# TRACK 8
# Practice Management and E-Filing in Surrogate's Court: The New Frontier

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# New York State Bar Association
# Elder Law and Special Needs Law Section
# Summer Meeting

## July 12 - 14, 2018

"Practice Management and E-Filing in Surrogate's Court: The New Frontier"

July 13, 2018

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# "Practice Management and E-Filing in Surrogate's Court: The New Frontier"

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# (I)

# E-FILING IN SURROGATE'S COURT

# E-FILE

## Electronic Filing
## in the New York State Courts

2018

Report of the Chief Administrative Judge
to the Legislature, the Governor, and the
Chief Judge of the State of New York

*"Technology is critical to our efforts to enhance the efficiency and productivity of court operations, as well as to improve our service to the public. E-filing is the centerpiece of these efforts. It reduces costs and saves time for both the court system and litigants, improves access to the courts, and sharply reduces the environmental impact of litigation. E-filing is the future of our court system, and we must expand, thoughtfully and carefully, but also diligently, the use of this powerful tool."*

Janet DiFiore

**Chief Judge Janet DiFiore**
Chief Judge of the State of New York

# I. Executive Summary

The New York State Courts Electronic Filing System ("NYSCEF") continues to make significant advances and to show itself to be both reliable and effective. A significant milestone was achieved in 2016 – the e-filing of one million cases since e-filing was first authorized in New York, a number that has since grown to more than 1.6 million cases. 2017 saw another important milestone – more than 100,000 registered users of NYSCEF, a number that will continue to grow as attorneys and others become familiar with the ease of e-filing and its many advantages. Yet another major milestone will soon be reached – after years of experience in the trial courts, e-filing will shortly debut in the appellate courts, with pilot programs in each of the four Departments of the Appellate Division beginning in the first quarter of 2018.

This steady expansion reflects a growing recognition of the many benefits of e-filing:

**Convenience.** A case can be commenced and subsequent documents can be filed with the court and served on opposing parties via NYSCEF from any place with Internet access at any time on any day, even when the courthouse is closed. E-filing makes case files accessible online to counsel of record at any time and anywhere and allows counsel immediate access to newly-filed papers.

**Efficiency and Productivity.** E-filing streamlines the mechanics of litigation. The system provides immediate e-mail notification and delivery of all filings, including court orders, judgments, and decisions, which are available online. In addition, the system automatically serves papers on all participating parties and thereby relieves attorneys and litigants of this burden.

**Cost.** E-filing offers significant cost savings to attorneys, litigants, County Clerks and the courts. For attorneys and litigants, it eliminates the cost of serving hard-copy papers on opposing parties. For attorneys, the courts, and County Clerks, it sharply reduces record storage and retrieval costs.

**Environment.** E-filing is a green initiative that not only saves vast quantities of paper each year but also sharply reduces the need to travel for the purpose of serving, filing, or retrieving papers.

E-filing is one of the most successful projects, and certainly one of the most important, ever undertaken by the New York State Unified Court System ("UCS"). E-filing is transforming very much for the better the way attorneys conduct litigation and the way the courts and County Clerk offices operate. More transformation is on the horizon.

Section II reports on the current status of the e-filing program, highlights recent progress, and sets out our plans for the future. Among other things, we outline the continued expansion of e-filing in Supreme Court and Surrogate's Court; report on efforts to bring an up-to-date case management system integrated with NYSCEF to the Supreme Court, thus achieving improvements in efficiency and labor savings for the courts and the County Clerks; set forth the plan for the imminent introduction of e-filing in the Appellate Division, thus achieving integrated e-filing in trial courts and on appeal; and summarize the status of our efforts to introduce e-filing in criminal and Family Court cases. We also describe our ongoing training and outreach efforts, and the work of the NYSCEF Resource Center.

Section III summarizes comments and suggestions about e-filing received from County Clerks, bar associations, not-for-profit entities, government agencies and other groups, individual attorneys, and members of the public, as well as our responses thereto.

Section IV sets forth the court system's proposal for legislative changes. After significant legislative reform in 2015, further major modifications are not sought at this time. There are, however, two respects in which current legislative scheme can and should be improved:

- Removal of statutory provisions that deny to the Chief Administrative Judge the authority to require attorneys to e-file in matrimonial, residential foreclosure, and consumer credit cases; and
- Extension of the September 1, 2019 sunset currently in place for the authorization for e-filing in criminal and Family Court cases.

OCA will submit to the 2018 Legislature a legislative proposal to accomplish these ends. This limited proposal (Appendix A) will improve the efficiency and effectiveness of the e-filing program, reduce some of the complexity that currently affects it, and facilitate our ongoing efforts to move the New York courts into the digital future.

**ERIE COUNTY SURROGATE'S COURT**
**TIPS AND TOPICS FOR E-FILING**
**June 1, 2018**

## I. Essential Step Prior To E-Filing Input

Prior to inputting any information to an initial file, an inquiry should be run on the Decedent's Last Name, using the first initial to determine if a file is already open. Due to the numbering system at Surrogate's Court, an inquiry based on the file number alone may not produce accurate results.

## II. Original Input of Case Information

1. An error in inputting the original case information can significantly delay the proceeding as any changes with respect to the original input cannot be made locally, but must be done at the Statewide level.

2. Case name must be entered as follows and in the order listed below:
   a. Initial entry must be identical to the signature on the Will;
   b. If the name on the death certificate is different, that becomes an "a/k/a";
   c. If the name on the Will does not match the signature, that also becomes an "a/k/a";
   d. No punctuation or spaces should be used when entering the name or the a/k/a (i.e. Mc Carthy should be input as McCarthy).

3. Most common errors
   a. Spelling
   b. Improper entry of date of death

4. Once you input a proceeding, initially, do not e-file subsequent documents until you receive a file number. Failure to do so will result in the creation of a secondary proceeding and will delay processing of your petition.

## III. Other Information

1. Failure to file accurate or correct documents delays the proceeding and requires filing of amendments:

   a. Review documentation
      (1) Scanned documents should be previewed on your computer before they are sent to the Court to make sure that they scanned properly and are legible.
      (2) Documents should be scanned right side up as the Court Processor cannot correct the view of the scan.
      (3) If submitting an attorney certified death certificate, the attorney signed certification should appear on the back of the death certificate. The front and back of the death certificate should then be scanned to the court.
      (4) If the death certificate is not legible when scanned it is suggested to print the scanned death certificate and then rescan.

2. Like documents must be scanned together, for example:
   a. Waivers (except Waiver of funeral home)
   b. Releases
   c. Notices of Probate
   d. Proofs of Service

3. The order of filing the documents does not matter to the Court.

4. If the drop-down box does not have the name of the document you are looking for with respect to the proceeding you are filing, i.e. if you are filing a release prior to settlement, use the "Other Document" and explain this in the Comments Box.

5. Request for Surrogate's Court Action (see attached forms)
   a. A new Request for Surrogate's Court Action form must be completed with each filing. Do not re-use your original Request for Surrogate's Court Action. Prepare a new one for each filing with comments pertaining to what is being requested.
   b. Do not submit a blank Request for Surrogate's Court Action.

6. Credit Cards and Document Return
   a. Make sure credit limit is large enough to cover anticipated filings for at least one (1) month.
   b. To ensure rapid return of requested documents, Surrogate's Court will keep your pre-paid self-addressed envelopes on file and, when filing your Request for Surrogate's Court Action, you should indicate that the item should be returned to you in the self-addressed envelopes located at the court. If self-addressed stamped envelopes are not provided, the court will place the documents into the attorney pick-up drawer located at the main desk.
   c. There are two ways of paying for e-filing:
      1. **Pay with your credit card on e-file website**. Input credit card information directly on website. You must insert information with each filing.
      2. **Pay at court**. You may pay by attorney or estate check, cash, money order or credit card at the court. When paying at court by mailing the payment, note prominently in your cover letter that the proceeding has been e-filed, or include a copy of the NYSCEF filing receipt.

7. General
   a. Failure to make payment - the court cannot process the filing.
   b. Failure to file original Will or original or attorney certified death certificate - the court may process, but the court will not take action, i.e. granting Lettters, etc. If an attorney certified death certificate (front and back) is scanned to the court, it is not necessary for an original death certificate to be filed with the original Will.
   c. Note that there is a **drop-off bin** at the front desk for e-filed documents including original Wills, death certificates and checks.
   d. Guardian ad Litem.
      Consent, Oath & Designation must be e-filed. Reports can be e-filed.
   e. <u>When attorneys e-file, they are responsible to have the ORIGINAL DOCUMENTS in their possession.</u>

(Effective 5/1/17)

REQUEST FOR SURROGATE'S COURT ACTION

NAME OF MATTER:_____ FILE NO.: (If assigned): _____

**NATURE OF PROCEEDING**

[ ] **Administration**
- [ ] Temporary Letters are being sought
- [ ] Citation required
- [ ] Objection to Administration

[ ] **Probate**
- [ ] Preliminary Letters are being sought
- [ ] Citation required
- [ ] Objection to Probate

[ ] **Voluntary Administration**
- [ ] Number of Certificates requested: _____

[ ] **Accounting Proceeding**
- [ ] Estate [ ] Citation required
- [ ] Testamentary Trust [ ] Citation required
- [ ] Inter Vivos Trust [ ] Citation required

[ ] **Construction Proceeding** [ ] Citation required
[ ] **Advice and Direction** [ ] Citation required
[ ] **Answer or Objection** (other than to Probate or Administration)
[ ] **Appointment of successor fiduciary**
[ ] **Proceeding to compel accounting**
[ ] **Proceeding to continue a business**
[ ] **Proceeding to open a safe deposit box**
[ ] **Discovery Proceeding**
[ ] **Proceeding to determine the right of election**
[ ] **Application of fiduciary to resign**
[ ] **Proceeding to compel the production of a Will**
[ ] **Other:**

[ ] **Check[ ] or Cash[ ] Authorization to Use Credit Card on File [ ]**
In the amount of _____ applied as follow:
Filing fee _____ Certified Copies _____
Certificates_____ Other_____

Date: _____
Filed by Name _____
Address _____
Telephone No. _____
Email _____

Method of contact/return
[ ]telephone [ ]email [ ]SASE [ ]pickup

(Effective 5/1/17)

# REQUEST FOR SURROGATE'S COURT ACTION

NAME OF MATTER:_____ FILE NO.: (If assigned): _____

## NON PROCEEDING RELIEF

[ ] Reissue of Short forms - Letters Testamentary Number_____
[ ] Reissue of Short forms - Letters of Administration Number_____
[ ] Reissue of Short forms - Letters Trusteeship Number_____
[ ] Reissue of Short forms - other Number_____
describe: _____

[ ] Search of safekeeping for Will on file
Most recent address of decedent _____
_____

Prior addresses of decedent _____
_____
_____

[ ] Certification of documents
Describe the document(s) to be certified:_____
[ ] Exemplification of documents
Describe the document(s) to be exemplified:_____

[ ] Disclaimer and Renunciation
[ ] Right of Election
[ ] Inventory of Assets
[ ] Informal Closing
[ ] Releases
[ ] Other:_____

[ ] **Check[ ] or Cash[ ] Authorization to Use Credit Card on File [ ]**
In the amount of _____ applied as follow:
Filing fee _____ Certified Copies _____
Certificates_____ Other_____

Date: _____

Filed by Name _____
Address _____
Telephone No. _____
Email _____

Method of contact/return
[ ]telephone [ ]email [ ]SASE [ ]pickup

**CREDIT CARD AUTHORIZATION**
ERIE COUNTY SURROGATE'S COURT
92 FRANKLIN STREET
BUFFALO, NEW YORK 14202

HON. ACEA M. MOSEY
SURROGATE JUDGE

PHONE: 716-845-2560
FAX: 716-845-2700
EMAIL: Erie-Surrogate@nycourts.gov

DATE:_____, 20__

CARDHOLDER NAME:_____ PHONE: (__) _____

ADDRESS:_____

FILE NAME :_____ FILE NO :_____

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New York State Surrogate's Courts will only accept VISA or MasterCard credit card payments. Use of credit or debit card payments requires the submission of an authorization signed by the payee or a duly authorized representative of the payee organization; no telephone credit card transactions can be accepted, except by fax to the court's dedicated fax number or by email to the court's dedicated email address set forth above. To do so, complete the credit card authorization below and submit this entire form.

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Check as appropriate:

Credit or Debit Card* (Check One): VISA___ MasterCard___

Credit or Debit Cardholder: _____
Print Clearly - Exactly as appears on card

Credit or Debit Card Number: _____

CV2 Code: _____ Expiration Date: _____

*Debit Cards without the VISA or MasterCard Logo will NOT be accepted. Debit cards with the VISA or MasterCard logo will be processed as a credit card.

I hereby pay the fee amount(s) as set by Section 2402 of the Surrogate's Court Procedure Act or the CPLR and authorize payment thereof via the above-noted credit/debit card.

CHECK ONE
( ) I authorize the use of this credit card for all fees in connection with the above-captioned estate, guardianship or other proceeding.
( ) I authorize the use of this credit card for this transaction only in the amount of $ _____.

Cardholder Signature: _____ Date: _____

Credit/Debit card transactions rejected by your bank for failure to submit all required information will result in return charge of $20 which will be added to the outstanding balance.

## ADMINISTRATIVE ORDER OF THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and in consultation with the Presiding Justices of the Appellate Divisions, upon notice by the Presiding Judge of the Court of Claims, and, as appropriate, in consultation with or with the approval of County Clerks, I hereby establish, continue, or give notice of, programs for the voluntary and mandatory use of electronic means for the filing and service of documents ("e-filing") in the manner authorized pursuant to L. 1999, c. 367, as amended by L. 2009, c. 416, L. 2010, c. 528, L. 2011, c. 543, L. 2012, c. 184, L. 2013, c. 113, L. 2015, c. 237 and L. 2017, c. 99 in the counties, courts, and cases in effect as of the date of this Order or upon the effective dates set forth in Appendix A (e-filing matters) attached hereto. Such programs shall be subject to sections 202.5-b, 202.5-bb, 206.5, 206.5-aa, 207.4-a, 207.4-aa, and 208.4-a of the Uniform Rules for the New York State Trial Courts, as well as the rules relating to matrimonial matters in Appendix B. This Order is effective May 23, 2018, and supersedes AO/116/18.

Chief Administrative Judge of the Courts

Dated: May 22, 2018

AO/192/18

**APPENDIX A**
***E-FILING MATTERS***
(Commenced on or after May 23, 2018)

**SURROGATE'S COURT**

| | |
|---|---|
| Broome<br>Cortland<br>Dutchess<br>Orange<br>Orleans<br>Queens<br>Tompkins | **Consensual/Voluntary:**<br>• probate and administration proceedings<br>• miscellaneous proceedings relating thereto<br>• such other types of proceedings as the court may permit<br><br>**Mandatory:** None |

**SURROGATE'S COURT**

| | |
|---|---|
| Albany<br>Allegany<br>Cattaraugus<br>Cayuga<br>Chautauqua<br>Erie<br>Franklin<br>Genesee<br>Jefferson<br>Livingston<br>Monroe<br>Montgomery<br>Niagara<br>Oneida<br>Onondaga<br>Ontario<br>Orleans<br>Oswego<br>Schenectady<br>Seneca<br>Steuben<br>Suffolk<br>Ulster<br>Warren<br>Wayne<br>Westchester<br>Wyoming<br>Yates | **Consensual/Voluntary:**<br>• such types of proceedings as the court may permit<br><br>**Mandatory:**<br>• probate and administration proceedings<br>• miscellaneous proceedings relating thereto |

* For cases commenced prior to May 23, 2018, see AO/243/08, AO/244/08, AO/371/09, AO/395/10, AO/396/10, AO/507/10, AO/376/11, AO/468/11, AO/527/11, AO/529/11, AO/530/11, AO/531/11, AO/235/12, AO/236/12, AO/237/12, AO/238/12, AO/245/12, AO/112/13, AO/173/13, AO/222/13, AO/029/14, AO/64/14, AO/210/14, AO/049/15, AO/058/15, AO/194/15, AO/10/16, AO/79/16, AO/151/16, AO/224/16, AO/24/17, AO/84/17, AO/170A/17, and AO/116/18; see also, administrative orders of the Court of Claims dated 12/31/02 and 6/3/13 (www.nycourts.gov/efile).

# *22 NYCRR § 207.64*

This document reflects those changes received from the NY Bill Drafting Commission through May 18, 2018

***New York Codes, Rules, and Regulations > TITLE 22. JUDICIARY > SUBTITLE A. JUDICIAL ADMINISTRATION > CHAPTER II. UNIFORM RULES FOR THE NEW YORK STATE TRIAL COURTS > PART 207. UNIFORM RULES FOR THE SURROGATE'S COURT***

## § 207.64 Omission or redaction of confidential personal information; public access to certain filings

**(a)**Omission or Redaction of Confidential Personal Information.

**(1)**Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information ("CPI") means:

**(i)**the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; and

**(ii)**other than in a proceeding under Article 13 of the SCPA, a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

**(2)**The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing CPI in accordance with the requirement of *22 NYCRR section 216.1* that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the pro se status of any party in granting relief pursuant to this provision.

**(3)**Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full CPI described in Paragraph (1) of this subdivision is material and necessary to the adjudication of the proceeding before the court, he or she may apply to the court for leave to serve and file, together with a paper in which such information has been set forth in abbreviated form, a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

**(4)**When served with objections or a request for an inquiry or examination under *SCPA 2211* or *1404* that specifies a request for particular unredacted documents previously filed in the proceeding with respect to which the objection or request for inquiry or examination relates, the party who originally served and filed the redacted document shall serve (but not file) an unredacted version upon all parties interested in the proceeding or such portion of it to which the objection or request for inquiry or examination relates.

**(b)**Public Access to Certain Filings. The officers, clerks and employees of the court shall not permit a copy of any of the following documents to be viewed or taken by any other person than a party to the proceeding, or the attorney or counsel to a party to the proceeding, the Public Administrator or counsel thereto, counsel for any Federal, State or local governmental agency, or court personnel, or by order of the court or written permission of the Surrogate or Chief Clerk of the court. The standard for the grant of such permission in a contested matter shall be the same as required under *22 NYCRR 216.1* and applicable law:

**(1)**All papers and documents in proceedings instituted pursuant to Articles 17 or 17-A of the SCPA;

**(2)**Death certificates;

**(3)**Tax returns;

**(4)**Firearms Inventory; and

**(5)**Documents containing information protected from disclosure under other provisions of Federal or State law such as HIPAA for medical information, job protected services reports, material obtained from a state mental hygiene facility under *MHL 33.13*, and records involving alcohol or other substance abuse under *42 CFR 2.64*. These examples are not intended to be exclusive. This rule shall not preclude disclosure or copying of any index of filings maintained by the court.

Any determination by the court regarding access to any filings may be the subject of an appropriate motion for clarification or reconsideration.

## Statutory Authority

**Section statutory authority:**

Surrogate's Court Procedure, § A13.Section statutory authority: *Surrogate's Court Procedure, § 2211*.Section statutory authority: *Surrogate's Court Procedure, § 1404*.Section statutory authority: Surrogate's Court Procedure, § A17.Section statutory authority: Surrogate's Court Procedure, § A17-A.Section statutory authority: *Mental Hygiene Law, § 33.13*

## History

Added 207.64 on 3/19/14.Amended 207.64(effective 03, 01, 16) on 2/03/16.

NEW YORK CODES, RULES AND REGULATIONS

End of Document

# (II)

# ELECTRONIC DISCOVERY

1. Discovery Generally

- CPLR 3101 (a)

  -- "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof".

- *Forman v. Henkin*, 30 NY3d 656 [2018]

  -- the terms "material and necessary" must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial. "The test is one of usefulness and reason" (*Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

  -- in *Forman*, the Court of Appeals was dealing with a request to access the social media records of an injured plaintiff. The test to be applied is relevancy to the issues in the case, with the Court not allowing a wholesale "fishing expedition".

- *Hacksaw v. Mercy Med. Ctr.*, 139 AD3d 798 [2016]

  "'. . . unlimited disclosure is not mandated, and the court may deny, limit, condition, or regulate the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' (*Diaz v. City of New York*, 117 AD3d [777,777]; see CPLR 3103[a]; *Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 799). 'The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court . . .' (*Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d at 799 [internal quotation marks omitted]; see *Gould v. Decolator*, 131 AD3d [445, 447])" (at 799-800).

- *Matter of Nugent*, 26 AD3d 892 [2006]

  -- in contested probate proceeding, Court must ensure that disclosure being sought is relevant to the actual issues involved. Thus, the Court properly granted "limited disclosure of proponent's financial records. These records may be relevant on the issue of undue influence" (at 893). However, where Will proponent had not put her "medical condition in controversy, nor has she otherwise waived the physician-patient privilege" (at 893), her medical records or information are not discoverable. "The issue in this case is the testamentary capacity of decedent", not the medical condition of the Will proponent.

- *Matter of Hoffenberg*, 2014 NY Slip Op 33429U [dec. Dec. 19, 2014, Surrogate's Court, Nassau County]

  -- "Discovery of documents is permitted even if they are not admissible in evidence, provided that the production of such documents may lead to disclosure of admissible evidence (*Fell v. Presbyterian Hospital in New York at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1983])" *(see also Carrillo v. Brown,* 2017 NY Slip Op 32321U [dec. Oct. 19, 2017]).

2. Electronically Stored Information [ESI]

- Uniform Civil Rules for Supreme and County Courts
  §202.12 [22 NYCRR 202.12] ["Preliminary Conference"]

  -- subd (b) sets out how to handle a case which is "reasonably likely to include electronic discovery", and subd (c) sets guidelines for dealing with, and preservation of, such possible material.

- *Irwin v. Onondaga Cty. Resource Recovery Agency*, 72 AD3d 314 [2010]

  -- decision discusses types of ESI potentially discoverable by obtaining computer records or by forensic examination of a computer hard drive, pointing out that "nearly 'every electronic document contains metadata'" (at 319);

  -- "substantive metadata" "is useful in showing the genesis of a particular document and the history of proposed revisions or changes" (at 321);

  -- "System metadata reflects automatically generated information about the creation or revision of a document, such as the document's author, or the date and time of its creation or modification. System metadata is not necessarily embedded in the document, but can be obtained from the operating system or information management system on which the document was created . . . [S]ystem metadata is most relevant if a document's authenticity is at issue, or there are questions as to who received a document or when it was received" (at 321);

  -- "Embedded metadata is data that is inputted into a file by its creators or users, but that cannot be seen in the document's display. Common types of embedded metadata include the formulas used to create spreadsheets, hidden columns, references, fields, or internally or externally linked files. Embedded metadata is often critical to understanding complex spreadsheets which lack an explanation

of the formulas underlying the output in each cell" (at 321).

- *Encore I, Inc. v. Kabcenell*, 2016 NY Slip Op 32282U [dec. Nov. 4, 2016, Supreme Court, New York County]

  -- e-mails relating to issues in a case can be the subject of a production order, and, in an appropriate case, the Court can direct that a computer be "searched" by a computer forensic expert for such e-mails. If a Court does so, it will set appropriate guidelines to govern such analysis.

- *Tener v. Cremer*, 89 AD3d 75 [2011]

  -- In a defamation action, plaintiff contended that a search of a medical center's computers was needed in order to establish who had sent out the allegedly defamatory e-mail. Even though there were hundreds of possible users of the computers in question, and even though information stored on the computers might be "deleted" in "normal business operations", the Appellate Division, First Department, pointed out that (a) relevant information might still be recoverable through forensic analysis, and (b) that plaintiff had no other way to prove her case. However, the Court said a hearing was required to look at <u>all</u> the relevant factors that would go into a decision whether to order such a forensic analysis, including a "cost-benefit" analysis.

3. <u>*Matter of Nunz* [Erie County Surrogate Court File #2012-4075/A]</u>

   - *Matter of Nunz*, 53 Misc 3d 483 [2015]

     -- in probate proceeding, objectant sought forensic examination of attorney-draftsperson's computer, noting that (a) attorney-draftsperson had stated that he deleted the Will draft from computer after downloading it, and (b) there was an apparent "discrepancy" between the first and subsequent pages of the Will. Objectants said they had "a guy who thinks he can restore the hard drive and retrieve almost all of it." Finding that the application for ESI from the subject computer was proper on its face and that a forensic examination "may" provide information relevant to objectants' claims, the Court nevertheless deferred decision pending further affidavit material (a) from the prospective forensic computer examiner, and (b) the other parties. The Court also directed that the attorney-draftsperson "shall ensure that the computer on which he drafted decedent's 2012 Will at issue here is preserved and is not removed, replaced or destroyed, pending the further Order of this Court."

- *Matter of Nunz*, 52 Misc 3d 1216A [2016]

  -- following submission of additional information required by *Matter of Nunz*, 53 Misc 3d 483 [2015], the Court had ordered an evidentiary hearing on whether the requested forensic examination should be granted. This decision, following that hearing, reviewed the hearing testimony from the proposed forensic computer expert, concluded that there was a proper basis to order the requested forensic examination to try to recover ESI about the draft of decedent's Will, set out certain terms for a protocol to be followed in that examination, and set the matter down for a "protocol conference" to work out all such terms and conditions.

- *Matter of Nunz*, decided September 20, 2016

  -- Court established a detailed Protocol for the forensic examination of the attorney-draftsperson's computer.

- David Paul Horowitz, *I [Gotta] Guy [for That]*, New York State Bar Association *Journal* [November/December 2016]

- David Paul Horowitz, *What's The Guy Gonna Do?*, New York State Bar Association *Journal* [February 2017]

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF ERIE



In the Matter of the Estate of

WILLIAM R. NUNZ, SR.,
Deceased.

File No. 2012-4075/A

JOHN RICHARD STREB, ESQ.
Attorney for Preliminary Executor Mary Jane Nunz

MICHAEL O. MORSE, ESQ.
Attorney for Objectants William Nunz, Jr., Michael Nunz, Kathleen Danheiser, and Tambra Nunz

SHELBY BAKSHI & WHITE
Attorneys for Estate of Wendy Fecher
Justin S. White, Esq., of Counsel

DEBORAH A. BENEDICT
Appearing *Pro Se*

KEITH D. PERLA, ESQ.
Appearing *Pro Se*

MEMORANDUM AND ORDER

BARBARA HOWE, J.

This is a probate proceeding in which decedent's surviving spouse is seeking to admit decedent's Last Will and Testament, dated August 17, 2012, to probate. Four of decedent's children [referred to herein as the Morse objectants] by his first wife have filed objections to probate, and discovery have been on-going.

As part of that discovery, the Morse objectants have requested that the computer on which the Will was drafted by non-party Keith D. Perla, Esq. [hereafter,

Perla] be forensically examined for ESI [electronically stored information] with respect to the Will drafting. They proposed that D4, LLC [hereafter, D4], a firm based in Rochester, New York, conduct that examination. The estate opposed production but, by decision dated August 9, 2016, I granted the Morse objectants' request and then set the matter down for a pretrial conference to establish a Protocol to be followed in the examination process.

At the pretrial conference, the estate and the Morse objectants submitted separate Protocol proposals, some of which were ultimately agreed upon, with the balance left for this Court's determination. Attached hereto and made part hereof is the Protocol to be followed for the forensic examination of Perla's computer. The Protocol constitutes the order of this Court with respect to all the matters contained herein.

This Court, in establishing the Protocol to be followed by D4 in conducting the forensic examination of Perla's computer, has been guided by the unresolved proposed protocols submitted by petitioner and by the Morse objectants. This Court has also been guided by the September 15, 2015 affidavit of D4 Vice-President John Clingerman [hereafter, Clingerman], who principally will be conducting the forensic examination, as well as by Clingerman's April 20, 2016 testimony about the prospective examination issues.

The parties and D4 should understand clearly that the strict non-disclosure provisions in the Protocol are designed to ensure that no possibly

confidential information on Perla's computer is disclosed without the written authorization of this Court. The parameters I set out in my August 9, 2016 Memorandum and Order are also designed with that concern and consideration in mind.

With respect to the costs of this forensic examination, that shall be borne entirely by the Morse objectants seeking such examination, and shall be paid as required by D4's normal billing. However, at the conclusion of the within probate proceeding, the Morse objectants may make an application for possible allocation of such costs, on notice to all interested parties.

Finally, I direct that, upon receipt of this decision, counsel for the Morse objectants seeking the forensic examination of Perla's computer shall send a copy of (1) this decision, with attached Protocol, and (2) this Court's August 9, 2016 Memorandum and Order, to D4. Counsel shall also send a copy of its cover letter to D4, but without the enclosures, to this Court, to opposing counsel, to non-party Keith D. Perla, Esq., and to Deborah A. Benedict.

This decision shall constitute the Order of this Court and no other or further order shall be required.

DATED: BUFFALO, NEW YORK
September 20, 2016

HON. BARBARA HOWE
Surrogate Judge

## APPENDIX A

## PROTOCOL FOR EXAMINATION OF A COMPUTER OF NON-PARTY KEITH D. PERLA, ESQ., WITH RESPECT TO LAST WILL AND TESTAMENT OF WILLIAM R NUNZ, SR., DATED AUGUST 17, 2012

This Protocol is intended to set forth the procedure for the examination of the computer of non-party Keith D. Perla, Esq. [hereafter, Perla] for the purpose of retrieving any drafts of a Will for William R. Nunz, Sr. The examination is to be conducted by D4, LLC [hereafter, D4], a company hired by Michael O. Morse, Esq., who is attorney for the objectants seeking this examination. A copy of the Will of William R. Nunz, Sr. dated 8/17/12 which has been offered for probate is attached hereto.

1. The computer owned by Perla and used by him in the preparation of the 2012 Last Will and Testament of the within decedent shall be picked up by D4 from Perla at Perla's offices - - 7350 Quaker Road, Orchard Park, New York, 14127 [1-716-870-5683] [keithperla@verizon.net] - - at a date and time to be arranged by D4 directly with Perla, but on or before October 3, 2016.
2. D4 shall, upon receipt of Perla's computer, clone the hard drive within two business days of receiving it, and shall, within two business days thereafter, return the computer to Perla with the original hard drive intact and the computer unaltered.

3. D4 shall use a write-blocking device to ensure that the data on Perla's original hard drive is not altered in any way in the imaging process.

4. Following D4's receipt of Perla's computer, D4 shall not communicate about this forensic examination in any manner whatsoever with any of the parties to this proceeding, or with their attorneys [John Richard Streb, Esq., Michael O. Morse, Esq., or Justin S. White, Esq.], or with Perla, or with anyone else other than this Court, except that D4 may communicate with Perla for the purpose of returning his computer to him.

5. The D4 employees involved with this forensic examination project may communicate with each other, but D4 shall ensure that any and all communications about its findings and what, if anything, it has retrieved from the cloned hard drive shall be made directly and only to this Court by confidential correspondence only.

6. Any D4 employee involved in this project is hereby precluded, as well as being precluded by this Court's Memorandum and Order dated August 9, 2016, from disclosing any of D4's analysis, findings, or conclusions to any person or entity except to this Court or exept as may otherwise be authorized in writing by this Court.

7. D4 shall not examine any files on the cloned hard drive which would not likely lead to the discovery of evidence related to the Will in question. In

the event D4 inadvertently begins to examine any such unrelated information, D4 shall immediately cease examination of that file.

8. Any examination of the cloned hard drive shall be conducted on a closed system, that is, a system not connected to the internet.

9. D4 shall search the cloned hard drive for the following terms:

    (1) Nunz

    (2) Danheiser

    (3) Benedict

    (4) Tambra

    (5) Fecher

    (6) stepdaughter

    (7) Burke

    (8) stepson

    (9) Schatzel

10. Upon conclusion of its analysis, which shall be completed on or before November 1, 2016, and which will be delivered in confidential written report form directly and only to this Court, D4 shall also deliver to this Court, for safekeeping, the cloned hard drive after D4's review of same, and D4 shall certify to this Court that no other copies have been made of the hard drive or any of its contents. D4's report to this Court shall be marked "**CONFIDENTIAL TO ERIE COUNTY SURROGATE**

**JUDGE BARBARA HOWE ONLY - - TO BE SEALED BY THE COURT**", at the head of the report, and the outside of the envelope transmitting the report to the Court shall also be so marked.

11. Upon this Court's receipt of the report and findings of D4, this Court will print those documents and mail them directly and **only** to Perla. Perla shall then have 14 days to object to disclosure of any such ESI by notifying this Court that he is objecting, and his reasons for objecting. Any such objections should identify the document at issue and set forth the privilege or other legally cognizable reason for the objection. The objections should be submitted to the Court with copies of the objections provided to counsel for the parties and to Deborah Benedict (who is proceeding *pro se*).

    Thereafter, counsel for the parties and Deborah Benedict shall have fourteen (14) days to respond to the objections. This Court then shall rule on any objections made by Perla and deliver or otherwise make available to counsel those documents which are discoverable.

12. D4 shall produce any ESI it finds in a Portable Document Format [PDF] [that is, a standard image format capable of being viewed and printed on standard computer systems], and screenshots of metadata.

13. D4 shall, in its report, specify the format it used to image data -- such as, for example, E01 format -- and the software used to analyze any data, and

any other tools used in the cloning and examination of Perla's computer hard drive.

14. Any report by D4 shall document with sufficient detail the steps undertaken by D4 with respect to its examination and findings so that an independent third-party could replicate the same process. Any forensic images relied upon by D4 shall be specified and available for copying by a third-party.

15. D4 shall maintain a complete and documented chain of custody for all data it collects.

BY DAVID PAUL HOROWITZ

**DAVID PAUL HOROWITZ** (david@newyorkpractice.org) is a member of Geringer, McNamara & Horowitz in New York City. He has represented parties in personal injury, professional negligence, and commercial cases for over 26 years. In addition to his litigation practice, he acts as a private arbitrator, mediator and discovery referee, and is now affiliated with JAMS. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), as well as the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Mr. Horowitz teaches New York Practice at Columbia Law School and lectured on that topic, on behalf of the New York State Board of Bar Examiners, to candidates for the July 2016 bar exam. He serves as an expert witness and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

# "I [Gotta] Guy [for That]"

## Introduction

By now we are all acquainted with the concept of retrieving deleted material from a computer or other storage device, and understand that very often deleted material can be recovered, in whole or in part. At the same time, electronic disclosure issues continue to bedevil lawyers, and constantly test the limits of our admittedly limited technical knowledge. As a result, both the bench and bar rely more and more on the advice, and guidance, of "experts" (yes, as I am typing this I am making the air quotes[1] gesture).

We are also familiar with the term "forensic," when used in conjunction with examining, cloning, and recovering files and other data from a computer or other electronic storage device. So, for example, where a court directs that one party deliver to another a "clone" (copy) of a hard drive, a forensic computer expert will duplicate that hard drive so that the clone is an exact copy, and so that nothing is altered on the original drive. The same type of expert can examine a hard drive and determine if, and when, alterations were made to the data stored on the device and, in the case of deleted files, make efforts to recover the deleted data.

When the computer being examined belongs, for example, to the attorney draftsman of a will, additional considerations come into play, most significantly the protection of privileged and confidential information on the computer. It also matters that the attorney is a non-party to the proceeding. A recent decision by Surrogate Barbara Howe, Erie County, in *In re Nunz*,[2] (*Nunz* II) addressed the issues that arise in just this scenario, and built upon a prior decision in the same proceeding (*Nunz* I).

## *Nunz* II

In *Nunz* II, a will was offered for probate by the nominated executrix, objections were filed by children of the decedent, and the objectants to the will sought, *inter alia*, forensic analysis of the computer of the attorney who prepared the will offered for probate.

The attorney draftsman (and witness) to the will furnished an affidavit to the court wherein he stated:

> that he had "prepared the will using a Microsoft Word for Mac word processing program on an Apple IMAC computer," that he had "*deleted the digital file* [he] had created in preparing the will *immediately after* printing *a copy of the will*," and that "*any computer files or other materials* relating to the preparation of this will which were *created and/or stored in electronic or digital format have been destroyed or no longer exist*" (emphasis added by court).[3]

In response to the affidavit, the objectants sought

> production of the computer used by [the attorney] in preparing decedent's Will, and [] electronically stored information [ESI] from the computer about the draft of the Will by means of forensic analysis. The estate has opposed production and forensic analysis of the computer, and has requested, *inter alia*, that this Court grant a protective order.[4]

The court ordered that the attorney "shall ensure that the computer on which he drafted decedent's 2012 Will at issue here is preserved and is not removed, replaced or destroyed pending the further Order of this Court."[5]

Thereafter, the attorney draftsman testified at a hearing about his use of the computer used to prepare the will at issue:

> Q. With regard to the computer at issue, has that been the computer you have done your legal work on since the day you did –
>
> A. Yes.
>
> Q. – this will?
>
> A. Yes.
>
> Q. Did you use any other computer?
>
> A. I might have. I mean, I might have used other computers, sure.

Q. All right. Could you characterize – and I understand it would only be a percentage estimate –
A. Well, 95 percent of my stuff is on that computer.
Q. Okay. For the time period –
A. Of the hundreds of clients I have, yes.
Q. Okay. From –
A. And all my personal information and personal photos, yes.

* * *

A. No, no, the computer, I haven't used the computer since the order when they said not to use it and the machine has not been functioning well. It's in the closet and I'm using another computer 'cause it's just very old and it doesn't operate correctly. And then I got nervous I couldn't fix it. If I had gone and fixed it, you know – I didn't fix it, but it's still sitting at my home.
Q. Where is the physical location of the computer, in your home?
A. It's in my office in my home.
Q. Okay. And that's the address you gave –
A. Yep.
Q. – on Quaker Street? Thank you. And is the computer functioning at the present time?
A. I – the last time I operated it, it had a question mark on it and I didn't know what that meant and I made some calls and they said, you have to bring it in, and then the order came down. I said, I'm not touching this computer.
Q. Okay. So the time the computer stopped functioning was in and around the time the order came out?
A. A month – month either way, yeah.

### *Nunz* I

Surrogate Howe's 2015 decision in *Nunz* I[6] detailed the initial proposal by objectants' counsel (Morse) for a forensic examination of the draftsman's (Perla) computer.

On May 19, 2015, Morse served an additional subpoena duces tecum upon Perla, seeking production of the Apple iMac computer he used in preparing the decedent's will. In his cover letter to Perla, Morse wrote:

> All I am looking for in this subpoena is the Apple iMac computer you told me about in connection with preparing Bill Nunz' will. *While you informed me that you deleted the file, I have a guy who thinks he can restore the hard drive and retrieve almost all of it.*
> *I imagine that you have concerns over confidentiality for your other clients as their work is likely to be on that computer as well. I proposed that my computer tech guy can operate under a non-disclosure order. When he restores the hard drive, we can simply do a search for all files containing the word Nunz.* You should be able to identify any that deal exclusively with Mary Jane. The remaining files would then be relevant and ultimately, *we may be able to locate the digital file used to create the will.* We can do all of this at the courthouse or any other agreed upon location (emphasis added).[7]

Not surprisingly, the court expressed hesitancy about ordering a forensic analysis of the attorney's computer by the "guy:"

> Given the complexity of e-discovery issues, something more is required from the Morse objectants than their attorney's assertions that a forensic examination of Perla's computer "*should be able* to generate an exact unsigned paper copy of the purported will" (emphasis added), and that such an examination will reveal "metadata describing the document's creation, modification and last access date" (footnote omitted).
> More to the point, given the potential for harm in the forensic examination process, I am not prepared to allow any e-discovery request predicated on the assertion that counsel "*ha[s] a guy who thinks* he can restore the hard drive and retrieve almost all of it" (emphasis added). Similarly, I am not prepared to allow indiscriminate access to an attorney's computer where there *may* be attorney-client privilege issues involved, or unrelated confidential information on it, based on the mere assertion by Morse that "*[his] computer tech guy* can operate under a non-disclosure order" (emphasis added). These are sensitive issues, and they need to be carefully explored and resolved *first* before any forensic examination of the computer is permitted.[8]

**Electronic disclosure issues continue to bedevil lawyers.**

The court directed that Morse furnish the following information about the "guy:"

> (1) the expert's name, address, qualifications and credentials;
> (2) the expert's opinion regarding the ability to retrieve the relevant ESI from Perla's computer, including, if being sought, what type of metadata is at issue (using the definitions set out in the *Irwin* decision, *supra*);
> (3) how long the process ESI discovery and examination of Perla's computer would take to complete, whether it can be done at Perla's office, or whether some other approach or place is either necessary *or desirable*;
> (4) what exactly the expert would need to accomplish the data retrieval; and
> (5) how the expert proposes to identify and protect ESI on Perla's computer which may be subject to the attorney-client privilege or to other confidentiality considerations;
> (6) what the expert proposes with respect to the considerations set

out in the *Commercial Division, Nassau County Guidelines for Discovery of Electronically Stored Information (ESI)*, section C, items 3, 5, 6, 8, 9, 11, 13, and 15 (available online at www.nycourts.gov/courts/comdiv/PDFs/Nassau-E-Filing-Guidelines.pdf).[9]

Finally, the court, while holding in abeyance a determination in the objectants' request for relief pending the exchange of information concerning the proposed forensic expert, directed that Perla "ensure that the computer on which he drafted decedent's 2012 Will at issue here is preserved and is not removed, replaced or destroyed, pending the further Order of this Court."[10]

## Conclusion

Following the exchange of the requested information, Surrogate Howe, in her 2016 decision, reviewed the "guy['s]" qualifications, together with the detailed proposal for conducting the forensic examination, all of which will be revealed in the January 2017 column.

Until then, have a Happy Thanksgiving, Holiday Season, and New Year! ■

1. A gesture with raised pairs of fingers, when making a statement, to simulate quotation marks. It indicates that what is being said is ironic or otherwise not to be taken verbatim, see https://www.italki.com/question/87547.
2. 2016 N.Y. Slip Op. 51185(U), 52 Misc. 3d 1216(A) (Sur. Ct., Erie Co.).
3. *Id.*
4. *Id.*
5. *Id.*
6. 2015 N.Y. Slip Op. 05462, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co.).
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

BY DAVID PAUL HOROWITZ

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# "What's the Guy Gonna Do?"

## Introduction

This month's column returns, as promised, to the subject of forensic computer examinations, with a follow-up column to November/December 2016's "I Gotta Guy For That." That column discussed two decisions in *In re Nunz*, a will contest where the objectants to a will sought a forensic examination of the hard drive of the drafting attorney's computer in response to the drafter's affidavit testimony that he

> "[P]repared the will using a Microsoft Word for Mac word processing program on an Apple IMAC computer," that he had *"deleted the digital file* [he] had created in preparing the will *immediately after printing a copy of the will,"* and that *"any computer files or other materials* relating to the preparation of this will which were *created and/or stored in electronic or digital format have been destroyed or no longer exist"* (emphasis added).

In her first decision,[1] Surrogate Howe held in abeyance a determination on the objectants' request for relief pending the exchange of information concerning the proposed forensic expert's examination of the subject computer.[2] Following the exchange of the relevant information, an evidentiary hearing was conducted, on consent, before the Chief Attorney of the Court, on a "hear and report" basis.[3]

Portions of the transcript of the hearing follow, and provide a useful roadmap for attorneys questioning witnesses on this subject.

## Testimony of the Objectants' Computer Forensic Expert

Following the testimony of the attorney draftsman, John Clingerman, the objectants' forensic computer expert, testified at the evidentiary hearing. Based upon his preliminary testimony, Surrogate Howe determined that Clingerman qualified as an expert on the subject matter at issue. Thereafter, Clingerman described how the computer hard drive would be cloned:

> **Q.** Could you explain step by step what's involved in a computer forensics examination of an Apple iMac computer approximately ten years old?
>
> **A.** Typically what is involved would be, for any forensic analysis, is to *remove the hard drive from the computer. That original hard drive that's in the computer is then write protected so it is connected to a hardware device to prevent the forensic person from making any changes whatsoever to that original hard drive. And then from there the data is* pulled out of that hard drive – or I should say *copied over to another destination piece of media. That destination piece of media is always sterilized ahead of time* so it is full of zeros and it has absolutely no data on it whatever. So *at the end of the process, what we get as the end result on that destination media is an exact replica of the original piece of media.*
>
> **Q.** When you make that copy, what danger is there to the originating computer? Is there any danger of damage?
>
> **A.** No. Everything that we do is forensically sound and it's fully defensible (emphasis added).
>
> * * *
>
> **Q.** The actual storage of a hard drive, the cloned hard drive, where would you put it?
>
> **A.** We have a secure evidence room. While it's under examination, it's in our secure forensic laboratory in Rochester. Very limited access to that room.

Clingerman next testified about the search of the cloned hard drive:

> **Q.** And you have observed the will, the purported will in this case?
>
> **A.** I have.
>
> **Q.** And you understand it's a three-page will and that there's a difference with the first page as opposed to the other two, correct?
>
> **A.** That's what I was told, yes.
>
> **Q.** Okay. But you did see the will, is that correct?
>
> **A.** Yes.
>
> **Q.** All right. *Now, how do you propose to conduct an investigation that would help us to determine what happened to that will and whether it was actually created on the date Mr. Perla said, whether there are other versions of the will or any other useful information* based upon both your experience with D4 and your law enforcement background?
>
> **A.** Quite specifically, *we would make a forensic image of the hard drive of that computer. We would then* take that forensic image, *load it into a software forensic tool and*

*we would conduct examination by doing a couple of very specific things.* So it's my understanding that this will was originally in a Microsoft Word document. *So I would look in the unallocated space of the computer and I would look for Microsoft Word type of documents. I would also run or execute very specific search terms against that area of the hard drive as well to see if we can find fragments of a deleted file* (emphasis added).

Clingerman was questioned about the limitations of utilizing very specific search terms:

**Q.** When Mr. Morse asked you what search terms you would use, *you suggested that perhaps ten search terms might be appropriate for this particular project.* Do you know – and the only specific you gave us was the word Nunz, N-u-n-z. Is it your understanding that the only file with the name Nunz in it on Mr. Perla's computer is the file regarding William R. Nunz, Sr.?

**A.** I have no idea.

**Q.** *Did Mr. Morse ever inform you, either by his own communication or by documents, that Mr. Perla has indicated that on his computer he also has files of many other Nunz family members, including William R. Nunz, Jr., Mary Jane Nunz, Michael Nunz and William R. Nunz, Sr.* – Jr.s' son. Has he ever told you that?

**A.** *I don't recall that being any of our conversations.*

**Q.** I'm so sorry, sir. The affidavit of Keith Perla's that you do recall receiving at one point, is that Exhibit 3 or Exhibit 4?

**MR. SHIFFLETT**: It's the earlier exhibit, Mr. Streb. It's the earlier.

**MR. STREB**: Thank you. *Would you agree then, sir, assuming hypothetically that there are many other files regarding other Nunz family members on Mr. Perla's computer, would you agree that using the search term Nunz will bring up those files as well if they can still be recovered on the hard drive?*

**MR. MORSE**: Objection. Nobody testified to those facts before the Court.

**MR. SHIFFLETT**: It's a hypothetical to an expert. Overruled.

**A.** *Certainly.*

**Q.** Okay. And *would you agree then that that* – we're going to get into the confidentiality issues in a moment, but would you agree then that that is going to pose an issue in terms of confidentiality, that *if you do recover some document fragments, you may be recovering document fragments for, say, a will for another Nunz family member or a DWI case for another family member or other sensitive matter, would you agree?*

**A.** *Yes.*

**Q.** *And would you agree that if you use the word will, w-i-1-1, that could also pose different possibilities*? For example, would you agree that if you find the word will, that we've now seen the ASCII binary code equivalent of, that that could reference a text that says the Last Will and Testament. Would you agree that's one possibility?

**A.** *Yes.*

**Q.** *Would you agree that it could also call up a person's name Will?*

**A.** *Yes.*

**Q.** For example, there's a William R. Nunz, Sr. and a Jr. Would you agree?

**A.** It would certainly find Will.

**Q.** *Would it also potentially call up phrases that say, "I will say" or "They will call you"?*

**A.** *Yes.*

**Q.** *So again, there's a potential here, a very serious potential, that you could be, when you try to do this analysis, looking at completely unrelated confidential files, correct?*

**A.** *Yes* (emphasis added).

Clingerman was questioned about who would be involved in the examination of the cloned drive:

**A.** Initially I would be doing the examination, but when it comes to digital forensics, we pride ourselves, industry standard, to do a peer review of our activities to ensure that we're doing everything correctly, we haven't missed something, in essence leaving no stone unturned.

**Q.** How many other people would be involved?

**A.** I would say probably one other person.

**Q.** So when you use the word team, you're just referring to one other person?

**A.** I have another person that works in the office next to me. My manager is in Chicago and I would discuss my findings with him, as I do all the time and the person who works in my office is a junior member of my team who I will frequently share results or investigative processes with him.

**Q.** So we've got at least three people that would be having access to Mr. Perla's computer, you, a junior member and your manager?

**A.** We could do it that way (emphasis added).

Clingerman next testified about how his findings would be reported:

**MR. SHIFFLETT**: All right. Mr. Morse, before I turn to you for redirect, Mr. Clingerman, what ultimately happens to the cloned hard drive?

**THE WITNESS**: Anything that the client wants to have happen to it. So when a case is resolved, we give the clients a choice and there are actually several choices. We can maintain possession of the cloned hard drives in our evidence vault until whenever they want to have something else occur to it. We can ship that to the client. We can ship it to a third party at their direction. We can have it physically destroyed if they want or we can wipe the hard drive, which means fill it full of zeros and purpose it for another day. So those are the choices.

**MR. SHIFFLETT**: And the client in this case would be Mr. Morse, as you understand where you are at this point in these proceedings?

**THE WITNESS**: Yes, he is my client, but *in a situation like this, we can be directed by the Court*, we can – you know, opposings could have an agreement. *You know, we can do whatever we're instructed to do.*

**MR. SHIFFLETT**: I understand. I just wanted to know what your normal procedure is. *What happens if, in your search of the cloned hard drive, you find no relevant document, as relevancy is defined for you?*

**THE WITNESS**: *Whatever we find or don't find gets reported.* You know, we're an unbiased third party. *We do our search and we provide the findings.*

**MR. SHIFFLETT**: *And you write a report, is that how it's done?*

**THE WITNESS**: It's always done differently. *It all depends on what protocol is agreed to between the parties, such as, you know, protocol would consist of search terms and the processes post examination. I mean, the protocol could address how, where, when we're going to do a forensic image, what we're gonna do with it afterwards and how the examination would be conducted, how we report our findings and who we report our findings to and then, you know, in what format and then ultimately what happens to the clone. So it can all be spelled out* (emphasis added).

Finally, Clingerman elaborated on the concept of, and need for, a well-defined protocol before proceeding:

**A.** Confidential protocol is the process that we're going to undertake and we have – it's basically rules of engagement and it's determined by the attorneys that are on each side of the matter, so together they devise a plan that we're going to work under and we follow that protocol.

**Q.** The confidential protocols in – so you're expecting a confidential protocol to be developed for this particular case?

**A.** Well, are we talking about protocol or are we talking about, say, the process of nondisclosure? Because which – I'm thinking that's maybe what I'm hearing. So when it comes to the protocol of nondisclosure, again, when we are engaged with clients, sometimes they request of us a very specific nondisclosure agreement, that either they can use our documentation or we can use theirs so – and the protocol may say who we can disclose things to and who we cannot (emphasis added).

## Decision of the Court

Following the hearing, there were a number of issues for the court to decide.

First, the court determined that there was a proper basis to order production of the computer.[4] Second, the court determined that a forensic analysis could be performed properly by Clingerman's "team."

More problematic was selecting the protocol to be followed during the forensic examination:

> Some aspects of the protocol are easier to determine than others, but what is clear is (a) that the parties have never attempted to resolve these issues, and (b) that, left on their own, the parties seem unlikely to come to accord on the protocol. However, without a clear protocol in place, the process will be pointless.

To preserve confidentiality, the court ordered:

> (1) Perla's computer shall be delivered to D4 *either by* Perla himself or by the estate attorney, as they shall determine, at a date, time and place to be agreed upon directly with Clingerman, and neither the Morse objectants nor their attorney shall have any part in that turnover process, except that such objectants' attorney shall be notified by the estate attorney immediately after the turnover has taken place;
>
> (2) Once Perla's hard drive has been cloned, D4 shall ensure the immediate return of the computer itself to whomever D4 had received it from;
>
> (3) After it has received Perla's computer, D4 shall not communicate in any manner whatsoever either with the Morse objectants, or with their attorney, or with Perla or with the attorney for this estate (except to return the computer), or with anyone else except the three D4 employees involved with the project, and D4 shall direct any and all communications, including any reports about its findings, *directly and only* to this Court, by confidential correspondence only;
>
> (4) Any D4 employee who is involved in this project shall give written assurance that he or she shall abide by the directions herein, and by any further protocol established for this project hereafter, and shall not disclose any of D4's analysis, findings or conclusions except as may otherwise be authorized in writing by this Court;
>
> (5) Once D4's report and findings have been transmitted in confidential form to this Court, I will issue whatever further Order is appropriate and necessary regarding disclosure (or not) of all or any part of the contents thereof.

Notwithstanding the court's observation about the lack of cooperation among the parties, the court ordered that the remaining protocol issues be worked out by counsel for the parties:

> I direct that counsel shall confer with each other and shall thereafter appear for a "protocol conference" with the Chief Attorney of this Court on *Wednesday, September 14, 2016, at 11:00 a.m.* At that conference, counsel should have with them proposed written protocols which can either by incorporated into a further Order to be issued by the undersigned on consent, or which can be tendered to the undersigned for review, consideration and determination. Counsel should reflect on the guidelines referred to in *Tener v. Cremer* (citation omitted), and should refer particularly to the Guidelines for Discovery of Electronically Stored Information [ESI] of the Nassau County Supreme Court Commercial Division. Counsel may also wish to consult with Clingerman prior to the protocol conference about any and all outstanding protocol issues that will be important to include in whatever Order I subsequently issue.

## Conclusion

It is often difficult to locate sample transcripts to serve as a guide when questioning witnesses on an unfamiliar or novel subject, and this decision offers,

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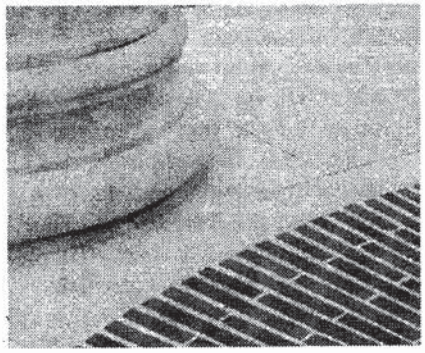
BY LUKAS M. HOROWITZ



**LUKAS M. HOROWITZ**, Albany Law School Class of 2019, graduated from Hobart William Smith in 2014 with a B.A. in history and a minor in political science and Russian area studies. Following graduation, he worked for two years as a legal assistant at Gibson, McAskill & Crosby, LLP, in Buffalo, New York, and with the New York Academy of Trial Lawyers hosting CLE programs. Lukas can be reached at Lukas.horowitz@gmail.com.

# Alphabet Soup

Alas, he still has a pulse! My first law school semester is officially in the record books. The three week-long finals period of the semester was interesting, to say the least, in much the same way that having dinner with Hannibal Lecter can be called interesting. Very trying at times but, overall, worthwhile and beneficial.

I didn't realize until I sat down to review the first semester's work just how much information had been covered, and how much knowledge I had acquired. The written material was a critical component, but not the only source of information. As I studied, I began to appreciate and understand how my professors had synthesized the entirety of the material we covered, and I realized I had been afforded the opportunity to acquire a deep and meaningful understanding of that material.

It felt as though at the beginning of the semester I was given various paints and pigments, brushes, and a canvas, and no instructions. As the semester progressed, what began with simple stick figures and finger painting gradually took form on the canvas, so that by the end of the semester I could produce a recognizable landscape. While my final grades made it clear the landscape was not a masterpiece, I know my parents will hang it up on their refrigerator.

I heard a lot about "thinking like a lawyer," and spent the better part of the semester certain I was definitely not thinking like a lawyer. However, by the end of the semester I was shocked to discover that I was able to carry on a legal conversation with my peers, thinking like a lawyer, and without ending every sentence with, "I think."

I left school after the first semester in good spirits, and hopeful. I embarked on a 12-day trip to Israel, an experience that not only met, but vastly exceeded, my expectations. From the Golan Heights in northern Israel to the Old City of Jerusalem, there was never a dull moment, a sentiment no doubt shared by "Big Bertha," the camel I rode while visiting a Bedouin camp.

With the holiday vibes dimming and my jetlag dissipating, I realigned my focus as the second semester of law school began. With torts and federal civil procedure behind me, I am taking on two new subjects: constitutional law and criminal law. Three weeks into the second semester and the wheels in my brain are beginning to spin again. Since I have been back at school, I have noticed a broadening of the areas of law that aroused my interest. Prior to law school, I had always told myself that criminal law was something I would avoid. I had always worked on the civil side of law in the past. To be honest, I had just never considered criminal law as an area I would be intrigued by. However, the cases that we have read thus far, though few in number, have held my attention more than any other type of case covered in my first semester. Proof that you really can't judge a book (or an area of law, for that matter) by its cover. I look forward to plunging further into criminal law as the semester progresses. Constitutional law has also caught my attention. Prior to class, the interpretation of the Constitution appeared to be straightforward. This is what the Constitution says, apply it literally, and you're done. Oh, how wrong I was! Looking at the Constitution through the lens my professor has provided in classroom lectures has changed my understanding of the word "interpretation." I am excited to view this historic document through a new pair of eyes. I know I will be surprised, and challenged, by what I learn this semester.

So, what you really want to know is how I did my first semester. As a child, there was nothing I loved more than alphabet soup. Enough said. ■

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BURDEN OF PROOF

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at the very least, a jumping off point for crafting a deposition or trial outline.

February provides many distractions, what with Valentine's Day, Washington's Birthday, Lincoln's Birthday, and my personal favorite, Groundhog Day. Nonetheless, for those of you involved in ESI issues, try and carve out a little time on one of these holidays and study *Nunz* and the guidelines referenced in the decision. And if you do so on Groundhog Day, review the material at least two times. ■

1. 53 Misc. 3d 483, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co. 2015).

2. The same Order directed "that the computer on which he drafted decedent's 2012 will at issue here is preserved and is not removed, replaced or destroyed, pending the further Order of this Court."

3. The parties waived the filing of a written referee report and consented that the court could decide the issues on the record before it, pursuant to SCPA 506(6)(c).

4. The court noted "[a]lthough Clingerman was not in a position to state with *certainty* that anything relevant could be recovered due to various unknown factors, he pointedly observed: 'All things considered, I still – I don't know whether or not it's possible. I mean, it's always poss – *we have to look. Until we look, we don't know*'" (emphasis added).