3. DISCOVERY

New York State Bar Association

Basic Matrimonial Practice Skills

Discovery: Navigating the Paper Trail from Commencement to Disposition

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Table of Contents

ARTICLE PAGE

I. **NET WORTH STATEMENT** 2

A. DRL §236(B)(4) 2

B. Non -compliance with the Demand for A Financial Affidavit can result in the preclusion of evidence at trial 3

C. Non-compliance with Discovery and Attempts to Vitiate Agreements .. 3

D. Non-Compliance and Possible Contempt 4

II. NOTICE FOR DISCOVERY AND INSPECTION 5

A. CPLR 3120(1) 5

B. CPLR 3120(2) states that the Notice for Discovery and Inspection or Subpoena Duces Tecum shall specify: 5

C. CPLR 3120(3) 5

D. CPLR 3122 5

III. SCOPE OF DISCLOSURE 7

A. CPLR 3101(a)(1): Disclosure from a Party 7

B. CPLR 3101(a)(2): Disclosure from a Non-Party 8

C. CPLR 3101(h): Amendment or Supplementation of Responses 8

D. Discovery by parties on the issues of grounds and custody 8

E. 22 NYCRR §202.7 (a) and ©: Motions on Discovery 10

F. CPLR 3103(a): Protective Orders 10

G. CPLR 3124 and 3126: Failure to Disclose; Motion to Compel 12

IV. SUBPOENAS 13

A. CPLR 2301: Scope 13

B. CPLR 2302: Authority 13

C. CPLR 2303: Service 13

D. CPLR 2303-a: Service 14

V. MEDICAL AUTHORIZATIONS AND HIPAA 15

A. Privilege 15

B. HIPAA: "The Health Insurance Portability and Accountability Act" (45 CFR §160 and §164) 16

C. Custody Matters 17

D. CPLR 3121: Physical Examination 17

VI. PENSION AND EMPLOYMENT BENEFIT AUTHORIZATIONS 18

VII. DEPOSITIONS AND 22 NYCRR PART 221 19

A. Priority of Depositions: CPLR 3106 19

B. Oral Depositions: CPLR 3107 19

C. Written Depositions: CPLR 3108 19

D. Objections at Oral Depositions: 22 NYCRR 221.1 20

E. Refusal to Answer When Objection is Made: 22 NYCRR 221.2 21

F. Communication with the Deponent 21

VIII. INTERROGATORIES 21

A. CPLR 3130 and 3132: Use and Service of Interrogatories 21

B. CPLR 3131: Scope of Interrogatories 22

C. CPLR 3133: Service of Answers or Objections to Interrogatories 22

IX. NOTICE TO ADMIT 22

A. CPLR 3123(a): Notice to Admit 23

X. NOTICE OF ENTRY ONTO PROPERTY 23

A. CPLR 3120 (1)(III): Entry onto Property 23

XI. ELECTRONIC DISCOVERY 24

A. Introduction 24

B. Preliminary Conference Order 25

C. Electronically Stored Information (ESI 26

1. Preservation.. 26

2. Access 26
3. Form of Production 31
4. Costs of Production. 32
5. Suppression 34
6. Spoliation 35
7. Conversion 37
8. Penal Law 38
9. Privilege 39
10. Malpractice 41
D. Metadata 41

XII. TRIAL DEMANDS 43
A. Demand for Witnesses 43
B. Demand for Experts 43
C. Demand for Statements; Photographs and Videotapes 44

XIII. CONFIDENTIALITY AGREEMENTS 46

I. **NET WORTH STATEMENT**

A. DRL §236(B)(4)

1. There shall be compulsory disclosure by both parties of their respective financial states in a matrimonial action - no showing of special circumstances required.

2. A demand for a statement of net worth can be served at any time after the commencement of an action (e.g. can be served with summons).

3. The statement of net worth must be provided within twenty (20) days of service.

4. The term "net worth" means the amount by which total assets (including income) exceed total liabilities (including fixed financial obligations - i.e. expenses).

5. The statement of net worth shall include:

   i. All income and assets of whatsoever kind and nature and wherever situated; and

   ii. A list of all assets transferred in any manner during the preceding three (3) years or the length of the marriage, whichever is shorter; but

   iii. Transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified.

6. The statement of net worth shall be accompanied by:

   i. A current and representative paycheck stub;

   ii. The most recently filed Federal and State income tax returns with W-2 statement(s); and

   iii. The attorney's retainer agreement.[1]

[1] *See* 22 NYCRR §202.16 (b) and (c) and Appendix A thereto.

B. Non-compliance with the Demand for a Financial Affidavit can result in the preclusion of evidence at trial.

1. Kandel v. Kandel, 129 A.D.2d 617, 514 N.Y.S.2d 404 (2nd Dept. 1987) (The trial court properly precluded a party from offering evidence of his finances at trial, where he failed to comply with the compulsory financial disclosure requirements of DRL §236(B)(4)).

2. Cohen v. Cohen, 228 A.D.2d 961, 644 N.Y.S.2d 831 (3rd Dept. 1996)
The cross examination of an expert witness by a party who failed to produce his financial records was properly curtailed regarding questions concerning the nature and extent of the financial data used to form the expert's opinion).

3. Anthony v. Anthony, 24 A.D.3d 694, 807 N.Y.S.2d 394 (2nd Dept. 2005)
The remedy of preclusion should only be imposed where the moving party establishes that the failure to disclose was wilful, deliberate and contemptuous.

4. Biggio v. Biggio, 24 A.D.3d 694, 807 N.Y.S.2d 394 (2nd Dept. 2005)
i. The party seeking preclusion must come to court with "clean hands." The wife should not have been precluded from offering financial evidence at trial where her spouse had failed to make full disclosure.

C. Non-Compliance with Discovery and Attempts to Vitiate Agreements

1. Label v. Label, 70 A.D.3d 898, 895 N.Y.S.2d 192 (2nd Dep't 2010) Husband's failure to disclose offer by his business partner to purchase his share of a business did not render stipulation of settlement in which wife waived equitable distribution of husband's interest in business so patently unfair as to require its vacatur.

2. Smith v. Walsh, 66 A.D.3d 534, 887 N.Y.S.2d 565 (1st Dep't 2009) Husband's failure to include his income in his financial disclosure was not by itself sufficient to vitiate prenuptial agreement with wife on grounds of duress or overreaching.

3. Pulver v. Pulver, 40 A.D.3d 1315, 837 N.Y.S.2d 369 (3d Dep't 2007).

Wife adequately disclosed her financial standing prior to execution of prenuptial agreement, and thus parties' prenuptial agreement was properly executed and enforceable, even though wife left spaces providing for the amount of stock that she held in each of

her family businesses blank.

D. Non-Compliance and Possible Contempt

The court has the power to punish a party by contempt for fraudulent or deceitful statements, as well as willful omissions, on a financial affidavit. (*See* Kim v. Kim, 170 Misc.2d 968, 652 N.Y.S.2d 694 (Supreme Ct. Suffolk Co. 1996)). Such conduct can also be the subject of criminal prosecution. (*See* People v. Russo, 124 Misc.2d 438, 476 N.Y.S.2d 469 (County Ct. Suffolk Co. 1984)).

II. NOTICE FOR DISCOVERY AND INSPECTION

A. CPLR 3120(1)

1. Two types of devices:

i. A Notice for Discovery and Inspection (commonly referred to as a “D&I Notice”) may be served upon a party to the action; and

ii. A Subpoena Duces Tecum must be served upon third parties.

2. Either device may be served at any time after the commencement of an action (e.g. can be served with summons).

B. CPLR 3120(2) states that the Notice for Discovery and Inspection or Subpoena Duces Tecum shall specify:

1. The time, which shall be no less than twenty (20) days after the service of the notice or subpoena;

2. The place and manner of making the inspection, copy, test or photograph;

3. In the case of inspection, copying, testing or photographing, each item should be described with “reasonable particularity”.

C. CPLR 3120(3)

1. The party issuing a Subpoena Duces Tecum to a third party shall at the same time serve a copy on all other parties.

2. Within five (5) days of receipt of the subpoenaed items, the receiving party must notify all other parties that the items are available for inspection and copying and specify the time and place thereof.

D. CPLR 3122

1. Objections to discovery demands shall be made within twenty (20) days of receipt and must state with “reasonable particularity” the nature of the objection.

2. Medical providers need not respond or object to a Subpoena Duces Tecum, unless it is accompanied by a written authorization

(i.e. HIPAA release form) by the patient.

3. In fact, a subpoena served upon a medical provider shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.

4. Failure to state an objection within twenty (20) days "significantly limits the grounds on which a party can make objections." (Anonymous v. High School for Environmental Studies, 32 A.D.3d 353, 820 N.Y.S.2d 573 (1st Dept. 2006)); but it does not result in the waiver of objection.

III. SCOPE OF DISCLOSURE

A. CPLR 3101(a)(1): Disclosure from a Party

1. There shall be full disclosure from a party of all matter material and necessary in the prosecution or defense of an action - regardless of the burden of proof.

i. Compulsory financial disclosure is a fundamental prerequisite for equitable distribution. (Reed v. Reed, 93 A.D.2d 105, 462 N.Y.S.2d 73 (3rd Dept. 1983); Rubenstein v. Rubenstein, 117 A.D.2d 593, 497 N.Y.S.2d 950 (2nd Dept. 1986)).

ii. Parties are entitled to a searching exploration of each other's assets and dealings at the time of and during the marriage, so as to delineate the extent of 'marital property', discover possible waste of 'marital property' and, in general, gain any information which may bear on the issue of equitable distribution, as well as maintenance and child support. The entire financial history of the marriage must be open for inspection by both parties. It is simply no longer true that the current financial status of the parties is all that counts. (Kaye v. Kaye, 102 A.D.2d 682, 478 N.Y.S.2d 324 (2nd Dept. 1984)).

iii. Absent an unreasonable request, disclosure pertaining to the value and nature of assets in a matrimonial proceeding should span the entire period of the marriage. (Goldsmith v. Goldsmith, 184 A.D.2d 619, 584 N.Y.S.2d 902 (2nd Dept. 1992)).

2. Exceptions to CPLR 3101(a)

i. Pursuant to CPLR 3101(b), privileged matter is not discoverable.

ii. Pursuant to CPLR 3101(c), attorney work product is not discoverable.

iii. Pursuant to CPLR 3101(d), materials prepared in anticipation of litigation or for trial may be obtained only upon a showing of substantial need for them and an undue hardship to obtain their substantial equivalent by other means.

B. CPLR 3101(a)(2): Disclosure from a Non-Party
Special circumstances' ruled no longer a threshold for non-party discovery

Kooper v. Kooper, ___ NYS2d ___, 2010 WL 1912142, 2010 N.Y. Slip Op. 04147, NY A.D. 2 Dept., May 11, 2010.)

Second Department held that it will no longer adhere to the standard of special circumstances. To this end, the Court specifically stated '[w]e hereby disapprove the further application of the 'special circumstances' standard ', however, '[w]e, nevertheless, look behind that language in our cases and find underlying considerations which are appropriate and relevant to the trial court's exercise of its discretion in determining whether a request for discovery from a nonparty should go forward or be quashed.' (Id.) The Court further stated that in order to withstand a challenge to the discovery request, the party seeking discovery must satisfy the threshold requirement that the disclosure sought is 'material and necessary', and a 'bare assertion' of special circumstances does not satisfy the threshold. (Id.)

C. CPLR 3101(h): Amendment or Supplementation of Responses

1. A party must amend or supplement a response previously given to a request for disclosure promptly upon the party thereafter obtaining information (i) that the response was incorrect or incomplete when made or (ii) that, though correct and complete when made, the response is no longer correct and complete.

2. Where a party obtains such information in an insufficient period of time before the commencement of trial to appropriately amend or supplement the response, the party shall not thereupon be precluded from introducing the evidence at trial based solely on the grounds of non-compliance with CPLR 3101(h).

3. Whether the evidence is admitted will be at the court's discretion. The court must find that, although the original response is no longer complete or correct, the failure to amend the response was not "materially misleading." Green v. Staten Island University Hospital, 161 Misc.2d 976, 615 N.Y.S.2d 856 (Supreme Ct. Richmond Co. 1994).

D. Discovery by parties on the issues of grounds and custody [2]

[2] *See* Harriet Cohen, "Limiting Discovery In Custody Cases: Downstate and Upstate Courts Have Taken Different Approaches", 7/14/2003 N.Y.L.J. 9 (col. 1).

1. First and Second Departments: “No”

   i. There is a general prohibition against discovery into the merits of a divorce case, including grounds and child custody.

   ii. This prohibition stems from a historical perspective that courts should exercise their broad discretionary powers to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person. Wegman v. Wegman, 37 N.Y.2.d 940, 380 N.Y.S.2d 649(1975); and it is still very much in force today. *See* Garvin v. Garvin, 162 A.D.2d 497, 556 N.Y.S.2d 699 (2nd Dept. 1990).

   iii. Exceptions

      a. Van Ess v. Van Ess, 100 A.D.2d 848, 474 N.Y.S.2d 90 (2d Dept. 1984) (denying discovery on marital fault, but leaving the door open if necessary to establish cause of action for divorce).

      b. Corsel v. Corsel, 133 A.D.2d 604, 519 N.Y.S.2d 710 (2d Dept. 1987) (denying discovery on marital fault, but leaving the door open where egregious conduct is alleged).

2. Third and Fourth Departments: “Yes”

i. There is no general prohibition against discovery into the merits of a divorce case, including grounds and child custody.

ii. The reasoning is that the failure to fully “flesh out” the issues (e.g. custody) may represent a potential long term danger (e.g. to the child). (*See* Stukes v. Ryan, 289 A.D.2d 623, 733 N.Y.S.2d 541 (3rd Dept. 2001); Lemke v. Lemke, 100 A.D.2d 735, 473 N.Y.S.2d 464 (4th Dept. 1984)).

iii. Restrictions are better left to individual determination, with the trial court having broad discretion to prevent abuse by limiting its use. Semon v. Saridis, 125 A.D.2d 882, 510 N.Y.S.2d 236 (3d Dept. 1986); Schaefer v. Connors, 159 A.D.2d 780, 552 N.Y.S.2d 61 (3d Dept. 1990).

E. 22 NYCRR §202.7 (a) and (c): Motions on Discovery

1. All motions on discovery issues require the simultaneous submission of a “good faith” affirmation.

2. It is an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

3. The affirmation shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with opposing counsel was held.

F. CPLR 3103(a): Protective Orders

1. Whether on motion of a party or on its own initiative, the Court may make a protective order denying, limiting, conditioning or regulating the use of a disclosure device.

2. Such an order is designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts.

3. Service of a motion for a protective order shall suspend disclosure of the particular matter in dispute.

4. If any disclosure has been improperly or irregularly obtained so that

a substantial right of a party is prejudiced, the court may order that the information be suppressed.

5. The Court can (and sometimes must) monitor the extent of discovery in a given case. (Kaye v. Kaye, 102 A.D.2d 682, 478 N.Y.S.2d 324 (2d Dept. 1984)).

6. Cases:

   i. Brown v. Brown, 162 A.D.2d 429, 556 N.Y.S.2d 383 (2nd Dept. 1990) (the burden of establishing exemption from disclosure rests upon the party resisting discovery. The mere assertion that items constitute attorney work product or materials prepared for litigation will not suffice).

   ii. Silber v. Silber, 111 A.D.2d 889, 491 N.Y.S.2d 27 (2d Dept.1985) (affirming the issuance of a protective order to prohibit disclosure of the names of the individual clients of the husband's law firm and depositions of two of its employees due to the wife's vexatious and dilatory behavior).

   iii. Kaufman v. Kaufman, 134 A.D.2d 407, 521 N.Y.S.2d 33 (2d Dept. 1987) (2d Dept. 1987) (finding that the husband was entitled to a protective order where the wife's blunderbuss request for documents was overly broad and oppressive and sought material which was not relevant and which had already been produced).

   iv. Geller v. Geller, 240 A.D.2d 539, 660 N.Y.S.2d 21(2nd Dept. 1997) (where the wife had been using discovery as a tool for harassment and financial waste, the court denied her motion to depose the husband).

   v. MacKinnon v. MacKinnon, 245 A.D.2d 690, 665 N.Y.S.2d 123 (3rd Dept. 1997) (The trial court properly limited the wife's disclosure where her use of "any" and "all" with respect to the husband's financial holdings and transactions pertaining to numerous corporations constituted an overly burdensome demand and she had not yet made use of the deposition or interrogatories).

   vi. Gruen v. Krellenstein, 233 A.D.2d 252, 650 N.Y.S.2d 145 (1st Dept. 1996) (denying the husband's request for a protective order where the wife's discovery demands with respect to his finances were not overbroad since they

specified target documents with sufficient precision and the use of “any” and “all” within the context of specific document demands is acceptable).

G. CPLR 3124 and 3126: Failure to Disclose; Motion to Compel

1. A motion to compel should not be sought unless “normal methods” have been employed, i.e. either (i) a stipulation under CPLR 3102(b), or (ii) a notice has been served and ignored.

2. A motion to compel is available for all forms of discovery except for the CPLR 3123 Demand to Admit; if a party ignores a Demand to Admit, the party will be deemed to have made an admission.

3. Failure to make a timely objection to a discovery demand will substantially compromise a party’s ability to resist a CPLR 3124 motion. Review will be limited to whether the requested information is protected by privilege. (Saratoga Hanress Racing, Inc. v. Roemer, 274 A.D.2d 887, 711 N.Y.S.2d 603 (3rd Dept. 2000)).

4. If any party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds out to have been disclosed, the court may make such orders as are just.

5. A motion to compel may request any of the following under CPLR 3126:

   i. Resolve the issues to which the information sought is relevant in favor of the requesting party;

   ii. Prohibit the non-complying party from supporting or opposing certain claims/defenses or from producing certain things or items in evidence;

   iii. Striking out the non-complying party’s pleadings or parts thereof;

   iv. Staying further proceedings until the order is obeyed;

   v. Dismissing the action or any part thereof; and

   vi. Rendering a judgment by default against the non-complying party.

7. Preliminary Conference Orders now incorporate discovery deadlines and provide for contact with the Court prior to making discovery motions (even if "good faith" attempts to compel have been made under 22 NYCRR 202.7).

8. A sample matrimonial Preliminary Conference Order is attached to the end of this outline.

IV. SUBPOENAS

A. CPLR 2301: Scope

1. A *subpoena* requires the attendance of a person to give testimony.

2. A *subpoena duces tecum* requires the production of documents.

B. CPLR 2302: Authority

1. Both may be issued without court order by an attorney of record for a party to an action.

2. Both may also be issued by court order in certain situations.

C. CPLR 2303: Service

1. A subpoena or subpoena duces tecum shall be served in the same manner as a summons (i.e. CPLR 308).

2. CPLR 308 provides for service as follows:

i. By delivering it to the person to be served;

ii. By delivering it to a person of suitable age and discretion at the actual place of business or dwelling of the person to be served and then mailing it via first class mail to the person to be served at his or her actual place of business or dwelling in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served;

iii. If service is cannot be made with due diligence under the previous two methods, by affixing the summons to the door of the actual place of business or dwelling of the person to be served then mailing it via first class mail to the person to be served at his or her actual place of business or dwelling in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served; or

iv. If service is impracticable under the previous three methods, in such manner as the court, upon motion, directs.

3. To the extent possible, service of a subpoena should be done personally or upon counsel (by consent) in order to avoid complications with enforcement.

4. Any person served with a subpoena shall be paid or tendered in advance authorized traveling expenses and one day’s witness fee.

D. CPLR 2303-a: Service

1. A subpoena to compel the attendance of a party at trial may be served by delivery to the party’s attorney of record (i.e. CPLR 2103).

2. CPLR 2103 provides for service, *inter alia*, as follows:

i. By delivering it to the attorney personally;

ii. By mailing it to the attorney at his or her office;

iii. If the attorney’s office is open, by leaving it with a person in charge; or if no person is in charge, by leaving it in a conspicuous place; or

iv. By dispatching it to the attorney’s office by overnight delivery.

E. For any subpoena or subpoena duces tecum to a third party, whether pre-trial or trial, a copy of it **must** be served on opposing counsel.

F. Any documents received pursuant to a subpoena duces tecum must either be copied and sent to opposing counsel or made available to opposing counsel for inspection and copying.

G. For a subpoena duces tecum for trial, it must specify that the documents be produced at court, not at the issuing attorney's office.

H. Do **not** serve a pre-trial or trial subpoena on a third party without serving all parties to the action, and giving them an opportunity to inspect and copy any documentation received in response to the subpoena; the penalties are severe. Matter of Beiny, 129 A.D.2d 126, 517 N.Y.S.2d 474, *reargument denied with further opinion* 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dept 1987) (when attorney received documents pursuant to third party, pre-subpoena, and did not notify other side of subpoena or documents received, trial court reported attorney to grievance committee, disqualified firm and suppressed all documentation at trial); Weinberg v Remyco, Inc., 9 A.D.3d 425, 780 N.Y.S.2d 625 (2d Dept, 2004) (mistrial declared where medical records received pursuant to third party, trial subpoena were delivered to attorney's office, rather than court document room, and attorney did not notify other parties); *see also,* Seigel*, New York Practice, 4th Ed.,* Section 382.

V. MEDICAL AUTHORIZATIONS AND HIPAA

A. Privilege

1. The physician/patient privilege protects as confidential certain information
involving that professional relationship.

2. It applies not only to information communicated orally by the patient, but also to information obtained from the observation of the patient's appearance and symptoms (unless obvious to a lay person). Dillenbeck v. Hess, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).

3. It does not apply to billing information or to that a patient visited a physician and made certain payments. Sterling v. Ackerman, 244

A.D.2d 170, 663 N.Y.S.2d 842 (1st Dept. 1997).

4. Pursuant to CPLR 4504(a), unless the patient waives the privilege, a physician shall not be allowed to disclose any information which was acquired in attending a patient in a professional capacity and which was necessary to act in that capacity.

B. HIPAA: "The Health Insurance Portability and Accountability Act" (45 CFR §160 and §164)

1. These privacy regulations create national standards for "covered entities" and their "business associates" concerning, *inter alia*, the use and disclosure of "protected health information".

2. "Covered Entity": any health care provider who electronically transmits health information in connection with certain health care transactions.

3. "Business Associate": any person or organization that contracts with a covered entity and performs activities involving the use or disclosure of protected health care information on their behalf.

4. "Protected Health Information":

   i. Individually identifiable health information that is maintained in any form or medium; related to, identifies or could identify the person that the health information concerns; and is maintained or transmitted by a covered entity.

   ii. Includes an individual's name, address, birth date, and social security number; past, present or future physical or mental health or condition; the provision of health care to the individual; and the past, present or future payment for the provision of health care to the individual.

5. The regulations generally require that proper patient "authorizations" be obtained prior to the disclosure of protected health information.

   i. Without authorization, disclosure of such information is permitted (but not required) as follows:

      a. To the individual.

      b. For treatment, payment and certain other health care options.

c. In judicial proceedings in response to court order.

d. In judicial proceedings in response to subpoena if certain documented assurances regarding notice to individual or a protective order is provided.

ii. Without an authorization, disclosure of psychotherapy notes is prohibited.

6. The regulations further limit the quantity of protected health information being disclosed - the minimum amount necessary to accomplish the recommended purposes of disclosure.

7. Plaintiffs in medical malpractice actions can be compelled to execute HIPAA authorizations permitting defense counsel access to plaintiff's medical records. The placing of plaintiff's medical or psychological condition at issue waives the physician/patient privilege. (Arons v. Jutkowitz, 9 N.Y.3d 393, 850 N.Y.S.2d 346 (2007)).

C. Custody Matters

1. It is a generally accepted principle that parties to a contested custody proceeding place their physical and mental conditions in issue. Rosenblitt v. Rosenblitt, 107 A.D.2d 292, 486 N.Y.S.2d 741 (2d Dept. 1985).

2. The value of psychiatric evaluations of both the parents and the child(ren) in a custody dispute has long been recognized by the courts of this State. Stern v. Stern, 225 A.D.2d 540, 639 N.Y.S.2d 80 (2d Dept. 1996).

3. Although relevant, the health of a parent is by no means the sole consideration in a custody dispute. Matter of Darlene T, 28 N.Y.2d 391, 322 N.Y.S.2d 231 (1971).

D. CPLR 3121: Physical Examination

1. A party may serve a notice and direct the other to submit to a physical or mental examination by a designated physician.

2. It is limited to where the physical or mental condition of the party to be examined is "in controversy" (e.g. custody; ability to work).

3. The notice shall be served after commencement, on the person to be examined, and specify the time (not less than 20 days after service) and conditions and scope of the examination.

4. Examinations must be accompanied by proper HIPAA authorization or court order.

5. The court's broad discretionary power to grant a protective order should provide adequate safeguards. *See* Wegman v. Wegman, 37 N.Y.2d 940, 380 N.Y.S.2d 649 (1975); CPLR 3103.

6. The party to be examined may have his/her own counsel present for such examination, so long as his/her counsel does not interfere, but opposing counsel may not be present for it. Nalbandian v. Nalbandian, 117 A.D.2d 657, 498 N.Y.S.2d 394 (2d Dept. 1986).

7. Cases:

   i. Wegman v. Wegman, 37 N.Y.2d 940, 380 N.Y.S.2d 649 (1975) (finding that it was proper for the husband to subject the wife to a physical examination where she alleged in her counterclaim that she was suffering from certain specified ailments, in addition to general poor health, and thereby placed her physical condition in controversy).

   ii. Nalbandian v. Nalbandian, 117 A.D.2d 657, 498 N.Y.S.2d 394 (2d Dept. 1986) (finding that the wife placed her psychiatric condition in issue with regard to her claim for maintenance by asserting during her deposition that her inability to work was due to a psychiatric condition and therefore the husband was properly permitted to notice her for a psychiatric condition).

   iii. Perretta v. Perretta, 140 A.D.2d 681, 528 N.Y.S.2d 1006 (2d Dept. 1988) (finding that the husband placed his mental condition in controversy by claiming that he was unable to work due to depression and therefore his mental condition was subject to pre-trial discovery).

8. As a practical matter, a copy of the report must be served on the other party, notwithstanding CPLR 3121(b).

VI. PENSION AND EMPLOYMENT BENEFIT AUTHORIZATIONS

A. A sample Pension Authorization form from Lexington Pension Consultants is attached to the end of this outline as an and also available at the

following link: http://www.lexpen.com/Forms/Authorization%20-%20Blank.pdf

B. Modify such authorizations to have a copy of materials sent to counsel as well.

VII. DEPOSITIONS AND 22 NYCRR PART 221

A. Priority of Depositions: CPLR 3106

1. Plaintiff may not serve a deposition notice on defendant (without court order) until defendant's time to serve a responsive pleading has expired (i.e. defendant has "priority").

B. Oral Depositions: CPLR 3107

1. Require twenty (20) days notice, unless otherwise ordered by the court.

2. The notice shall be in writing, stating the time and place of the deposition, and the name and address of each person to be examined. If any name is not known, then a general description sufficient to identify him or her.

3. The notice need not enumerate the matters upon which person is to be examined.

4. A party to be examined pursuant to a notice already served by the other party may serve notice of at least ten (10) days for the examination of that other party.

5. When the deposition of a non-party is sought, the notices provided for in CPLR 3107 are to be served on all other parties. Pursuant to CPLR 3106(b), a subpoena and requisite fees must be served on the witness. The subpoena should include a statement of the reasons or circumstances that the disclosure is sought. (*See* Wilson v City of Buffalo, 298 A.D.2d 994, 747 N.Y.S.2d 657 (4th Dept. 2002).

C. Written Depositions: CPLR 3108

1. A deposition may be taken on written questions when the examining party and deponent stipulate or when testimony is to be taken without the State.

2. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside the State.

3. Letters Rogatory:

   i. Formal request from a court to a foreign court for some type of assistance.

   ii. The most common remedies sought are service of process and taking of evidence.

D. Objections at Oral Depositions: 22 NYCRR 221.1

1. No objections shall be made at a deposition, except those which, pursuant to subdivision (b), (c) or (d) of CPLR 3115, would be waived if not interposed.

2. All objections made at a deposition shall be noted by the officer before whom the deposition is taken. The answer shall be given and the deposition shall proceed subject to the objection, and to the right of the person to apply for appropriate relief pursuant to CPLR Article 31.

3. Objections must be succinctly stated and framed as so not to suggest an answer to the deponent.

E. Refusal to Answer When Objection is Made: 22 NYCRR 221.2

1. A deponent shall answer all questions, except:

i. To preserve a privilege or right of confidentiality;

ii. To enforce a limitation set forth in an order of the court; or

iii. When the question is “plainly improper” and would, if answered, cause significant prejudice to any person.

2. Any refusal to answer, or direction not to answer, shall be accompanied by a succinct and clear statement of the basis therefor.

F. Communication with the Deponent: 22 NYCRR 221.3

1. An attorney shall not communicate with a deponent unless:

i. All parties consent; or

ii. The communication is made for the purpose of determining whether the question is appropriate on the grounds set forth in 22 NYCRR 221.2.

2. The reason for the communication shall be stated for the record clearly and succinctly.

VIII. INTERROGATORIES

A. CPLR 3130 and 3132: Use and Service of Interrogatories

1. Interrogatories may not be served upon a defendant (without court order), until defendant’s time to serve a responsive pleading has expired.

2. In matrimonial actions only, written interrogatories, as well as a demand for a bill of particulars, may be made upon a party.

3. In matrimonial actions, written interrogatories may be served upon a non-party at any time after the commencement of an action provided:

i. A motion is brought by either party.

ii. Notice is served upon the other party and non-party from

whom disclosure is sought.

iii. Interrogatories are restricted to financial matters concerning a party.

iv. Requested information is both reasonable and necessary in the prosecution or defense of such matrimonial action.

4. A copy of the interrogatories and of any order made under this rule shall be served on each party.

B. CPLR 3131: Scope of Interrogatories

1. May relate to any matters embraced in the disclosure requirement of CPLR 3101.

2. Answers may be used to the same extent as the deposition of a party.

3. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded.

C. CPLR 3133: Service of Answers or Objections to Interrogatories.

1. Service of an answer

i. Must be served within twenty (20) days after the service of the interrogatories.

ii. The party upon whom the interrogatories were served shall serve a copy of the answers to each interrogatory, except ones to which the party objects, in which case the reasons for the objection will be stated with reasonable particularity.

2. Form of answers and objections

i. Shall be in writing and under oath by the party served.

ii. Each question shall be answered adequately and fully, and be preceded by the question to which it responds.

3. Answers may be amended or supplemented only by order of the court, unless done so pursuant to CPLR 3101(h).

IX. NOTICE TO ADMIT

A. CPLR 3123(a): Notice to Admit

1. Can be served on the sooner of:

   i. The service of the defendant's answer.
   ii. Twenty (20) days from service of the summons.

2. However, the notice to admit cannot be served later than twenty (20) days before trial.

3. It may only seek an admission as to the genuineness of papers or documents, the correctness or fairness of representation of photographs, or the truth of any matters of fact, in the request and as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of the other party or can be ascertained by him upon reasonable inquiry.

4. D.M. v S.N., 2008 WL 866042 (Table) (N.Y. Sup) (The husband's use of the term "menage-a-trois" was not defined, either by statute or in the notice to admit itself. The court granted the wife's request for a protective order since there could be a dispute, not only as to the facts but also as to the term being used, which rendered the Notice to Admit improper).

5. A Notice to Admit may not require a party to admit to a crime. McCue v.McCue, 225 A.D.2d 975, 639 N.Y.S.2d 551 (3rd Dept. 1996).

B. The device is used to establish certain facts or authenticity of documentation (including photographs) to be used at trial without protracted testimony. Copies of the documents and or photographs must be served with the request (unless already furnished).

C. Each of the matters as to which an admission is requested is deemed admitted, unless within twenty (20) days of service, the party to whom the request is directed, serves upon the party requesting the admission a sworn statement either (i) denying the matter to which an admission is sought or (ii) setting forth reasons why he cannot truthfully deny or admit those matters.

X. NOTICE OF ENTRY ON TO PROPERTY

A. CPLR 3120(1)(ii): Entry onto Property

B. At any time after commencement, any party may serve upon any other party a notice, or on any other person a subpoena duces tecum, permitting entry upon designated land or other property in the control of the party served, for the purpose of measuring, surveying, sampling, testing, photographing or recording by motion picture or otherwise the property or any specifically designated object or operation thereon.

C. The notice of subpoena duces tecum shall specify the time, which shall not be less than twenty (20) days after service, and the place and manner of the entry upon the land or other property.

XI. ELECTRONIC DISCOVERY

A. Introduction

1. The discovery process has historically involved demands for the production of paper documentation.

i. The issues are whether the document is material and necessary and not subject to any exemptions from disclosure.

ii. If the issues are resolved, the party in possession of the documents is required to produce them.

a. If the volume of documents is small, the party upon whom the demand is made will copy and then serve them upon the demanding party.

b. If the volume of documents is large, the party upon whom the demand is made will make them available for review and copying at the demanding party's expense.

2. In this age of technology, however, information is increasingly stored electronically in addition to and often instead of on paper.

3. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (holding that electronic documents are no less subject to discovery than paper records).

4. Ball v. State of New York, 101 Misc.2d 554, 421 N.Y.S.2d 328 (Court of Claims 1979) (relying on federal authority for the proposition that computer based information is subject to disclosure).

5. A sample Electronic Data and Document Request from KLG Computer Forensics is attached to the end of this outline.

6. Although the analysis remains the same ("material" and "necessary"), there are new and unforeseen issues surrounding electronically stored information.

   i. Are the documents still on the hard drive or are they on some form of back-up?

   ii. What software was used to create and store the documents?

   iii. Is that software commercially available or was it created and/or licensed specifically for the user. (*See* Lipco Electircal Corp v. ASG Consluting Corp., 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (Supreme Ct. Nassau Co. 2004) (Austin, J)).

   iv. Have the documents been deleted?

   v. If so, can those documents be recovered?

7. Unfortunately, there is not all that much law on these issues, although the area is growing.

B. Preliminary Conference Order

1. By administrative order, 22 NYCRR 202.12 was amended, effective March 20, 2009.

2. The matters to be considered at the preliminary conference now include:

   "Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation."

C. Electronically Stored Information (ESI)

1. Preservation

i. Federal Approach

a. The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.

b. A litigant is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.

c. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (finding that the employer had a duty to preserve the backup tapes at issue in a gender discrimination action).

ii. In a matrimonial action, the issue of preserving electronic data should now be addressed at the preliminary conference.

iii. However, a careful practitioner will issue preservation letters and/or notices to opposing counsel and/or non-parties as early as possible.

iv. A sample Electronic Data Preservation Notice / Letter from KLG Computer Forensics is attached to the end of this outline.

2. Access

i. Byrne v. Byrne, 168 Misc.2d 321, 650 N.Y.S.2d 499 (Supreme Ct. Kings Co. 1996) (Rigler, J.)

a. Finding that the computer at issue was used by the parties' children and thus for the family, that the

memory of a computer is akin to a file cabinet, that the wife would have access to a file cabinet in the marital residence and should have access to the contents of the computer, that information stored on the computer concerning the husband's finances and personal business records are discoverable, and that the wife did nothing wrong in removing the computer from the residence to her attorney's office.

b. Ordering that the parties shall meet with their computer experts to download all the memory files on the computer, that the original downloads shall be deposited with the court, that a list of the nature of the documents downloaded will be generated and provided to both counsel, that the husband's attorney may review copies of the documents to determine if any material warrants protection from disclosure, and if not, that the documents be turned over to the wife's attorney.

ii. Lipco Electrical Corp. v. ASG Consulting Corp., 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (Supreme Ct. Nassau Co. 2004) (Austin, J.)

a. Finding that raw computer data or electronic documents are discoverable; that retrieving computer based records or data is not the equivalent of getting the file from a cabinet; that deleted emails are not expunged from a computer's hard drive, can be retrieved by a person with sufficient computer savvy, and are discoverable; and that computer experts can determine if data has been altered and reconstruct the originally entered data.

b. Ordering that the commercial parties provide an appropriate and detailed analysis indicating whether the requested material is on the hard drive or back up tape, the actual procedures involved in extracting this material, and the costs that will be incurred; that the party seeking disclosure agree to pay for the costs of production before the other party is required to produce the requested data; and that a referee be appointed to supervise, schedule and regularly monitor the progress of discovery.

iii. Etzion v. Etzion, 7 Misc.3d 940, 796 N.Y.S.2d 844 (Supreme

Ct. Nassau Co. 2005) (Stack, J.)

a. Finding that matrimonial parties are entitled to full disclosure of financial records (including both hard copy and computer stored data), that some showing must be made before the cloning of a hard drive, that the services of a computer expert is required to insure complete and accurate discovery of relevant data when there are claims that files have been deleted or altered, that such an expert can nevertheless clone a hard drive and restore or rescue deleted documents, and that some files may need review by a court or referee to determine if they contain privileged data.

b. Ordered that the wife is entitled to discovery from the computers where the husband resides and conducts business (excluding privileged attorney-client communications and personal emails to third parties unrelated to business), that the husband shall notify the court-appointed referee of the locations of those computers, that the parties' experts and the referee shall go to the locations of the computers, that the wife's expert shall clone the hard drives, that the hard drives shall be turned over to the referee, that they shall be examined by the experts and referee, that copies of any business records shall be made and distributed to both parties, that the referee shall maintain control of the clones until the conclusion of the matter, and that the referee's determination as to the appropriate review of a particular document shall be final.

iv. Bill S. v. Marilyn S., 8 Misc.3d 1013(A), 801 N.Y.S.2d 776 (Supreme Ct. Nassau Co. 2005) (Balkin, J.) (quashing the husband's subpoenas to Nextel, AT&T and American Online for the wife's phone records and instant messenger chat logs as overbroad and improper attempts to get disclosure on the issue of marital fault since the wife made no showing that the information was relevant and material to the action or of special circumstances to warrant non-party disclosure; but citing Etzion and noting that the body of the electronic messages themselves may be discoverable for financial purposes.

v. Matter of Jeevan Padliyar v. Yeshiva University (Supreme Ct. New York Co.) (6/12/2006) (finding that the petitioner

should have an opportunity to retain his own forensic computer expert to search the respondent's hard drives subject to confidentiality agreement, that access to the hard drives should only be given to the petitioner's expert (not the petitioner), and that an expert report should be submitted to the court).

vi. Delta Financial Corp. v. Morrison, 9/19/2006 N.Y.L.J. 25 (col. 1) (Supreme Ct. Nassau Co.) (Warshawsky, J.)

a. Finding that there is an absence of guidance from the CPLR, that reliance upon federal rules and caselaw is not without precedent, and that recent state cases on the disclosure of electronic records have cited to federal cases on electronic discovery.

b. Ordering that, where the requesting party sought additional discovery of the responding party's email documents, non-email documents and backup tapes, the responding party must search and produce responsive, non-privileged documents for a sample period of time as well as affidavits as to the results and costs thereof, and that the court will then determine whether more expansive searches are necessary. (*See also* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

vii. In the Matter of the Application of John Maura, Jr., 17 Misc.3d 237, 842 N.Y.S.2d 851 (Surrogate's Ct. Nassau Co. 2007) (Riordan, J.)

a. Finding that executors in an action to determine the validity of an elective share under a prenuptial agreement are not entitled to all estate planning records and postnuptial agreements from other cases on the computers of the law firm who drafted the agreement at issue.

b. Noting that it has been suggested that cloning or system access should be allowed only if other alternatives are unsuccessful and only upon a showing of good cause and that, although use of the law firm's back-up tape would be less invasive and burdensome, the back-up tape will not show changes to information, which is relevant to the disputed authenticity of the agreement.

c. Ordering that a clone of the law firm's hard drive be made, that the computer professional retained by the requesting party is declined, that the law firm shall select another computer professional to do the cloning, that the parties' attorneys and a representative from the law firm may be present for the cloning, and that hard copies of any billing or other documents regarding the agreement be delivered to the court, and if no objection as to privilege or otherwise, then to the attorneys as well.

viii. L-3 Communications Corp. v. Kelly, 2007 NY Slip Op 31081(U) (Supreme Ct. Suffolk Co.) (Emerson, J.) (denying the plaintiff's request for disclosure of all documents and email messages contained on the defendant's personal computer, as well as all passwords and access codes in order to impound, clone and inspect such computer, because the plaintiff failed to provide a compelling reason for such broad relief).

ix. Joyner v. Planned Parenthood Federation, 2007 NY Slip Op 31798(U) (Supreme Ct. New York Co.) (Shulman, J.) (finding that the plaintiff's demands for "all emails" and "all databases" were overbroad and unduly burdensome; that the plaintiff's need for "all word processing files" in electronic form did not outweigh the prejudice to the defendant in searching for files duplicative of paper documents already produced; and that the defendant's attorney must provide the plaintiff's attorney with an estimate for conducting a computerized search for any electronic discovery permitted).

x. Etzion v. Etzion, 19 Misc.3d 1102(A), 2008 WL 682507 (Supreme Ct. Nassau Co.) (Marber, J.) (denying the wife's post-judgment motion for additional electronic discovery from the husband's personal and business computers for information on the sale of certain property he received in their settlement agreement well in excess of the value assigned to it at that time as a result of re-zoning because the wife, her attorneys and her financial advisors were privy to public information regarding the re-zoning during the negotiation of the agreement and did not engage in further discovery at that time).

xi. R.C. v. B.W., 4/3/2008 N.Y.L.J. 26 (col. 1) (Supreme Ct.

Kings Co.) (Adams, J.) (denying the husband's request to produce the wife's computers for the discovery of information to defend her applications for maintenance and counsel fees because he failed to prove that such an invasive and violative search was necessary - she already admitted that she has not and does not intend to seek employment and, although she has assisted her attorney with legal work on the case, those documents are not material and necessary to rebut a fee application).

xii. Karim v. Natural Stone Industries, Inc., 19 Misc.3d 353, 855 N.Y.S.2d 845 (Supreme Ct. Queens Co. 2008) (Kitzes, J.) (denying the request of a third party defendant to clone the hard drive of the plaintiff, who was involved in an accident at work and is claiming grave injury, as improperly invasive - the computer hard drive is not relevant and material to the plaintiff's ability to return to employment, and it contains private communications of the plaintiff and other family members who use the computer).

xiii. Melcher v. Apollo Medical Fund Management LLC, 52 A.D.3d 244, 859 N.Y.S.2d 160 (1st Dept. 2008) (finding that the lower court improperly directed the cloning of the plaintiff's hard drives in light of the absence of proof that the plaintiff intentionally destroyed or withheld evidence, his assistant's testimony that she searched his computers, and the adequate explanation for the non-production of two items of correspondence).

3. Form of Production

i. Much of the law with regard to electronic discovery has focused on the production of electronic evidence, as opposed to the manner by which documents are turned over.

ii. The courts have authorized the discovery of computer data, electronic documents, and computer memory.

iii. It is implicit that, where a party seeks electronic discovery, the responding party will produce the information sought by some form of electronic means.

iv. In federal practice, the courts have held that the production of documents by electronic files must be made in a reasonably usable form, such as a "pdf" format.

v. CPLR 3122

a. "Whenever a person is required to produce documents for inspection, that person shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the request."

b. While this provision does not explicitly authorize the production of documents by electronic files, such production is not prohibited.

c. "It shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced."

d. Such language does not limit the delivery to paper copies.

vi. In the Matter of Tamer, 877 N.Y.S.2d 874 (Surrogate's Ct. Westchester Co. 2009) (Scarpino, J.) (permitting objectants to a revocable trust to produce documents in electronic form to trustees, so long as said production is accompanied by an index identifying the documents produced in response to each demand and the electronic file(s) where the documents have been stored).

4. Costs of Production

i. The costs of production can be very high in cases involving electronically stored information.

ii. The party seeking discovery should bear the costs incurred in the production of discovery material. (*See* Schroeder v. Centro Pariso Tropical, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2nd Dept. 1986); Rubin v. Alamo Rent-A-Car,190 A.D.2d 661, 593 N.Y.S.2d 284 (2nd Dept. 1993)).

iii. Lipco Electrical Corp. v. ASG Consulting Corp., 4 Misc.3d 1019(A), 798 N.Y.S.2d 345 (Supreme Ct. Nassau Co. 2004) (Austin, J.) (holding that the parties must provide an appropriate and detailed analysis indicating the costs in extracting the requested material and that the party seeking disclosure must agree to pay for the costs of production before the other party is required to produce the requested data).

iv. Etzion v. Etzion, 7 Misc.3d 940, 796 N.Y.S.2d 844 (Supreme Ct. Nassau Co. 2005) (Stack, J.) (holding that the wife who is seeking discovery of electronic information on the husband's computer must pay all of the expenses of her expert, including the costs of hard copy production, that the husband must pay all of the costs of his expert, who will oversee the cloning process, and that the parties will share the fees of the court-appointed referee).

v. Waltzer v. Tradescape & Co., LLC, 31 A.D.3d 302, 819 N.Y.S.2d 38 (1st Dept. 2006) (holding that, although the party seeking discovery generally bears the cost thereof, the requested information did not involve the retrieval of deleted electronically stored material but was readily available on two CDs, whose cost of copying and producing would have been inconsequential, and that the cost of examining the requested material to determine whether it should not be produced due to privilege or irrelevance should be borne by the party to produce such material).

vi. Weiller v. New York Life Insurance Co., 6 Misc.3d 1038(A), 800 N.Y.S.2d 359 (Supreme Ct. New York Co. 2005) (Cahn, J.) (holding that the party responding to discovery demands must initially bear the cost of complying with a preservation order and that the court would entertain an application to obligate the requesting party to absorb all or part of the cost because, although the court is not insensitive to the cost entailed in electronic discovery, it will not constrain the production of relevant evidence on account of a later need to allocate the cost).

vii. Delta Financial Corp. v. Morrison, 9/19/2006 N.Y.L.J. 25 (col. 1) (Supreme Ct. Nassau Co.) (Warshawsky, J.) (holding that the party requesting additional searches of certain electronic records shall initially bear all of the costs of the responding party's restoration, search, de-duplication and review processes).

viii. In the Matter of the Application of John Maura, Jr., 17 Misc.3d 237, 842 N.Y.S.2d 851 (Surrogate's Ct. Nassau Co. 2007) (Riordan, J.) (holding that the party responding to the demand for a clone of a hard drive shall present an estimate of its selected computer professional to the requesting party, who must pay it to proceed with such electronic discovery).

ix. Non-Party

a. CPLR 3122(d) provides that the reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.

b. What constitutes reasonable production expenses has not been well defined by the state courts.

c. But federal courts have held that, in addition to the actual copying costs, the reasonable cost of labor expended to gather and review document production, including attorney's fees, are covered.

d. The rationale - non-parties should not have to subsidize the cost of litigation in which they are not a party, and parties should be deterred from engaging in fishing expeditions for marginally relevant documents - supports extension to CPLR 3122.

e. Finkelman v. Klaus, 17 Misc.3d 1138(A), 856 N.Y.S.2d 23 (Supreme Ct. Nassau Co. 2007) (Bucaria, J.) (directing the plaintiff to pay the defendants the costs incurred in producing the email records in order to procure their production).

f. However, while some of its costs are recoverable, a responding non-party does bear the costs associated with withholding documents from production due to relevancy or privilege.

5. Suppression

i. Moore v. Moore, 8/14/2008 N.Y.L.J. 26, (col. 1)

a. Denying the husband's motion to suppress material, including online chat logs, copied from a laptop computer, that was removed by the wife from the trunk of a car to which they both had access.

b. Reasoning that the computer was used by all members of the family, and in any event, there had been a written stipulation which permitted the wife's attorney to clone the hard drive and provide copies to both parties.

ii. Boudakian v. Boudakian, 12/16/08 N.Y.L.J. 27, (col. 3) (Supreme Ct. Queens Co.) (Lebowitz, J.)

a. Denying the husband's motion to suppress material, including evidence of his extramarital affairs, copied from a laptop computer in the parties' home.

b. Reasoning that the wife was entitled to access the laptop computer and copy its hard drive because it was a family computer - it was used by the wife and the children, and although the husband's email account was password protected, the wife had the main password to access the computer.

6. Spoliation

i. The destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or reasonably foreseeable litigation. (Travelers Indemnity Co. v. C.C. Controlled Combustion Insulation Co., 2003 WL 22798934 (Civil Court of the City of N.Y.)

ii. CPLR 3126 provides the following remedies:

a. Resolving the matter against the party who destroyed or failed to preserve the evidence;

b. Prohibiting the disobedient party from supporting or opposing claims based upon such spoliated evidence;

c. Striking the pleadings of the disobedient party;

d. Dismissing the action; or

e. Rendering a judgment by default against the disobedient party.

iii. The determination of an appropriate sanction is confined to the sound discretion of a court and assessed on a case-by-case basis. (Travelers Indemnity Co., *supra*).

iv. In its determination, the court will look to the extent that the spoliation of evidence may prejudice a party and whether a particular sanction will be necessary as a matter of elementary fairness. (*See* Hartford Fire Insurance Co. V. Regenerative Building Construction Inc., 271 A.D.2d 862, 706 N.Y.S.2d 236 (3d Dept. 2000), *quoting* Kirkland v. New

York City Housing Authority, 236 A.D.2d 170, 666 N.Y.S.2d 609 (1st Dept. 1997)).

v. It is incumbent upon the proponent of spoliation to show that the evidence allegedly lost or destroyed actually existed, that it was under the opposing party's control and that there is no reasonable explanation for the failure to produce it. (Ecor Solutions Inc. v. State of New York Dept. of Environmental Conservation, 17 Misc.3d 1135(A), 851 N.Y.S.2d 69 (Court of Claims of N.Y. 2007)).

vi. Ingoglia v. Barnes & Noble College Booksellers, Inc., 48 A.D.3d 636, 852 N.Y.S.2d 337 (2nd Dept. 2008)

a. Reversing the lower court for not dismissing the plaintiff's complaint based on spoliation of evidence which severely prejudiced the defendant.

b. Finding that numerous files on the plaintiff's home computer had been deleted between the date the defendant demanded inspection of it and the actual date of the inspection and that a software program had been installed on the computer which was designed to permanently remove data from the hard drive.

vii. Friel v. Papa, 36 A.D.3d 754, 829 N.Y.S.2d 569 (2d Dept. 2007). (reversing the striking of an answer for spoliation of evidence based on the destruction of a defendant's hard drive since the prosecution already inspected the hard drive, obtained the relevant information prior to destruction, and failed to show that evidence destroyed was central to their case or that they were prejudiced by the destruction).

viii. Lamb v. Maloney, 46 A.D.3d 857, 850 N.Y.S.2d 138 (2d Dept. 2007) (affirming the denial of an application to strike an answer and preclude certain records from introduction into evidence for spoliation where there was no showing that the party seeking the evidence was prejudicially bereft of appropriate means to confront a claim with incisive evidence).

ix. Hunts Point Realty Corp. v. Pacifico, 16 Misc.3d 1122(A), 847 N.Y.S.2d 902 (Supreme Ct. Nassau Co. 2007) (Warshawsky, J.) (denying an adverse inference from the failure to preserve emails in contravention of an order to

preserve such communications where there was no showing that the destroyed emails were relevant to the action, but awarding the requesting party counsel fees and costs as a sanction for the additional work necessitated by the unabashed flaunting of the preservation order).

x. L-3 Communications Corp. v. Kelly, 2007 NY Slip Op 31081 (Supreme Ct. Suffolk Co.) (Emerson, J.) (denying relief for spoliation where, although the defendant admitted deleting a blank form that contained no factual information and some unspecified emails from his personal computer, the plaintiff failed to prove how the document and emails were crucial to the prosecution of the matter or prejudice by their loss).

xi. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (sanctioning the willful destruction of relevant emails by the defendant's employees in defiance of explicit instructions by counsel not to do so with an adverse inference jury instruction with respect to those emails).

xii. Gutman v. Klein, 12/9/2008 N.Y.L.J. 31, (col. 3) (E.D.N.Y.) (Cogan, J.) (adopting the recommendation of a federal magistrate to enter a default judgment against the defendants and award the plaintiffs counsel fees and costs based upon the spoliation of evidence where the forensic examination of a laptop computer revealed visits to websites about data deletion, the downloading of a file deletion program, the deletion of select files from the hard drive, the modification and reinstallation of the operating system, and the changing of the system clock to backdate the record of certain actions, all of which occurred between notice of the forensic examination and the actual forensic examination). *See* Gutman v. Klein, 10/27/2008 N.Y.L.J. 22, (col. 1) (E.D.N.Y.) (Levy, M.).

7. Conversion

i. The unauthorized assumption and exercise of ownership over personal property belonging to another to the exclusion of the other.

ii. It historically centered on physical, tangible property.

iii. The issue is whether it can apply to virtual, intangible property.

iv. Thyroff v. Nationwide Mutual Insurance Co., 8 N.Y.3d 283, 832 N.Y.S.2d 873 (2007) (extending the doctrine of conversion to include electronic records stored on a computer and finding that a cause of action lies for an employer's misappropriation of an insurance agent's customer and other personal information on a computer at work because the information in (not the nature of) a document determines its worth and a document stored on a hard drive can have the same value as a paper document kept in a file cabinet).

v. Shmueli v. The Corcoran Group, 8/4/2005 N.Y.L.J. 18 (col. 1) Supreme Ct. New York Co. (Cahn, J.) (finding that a cause of action for conversion lies for an employer's misappropriation of a real estate broker's computerized client / investor list, noting that virtual documents can be made tangible by the mere expedient of a printing key function).

vi. Leser v. Karenkooper.com, 18 Misc.3d 1119(A), 2008 WL 192099 (Supreme Ct. New York Co.) (Kapnick, J.) (finding that allegations that a business copied and displayed material including images from another's website and displayed them on other locations on the web, without permission, did not give rise to a cause of action for conversion since there was never alleged deprivation of control and since the Thyroff case did not consider whether any of the myriad other forms of virtual information should be protected by the court).

8. Penal Law

i. The Penal Law proscribes and punishes several actions involving computers and electronically stored information.

a. §250 deals with "eavesdropping", which includes "intercepting or accessing an electronic communication".

b. §156 deals with "computer offenses", which include unauthorized use, trespass, tampering, unlawful duplication and criminal possession.

ii. Moore v. Moore, 8/14/2008 N.Y.L.J. 26, (col. 1)

a. Finding that the wife did not commit eavesdropping because a recording of the on-line chats at issue was previously downloaded and saved by the husband on his computer and the wife's subsequent access to this material on the hard drive was not an intercepted communication.

b. Finding that the wife did not commit any computer offenses because there was a stipulation which permitted her attorney to access the hard drive of the husband's computer.

iii. Boudakian v. Boudakian, 12/16/08 N.Y.L.J. 27, (col. 3) (Supreme Ct. Queens Co.) (Lebowitz, J.)

a. Finding that the wife did not commit eavesdropping because the communication at issue occurred on the computer on prior occasions and the wife's subsequent access to that material on the hard drive was not the result of an intercepted communication.

b. Finding that the wife did not commit any computer offenses because she was authorized to access and use the computer.

9. Privilege

i. CPLR 4548

a. "No communication shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication."

b. Its purpose was to recognize the widespread commercial use of email, and that when parties to a privileged relationship communicate by email, they have a reasonable expectation of privacy. (Scott v. Beth Israel
Medical Center, Inc., 847 N.Y.S.2d 436 (Supreme Ct. N.Y. Co. 2007)).

ii. NYSBA Committee on Professional Ethics: Opinion 782

(12/8/04)

a. CPLR 4548 does not absolve an attorney of responsibility with respect to electronic communication with a client.

b. A lawyer who uses technology to communicate with a client must use reasonable care with respect to such communication, assess the risks attendant to the use of that technology, and determine if the mode of transmission is appropriate under the circumstances.

iii. If privileged communication or work product are not protected, they can be waived.

iv. Scott v. Beth Israel Medical Center, Inc., 17 Misc.3d 934, 847 N.Y.S.2d 436 (Supreme Ct. New York Co. 2007)

a. Finding that CPLR 4548 does not invalidate or otherwise preclude an employer from adopting policies which prohibit personal use of computers by employees and allow for monitoring of employee use by the employer.

b. Noting that such policies diminish any expectation of confidentiality and that CPLR 4548 contemplates there may be other reasons that an electronic communication may lose its privileged character.

c. Finding that an employee's use of the employer email system to communicate with his attorney was not made in confidence and subject to privilege because of the employer's "prohibiting" and "monitoring" policies and the employee's actual and constructive knowledge thereof.

d. Finding that the emails at issue are not privileged work product since such work product is waived when disclosed in a manner that increases the likelihood that an adversary will obtain the information; that although inadvertent production generally does not waive privileged work product, there is an exception where the producing party's conduct was so careless as to suggest that it was not concerned with the protection of the privilege; and that reasonable precautions were not taken to prevent inadvertent

disclosure.

9. Malpractice

   i. An attorney must be particularly careful in handling matters of electronic discovery.

   ii. There are numerous pitfalls and potential risks of malpractice.

   iii. *See* Chen v. Dougherty, C04-987 MJP WD WA (July 7, 2009)(where a Judge in the Western District of Washington reduced the hourly rate for a fee award to the prevailing plaintiff's counsel from $300 to $200 because counsel's "inhibited ability to participate meaningfully in electronic discovery tells the Court that she has novice skills in this area and cannot command the rate of experienced counsel").

D. Metadata [4]

1. Metadata is "data about data" in electronic files.

2. It refers to electronically stored information that generally is not visible - regardless of whether on a computer monitor or a document printed out.

3. It is embedded in software and reveals information about the creation and modification of a document.

4. Although mundane, the information can be quite significant and might even be confidential or privileged.

5. A lawyer nevertheless has a duty to protect such confidential or privileged information from being disclosed.

6. Issues:

   i. Whether you can look for metadata in another lawyer's documents?

   ii. If you do look and find metadata, do you have to notify the

[4] *See* Marcia Coyle, Where do Footprints of Metadata Lead?, The National Law Journal, February 26, 2008.

other lawyer?

7. NYSBA Committee on Professional Ethics: Opinion 749 (12/14/01)

   i. Modern computer technology enables sophisticated users who receive documents by electronic transmission to “get behind” what is visible.

   ii. Use of this technology would enable a lawyer who receives electronic documents from counsel for another party to obtain various kinds of information that the sender has not intentionally made available to that lawyer, which could include the client’s confidences and secrets.

   iii. A lawyer may not make use of computer software applications to surreptitiously examine or trace electronically transmitted documents.

   iv. Such use of technology to obtain information that may be protected by the attorney-client privilege, work product doctrine or may otherwise constitute a “secret” would violate the letter and spirit of the Disciplinary Rules.

XII. TRIAL DEMANDS

A. Demand for Witnesses

1. CPLR 3101(a): There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.

2. This disclosure certainly includes the name, address and contact information of each person the other party intends to call as a lay witness.

B. Demand for Experts

1. CPLR 3101(d)(1)

i. Upon request, each party shall disclose:

a. Each person whom the party expects to call as an expert witness at trial.

b. In reasonable detail, the subject matter on which the expert is expected to testify.

c. The substance of the facts and opinions on which the expert is expected to testify.

d. The qualifications of the expert, and a summary of the grounds for his or her opinion.

ii. CPLR 3101(d)(1) contains no time limits for a party to make a demand for experts.

iii. However, if a party for good cause retains an expert in an insufficient amount of time before trial to give appropriate notice, the party shall not be precluded from offering the expert's testimony based solely on noncompliance with this provision. It is at the court's discretion to make whatever order may be just.

a. Corning v. Carlin, 178 A.D.2d 576, 577 N.Y.S.2d 474 (2nd Dept. 1991) (The testimony of an expert witness was precluded by the trial court where, after service of a notice pursuant to CPLR 3101, good cause was not shown as to why the expert was not retained until the eve of trial, and there was no mention of the expert until after opening statements were made).

b. Vigilant v. Barnes, 199 A.D.2d 257, 604 N.Y.S.2d 248 (2nd Dept. 1993) (Where a notice pursuant to CPLR 3101(d) had been served, the withholding of the names of expert witnesses until three weeks before trial resulted in an order precluding their testimony).

2. 22 NYCRR 202.16

i. Pursuant to 22 NYCRR 202.16(g)(1), responses to demands for expert information pursuant to CPLR 3101(d) shall be served within twenty (20) days of service of such demands.

ii. 22 NYCRR 202.16(g)(2) requires experts to file a written report with the court, which shall be exchanged and filed no later than sixty (60) days before the date set for trial.

iii. Reply reports, if any, shall be exchanged and filed no later than thirty (30) days before the date set fort trial.

iv. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert.

v. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial.

vi. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause.

vii. In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination.

viii. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

C. Demand for Statements; Photographs and Videotapes

1. CPLR 3101(e): A party has a right to a copy of his or her own statement in the possession of the other party.

2. CPLR 3101(i): A party has the right to all films, photographs, video or audio tapes of that party, including transcripts or memoranda thereof, whether or not it will be offered at trial by the other party.

XIII. CONFIDENTIALITY AGREEMENTS

A. A confidentiality agreement or clause is self explanatory.

B. It seeks to preserve certain information as confidential by restricting its release and providing for a remedy (injunction and/or damages) in the event of its release.

C. It can arise in a matrimonial case in a number of ways:

1. Between the spouses.

2. Between the spouses and their attorneys.

3. Between a spouse's business/practice and a spouse's attorney.

4. Between a spouse's business/practice and a spouse's expert.

5. Between a spouse's attorney and a spouse's expert.

D. A sample Confidentiality Clause / Agreement / Addendum for the foregoing situations is attached to the end of this outline.

E. Cases:

1. Trump v. Trump, 179 A.D.2d 201, 582 N.Y.S.2d 1008 (1st Dept. 1992) (upholding the validity of a confidentiality provision in a settlement agreement which prohibited the wife from releasing any information about the husband's personal, business, and financial affairs without his consent, and if she did, provided that he was entitled to an injunction and to cease paying her maintenance).

2. Goldsmith v. Goldsmith, 184 A.D.2d 619, 584 N.Y.S.2d 902 (2d Dept. 1992) (affirming the denial of the husband's motion to compel the wife to execute a confidentiality agreement with respect to disclosure).

3. Weinstein v. Weinstein, 3/24/95 N.Y.L.J. 29 (col. 2) (Supreme Ct. New York Co.) (Friedman, J.) (referring to a confidentiality agreement where each spouse posted $1,000,000 in escrow to be forfeited to the other in the event either made certain disclosures).

4. Anonymous v. Anonymous, 233 A.D.2d 162, 649 N.Y.S.2d 665 (1st Dept. 1996) (denying the husband's request for disclosure on his claim that the wife breached the confidentiality clause in their settlement agreement because he made no showing to support

conclusory allegations that she was the source of news stories about disputes between them).

5. Huggins v. Povitch, 1996 WL 515498 (Supreme Ct. New York Co. 1996) (Cohen, J.) (discussing that the wife issued press releases and made media appearances to discuss her marriage, divorce and resulting financial status in violation of a confidentiality agreement, which resulted in a restraining order and finding of contempt).

6. Rice v. Rice, 288 A.D.2d 112, 733 N.Y.S.2d 393 (1st Dept. 2001) (denying the wife's request to modify a confidentiality stipulation, which stated that financial information provided by the husband in discovery would only be used for purposes of their matrimonial action, in order to pursue an action in furtherance of her private interests against a third party because the purpose of the confidentiality stipulation had not expired and the husband was entitled to the benefit of his bargain).

7. Byck v. Byck, 1/24/2002 N.Y.L.J. 24 (col. 2) (Supreme Ct. Nassau Co.) (Lamarca, J.) (referring to a wife, who held shares in a closely held family corporation, presenting to a husband a confidentiality agreement which required that, in exchange for obtaining disclosure, he not release any of the information).

8. Hauzinger v. Hauzinger, 10 N.Y.3d 923, 2008 WL 2519811 (2008) (affirming the denial of a mediator's claim of qualified privilege to maintain mediation confidentiality where, notwithstanding the existence of a confidentiality clause in the parties' mediation agreement, the husband executed a waiver of mediation confidentiality and the wife's actions in seeking disclosure were deemed to be a waiver of mediation confidentiality; further, the mediation agreement provided that, upon the consent of both parties, the mediator might communicate with an attorney for either party and release documents to third parties).

NEW YORK STATE BAR ASSOCIATION

Basic Matrimonial Practice Skills – Fall 2013

Discovery: Update and Supplemental Case Index

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I. CPLR 3101 (a)(2): DISCLOSURE FROM A NON-PARTY

Cotton v. Cotton, 91 A.D.3d 697, 938 N.Y.S.2d 92 (2d Dept. 2012) – upholding the lower court's denial of the ex-wife's post-judgment motion seeking leave to depose non-parties to determine the ex-husband's financial resources citing her failure to make any showing that the requested information was not available from other sources, notably, the ex-husband.

Humphrey v. Kulbaski, 78 A.D.3d 786, 911 N.Y.S.2d 138 (2d Dept. 2010) finding that the Supreme Court properly quashed subpoenas served upon nonparties as the plaintiffs failed to satisfy the threshold requirement that the disclosure sought was "material and necessary" in their prosecution of the action (CPLR 3101[a]). The subpoenas demanded production of "all ... files and records" pertaining to the plaintiff's treatment and billing by the nonparty healthcare providers and insurer without narrowing the request by time period, the type of treatment, or relationship to the medical condition which was the subject of the action. Plaintiffs also failed to make any showing that the requested documents were relevant to the substantive issue in the case.

II. DISCOVERY ON ISSUES OF CUSTODY – FORENSIC DATA

A.L. v. C.K., 21 Misc.3d 933, 866 N.Y.S.2d 514 (Sup.Ct., Kings Co. 2008)[Sunshine, J.] - holding that the general prohibition against discovery on issues of custody should not be viewed as an absolute bar, and there must be a case by case analysis of the benefits for disclosure.

S.C. v. H.B., 9 Misc.3d 1110, 806 N.Y.S.2d 448 (Fam. Ct., Rockland Co. 2005) – the court granted the party's application, *inter alia*, for the release of medical and psychiatric treatment records previously provided to the court-appointed mental health professional, to the forensic privately retained by the petitioner. The court noted that it is obligated to exercise its discretion to balance the

benefit of permitting disclosure in custody matters against the detriment of such disclosure.

But see CP v. AP, 32 Misc.3d 1210, 932 N.Y.S.2d 759 (Sup. Ct. N.Y. Co. 2011)[Kaplan, J.] where the court denied the wife's application seeking a direction that the court-appointed forensic evaluator turn over to her and her counsel his notes and test data. The court concluded that there were no "special circumstances" to warrant the disclosure requested and the wife would have a full opportunity at trial to cross examine the neutral with regard to the data he relied upon in reaching his determination.

See Nimkoff v. Nimkoff, 36 A.D.3d 498, 830 N.Y.S.2d 27 (1st Dept. 2007) - upholding the lower court's order vacating the husband's notice to take the deposition of the forensic evaluator and quashing his subpoena for pre-trial disclosure of the evaluator. However, the Court also upheld the order directing production of the evaluator's data file for review three (3) business days prior to trial.

III. DEPOSITIONS AND 22 NYCRR PART 221: REFUSAL TO ANSWER

Koch v. Sheresky Aronson & Mayefsky LLP, 33 Misc.3d 1228, 943 N.Y.S.2d 792 (Sup.Ct. N.Y. Co. 2011) - noting that a party's failure to answer a question at a deposition generally does not permit counsel to unilaterally adjourn the depositions; also citing CPLR 3113(b) ["The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree"]. The question should be marked for a ruling and the deposition should continue.

Lunt v. Mt. Sinai Hosp., 2010 WL 3617140 (N.Y.Sup.2010) (Lobis, J.) - where the plaintiff argued that pursuant to 22 N.Y.C.R.R. § 221 the defendant failed to articulate a valid objection to six challenged questions, so that the deponent should have been compelled to appear for a second deposition and answer those questions. The defendant argued, *inter alia*, that the questions were "plainly improper", irrelevant, and prejudicial to the deponent. The court held that "while a question may not be relevant and may not be admissible at trial, the court directs the deponent to answer the question unless the deponent can articulate 'significant prejudice.' Although the challenged questions lacked proper form and foundation, and are likely to be inadmissible at trial, the court is not persuaded by defendant's conclusory argument that the Hospital and Dr.

Grucela would be significantly prejudiced by Dr. Grucela answering the challenged questions."

IV. PRECLUSION: CPLR 3126

Regarding the time to make an application, in Armstrong v. Armstrong, 72 A.D.3d 1409, 900 N.Y.S.2d 476 (3d Dept. 2010), the Appellate Division affirmed the lower court's denial of the plaintiff's request made at trial to preclude the defendant from introducing evidence regarding his separate property. In so holding, Appellate Division noted, *inter alia*, that the plaintiff had been directed at a conference three (3) months before the trial not to delay until the trial to seek resolution of any discovery issues.

Isaacs v Isaacs, 71 AD3d 951, 952 (2d Dept. 2010) – upholding the lower court's order directing the defendant to provide detailed responses to plaintiff's discovery demands, and granting a "conditional order of preclusion in the event of his noncompliance." The defendant was permitted the opportunity to provide an "affidavit of due diligence" as to items not provided, setting forth the effort made to provide the item.

Raville v Elnomany, 76 A.D.3d 520, 522 (2d Dept. 2010), appeal dismissed, 16 N.Y.3d 739, 942 N.E.2d 314 (2011) – the Appellate Division, Second Department affirmed the trial court's determination precluding the defendant from offering financial evidence at the trial on equitable distribution considering "each party's credibility and the particular facts presented in this case, including the defendant's failure to comply with discovery demands for financial documentation." The trial court determined equitable distribution based solely upon the evidence proffered by the plaintiff, with such award left undisturbed on appeal.

Relief from a Conditional Order – Gibbs v. St. Barnabas, 16 N.Y.3d 74, 942 N.E.2d 277, 917 N.Y.S.2d 68 (2010) – The Court of Appeals articulated the two-prong test for obtaining relief from a "conditional order" stating, "we have made clear that to obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense.

Cooper v. Cooper, 84 A.D.3d 854, 923 N.Y.S.2d 596 (2d Dept. 2011) – the Appellate Division affirmed the lower court's denial of the plaintiff's motion for preclusion where the defendant fully complied with discovery in response to the motion and after having retained new counsel.

V. CPLR 2123(e): NOTICE TO ADMIT

Nacherlilla v. Prospect Park Alliance, Inc., 88 A.D.3d 770, 930 N.Y.S.2d 643 (2d Dept. 2011) – wherein the Appellate Division, Second Department held as follows:

> The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial" (*DeSilva v. Rosenberg,* 236 A.D.2d 508, 508, 654 N.Y.S.2d 30; *see Rosenfeld v. Vorsanger,* 5 A.D.3d 462, 462, 772 N.Y.S.2d 597). "It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*DeSilva v. Rosenberg,* 236 A.D.2d at 508, 654 N.Y.S.2d 30). "Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial" (*id.* at 509, 654 N.Y.S.2d 30). "A notice to admit which goes to the heart of the matters at issue is improper" (*id.* at 508, 654 N.Y.S.2d 30; *see Tolchin v. Glaser,* 47 A.D.3d 922, 849 N.Y.S.2d 439; *Glasser v. City of New York,* 265 A.D.2d 526, 697 N.Y.S.2d 167).

VI. ELECTRONIC DISCOVERY (E-Discovery)

Social Media Sites

Courts have become reluctant to find a "social network site privilege" and have broadened discovery rules to include social media data *relevant* - even if "private".

It is often problematic to subpoena information directly from a social media site. The provider may fight the subpoena to protect the privacy rights of its users. Secondly, there is a federal law obstacle.

Almost all social media service providers require a subpoena, court order, or other valid legal process to disclose information about their uses.

Facebook – Legal Department has stated publicly that even if a subpoena is served, they will decline to provide the user data.

E-Mails – Samide v. Roman Catholic Diocese of Brooklyn, 5 AD3d 463, 773 NYS 116 (2d Dept. 2004) – Defendants directed to produce hard copies of all email messages relating to designated allegations including any email messages that have been deleted but may be recovered by a qualified expert appointed by referee supervising disclosure for an *in camera* inspection and a determination of which documents in fact deal with the designated allegations and only those emails will be turned over to plaintiff.

D.M. v. J.E.M., 23 Misc3d 584, 873 NYS2d 447 (Fam.Ct., Orange Co., 2009, Kiedaisch, J) -- In a family offense proceeding, alleging that respondent sent petitioner numerous vulgar emails, respondent directed to execute authorizations for Yahoo, respondent's Internet email service provider, to produce emails from respondent to petitioner during a given period of time. While the CPLR does not expressly provide for authorizations to obtain Internet, computer or email records, the purpose of pretrial disclosure is to permit parties to discover material and necessary evidence for use at trial.

cf. Grounds for Divorce - Bill S. v. Marilyn S., 8 Misc3d 1013, 801 NYS2d 776 (Sup.Ct., Nassau Co., Balkin J.) – Court quashed subpoenas *duces tecum* served by husband for telephone and chat logs relating to alleged paramours of the wife. Husband not entitled to pretrial discovery with respect to the issue of grounds for the divorce or marital fault, he failed to establish how the records sought are relevant and material, and failed to show special circumstances permitting non-party disclosure.

If a defendant cannot get the plaintiff to voluntarily agree to provide written consent, courts most likely will require a plaintiff to provide signed authorizations for the production of relevant social media discovery.

Access To Home Or Spouse's Computer

Access Granted

Byrne v. Byrne, 168 Misc3d 321, 650 NYS2d 499 (Sup.Ct., Kings Co., 1996, Rigler, J.) - Information stored by husband on laptop computer, albeit password protected, subject to disclosure in matrimonial action where wife sought access on grounds that husband stored information thereon concerning his finances and personal business records. As the laptop was in the marital residence, it was akin to a filing cabinet to which the wife clearly would have had access.

Moore v. Moore, NYLJ, 8/14/08, p.26 col.1 (Sup.Ct., NY Co., Evans, J.) – husband moved to suppress data obtained by wife from the hard drive of a computer she found in the trunk of husband's car, the wife claiming it was a shared family computer, and the husband claiming it was his personal computer issued to him by his employer. The Court refused to grant the suppression motion.

Etzion, 7 Misc3d 940, 796 NYS2d 844 (Sup.Ct., Nassau Co., 2005, Stack, J.) - In matrimonial action, wife entitled to have her computer expert copy data from hard drives of husband's personal and business computers, and to examine hard copies of non-privileged business records identified by referee from hard drives.

Boudakian, NYLJ, 12/26/08, p. 25, col. 1, Sup.Ct., Queens Co., Lebowitz, J. – Defendant sought an order of suppression for all information obtained by the plaintiff from the couple's home computer and all information derived therefrom and for an order directing the return of all clones or copies made of the hard drive. The defendant conceded that the plaintiff had the password for and access to the computer and that the parties' children had viewed Thomas the Tank Engine movies several times on the computer, but he alleges that the usage by the plaintiff and the children did not make the computer a "family" computer. The defendant further alleges that he had an expectation of privacy because he had a separate password for the email account that he accessed through the computer. The court found that the computer was a family computer and therefore the defendant had no expectation of privacy for files saved to the computer's hard drive. The court found that the plaintiff did not violate Penal Law 250.05. Eavesdropping did not apply because the communication occurred prior to the wife's subsequent access to the material on the hard drive; therefore, it was not the result of an intercepted communication; that she did not violate Penal Law 156.35 (Criminal possession of computer related material) because all of the information was found on the computer hard drive which the plaintiff was authorized to use and, lastly, that the plaintiff did not violate Penal Law 250.25 (Tampering with private communications) because the plaintiff did not access anything other than the hard drive which she was authorized to use. Furthermore, the court found that even if the information was obtained by improper means, suppression under CPLR 3103(c) was not warranted because the party would be entitled to discovery of the information obtained.

Access Denied

Access to law firm's computer for electronic discovery of billing records and documents related to spouses' estate planning was denied since the records had no bearing on validity of prenuptial agreement in executors' suit to determine widow's right of election renounced by each spouse in prenuptial agreement, and widow had already been provided with hard copies of estate planning file. In re Maura, 17 Misc3d 237, 842 NYS2d 851 (Surr. Ct., Nassau Co., 2007)

R.C. v. B.W., NYLJ, 4/23/08, p.26 col.1 (Sup.Ct., Kings Co., 2008) – denied "fishing expedition" into wife's computer where information sought was not limited and "particular" did "not seek financial documents, records, billing statements or bank statements".

Theofel v. Farey-Jones, 359 F3d 1066 (9TH Cir., 2004) - disapproved of a subpoena for "all email sent or received by anyone" at the plaintiff's company on the ground of over-breadth.

Pure fishing expeditions are not permitted and there must be a preliminary showing of relevance before ordering broad social media discovery. Abrams v. Pecile, 83 A.D.3d 527 (1st Dept. 2011).

McCann v. Harleysville Ins. Co. Of N.Y., 910 NYS2d 614, 615 (2010) – "Although defendant specified the type of evidence sought, it failed to establish a factual predicate with respect to the relevancy of the evidence (*see* *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [1989]). Indeed, defendant essentially sought permission to conduct "a fishing expedition" into plaintiff's Facebook account based on the mere hope of finding relevant evidence (*Auerbach v Klein*, 30 AD3d 451, 452 [2006])."

Melcher v. Apollo Med. Fund Mgmt., 52 AD3d 244, 859 NSY2d 160 (1st Dept. 2008) -- In addressing the issue of "cloning" a computer hard drive, the court held that: "In view of the absence of proof that plaintiff intentionally destroyed or withheld evidence, his assistant's testimony that she searched his computers, and the adequate explanation for the nonproduction of two items of correspondence, the court improperly directed the cloning of plaintiff's computer hard drives."

Safeguards

Lipco Electrical Corp. V. ASG Consulting Corp., 4 Misc3d 1019 (Sup.Ct., Nassau Co., 2004, Austin, J.) - The party from whom electronic discovery is sought should be required to produce material stored on a computer so long as the party being asked to produce the material is protected from undue burden and expense and privileged material is protected.

Computer Inspection Protocol

Schreiber v. Schreiber, 29 Misc. 3d 171 (Sup. Ct. Kings Co. 2010) [Thomas, J.] - Where plaintiff wife moved for an order directing the hard drive disk of defendant husband's office computer be confiscated and/or permitted to be copied in its entirety, alleging that defendant concealed his income and assets to avoid paying the fair share of marital income and assets earned and acquired during the couples' 30 year marriage, the court found that plaintiff was not entitled to an unrestricted turnover of the computer hard drive disk. It found the request was overbroad as it sought general, and unlimited in time, access to the entirety of defendant's business and personal data stored on his office computer. Thus, it denied plaintiff's motion to compel production of the hard drive, with leave to renew provided the renewal application contained a detailed discovery protocol that would protect privileged and private material. The court further provided a proposed list of items such protocol should contain, including:

a. *Discovery Referee*: The parties will have until the renewal deadline to agree on an *attorney referee, preferably someone with some technical expertise in computer science,* to be appointed pursuant to CPLR 3104 (b) to supervise discovery (the referee). If the parties fail to agree on a referee before the renewal deadline, they will submit two names each to the court (along with a summary of the proposed referee's qualifications, not to exceed one page, and hourly rate), and the court will select a referee from among the candidates submitted.
b. *Forensic Computer Expert*: The parties will have until the renewal deadline to agree on a forensic computer expert who will inspect and analyze the clone (the expert). If the parties fail to agree on an expert before the renewal deadline, they will submit two names each to the court (along with a summary of the proposed expert's qualifications, not to exceed one page, and the expert's fee structure), and the court will select an expert from among the candidates submitted. The expert will execute a *confidentiality agreement* (to be agreed upon by the parties) governing non-

disclosure of the contents of the clone and its re-delivery to defendant's counsel after completion of electronic discovery.

c. *File Analysis*: *The expert will analyze the clone for evidence of any download, installation, and/or utilization of any software program, application, or utility which has the capability of deleting or altering files so that they are not recoverable (a drivewiping utility). The expert will then (i) extract from the clone all live files and file fragments, and (ii) if the files on the clone have been deleted or altered using a drive-wiping utility, will also recover all deleted files and file fragments*.

d. *Scope of Discovery*: Plaintiff will list the keyword and other searches she proposes to have the expert run on the files and file fragments, subject to a reasonably short time frame (to be agreed upon by the parties) in which such files or file fragments were created or modified. Plaintiff is cautioned that she should narrowly tailor her search queries so as to expedite discovery and reduce the costs of litigation to the parties. To illustrate, a search query for all documents with an.xls (Microsoft Excel) extension, created or modified within a three-year period preceding the commencement of this matrimonial action, will not be permitted.

e. *First-Level Review*: The expert will run keyword or other searches on all of the extracted files and file fragments. After performing searches, the expert will export to CDs or DVDs a copy of the native files and file fragments which were hit by such searches, and will deliver such media to defendant's counsel to conduct a privilege review. An exact copy of the media delivered to defendant's counsel will be contemporaneously delivered by the expert to the referee. The expert will also concurrently deliver to the referee and to counsel for both parties a report (i) detailing the results of its searches, (ii) listing the file types for all files hit by the searches, with the file extensions and number of files for each, and (iii) stating whether or not it found evidence of the use of a drive-wiping utility.

f. *Second-Level Review*: Within twenty days after delivery of the media containing the extracted files and file fragments, defendant's counsel will deliver to plaintiff's counsel in electronic format (to be agreed upon by the parties) all non-privileged documents and information included in the extracted files and file fragments, together with a privilege log which identifies each document for which defendant claims privilege and describes the nature of the

documents withheld (but without revealing information which is itself privileged), so as to enable plaintiff to assess the applicability of privilege.

g. *Discovery Disputes*: The referee will resolve any disputes concerning relevancy and privilege. Subject to the parties' agreement, the referee's determination will be final.
h. *Cost Sharing*: All costs for the expert will be borne by plaintiff, subject to any possible reallocation of costs at the conclusion of this action. Plaintiff will indicate if she is willing to bear any other discovery-related costs and, if so, specify her proposed share.
i. *Discovery Deadline*: The parties should agree to a fast-track discovery schedule, subject to an outside ninety-day deadline within which discovery should be completed.
j. *Retention of Clone*: The discovery referee will keep the clone until the action is concluded, at which time the clone will be returned to defendant's counsel for disposal.
k. Counsel for parties should discuss and seek to memorialize protocols before engaging in motion practice.

<u>Electronic Communications Privacy Act (18 USC §2510 et seq.)</u>

Stored Communications Act (SCA) passed in 1986 as part of the Electronic Communications Privacy Act (ECPA). In general, SCA prevents providers of communications services from divulging private communications to certain entities and individuals

- makes it unlawful for a person to intentionally intercept any wire, oral, or electronic communication, or to use or disclose any wire, oral, or electronic communication that has been intentionally intercepted
- It is permissible, however, if the person is either a party to the communication or one of the parties to the communication gives prior consent to have the communication intercepted. (18 USC §2511(2)(d))
- Only applies to communications that have been "intercepted" while being transmitted from sender to recipient. Where transmission has already occurred, reading a copy of the message is not an "interception". (*Gurevich*, *supra*; *Steve Jackson Games, Inc. v. U.S. Dept. of Justice*, 36 F.3d 457 [5th Cir. 1994])

18 USC §§ 2511 and 2520 prohibits only intercepts that are contemporaneous with transmission, i.e., the intercepted communication must be in transit, not in

storage (*see,* Wesley Coll. v Pitts*,* 974 F. Supp. 375, 385-386 [D Del], *affd* 172 F3d 861 [3d Cir]). Hudson v Goldman Sachs & Co., Inc., 283 AD2d 246, 247, 725 NYS2d 318, 85 (1st Dept. 2001)

Crispin v. Christian Audigier*,* 717 F.Supp.2d 965 (District Ct., CD, Ca. 2010) - Federal court in California quashed subpoenas to MySpace and Facebook on the grounds that some of the content on those sites is protected by the Stored Communication Act (SCA), and because the use of selected certain privacy settings intended to limit access. SCA's protections (and associated discovery preclusions) include at least some of the content hosted on social networking sites, including the private messaging features of social networking sites protected as private email. Also, because Facebook, MySpace, and Media Temple all provide private messaging or email services as well as electronic storage, they **all** qualify as both Electronic Communication Services (ECS) and Remote Computing Services (RCS) providers, with appropriate SCA protections.

Issue of Transmission; Use of Adverse Party's EMails

Gurevich v. Gurevich, 24 Misc3d 808, 886 NYS2d 558 (Sup.Ct., Kings Co., 2009, Sunshine, J.) -- A party to a matrimonial action has the right to access and utilize the email account of the estranged spouse whom she no longer resides with and obtain copies of emails in his email account. Such action does not constitute illegal "eavesdropping" pursuant to Penal Law §250.00 which requires unlawfully intercepting or accessing electronic mail. That section prohibits individuals from intercepting communications going from one person to another. Here, the emails were not "in transit" but was stored in an email account, and thus there was no interception, and the emails could not be suppressed pursuant to CPLR §4506[1]. Wife was using husband's emails to show a scheme by husband to hide his income.

Issue of Expectation Of Privacy – E-Docs Stored at Work

Scott v. Beth Israel Med. Ctr., 17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct. N.Y Co. 2007][Ramos, J.] -physician's email communications with his attorney, which emails were stored on defendant-hospital's email server, were not confidential, for purposes of attorney-client privilege, where hospital's electronic communications policy, of which the physician had actual and constructive notice, prohibited personal use of hospital's email system and stated that hospital reserved the right to monitor, access, and disclose

communications transmitted on hospitals email server at any time without prior notice, though physician's employment contract required hospital to provide him with computer equipment.

Litigation Holds For ESI; Spoilation

Spoliation occurs when a party intentionally destroys evidence or negligently destroys evidence that the party has a duty to preserve (Weiss v. Industrial Enterprises, LTD, 7 AD3d 518).

When Does Duty to Preserve Arise

Zubulake v. UBS Warburg, LLC – "once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of routine documents."217 F.R.D. 309 (S.D.N.Y. 2003). VA party's duty to preserve evidence extends to all of electronically stored information that a party knows, or reasonably should know, is relevant to the subject matter of the litigation. This necessarily includes social mediate data.

Voom HD Holdings v. EchoStar Satellite LLC, 93 AD3d 33, 939 NYS2d 321 (1st Dept. 2012) – Court applies the standard for spoliation of electronic evidence set forth in *Zubulake v. UBS Warburg LLC*, 220 FRD 212, holding that:

- Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. This applies to both the initiator or the target of the litigation.
    - Recognition that parties often engage in settlement discussions before and during litigation but such discussions does not vitiate the duty to preserve which would allow parties to freely shred documents and purge emails, simply by faking a willingness to engage in settlement negotiations.
    - "In the world of electronic data, the preservation obligation is not limited simply by avoiding affirmative acts of destruction. Since computer systems generally have automatic deletion features that periodically purge electronic documents such as emailed, it is necessary for a party facing litigation to take active steps to halt that process."

- The defendant should have put in place a litigation hold, including a stop to automatic deletion of emails, when its corporate counsel sent plaintiff a letter containing a notice of breach, a demand and an explicit reservation of rights.
- An adverse inference against the defendant was deemed to be a reasonable sanction.

General Motors Acceptance v. New York Cent. Mut. Fire Ins., 104 AD3d 523, 961 NYS2d 142 (1st Dept. 2013) - a party's failure, after being ordered on multiple occasions, to produce relevant ESI that was known to have existed, and the parties' concomitant failure to provide an adequate affidavit explaining defendant's reasons for not locating certain ESI earlier and turning over it to the other party was "willful and contumacious", and the court imposed the sanction of adverse inference charge, as that would "prevent defendant from using the absence of these documents at trial to its tactical advantage."

Suazo v. Linden Plaza Associates, 102 AD3d 570, 958 NYS2d 389 (1st Dept. 2013) - As defendants were on notice of a credible probability that they would become involved in the subject litigation, their failure to take active steps to halt the process of automatically recording surveillance video and preserve it for litigation constituted spoilation of evidence and the proper remedy was not striking defendant's answer but to impose an adverse inference charge at trial.

Holme v. Global Minerals and Metals Corp., 90 AD3d 423, 934 NYS2d 30 (1st Dept. 2011) - grant of an adverse inference charge against defendants due to spoilation of electronic records, the court stating: "defendants had an obligation to preserve such records because they should have foreseen that the underlying litigation might give rise to the instant enforcement actions; the records were destroyed with a culpable state of mind; and they were relevant to plaintiff's claims of fraudulent conveyances."

Data created on the company's social media page is likely information in its possession, custody or control. –

Netbula, LLC v. Chordiant Software, Inc. - so long as a party can modify or allow access to information on a website, the company will be found to be in "control" for purposes of Rule 34(a)(1).

Prudent parties should inform employees of the need to preserve potentially relevant information created using personal social media accounts.

Corporate parties may have a duty to preserve relevant information where employees use social media for business purposes.

Spoliation

Dismissal of Complaint – Chen v. Fischer, 73 AD3d 1167, 901 NYS2d 682 – Prior to final judgment of divorce, wife sued husband for personal injuries for alleged physical and emotional abuse during the marriage. Due to wife deleting from her computer's hard drive materials that she had been directed to produce in the personal injury action, court directed dismissal of her complaint in its entirety.

Spoliation occurred requiring dismissal of plaintiff's action where between date that defendant demanded inspection of plaintiff's computer, and date of inspection, plaintiff deleted files, images and folders and installed software program designed to permanently remove data from the computer's hard drive. Ingoglia v. Barnes and Noble College Booksellers Inc., 48 AD3d 636, 852 NSY2d 337 (2d Dept. 2008).

Discovery obligations extend to the ESI of key players. A "key player" in a dispute is anyone at the company who was likely to have relevant information.

A party has a duty to preserve evidence when it has notice of pending litigation.

Notice of an accident may serve as notice of pending litigation and give rise to a duty to preserve evidence *(*Adrian v. Good Neighbor Apartment Associates, 277 AD2d 146). However, "[i]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices" (*Conderman v. Rochester Gas & Elec. Corp.*, 262 AD2d 1068)." *Penofsky v Alexander's Dept. Stores of Brooklyn, Inc.*, 11 Misc 3d 1052(A), 814 NYS2d 891, 2006 NY Slip Op 50186(U), 2006 WL 344314 [Sup Ct. 2006] (*Penofsky v. Alexander's Dept. Stores of Brooklyn*, 814 NY2d 891 [S.Ct., Kings Co., 2003, Schneier, J.)

Preliminary Conference

22 NYCRR 202.12(c)(3)(i) – At preliminary conference, a matter to be considered is "retention of electronic data and implementation of a data preservation plan".

Failure to Implement Litigation Hold Procedure

Einstein v. 357 LLC, 2009 NY Slip Op 3278 (U) (Sup.Ct., N.Y. Co. 2009 (Ramos, J.) - In a case dealing with electronic mail that was prone to deletion, the court held that "it is well settled that the 'utter failure to establish any form of litigation old at the outset of litigation is grossly negligent…'[I]t is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched".

As the CPLR and New York case law are silent on the obligations of parties and their counsel to effectuate a "litigation hold", "New York courts have turned to the Federal Rules of Civil Procedure and the caselaw interpreting them for guidance."

The demanding party is entitled to an adverse inference and "the utter failure to implement a litigation hold constitutes a separate discovery violation warranting sanctions (in form of attorneys' fees and costs for a forensic review of the producing party's hard drives and counsel fees and costs on the motion.

Once litigation has commenced or is reasonably anticipated, a party must take additional steps to preserve potentially relevant emails

Metadata

Definition

Data about data; the information embedded within electronic documents - typically includes its history, tracking, and management, which may also include changes to that document.

Data hidden in documents that is generated during the course of creating and editing documents and which describes the history, tracking or management of an electronic document.

Types:

Substantive metadata - records and reflects any changes to a document made by the creator or user of a document, and can reveal prior edits made by the

creator. Such metadata is automatically linked with the documents and travels with it anytime it is sent electronically.

System metadata – created automatically by operating system or application; includes author, date and time of creation and the date a document was modified

Microsoft Office Documents - Metadata exists in all Microsoft Office Documents (Word, Excel, Power Point etc.)

Mining for Metadata – Proper?

ABA – Yes

"the ABA Model Rules of Professional Conduct permit a lawyer to review and use embedded information contained in email and other electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party." The Model Rules thus do not prohibit a lawyer from "mining for metadata" and taking full advantage of any discoveries. (ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (2006),

Sending lawyer's duty to maintain client confidentiality by properly "scrubbing" the data to avoid disclosing client confidences. "Scrubbing" means eliminating certain embedded information in an electronic document before sending it to others.

NY County Lawyers – No

"when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material . . . ." Every lawyer still has an obligation to "scrub" electronic documents to avoid disclosing client confidences and secrets, but clearly not all documents will always be properly "scrubbed" because mistakes do happen. In such situations, the NYCLA opinion instructs New York lawyers not to take advantage of the sending attorney's oversight by "mining for metadata."

NYSBA

NYS Bar Ass'n Comm. on Professional Ethics, Op. 749 (2001) and 782: "Lawyers may not ethically use available technology to surreptitiously examine and trace email and other electronic documents." (Opinion 749)

"Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in quote metadata unquote in documents they transmitted electronically to opposing counsel or other third parties." (Opinion 782)

Cost Allocation; "Requester" Pays

Silverman v. Shaoul, NYLJ, 11/8/10 (Sup.Ct., NY Co., Bransten, J.) -

- Requesting party bears the cost of electronic discovery when the data sought is not "readily available".

- In this case, the data at issue was neither archived nor deleted; simply stored in a number of places and "interspersed with defendant's various documents for the several business entities." The fact that defendant was required to process the data was not an undue burden, but merely the normal burden of litigation.
- Court does not suggest that retrieving archived data is the only circumstance that renders electronic data not "readily available".
- The cost of an examination of defendant agents to see if material should not be produced due to privilege or on relevancy grounds should be borne by the producing (not requesting) party. *(Waltzer v. Tradescape & Co., LLC, 31 AD3d 302 [1st Dept., 2006])*

Lipco Electrical Corp. V. ASG Consulting Corp., 4 Misc3d 1019 (Sup.Ct., Nassau Co., 2004, Austin, J.) – Under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material.

Etzion, supra– In matrimonial action, plaintiff directed to bear the costs associated with attorney and computer expert time to clone or copy the hard drive of certain computers of the defendant-husband, as "Under the CPLR, the party seeking discovery should incur the costs in the production of discovery material.

T.A. Ahern Contractors Corp. v. DASNY, 24 Misc3d 416, 875 NYS2d 862 (Sup.Ct., NY Co., 2009) - court was "not empowered - by statute or by case law – to overturn the well-settled rule in New York State that the party seeking discovery bear the cost incurred in this production," and ordered that ESI will not be produced until such time as requesting party agrees to bear the costs associated with its production.

Cf. MBIA Ins. Corp. v. Countrywide Home Loans Inc., 27 Misc3d 1061, 895 NYS2d 643 (Sup.Ct., NY Co., 2010, Bransten, J.) – Criticizes the general requester-pays rule as stated in *Lipco* as "standing on more precarious footing than" the *Lipco* and other courts suggest.

Cf. Domestic Relations Law §237 (d): The term "expenses" as used in subdivisions (a) and (b) of this section shall include, but shall not be limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses that the court may determine to be necessary to enable a spouse to carry on or defend an action or proceeding under this section."

VII. DISCOVERY RE: MARITAL FAULT/EGREGIOUS CONDUCT

Howard S. v Lillian S., 14 NY3d 431 [2010] - The Court of Appeals held that the wife's adulterous affair did not amount to egregious misconduct where it was alleged that the youngest of the parties' children was the product of an extra-marital affair between the wife and an unidentified man, which was not discovered by the husband until the child was over three (3) years old. Moreover, the wife had allegedly commenced another extra-marital affair during the marriage, which she had denied when confronted by the husband. Ultimately, the DNA marker testing revealed that the husband was indeed not the biological father of the youngest child. Citing to *Levi v. Levi*, 46 A.D.3d 520, 848 N.Y.S.2d 225 (2d Dept. 2007) [attempted bribery of the trial judge], and *Havell, supra,* the Court of Appeals further noted that, "absent these types of extreme circumstances, the Courts are not in the business of regulating how spouses treat one another."

In so holding, the Court also affirmed the lowers court's determination that discovery was not permitted with respect to marital fault, reiterating the general rule that fault should only be considered is a "limited set of circumstances involving egregious conduct."

Eileen G. v. Frank G., 934 N.Y.S.2d 785 (Nassau Co., Sup. Ct. 2011)[Palmieri, J.]- The Supreme Court, Nassau County, held that the defendant-husband's conduct in allegedly sexually molesting the wife's eight-year-old granddaughter was sufficiently "outrageous" or "conscious-shocking" to warrant pre-trial discovery of marital fault as a potential factor in equitable distribution. The plaintiff-wife had further alleged that the husband had been arrested and subsequently convicted for this act in 2006 for engaging in a course of sexual conduct against a child in the second degree. Moreover, the wife alleged that in 2008 the defendant had admitted that he also had earlier molested the plaintiff's daughter, the mother of the granddaughter, when the daughter was twelve years old.

VIII. CPLR 3119: DISCLOSURE IN NEW YORK STATE RELATING TO ACTIONS PENDING IN OTHER STATES

Effective January 1, 2011, New York adopted the Uniform Interstate Depositions and Discovery Act, which is embodied in CPLR 3119. The act lays out a simplified and expedited procedure for litigants involved in actions outside of New York State to obtain discovery within the state without the need

for a court order. It permits an out-of-state subpoena issued by a court in another state to be presented to a county clerk who can then issue a New York subpoena. CPLR 3119(b)(2). If the court in which the action is pending is outside the United States, a party must utilize the disclosure procedure set forth in CPLR 3102(e).

In divorce actions litigated in New York State, it is not uncommon for a litigant to require disclosure of information maintained by out-of-state entities, or depositions of individuals residing and/or domiciled in a jurisdiction outside of this state. Under such circumstances, if disclosure must be compelled, the first inquiry to be made is whether the state in which disclosure is sought has a reciprocal statute to CPLR 3119, i.e., whether it has adopted in some form the Uniform Interstate Depositions and Discovery Act. If not, the procedure for obtaining a commission will be followed.