APPENDIX

NEW YORK COURT DECISIONS PERTAINING TO ESI AND ELECTRONIC DISCOVERY

1301 Props. Owner, LP v. Abelson, 2016 NY Slip Op 50446(U) (Sup Ct, NY County 2016)

> Judge(s): Scarpulla. The landlord of the law firm Dewey & LeBoeuf sued the law firm's partners for payments due under the law firm's lease. In connection with motions made to dismiss, defendants, among other things, relied upon two emails sent by a member of the law firm. While the landlord argued that the emails were not proper "documentary evidence" on a motion to dismiss, the motion court held that they qualified for same where their content was "essentially undeniable." The motion court based its finding on the fact that the two emails were retrieved from the law firm's email box by counsel for the trustee and due to an affidavit submitted by the accounting firm that the financial reports attached to the two emails were created and maintained by the law firm.
> **Topic(s): Production of emails.**

255 Butler Assocs., LLC v. 255 Butler, LLC, 2019 NY Slip Op 30372(U) (Sup Ct, Kings County 2019)

> Judge(s): Ash. Defendants moved for an order granting a protective order directing defendants to produce approximately 46,000 records identified through application of the parties' agreed-upon ESI search terms, among other things. Plaintiff moved for an order awarding plaintiff's attorney's fees and costs based on its contention that Defendants never intended to conduct discovery in good faith, among other things.
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> Defendants were ordered to produce "all documents collected to date by defendants' ESI consultants and limited by agreed upon search terms, on or before July 31, 2018, except for privileged documents or those which Defendants need not produce pursuant to Decision and Order dated June 7, 2013." This order resulted from a conference where plaintiff contended that defendants' failed to include certain emails that plaintiff had in its possession that were responsive and non-privileged. Defendants did not provide a complete explanation for their failure to include these emails and the court directed defendants "to produce all documents that 'hit' the parties' agreed-upon search terms, which total approximately 46,000 documents, except those subject to privilege or a previous court order." The court denying defendants' motion to vacate the order requiring them to re-review 46,000 "hits" stated:
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> > defendants failed to explain then, at the compliance conference, and still fail to explain how their production failed to yield certain emails in Plaintiff's possession that should have been produced had Defendants conducted a thorough ESI search and review process. Plaintiff's claim of missing emails, which has not been contradicted by Defendants, indicate one of only two possible scenarios: (1) that Defendants" ESI

> search and review process was poorly executed; or (2) that Defendants have deliberately withheld or destroyed documents, thereby obstructing their attainment.

The court recognized that the amount of discovery was significant and did not find defendants past delays to be deliberate or in bad faith. However, the court noted that plaintiff should not have to bear the cost of having to re-review defendants' production and welcomed an application for reasonable costs. With regards to plaintiff's claim that defendants failed to produce documents, the court stated that it will issue appropriate relief "either at the time of trial, such as the imposition of an adverse inference upon a showing that such documents exist, or by way of a preclusion order."

Topic(s): Reproduction. Costs of production. ESI search terms.

Abe v. New York Univ., 140 AD3d 557 (1st Dept 2016)

Judge(s): Mazzarelli, Andrias, Saxe, Gische, Kahn. In denying plaintiff's motions for spoliation sanctions the court noted:

> The computer drive that was erased was a back-up of a drive that remained available. Thus, there is no showing that evidence was destroyed in the first instance. Similarly, plaintiff offers no proof that any evidence was destroyed by the loss of access to the laptop used, but not owned, by one of the defendants. Moreover, certain documents at issue, namely, those letters sent out to adjunct professors in the Art Department to inform them as to whether they would be reappointed for the upcoming academic year, were all exchanged, as was an export chart of the letters' metadata. Plaintiff's assertion that additional metadata existed, but was not exchanged, is unsupported.
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> Plaintiff also failed to make a showing of entitlement to all of the social media sites and private email accounts of certain individual defendants. The mere fact that a Facebook "friend" of defendant Barton, who also worked at defendant New York University, wrote "Hi" on Barton's "wall" does not establish that Barton used her Facebook account for NYU business in general, so as to warrant production of the discovery requested

Topic(s): Spoliation.

ABL Advisor, LLC v. Patriot Credit Co., LLC, 2019 NY Slip Op 32617[U] (Sup Ct, NY County 2019)

Judge(s) Goetz. Plaintiffs moved to compel defendants' compliance with their discovery obligations and for spoliation sanctions. According to the plaintiffs, the defendants failed to produce and failed to preserve certain documents, such as emails. According to the defendant's principal, one employee maintained documents relevant to the loan at the heart of the dispute. This employee left the defendant's employ after the start of this litigation and took her computer with her. Defendants had nothing in place to preserve the records. Thus, defendants never produced any emails bearing this employee's name despite her being the one who handled the loan. Here, the court found spoliation sanctions appropriate. The court stated that "defendants failed to preserve relevant evidence by failing to institute a litigation hold and failing to preserve the documents and emails on [a former employee's] computer. This is sufficient to warrant a finding of gross negligence and the relevance of these documents is therefore presumed." The court asserted that an adverse inference was the appropriate sanction as plaintiffs were able to obtain relevant information themselves.
Topic(s): Preservation. Spoliation. Adverse inference instruction.

Absolute Elec. Contracting, Inc. v. IBEX Constr. Co., LLC, 2016 NY Slip Op 30412(U) (Sup Ct, NY County 2016)

Judge(s): Kern. Plaintiff established its prima facie claim to summary judgment on its cause of action for breach of contract upon demonstrating the existence of the agreement between the parties, that plaintiff fully performed under the agreement, that defendant breached the agreement by failing to fully pay plaintiff, and damages as a result of defendant's breach. Plaintiff asserted, among other things, that defendant then failed to raise a material issue of fact because it had not provided an affidavit of someone with personal knowledge of the facts affirming the contents of critical e-mails. The motion court found this argument to be without merit because it saw "no reason why [the emails] would not be sufficient to raise an issue of fact on a motion for summary judgment" where the "First Department has found that e-mails, standing alone, constitute documentary evidence for the purposes of a motion to dismiss" pursuant to CPLR rule 3211(a)(1).
Topic(s): Production of emails.

A.D. v C.A., 2015 N.Y. Slip Op. 25283 (Sup Ct, Westchester County 2015)

Judge(s): Ecker. a contested matrimonial custody battle, plaintiff husband sought an order directing defendant to turn over printouts of all pictures, posts and information posted on her Facebook pages over four years or, in the alternative, should defendant not voluntarily produce said records, that defendant be directed to turn over to plaintiff's retained expert all computer hard drives, data storage systems, flash drive/memory sticks and CD/DVDs created by defendant, as well as an order directing defendant to turn over a copy of the SD card from defendant's smartphone or iPhone. The court noted:

> [a] person's use of privacy settings on social media, such as Facebook, restricting the general public's access to private postings does not, in and of itself, shield the information from disclosure if portions of the material are material and relevant to the issues of the action.

Topic(s): Social Media. Production.

Angel v. Rubin, 2015 NY Slip Op 31369(U) (Sup Ct, NY County 2015)

Judge(s): Lobis. In a medical malpractice action, defendant physician moved for an order compelling discovery of "non-privileged communications, including phone records (home and cell), e-mails, and text messages limited to the 14 or 16 hour period after the decedent was seen by" defendant. The physician asserted that his notes indicated that he advised plaintiff to go to the hospital, but that plaintiff refused, and that plaintiff's communications from that visit to his death would shed light on this contention and refute decedent's wife's testimony that the physician not only did not tell him to go to the hospital, but actively dissuaded him from doing so. The motion court granted the motion where decedent was unavailable to testify on this "critical" issue.

Topic(s): Production of emails. Text Messages.

AQ Asset Mgmt., LLC v. Levine, 128 AD3d 620 (1st Dept 2015)

Judge(s): Andrias, Moskowitz, DeGrasse, Gische, Kapnick. The Court denied defendants' motion for partial summary judgment where it "offered only an unsworn email list" of inventory, which none of the affiants authenticated or stated was accurate, and which was therefore inadmissible hearsay.

Topic(s): Authentication. Hearsay.

Arbor Realty Funding, LLC v. Herrick, Feinstein, LLP, 140 AD3d 607 (1st Dept 2016)

Judge(s): Mazzarelli, Moskowitz, Manzanet-Daniels, Gesmer. defendant sought spoliation sanctions and the First Department held it was undisputed that Arbor's obligation to preserve evidence arose at least as early as June 2008, but it did not issue a formal litigation hold until May 2010. The First Department noted that:

> [f]ailures 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 []; (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.

The Appellate Division held that the "motion court correctly determined that Arbor's destruction of evidence was, at a minimum, gross negligence, since Arbor failed to institute a formal litigation hold until approximately two years after even Arbor admits it had an obligation to do so." The Court noted that the "sanction must reflect 'an appropriate balancing under the circumstances'" and that "[g]enerally, dismissal of the complaint is warranted only where the spoliated evidence constitutes 'the sole means' by which the defendant can establish its defense or where the defense was otherwise 'fatally compromised' or defendant is rendered 'prejudicially bereft' of its ability to defend as a result of the spoliation."

Topic(s): Spoliation.

Arma v. East Islip Union Free Sch. Dist., 2016 NY Slip Op 31823(U) (Sup Ct, Suffolk County 2016)

Judge(s): Asher. Plaintiff was a senior at high school and commenced an action seeking damages against another student who has bullying her at school posting derogatory comments about her on Facebook and sending offensive and threatening text message to her cell phone. Denying plaintiff's motion, the court noted:

> Likewise, plaintiff's motion to compel Colleen Costigan to comply with the demands for access to her social media accounts, her school disciplinary records, and the sealed records related to the youthful offender adjudication is denied, as plaintiff's counsel failed to include an affirmation of good faith with the moving papers. The Court notes that even if a proper affirmation of good faith had been submitted, plaintiff's demand for "[a]ny and all statements made on any internet website or application pertaining to the plaintiff in general or to the underlying complaint in particular" is vague, overbroad, unduly burdensome, and seeks irrelevant information. (internal quotations omitted)

Topic(s): Social Media.

Auffarth v. Harold Nat'l. Bank, 2016 NY Slip Op 31169(U) (Sup Ct, NY County 2016)

Judge(s): Singh. a spoliation sanction was denied where the destruction of emails did not support a finding of gross negligence. The motion court held that gross negligence is "conduct that evinces a reckless disregard of the rights of others or smacks of intentional wrongdoing." Applying such standard, the motion court found that there was "no evidence that the e-mails were intentionally or willfully destroyed" where the bank attempted to preserve the e-mails of all terminated employees, but left plaintiff's name off the list of whose emails were to be preserved due to an error made in failing to copy and paste all of the names properly. The motion court found that this error was inadvertent and that such act was negligent in "failing to take reasonable care after being instructed to preserve the e-mails of all employees terminated." The motion court noted that there had been "no showing by the estate how the e-mails are relevant to establishing that the bank acted in bad faith or engaged in fraud or arbitrary action in terminating [the decedent] for his alleged failure to perform."
Topic(s): Spoliation.

Aydin v. Elwood Props, Inc., Index No. 601016/2014 (Sup Ct, Nassau County 2014)

Judge(s): K. Murphy. The motion court denied plaintiffs' cross-motion to strike defendant's pleading for spoliation or, alternatively, to preclude defendant landlord from using or making reference to a certain video concerning the accident made by its tenant. In moving for summary judgment, defendant landlord relied upon the testimony of plaintiff's non-party employer-tenant who had watched the video. The video was not preserved and was recorded over as part of a continuous loop within two weeks of the accident. The defendant landlord had no control over the video, and the court stated that "there is no claim, much less any evidence that [the landlord] had any reason to think that it would be a party to an action stemming from any litigation involving a slip and fall at a nursing room that it transferred possession and control over pursuant to a lease agreement." In the end, relying upon *Pegasus*, the court denied the requested relief for a spoliation sanction as the credibility of the non-party witnesses who viewed the video would be subject to cross-examination and there was no prejudice to either party as both had access to the same evidence.
Topic(s): Spoliation of ESI. Non-Parties.

Bank of N.Y. Mellon v. WMC Mortg., LLC, 2017 NY Slip Op 30139(U) (Sup Ct, NY County 2017)

Judge(s): Kornreich. The court noted that, when a party is seeking documents from a non-party, cost-shifting will be applied to "defray [the non-party's] reasonable document collection, review, and production costs, including certain legal fees," citing 22 NYCRR 202.70, Rule 11-c, Appendix A ("Fees charged by outside counsel and e-discovery consultants ... include "[t]he costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software

applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production.")
Topic(s): Cost of production. Non-parties.

Baidoo v. Blood-Dzraku, 48 Misc 3d 309, 310 (Sup Ct, NY County 2015)

Judge(s): Cooper. The issue before a matrimonial court was whether a wife may serve her husband with a divorce summons by solely sending it "through Facebook by private message to his account." The court characterized the wife's request as asking the court "already beyond the safe harbor of statutory prescription, to venture into unchartered waters without the guiding light of clear judicial precedent." The court noted that the Domestic Relations Law permits a spouse to utilize one of the alternative methods of service provided under the CPLR and CPLR Section 308.5, in turn, permits a court to order service and devise a method that "fits the particular circumstances of the case." However, such service must be "reasonably calculated, under all the circumstances, to apprise [the defendant] of the pendency of the action."

The court characterized service by publication as expensive and "essentially statutorily authorized non-service" because it is "almost guaranteed not to provide a defendant with notice of the action for divorce." As such, the 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."
Topic(s): Social Media. Service.

Balestriere PLLC v. Banxcorp, 2016 NY Slip Op 30208(U) (Sup Ct, NY County 2016)

Judge(s): Madden. Defendant's request for spoliation sanctions was denied. The court stated that:

> Defendants have not demonstrated any conduct of the kind that would warrant striking the Firm's complaint or its reply papers submitted in connection with its summary judgment motion. To the contrary, the record shows that the Firm did not engage in any misconduct and is in compliance with its discovery obligations. Specifically, while the time records submitted with the summary judgment motion were previously produced in a different format and removed certain entries enumerated above, including for interns for which the Firm no longer seeks fees, such changes do not provide a basis for awarding discovery sanctions.

Topic(s): Spoliation

Baron v. Black, 2015 NY Slip Op 31201(U) (Sup Ct, NY County 2015)

Judge(s): Kern. plaintiffs commenced their action alleging causes of action for slander, libel, tortious interference with economic advantage, abuse of process, false arrest and false imprisonment, negligence and gross negligence and intentional infliction of emotional distress arising out of alleged false statements made by the defendant about the individual plaintiff. Defendant sought, inter alia, to dismiss the complaint resulting from the spoliation of evidence. The motion court found that the defendant failed to establish that plaintiffs' conduct rose to the level of spoliation. The court noted that:

> defendant has not established that plaintiffs deleted the e-mails with a "culpable state of mind." Indeed, plaintiffs have affirmed that the e-mails were deleted only after receiving a notification from Google that e-mails needed to be deleted in order to free up space in plaintiff's Gmail account and defendant has not presented any evidence that the e-mails were deleted for any other reason. Finally, defendant has not established that the deleted e-mails were relevant to defendant's defense in the instant action. While defendant asserts that the deleted e-mails likely involved plaintiff's alleged employment with FIT, plaintiff Baron has affirmed that he deleted thousands of e-mails but that he "did not delete any emails that are relevant to this litigation." Specifically, plaintiff Baron affirmed that he "specifically did not delete any emails that related to: (1) the Defendant Seven Black; (2) the 'Fashion Institute'; and (3) '315 Seventh Avenue'" and that he has provided defendant with any and all discovery related to his alleged employment with FIT.

Topic(s): Emails. Spoliation.

Barr v. Bentley Motors Ltd., 2016 NY Slip Op 32250(U) (Sup Ct, Nassau County 2016)

Judge(s): Murphy. The court established that e-mails annexed to the moving papers do not constitute documentary evidence within the contemplation of Rule 3211(a)(1).
Topics: Emails as documentary evidence.

Berardi v Phillips Nizer, LLP, 2016 NY Slip Op 30860(U) (Sup Ct, NY County 2016)

Judge(s): Bannon. The e-mails primarily reflected communications between plaintiff and the attorneys at the firm concerning legal advice and strategy; updates on the course of the litigation; and communications among the attorneys at the firm, between the firm's attorneys and their adversaries, and between the firm's attorneys and retained experts. The motion court, in denying a CPLR Rule 3211 (a)(1) motion stated:

> The e-mails primarily reflected communications between plaintiff and the attorneys at the firm concerning legal advice and strategy; updates on the course of the litigation; and communications among the attorneys at the firm, between the firm's attorneys and their adversaries, and between the firm's

attorneys and retained experts. The motion court concluded that such "writings do not establish any unassailable fact and, hence, are not to be characterized as 'documentary evidence'" pursuant to CPLR Rule 3211(a)(1).

Topic(s): Emails as documentary evidence.

Brandsway Hosp., LLC v. Delshah Capital LLC, 173 AD3d 457 (1st Dept 2019)

Judge(s) Friedman, Tom, Kapnick, Kahn. The Supreme Court of New York County denied a motion to dismiss for spoliation of electronic evidence. The Appellate Division affirmed that decision. In addressing the spoliation accusation, the Supreme Court referred the issues to an expert "to examine various email accounts, servers and domains to determine who deleted emails, when they were deleted, and whether they could be retrieved." In this matter there was no dispute that emails had been deleted, but there was conflict over who deleted the emails and when then deletions occurred. The Appellate Division stated that the trial court was correct in being "concerned about plaintiff's principal's selective use of emails from accounts that had been largely deleted" and thus it was correct in seeking more information regarding when the deletions occurred and if those deleted emails could be recovered prior to deciding whether or not spoliation sanctions were appropriate.

Topic(s): Spoliation. Emails.

Breest v. Haggis, 2019 NY Slip Op 51115(U) (Sup Ct, NY County 2019)

Judge(s): Reed. In an action to recover upon a claim of gender-motivated violence, among defendant's discovery requests are plaintiff's social media accounts and postings. The court stated "the threshold inquiry for courts addressing disputes over the scope of social media discovery is…whether they are reasonably calculated to contain relevant information." Since plaintiff claimed she was unable to have any intimate relationship with a man after the alleged assault, her social media accounts and the information stored there may be reasonably expected to contain information as to plaintiff's damages allegations. The court held "the discovery sought is targeted and appropriately tailored and may yield evidence relevant to plaintiff's assertion of her injured relationships with men—and, as such, is discoverable."

Topic(s): Production. Social Media.

Broadrock Gas Servs., LLC v. AIG Specialty Ins. Co., 2015 U.S. Dist. LEXIS 26462 at *16 (SD NY Mar. 2, 2015)

Judge(s): Dolinger. Plaintiffs sought copies of drafts and metadata involving a certain coverage-position letter, and defendant argued that drafts had no pertinence because the insurance carrier was bound only by the final version of its letter. The court, reviewing the usefulness of draft documents ordered to be produced in other cases, held that "the drafts are potentially relevant insofar as they may contain admissions that were then deleted in the process of editing. That phenomenon would at least be helpful to plaintiffs in pursuing their assertion that the carrier's performance was in bad faith."
Topic(s): Metadata.

Brook v. Peconic Bay Med. Ctr., 2017 NY Slip Op 31728(U) (Sup Ct, NY County 2017)

Judge(s): Scarpulla. the motion court held that defendant's "failure to institute a formal litigation hold as early as July, 2010, did not necessarily amount to gross negligence per se and is instead one factor that to consider in making a determination as to the alleged spoliator's culpable state of mind." The court observed that a formal litigation hold had been issued six months after defendants should have reasonably anticipated litigation, and one month after plaintiff instituted his lawsuit. The court found that, while evidence existed that emails had been created during the period when no hold had been in place which would support plaintiff's claim, independent evidence also existed that would allow the affected party to adequately prepare its case. As such, where depositions may produce" sufficient, alternative evidence" of the subject matter of the missing communications, the court nevertheless ruled that an adverse inference charge would be appropriate, but only concerning the emails generated during the limited period of time when no litigation hold was in place as "defendants were unable to produce the Rubenstein email or any other communication between PMBC administrators and physicians relating to the investigation into Dr. Brooks made during that time frame"
Topic(s): Spoliation.

Calpo-Rivera v. Siroka, 144 AD3d 568 (1st Dept 2016)

Judge(s): Mazzarelli, Sweeny, Andrias, Webber, Gesmer. The court affirmed denial of a motion to dismiss pursuant to CPLR 3211(a)(1) where the emails were "not conclusive, and did not preclude a finding, upon further discovery, that the plaintiffs held themselves out as performing architectural services for the defendants."
Topic(s): Emails.

Carpezzi-Leibert Grp. Inc. v. Henn, 2015 NY Slip Op 30132(U) (Sup Ct, NY County 2015)

Judge(s): Rakower. an action involving a sales representative's alleged failure to comply with the terms of a non-solicitation agreement, the court agreed to review defendants' document production in camera regarding certain entries that defendants had previously redacted. Defendants' counsel provided the court with copies of the unredacted documents and a redaction log seeking to document the reasons for the redactions. With respect to that log, the court found that defendants'

> privilege log does not provide sufficient detail for the Court to determine whether the remaining redactions, particularly with respect to Henn's text messages and iphone calendar entries, are properly redacted. Accordingly, Defendants are directed to provide a more detailed privilege log, identifying the names of the individuals with whom Henn exchanged the redacted text messages in the attached documents, and providing further, non-conclusory, explanation as to whether such individuals, as well as the individuals identified in the redacted iphone calendar entries, are CLG clients, prospects, employees, or former employees.

Topic(s): Deficient ESI privilege log.

Chan v. Cheung, 138 AD3d 484 (1st Dept 2016)

Judge(s): Mazzarelli, Sweeny, Manzanet-Daniels, Gische. The Court in striking a defendant's answer on spoliation grounds, noted that "[i]n light of the warnings concerning potential loss of data and the prompts to reboot the machine that defendant would have received during the reinstallation process, the deletion of files containing defendant's archived email (like the reinstallation itself) could not be said to have been inadvertent."

Topic(s): Spoliation.

Chattah v. Butter Grp., 2019 NY Slip Op 33259[U] (Sup Ct, NY County 2019)

Judge(s) Lebovits. There was an altercation between two club patrons wherein one patron, plaintiff, was allegedly injured. Plaintiff sued the club, the club owner, and the club's security contractor. Plaintiff has moved for spoliation sanctions, arguing that the club failed to preserve video footage that might have shown the altercation. The court did not immediately grant the motion. The court established that the club was placed on notice when plaintiff sent a letter demanding that they preserve video depicting the altercation and by defendant acknowledging receipt of that letter. Thus, the court stated that the club did have an obligation to preserve the video. However, there was a question as to whether any of the club's cameras caught the incident on video. Therefore, instead of implementing spoliation sanctions, the court found the most appropriate step to be "[referring] the discrete factual question of the presence of a camera on the night in question to a judicial hearing officer to hear and report, and reserve any final determination on the spoliation issue until after receiving the hearing officer's report."

Topic(s): Spoliation. Video footage. Preservation of evidence.

Corp. Elec. Techs., Inc. v. Structure Tone, Inc., 2020 NY Slip Op 30085[U] (Sup Ct, NY County 2020).

> Judge(s) Masley. Macy's contracted with Structure Tone, Inc. (STI) to remodel Macy's flagship store in Herald Square. STI subcontracted out to Corporate Electrical Technologies, Inc. (CET). There were delays in the project and alleged requests to perform work, which CET claimed caused their price of performance to increase. CET asserted that it is still owed money on the project and thus it brought this action against STI and Macy's. CET moved for spoliation sanctions, arguing that "Macy's wrongfully destroyed all internal emails from 2014 that would have supported CET's theory that STI's poor management caused numerous issues that affected CET's work on the Project." The court held that spoliation sanctions were improper because CET "[had] not demonstrated that Macy's had an obligation to preserve the 2014 emails in the Fall of 2014." The court found that "the delays on the Project, engagement of another subcontractor, and email that CET sent to Ken Capra of Macy's are insufficient to establish that Macy's was on notice of a credible probability that it would become involved in litigation."
> **Topics: Spoliation. Preservation of evidence. Emails.**

Crocker C. v. Anne R., 58 Misc 3d 1221(A) (Sup Ct, Kings County, 2018)

> Judge(s): Sunshine. the trial court asked "[w]hat remedies are available to an innocent spouse and her counsel when a marriage gets 'hacked' and what remedies are available to the Court when the 'hacking' included intercepting the innocent spouse's attorney-client privileged communications and the 'hacking' spouse then purposefully engaged in spoliation of the evidence while simultaneously asserting his Fifth Amendment right against self-incrimination?" The trial court noted that:
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> > A review of the New York case law related to the remedies correlating to the state of mind of the spoliator support a general approach that as the culpability of the spoliating party decreases (from bad faith and intentional to negligent and unintentional) so too does the appeal of the punitive and deterrent purpose underlying the spoliation doctrine. The rational is obvious: where a party intentionally destroys evidence the conduct raises a strong inference that the party thought the evidence would be so harmful to its case that the risk of getting caught destroying the evidence outweighed the risk of the opposing party obtaining the evidence and the possibility that the Court could have the evidence to consider. It appears that the Court of Appeals decision in *Pegasus* intended to draw the distinction in a way that corresponds the sanction to the intent of the spoliator when possible so that less drastic sanctions are possible for spoliators who were not acting in bad faith so long as the spoliation did not result in insurmountable prejudice to the innocent party.
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> **Topic(s): Spoliation.**

Czyz v. Scherl, 2017 NY Slip Op 31465(U) (Sup Ct, NY County 2017)

Judge(s): Shulman. Plaintiffs move to compel defendants' compliance with the disclosure of the metadata and other electronic materials. The Court denied such disclosure establishing that:

> plaintiffs do not establish how disclosure of electronic data above and beyond the audit trail spreadsheet provided would yield relevant information, nor is any explanation provided as to why the spreadsheet is inadequate. Plaintiffs seek information pertaining to changes made to plaintiff-decedent's electronic medical records, including the dates and times thereof, yet the spreadsheet appears to include such information. (motion to compel disclosure of audit trail of defendant's electronic medical records [EMR] denied where plaintiff failed to distinguish audit trail's utility from that of the corresponding EMR). (internal quotations omitted).

Topic(s): Audit trail.

Dantzig v. ORIX AM Holdings, LLC, 2019 NY Slip Op 33030[U] (Sup Ct, NY County 2019)

Judge(s) Masley. Plaintiff Dantzig entered into various agreements with the ORIX defendants. Allegedly, the ORIX defendants "disseminated false information that Dantzig's employment was effective immediately," which hurt Dantzig's reputation as investors believed Dantzig was terminated for wrongdoing. Additionally, Dantzig alleged that the ORIX defendants withheld compensation that he had been previously owed.

Dantzig moved for spoliation sanctions. Dantzig alleged even though two letters were sent to the ORIX defendants that instructed them to preserve ESI, the ORIX defendants destroyed emails. Dantzig asserted that without the emails, he was unable to prove a number of things, including damages related to disparagement as he was unable to show that clients were inquiring about his termination.

The court found spoliation sanctions appropriate and that, as applied to these facts, "the most appropriate sanction [was] an adverse inference that the destroyed ESI would not contradict Dantzig's evidence at trial." In arriving at that holding, the court stated that the party who is seeking spoliation sanctions must show:

> "[1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a 'culpable state of mind,' and [3] 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support the claim or defense."

The court stated that the ORIX defendants had control over the ESI as "Dantzig transferred control of the ESI to the ORIX defendants, who maintained that control when they requested to cancel services from [the server hosting the electronic documents]." Furthermore, the court found that the ORIX defendants had an obligation to preserve the ESI since "a reasonable anticipation of litigation arose" when Dantzig sent letters to the ORIX defendants regarding the preservation of the ESI. Additionally, the court found a culpable state of mind, holding that the ORIX defendants intentionally destroyed the ESI. Lastly, the court presumed the relevance of the documents as the ESI was intentionally destroyed.

Topic(s) Spoliation. Emails. Adverse inference instruction.

Deutsche Bank AG v. Sebastian Holdings, Inc., 2019 NY Slip Op 30062(U) (Sup Ct, New York County 2019)

Judge(s): d'Auguste. Plaintiff moved to compel disclosure from defendants of documents that defendants claim is privileged. The court stated:

> Whether a particular document is or is not protected by the attorney-client privilege is a fact-specific determination most often requiring in camera review (Spectrum, 78 NY2d at 378). Defendants must produce a privilege log. Johansson says that, since 2008, there have been multiple daily communications such as those that Deutsche Bank mentions in its moving papers, possibly amounting to tens of thousands of emails. To review all of those and prepare a privilege log would be an overwhelming costly burden. Nonetheless, since Johansson and SHI claim the privilege, they must prove it.

The court also granted plaintiff's motion to resume the deposition of Johansson and stated:

> Johansson does not establish the impropriety of any question, nor does he explain how any question would, if answered, cause significant prejudice. During the deposition, Johansson would not clearly answer questions about what steps SHI took to preserve documents. Ramesh Aff. Ex. 7, at 37-42. The court agrees that Johansson was evasive and should answer properly. When asked if he was aware of any emails relating to SHI that he had deleted, he answered that it was possible that he had deleted emails and that he did not remember (id. at 52-53).

Topic(s): Privilege log. Attorney-client privilege. Work product. Preservation.

Discover Prop. & Cas. Co. v. NFL, 2019 NY Slip Op 32930[U] (Sup Ct, NY County 2019)

Judge(s) Masley. Here, the court addressed "whether the National Football League and NFL Properties LLC (collectively the NFL) are entitled to insurance coverage for their defense costs and settlement payments in connection with the underlying litigation." In this action, the insurers moved to compel more document production, using 46 new search terms. However, a Special Referee found that only 32 of those terms "were likely to yield additional relevant information and granted the Insurers' motion." Despite the Referee's decision, the Insurers are adamant that 5 of the 14 terms disregarded by the Referee were essential, and that "with regard to two named doctors on the NFL's MTBI Committee, the Referee mistakenly omitted them." The Referee did not put forth a reason for rejecting the 14 terms, but the court asserted that "implicit in his failure to list them is that he did not find them likely to yield additional relevant information." The court then addressed each search term.

Discovery is allowed where the request is "reasonably calculated to lead to the discovery of relevant information" and is not unduly burdensome."

With respect to the two named doctors that the Insurers assert the Referee mistakenly admitted, the court found that it was not clear "that searching for any of the names of the members of the MTBI Committee would meaningfully add to the anticipated robust response that simply searching 'MTBI' would yield." Thus, the court rejected the Insurers' argument.

Additionally, the Insurers asked that the first name of a different doctor be included in the search terms. However, the court denied this request as the Insurers did not explain why he would be referred to by only his first name nor did they request the first name of the other doctors be included as search terms. Nevertheless, the court stated that the "Insurers are welcome to question witnesses about whether they referenced the doctor by his first name, and if so, renew this request."

Next, the Insurers requested that a book title and a movie's title, producer, and star be included in the search terms. Both the book and the movie pertain to concussions. The court noted that "the Insurers concede that both the book and the movie post-date the filing of the underlying litigation, but argue that there may be communications discussing whether the book is accurate or affected the NFL's decision to settle." With this in mind, the court decided that the Insurers can certainly inquire and renew their request if appropriate.

Penultimately, the Insurers sought to add the name of a football player who wore a specially designed helmet that was designed to reduce the risk of concussions. However, since the name of the helmet was an initial search term, the court found that the name of the football player would be "redundant and not likely to lead to new or different relevant information."

Lastly, the Insurers sought to add the name of a U.S. tobacco company, which was formerly partially owned by a co-owner of the NY Giants football team. The Insurers asserted that the "NFL and [the tobacco company] shared lobbyists, lawyers, and consultants." Furthermore, the Insurers stated that the above-mentioned co-owner of the NY Giants communicated with tobacco company's general counsel. Disregarding the NFL's contention that searching the tobacco company's name would result in many irrelevant hits, the court found that the addition of the company name was "reasonably calculated to lead to the discovery of relevant information" and it is not unduly burdensome.
Topic(s): Production. Search terms/

Doe v. Bronx Preparatory Charter Sch., 160 AD3d 591 (1st Dept 2018)

Judge(s): Renwick, Tom, Andrias, Oing. In denying authorization to obtain the infant plaintiff's social media records the Appellate Division noted:

> there was no showing that plaintiffs wilfully failed to comply with any discovery order, since they provided access to the infant plaintiff's social media accounts and cell phone records for a period of two months before the date on which she was allegedly attacked on defendant's premises to the present, which was a reasonable period of time. Defendant's demands for access to social media accounts for five years prior to the incident, and to cell phone records for two years prior to the incident, were overbroad and not reasonably tailored to obtain discovery relevant to the issues in the case

Topic(s): Social Media.

Doe v. City of New York, 2020 NY Slip Op 30183[U] (Sup Ct, NY County 2020).

Judge(s) Frank. Plaintiff was allegedly sexually assaulted by another student while in the playground at a public school. There was footage wherein two school employees were shown standing and talking to each other while the alleged assault was occurring. A notice requesting the preservation of the footage was sent by plaintiff's attorney to the school principal's email and what plaintiff asserts is the department of education's email. The footage was not preserved and instead was "erased pursuant to the [Department of Education's] 90-day retention archive policies." Plaintiff moved for spoliation sanctions, arguing that defendant had an obligation to preserve video surveillance footage and failed to do so. Specifically, plaintiff moved to strike the defendants' answer. The court denied plaintiff's motion. The court stated that "plaintiff has not established that defendants intended to conceal or destroy evidence, thus failing to warrant such an extreme sanction, especially where here the mailed notice of preservation was sent at most one day before the evidence was to be destroyed."
Topic(s) Spoliation. Video footage. Preservation of Evidence.

Donato v. Nutovits, 2016 NY Slip Op 32763(U) (Sup Ct, Westchester County 2016)

Judge(s): Leftkowitz. The gravamen of plaintiff's argument is that according to plaintiff, HVHC tendered to plaintiff four versions of decedent's HVHC medical file, and nurse Myrna Bacdayan testified at her November 12, 2015, deposition that "the notes of the nurses are missing" These ostensible differences and characterization of nursing notes as "missing" give rise to plaintiff's argument that the audit log/trail of decedent's electronic medical record is necessary to plaintiff's case. The Court denying the motion noted:

> Whatever the potential discoverability of system metadata in this action, this Court is constrained to deny plaintiff's motion on grounds that the sought materials apparently do not exist or cannot be procured by defendant with reasonable diligence. The Szymanski affidavit makes clear that metadata retrieval requires that technical software such as P2 Sentinel software be installed and functioning at the time the underlying record is made. Because HVHC installed this technical software after the record dates for which plaintiff now seeks discovery of metadata, HVHC argues - and this Court is constrained to accept - that the sought metadata cannot be harvested. It is axiomatic that a party can prevail on a CPLR 3124 motion only to compel disclosure of materials that exist, not materials that do not exist.

Topic(s): Metadata.

Doyle v. Temco Serv. Indus., Inc., 172 AD3d 554 (App Div 2019)

Judge(s): Guzman, Acosta, Richter, Manzanet-Daniels, Webber, Kern. The First Department reversed an order denying defendants' motion to compel plaintiff to provide access to any social media accounts maintained after a slip and fall accident at her place of work. Plaintiff claimed that her injuries have caused her to suffer a loss of enjoyment of life. Defendants are entitled to discovery to rebut these claims. Although defendants' original discovery demands were overbroad, they have limited their demands to social media records "regarding social and recreational activities that she claims have been limited by her accident." The motion to compel was granted to that extent.
Topic(s): Social Media.

Dziadaszek v. Legacy Stratford, LLC, 177 AD3d 1276 (4th Dept 2019)

Judge(s) Carni, Lindley, DeJoseph, Curran, and Winslow. Plaintiffs cross-moved for spoliation sanctions against certain defendants. The Supreme Court denied the cross-motion. The Appellate Division affirmed. In finding that the spoliation sanctions were appropriate, the court asserted that the moving party must establish that the evidence was destroyed with a culpable state of mind. Here, the court found that plaintiff failed to establish that the defendants intentionally or negligently disposed of certain video footage. The court noted that the record indicates that the video footage had been automatically overwritten within three

weeks of the accident and several months before this action was commenced. Furthermore, the court pointed out that plaintiffs did not request the footage until over two years after the accident.
Topic(s) Spoliation. Video footage.

Eastern Consol. Props., Inc. v. Waterbridge Capital LLC, 2020 NY Slip Op 30310[U] (Sup Ct, NY County 2020)

Judge(s) Borrok. Plaintiff, Eastern Consolidated Properties, Inc., alleged that it introduced a property to the then Director of Acquisitions at Waterbridge Capital LLC. Later, on January 6, 2014, an oral agreement was reached between Plaintiff's licensed real estate salespeople and the Chief Executive Officer of Waterbridge. Under the agreement, "plaintiff agreed to accept a half commission of 1/2% for Waterbridge's purchase of the Property." After closing, the Plaintiff demanded its commission, however the defendants refused to pay. After the plaintiff's initiated the suit, defendants demanded that all "Documents and Communications concerning the Property that mention or concern the January 6, 2014 meeting by and among [Schreiber, Chief Executive Officer of Waterbridge,] and Plaintiff." Defendant's counsel deposed both of plaintiff's real estate salespeople, questioning them about text messages that might exist about the sale of the property. During deposition, one of the real estate people said that he had replaced his phone six times since 2013, but that he believed his phone may have backed up to the Plaintiff's storage. Additionally, the plaintiff's other real estate person stated that she had erased tests and had lost her phone sometime after the relevant texts were exchanged.

The court held that no sanctions on the plaintiff would be appropriate. First, the court examined if the texts were destroyed when litigation was reasonably anticipated. The court noted that the plaintiff failed to implement a litigation hold and that litigation was not reasonably anticipated when the destruction of texts occurred. Furthermore, the court noted that "it is not clear that the Plaintiff had the requisite control" over the real estate people "as employees as opposed to independent contractors, or that the Plaintiff could control the contents and/or disposition of their personal phones." Next, the court asserted there was no evidence that the real estate people had acted with a culpable state of mind. Lastly, since there was "no intentional or willful destruction of the text messages, there [was] no presumption of relevance."
Topic(s) Spoliation. Text Messages. Preservation of evidence.

Elias v. Tolbert, 2019 NY Slip Op 31779(U) (Sup Ct, NY County 2019)

Judge(s): Silver. In a medical malpractice action, defendants request emails to/from Ms. Sonin, as plaintiff testified that he spoke with Ms. Sonin about decedent during the last few weeks of decedent's life. Plaintiff argued he was not obligated to provide these

emails to defendant and that a previous court order explicitly stated defendants are not entitled to such emails. The court denied defendants' request and stated:

> Defendants' argument that plaintiff testified that he spoke with Ms. Sonin about decedent during the last few weeks of decedent's life is unavailing as it does not demonstrate the relevance or materiality of Ms. Sonin's […] emails to any particular issue in this case.

Topic(s): Production of emails.

Ellis v. JP Morgan Chase Bank, N.A., 2019 NY Slip Op 32796[U] (Sup Ct, NY County 2019)

Judge(s) Lebovits. Plaintiff, a delivery driver, attempted to make a delivery to defendant JP Morgan's offices when she was injured in the loading dock. She brought this personal injury action. Defendant moved for summary judgment, and plaintiff cross-moved for spoliation sanctions. Plaintiff alleged that there was video footage from several security cameras in the loading dock that was taken on the day of the incident, but that the footage was overwritten before plaintiff could obtain it. In arguing against the spoliation sanctions "JP Morgan [argued] that the incident itself did not provide notice of the possibility of future litigation," so they had no duty to preserve. The court disagreed. The court noted that "a defendant's contemporary knowledge that an individual has been injured in an accident on the defendant's premises can give rise to an obligation to preserve video footage for potential future litigation even in the absence of a damages claim or pre-action litigation-hold notice." Here, the court stated that JP Morgan's security manager was at the scene of the incident within minutes of its occurrence and "was informed both of the circumstances of the incident and that [plaintiff] had been injured. Thus, the court held that JP Morgan had an obligation to preserve the footage since it had notice and spoliation sanctions in the form of adverse inference were appropriate.
Topic(s) Spoliation. Video footage. Preservation of evidence. Adverse Inference.

Elmaleh v. Vroom, 160 AD3d 557 (1st Dept 2018)

Judge(s): Friedman, Richter, Andrias, Kapnick, Webber. the motion court reversed a grant of spoliation sanctions to the extent of precluding defendant from "testifying at trial or offering evidence in an affidavit in substantive motion practice," where defendant was not on notice that the Electronic Data Recorder (EDR) in his car "would be needed for future litigation." The motion court held that the failure to preserve the car or the EDR "did not constitute negligent spoliation of evidence" especially where plaintiff did not promptly make a demand for either the EDR or an opportunity to inspect the car.
Topic(s): Spoliation.

Encore I, Inc. v. Kabcenell, 2016 NY Slip Op 32282(U) (Sup Ct, NY County 2016)

Judge(s): Schecter. Defendant Kabcenell searches where not enough as "demonstrated by his repeatedly finding more responsive email after conducting more searches." Where it is demonstrated that a party after multiple attempts has not adequately reviewed and produced its ESI, despite an affidavit of good search, the defendant must make his laptop accessible to a computer forensic expert to ensure a fulsome ESI production.
Topic(s): Forensic Examination.

Estate of White, 2017 NYLJ LEXIS 2780 (Surr Ct, Suffolk County 2017)

Judge(s): Czygier. petitioner, the duly appointed fiduciary of the estate of a decedent, sought an order granting him access to a Google email account of the decedent, to which Google has refused to grant access. Petitioner asserted that decedent may have assets that can only be identified and administered after gaining access to that email account. The court noted that it appeared that the "decedent may have owned a business at the time of his death and that an assessment of this business, including its assets and liabilities, cannot be completed without obtaining access to the information contained in this email account." EPTL Article 13-A, which addresses access to digital assets, is applicable to an administrator acting for a decedent and a custodian of the user who resides in New York at the date of death. The court noted that "[a]lthough it appears that Google, Inc. provides an "online tool" to grant access to "'trusted contacts' after a period of inactivity, it does not appear that the decedent had activated this feature; nor did decedent address disclosure of his digital assets via a will, trust or other record." Petitioner asserted that there is no state or federal law, including, but not limited to, the Stored Communications Act that prohibits disclosure of the contents stored in decedent's email account.

Although the application was unopposed, the court expressed concern "that unfettered access to a decedent's digital assets may result in an unanticipated intrusion into the personal affairs of the decedent or disclosure of sensitive or confidential data, for example, information unrelated to his business or corporation. The court balanced the fiduciary's duty to properly administer this estate, while avoiding the possibility of unintended consequences." As such, the court granted the relief "solely to the extent that Google, Inc. shall disclose the contacts information stored and associated with the email account stated above" and ruled that, if greater access is warranted, application may be made to expand the authority of petitioner.
Topic(s): Access to decedent's emails.

Ferrara Bros. Bldg. Materials Corp. & Best Concrete Mix Corp. v. FMC Constr. LLC, 54 Misc 3d 529 (Sup Ct, Queens County 2016)

Judge(s): Dufficy. In an action premised upon allegations that defendant interfered with a construction contract plaintiff entered with a property developer, plaintiff's motion for the imposition of sanctions against defendant for destruction during the pendency of the

litigation of defendant's computer system, which allegedly contained metadata of the date and time of creation of defendant's contract with the same developer and was therefore relevant to the question whether defendant's principals were aware of plaintiff's contract at the time defendant entered into its own contract, was granted to the extent of directing that a negative inference charge be given at trial. The computer system was discarded at a time when defendant's principals knew or should have known, even absent a specific demand by plaintiff, that the creation and modification of defendant's contract, via the computer system, would bear upon the parties' dispute. Though plaintiff waited years into the litigation to request the metadata, defendant failed to demonstrate that it would have been impractical or cumbersome to preserve the computer system in storage with the metadata intact during the pendency of the litigation, that the metadata was preserved in its native form or that the discarding of the computer system as part of a corporate technology update was an automatic event. Defendant thus failed to rebut the presumption that it was negligent, even grossly negligent, in failing to suspend destruction of the computer system on which its contract was generated.
Topic(s): Metadata, Spoliation.

Forman v. Henkin, 30 N.Y.3d 656 (2018)

Judge(s): Difiore, Rivera, Stein, Fahey, Garcia, Wilson, Feinman. The Court in Henkin noted that a user may "set privacy levels to control with whom they share their information," designating a portion of a social media account as "private" which "typically means that items are shared only with 'friends' or a subset of 'friends' identified by the account holder." However, the Court concluded that "[w]hile Facebook — and sites like it — offer relatively new means of sharing information with others, there is nothing so novel about Facebook materials that precludes application of New York's long-standing disclosure rules to resolve this dispute." The Court stated that:

> a threshold rule requiring that party to "identify relevant information in [the] Facebook account" effectively permits disclosure only in limited circumstances, allowing the account holder to unilaterally obstruct disclosure merely by manipulating "privacy" settings or curating the materials on the public portion of the account. Under such an approach, disclosure turns on the extent to which some of the information sought is already accessible — and not, as it should, on whether it is "material and necessary to the prosecution or defense of an action."

Significantly, the Court "rejected" the "notion that the account holder's so-called 'privacy' settings govern the scope of disclosure of social media materials" and stated that "even private materials may be subject to discovery if they are relevant."
Topic(s): Social Media.

Frat Star Movie, LLC v. Tebele, 2018 NY Slip Op 32042(U) (Sup Ct, New York County 2018)

Judge(s): Lebovits. This is a breach of contract action "resulting from defendant's alleged breach of an agreement in which defendant agreed to promote plaintiff's film, Frat Star, through defendant's popular social media accounts." Plaintiff brought a motion seeking "forensic examinations of (I) the mobile phone of Defendant Elliot Tebele, (2) the mobile phone of Elie Ballas — Tebele's business partner and member of defendant FJerry LLC — and (3) the Apple iCloud accounts and/or any other cloud storage associated with Tebele's phone, Ballas' phone, and FJerry LLC." The court held "in light of this pattern of defendants' representing that they have turned over all their responsive documents only then to turn over more responsive documents shortly after, plaintiff's motion for a forensic examination is granted."
Topic(s): Production. Social Media.

Genger v. Genger, 144 AD3d 581 (1st Dept 2016)

Judge(s): Friedman, Saxe, Richter, Gische. The Court denied the request to review opposing party's computer to obtain electronically stored information ("ESI") because the requesting party "failed to clearly articulate what alleged missing documents prompted such a search, and why those documents could not be obtained . . . from other sources."
Topic(s): Forensic Examination

Gilbert v. Highland Hosp., 52 Misc 3d 555 (Sup Ct, Monroe County 2016)

Judge(s): Doyle. In this medical malpractice action, the court granted plaintiff's motion to compel the production of the "audit trail" of decedent's electronic health records ("EHRs") where the medical records produced to date had not indicated whether an emergency attending physician had reviewed decedent's medical records and plan of care prior to her discharge from the emergency department and plaintiff wanted to quantify the level of such care. The motion court noted that, in addressing the "audit trail" for EHRs, one commentator described it as follows:

> The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's EHR ["electronic health records"]. For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record. It also shows what the provider did with the records — e.g., simply reviewed them, prepared a note, or edited a note. The audit trail may also show how long the records were opened by a particular provider. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail. Providers cannot hide anything they do with the medical record. No one can escape the audit trail.

(2011 Health L. Handbook § 10:9 "The positive effect of EHRs on reducing health care provider liability — the audit trail").

The motion court agreed that the "audit trail will account" for the attending physician's accessing and viewing decedent's EHRs, a topic plaintiff "may wish to explore further during a deposition or on cross-examination." The motion court noted that system metadata is relevant if the authenticity of a document is questioned or, as here, "if establishing who received what information and when is important to the claims or defenses of a party."
Topic(s): Audit Trails.

Global Access Inv. Advisor, LLC v. Lopes, 2017 NY Slip Op 31173(U) (Sup Ct, NY County 2017)

Judge(s): Kalish. The court noted that the spoliation motion presented a "unique question" on the issue of what constitutes "notice" of an impending lawsuit upon a foreign company which did not have an extensive presence in New York or that solicited business as a general matter in New York, sufficient to trigger a potential party's duty to preserve evidence in accordance with the statutory discovery requirements of New York. Plaintiffs asserted that Banif's duty to preserve was triggered as of when a certain email was sent that a legal action was being commenced against it. The motion noted that Banif is a corporation organized under the laws of the Cayman Islands with its principal place of business there. Further, although the email informed Banif that plaintiff had commenced such a lawsuit, it did not indicate that Global had commenced the lawsuit in New York and did not direct Banif to preserve any evidence relevant to the lawsuit. As such, the court denied the spoliation motion ruling that "there is no basis to conclude that Banif had any reason to believe that it would ever be subject to the discovery laws of the state of New York, had knowledge of or should have had knowledge of the discovery laws of the state of New York."
Topic(s): Preservation, Emails.

Goldman v. Chop't Creative Salad Co., LLC, 2019 NY Slip Op 33731[U] (Sup Ct, Bronx County 2019).

Judge(s) Higgitt. Plaintiff commenced this personal injury action after she contracted "an E. Coli infection from food products she purchased from one of defendants' restaurants." Plaintiff sought to compel the defendant to comply with directives from a compliance order. Among the directives were the instructions to conduct a search of ESI of 10 individuals by using specified search terms and search and produce certain text messages. In opposition, defendants argued that they have already provided over 200 pages of material. The court held that defendants must comply with the directives. The court specified that defendants had to "undertake a search of ESI in the control or custody of the 10 individuals specified above for the one- year period prior to [the incident] through the

present." Furthermore, the court found that defendants failed to demonstrate sufficient compliance with the directive that instructed defendants to search for certain text messages and that a search spanning the above mentioned time period must also be commenced with respect to the text messages. Furthermore, the court ordered to provide an affidavit detailing the search that was undertaken for ESI and for the text messages.
Topic(s): Production. Text Messages.

Gonzalez v. City of New York, 47 Misc 3d 1220(A) (Sup Ct, Queens County 2015)

Judge(s): Flug. This action arises from an accident wherein the plaintiff alleges he injured his left knee while acting within the course of his employment. Plaintiff was deposed and during said deposition, plaintiff testified that he posted only one photograph of his knee on his Facebook account. When questioned if he posted any written works or any comments about the accident or his injuries, plaintiff testified that he did not. In reply, defendants attached the results of an internet search which indicates that plaintiff has social media accounts with Facebook, Twitter and Instagram under the name "Kepstar". Defendants attached several printouts which reveals that plaintiff made several comments regarding the accident, how the accident happened, his injuries, his recovery, and his activities post-accident. Defendants claimed that this information clearly contradicts plaintiff's testimony, and accordingly defendants argue that they have established a "factual predicate" that warrants discovery of plaintiff's social medial accounts.

The Court granted the motion noting that "defendants have demonstrated that the plaintiff has posted photographs and comments concerning the how the accident happened and the extent of his injuries. Accordingly, defendants established that discovery of plaintiff's social media account will lead, or may reasonably be calculated to lead, to relevant evidence bearing on plaintiffs claims." However the Court recognized that a persons Facebook profile or other social media accounts, may contain material of a private nature that is not relevant and therefore "the Court shall conduct 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 to determine which of those materials, if any, are relevant to plaintiff's claims and injuries."
Topic(s): Social Media.

Gem Holdco, LLC v. Changing World Techs., LP, 2019 NY Slip Op 30268(U) (Sup Ct, NY County 2019)

Judge(s): Schecter. Defendants moved to vacate the judgment "two years after its entry on the ground of 'newly discovered evidence' that supposedly excuse[d] their failure to comply with court orders." Defendant contended that he could not produce ESI previously because he did not have access to the records and was not aware of a "secret" storage unit they were in. The court found that defendant's counsel never claimed he had lack of access and regardless of whether he knew about the storage unit or not, he did not raise these issues at the time they were to be addressed. Defendant continuously ignored

court orders and "the Appellate Division has repeatedly held that such conduct cannot be countenanced." The court denied defendant's motion to vacate the judgment.
Topic(s): Production of ESI.

Greenberg v. Spitzer, 63 Misc 3d 554 (Sup Ct, Putnam County 2019)

Judge(s): Grossman. The court noted that "the issues raised by electronic discovery, after a lengthy record of precedent regarding 'paper' discovery, do not lend themselves to automatic importation as there is no comparison between paper discovery and electronic discovery" and the cost of electronic storage is nominal. Although there was no dispute over the amount of work involved, the court could not fully "determine the legitimacy of the claimed expense, whether there was a less expensive alternative, or whether the form of production was cost-effective." The court recognized the enormity of the expense and required defendant to reimburse plaintiff one-half of the production costs "subject to a further determination and award of disbursements at the conclusion of the action.
Topic(s): Cost of production.

Greuner v Center for Specialty Care, Inc., 2016 NY Slip Op 32343(U) (Sup Ct, NY County 2016)

Judge(s): Lebovits. The defendant moves to dismiss plaintiff's complaint on the ground that under CPLR 3211 (a)(1) CSC's defense is founded on documentary evidence. The motion court denied a motion to dismiss, pursuant to Rule 3211(a)(1), noting that "emails are generally not considered documentary evidence if they represent an overview of testimony." The court held that the email correspondence and text messages cannot be "characterized as documentary evidence [as they] . . . present the correspondence of each party's position throughout the series of negotiations, and their discussions about terms . . . . [and] can best be characterized as letters or summaries of the parties' conclusions, and thus "raise issues of credibility for a jury to decide."
Topic(s): Emails as documentary evidence.

Hegbeli v. Tjx Cos., 2019 NYLJ LEXIS 2428 (Sup Ct, NY County 2019)

Judge(s): Reed. Plaintiff suffered injuries after a display table fell on her foot in defendant's store. Plaintiff moved to strike defendant's answer after defendant failed to respond to outstanding discovery. Two witnesses, defendant's employees, testified to viewing a video of plaintiff when she alleged the incident occurred. Defendant claimed the video it provided to plaintiff was the only video and it portrayed the incident. Defendant failed to explain the inconsistencies between its employees' deposition and the video it provided, "raising 'the spectre of spoliation.'" Although the court believed a sanction was appropriate, it issued an adverse inference charge against defendant regarding the missing video instead of striking defendant's answer.
Topic(s): Spoliation. Video footage. Emails. Production. Adverse inference instruction.

Herman v. Herman, 2015 NY Slip Op 31205(U) (Sup Ct, NY County 2015)

Judge(s): Kornreich. Ten months after the action was commenced, the parties agreed to a preservation stipulation. Notwithstanding the preservation stipulation, the motion court held that even before it was executed, defendant "had an obligation to preserve ESI, since the obligation to preserve ESI begins when litigation is reasonably anticipated." Further, the motion court noted that the "destruction of ESI after litigation begins is "grossly negligent, if not intentional." Ultimately, the motion court concluded that defendant wrongfully deleted certain emails in violation of his obligation to preserve ESI and directed there to be an adverse inference based upon defendant's failure to deny that he had deleted such emails.
Topic(s): Preservation, Spoliation.

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

Judge(s): Platkin. HMS moves pursuant to CPLR 3126 for the imposition of spoliation sanctions against defendants Curtin and Lange, alleging that they intentionally deleted and destroyed electronically stored information while under a duty of preservation. The relief sought by HMS includes an order of preclusion and an adverse inference. Granting the motion, the court noted:

> the Court finds that both Curtin and Lange engaged in egregious misconduct for which they bear a high degree of culpability. Curtin repeatedly initiated the Secure Erase function of his personal computer to prevent HMS from recovering his deleted files through forensic means. He also intentionally withheld from discovery the external Toshiba hard drive to which he had downloaded a host of confidential information immediately to leaving HMS's employment and which he last accessed while competing against HMS for the Louisiana contract. For her part, Lange deliberately deleted the DRL directory from her PCG laptop to avoid producing it. She also spoliated her iPhone 4 in a deliberate effort to deny HMS access to her text messages. And Lange admits to deleting relevant text messages from her iPhone 5 while under a legal duty to preserve evidence. Adding to defendants' culpability is their failure to testify truthfully about material events, which has had the effect of interfering with the sound administration of justice.
>
> The Court also is mindful of the substantial prejudice accruing to HMS as a result of defendants' misconduct. Both Curtin and Lange stored confidential HMS information on their computers and hard drives, and their spoliation has rendered it impossible to determine what they deleted, destroyed or failed to produce. Further, defendants' misconduct has denied HMS access to metadata showing when defendants accessed, used and/or modified the files that they deleted, destroyed or failed to produce. Metadata is of particular importance here, since defendants acknowledge possessing their former employer's confidences, but maintain that HMS is unable to show evidence of "use". And Lange's text messages in the aftermath of the Louisiana bid protest and

HMS's commencement of litigation have left HMS with an incomplete record of communications.

Topic(s): Spoliation, Metadata.

Hoffman v. Wyckoff Heights Med. Ctr., 2015 NY Slip Op 32580(U) (Sup Ct, NY County 2015)

Judge(s): Friedman. Hoffman seeked an order directing the defendants to produce certain electronically stored information (ESI), already produced to him in the form of text-searchable PDFs, in its original (i.e. native) format, "including original file name with regard to word documents and PDF files, and with original sender and recipient, and subject information, in outlook format, with regard to email." The court denying to order production stated:

Hoffman makes no showing that he demanded production of native files prior to Wyckoff's substantial production of 16,000 documents. Although it is "undoubtedly true" that Wyckoff's production could be searched more easily had the documents been provided in native format with metadata, Hoffman also makes no showing that "the additional searchability that [he] might gain through access to the metadata is critical to [his] pretrial preparation." Hoffman has had substantial time to familiarize himself with the documents produced in response to his discovery requests. His asserted difficulty in searching the documents cannot support the imposition of the burden of reproduction on Wyckoff, particularly given that the documents were produced in a text-searchable format. Indeed, following a compliance conference at which searchability was addressed, Wyckoff provided plaintiff with additional instructions for searching the already-provided documents.

Topic(s): Metadata. Reproduction.

Hurtado v. 96 Dan Meat Mkt., Inc., 2017 NY Slip Op 32375(U) (Sup Ct, NY County 2017)

Judge(s): Kalish. On this motion, Plaintiff moves for various discovery sanctions against Defendant for Defendant's alleged spoliation of evidence. In particular, Plaintiff alleges that Defendant failed to preserve and timely disclose video surveillance of Plaintiff's slip and fall at Defendant's premises. Defendant stated that it was not in possession of any video recordings because footage from the cameras is automatically stored and then auto-erased after 14 days. The court stated:

Even if the Court were to construe the above evidence in the light most favorable to Plaintiff—which the Court is not required to do on this motion—this Court cannot say that Defendant was on notice of a "credible probability" that it would be involved in litigation before the subject surveillance footage auto-erased fourteen days after Plaintiff's alleged slip and fall.

> Such a finding is further buttressed by the fact that Plaintiff apparently did not retain counsel until roughly seven months after the date of her accident, and said counsel never requested that Defendant preserve video or any—evidence when it mailed its claim letter to Defendant on February 26, 2013.

Topic(s): Video footage, Spoliation.

Icon Octavian Ctr., LLC v. Ctr. Navigation, Ltd., 2019 NY Slip Op 32071[U] (Sup Ct, NY County 2019).

Judge(s) Borrok. Plaintiff moved to compel production of documents from non-parties, arguing that "that the defendants should produce documents from the non-parties because [defendant's] relationship with the non-parties provides it the practical ability to obtain the documents in question." Information that is electronically stored was among the requested documents. The court held that the defendants had to produce documents from the nonparties because such documents are in "the possession, custody and control of the defendants." The court stated that "although the documents sought by [plaintiff] are not in the physical possession of the defendants, the record shows that [defendant's] relationship with the non-parties affords [defendant] the ability to obtain the documents that [plaintiff] has requested."

Topic(s): Non-Parties. Production.

I.M. Operating, LLC v. Younan, 2018 NY Slip Op 30025(U) (Sup Ct, NY County 2018)

Judge(s): O'Neil Levy. The motion court relying on People v. Lynes, 49 N.Y.2d 286 (1980), addressed whether certain voicemail messages were admissible, noting that:

> while in each case the issue is one to be decided upon its own peculiar facts, in the first instance the Judge who presides over the trial must determine that the proffered proof permits the drawing of inferences which make it improbable that the caller's voice belongs to anyone other than the purported caller.

The motion court noted that a "caller's own self-identification is not enough to establish the identity of the caller, but the caller's identity may be sufficiently established from surrounding facts and circumstances" and that the "surrounding facts and circumstances can be enough to establish a caller's identity where, for example, the caller makes reference to facts of which he alone is likely to have knowledge, or where the number called back was listed in a directory and the person answering the phone confirmed they are the person whose name is listed with the number in the directory."

Topic(s): Voicemail.

In the Matter of Fedder, File 2011-265265/A (Surr Ct, Nassau County 2015)

The defense asserted that metadata need not be produced because a static "screen shot" of an electronically stored document was sufficient. There, while movant asserted that Citibank had not provided certain metadata and therefore could not substantiate the date data was inputted into its computer system, the court accepted Citibank's position that "screen shot"' of the data demonstrated the date generated.
Topic(s): Metadata.

Israeli v. Rappaport, 2019 NY Slip Op 30070(U) (Sup Ct, NY County 2019)

Judge(s): Madden. In an action arising from injuries to plaintiff from a breast implant procedure done by defendant, "defendant moves for an order to preclude plaintiffs from ordering certain evidence at trial based on their failure to provide discovery, or in the alternative, compelling plaintiffs to produce discovery including plaintiffs' private Facebook and other social media account records."

The court granted defendant's motion directing that plaintiffs provide all photographs, pictures, videos, and other "postings" that plaintiffs "shared" to their Facebook accounts or were "tagged" which depict plaintiff's physical activities relating to her asserted injuries and plaintiff's relationship or interactions with her husband from the date of the alleged malpractice to the present time. The court also granted plaintiffs' cross motion stating that plaintiffs' are not to provide any materials from Facebook accounts dating before the alleged malpractice or any communications between plaintiffs not shared or made available to any third party.
Topic(s): Social Media. Production.

Jenack v. Goshen Operations, LLC, 2019 NY Slip Op 33772[U] (Sup Ct, Orange County 2019).

Judge(s) Sciortino. Plaintiffs brought suit alleging that defendants provided unsafe and inadequate care in a nursing home facility. Plaintiffs moved for an order directing the entry of ESI protocol. Plaintiff's counsel provided the ESI protocol to defendant's counsel, but defendant's counsel responded that the protocol was not necessary in this action. Plaintiffs argued that defendant's past refusal to produce ESI indicates that such refusal will continue without an order. Plaintiffs further argued "that defendants' refusal to provide ESI or to negotiate the terms of the proposed ESI protocol frustrates the Court's interest in effective, expedient discovery." The court granted the plaintiff's motion after finding that the "protocol for the discovery and production of ESI will facilitate the efficient exchange of discovery in this matter." Even though such protocol is not typically required in this type of action as it is not governed by the rules of the Commercial Division, the court still granted the motion as the protocol will "minimize the opportunity for disputes and delays in discovery, and to promote the efficient resolution of this litigation."
Topic(s): Production.

Kaplan v. New York City Dep't. of Health & Mental Hygiene, 142 AD3d 1050 (2nd Dept 2016)

Judge(s): Rivera, Balkin, Hinds-Radix, Barros. The Appellate Division determined that the trial court in granting motion to dismiss, pursuant to CPLR 3211(a)(7), "erred in determining that emails from the plaintiff and her temporary employment agency constituted party admissions and were admissible under an exception to the hearsay rule."
Topic(s): Emails.

Kohan v. Nehmadi, 2017 NY Slip Op 31202(U) (Sup Ct, NY County 2017)

Judge(s): O'Neill Levy. The issue here involves forensic review of a server when a litigation hold had not been implemented. The motion court noted that such "omission is less insidious than it sounds because it appears that there was no mechanism by which defendants' documents were being automatically destroyed." However, due to the nature of the allegations and plaintiff's failure to comply with its discovery obligations, the court found "that it would be useful and reasonable that defendants be compelled to make their allegedly damaged computer tower available for inspection by plaintiffs' computer forensics expert," noting that the inspection "holds a reasonable possibility of providing plaintiffs with relevant documents concerning the management of the subject building." The motion further ordered that defendants are "to make available a copy of their outdated RAISH software program so that plaintiffs' computer forensics expert may examine it at the inspection."
Topic(s): Emails. Spoliation.

Kohl v. Trans High Corp., 2019 NY Slip Op 33110[U] (Sup Ct, NY County 2019).

Judge(s) Masley. Initially, defendant moved to compel plaintiff to produce emails from his personal email account. The court directed the plaintiff to provide a third-party vendor with access to the email account to examine it for the February 15, 2016 to March 16, 2016 timespan. Plaintiff provided access to the email account, and the vendor then determined that no emails were from 2016. The defendant then sought an order to be able to forensically search the plaintiff's personal cell phones and laptops to determine whether relevant emails were not preserved or not produced. The defendant asserted that one email was sent by plaintiff to defendant, but was not found in the email account. Furthermore, a preservation letter was sent, instructing plaintiff to "preserve all evidence located on individual personal . . . devices . . . irrespective of whether Plaintiff believes the file, document, equipment or device contains any relevant information." Lastly, the vendor asserted that "the next appropriate step would be to image Plaintiff's devices . . . and conduct a further search." Plaintiff countered by stating that "he did not use the [email account] in his employment but believes that he may have occasionally sent employment-related emails from the [email account] by mistake on his mobile phone." Furthermore, plaintiff claimed that he diligently searched the email account and found no emails prior to April 2017.

The court declined to grant the defendant's request, calling it "highly-intrusive." The court was not moved by defendant's argument "that more emails may exist or have existed based on the existence of a solitary email, the contents of which [were] not explicitly relevant to this action beyond the fact that it was sent by plaintiff to a board member asking that board member to call him."

However, the court noted that the plaintiff failed to preserve the one email discussed above. The court then directed plaintiff to submit an affidavit with information regarding his cell phones, computers, laptops and other electronic devices that had access to his account from the date of the preservation letter, the manner in which he used the email account, why there were no emails from 2016, and what efforts he took to preserve the contents of the account. Using that information, the court will determine a penalty for failure to preserve emails.
Topic(s) Preservation. Production. Emails.

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

Judge(s): Renwick. The Court established that the parties' emails and other correspondence could be viewed as constituting a binding offer and acceptance of an extension of the employment agreement, such that they created a legally enforceable contract. The Court made it clear that emails may in the appropriate case constitute documentary evidence under CPLR Rule 3211(a)(1), and a recent civil court decision found that emails exchanged between counsel can be sufficient to establish a stipulation that resolves a matter.
Topic(s): Emails. Documentary evidence.

LaBuda v. LaBuda, 175 AD3d 39 (3d Dept 2019)

Judge(s): Garry, Egan Jr., Lynch, Mulvey, Pritzker. In a personal injury action, defendant's discovery demands consisted of photographs and video recording of the incident, all related metadata, and preservation of the cell phone. Plaintiff emailed defendant one photo and one video of the incident and later advised defendant that he no longer had the cell phone. Defendant was granted a dismissal of the action on the grounds of failure to comply with discovery demands and spoliation of evidence. The Third Department reversed this order of the motion court dismissing plaintiff's action as a sanction for spoliation. The court stated:

> the record did not permit a determination whether the metadata from plaintiff's phone was 'critical to the core issue' in the action, specifically, whether defendant acted negligently or intentionally in operating the ATV, nor did it demonstrate that the loss of the metadata, if it had been lost, was so crucial to defendant's case that dismissal was required as a matter of fundamental fairness.

Topic(s): Preservation. Metadata. Spoliation. Cell phone.

Lantigua v. Goldstein, 149 AD3d 1057 (2d Dept 2017)

Judge(s): Hall, Sgroi, Maltese, Duffy. The Appellate Division established that the trial court erred in denying the plaintiff's CPLR 3126 motion to preclude the defendants from offering printouts of his social media pages because the plaintiff denied that the printouts were from his social media account and he had no other means to prove or disprove their authenticity. The court noted:

> the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiff's motion which was to preclude the defendants from offering the printouts as evidence at trial unless the defendants produced the person who obtained the printouts for a deposition, because the plaintiff denied that the printouts were from his Facebook account, and he had no other means to prove or disprove their authenticity.

Topic(s): Social Media.

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

Judge(s): Mahon. The court conducted a preliminary injunction hearing relating to a business dispute concerning partners, where defendant had changed plaintiff's password to certain client information in connection with his starting a competing business. The 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 court also directed defendant to "maintain, preserve and share all electronic files of Expendable Plus LLC" under defendant's control.

Topic(s): Preservation.

Libron v. Sunny, Index No. 02823/20014 (Sup Ct, Queens County, 2015)

Judge(s): Nahman. The issue here is how metadata may be used to date and time when pictures and videos were actually taken and metadata's use in determining whether the image taken accurately reflects the subject that was digitally recorded. The court ordered defendants to exchange the "metadata for photos of scene taken with tablet computer by defendants."

Topic(s): Metadata.

Lisi v. Lowenstein Sandler, LLP, 2017 NY Slip Op 32411(U) (Sup Ct, NY County 2017)

Judge(s): Kornreich. The trial court on a motion to dismiss based on "documentary evidence," predicated upon CPLR Rule 3211(a)(1), noted that where the recipient of the

email did not deny that he received it, but rather claimed no record or recollection of it, and where the email had been transmitted to an email address that plaintiff had regularly used to correspond with the sender and his attorneys, plaintiff's assertion that the email was not entitled to an assumption of its truth or the benefit of every favorable inference on a Rule 3211(a) motion, was rejected, and the court did "not require an inference that the email was not in fact received, and stated that the "most reasonable inference" to be drawn from plaintiff's asserted inability to locate the email in his records was that the email was deleted.

Topic(s): Documentary Evidence. Inferences Drawn From Emails Under CPLR Rule 3211(A)(1).

LM Bus. Assoc., Inc. v. New York, 124 AD3d 1215 (4th Dept 2015)

Judge(s): Centra, Fahey, Whalen, Dejoseph. The Appellate Court reversed on the issue of liability for conversion. The Court noted that:

> a 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." Claimants have never challenged the validity of the search warrant. Moreover, the unchallenged warrant placed no time limit on the retention of the items seized, and the authorization to "seize" the computers was not terminated until County Court ordered the property returned following Boerman's guilty plea. We therefore conclude that defendant's exercise of control over the computers did not constitute conversion inasmuch as it had the proper authority to exercise such control.

Topic(s): Conversion.

Lopez v. 225 4th Ave. Prop. Owner, LLC, 2019 NY Slip Op 30182(U) (Sup Ct, NY County 2019)

Judge(s): Bluth. In an action arising from injuries to plaintiff from a construction accident that took place on defendant's property, defendant moves to strike plaintiff's complaint in response to plaintiff's delay in providing discovery materials. "Pre-accident and post-accident information posted on social media sites is discoverable information." The court held that "plaintiff engaged in willful and contumacious behavior by continuously failing to respond to court orders." Plaintiff had five chances to produce the Facebook information and after agreeing to do so, he willfully refused. The court held that dismissing plaintiff's case was an adequate remedy under the circumstances.

Topic(s): Social Media. Production.

Lucci v. Cabrera, 2015 NY Slip Op 32206(U) (Sup Ct, Queens County 2015)

Judge(s): Weiss. This was an action for personal injuries allegedly sustained by plaintiff after a motor vehicle accident. The Court granted the motion by defendants seeking copies and the electronic/digital files of the remainder of Plaintiff's Facebook photographs. The Court noted:

> Courts have held that to warrant discovery of private social media accounts, "defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's [social media] account-that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims.".
>
> Here, defendants established at plaintiff's deposition that plaintiff posted photographs of himself at a business party, six days after his shoulder surgery in December of 2013, although the Verified Bill of Particulars claims plaintiff was "totally disabled" and confined to bed and home for a period of eleven months after the accident on July 3, 2013. The Bill of Particulars further claims that plaintiff was incapacitated from employment over the same period of time, although plaintiff posted several work promotional photographs on Facebook during that time. As such, defendants have established the factual predicate for obtaining access to plaintiff's social media account. (internal quotations omitted)

Topic(s): Social Media.

Marfo v. Castillo, 2019 NYLJ LEXIS 1490 (Sup Ct, NY County 2019)

Judge(s): Silvera. In an action arising from injuries sustained in a motor vehicle accident, defendants sought to compel plaintiff to provide videos and photos from the date of loss from his smartphone and social media accounts. The court stated that defendant failed to submit a required satisfactory affirmation of good faith, failed to demand discovery that was "reasonably calculated to yield 'material and necessary' information," and his blanket request failed to attempt to limit the requested discovery to eliminate irrelevant information. Defendant showed no basis of knowledge that this material even existed. Defendant's motion was denied.

Topic(s): Production. Social Media.

Maria McBride Prods., Inc. v. Badger, 46 Misc. 3d 1221(A) (Civ Ct, NY County 2015)

Judge(s): d'Auguste. Defendants moved for an order enforcing the parties' stipulation to settle an action which consisted of multiple email exchanges. CPLR Rule 2104 provides that an "agreement between the parties or attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney." The court held that the 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.

Marshall v. Salahuddeen, 2019 NY Slip Op 32687(U) (Sup Ct, NY County 2019).

Judge(s) Silvera. Defendant asked the court to compel plaintiff to provide the contents of plaintiff's social media accounts which depict physical activity. The court granted the motion. The court stated that a party's request for discovery must be "reasonably calculated to yield information that is 'material and necessary.'" The court found that the plaintiff has met that requirement. Here, the plaintiff testified that he could no longer participate in physical activities such as pull-ups. However, the defendant testified that "he followed plaintiff on Instagram and saw a post in which plaintiff was doing pull-ups." Furthermore, the court stated that the defendant has not made an impermissible "blanket request" as the request was tailored to social media information in which the plaintiff is participating in physical activity.
Topic(s): Production. Social Media.

Matter of All Weitz & Luxenberg, 2014 NY Slip Op 33308(U) (Sup Ct, NY County 2014)

Judge(s): Klein Heitler. The Court ordered that Cleaver- Brooks Inc. produce an electronic copy of its digitalized commercial records database and paper copies of any commercial records not yet digitalized.

CB has taken every opportunity to argue that the production of its 12 million document repository would be prohibitively expensive using its antiquated michofiche system. Now CB has revealed that for over a year it has engaged an outside law firm to transfer upwards of 9 million pages of commercial files to an easily accessible computer hard drive, the production of which would virtually eliminate production costs. Since the documents are not protected from attorney-client privilege the Court granted Plaintiff's discovery request.
Topic(s): Discovery. Production.

Matter of Colby II. (Sheba II.), 145 AD3d 1271 (3d Dept 2016)

Judge(s): Mulvey, Egan Jr, Rose, Clark, Aarons An order terminating a mother's parental rights under Social Services Law § 384-b was reversed because the basis of the termination was that the mother abandoned the child and failed to make any contact but the Family Court erred by precluding the mother from admitting printed out social media messaging that she conducted regularly with the child through her adult son's account, as the frequency and content of the social media communications were relevant in

determining whether the mother maintained substantial contact with the child. The court noted:

> A recorded conversation—such as a printed copy of the content of a set of cell phone instant messages—may be authenticated through, among other methods, the "testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered" Notably, "[t]he credibility of the authenticating witness and any motive she [or he] may have had to alter the evidence go to the weight to be accorded this evidence, rather than its admissibility"

Topics(s): Social Media. Instant messages.

Matter of Isabella, 52 Misc 3d 653 (Fam Ct, Albany County 2014)

Judge(s): Kushner. The Court rejected business records exception to the rule against hearsay and denied admission of an email sent by a case worker for the truth of its contents on the grounds that it contained triple hearsay and because the person who sent the email was not the person asked to authenticate it.
Topic(s): Hearsay.

Matter of J.T., 53 Misc 3d 888 (Fam Ct, Onondaga County 2016)

Judge(s): Hanuszczak. Family services petitioned the court in to terminate parental rights and sought an order authorizing service by email of its petition on the non-party father. Upon ruling that personal service on the father was legally "impracticable," the court held that it has broad discretion in determining an alternative means of service that comports with due process. The court stated that "[a]lthough not directly set forth in the CPLR as a means of service, there is no prohibition [to service by email] provided appropriate circumstances exist."
Topic(s): Email. Service.

Matter of Nunz, 2016 NY Slip Op 51185(U), (Surr Ct, Erie County 2016)

Judge(s): Howe. The issue here is how the disclosure to the requesting party of irrelevant, confidential or privileged information can be prevented. The court established that such review can be prevented through often standard reviewing protocols.
Topic(s): Forensic Examination.

Matter of Peerenboom v. Marvel Ent., LLC, 160 AD3d 439 (1st Dept 2018)

Judge(s): Acosta, Tom, Oing, Moulton. The First Department held there to be neither any attorney-client privilege nor any marital privilege over certain documents and noted that, "[g]iven the lack of evidence that Marvel viewed any of [the employee's] personal emails and the lack of evidence of any other actual disclosure to a third party, [the employee's] use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections." As such, the action needed to be remanded for an in camera review to determine whether certain documents were protected as attorney work product. After remand and again before the First Department, the Court found that certain documents were entitled to protection as work product or materials prepared in anticipation of litigation where: (i) emails had discussed changes to pleadings, (ii) documents contained discussions between attorneys regarding topics related to a pending action between petitioner and Perlmutter, (iii) detailed invoices prepared by Perlmutter's attorneys contained summaries of "legal research, analysis, conclusions, legal theory or strategy," and (iv) emails among and between Perlmutter's investigator and his counsel discussed an investigation undertaken by it in connection with the pending action.
Topic(s): Emails, Work Product.

Matter of R.D. (C.L.), 58 Misc 3d 780 (Fam Ct, NY County 2017)

Judge(s): Goldstein. A mother moved to reargue a ruling in her neglect trial, in which incriminating text messages found on her cell phone were admitted into evidence, arguing a proper foundation was not laid to authenticate the texts. She was accused of engaging in prostitution while her two children were present. ACS sought to enter a screenshot of texts on mother's phone indicating she was agreeing to engage in sex for money and the children would be present, stating same was authenticated by the children's father. It asserted a foundation was established as father was familiar with the phone, testified the screenshot was an accurate depiction of the texts he saw, and knew the phone's password and number. The court agreed, noting courts have been flexible as to the manner of authenticating electronic evidence and that often came from a combination of sources. It stated evidence was often authenticated circumstantially, including through distinctive nature of the contents of messages. The court granted reargument, but adhered to its original ruling finding a sufficient foundation was laid for authentication of the two texts taken from the mother's phone.
Topic(s): Cell phone. Screen shot.

Matter of Serrano, 56 Misc 3d 497 (Sur Ct, NY County 2017)

Judge(s): Mella. petitioner requested authority to access his deceased spouse's Google email, contacts and calendar information in order to "be able to inform friends of his passing" and "close any unfinished business etc." Petitioner provided the court with an email from Google, responding to his request for this information, in which Google requested a court order specifying that, among other things, "disclosure of the content [of

the requested electronic information] would not violate any applicable laws, including but not limited to the Electronic Communications Privacy Act and any state equivalent." The court held that to the extent information about a user's contacts is "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person," it is considered a catalogue of electronic communication that may be disclosed. The court held that inasmuch as there is no transfer of information between two or more parties when a calendar or contact entry is made, a user's calendar or contact is not a "communication," the disclosure of which by the custodian is prohibited by the Stored Communications Act, it must be disclosed to a personal representative by the custodian of such record. However, authority to request that Google disclose the contents of the decedent's email communication was denied by the court without prejudice to an application by the voluntary administrator, on notice to Google, establishing that disclosure of that electronic information is reasonably necessary for the administration of the estate.
Topic(s): Access to decedent's emails.

Matter of Sagaponack Ventures, LLC v. Board of Trustees of Sagaponack, 2015 NY Slip Op 31960(U) (Sup Ct, Suffolk County 2015)

Judge(s): Santorelli. "Village Planner stated that his review of the metadata for the photograph renderings taken by the petitioner reveals that they were not taken with a 'naked eye lens,' but a zoom lens without a fixed focal point, and that his photographs show a different height for the poles used to access visual impact because of the 'lensing' used by the petitioner."
Topic(s): Metadata.

Matter of Sucich, 2015 NY Slip Op 50523(U) (Surr Ct, Dutchess County 2015)

Judge(s): Pagones. The proposed executor sought an order authorizing service of a citation by electronic mail pursuant to SCPA §307(3) upon Nicholas Sucich, a nephew and distributee of the decedent who is alleged to have been a fugitive from justice and believed to reside in Mexico.
The court stated:

> [w]hile service of process by e-mail is not directly authorized by either the CPLR or the Hague Convention, it is not prohibited under either state or federal law, or the Hague Convention, given appropriate circumstances … [B]oth New York courts and federal courts have, upon application by plaintiffs [in civil suits], authorized e-mail service of process as an appropriate alternative method when the statutory methods have been proven ineffective.

The 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."

Topic(s): Emails. Service.

Medina v. City of New York, 2015 NY Slip Op 32429(U) (Sup Ct, NY County 2015)

Judge(s): Stallman. In this action arising from injuries to plaintiff in the course of his work at the East Side Access Project, defendants move to compel plaintiff to provide authorizations for the release of plaintiff's social media records from Facebook and Instagram. The Court denying the motion noted:

> A party's "mere possession and utilization of a Facebook account is an insufficient basis to compel [that party] to provide access to the account or to have the court conduct an in camera inspection of the account's usage." (*Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620, 958 N.Y.S.2d 392 [1st Dept 2013].) Rather, the Appellate Division, First Department has held that "[t]o 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." (Id. [internal quotation marks omitted].) In addition, the party seeking discovery must show "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." (*Forman v Henkin*, AD3d, 2015 NY Slip Op 09350 (1st Dept 2015)

Topic(s): Social Media.

Meissner v. Tracy Yun, 2016 NY Slip Op 30468(U) (Sup Ct, NY County 2016)

Judge(s): Oing. Plaintiff moved to compel the production of allegedly privileged email threads among the individual defendant and attorney Christopher Kelly. The motion court found that the record demonstrated that Kelly represented the defendant's entity and performed work for the benefit of the entity, rather than for the individual defendant. The motion court noted that:

> [w]hile [defendant] points to the fact that, in most of the emails at issue here, she communicated with Kelly from her personal email address, this course of conduct is insufficient to establish a separate relationship outside of Kelly's representation of [the entity], as she also used this personal email to conduct business.

Topic(s): Attorney-client privilege. Email chains.

Melissa G. v. North Babylon Union Free Sch. Dist., 2017 NY Slip Op 31085(U) (Sup Ct, Suffolk County 2015)

Judge(s): Rebolini. On a Facebook discovery motion, the trial court required counsel for plaintiff, in the first instance, to review his client's social media postings for relevance, and rejected movant's request for the court to review such postings in camera. Then, in order to protect plaintiff's "reasonable expectation of privacy," the court denied, absent evidence that routine communications with family and friends contained information is material and necessary to the defense, the production of communications sent through the "one-on-one messaging option" that is available through Facebook accounts regarding "private messages sent by or received by plaintiff."
Topic(s): Social Media.

Miller v. Zara USA, Inc., 151 AD3d 462 (1st Dept 2017)

Judge(s): Renwick, Richter, Feinman, Gische, Kahn. The First Department modified a motion court's order granting a protective order precluding defendant from accessing plaintiff's personal documents on an employer-owned laptop, and denied so much of the order that sought protection of attorney-client privileged materials. The Court further directed plaintiff to produce to the motion court all items in the employee's privilege log in which he asserts attorney work product protection and remanded the matter for in camera review to determine whether such documents are protected attorney work product.

The First Department held that "plaintiff lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, Inc. (Zara), his employer, and thus lacked the reasonable assurance of confidentiality that is foundational to attorney-client privilege." The Court noted that:

> [a]mong other factors, Zara's employee handbook, of which plaintiff, Zara's general counsel, had at least constructive knowledge, restricted use of company-owned electronic resources, including computers, to "business purposes" and proscribed offensive uses. The handbook specified that "[a]ny data collected, downloaded and/or created" on its electronic resources was "the exclusive property of Zara," emphasized that "[e]mployees should expect that all information created, transmitted, downloaded, received or stored in Zara's electronic communications resources may be accessed by Zara at any time, without prior notice," and added that employees "do not have an expectation of privacy or confidentiality in any information transmitted or stored in Zara's electronic communication resources (whether or not such information is password-protected)."

Topic(s): Attorney-client privilege

MLO v "Younglawyer", 2015 NY Slip Op 30498(U) (Sup Ct, Kings County 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 such 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 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.'" In sum, the 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): Emails. Service.

Morell v. E. 34th St., 2018 NY Slip Op 31907(U) (Sup Ct, NY County 2018)

Judge(s): Goetz. In a personal injury action, plaintiff sought discovery sanctions after defendants failed to produce emails and texts concerning the incident, among other things. The court found "defendants never instituted a litigation hold and defendants' witnesses admitted during their depositions that they continued to delete their emails and texts on a daily basis during the pendency of this litigation, including up to the time of their depositions." Defendants neglected their discovery obligations and there needed to be a sanction that was appropriate under the circumstances. The court held "the sanction of striking defendants' answer is unwarranted as there are key witnesses that are available to testify and the spoliated evidence does not constitute the "sole means" by which plaintiff can prove her case… Accordingly, an adverse inference charge is an appropriate sanction under the circumstances. In addition, defendants shall be required to pay discovery sanctions to plaintiff for the attorneys' fees and costs incurred in making the three spoliation motions…"
Topic(s): Emails. Text Messages. Spoliation. Adverse inference instruction.

Mylon v. Leibowitz, 2019 NY Slip Op 30258(U) (Sup Ct, NY County 2019)

Judge(s): Silvera. In an action arising from injuries sustained in a motor vehicle accident, defendants sought to compel plaintiff to provide all photos and videos from the date of loss until the present from her smart phone, social media accounts, and computers, preserve all emails, social media accounts, texts, whatsapp accounts, smart phones, apps

on smartphones, laptops, tablets, cameras, go cams, photographs, videos, tags, and to adjourn plaintiff's deposition until production of this discovery. Defendants failed to meet their initial burden threshold as required by the Court of Appeals. Defendants did not demand discovery that was "reasonably calculated to yield information that is 'material and necessary'…defendants blanket request fails to even attempt to narrow or limit the requested discovery to eliminate material that would be irrelevant to the instant action." Defendants' motion was denied.
Topic(s): Production. Preservation. Social Media. Emails.

Netologic Inc., v. Goldman Sachs Grp. Inc., 2016 NY Slip Op 30584(U) (Sup Ct, NY County 2016)

Judge(s): Scarpulla. Plaintiff moved for a protective order related to more than 260 pages of emails that included communications between a CPA and an entity's accountant, as well as with an individual working within the public relations field. Plaintiff also moved for a protective order related to 40 pages of emails that included communications with another CPA, who had been retained in connection with a divorce proceeding involving the entity's CEO. The motion court granted the protective order specifically noting that "[m]erely because a communication concerns [an] action does not mean that is supports a party's claims or defenses." In so ruling, the motion court found that the documents and communications which post-dated the filing of the complaint by many months were not "material and necessary" to either party's claim or defense to the breach of contract causes of action.
Topic(s): Production of emails.

O'Brien v. Peter Marino Architect, PLLC, 2019 NY Slip Op 51061[U] (Sup Ct, New York County 2019).

Judge(s): Reed. Plaintiff brought this discrimination claim. Defendant moved for spoliation sanctions, stating that "metadata collected from [plaintiff's neighbor's] computer shows that there were at least 67 different versions of [a written statement plaintiff had made], suggesting that plaintiff edited and deleted other versions of such statement." The court denied defendant's request for spoliation sanctions. The court stated that "[W]hat defendants seek here is plaintiff's thought process as she came to a final decision on what her statement should contain." The court explained that "[w]hile we are in a high-technological era, where our electronic devices have the ability to track our thought processes before we finalize them, those ponderings should hardly be treated as key evidence — the loss of which invites spoliation sanctions." Furthermore, the court stated that defendant failed to show that plaintiff possessed a culpable mental state, which is required before spoliation sanctions are implemented.
Topic(s): Metadata. Spoliation.

Ocwen Loan Servicing, LLC v Ohio Pub. Emps. Ret. Sys., 2015 NY Slip Op 51775(U) (Sup Ct, NY County 2015)

Judge(s): Bransten. In this action, Plaintiff Ocwen Loan Servicing, LLC ("Ocwen"), a trust servicer, seeks to recover approximately $5 million on behalf of ABFS Mortgage Trust from Defendant Ohio Public Employees Retirement System ("OPERS") on the grounds that OPERS mistakenly received principal distributions to which it was not entitled. Plaintiff now seeks spoliation sanctions, claiming that OPERS failed to preserve relevant electronically stored information ("ESI") in connection with this litigation. Specifically, Plaintiff asks the Court to strike OPERS' sixth affirmative defense asserting detrimental reliance or, alternatively, to issue a preclusion sanction or adverse inference against OPERS. The court granted the motion for sanctions noting that:

> Ocwen has demonstrated prejudice as a result of OPERS' failure to preserve France's ESI and Bloomberg messages. However, the "extreme sanction" of striking OPERS' affirmative defense is not appropriate in this case because Ocwen was able to obtain some evidence to disprove detrimental reliance, namely the August 2009 message sent from Gleacher to France. See [*22] VOOM, 93 AD3d at 45; see also Melcher v. Apollo Medical Fund Mgmt. L.L.C., 105 AD3d 15, 24, 959 N.Y.S.2d 133 (1st Dep't 2013) ("Striking a party's pleading would be too drastic a remedy where [the opposing party is] not entirely bereft of evidence tending to establish [its] position."); Iannucci v. Rose, 8 AD3d 437, 438, 778 N.Y.S.2d 525 (2d Dep't 2004) (denying request to strike pleading as a sanction for spoliation as "[a] less severe sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case"). Since the loss of potentially relevant ESI is not fatal to Ocwen's rebuttal of OPERS' sixth affirmative defense, the imposition of an adverse inference as to that charge is appropriate and "reflects an appropriate balancing under the circumstances."

Topic(s): Spoliation.

Oorah, Inc. v. Covista Commc'ns., Inc., 2016 NY Slip Op 31618(U) (Sup Ct, NY County 2016)

Judge(s): Bransten. The court addressed the implication of a defendant which sold its assets, including its computer servers containing responsive ESI, during the pendency of a litigation without having first preserved such ESI.

The motion court held that defendant should have been aware of its preservation obligations and failed to institute a litigation hold, and then sold its computer servers to a third-party whose "standard protocol" was to erase the servers' content. The court found that the "transfer of the servers without a litigation hold in this context clearly was done with a 'culpable state of mind,' since this element is satisfied by a showing of mere 'ordinary negligence' — a threshold that [defendant's] actions clears easily. In fact, [defendant's] actions here were 'grossly negligent, if not intentional.'" Even though the court found that the overwhelming majority of documents pertaining to the action were located on the sold servers, plaintiff was not left "prejudicially bereft" or without the

"sole means" necessary to establish its breach of contract and breach of fiduciary duty claims. As such, the court did not strike defendant's pleading, but instead ordered that an "adverse inference instruction to be read at trial in connection with [plaintiff's] claims for breach of fiduciary duty and damages for breach of contract."
Topic(s): Spoliation.

Park v. Song, 2019 NY Slip Op 32329[U] (Sup Ct, NY County 2019).

Judge(s) Schecter. Plaintiffs moved to compel defendants to produce certain documents, including point of sale (POS) records from certain restaurants. The court held that the defendants had to produce all POS records. However, the court stated that "to the extent it would be more convenient for defendants to obtain these records directly from the POS companies, they may do so in lieu of attempting to locate them among their unproduced ESI." The court noted, however, that if defendants chose to obtain the records from the POS companies, they would "have to pay whatever associated costs are incurred since the records are within their possession, custody and control." Additionally, plaintiffs sought additional ESI from defendants. However, after stating that the additional ESI was beyond the scope of the agreed-upon protocol, the court denied the request. The court explained that the cost of additional email production would be "disproportionate to the amount in controversy and its relative importance." Notably, the court stated that the plaintiff could choose to seek ESI from third parties through subpoenas, but that plaintiff would have to pay the costs associated with such production.
Topic(s). Production. Cost of production. Non-parties.

Pegasus Aviation I, Inc. v. Varig Logistica S.A., 26 NY3d 543 (2015)

Judge(s): Pigott. The Court of Appeals sustained the concept that spoliation of electronically stored information may be predicated upon negligence. The court hold that the intermediate appellate court erred in reversing the trial court's order that imposed a spoliation sanction on the defendant and the defendant's buyer because the intermediate appellate court all but ignored the plaintiff's arguments concerning the relevance of the electronically stored information.
Topic(s): Spoliation.

People v. Aleynikov, 31 NY3d 383 (2018)

Judge(s): Fahey, DiFiore, Rivera, Stein, Garcia, Wilson, Feinman. The action commenced after an employee of Goldman Sachs transferred Goldman's high-frequency trading source code via a website to a subversion repository right before he left the company to work for another competitor. When determining whether this was unlawful use of secret scientific material, the Court stated that:

> the term "tangible" is not defined in the Penal Law… Instead, we accept the dictionaries' lesson that "tangible" can also denote "material" or "having

> physical form." Second, the statutory language is unambiguous that the crime occurs when an individual "makes a tangible reproduction or representation of… secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material" (Penal Law § 165.07 [emphasis added]). What must be tangible is not the secret scientific material—here, the source code—but the reproduction or representation thereof. The question for the Court, then, is not whether source code is tangible, but whether defendant made a tangible copy or copies of source code when he uploaded source code to a server and downloaded it to his electronic devices.

The court also noted that "appropriation does not imply depriving another of property. In fact, larceny in general is defined as involving either intent to appropriate or intent to deprive, with the clear implication that the two terms refer to separate concepts…defendant may have intended to 'appropriate' the source code without intending to deprive Goldman of all possession or use."

The Court held that "[1]-Sufficient evidence supported defendant's conviction under Penal Law § 165.07, prohibiting unlawful use of secret scientific material, because, inter alia, it showed he created a tangible copy of his former employer's source code without its consent, "tangible" could denote "material" or "having physical form," and the crime occurred when an individual made a tangible reproduction or representation of secret scientific material which was physical in nature; [2]-The evidence was also legally sufficient because it showed defendant had the necessary intent to appropriate it, as he admittedly intended to exercise control over the source code permanently, and appropriation, under Penal Law § 155.00(4), did not imply depriving another of property."

Topic(s): Secret scientific material Electronic trading. Software. Source code.

People v Durant, 26 NY3d 341 (2015)

Judge(s): Abdus-Salaam. Defendant was not entitled to an adverse inference instruction based on the failure of the police to record his interrogation because no case law or statute required the instruction, and the failure to record the interrogation did not give rise to circumstances similar to those held to require the charge, as no legal duty was breached, the police did not destroy material evidence, since the contents of a potential recording was unknown, a missing witness instruction rationale did not apply, and policy dictating defendant's detention at a place lacking recording equipment was not based on a desire to suppress unfavorable statements, nor did the People choose to produce weaker evidence instead of existing stronger evidence, so the instruction was not required as a penalty for governmental malfeasance or akin to a missing witness charge.

Topic(s): Adverse inference instruction.

People v. Flanagan, 132 AD3d 693 (2nd Dept 2015)

Judge(s): Hall, Cohen, Hinds-Radix, Lasalle. The Court affirmed jury's criminal conviction holding that the trial court did not err in "permitting the People to elicit hearsay testimony from a witness relating to an email sent by that witness concerning her belief that, among other things, members of the police department were 'trying to bury the case,' as that testimony was admissible under the 'state-of-mind' exception to the hearsay rule."
Topic(s): Hearsay.

People v. Moye, 51 Misc 3d 1216(A) (Sup Ct, Queens County 2016)

Judge(s): Modica. A defendant challenged the admission of an instant message sent via Facebook from an account identified as the defendant's on the basis of its insufficient authentication. The trial court held that authentication can be established "circumstantially by appearance, contents, substance, internal patterns or other distinctive characteristics of the evidence." The trial court then admitted the instant message "given all the circumstances in the case" on the basis that the victim testified to the defendant's screen name and his photograph and where the contents of the message made no sense unless it was from the defendant.

The trial court held that the "circumstantial evidence" needs to "be sufficient to support a finding that there is a reasonable likelihood that the matter in question is what its proponent claims it is." The trial court noted that "defendant's argument concerning knowing exactly who typed out the message, by eyewitnesses or other evidence, does not defeat admissibility, but rather is more appropriately addressed to the weight of the evidence to be given by the fact finder." The trial court also noted that "[a]lthough a message can be traced to a computer, for example, it can almost never be traced to a specific author with any certainty" and that "the same uncertainties exist with traditional written documents, however; they can be forged, or typed on someone else's computer or typewriter." Lastly, the trial court noted that the First Department had previously found instant messages could be authenticated through evidence including a close friend of the defendant (but not through the defendant who had passed away) who testified to the defendant's screen name, and the defendant's cousin who further testified that she sent an instant message to the same screen name and received a reply, "which would have made no sense unless it came from the defendant."
Topic(s): Authentication. Instant messages

People v. Spears, 2015 NY Slip Op 32678(U) (Sup Ct, Westchester County 2015)

Judge(s): Neary. The defendant contends that a substantial portion of the People's potential evidence consists of medical, social media, telephone, laptop, iPad and iPhone records which are either so remote in time and/or subject to speculation as to be irrelevant concerning the period of time during which the People contend the crime was committed.

The Court denied defendant's motion for preclusion in all aspects and noted:

> The People's argument that certain text messages, phone records, on line searches, and social media entries of the defendant, many of which appear inconsistent to medical information she had received, are probative of her state of mind and constitute evidence of mens rea is persuasive and, assuming the proper foundation can be established, admissible. It would appear that any timely on line searches about the bodily effects of sodium; any photographs posted on social media, allegedly by the defendant, depicting the child's declining health; and any phone records linking her with an attempt to destroy evidence are clearly relevant and admissible as evidence in chief.

Topic(s): Social Media.

Pichardo v. N.Y.C. Transit Auth., 2019 NY Slip Op 31186(U) (Sup Ct, Bronx County 2019)

Judge(s): Danziger. In a personal injury action, defendants moved for an order to compel plaintiff to produce "the private portions of his Facebook page" and to compel plaintiff "to appear for a further deposition with regards to plaintiffs' 'social media accounts.'" Plaintiff did not deny the video submitted and the Facebook account referenced in support of defendants' motion belonged to him, nor did plaintiff contend that the information sought does not contradict his claims of loss. The court found that defendants made "a sufficient predicate showing to warrant the disclosure and examination of plaintiff's Facebook profile" and that plaintiff failed to refute said showing. The court also held that defendants were entitled to a further EBT of plaintiff "to inquire as to the relevant Facebook postings."

Topic(s): Social Media. Spoliation.

Platinum Equity Advisors, LLC v. SDI, Inc., 2016 N.Y. Slip Op 50887(U) (Sup Ct, NY County 2016)

Judge(s): Bransten. Plaintiffs sought dismissal of a pleading on spoliation grounds because defendant failed to preserve ESI generated by representatives of non-party Celerant Capital and its affiliate non-party Celerant Consulting. The issue before the motion court was whether defendant exercised sufficient control over these non-parties and their employees and consultants such that defendant — "which is not alleged to have failed to meet its own obligations to preserve or produce documents relevant to this action — can be held liable for spoliation sanctions based on the [non-parties'] nonproduction." Plaintiffs did not contend that the defendant was involved in the destruction of the non-parties' ESI. Instead, plaintiffs asserted that the non-parties should be deemed the "embodiment" of defendant, since defendant is the successor to the holding company formed by one non-party with other non-parties to complete the transaction.

The court reviewed the First Department's decision in *Pegasus* which analyzed the nature of the relationship between "legally and organizationally distinct entities." In *Pegasus*, the Appellate Division concluded that the subsidiary's ESI was "sufficiently under the [corporation's] 'practical control' to trigger a duty on their part to ensure that those materials were adequately preserved." The court in Platinum, however, found the facts did not demonstrate such "practical control" as defendant was not the sole shareholder of the non-parties (which were not joined in the action) and there was no demonstration that defendant was involved in formulating any of the non-parties' business strategy and there was no admission that defendant could obtain the non-parties' documents upon request.
Topic(s): Spoliation. Non-Parties.

Punter v. N.Y.C. Health & Hosp. Corp., 2019 NY Slip Op 31065(U) (Sup Ct, NY County 2019)

Judge(s): Silver. In a medical malpractice action, plaintiff requests audit trails from defendants seeking information relating to changes made to plaintiffs EMRs (electronic medical records), including the dates and times. "…Plaintiff argues that the EMR audit trail is necessary as the metadata it contains will allow plaintiff to see when entries were made, and who made them, thus allowing her to determine whether the orders regarding diagnoses and treatments were made in a timely and appropriate manner." Defendants argue that the audit trails are irrelevant because they only show when and who accessed the medical records, not when a provider saw the patient. The court denied plaintiff's request and stated:

> plaintiff has yet to demonstrate that the information gleaned from an audit trail would be material and necessary and cannot be deduced from plaintiff's EMRs, which have already been produced. Indeed, to date plaintiff has made no allegation that the EMRs are inauthentic or improperly altered. Plaintiff may establish such a foundation following further discovery and depositions, but has yet to make such a showing, rendering the instant request premature.

Topic(s): Audit trail.

Radiation Oncology Servs. of Cent. N.Y., P.C. v. Our Lady of Lourdes Mem'l. Hosp., Inc., 2020 NY Slip Op 20133 (Sup Ct, Cortland County 2020).

Judge(s) Masler. Plaintiffs move to compel defendants to produce their litigation hold, including all related electronically stored information, and for spoliation sanctions. The court found that plaintiff was able to establish the destruction of ESI. The court stated, in establishing the destruction, "plaintiffs made a preliminary showing of spoliation sufficient to compel production of defendants' litigation hold." Thus, the court ordered defendants to produce the litigation hold, including all associated ESI.
Topic(s) Spoliation. Production.

Rossi v. Doka USA, Ltd., 181 AD3d 523 (1st Dept 2020)

Judge(s) Richter, Gische, Mazarelli, Gesmer. Plaintiff worked as a carpenter, installing concrete walls at 4 World Trade Center. The walls were formed using a system distributed by defendant Doka. The system allowed a form, which would be filled with concrete to create a wall, to move back and forth on a track system using a ratchet. While Plaintiff was operating the system, the wall became difficult to move, and plaintiff used his foot to apply pressure onto the ratchet. While applying pressure, "the gears in the ratchet broke, propelling the ratchet forward and with it plaintiff himself, causing his knee to hit a brace that was directly in front of him." Just over a month before the accident, Doka's senior account manager emailed two other Doka employees that "he had been informed of several defective ratchets at the World Trade Center site." Notably, the ratchet that injured the plaintiff was never recovered.

Two years after the accident, plaintiff commenced this product liability suit. Plaintiff served a demand on defendant Doka for any emails "pertaining to any complaints of defective and malfunctioning Doka wrench/ratchet[s]." Doka searched their records, but was unable to find any emails regarding "defective wrenches or ratchets supplied by Doka to plaintiff's employer for the project." More than one year after the suit was commenced, Doka replaced its email system and all of the emails that predated the replacement were no longer accessible. Defendant Doka moved for spoliation sanctions, arguing that it was entitled to dismissal due to the missing ratchet. Plaintiff cross motioned for spoliation sanctions, "seeking to strike Doka's answer for spoliation, arguing that it destroyed relevant emails." The lower court granted Doka's motion and denied plaintiff's cross motion after finding that Doka could not "exclude the various possibilities that the accident was caused by misuse, alteration, or poor maintenance' . . . rather than some design or manufacturing defect," and that plaintiff had "failed to establish spoliation based on Doka's alleged destruction of emails."

On appeal, the Appellate Division found that the lower court erred in dismissing the complaint and then moved on to address plaintiff's cross motion for spoliation sanctions. First, the Appellate Division asserts that plaintiff, when complaining that Doka should have put a litigation hold on its emails when the suit commenced, resorted to "nothing more than speculation when he [surmised] that there were emails on those servers that could have assisted him in establishing his design defect claim." Furthermore, the court noted that Doka had already conducted a search and found no relevant emails prior to the old server's replacement. In addressing the above referenced email from Doka's senior account manager, the court found that there "[was] no way of knowing whether that email, and any emails responding to it, were deleted outside the ordinary course of Doka's business operations." Thus, the Appellate Division concluded that plaintiff failed to establish "that there were emails still on the server, at the time Doka switched its email provider, that were relevant to his claim" and that spoliation sanctions were improper.

Topic(s) Spoliation. Preservation. Emails.

Royal Waste Serv., Inc. v. Interstate Fire & Cas. Co., 2014 NY Slip Op 30386(U) (Sup Ct, NY County 2014).

Judge(s): Billings. summary judgment denied where defendant supported its claim that plaintiffs failed to pay their premiums only through an unauthenticated email hearsay communication that plaintiffs' premium deposit was not honored.
Topic(s): Hearsay.

RSSM CPA, LLP v. Bell, 2017 NY Slip Op 30020(U) (Sup Ct, NY County 2017)

Judge(s): Kornreich. The plaintiff, RSSM, an accounting firm that had gone out of business, claimed that it could not afford to fund its ESI discovery obligations and sought to shift such costs. The motion court noted that the accounting firm's partners had a financial obligation for the firm's ediscovery obligations, as well as their own. The court rejected the contention that accounting firm's bank controlled its funds and that it would not permit the firm to pay its ESI vendor, which refused to release the processed ESI without payment. The motion court noted that:

> The RSSM Partnership Agreement does not govern discovery. RSSM brought this action. Its partners controlled the decision to bring it. Having done that, they must fund reasonable ESI searches and production. There is no showing that the partners have no funds or that their funds were seized by the Bank. Further, the ESI Stip was agreed to by the TPDs, not just RSSM. It was an agreement between the parties, not imposed by the court.

The court, however, stated that "[g]iven the limitation on the issues left to try and the importance of proportionality when crafting ESI discovery, the court will revisit the scope of ESI searches and limit them to what is reasonably necessary to prepare for trial" and the accounting firm will "have one chance to run more limited searches and produce ESI, at their own expense." Finally, the motion court noted "ESI discovery is not a punishment administered to an adversary to gain an advantage."
Topics(s): Costs.

Ruth Bronner and Zwi Levy Family Sprinkling Trust, 2016 NY Slip Op 30086(U) (Surr Ct, NY County 2016)

Judge(s): Mella. The issue here is that one party is trying to use metadata in an attempt to question the authenticity of a certain document. Movant's counsel stated that the metadata for what he "describes as 'fake page 1 and page 2' . . . has not been lost and, as proof, he provides a printout of a screen shot of the screen in which the metadata 'of the thumb drive' appears indicating: 'Date Modified: 5/16/1995 5:52 P.M.'" In response, opposing counsel stated that the thumb drive containing the metadata of the electronically stored

document provided to movant's counsel did "not reflect the original metadata for this document, as such original metadata no longer exists" as, "since even its 'date of creation' shows a date of November 30, 2007, which correspond[s] to the date the law firm changed its document management system." This case reveals a common mistake when analyzing metadata as the metadata may not reflect accurate information concerning the actual date of the action that the reviewer is trying to analyze, such as when the electronically stored information ("ESI") was, for instance, created, modified, printed or shared with others.
Topic(s): Metadata.

Sarach v. M&T Bank Corp., 140 AD3d 1721 (4th Dept 2016)

Judge(s): Centra, Carni, Dejoseph, Scudder. In April 2010, plaintiff sought pre-action disclosure and the preservation of evidence. Defendant opposed, but represented to the motion court that it had voluntarily undertaken preservation of surveillance videotapes, and ultimately "consent[ed] to an order of preservation." In October 2010, the court granted plaintiff's application and ordered defendant to preserve all "video tapes, including but not limited to security and surveillance video related to the subject accident." After an action had been commenced, in 2014, plaintiff requested videos related to the accident, and defendant's counsel advised that the video was no longer available due to the normal business practice of overwriting videos after ninety days, which overwriting had occurred fourteen months before the October 2010 preservation order had been issued and one year after the accident had taken place in 2009. Nevertheless, the court granted plaintiff's motion, pursuant to CPLR 3126, to strike the answer on the ground that defendant had violated the court's order of preservation.

On appeal, the Fourth Department majority held that a sanction was warranted inasmuch as defendant "wilfully fail[ed] to disclose information" that the court had ordered to be preserved. Nevertheless, the majority held that the motion court abused its discretion in striking defendant's answer, but concluded that an appropriate sanction would be an adverse inference charge given at trial. The dissent noted that such sanction had been imposed by the majority sua sponte without a request by either party. In any event, the majority ruled that it was unable to conclude that defendant's failure to comply with the order was "anything but wilful."
Topic(s): Spoliation.

Semsysco GMBH v. GLOBALFOUNDRIES, Inc., 2019 NY Slip Op 30664(U) (Sup Ct, NY County 2019)

Judge(s): Friedman. In a breach of contract action, defendants move for an order compelling plaintiffs "to make additional disclosure" based on plaintiffs' alleged waiver of the attorney-client privilege as a result of the forwarding of an email chain containing communications between plaintiffs and their counsel. The CEO of Semsysco sent one of defendants' employees an email with a series of emails attached that were privileged communications between plaintiffs and their counsel. The court stated that "the general

rule that a disclosure of a privileged communication will operate as a waiver of the attorney-client privilege is subject to an exception where 'it is shown that the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued.'" Here, plaintiffs failed to meet their burden of showing that this disclosure was unintentional. Plaintiffs failed to show that they acted promptly to remedy the situation. The court directed the Special Referee/JGO to undertake in camera review to determine which documents must be disclosed as a result of the subject matter waiver. The court granted defendants' motion "solely to the extent of referring the above matters to a Special Referee/JHO."

Topic(s): Attorney-client privilege. Email chains.

Shop Architects, P.C. v. 25th St. Art Partners LLC, 145 AD3d 447 (1st Dept 2016)

Judge(s): Tom, Acosta, Andrias, Moskowitz, Khan. The Appellate Court affirmed the order denying defendants the appointment of an expert to conduct a forensic examination of plaintiff's computer system. The Court stated:

> Discovery of electronically stored information may be court ordered where the party seeking such discovery makes a showing that includes that the files sought can actually be obtained by the methods suggested. Here, defendants do not seek any particular document, but instead seek an examination of plaintiff's drives to determine whether any documents exist that have not been exchanged or obtained from third parties. Although defendants had also previously sought to determine when particular invoices were created, plaintiff has admitted that they were all created together, outside of its accounting program, and backdated, mooting that basis for forensic examination of plaintiff's system.

Topic(s): Forensic examination.

Simons v. Petrarch, LLC, 2017 NY Slip Op 30457(U) (Sup Ct, NY County 2017)

Judge(s): Hagler. The motion court was confronted with a series of spoliation applications and ruled as follows. Plaintiff secretly made recordings on her iPhone and then transferred them to her computer. The court ruled that plaintiff had an obligation to preserve both the computer and the iPhone and should thus "be precluded from introducing the undated audio recording into evidence," noting that where "the computer and iPhone have been discarded, defendants have no way to identify when or how the recording was made and whether it had been altered."

Plaintiff selectively saved screen shots of text messages on her cell phones that she believed would support her claims. When plaintiff switched her phone from an iPhone to

a Galaxy, she lost all of the data stored on her iPhones. The court ruled that "plaintiff had a duty to preserve her phones and complete text messages which were in her control." "By throwing away her phones, plaintiff has deprived defendants from viewing the complete and original text messages from where the screen shots were taken. As defendants were deprived of this opportunity, plaintiff 'should be precluded from entering the [screen shots] into evidence or having a witness testify to [their] contents.'"

Had plaintiff "preserved the computer where she inputted her [l]og of harassment, defendants would have been able to review the metadata to determine whether the log was inputted when plaintiff stated it was, or whether, as defendants allege, it was fabricated after, plaintiff's termination." The court thus ruled that defendants "are entitled to an adverse inference charge as to the computer and the corresponding typewritten [l]og and that all disputed issues related to the [l]og shall be resolved in defendants' favor."

As to two deleted recordings that did not support plaintiff's claims, the court ordered that defendants "are entitled to the presumption that the recordings would have been favorable to them, regardless of whether or not plaintiff intends to use them or claims that they contained nothing to support her claim."A "limited and narrowly tailored forensic search of plaintiff's gmail account(s), based on agreed upon search terms was warranted where plaintiff worked for defendants for at least four years and "testified that she communicated with supervisors and other co-workers by means of her personal gmail account." The court noted that "as a result of plaintiff's testimony and her alleged conduct of tampering with evidence, there is reason to believe that she failed to produce all responsive documents included in electronic form from her gmail account."
Topic(s): Cellphone. Emails. Spoliation.

Solartech Renewables, LLC v. Vitti, 156 AD3d 995 (3d Dept 2017)

Judge(s): McCarthy, Lynch, Devine, Clark, Pritzer. Defendant's motion for summary judgement was affirmed as defendant's typed name on proposed side letter did not satisfy statute of frauds since letter did not transform into electronic record (ER) under State Technology Law § 302(3) by attaching it to email, revert to non-ER when printed and signed, and transform into ER when signed copy was scanned and attached to new email.

The Court noted that the Legislature provided in the Electronic Signatures and Records Act ("ESRA) that, "unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." State Technology Law § 304(2). The Court noted that an "electronic signature" is defined as "an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." Id. at § 302(3). Further, an "'[e]lectronic record' shall mean information, evidencing any act, transaction occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." Id. at § 302(2). The Court then concluded that:

> [u]nder ESRA, plaintiff would have a viable argument that defendant signed the emails she sent, as they are electronic records and she typed her name at the end of each. As confirmed at oral argument, however, plaintiff does not contend that the emails constituted signed documents forming the contract, but that defendant's typed name at the end of the proposed side letter constituted her signature. That document was separately typed and attached to emails for transmission. Although emails are electronic records, not every attachment to an email qualifies as an electronic record under ESRA.

However, the Court noted that where an "ordinary typed documents that are scanned and attached to emails," a party could "easily affix a handwritten signature to those documents." Thus, where the defendant provided a "signature line for plaintiff on the proposed side letter and requested that plaintiff's representative sign it to acknowledge acceptance of her conditions," the record demonstrated that "plaintiff's representative must have printed a copy of the proposed side letter and endorsed it with his handwritten signature, then scanned and emailed the signed copy to defendant." The Court thus found that such "act did not transform [the side letter] into an electronic record simply by virtue of its attachment to an electronic record (i.e., defendant's email), revert to a non-electronic record when printed and signed, then transform into an electronic record again when the signed copy was scanned and attached to a new email." Accordingly, even though that letter was attached to an email, the Court rejected plaintiff's argument that "defendant's typed name at the bottom of the letter constituted a signature."
Topic(s): State technology law. Electronic signature.

S.R.E.B. v. E.K.E.B., 2015 NY Slip Op 51158(U) (Sup Ct, Kings County 2015)

Judge(s): Sunshine. A wife contended that her husband had been video recording in the home and that he records continuously with two permanently affixed "DropCam" cameras that are equipped with motion detectors, night vision, and high audio capture ability, which transmit and store recordings on an online cloud for seven to 30 days. The husband contended that he had produced video files stored on an internet cloud (to which his wife did not have access) to the extent that they were under his "custody and control." However, the husband failed to address "whether or not he retained the audio and video [files] after the subpoenas were served upon him" and "whether or not he allowed the audio and video files to lapse and automatically be deleted from the cloud each period so as to purposefully relinquish control over the material." The motion court noted that the husband's claim that he was unable to obtain certain records is "unconvincing in a day and age where cloud storage allows for convenient and extensive access" and that "[e]ven if the files were not under the husband's custody or control, he was bound to take the steps necessary to assure their preservation" given the notice provided to him in the Preliminary Conference Order. The motion court found that the husband's claim that he was "unable to obtain the requested audio and video files [was] completely unavailing [based] upon the fact that he [was] able to store files from the cloud, make the files independent from the cloud, and thereby [had] access them after the cloud access period has lapsed." Finally, the above demonstrated to the court that "there were steps available to the husband to assure the preservation of the material."
Topic(s): Video footage.

Taboola, Inc. v. Aitken, 2016 NY Slip Op 31340(U) (Sup Ct, NY County 2016)

Judge(s): Coin. The court found that an email that stated that plaintiff "is not accusing you of violating the agreement because you no longer are employed at Ketchum" is not "valid documentary evidence" for the purpose of a CPLR 3211(a)(1) motion. The "letters, summaries, opinions, and/or conclusions" of one party are not "essentially undeniable," so they do not constitute documentary evidence. The emails submitted by Taboola do not pass that test since these documents "do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint" because they speak only to the consistency of plaintiff's reasons when communicating with defendant.
Topics: Emails as documentary evidence.

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

Judge(s): Bucaria. In a covenant not to compete action, the parties served competing document requests with plaintiff seeking the production of a variety of electronic communications. Plaintiff sought defendant's communications with clients of plaintiff from both defendant's personal and his new employer's email accounts. Plaintiff's request, however, for the production of metadata concerning such documents was denied, with leave to renew, until after defendants produced the ordered documents.
Topic(s): Metadata.

Threadstone Advisors, LLC v. Success Apparel Inc., 2015 NY Slip Op 31003(U) (Sup Ct, NY County 2015)

Judge(s): Rakower. The court addressed the implication of the failure to appropriately and timely seek the production of metadata when allegedly needed to establish a point. The court expressly noted that defendant's "insinuation" that a certain list was generated for the purpose of litigation is an "argument the court will not consider and if it wanted to prove that the List (a spreadsheet, likely saved as an Excel or Word file) was created after-the-fact, it could have and should have sought the metadata for the file containing the list."
Topic(s): Metadata.

Threadstone Advisors, LLC v Success Apparel Inc., 2017 NY Slip Op 30212(U) (Sup Ct, NY County 2017)

Judges(s): Rakower. Plaintiff served a restraining notice on the entity defendant as well as subpoenas duces tecum and ad testificandum. The document subpoena sought the production of defendant's financial and accounting statements and tax returns, as well as defendant's financial dealings with its owner. Defendant did not satisfy any part of the judgment and did not comply with the subpoena. Defendant argued that its principal "lack[ed] the technical capabilities or know-how to access the server to obtain documents in response to [Plaintiff's] Subpoena." The motion court rejected such argument as "unpersuasive" and noted that parties may be sanctioned for spoliation even when evidence is in the possession of a non-party. While denying the spoliation sanction and refusing, as "improvident," to order the defendant to provide plaintiff with "remote unfettered access through a password" to defendant's accounting system, the motion court granted plaintiff's expert supervised access to defendant's accounting system through normal Quickbooks protocols.
Topic(s): Spoliation. Non-parties.

TIAA Glob. Invs. LLC v. One Astoria Square, LLC, 2016 NY Slip Op 31240(U) (Sup Ct, NY County 2016)

Judge(s): Singh. Plaintiffs move for an order pursuant to CPLR 3124 compelling defendants to produce all electronic documents and emails in their possession, custody or control, including those in the possession of Yahoo! Small Business, as demanded in plaintiffs' July 10, 2013 Notice for Discovery and Inspection; and pursuant to CPLR 3126 striking the Criterion defendants answer due to the spoliation of critical evidence. The Court stated:

> The nature and severity of the sanction depends upon a number of factors, including the knowledge and intent of the spoliator, the existence of proof of an innocent explanation for the loss of the evidence and the degree of prejudice to the opposing party.
>
> The drastic remedy of striking a pleading generally is not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability.
>
> Where independent evidence exists that permits the affected party to adequately prepare its case, striking the spoliator's pleading is unwarranted, and a less drastic sanction, such as imposition of costs, an adverse inference charge or a spoliation charge, is appropriate.
>
> A court may be reluctant to impose sanctions where the destruction of evidence, although intentional, was undertaken in good faith in the course of the defendant's normal business practices

The Court found that the defendants had an obligation to preserve the deleted emails but that the "failure to institute a litigation hold does not amount to recklessness or gross negligence, but only to simple negligence". The Court further found that since the evidence would indeed be relevant an adverse inference charge was appropriate.
Topic(s): Spoliation. Adverse inference.

U.S. Merch. Marine Acad. Alumni Ass'n. and Found. v. Hicks, Index No. 6230/2103 (Sup Ct, Nassau County, 2015)

Judge(s): Capetola. The defendant was unable to "account satisfactorily for the dearth of emails produced and testified that once the lawsuit was commended, he 'made no proactive measure whatsoever' to maintain all the documents in his possession." The motion court found that, while the defendant neglected to properly preserve the documents required, the plaintiff did not establish that "defendants' failure left it prejudicially bereft of the ability to prosecute this action or defend against defendants' counterclaims." As such, the court denied plaintiff's motion to strike defendants' pleading. However, defendants were directed to produce the hard drives of any computers used by them for emails within thirty days and the court further ordered that, if defendants failed to produce them or if the hard drives failed to reveal any relevant documents, a negative inference charge would be issued at trial against defendants.
Topic(s): Preservation, Spoliation.

U.S. Bank N.A. v. Lightstone Holdings LLC, 2016 NY Slip Op 30644(U) (Sup Ct, NY County 2016)

Judge(s): Singh. Defendants moved for an order compelling non-party Cadwalder, Wickersham & Taft to respond to subpoenas duces tecum by producing an unredacted copy of an email chain and billing records that relate to the drafting of a guaranty agreement.

The motion court held that there was "no reasonable expectation of privacy" of the information sought in order to confer the stature of a privileged communication because it was understood that private information conveyed between attorney and client which was to be transmitted to others is not confidential. The motion court also found that the communication was not privileged because it was intended "'to assist counsel in performing other services, such as the provision of business advice or the performance of such functions as negotiating purely commercial aspects of a business relationship'" and thus the subject email chain did not concern predominately legal advice. Finally, the motion court noted that assuming arguendo that the subject email chain was privileged, the privilege had been waived where counsel for the defendants confirmed that a party shared with him the contents of the subject email chain.
Topic(s): Attorney-client privilege. Email chains. Non-parties.

Valentine v. Collins Bros. Moving, 2019 NY Slip Op 33731(U) (Sup Ct, Bronx County 2019)

Judge(s) Silvera. In this action, defendants cross-moved, seeking to have plaintiff "preserve all of his websites, photographs, video recordings, [and] electronic communications." Furthermore, the defendants requested that they be allowed to have "unrestricted authorizations for all of plaintiff's social media accounts" or that the court direct "plaintiff to download and disclose the contents of these accounts." The court noted that defendants failed to submit a satisfactory affirmation of good faith and thus denied the cross-motion. Nonetheless, the court still considered the cross-motion on the merits. According to the court, "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary.'" Here, defendants have argued that access to the social media accounts "may yield relevant evidence." In opposition, the plaintiff contended that the request is "overly broad." In the alternative, plaintiff claimed that the cross-motion is moot since plaintiff had already disclosed the necessary discoverable photographs. Furthermore, plaintiff stated that defendants have provided "no basis that plaintiff is under any obligation to preserve all of his websites and electronic communications." The court agreed with the plaintiff in that the defendant's cross motion is overly broad. The court states that "defendants' demands are blanket demands which would yield every photograph or communication plaintiff has on any topic prior to and since the subject motor vehicle accident." Thus, given the overbreadth of defendants' claim, defendants have failed to meet their initial burden.

Topic(s): Production. Social Media.

Vargas v. Lee, 2015 NY Slip Op 31048(U) (Sup Ct, Kings County 2015)

Judge(s): Dabiri. Plaintiff wanted to discover physicians and hospitals' electronic medical records ("EMR") along with their attendant electronic "audit trails." Plaintiff asserted that the "audit trail" would provide material and necessary information regarding the timing and substance of plaintiff's post-surgical care. The motion court noted that the "issue of metadata production is at the forefront of present day e-discovery disputes." Nevertheless, the court held that "plaintiff has not distinguished the audit trail's utility from that of its corresponding EMR" where plaintiff could presumably obtain the patient's treatment details from the already produced EMRs. The court noted that:

> [i]n some instances, system metadata production has been considered relevant when the process by which a document is created is in issue or there are questions concerning a document's authenticity. While not a prerequisite to meta-data production, such authenticity issues speak to the utility and necessity of such production. Here, plaintiff does not articulate any analogous or salient consideration. General comments that the audit trial may provide discovery on the "timing and substance of plaintiff's care" are insufficient.

Topic(s): Preservation, Metadata.

Vargas v. Lee, 70 AD3d 1073 (App Div 2010)

Judge(s): Scheinkman, Miller, Barros, Nelson. The Second Department reversed an order of the motion court. The court stated "plaintiff's motion to compel defendant hospital to produce the audit trail of plaintiff's records was error because CPLR art. 3101(a) was to be interpreted liberally and plaintiff demonstrated that the part of the audit trail at issue was reasonably likely to yield evidence relevant to the negligence allegations regarding plaintiff's post-operative care and the request was limited to the period immediately following the injured plaintiff's surgery; further, defendant failed to demonstrate that the requested disclosure was improper or otherwise unwarranted, and allegations that producing the audit trail would be time consuming were conclusory and unsubstantiated."
Topic(s): Audit Trails. Production. Metadata.

Vasquez-Santos v. Mathew, 168 AD3d 587 (App Div 2019)

Judge(s): Silvera, Sweeny, Tom, Kahn, Oing, Singh. The First Department reversed an order denying defendant's motion to compel access by a third-party data mining company to plantiff's devices, email accounts, and social media accounts to obtain photographs and evidence of plaintiff engaging in physical activities. The court recognizes that "private social media information can be discoverable to the extent it 'contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims.'" Plaintiff claimed he became disabled after the automobile accident that was at issue. "Defendant is entitled to discovery to rebut such claims and defend against plaintiff's claim of injury." However, access to plaintiff's accounts and devices was limited to only those posted or sent after the accident.
Topic(s): Social Media. Emails. Cell phone.

Virano v. Daggett, 2016 NY Slip Op 32901(U) (Sup Ct, Greene County 2016)

Judge(s): Tailleur. The Court denying defendants motion did an extensive analysis of production of data from social media accounts. The Court noted:

> A court must conduct a two-pronged analysis before it orders the production of data from social media accounts: the Court must determine if the content on the social media account is material and necessary and, second, conduct a balancing test to determine "whether the production of content would result in the violation of the account holder's privacy rights" But first, to warrant discovery, the movant must establish a factual predicate by identifying relevant information in the non-movant's Facebook account that "contradicts or conflicts with the plaintiff's alleged restrictions, disabilities, and losses and other claims". The defense seeks "Plaintiff's Facebook account data, and more specifically, a complete copy of posts and photographs uploaded to the social media account from September 30, 2014 through the present for each one of the plaintiff's Facebook accounts, including those posts and photographs in which plaintiff was 'tagged' by other Facebook users" AND

"Plaintiff's Instagram account data, and more specifically, a complete copy of posts and photographs uploaded to the social media account from September 30, 2014 through the present for each one of the plaintiff's Instagram accounts, including those posts and photographs in which plaintiff was 'tagged' by other Instagram users" (defendant's second demand for social media information, attached as exhibit "Q" to defendant's motion to compel). The defense describes these requests as being a "narrowly-tailored discovery request" for information "for possible use as evidence-in-chief that plaintiff's injuries are exaggerated or on cross-examination as to plaintiff's credibility (defense affirmation in opposition). Clearly, the defense has not established a factual predicate with specificity, much less if it is material and necessary. Their argument is "nothing more than a request to conduct a fishing expedition". Setting aside exhibit "L", the dirt bike photograph", the defense has four (4) photographs that were introduced at the deposition. At that time, the plaintiff testified under oath as to the facts and circumstances of those photographs. Whether those photographs make the plaintiff's allegations more or less credible is a determination left to the trier of fact. This Court does not belief that a review of all photographs of the plaintiff posted on Facebook and Instagram that may lead to a photograph or photographs that would enhance the defendant's claims is reasonable or necessary. Furthermore, the defense has not alleged that the information they seek is not available from another source. (Internal quotations omitted)

Topic(s): Social Media.

Virtu Ams., LLC v. Spartan Cap. Secs., LLC, 2019 NY Slip Op 32940[U] (Sup Ct, NY County 2019).

Judge(s) Borrok. Petitioner commenced the instant petition for pre-action discovery, which was granted thereby allowing petitioner to conduct limited discovery. Respondents were directed “to preserve and not destroy all potentially relevant information concerning the petitioner's claims . . . including but not limited to emails, text messages, voice recordings, and call logs.” Petitioner alleged that the respondent failed to comply with the court’s order and requested permission to conduct a limited forensic examination on certain laptops, smartphones, and tablets. The court denied this request saying that the forensic examination “would go beyond [the order] and would exceed the narrow scope of pre-action discovery permitted by the CPLR.” The court recognized that respondents failed to comply with the order and thus allowed petitioner to provide up to eight search terms that respondents must use in their search of “all responsive documents, including any handwritten notes, text messages, personal and corporate emails, and a privilege log, if needed, to [petitioner] within thirty days after receipt of the search terms.”

Topic(s): Emails. Text messages. Production. Cell phones.

Vivona v. Bridgeview Assoc., LLC, 2019 NY Slip Op 31535(U) (Sup Ct, Bronx County 2019)

Judge(s): Douglas. In a personal injury action, plaintiff alleged he tripped as a result of a misleveling elevator in defendant's building. Defendant sought authorization to obtain the content on plaintiff's Facebook account after plaintiff alleged additional injuries. Defendant submitted an affidavit from a licensed private investigator that searched for and accessed plaintiff's publicly-available Facebook content. Plaintiff deleted photographs that existed before the accident and depicted injuries sustained from previous activities. Defendant "argue[d] that similar material contained on his private Facebook account is material and relevant to defend itself, since it can reveal pre-existing conditions or injuries which may have affected his physical and cognitive functions." The court found that plaintiff's "practice of posting such photographs on Facebook, coupled with his admission that he may have sustained concussion(s) previously satisfied defendant's burden of showing that plaintiff's Facebook account was reasonably likely to reveal relevant evidence." Plaintiff was ordered to release the contents of his Facebook account limited to photographs and other content referencing athletic activities.
Topic(s): Social Media. Production.

Walt Disney Co. v. Peerenboom, 2019 NY Slip Op 30181(U) (Sup Ct, NY County 2019)

Judge(s): Bannon. Petitioner sought a protective order quashing the subpoena served on it by respondent. The subpoena sought documents from petitioner's email accounts, company policies, documents and communications concerning employment contracts, documents and communications concerning complaints or grievances, documents and communications concerning any legal actions or claims, and documents and communications showing internet usage history. Petitioner did not object to the production of non-privileged documents responsive to the first request. The court found that respondent "fail[ed] to cite any factual basis for seeking information from [petitioner's] e-mail accounts," respondent had broad discovery requests and his arguments were unpersuasive. The court also found that respondent made no other basis for seeking company policies, the other requests would not produce relevant information and there is no "self-evident" reason for disclosure.

Petitioner also sought to have its reasonable costs of compliance with the subpoena paid by defendant. The court found that production expenses of a non-party should be defrayed by the party seeking discovery. Respondent shall be responsible for these expenses, but since petitioner did not specify an amount, the application is denied pending petitioner's submission of an "itemization of the reasonable expenses it actually incurs."

Topic(s): Cost of production. Attorney- client privilege. Emails. Work Product.

W. Flooring & Design, Inc. v. K. Romeo, Inc., 2016 NY Slip Op 31967(U) (Sup Ct, Suffolk County 2016)

Judge(s): Ford. ("Resolution of the pending motion thus seeks credibility assessments concerning documentary evidence (emails sent and received by principals for the parties . . .) not appropriate for a motion to dismiss").
Topics: Emails as documentary evidence.

Woloszuk v. Logan-Young, 162 AD3d 1548 (App Div 2018)

Judge(s): Whalen, Centra, Peradotto, Troutman. In a medical malpractice action, plaintiff sent a notice to defendant to produce discovery from their Computer Aided Detection software. Specifically, plaintiff sought "'CAD findings/CAD printouts/CAD pictures or diagrams,' and also sought '[a]ll algorithms regarding breast mass/breast exam/breast cancer screening.'" Defendants produced the only image in decedent's file, a single-page image report showing CAD markers from decedent's 2006 mammogram. At a later date, the Clinic became aware that they could generate CAD "structured" reports from a patient's digital mammogram file using a specific computer program. After defendants objected to plaintiff's subpoena requesting the CAD reports, plaintiff moved to strike defendants' answers or for other sanctions for defendants' discovery violation. Defendants then generated the CAD reports and provided them to plaintiff. The Fourth Department stated:

> On the merits of the motion, although we agree with the court that plaintiff established that a discovery violation occurred, we conclude that the sanction of striking the answer of the Clinic was too severe under the circumstances of this case… This case is not similar to a spoliation case because the CAD structured reports were never destroyed but, rather, were not generated and produced in a timely manner… We conclude that the Clinic should be sanctioned by imposing costs upon it for any additional expenses plaintiff incurred as a result of the delay in disclosure.

Topic(s): Production, Costs.

W & G Wines, LLC v. Golden Chariot Holdings, LLC, 46 Misc 3d 1202(A) (Sup Ct, Kings County 2014)

Judge(s): Demarest. Defendant moved to dismiss the complaint, pursuant to CPLR Rule3211(a)(1), based on documentary evidence, and annexed printouts of plaintiff's promotional materials from the internet as evidence that plaintiff allegedly violated certain liquor laws and its lease. In denying the motion, the court ruled that "the internet printouts proffered by Defendant from Plaintiff's Facebook page, Yelp, and other sources, are subject to interpretation and their reliability and authenticity have not been sufficiently established. Defendant's cross-motion cannot be granted on this type of printed evidence."
Topic(s): Admissibility.

Zacharius v. Kensington Publ. Corp., 2015 NY Slip Op 31698(U) (Sup Ct, NY County 2015)

Judge(s): Bransten. The court established that the misconduct from plaintiffs was not as extreme and with far less prejudice suffered by the moving party, the motion court imposed the sanction of ordering the payment of the attorneys' fees and costs incurred by defendants in reviewing plaintiff's emails as well as the attorneys' fees and costs incurred by defendants in preparing their spoliation motion.

In determining the appropriate relief to be awarded, the motion court considered the delays and costs to defendants resulting from plaintiff's testimony that she may have inadvertently deleted emails related to the litigation and the motion practice required in order to obtain the Yahoo emails revealing plaintiff's deletions.
Topic(s): Spoliation.Preservation.

Zacharius v. Kensington Publ. Corp., 154 AD3d 450 (1st Dept 2017)

Judge(s): Acosta, Renwick, Webber, Oing, Moulton. the First Department affirmed the motion's court grant of spoliation sanctions in the form of attorneys' fees and the costs incurred in reviewing a certain email account and in making the spoliation motion, where the record:

> demonstrated that plaintiff was in control of her own email account; was aware, as an attorney, of her obligation to preserve it at the time it was destroyed, with or without service of defendants' litigation hold notice upon her, since she commenced the action; and had a "culpable state of mind," as she admitted that she intentionally deleted well over 3,000 emails during the pendency of the action.

Topic(s): Spoliation.