E-Discovery Best Practices: Admissibility

Electronic evidence, no matter how probative it may be, is useless if it cannot be used in court. Thus, from the outset of a case, practitioners must pay careful attention to whether potential electronic evidence would be admissible upon a motion for summary judgment, at trial, or in any other procedural context for which a court would require admissible evidence. Existing rules concerning the admissibility of evidence – such as the rules of relevance, authentication, hearsay, and the best evidence rule – have been extended to apply to ESI. However, ESI can present novel admissibility issues, such as electronic evidence which is created without any human input or voluminous data which is not readily summarized, printed, or rendered into hard copy. ESI may also be more susceptible to alteration than traditional evidence. Thus, practitioners must be familiar both with the traditional rules of evidence as well as the new challenges posed by electronic evidence.

When considering whether ESI would be admissible in a New York court, practitioners should ask themselves at least the following questions to identify some of the most common potential evidentiary issues:

- Does the ESI tend to make the existence of any fact that is of consequence more or less probable?

- How could the ESI be authenticated?

- Does the ESI constitute hearsay, and if so, does an exception apply?

- Does the best evidence rule or its exceptions apply to the ESI?

- Are there any statutes which may bar the admission of the ESI?

Below, we address how New York State courts have addressed these issues, although in many respects, the case law on the admissibility of ESI is developing slowly.

Be Able to Explain Why ESI Is or Is Not Relevant

ESI cannot be addmitted unless it is relevant. The Court of Appeals has defined "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[1] While some parties have argued that the spontaneity and brevity of certain ESI, such as text messages or instant messages, should affect its relevance, New York courts have rejected such arguments, which only go to the weight of the evidence.[2] Even if electronic evidence is relevant, a court may in its discretion exclude it if its probative weight is outweighed by the risk of unfair prejudice

or jury confusion.[3] While there are no reported cases addressing this issue, email, text messages, social networking data, or other types of electronic evidence often consist of casual communication which may be personal or inflammatory in nature and potentially prejudicial. Ultimately, the relevance or potential prejudice will be determined by the content of the evidence, as opposed to the mere fact of its electronic form.

Be Prepared to Authenticate Your ESI

All evidence must be authenticated, which means that the offering party must provide information sufficient to demonstrate that the evidence is what the offering party claims it to be. Authentication is a corollary to the relevance requirement because only authentic evidence can be relevant. ESI can be authenticated in many ways, including testimony by a witness with personal knowledge of its creation and storage, testimony as to the reliability of the process by which the ESI was created or recorded, unique characteristics of the ESI, expert testimony, and circumstantial evidence.

The case law demonstrates the variety of means which may be used to authenticate electronic evidence. For example, the First Department held that surveillance videotapes and digital photographs taken from the tapes were properly admitted – even without expert testimony about the process by which the photographs were made – based on the testimony of a bank employee who made the tapes and had compared the tapes and the photographs.[4] Likewise, evidence about the unique contents of a computer disk was sufficient to authenticate such evidence in a criminal case.[5] Generally, digital photographs and videotapes may be authenticated by the testimony of a witness to the recorded events or of an operator or installer of the equipment that the videotape accurately represents the subject matter depicted.[6]

Email or instant messages pose particular authentication issues because people typically use screen names or aliases which must be connected to the purported sender or recipient. In such cases, circumstantial evidence may necessary to link the account name and the user. For example, the First Department held that instant messages were properly authenticated when two witnesses testified that the defendant used a particular screen name and that messages sent to and from that account did not make sense unless they had been sent by defendant.[7]

Similar authentication issues are posed by the burgeoning use of social networks, which are likely to become a source of potential evidence in many civil and criminal cases. While New York cases have very rarely addressed social networking evidence in any context, the Third Department held that messages sent on the social networking website MySpace were authenticated when a representative of the State Police's computer crime unit testified that he had retrieved such conversations from the hard drive of a victim's computer, MySpace's compliance officer testified that the messages had been exchanged by users of accounts created by defendant and the victims, and defendant's wife testified that she had viewed the sexually explicit conversations in defendant's MySpace account while on defendant's computer.[8] This case also highlights

the potential need for testimony by non-party carriers or hosts of electronic communications to help authenticate electronic evidence.

Making or Overcoming Potential Hearsay Objections

Under New York law, hearsay refers to an out of court statement offered to prove the truth of the matter asserted, but which may or may not be subject to various exceptions to the general rule that hearsay is inadmissible. The hearsay rule applies to electronic evidence just as it does to other types of evidence. Often, hearsay objections to ESI turn on whether a party seeking its admission has established a proper foundation for the evidence to fall within exceptions to the hearsay rule, such as the business records exception set forth in CPLR § 4518(a). New York cases also reflect hearsay objections in connection with motions for summary judgment, for which a movant is required to submit evidence in admissible form.

For example, a few recent New York cases have addressed unsuccessful summary judgment submissions because the parties had provided affidavits which attached hearsay emails.[9] Attorney affirmations are likely to be insufficient to establish that an email is a business record because the attorney would not have personal knowledge to establish that it was created in the ordinary course of business and that it was business's regular practice to create the record at or within a reasonable amount of time after the transaction.[10] Testimony from a witness with knowledge of the company's business practices and how and when computer records are created will suffice to establish the foundation for establishing an electronic business record.[11] However, courts have excluded evidence as hearsay which was not a business record because anyone at the company could have sat down at a computer and entered the record at any time.[12]

Even if electronic evidence does not qualify as a business record, email and other types of ESI may also be admissible as a party admission or under other hearsay exceptions. For example, text messages have been admitted, upon a proper showing of authentication, as admissions against a criminal defendant.[13] Still other hearsay exceptions may apply to electronic evidence, such as the excited utterance or present sense impression rules which may apply to the instantaneous and informal nature of electronic communications, although reported New York cases have not yet applied these hearsay exceptions to electronic evidence.

ESI Must Satisfy the Best Evidence Rule

Under New York law, a party must submit an original writing into evidence when it seeks to establish its contents.[14] There are important exceptions to this rule, such as whether the writing is collateral to the issue to be proven.[15] Additionally, if the original is not available, secondary evidence is admissible if the proponent satisfactorily explains why the original is unavailable.[16]

Electronic evidence may implicate the best evidence rule when a party seeks to submit computer printouts or oral testimony about electronic evidence is lieu of the actual

electronic data. New York courts have uniformly admitted computer printouts on the basis of the voluminous writings exception to the best evidence rule.[17] The voluminous writing exception permits the admission of summaries of voluminous entries when the party against whom the evidence is offered has access to the original data.

CPLR § 4539 provides another exception to the best evidence rule, which is potentially applicable to duplicates of electronic evidence made in the course of business and to scanned images. CPLR § 4539(a) permits the admission, as "originals," of "any writing entry, print or representation" that was created "in the regular course of business activity."[18] Furthermore, CPLR § 4539(b) provides another exception but it is not limited to business activity. This section allows the admission of a reproduction of "an image of any writing, entry, print or representation" produced in a way that does not permit alterations without leaving a record of these alterations, when authenticated by competent testimony or affidavit which includes the manner or method by which tampering or degradation of the reproduction is prevented."[19] If a party intends to rely upon this statutory exception, it must proffer evidence sufficient to fulfill its requirements.[20]

Finally, practitioners should evaluate whether they can substitute testimony for original electronic evidence without violating the best evidence rule. For example, while courts held oral testimony about an X-ray to be admissible, testimony about surveillance videotapes has been found to violate the best evidence rule.[21] Similarly, another court held that oral testimony about a lost surveillance videotape violated the best evidence rule – even when its unavailability was explained – because the proponent did not meet its "heavy burden" of establishing that the witness was able to recount or recite, from personal knowledge, substantially and with reasonable accuracy, all of the video's contents.[22]

Do Any Statutes or Regulations Bar the Admission of ESI?

Practitioners should evaluate whether electronic evidence violates any statutes or regulations, including criminal laws. Notably, CPLR § 4506(1) prohibits a party from using evidence which it obtained by eavesdropping. Under the Penal Code, a party commits the crime of eavesdropping when it "unlawfully engages in wiretapping, mechanical overhearing of conversation, or interception or accessing of an electronic communication."[23] However, a party does not violate the law if: (a) one overhears a conversation unintentionally; (b) one overhears a conversation intentionally but not through the use of an instrument, device or equipment; or (c) one party to the communication consents to the overhearing or recording.[24]

Therefore, parties should question whether ESI was gathered by interception and without the consent of any party to the communication. One New York court rejected a claim that a party had obtained emails by eavesdropping because the data was already stored when the party acquired it.[25] In addition to the eavesdropping statute, other federal and State statutes and regulations may govern whether electronic evidence was obtained lawfully.

Conclusion

While New York law on the admissibility of electronic evidence is not yet well-developed, the ubiquity of electronic communications will lead to increased attention in State courts to these issues. For now, practitioners should consider admissibility issues during the early stages of litigation and be mindful of whether additional discovery or testimony will be necessary to ensure the admissibility of potential electronic evidence.

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[1] *People v. Davis,* 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456 (1977).
[2] *People v. Limage,* 19 Misc.3d 395, 851 N.Y.S.2d 852 (Crim. Ct. Kings Cty. 2008); *see also Rosen v. Evolution Holdings, LLC*, 24 Misc. 3d 1205(A), 890 N.Y.S.2d 370 (N.Y. Dist. Ct. Nass. Cty. 2009).
[3] *See, e.g., Kish v. Board of Education,* 76 N.Y.2d 379, 558 N.E.2d 1159 (1990) (In personal injury case involving claim of lost, past and future earnings from alleged disability, probative value of evidence that plaintiff voluntarily retired not substantially outweighed by risk of prejudice).
[4] *People v. Rodriguez*, 264 A.D.2d 690, 691, 698 N.Y.S.2d 1, 1 (1st Dep't 1999).
[5] *People v. Foley,* 257 A.D.2d 243, 254, 692 N.Y.S.2d 248, 257 (4th Dep't 1999) aff'd, 94 N.Y.2d 668, 731 N.E.2d 123 (2000).
[6] *People v. Patterson,* 93 N.Y.2d 80, 84, 710 N.E.2d 665, 668 (1999).
[7] *People v. Pierre*, 41 A.D.3d 289, 291-92, 838 N.Y.S.2d 546, 548-49 (1st Dep't 2007).
[8] *People v. Clevenstine,* 68 A.D.3d 1448, 891 N.Y.S.2d 511, 514 (3d Dep't 2009).
[9] *Zuccarini v. Ziff-Davis Media Inc. and Ziff Davis Publishing,* Index No. 014997-01 (Sup. Ct. Nass. Cty., Nov. 8, 2004); *Les Collections v. Great Shapes of Albertson, Inc.,* Index No. 4596/08 (Sup. Ct. N.Y. Cty., Sept. 10, 2010).
[10] *See generally* James M. Wicks & Aaron E. Zerykier, *Emails and the Hearsay and Foundational Objections They Bring,* The Suffolk County Lawyer, Vol. 26 No. 2 (October 2009); *see also Berkowitz v. Prendo Forensics, LLC,* Index No. 783-10 (Sup. Ct. Albany Cty., Feb. 10, 2010) (emails inadmissible because of lack of proper foundation).
[11] *Federal Express Corp. v. Federal Jeans, Inc.,* 14 A.D.3d 424, 788 N.Y.S.2d 113 (1st Dep't 2005).
[12] *People v. Manges,* 67 A.D.3d 1328, 1329, 889 N.Y.S.2d 341, 341 (4th Dep't 2009).
[13] *People v. Pierre*, 41 A.D.3d 289, 291-92, 838 N.Y.S.2d 546, 548-49 (1st Dep't 2007).
[14] *Schozer v. William Penn Life Insurance Co. of N.Y.,* 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353 (1994).
[15] *See, e.g.,* Ferraioli *v. Ferraioli*, 295 A.D.2d 268, 269, 744 N.Y.S.2d 34, 35 (1st Dep't 2002).

[16] *Schozer,* 620 N.Y.S.2d at 800-801, 644 N.E.2d at1356-57 (oral testimony of doctor concerning plaintiff's X-ray, considered a "writing" under New York evidence rules, which had been subsequently lost, could be established as secondary evidence).
[17] *See, e.g., Sager Spuck Statewide Supply Co., Inc. v. Meyer*, 298 A.D.2d 794, 751 N.Y.S.2d 318 (3d Dep't 2002) (computer printouts summarizing equipment supplier's declining gross sales and profits admissible for limited purpose of aiding jury in comprehending voluminous data already in evidence); *People v. Weinberg,* 183 A.D.2d 932, 586 N.Y.S.2d 132 (2d Dep't 1992) (computer printouts summarizing medical records came without the voluminous writings exception to the best evidence rule).
[18] CPLR § 4539(a); see also N.Y. State Tech. Law § 306.
[19] CPLR § 4539(b).
[20] *See Bell Atlantic Yellow Pages v. Havana Rio Enterprises Inc.,* 184 Misc.2d 863, 710 N.Y.S.2d 751 (Civ. Ct. 2000) (denying exception because witness could not identify the fax of a copy of the microfilm of the original contract as either a copy of the original, complete and unaltered, or a product of plaintiff's regular business practice to preserve and reproduce complete and unaltered contracts).
[21] *See, e.g., People v. Cyrus,* 48 A.D.3d 150, 159, 848 N.Y.S.2d 67, 74 (1st Dep't 2007) (officers' testimony concerning their observations of a surveillance videotape, depicting a crime they did not witness, would violate the best evidence rule); *People v. Jimenez,* 8 Misc. 3d 803, 805, 796 N.Y.S.2d 232, 234 (Sup. Ct. Bronx Cty. 2005) (discussing the differences between video and photography, noting that testimony about video is more prone to be unreliable and inaccurate).
[22] *Id.*
[23] NYPL. § 250.05.
[24] *People v. Lasher*, 58 N.Y.2d 962, 460 N.Y.S.2d 522, 447 N.E.2d 70 (1983).
[25] *Gurevich v. Gurevich,* 24 Misc.3d 808, 888 N.Y.S.2d 558 (Sup. Ct. Kings Cty. 2009) (finding that wife did not "intercept" husbands email and thus eavesdropping law did not preclude admission of emails in matrimonial action where emails were not in transit when wife obtained them but rather were already stored in husband's email account).