



COMMERCIAL DIVISION UPDATE

Expert Analysis

Use of Electronically Stored Information in Litigation

The use of electronically stored information (ESI) in complex commercial litigation has grown significantly in recent years. The rise in the use of e-mail, instant messaging, digital voicemail, and text messaging has left courts struggling to deal with ESI discovery and the use of ESI in the courtroom. As a result, an evolving patchwork of rules has developed in New York to help judges and lawyers manage the production of ESI.

This article addresses the current state of the New York law as it relates to the preservation and production of ESI. First, we examine the relevant rules governing the use of ESI in the Commercial Division. Next, we consider the case law to examine how some state courts are dealing with the unique myriad of problems that the use of ESI can present, focusing on developments in the preservation of ESI and the financial burdens of producing ESI. Then we will review how some Commercial Division courts have sought to clear up confusion surrounding ESI by inserting ESI disclosure provisions into Preliminary Conference Orders. Finally, we address roadblocks to creating a uniform system and provide recommendations for streamlining the ESI process.

ESI in Commercial Division

The rules of the Commercial Division contain meet and confer requirements that are similar to those found in the Federal



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Rules of Civil Procedure.¹ The state version is somewhat more tailored to reflect the importance of ESI, requiring the parties to confer prior to the preliminary conference to discuss a variety of ESI issues. These issues include formulating plans for how to deal with data preservation, the scope of ESI discovery, anticipated costs of ESI discovery (including a proposed allocation of those costs), and disclosures about how a party maintains and stores ESI infor-

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mation.² The New York meet and confer requirement thus contemplates addressing technical issues which may require the involvement of an Information Technology expert. Counsel may find that an IT expert is better able to communicate the location of ESI on a mainframe, or format the production of metadata to best serve the case needs. Meta-data is the data embedded in many types of documents which shows unseen information such as when and how a document was created. Due to technical complexities, at times it is worthwhile to retain an expert to assist with the use

of technology that attorneys may not be trained to navigate.

Despite the requirements of the Commercial Division, the New York Civil Procedure Law and Rules (CPLR) has not been updated to reflect the importance that ESI plays in modern litigation. As a result, the implementation of the Commercial Division's meet and confer requirements has been inconsistent at best. At a recent event, Justice Ira B. Warshawsky of Nassau County reflected that parties continue to ignore the meet and confer requirements and frequently give little if any consideration to the discovery or production of ESI, leading to confusion and delay in the litigation process.³

Relevant Caselaw

A number of cases in state courts have dealt with issues surrounding the use of ESI. Some relevant decisions for commercial litigation involving the discovery and production of ESI are being made by justices not assigned to the Commercial Division, but such are instructive when confronting ESI issues. The decision in *Lipco Electrical Corp. v. ASG Consulting Corporation* sparked the development of New York ESI case law.⁴

The plaintiff alleged that the defendant overcharged it for certain work and that it breached the terms of a consulting agreement.⁵ The plaintiff sought the production of ESI in the hands of the defendant related to projects undertaken by the plaintiff and defendant.⁶ In *Lipco*, the Supreme Court noted that the discovery of ESI is an issue that was "never envisioned by the drafters of the CPLR."⁷ The court looked to federal decisions for guidance, concluding that ESI is discoverable and that despite special challenges created by this medium, ESI must be produced.⁸ The state courts continue to wrestle with issues surrounding

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the discovery of ESI without much guidance from the state legislature or Chief Administrative Judge.

Only a few state cases deal specifically with a party's duty to preserve ESI in advance of or during litigation; however, the evolving case law shows that the duty to preserve ESI may arise in advance of specific notice of a claim. The 2005 case of *McCarthy v. Phillips Electronics NA* in the Supreme Court of New York County advanced the notion that defendants had notice of impending litigation well before the plaintiff filed a claim and, because of this knowledge, the duty to preserve ESI could have arisen before the claim was filed.⁹ The court based this conclusion on documentary evidence in which the defendant raised specific concerns about litigation as a result of its actions.¹⁰ The *McCarthy* court adopted the reasoning from federal court decisions and found that a party is responsible for preserving ESI "when a party should have known that the evidence may be relevant to future litigation."¹¹ Once a party can "reasonably anticipate" litigation, it must suspend routine deletion and document retention policies, and place a litigation hold¹² on the relevant ESI of "key players to the existing or threatened litigation."¹³

The duty to preserve in advance of notice of a specific claim is reinforced by a more recent decision. In *Fitzpatrick v. Toy Industry Association*, a discrimination case involving claims of hostile work environment and retaliation, the plaintiff alleged that the defendant destroyed ESI through defective data preservation procedures.¹⁴ Sanctions were requested as a consequence of this inadvertent destruction.¹⁵ Here, the New York County Supreme Court found that a duty to preserve in advance of a specific claim may have arisen based on an e-mail which cited the plaintiff's continued refusal to perform job functions.¹⁶

According to the holding in *Brown v. Parfums Jacques Bogart S.A.*, a party may be sanctioned for spoliation of evidence "prior to a notice or order to produce it, or prior to becoming a party, so long as the party is on notice that the evidence might be needed for the future."¹⁷ A court also has the power to order a party to preserve ESI upon motion by a party to the litigation. Preservation by court order follows the same procedures that would be used in requesting a preliminary injunction.¹⁸

New York courts have frequently looked

to federal decisions for guidance on the preservation, discovery, and production of ESI, but when it comes to allocating the costs involved in this process they have departed from the practices in the federal system. According to the *Lipco* court and other subsequent New York courts the presumption is that the requesting party pays for the production.¹⁹ The CPLR also allows non-parties responding to a subpoena to recover the costs of production from the requesting party.²⁰ Despite the sometimes "steep" costs of producing ESI, New York courts continue to require the requesting party to bear the costs of producing documents in connection with a subpoena.²¹

Until changes to the CPLR are formally implemented, New York courts will continue to struggle with the use of ESI. In the meantime, more branches of the Commercial Division should adopt the more rigorous attitude of the Nassau County Commercial Division.

A recent decision may add to the costs of discovering and producing ESI. In *T.A. Ahern Contractors Corp. v. Dormitory Authority*, the court held that the hiring of a vendor was a required component of the production process where plaintiff requested responsive documents from a large amount of ESI.²² The plaintiff requested information from the e-mail accounts of 27 employees of the defendant.²³ The harvesting of these accounts yielded 35 gigabytes of data. The plaintiff argued the defendant should bear the cost of hiring an expert (\$35,000) to isolate responsive data due to the large amount of ESI.²⁴ In holding that the plaintiff should bear the cost, the New York County Supreme Court noted that the use of an expert is a "necessary" component of ESI production and that should the plaintiff refuse to pay the cost, the defendant is under no obligation to produce the data.²⁵

Courts Take Charge

A number of Commercial Division courts now contain provisions regarding the production of ESI within their local county court rules. Such courts require parties to report how they intend to deal with ESI in their Preliminary Conference Stipula-

tion and Order, forcing parties to discuss these matters before production requests are made. Nassau County is leading the charge by requiring comprehensive disclosures about the preservation, discovery, and production of ESI. The Nassau County order requires the preservation of a variety of ESI, including metadata.²⁶ The order directs parties to suspend their routine data backup and deletion procedures and gives parties a great deal of flexibility in deciding how to produce ESI.²⁷

Section 12(b)(ii) of the order allows parties to elect to ignore ESI altogether, and section 12(d) allows parties to stipulate as to the format of production for certain kinds of ESI.²⁸ The order also states that in the absence of an agreement on these issues the court shall direct the manner of ESI production upon application by the parties.²⁹ Nearly two pages of the eight-page document are devoted to ESI issues, showing the increasing importance of procedures related to ESI.

Nassau County also published a set of guidelines intended to help parties navigate the use of ESI.³⁰ These guidelines are based largely on a similar set published by a committee consisting of jurists and practitioners in U.S. District Court for the District of Maryland.³¹ This set of guidelines discusses a variety of subjects, including: implementing litigation holds, matters that should be discussed at the preliminary conference, forms of ESI production, and cost-shifting (which is described as a "developing" area of New York law). Together, the Nassau County order and published set of guidelines provide practitioners with a concrete framework to use when dealing with ESI during the course of litigation. These documents reflect the current state of ESI law in New York and demonstrate the close connection between New York and federal ESI law.

Suffolk County also includes information about ESI in its Preliminary Conference Stipulation and Order.³² While the Suffolk County order is not as detailed as the Nassau County order, it does state that ESI shall be produced with bates stamps in native format along with metadata, unless the parties agree otherwise.³³ The Suffolk County order also includes commands that ESI shall be preserved "[f]or the relevant periods relating to the issues in this litigation."³⁴ Westchester and Onondaga County Preliminary Conference orders simply ask parties

to disclose how they agreed to handle ESI during their meet and confer.

Despite the movement of the Commercial Division and other New York courts to create a more comprehensive set of ESI procedures, there has been little movement in the New York Legislature to amend the CPLR. The New York State Bar Association recommended changes to the CPLR in June of 2008.³⁵ Many of the proposed changes constitute basic alterations of the rules to include, for example, that ESI may be produced in response to document requests.³⁶ Other changes have larger implications, such as the change to Rule 3122 which would allow a producing party to object to the requested form of production or object to a request for ESI because the data is not reasonably accessible.³⁷

The proposed changes go a long way toward bringing the CPLR closer to the reality of litigation in New York courts. The proposed changes were introduced in the State Assembly in February of this year.³⁸ The bill has yet to be approved by the Legislature, and it is unlikely that it will be acted upon in this legislative calendar.

Recommendations

Until changes to the CPLR are formally implemented, New York courts will continue to struggle with the use of ESI. In the meantime, more branches of the Commercial Division should adopt the more rigorous attitude of the Nassau County Commercial Division. Defining the court's expectations in advance of ESI issues will decrease the amount of missteps that parties may encounter during the course of litigation. Courts should also be progressive in enforcing meet and confer requirements so that parties have the time necessary to formulate an approach to ESI that works. When parties do not meet and confer about the discovery of ESI what often results is a panoply of disputes over preservation, discovery, and production which only hampers the progress of a lawsuit and inhibits factual investigation.

Attorneys also have an important role to play in making sure that avoidable issues surrounding ESI do not surface.³⁹ In advance of litigation, counsel should advise parties that they may have a duty to preserve ESI before a lawsuit is initiated if they anticipate that litigation may be imminent. After a claim has been initiated, lawyers should endeavor

to make sure that litigation holds are consistently applied and maintained and that all parties are aware of what is legally required of them. Before parties meet and confer in advance of a Preliminary Conference, each party must determine not only what sort of ESI they anticipate producing, but also how they would like ESI to be produced to them. During the meet and confer both sides must be ready to discuss the technical issue of ESI discovery and production, and later present their discovery plan to the court. From a practical perspective, the unique demands of ESI often transform the advocate into the IT specialist, and as one court recently found may make the use of a vendor "necessary" to ESI production.⁴⁰

Conclusion

Without leadership from the state Legislature, the state courts are largely left to craft ESI rules on their own. Opinions reflect the gap in New York law as courts look to the federal system for guidance. Until there is action by the state Legislature it is likely that this confusion will continue to be felt in the court system. The patchwork of rules that has developed is not sufficient to overcome the limitations of the CPLR, but does reflect a growing competency of the courts to deal with ESI disputes.



1. N.Y. Comp. Codes R. & Regs. tit. 22, §202.70(g) Rule 8(b).
2. Id.
3. Ira B. Warshawsky, Supreme Court Justice, Nassau County, Remarks at Electronic Discovery Practice for the New York Attorney, Sponsored by the Commercial and Federal Litigation Section's Electronic Discovery Committee and the Committee on Continuing Legal Education of the New York State Bar Association (June 4, 2009).
4. 2004 N.Y. slip op. 50967(U), at *1, 2004 N.Y. Misc. LEXIS 1337, at *1 (Sup. Ct. Nassau Co. Aug. 18, 2004).
5. Id. at *1-3, 2004 N.Y. Misc. LEXIS, at *1-8.
6. Id. at *3, 2004 N.Y. Misc. LEXIS, at *7-8.
7. Id. at *6, 2004 N.Y. Misc. LEXIS, at *15.
8. Id. at *7, 2004 N.Y. Misc. LEXIS, at *19-21.
9. No. 112522/03 at *1 (Sup. Ct. N.Y. Co. June 17, 2005).
10. Id. at *3.
11. Id. at *2-3 (quotations and citations omitted).
12. A litigation hold is a mandate issued to the relevant personnel of an organization to preserve all documents that may be relevant to the litigation. This normally includes suspending a party's routine

ESI deletion or destruction procedures and assuring that relevant personnel do not delete or otherwise destroy any ESI or other documents that may be relevant to the impending litigation.

13. Id. (quotations and citations omitted).
14. No. 116548/05, at *1 (Sup. Ct. N.Y. Co. Jan. 16, 2009).
15. Id.
16. Id. at *13.
17. 2006 N.Y. slip op. 51481(U), at *5, 2006 WL 2085478, at *4 (Sup. Ct. N.Y. Co. May 31, 2006).
18. See generally *Weiller v. New York Life Ins. Co.*, 800 N.Y.S.2d 359, 2005 N.Y. Slip Op. 5034(U), 2004 WL 3245345 at *1 (Sup. Ct. N.Y. Co. March 16, 2005).
19. See *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 608-09, 819 N.Y.S.2d 908, 911-12 (Sup. Ct. Nassau Co. Aug. 17, 2006) (looking to federal decisions on the issue of ESI production, but holding that the requesting party will initially bear 100 percent of the ESI production costs); *Lipco*, 2004 N.Y. Slip Op. 50967(U), at *8, 2004 N.Y. Misc. LEXIS 1337, at *23 ("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."); but see *Waltzer v. Tradescape & Co., L.L.C.*, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept. 2006) (finding that responding party should bear the costs of inconsequential production).
20. *Finkelman v. Klaus*, 2007 N.Y. slip op. 52331(U), at *5, 2007 WL 4303538, at *6 (Sup. Ct. Nassau Co. Nov. 28, 2007).
21. Id.
22. 875 N.Y.S.2d 862, 864 (Sup. Ct. N.Y. Co. 2009).
23. Id.
24. Id. at 864-65.
25. Id. at 867-69.
26. Preliminary Conference Stipulation and Order, <http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-PC-Order2-1-09.pdf>.
27. Id.
28. Id.
29. Id.
30. Nassau County Electronic Discovery Guidelines, http://www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing_Guidelines.pdf.
31. Id.
32. Preliminary Conference Order and Stipulation, <http://www.nycourts.gov/courts/comdiv/PDFs/PreliminaryConferenceCommercial.pdf>.
33. Id.
34. Id.
35. New York State Bar Association, Report of the New York State Bar Association Commercial and Federal Litigation Section Recommending Certain Amendments to the CPLR Concerning Electronic Discovery, June 21, 2008, <http://www.courts.state.ny.us/ji/commercial-litigation/PDFs/4.a.%20Proposed%20Amendments%20to%20the%20CPLR.pdf>.
36. Id.
37. Id.
38. New York State Assembly, <http://www.assembly.state.ny.us/leg/?bn=A06000>.
39. See, e.g., Fitzpatrick, No. 116548/05, at *1.
40. T.A. Ahern, 875 N.Y.S.2d at 867.

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