 34, to allow a party to specify a production format. *Id*. at 50. The Joint Committee also recommends amending CPLR 3122 to allow a party to object to the form of production specified. *Id*. at 50. If a party objects to the form proposed (or if no form was requested) the producing party "shall state the form or forms it intends to use, and shall produce documents in a form that is reasonably usable or the form or forms in which the documents are ordinarily maintained." *Id*. at 51. The rule would also provide that "[a] party need not produce the same data in more than one form." *Id*.

Inadvertent Disclosure

According to the Joint Committee, "[g]iven the growing sizes of electronic production, the review of such material for privilege will result in mistakes and the inadvertent production of some privileged material." *Id*. at 36. What happens in New York when such a situation arises? The CPLR protects as privileged confidential communications between attorney and client, as well as attorney work product and materials that are prepared in preparation for litigation. *Id*. at 37-38. However, there is currently no provision in the CPLR directing what should be done if privileged materials are inadvertently disclosed. Rule 26(b)(5)(B) of the FRCP, on the other hand, was revised in 2006 to include a so-called "clawback" provision, which allows a producing party to request the return of inadvertently produced privileged materials. *Id*. at 39.

The Joint Committee has proposed that Rule 3122 be amended to include a clawback provision broader than that in the FRCP. The rule would apply to both ESI and traditional paper documents. *Id*. at 41. The committee believes that a claw-back provision will minimize discovery costs, as it will allow parties to continue to pursue time- and cost-saving search options with clear knowledge of how an inadvertent disclosure will be treated. *Id*. at 44. Under the new rule, if a party inadvertently discloses information that is "subject to a claim of privilege or protection," it may request the return of the data within fifteen days of learning of the inadvertent disclosure, so long as the party took "reasonable steps to avoid disclosure of the material." The Joint Committee believes this will "compel a party who relies

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on a privilege or protection to be vigilant in maintaining and/or re-establishing the confidential nature of the material." *Id*. at 42. The party that received the information in error must then "return, sequester or destroy the specified material and may not use, distribute or disclose the material until the claim is resolved. If the receiving party distributed or disclosed the information before being notified, it must take reasonable steps to retrieve it." *Id*. at 41.

When an inadvertent disclosure has taken place, is the privilege waived? In New York, courts generally employ multi-factor analysis, which balances a number of considerations to determine whether the privilege remains intact. Courts look to the reasonableness of the steps taken to protect the privileged material, how soon the inadvertently disclosing party attempts to remedy the disclosure, and the prejudice to the party to whom the information was disclosed when making their decision. *Id*. at 47. The Joint Committee recommends incorporating this multi-factor approach into section 3122 of the CPLR, which would apply to ESI as well as to paper documents. *Id*. at 48.

Cost-Shifting

The Joint Committee did not address the issue of cost shifting in its report. However, it noted that "courts are confronted with more and more cost disputes because the cost of discovery has increased dramatically as a result of ESI," and that "there is confusion about the presumption" of who bears the cost of discovery in New York. *Id*. at 5. Rather than proposing a change to the CPLR, the Joint Committee referred to its previously-issued Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation. The manual is discussed in this issue of the E-Discovery Update (at p.6) in the companion article: "Cost Shifting in New York: Forum Makes All the Difference."

If enacted, the changes to the CPLR will provide greater clarity to potential litigants regarding their obligations to preserve and produce ESI.

Conclusion

If enacted, the changes to the CPLR will provide greater clarity to potential litigants regarding their obligations to preserve and produce ESI. We conclude with key takeaways, summarizing the main tenets promulgated in the Report.

- The Report proposes a uniform standard to determine when the duty to preserve attaches. Documentation must be preserved beginning when there are "circumstances which would lead a reasonable person in the party's position to believe that future litigation is likely."
- To determine the scope of what must be preserved, the Report proposes using "reasonable and good faith efforts to retain information that may be material and necessary to pending or threatened litigation," considering factors such as the nature of the issues, prior experience with similar issues and the amount in controversy.
- When determining the scope of production, the Report proposes that litigants consider accessibility, duplicativeness, and proportionality.
- There are no definitive rules for the form in which documents must be produced, but the Report proposes allowing litigants to request specific forms, or object to the form their adversary has chosen.
- In the case of an inadvertent disclosure, the Report proposes that a party may request the document back within fifteen days of learning of its production, provided that the producing party took "reasonable steps to avoid disclosure of the material." The party in receipt of the information must then "return, sequester or destroy the specified material and may not use, distribute or disclose the material until the claim is resolved." In determining whether the privilege has been waived, courts will consider a number of factors, including the inadvertently disclosing party's attempts to remedy the disclosure, and the prejudice to the party to whom the information was disclosed. ■

Cost Shifting in New York: Forum Makes All the Difference

As discovery requests become increasingly extensive and time consuming, litigants are more concerned than ever with determining when the costs of preservation and production can be shifted to their adversary. As noted in the companion article in this issue of the Electronic Discovery Update (at p.1) highlighting the Association of the Bar of the City of New York's Joint Committee (the "Committee") Report on Electronic Discovery, the Committee did not propose any modifications to the New York Civil Practice Law and Rules ("CPLR") relating to cost shifting; notwithstanding its acknowledgment that "courts are confronted with more and more costs disputes because the cost of discovery has increased dramatically as a result of ESI." Ass'n of the Bar of the City of New York Joint Comm. on Elec. Discovery Report, *Explosion of Electronic Discovery in All Areas of Litigation Necessitates Changes in CPLR*, at 5 (August 2009), *available* at http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf. Instead, the Committee referred readers to its previously issued Manual for State Trial Courts Regarding Electronic Discovery Cost-Allocation (the "Manual"). The Manual reviews the best practices for e-discovery as set out by the Electronic Discovery Reference Model, and then discusses how New York courts, other federal and state courts, and professional organizations have handled cost-shifting issues. Joint Committee, *Manual for State Trial Courts Regarding Electronic Discovery Cost Allocation* (Spring 2009), *available at* http://www.nycbar.org/Publications/pdf/Manual_State_Trial_Courts_Condensed.pdf.

> In New York, there is a general presumption that the requesting party pays for the cost of discovery . . . [T]he requester-pays standard gives a party "a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible."

In New York, there is a general presumption that the requesting party pays for the cost of discovery. Though the CPLR does not explicitly apply this presumption to ESI costs and the Commercial Division rules allow for cost-sharing agreements, New York courts have followed this presumption when deciding how to allocate e-discovery costs. In *Lipco Elec. Corp v. ASG Consult. Corp* the court found 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." *Lipco Elect. Corp v. ASG Consult. Corp*, 4 Misc.3d 1019(A), 2004 WL 1949062 (Sup. Ct. Nassau Co. Aug. 18, 2004). However, the Manual notes that CPLR 3103(a) allows the court to grant a protective order to protect a party "from incurring unreasonable expenses in complying with discovery demands." The Manual at 20.

In contrast to the New York presumption, the standard under federal jurisprudence is that the producing party bears the cost of discovery requests. Judge Shira Scheindlin of the Southern District has articulated a multi-factored balancing test, which has been influential in guiding determinations of when the cost of producing "inaccessible" data should be shifted to the requesting party. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003). A recent Supreme Court of New York opinion declined to apply this federal approach, stating 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 cost incurred in its production." *T.A. Ahern Contractors Corp. v. Dormitory Auth. of the State of N.Y.*, 2009 WL 806779 (Sup. Ct. N.Y. Co. Mar. 19, 2009). That court observed that the requester-pays standard gives a party "a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible." *Id*. New York courts are divided on whether the requester-pays standard extends to attorneys fees and costs. *See* The Manual at 21.

Potential litigants are not alone in their worries over the rising costs of e-discovery; non-parties may also be required to preserve and produce documents for litigation. Thus, both the state and federal systems have provisions in place to protect non-parties from bearing the costs of e-discovery. The CPLR and the Federal Rules of Civil Procedure state that the "reasonable production expense of a nonparty witness shall be defrayed by the party seeking discovery." The Manual at 25. Under New York law, the requesting party absorbs the costs that otherwise would have fallen on the non-party. *Id*. Under the federal system, courts apply a three-factor test to determine whether a non-party should bear some of the costs of discovery, considering (i) the interest of the non-party in the case, (ii) the party's ability to bear the costs of discovery, and (iii) the public importance of the case. *Id*. at 27. Thus, under the federal paradigm, a totally disinterested non-party will be protected from the burden of discovery, but an interested party who "reasonably anticipated being drawn into subsequent litigation" might be called upon to share in the costs. *Id*.

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In sum, whether a case is brought in New York State or in federal court will have great impact on which party bears the cost of discovery. The divergences reflect the varying perspectives the courts bring to these issues and the differing standards they employ to manage and constrain the impact of e-discovery. As noted in the Manual, "New York's approach of requiring the requesting party to bear all ESI production costs, whether the ESI is accessible or inaccessible, contrasts with . . . other approaches, and represents a policy determination that making requesting parties responsible for discovery costs is the most efficient means of containing the scope of discovery and the costs associated with it." The Manual at 35. ■

Emails May Satisfy the New York Statute of Frauds Writing Requirement

As business is increasingly conducted through a variety of electronic communication devices, courts must make determinations regarding the evidentiary weight that should be placed upon records of those communications. The New York Supreme Court recently encountered this issue in *Esther Creative Group LLC v. Gabel*, in which it held that a collection of writings that included emails, summary financial statements, and checks "may well satisfy the [Statute of Frauds] writing requirement." 2009 WL 3490942, at *3 (N.Y. Sup. Ct. Oct. 7, 2009).

In 2008, Esther Creative Group, a management company involved in the music industry, commenced an action against the members of a band called Against Me! alleging breach of contract and seeking recovery based on *quantum meruit* for the value of its services. According to Esther, it was contractually entitled to fifteen percent of the band's income. *Id*. at *1. In support of its claim, Plaintiffs produced a variety of written evidence, including (1) emails between Tom Sarig, the principal of Esther, and Defendants, in which Sarig refers to Defendants as "part of the team," and (2) financial statements, prepared by Defendants, which indicated the band's income and the amount of commission the band owed to Esther based upon a calculation of fifteen percent of its income. *Id*. at *2. Defendants moved to dismiss the claim on the grounds that it was barred under the New York Statute of Frauds. *Id*.

The Court agreed that the Statute of Frauds applied to the agreement at issue. However, it refused to dismiss the claim, finding that Esther could potentially satisfy the writing requirement by producing a set of writings, including emails, that taken together would demonstrate the existence of an agreement sufficient to satisfy the statute. The Court stated, "[t]he summary statements, emails and checks issued by Defendants considered together in addition to other evidence that may be uncovered through discovery may well satisfy the statute's writing requirement." *Id*. at *3.

In making its determination, the Court cited a First Department case which held that memoranda, *i.e.* writing sufficient to meet the New York Statute of Frauds, "need not be in one document, but may be pieced together from separate writings if they can be shown to be related to the transaction." *Nausch v. AON Corp.*, 2 A.D.3d 101, 102 (1st Dep't 2003). Here, the Court refined that holding by indicating that emails, specifically, may constitute some of those "separate writings" that evidence the existence of an agreement.

Where seeking to uphold a contract that falls within the Statute of Frauds' ambit, counsel may find opinions such as *Esther Creative Group* helpful to argue the appropriateness of reliance on and the use of emails or other forms of electronic communication to establish the existence of a writing. ■

Spotlight on the Judiciary: Judge James C. Francis IV

The newest feature of our Electronic Discovery Update, "Spotlight on the Judiciary," highlights the body of work of a judge who has made a significant impact on the development of e-discovery law. Selection for the spotlight is based on the judge's recognized interest in the topic, as well as the effect of the judge's decisions and other writings on the subject of e-discovery. This month, "Spotlight on the Judiciary" has chosen to recognize the Honorable James C. Francis IV, a magistrate judge for the Southern District of New York. Judge Francis received his Bachelor's degree from Yale College and his Juris Doctor degree from Yale Law School. He also holds a Masters of Public Policy from Harvard College. He ascended to the bench in 1985 in the Southern District of New York.

Recent News: Attorney Sanctioned for Preservation Failure

Judge Francis has made a significant impact on the growing body of case law regarding e-discovery issues. In his most recent e-discovery opinion, *Greene v. McClendon*, Judge Francis addressed the issue of sanctions as a remedial measure for inadequate preservation procedures. 2009 WL 2496275 (S.D.N.Y. Aug. 13, 2009). Judge Francis imposed sanctions on a defendant and her attorney for failing to properly preserve electronic documents for litigation, even though there was no evidence that the documents in question would have operated in the plaintiff's favor and it was "uncertain whether the plaintiff has actually been deprived of any information." *Id.* at *6.

> In *Greene v. McClendon*, Judge Francis emphasized that the obligation of preservation first falls on the attorney, who then has the obligation of advising his or her client of its preservation duties.

The plaintiff, an art dealer, sued the defendants for breach of contract in October 2008, alleging that they had failed to complete their purchase of a painting from his gallery. After commencing suit, the plaintiff requested that the defendants produce all documents relevant to the alleged sale. Mrs. McClendon and her attorney asserted that they had thoroughly searched Mrs. McClendon's files and produced all relevant, non-privileged materials. *Id.* at *1-2. Months later, Mrs. McClendon produced an Excel spreadsheet from her home computer that related to her purchases of many works of art, including the painting in question. The plaintiff requested additional information about the file and was provided with three electronic documents, each of which was accompanied by a partial electronic history. The electronic files differed from the hard copy in several respects, including that the hard copy listed a price for the work in question whereas the electronic versions did not. *Id.* at *2. The plaintiff sought a motion ordering an examination of the defendant's computer, as well as sanctions. Mrs. McClendon then disclosed that the son of one of her friends had reinstalled her operating system in January 2009, three months after the litigation commenced. The plaintiff withdrew his request for an examination of the computer, but continued to request sanctions, including costs and attorney's fees as well as an adverse inference that the defendants recognized that they had agreed to purchase the painting. *Id.* at *3.

Judge Francis denied the plaintiff's request for an adverse inference, as the plaintiffs failed to establish that the destroyed information was relevant. *Id.* at *6. However, he ruled that the plaintiffs were entitled to receive costs and attorneys fees from the defendant and her lawyer for their failure to preserve the evidence in question. As the data was deleted *after* the litigation was commenced, Mrs. McClendon clearly had a preservation obligation. *Id.* at *4. Furthermore, Judge Francis found that both she and her counsel were "at least negligent in failing to implement a litigation hold, properly search for responsive documents, and supplement discovery responses in a timely and thorough manner." *Id.* at *6. Judge Francis emphasized that the obligation of preservation first falls on the attorney, who then has the obligation of advising his or her client of its preservation duties. *Id.* at *5. In this case, "Mrs. McClendon's counsel failed to meet these discovery obligations. Unless Mrs. McClendon brazenly ignored her attorney's instructions, counsel apparently neglected to explain to her what types of information would be relevant and failed to institute a litigation hold to protect relevant information from destruction. Moreover, despite numerous representations to the contrary, it is highly unlikely that counsel actually conducted a thorough search for relevant

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documents in Mrs. McClendon's possession." *Id.* Thus, sanctions were appropriate. As the relative culpability of Mrs. McClendon and her counsel was not yet clear at the time of the ruling, Judge Francis ordered that they should first attempt to work out an agreement for sharing costs on their own, and if they could not, he would determine this issue at a later date. *Id.* at *8.

Cost Shifting

Judge Francis is perhaps best known in the e-discovery realm for his decision in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, in which he developed an eight factor balancing test to determine when discovery costs should be shifted to the plaintiff. 205 F.R.D. 421 (S.D.N.Y. 2002). In *Rowe*, an African-American concert promoter brought a suit against booking agencies and promoters for allegedly attempting to freeze him out of the market through discriminatory and anti-competitive practices. During discovery, Rowe made extensive document production requests, including some for materials that were only available through the defendants' email retention systems. The defendants refused to produce the documents, alleging that the burden of restoration would far outweigh any potential benefits to the plaintiff. *Id.* at 424. Applying an eight factor balancing test, Judge Francis decided to shift the costs of production to the plaintiff, weighing considerations such as the specificity of the discovery requests, the likelihood of a successful search, the availability of the material from other sources, and the relative ability of each party to control costs and its incentive to do so. *Id.* at 429. Though he shifted the cost of production, Judge Francis decided that the defendants would continue to bear the financial responsibility of reviewing the documents for privilege and confidentiality. *Id.* at 432.[1]

> Judge Francis has noted that judges "do not have the information that the attorneys have regarding discovery . . . [a]nd yet, we are asked to make determinations about whether the information is discoverable. Without cost shifting, that is a binary determination."

In 2007, Judge Francis spoke at the Philip D. Reed Lecture Series at Fordham Law School, where he reflected on cost shifting in e-discovery cases. He explained that cost shifting is a valuable tool because it allows judges to make more nuanced and ultimately more satisfying determinations about what information is discoverable. He said, "We do not have the information that the attorneys have regarding discovery. . . [a]nd yet, we are asked to make determinations about whether the information is discoverable. Without cost shifting, that is a binary determination." Cost shifting allows judges to transfer a portion of the burden based on the likelihood that the information in question will be useful. "That I think, is a more satisfying result than having to make a black-or-white, yes-or-no determination," explained Judge Francis. *See* Hon. Lee H. Rosenthal & Hon. James C. Francis IV, *Managing Electronic Discovery: Views From The Judges, Panel Discussion*, 76 Fordham L. Rev. 1, 26 (2007).

Electronically Stored Information (ESI) Preservation

In addition to his contributions to cost shifting analysis, Judge Francis has been active in drafting helpful guidelines for ESI preservation orders. In the same Fordham Law School lecture, Judge Francis noted that such preservation orders are markedly different from traditional "paper" orders in that they are inherently more detailed, specifying relevant individuals and document locations. *Id.* at 19. Judge Francis opined that such preservation orders should not be imposed unless there is a showing of need, which in turn "requires some showing of danger that there is specific information which, absent the order, will disappear." *Id.* This comment echoes Judge Francis's decision in *Treppel v. Biovail Corp.*, in which he employed a balancing test to determine whether an ESI preservation order was necessary. 233 F.R.D. 363 (S.D.N.Y 2006).

In *Treppel*, the plaintiff Jerry Treppel, a securities research analyst, brought suit against Biovail Corp., a pharmaceutical corporation, alleging that the company was liable for defamation, tortious interference with prospective economic advantage, and civil conspiracy. *Id.* According to Mr. Treppel, the company had engaged in a smear campaign against him after he had given them an unfavorable report, causing the company's stock value to decrease. *Id.* at 366.

[1] We note that Judge Shira Scheindlin modified Judge Francis's eight factor test in her landmark e-discovery opinion *Zubulake v. UBS Warburg LLC*, turning it into a seven factor test and weighting each factor in terms of its importance. 217 F.R.D. 309, 321-323 (S.D.N.Y. 2003). Nonetheless, *Rowe* remains an important development in e-discovery case law.

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In February 2005, Mr. Treppel's counsel sent Biovail a proposed e-discovery order, requesting that the company preserve and produce all accessible paper and electronic data in its original format. *Id.* at 368. The order also asked Biovail to answer a number of questions regarding their internal retention policies and general management process for the storage of electronic data. *Id.* Biovail did not comply with the proposed order, alleging that it was "unnecessarily onerous in light of the relatively narrow issues presented" in the case. *Id.* Mr. Treppel then filed a motion to compel the defendants to comply with the proposed order.

In a February 2006 decision, Judge Francis granted Mr. Treppel's motion in part, but denied his request for compliance with the preservation order. After considering several approaches to the issue, Judge Francis employed a balancing test to determine whether to require the preservation of the evidence in question. In doing so, he considered the danger of destruction, the content of the destroyed documents, and the burden of preservation. *Id.* at 371. In his opinion, Judge Francis acknowledged that while Biovail's initial document retention process was inadequate, Mr. Treppel could not show that specific evidence was lost, or that current procedures were insufficient. "It would be enough to demonstrate that certain types of relevant documents existed and that they were necessarily destroyed by the operation of the autodelete function on Biovail's computers or by other features of its routine document retention program. But the plaintiff has not yet made even the most basic showing that any documents potentially relevant to this litigation were lost." *Id.* at *372. Since Mr. Treppel could not prove the actual loss of data and Biovail had taken steps to improve its retention program beginning in 2003, Judge Francis held that the circumstances were insufficient to compel the proposed preservation order. *Id.*

In *Convolve Inc. v. Compaq Computer Corp*., Judge Francis tackled the topic of a company's obligation to preserve ephemeral data or data of a short-lived or transitory nature. 223 F.R.D. 162 (S.D.N.Y. 2004). Initiating the suit, Convolve Inc. and the Massachusetts Institute of Technology brought a claim against Compaq Computer Corp. and Seagate Technology, alleging that both parties were liable for patent infringement and theft of trade secrets with regard to certain disk drive technology. One of the many discovery disputes that arose during the case centered on Convolve's contention that Seagate should have preserved certain emails and data relating to its technology known as TOME. Convolve alleged that Seagate should be required to produce the requested information, and should be sanctioned to the extent it was not preserved. *Id.* at 164.

In his August 2004 decision, Judge Francis noted that "in 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." *Id.* at 175-176.

Ultimately, Judge Francis ordered that while certain emails relating to the TOME technology should have been retained, sanctions were not appropriate because Convolve had not made any showing that the destroyed documents would have operated in their favor, nor was there any evidence of bad faith to justify an adverse inference. *Id.* at 176. Moreover, Judge Francis rejected Convolve's argument that the defendants should be sanctioned for failing to preserve for litigation the wave patterns developed by their engineers. He explained that in contrast to emails, which "normally have some semi-permanent existence... the data at issue here are ephemeral. They exist only until the tuning engineer makes the next adjustment, and then the document changes. No business purpose ever dictated that they be retained, even briefly." *Id.* at 177. Their preservation "would have required heroic efforts far beyond those consistent with Seagate's regular course of business." *Id*. Thus, since no preservation order was violated, sanctions would be inappropriate. *Id.*

Conclusion

In the burgeoning and rapidly changing area of e-discovery, the thoughtful insight of the judiciary provides crucial direction to practitioners and their clients. As the above cases demonstrate, Judge Francis has proven instrumental in the development of e-discovery case law in the Southern District of New York, specifically in the area of cost-shifting, and more recently, ESI preservation. Judge Francis is helping to create a robust set of e-discovery guidelines for practitioners and corporations alike. As such, we are pleased to highlight the wealth of guidance Judge Francis has provided. ■

How Private Are Personal Emails – Part III: Florida District Court Finds No Attorney-Client Privilege for Email Communications at Work

In previous issues of the Electronic Discovery Update, we have discussed recent court determinations of whether personal emails sent by employees from their work computers should be treated as confidential and within the protection of the attorney-client privilege. Most recently, the Southern District of Florida has weighed in on the issue. In *Leor Exploration & Production LLC v. Aguiar*, the court held that a defendant had no reasonable expectation of privacy in emails transmitted through his employer's server, and consequently emails between the defendant and his attorney were not protected by the attorney-client privilege. 2009 WL 3097207 at *4 (S.D.Fla. Sept. 23, 2009).

Florida Precedent

On June 23, 2009, Paul McCawley, an attorney for Defendant Guma Aguiar, was deposed in connection with ongoing litigation between Mr. Aguiar and various related entities in the oil and gas exploration and production business, including Leor Exploration and Production LLC ("Leor"), for which Mr. Aguiar was the former CEO and Vice Chairman. *Id.* at *2. During that deposition, Leor's counsel sought to question Mr. McCawley about an email he sent to Garrett Smith, another Leor employee who was purportedly acting as Mr. Aguiar's "personal advisor and agent" when the email was sent. *Id.* at *3. Mr. McCawley objected to use of the email during the deposition on the ground that it constituted a privileged attorney-client communication between him and Mr. Aguiar, through Mr. Aguiar's agent. The appointed Special Master decided that the email was privileged. Leor opposed the Special Master's ruling, and the district court ruled in Leor's favor. *Id.* at *1.

> The court held that the Leor computer and email policies, as set forth in the handbook, precluded Mr. Aguiar from asserting an expectation of privacy with regard to any email sent over Leor's email system.

The court refused to deem the email privileged, holding that "Aguiar had no reasonable expectation of privacy" with regard to it. *Id.* at *3. Under Florida law, which controlled in the litigation because subject-matter jurisdiction was based on diversity, "communication between lawyer and client is 'confidential' if it is not intended to be disclosed to third parties other than . . . [t]hose to whom disclosure is in furtherance of the rendition of legal services to the client" or "[t]hose reasonably necessary for the transmission of the communication." Fla. Stat. § 90.502(1)(c). Mr. Aguiar failed to establish the intent to keep the email confidential because it initially was sent to Mr. Smith, a third party affiliated with Leor, without any indication that Mr. Smith should keep it confidential. *Id.* at *3.

More generally, the court determined that no privilege would have applied even if Mr. McCawley had emailed Mr. Aguiar directly. *Id.* at *4. In reaching this conclusion, the court considered four factors set forth in *In Re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005): "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or emails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *Id.* at *4.

Leor had implemented and documented a strict policy regarding personal email-use among employees in its employee handbook, which provided, among other things, that "Leor owns all electronic communications, [] that individuals using the Leor email system have no expectation of privacy," and that Leor's representatives "may access and monitor the use of its systems and equipment." *Id.* at *4. Thus, the court held that these policies, as set forth in the handbook, precluded Mr. Aguiar from asserting an expectation of privacy with regard to any email sent over Leor's email system.

The Florida court's approach to the confidentiality of personal email at work drew directly from the *Asia Global Crossing* opinion. That decision equated personal emails sent from a work email account with general hard copy files kept at the workplace, stating that "sending a message

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over [an] email system [is] like placing a copy of that message in the company files. Short of encryption, . . . [e] mails [can] be reviewed and read by anyone with lawful access to the system." *Asia Global Crossing*, 322 B.R. at 259. Following this reasoning, the Florida District Court imposed an extremely high burden for establishing the confidentiality of personal emails sent over an employer's server. The New York Supreme Court has adopted a similarly strict approach. *See Scott v. Beth Israel Medical Center*, 2007 WL 3053351 (Sup. Ct. N.Y. Co. Oct. 17, 2007); *see also How Private Are Personal Emails?*, Electronic Discovery Update, Mar. 2008, *available at http://www.kramerlevin.com*.

New Jersey Precedent

In sharp contrast to these decisions, the New Jersey Superior Court, Appellate Division, recently held that email communication with one's attorney over an employer's email system is protected from production. Reversing the trial court's decision in *Stengart v. Loving Care Agency, Inc.* (No. BER-L-858-08, N.J. Super. Ct. L. Div. Feb. 5, 2009), the Appellate Division found that an employee had not waived her attorney-client privilege with respect to email communications with her attorney that were conducted at the employee's work via a web-based, password-protected Yahoo! email account. 973 A.2d 390 (N.J. Super. Ct. App. Div. June 26, 2009). The Court reasoned that the email should remain privileged where the public policy underlying the attorney-client privilege outweighs the employer's interest in the enforcement of its electronic communications policy. *See Attorney-Client Privilege Trumps Employer's Interest in Private Emails: Revisiting Stengart v. Loving Care Agency, Inc.*, Electronic Discovery Alert, July 2009, *available at http://www.kramerlevin.com*.

Conclusion

Because there are conflicting holdings across jurisdictions regarding the confidentiality of personal emailing at work, legal practitioners should be wary before sending an email to a client's workplace email address, and should advise clients about the risk of waiver – including even the possibility of waiving privilege by accessing a personal email over an employer's server. Legal practitioners are also well-advised to act with an abundance of caution when emailing clients generally, until more consistency emerges in the law. ■

Seventh Circuit Launches E-Discovery Pilot Program

On October 1, 2009, the Seventh Circuit Court of Appeals launched an Electronic Discovery Pilot Program, a test run of a set of principles designed to minimize the growing cost and burden associated with the discovery of electronically stored information ("ESI"). *See* Seventh Circuit Electronic Discovery Pilot Program, Statement of Purpose and Preparation of Principles, *available at* http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf. The principles, which take the form of supplemental procedural guidelines addressing e-discovery issues, were drafted by the Seventh Circuit's Electronic Discovery Committee (the "Committee"), a task force composed of trial judges, attorneys, academics, and litigation consultants with expertise in e-discovery. In Phase One of the Pilot Program, which runs from October 1, 2009 to May 1, 2010, participating district court, magistrate, and bankruptcy judges will adopt the Committee's principles in Standing Orders entered in select cases. After other phases of testing and review are completed, the Committee intends to formally present its findings and publish a revised set of final principles in May 2011.

The Committee intends the principles to "incentivize early and informal information exchange on commonly encountered issues" relating to ESI discovery, and, to that end, generally encourage counsel and parties to discuss and resolve issues early and without court involvement. Beyond the general goal of improving communication and fair play in discovery, the principles impose additional procedural obligations on parties. If they are deemed successful, the principles could be adopted in other jurisdictions. This article provides a brief overview of the Pilot Program's more noteworthy features.

Duty to Meet and Confer on E-Discovery Issues

Principle 2.01 requires counsel to meet and confer prior to the initial status conference, on various e-discovery issues, including the identification and scope of relevant and discoverable ESI, formats for preserving and producing

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ESI, and procedures for handling inadvertent production of privileged information. *See* Principle 2.01 (a)(1)-(5). While disputes between the parties relating to these issues may still be presented to the court at the initial status conference, the principle attempts to incentivize early resolution by (i) encouraging counsel to review how their clients' data is stored and retrieved before discovery requests are made and (ii) emphasizing that a failure to participate in the meet and confer process may subject parties to sanctions or other penalties.

If a dispute does arise concerning the preservation or production of ESI, Principle 2.02 directs the parties to appoint "e-discovery liaisons," defined as individuals – whether attorneys, third party consultants, or party employees – who are knowledgeable about the parties' e-discovery procedures, ESI storage systems, and information retrieval technology. The principle contemplates that e-discovery liaisons will be available for any meetings, discussions, or court hearings on e-discovery issues.

ESI Preservation Guidelines

The principles provide guidelines designed to eliminate "vague and overbroad" preservation requests and responses in favor of those that "facilitate cooperation between requesting and receiving counsel and parties by transmitting specific and useful information." *See* Principle 2.03 (a), (b). Principle 2.03 suggests well-drafted preservation requests will include the names of the parties and potential witnesses and other people reasonably anticipated to have relevant evidence; the factual background of the legal claims; and the time period relevant to the request. Principle 2.04 encourages parties responding to preservation requests to better explain their preservation efforts by detailing what information they are willing to preserve and what they are doing to respond to the preservation request; any disagreements they have with the preservation request; and any other preservation issues not raised in the request.

Noting that discovery of a party's preservation and collection efforts may lead to unnecessary expense and delay or raise privilege issues, the principles require parties seeking such information first to discuss the need for the information and its relevance to the litigation. *See* Principle 2.04(c). Parties must also discuss at the meet and confer stage any requests seeking types of ESI that the Committee finds "generally are not discoverable," including: deleted, fragmented, or unallocated data on hard drives; RAM or other ephemeral data; on-line access data, such as temporary internet files and browsing history; backup data "that is substantially duplicative of data" more readily accessible elsewhere; and any other ESI "whose preservation requires extraordinary affirmative measures that are not utilized in the ordinary course of business." *See* Principle 2.04(d).

ESI Production Guidelines

The principles mandate discussion of both how ESI is collected and the format in which it is produced. Principle 2.05, for instance, requires parties to discuss ESI collection methodologies at the Federal Rule of Civil Procedure 26(f) conferences, and encourages particular discussion of plans to "de-dupe," or eliminate duplicative ESI; filtering data based on various parameters; and the use of keyword searches and more advanced collection methodologies.

One principle attempts to incentivize early resolution by (i) encouraging counsel to review how their clients' data is stored and retrieved before discovery requests are made and (ii) emphasizing that a failure to participate in the meet and confer process may subject parties to sanctions or other penalties.

Under Principle 2.06, parties must make a good faith effort at the Rule 26(f) conference to agree on the format for ESI production. To that end, the principle clarifies that ESI or paper documents "that are not text-searchable need not be made text-searchable," and encourages counsel and parties to discuss sharing the cost of making ESI or paper documents text-searchable through optical character recognition ("OCR") or other means.

Conclusion

The Seventh Circuit's Electronic Discovery Committee notes that its Pilot Program stands out from other recent calls for e-discovery reform because its recommendations will be tested and evaluated. While the impact of the principles' adoption on litigation costs may not be formally assessed for several years, any early successes could inspire the implementation of similar reforms in other circuits and state courts. ■

Recent Developments in the Delaware Chancery Court's E-Discovery Jurisprudence

There is a growing body of law regarding e-discovery from the Delaware Court of Chancery, a familiar judicial body to practitioners across the country. In four recent rulings, the Chancery Court has provided useful guidance for practitioners on the best methods for managing e-discovery requests and avoiding costly expenses. Although Delaware law has been sparse on specific e-discovery rules, these four opinions provide instructive "cautionary tales" to litigants, detailing affirmative steps that should be taken before and during litigation.

Triton Constr. Co. v. Eastern Shore Electrical Services, Inc.

In *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, the Delaware Chancery Court addressed in what instance an adverse inference is appropriate where an opposing party has spoliated evidence. 2009 WL 1387115 at *1 (Del. Ch. May 18, 2009). Triton Construction Co. ("Triton") had filed suit against the defendants, Triton's former employee, Tom Kirk, and his current employer, Eastern Shore Electrical Services, Inc. ("Eastern") for breach of fiduciary duty, aiding and abetting such breach, and misappropriation of trade secrets belonging to Triton. The allegations arose from Mr. Kirk's simultaneous employment with Triton and Eastern from 2005 until 2007, of which Triton was unaware.

Triton ultimately requested an adverse inference against Eastern for Mr. Kirk's intentional or reckless destruction of electronically stored information ("ESI") before discovery.

> The ultimate result of an adverse inference may be as severe as a default judgment: swift defeat for the spoliating party. Courts are intolerant of intentional and deceptive practices aimed at spoilating ESI and such willful actions will not go unpunished.

The court found that Mr. Kirk had destroyed electronic evidence on his work computer through the use of a wiping program that made files irretrievable and that he had improperly failed to produce his home computer and a backup thumb drive (also known as a USB flash drive), on which he kept work-related files. *Id.* at *7-8. As a remedy, the court inferred that any information Mr. Kirk destroyed would have supported Triton's position on any issue to which that information was relevant and granted the motion for an adverse inference. As a result, it inferred that Mr. Kirk's work for Eastern was significant enough that it involved the use and disclosure of at least some of Triton's confidential information. *Id.* at *9. Ultimately, in part due to the adverse inference, the court held Mr. Kirk liable for breach of the fiduciary duties of loyalty, disclosure, and confidentiality. *Id.* at *27-28.

Other courts have chosen to impose stricter sanctions for destruction of evidence. Our November 2008 issue of the Electronic Discovery Update highlighted *Gutman v. Klein*, an Eastern District of New York decision, granting a default judgment against the spoliating party who, like Mr. Kirk, deleted key evidence from a computer. 2008 WL 4682208 (E.D.N.Y. Oct. 15, 2008). While the Chancery Court's decision imposes a lesser punishment, the ultimate result of an adverse inference may be as severe as a default judgment: swift defeat for the spoliating party. Moreover, both decisions reflect that courts are intolerant of intentional and deceptive practices aimed at spoilating ESI and such willful actions will not go unpunished.

Beard Research, Inc. v. Kates

In a second decision on a factually and legal similar matter, the Delaware Chancery Court again imposed an adverse inference instruction against a spoliating party. In *Beard Research, Inc. v. Kates,* the court granted, in part, plaintiffs CB Research & Development Inc.'s ("CB") and Beard Research Inc.'s ("Beard") Motion for Sanctions for Spoliation of Evidence against former employee, Dr. Michael Kates, and his subsequent employers, Advanced Synthesis Group, Inc. ("ASG") and ASDI, Inc. ("ASDI"). 2009 WL 2997984 at *1 (Del. Ch., May 29, 2009).

CB and Beard had brought an action against Dr. Kates, ASG and ASDI for tortious interference of business relations and misappropriation of trade secrets. *Id.* at *1. In connection with that litigation, CB and Beard repeatedly requested the production of a laptop that Dr. Kates used for work and personal use, alleging that it contained (1) relevant emails between Dr. Kates and the other defendants; and (2) a PowerPoint presentation through which Dr. Kates

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shared proprietary information with ASDI. The laptop and its files were never produced. *Id.* at *12. Moreover, Dr. Kates admitted that he had deleted a significant amount of allegedly relevant information from the laptop in November 2005, at which point he had been involved in this litigation for six months, and had received plaintiffs' first discovery request. *Id.* at *6.

> Weighing the likely relevance of the missing evidence and the level of intentionality and bad faith that was exercised in destroying the evidence, the court denied plaintiffs' motion to the extent it sought entry of a default judgment, but granted an adverse inference against defendants with regard to the contents of the spoliated evidence.

Plaintiffs' motion sought entry of a default judgment against the defendants, or, in the alternative, an adverse inference due to the intentional destruction of relevant evidence. *Id.* The court found that Dr. Kates had failed to comply with his obligation to preserve relevant evidence. *Id.* at *6-7. Weighing the likely relevance of the missing evidence and the level of intentionality and bad faith that was exercised in destroying the evidence, the court denied plaintiffs' motion to the extent it sought entry of a default judgment, but granted an adverse inference against defendants with regard to the contents of the spoliated evidence. The court also awarded plaintiffs their attorneys' fees and expenses in connection with the motion. *Id.* at *4.

Interestingly, the court also held ASDI and ASG responsible for this destruction of evidence – even though Dr. Kates had acted independently when he deleted the files. The court reasoned that all parties had received plaintiffs' first set of interrogatories by the November spoliation, ASG and ASDI knew or should have known that Dr. Kates had possession of relevant electronic information by the time Dr. Kates deleted the files, and ASDI and ASG had a concomitant obligation to find and preserve that evidence. *Id.* at *7.

The court similarly found all defendants culpable for failure to preserve the original hard drive from the laptop, which ASDI's technology department had replaced at Dr. Kates's request. *Id.* at *8. The court noted specifically that, "[d]espite knowing that the laptop might contain relevant evidence, ASDI, ASG, and their counsel did virtually nothing to preserve that computer. . . At a minimum, ASDI and its counsel should have advised [its technology department] of the importance of preserving relevant information, such as the contents of Dr. Kates's laptop." *Id.*

To remedy defendants' breach, the court drew an adverse inference against them with regard to the missing file allegedly containing Dr. Kates' PowerPoint presentation to ASDI, but did not extend that inference to the content of emails that might have been present on the laptop because those emails ostensibly were available elsewhere. To that end, the court opined that "[a]n e-mail, almost by definition, has a sender and a receiver. Plaintiffs have taken extensive discovery from ASDI and from other third parties with whom CB or BR had relationships. Even if Kates had destroyed certain e-mails on his end, the e-mails still would exist on the other end and would have been produced." *Id.* at *12.

Finally, the court held defendants liable for attorneys' fees and costs. *Id.* at *13. In a subsequent decision awarding $76,906.80 in costs and attorneys' fees, the court noted that plaintiffs' award was given solely because "Defendants wasted Plaintiffs' (and the Court's) time and resources by forcing litigation of a third motion to compel, even though the original hard drive in [Dr.] Kates's laptop already had been changed, reformatted, and ultimately lost well before the July 24, 2008 hearing." *Beard Research Inc. v. Kates*, 2009 WL 3206416 at *2 (Del. Ch. Oct. 1, 2009).

Omnicare Inc. v. Mariner Health Care Management Co.

In another contemporaneous opinion, *Omnicare*, *Inc. v. Mariner Health Care Management Co.* the Chancery Court took up the issue of cost shifting, denying a request by Omnicare Inc. ("Omnicare") to shift costs to defendants, Mariner Heath Care Management Co. ("Mariner"), and affiliates, for restoring Mariner's email communications from backup tapes. 2009 WL 1515609 at *7 (Del. Ch. May 29, 2009).

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Omnicare, a pharmaceutical supplier, had brought an action against Mariner, a nursing home operator, to compel performance of an alleged contractual obligation, among other claims. *Id*. at *2. Mariner counterclaimed that, among other things, Omnicare knowingly overcharged for its services. *Id*. During discovery, Omnicare specifically requested production of Mariner emails from 2003 to 2005, which were only available on backup tapes created by an automatic deletion program, and which would cost between $22,000 and $40,000 to restore. *Id*. at *7. Although the responding party traditionally bears the production expenses of ESI, Mariner argued that it should not be expected to cover the costs because the request was unreasonable. *Id*.

The Chancery Court did not shift the costs to Omnicare for production of the ESI in question, holding that although cost shifting may be appropriate when a party requests files that are not reasonably accessible, "[s]imply because the ESI is now contained on Backup Tapes instead of in active stores does not necessarily render it not reasonably accessible." *Id*. The court added that checking backup tapes is a logical step that a defendant takes when complying with discovery requests. *Id*. Demonstrating some sensitivity to Omnicare's cost concerns, however, the court ordered that "[p]roduction should first be from Defendants' active stores in order to assess the likelihood of finding relevant and discoverable data on the Backup Tapes. If that is productive, then it becomes more likely that recovery from the Backup Tapes would be fruitful and processing of the Backup Tapes at Defendant's expense would be appropriate." *Id*. Since restoration of the backup tapes was a "reasonable" discovery request, the court refused to shift Omnicare's production costs to Mariner.

Grace Bros. Ltd. v. Siena Holdings Inc.

Finally, in *Grace Bros. Ltd. v. Siena Holdings Inc.,* the Chancery Court dealt with the issue of compelling the production of ESI when it granted Grace Brothers' motion to compel production of incoming and outgoing emails belonging to Siena Holdings Inc.'s ("Siena") board of directors. 2009 WL 1547821 at *1 (Del. Ch. June 2, 2009).

Grace Brothers, a shareholder in Siena, had brought allegations against Siena for conduct related to a 2003 reverse stock split. In an April 2009 discovery request, Grace asked Siena to turn over non-privileged email communications from the company's board of directors. Siena refused to comply with the request, claiming that it had turned over all relevant emails during the initial discovery period and that production of the directors' emails would be duplicative. Grace then filed its Motion to Compel Discovery. *Id*.

The Chancery Court granted Grace's motion, holding that Grace's production request was "reasonably calculated to lead to the discovery of admissible evidence." *Id*. Moreover, the court held that "[t]he burden is on the objecting party to show that the information sought is privileged or improperly requested," *id*., and Siena failed to demonstrate that the request was improperly duplicative. The directors' declaration that none of their e-mails were discoverable was insufficient, particularly because "Siena failed to even ask that the directors look for any relevant e-mails in their accounts." *Id*. Additionally, Grace's opportunity to inquire about relevant emails during the directors' depositions did not render the subsequent production request improper. *Id*. Accordingly, although Grace's production request would result in producing some duplicative emails, the court found that "this added production would not be overly burdensome and would not result in great expense for Siena." *Id*.

Conclusion

One of the first judiciaries to use e-filing and an electronic docketing system for civil cases, the Delaware Court of Chancery has been on the cutting edge of technological litigation developments. Simultaneously, the court has experienced an influx of e-discovery related issues. These decisions showcase the court's influential role in shaping jurisprudence on e-discovery issues and its concerted efforts to provide litigants with guidance on such e-discovery issues as spoliation, cost shifting and the complications of ESI production. ■