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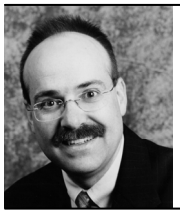

# State Law on Cost of E-Discovery Is Starting to Take Shape

**BY KEVIN SCHLOSSER**

It's hard to believe it was six years ago that the government's Microsoft antitrust litigation hit the headlines by exposing incriminating internal e-mails from the very top of the corporate ladder, leading Bill Gates to lament: "I had expected [David] Boies to ask me about competition in the software industry, but [instead] he put pieces of paper in front of me and asked about words from e-mails that were three years old."[1] Meanwhile, the front page of The New York Times declared: "Never mind monopoly power in the marketplace; the real lesson corporate America is taking away from the Microsoft antitrust trial is that old e-mail can be a minefield of legal liability, not to mention a source of public embarrassment."[2]

Apparently not everyone in corporate America has learned the "lesson," however, because, as anyone who has read the recent headlines knows, devastating e-mails continue to rear their ugly head in high-profile litigation. Just last month, The New York Times proclaimed: "Once Again, Spitzer Follows E-Mail Trail; Marsh Suit, Like Others, Cites Indiscreet Electronic Messages,"[3] while this month, The Wall Street Journal announced: "E-Mails Suggest Merck Knew Vioxx's Dangers at Early Stage; As Heart-Risk Evidence Rose, Officials Played Hardball; Trainees are Told: 'Dodge!'."[4]

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Of course, litigators would be naïve to think that troublesome electronic messages appear only in high profile, headline-grabbing cases. Indeed, in *Creditriskmonitor.com, Inc. v. Fensterstock*, 006211/2001, a commercial dispute in Nassau County Supreme Court, Justice Ira B. Warshawsky cited volumes of incriminating e-mail evidence in his Aug. 6, 2004, 115-page decision holding defendants in contempt of court for willfully violating a so-ordered stipulation of settlement, and imposing compensatory and punitive damages.

Justice Warshawsky noted that the court had "sifted through hundreds of e-mails that . . . would not have been discovered without the services of an outside contractor who cloned the defendants' computers and then searched them for material related to [the plaintiff and defendant]."

Obviously, attempting to uncover electronic evidence in pretrial discovery is an essential endeavor. Unfortunately, the cost in seeking, investigating and uncovering electronic evidence could be prohibitive.

The federal courts have been grappling with the question of who should pay for the cost of electronic discovery for years. The leading cases of *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002), aff'd., 2002 W.L. 975713 (S.D.N.Y. May 9, 2002), and *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003), are well known to federal litigators. Starting with the presumption that in federal court, the party responding to discovery must pay for its costs, these cases analyzed the circumstances under which the costs of electronic discovery in particular should be shifted, in whole or in part, to the party requesting the discovery.

The law is now slowly starting to take shape in the state courts. A recent case in the Commercial Division of the Supreme Court, Nassau County, has squarely addressed the issue of which party must bear the cost of electronic discovery. In *Lipco Electrical Corp. v. ASG Consulting Corp.*, 4 Misc.3d 1019 (A), 2004 WL 1949062 (Aug. 18, 2004), the electronic evidence at issue was not e-mails, but computer data concerning defendants' income, expenses and time records involving certain public work projects at issue. Although the plaintiff was provided with hard copies of much of the information requested, it nevertheless sought the raw computer data in an effort to verify the truth and accuracy of the materials produced.

After finding that "[r]aw computer data or electronic documents are discoverable," Justice Leonard B. Austin noted the federal rule that "the party responding to the discovery demand bears the cost of complying with discovery demands." He continued: "However, cost shifting of electronic discovery is not an issue in New York since the courts have held that, under the CPLR, the party seeking discovery should incur the costs incurred in the production of discovery material," citing two Appellate Division, Second Department, cases.

Thus, Justice Austin found that "[u]ntil such time as [plaintiffs] express a willingness to pay the cost to be incurred for the production of this [computer] data, the Court will not direct its production." The judge did, however, refer the discovery issues to Special Court Referee Frank Schellace to determine, among other things, the manner in which the relevant data could be ascertained and the cost for extracting the information. Justice Austin also left open the possibility that the costs could be apportioned between the parties at a later date upon "proper application" by the plaintiffs.

## 'Rosado'

Interestingly, both of the Second Department cases cited by the court in *Lipco* relied on *Rosado v. Mercedes-Benz of North America, Inc.*, 103 A.D.2d 395, 480 N.Y.S.2d 124 (2d Dep't. 1984), for the proposition that in state court the party seeking discovery of documents must pay for the cost of their reproduction. None of the cases involved electronic data, however, and, in fact, *Rosado* only addressed the discreet issue of which party must bear the cost of translating a document that only existed in a foreign language.

Ironically, the *Rosado* court relied upon a federal court decision issued by the U.S. Court of Appeals for the First Circuit holding that, notwithstanding the federal court's presumption that the responding party must ordinarily bear the cost of discovery, a party responding to discovery does not have an obligation to pay for the cost of translating documents from a foreign language into English.[5]

Moreover, the *Rosado* court also relied upon NY CPLR 3114, which provides that a party taking a deposition must bear the cost of translating all of the questions and answers where the witness does not speak English. Thus, the Second Department may have overstated the case by extrapolating a general rule that a party requesting discovery must pay for the costs of producing the information from its prior decision on the rather limited question of which party should pay for the cost to translate documents from a foreign language into English.

While the Second Department has not directly addressed the question of who must pay the costs for producing electronic discovery, it may have given a hint of how it is leaning on this issue in its recent decision in *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 773 N.Y.S.2d 116 (2d Dep't. 2004).

The court's written decision in that case indicates it was able to persuade plaintiff's counsel to agree during oral argument of the appeal that "all costs related to the recovery of the [defendants'] hard drive data shall be borne solely by the plaintiff" in order to ascertain whether any relevant e-mails that were deleted could be retrieved. The issue was thus not otherwise contested either in the court below or on appeal.

## 'House of Dreams'

Consistent with these recent decisions in the Second Department and Nassau Supreme Court is a decision issued earlier this year in Manhattan Supreme Court by Justice Shirley Werner Kornreich in *House of Dreams, Inc. v. Lord & Taylor, Inc.*, 122902/02.

In *House of Dreams*, plaintiffs sought extensive electronic data, including e-mails, and alleged that defendants had intentionally discarded or destroyed relevant electronic discovery. The court noted that although "defendants have offered to produce as many as fifty server back-up tapes . . . plaintiff has refused because the tender was 'too little too late,' as well as because plaintiff maintains that it is defendants' duty to sift through such tapes at its own expense to find any relevant information."

Without otherwise citing case law on the question of which party should pay for electronic discovery, the court found that plaintiff's motion was brought in bad faith insofar as there was no evidence that defendants engaged in "spoliation" of the electronic evidence in question. Thus, the court held that if "plaintiff wish[es] to pursue a deciphering of the files contained on defendants' disaster recovery tapes," plaintiff "alone must bear the cost of this discovery, in light of the fact that there is absolutely no evidence to suggest that the subject tapes contain the proof of a binding 7-year commitment that plaintiff seeks, and because plaintiff has already put the defendants to the trouble and expense of defending against the instant meritless motion for spoliation sanctions."

On the other hand, in an earlier decision in *Creditriskmonitor.com*, Justice Warshawsky of Nassau Supreme Court ordered both parties to share the cost of electronic discovery. He appointed an independent computer forensics expert to examine the defendant's home computer and Palm Pilot, and ordered the parties to share the cost of such forensic discovery in equal measure in light of "a conflict in the assertions of each party's compliance with production of [the electronic discovery]."

## Conclusion

These early decisions indicate that state courts seem inclined to expect the party requesting electronic discovery to bear the costs, at least initially and without other justification. Of course, we are still in the infancy stages of this developing area of law. It is inevitable that the state courts will continue to be confronted with additional questions concerning the cost of e-discovery and that the trails that are being blazed will continue to take shape as the more specific and particular issues are addressed.

## Endnotes:

1. J. Heilemann, "Pride Before the Fall: The Trials of Bill Gates and the End of the Microsoft Era" (HarperCollins Publishing 2001), p.159.

2. A. Harmon, "Corporate Delete Keys Busy as E-mail Turns Up in Court," The New York Times, Nov. 11, 1998, p.1.

3. The New York Times, Oct. 8, 2004, p. 1, col. 1.

4. The Wall Street Journal, Nov. 1, 2004, sec. A, p.1, col. 5.

5. In re Puerto Electronic Power Authority, 687 F.2d 501 (1st Cir. 1982).