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Ringing in the Holidays SCBA-style

By Laura Lane

The entrance to the Suffolk County Bar Association was the first indication that it was time to celebrate the holidays. Festively decorated, there were red and gold Christmas balls, wreaths, and a table in the lobby surrounded by poinsettias. This year even the ceiling shimmered, with a sprinkling of tiny green and red lights that twinkled.

Inside a small area right before the entrance to the Great Hall a nativity scene was on view. It was so beautifully arranged and included nearby citizens who also must have heard that someone special had been born. The nativity is donated each year in memory of Kenneth Grabie, who had been active at the SCBA.

It was the work of the staff at the Association that created the magical holiday scene. They always work so hard to ensure that people feel the warmth of the holiday. Proof of their success? As people entered they smiled and commented on how nice everything appeared.

And Santa Claus stopped by too. Busy handing out candy canes he wished everyone a happy holiday. Santa is a big fan of the SCBA. "The SCBA is one of the best bar associations in the state," he said, "maybe even the country."

Throughout the evening, everyone enjoyed an array of hot food, festive holiday desserts and just catching up with colleagues and friends. The SCBA provides so many opportunities for joy, but its holiday party each year is perhaps one of its best achievements.

New phone system at the courts

The Suffolk County Courts are converting to a new I.P. phone system, which is being implemented in various phases. Phase one will result in new phone numbers for all judicial and non-judicial personnel in the Central Islip Cohalan Court Complex effective January 3, 2018. Prior to this date, a new telephone listing for all judges and other personnel will be provided via an e-blast from the SCBA. – LaCova

Retirement party for a dear friend of the SCBA

Photo by Barry Smolowitz

The Appellate Practice, the Supreme Court and the SCBA Board of Directors hosted a retirement party for the Honorable Randall T. Eng, New York State Supreme Court, Appellate Division, Second Judicial Department on Nov. 9. SCBA President Patricia Meisenheimer, left, and SCBA Executive Director Jane LaCova thanked Justice Eng for his service. See story on page 3 and see photos on page 18.

PRESIDENT'S MESSAGE

The Spirit of the Holidays

By Patricia Meisenheimer

Patricia Meisenheimer

The holiday spirit is a tangible part of who we are, bringing out the best in all of us and reminding us of our blessings and friendships. While we count our blessings, rather than our differences, we share the spirit of the holidays, deepening our understanding of the values embodied in the spirit of this holiday season.

This spirit is particularly evident in our interactions with others and when we go the extra mile to assist and to share with others who live in need. The holiday season can humanize us like no other time of the year.

True holiday spirit urges us to do good, motivating us to spread the joy of the season to those around us. Why not stretch yourself beyond your comfort zone to share the spirit of the season with those in need of legal assistance. Let this holiday season be a starting point for renewed commitment to help those less fortunate. Keep the holiday spirit alive throughout the year by volunteering with the Suffolk County Bar Association's Pro Bono Project.

At the SCBA we embrace a rich and dynamic culture of diversity, inclusion and of reaching out to help others in the community. The challenge is to do more, to acknowledge and celebrate the spirit of the holidays by fostering awareness of the exceptional work that our Pro Bono lawyers do for the legal com-

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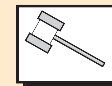

BAR EVENTS

Swearing in & Robing Ceremony

Monday, Jan. 8 at 9 a.m.
Touro Law Center
225 Eastview Drive, Central Islip

Join us to honor our distinguished members of the Judiciary at their Swearing-in ceremony.

SCBA Wishes Everyone a Happy Holiday!

Suffolk County Bar Association President Patricia Meisenheimer, the Executive Board, Executive Director Jane LaCova and the staff at the Association wish our members and their families a safe and happy holiday season.

FOCUS ON
HELPING COURTS
SPECIAL EDITION

CYBER

An e-Discovery Checklist

By Victor Yannacone

To properly prepare for a Rule 26(f) e-discovery conference, consider the issues that must be identified and addressed, at least to some extent, in the Conference Report — matters dealing with preservation, liaison, informal discovery about location and types of systems, proportionality and costs, search, phasing, production, and claims of privilege or of protection as trial-preparation materials.

Liaison

Counsel for each party should be designated before the initial conference.

Preservation

The range of creation dates for any ESI should be preserved. This requires determining the dates before which the ESI is not relevant. Disagreements over dates can be resolved by phased discovery.

ESI from sources that are not reasonably accessible because of undue burden or cost must still be preserved, if relevant.[1] Backup ESI should always be preserved.

The description of ESI from sources that the party believes could contain relevant information, but has determined, under the proportionality factors, is not discoverable and should not be preserved. The issue under governing proportionality rules will be the "importance" of the information to material issues of fact in dispute and its probative value.

Victor Yannacone

Suspension of any document-destruction program, such as ongoing erasures of e-mails, voicemails, and other electronically recorded material. The key custodians of ESI should have their email and voice mail auto-delete functions turned off and as many deletions as possible recovered from backups.

The names, general job titles, and descriptions of custodians for whom ESI will be preserved. The broad list of key custodians may be divided in classes by probable importance of their ESI to the outcome of the case in order to stage the actual production and review.

The list of systems, if any, that contain ESI not associated with individual custodians that must be preserved, such as enterprise databases.

Any disputes related to scope or manner of preservation should be resolved quickly with the ESI preserved until the issue is resolved.

Discovery about location and types of systems

Systems containing ESI such as e-mail, finance, and HR should be prioritized according to their probative value, particularly to the extent they contain communications between people and contemporaneous writings.

Descriptions and location of *all* the IT systems, including document management systems and network drives and servers where relevant ESI might be stored and how potentially discoverable information is stored — whether it is stored manually at the discretion of listed custodians or stored automatically by other software systems.

The best methods for collecting discoverable information from systems and media in which it is stored without modifying or damaging the metadata.

Proportionality and costs

The amount and nature of the claims being made by the parties and the actual disputed facts determine the evidentiary value of the ESI and whether it is relevant and material to claims and defenses that have actually been raised in the case.

The nature and scope of burdens associated with the proposed preservation and discovery of ESI should be stated in terms of meaningful, verifiable time and expense budgets, usually with suggestions on the metrics the court should use to consider the issues and monitor the effort.

If objections are raised, the party seeking discovery must offer *prima facie* evidence of the likely benefit of the proposed discovery.

Because of confidentiality issues, beware of offers to share costs through use of a common electronic-discovery vendor or a shared document repository, even with co-defendants or co-plaintiffs.

Preservation is required by law to be reasonable, not exhaustive or perfect and limits on the scope of preservation or other cost-saving measures must always be considered.[2] "Reasonable" means proportionate to the needs of the case. Only relevant ESI need be preserved.

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PERSONAL INJURY

Getting Medical Records Into Evidence

By Paul Devlin

You may find yourself handling a personal injury case on the court's trial calendar. Whether you represent the plaintiff or the defendant, there are probably medical records that you want in evidence to support your claims or defenses. However, those records are inadmissible hearsay. The easiest way to get them into evidence is to stipulate with adverse counsel. Usually, adverse counsel is not keen on making their adversary's job any easier. If the attorneys do not agree, then you could have the records admitted into evidence based on the business records exception to hearsay set forth in CPLR 4518.

CPLR 4518(a) provides in sum that a business record may be admissible if a judge finds that it was the regular course of the business (e.g., medical office) to make the record and that the business records was made at the time of the act, transaction, occurrence, or event, reflected in the records (e.g., medical treatment) or within a reasonable time thereafter. All other circumstances of the making of the records may be proven to affect their weight, but those circumstances shall not affect admissibility. You could have an employee from the medical office with the appropriate knowledge appear at trial and testify in order to satisfy each of the requirements of the rule. Having done so, your motion to have the records admitted into evidence will almost certainly be granted.

Paul Devlin

But what if you want to avoid the inconvenience of calling an employee of the medical office where the records were created to testify at trial? CPLR 3122-a permits self-authentication of certain medical records provided that specific requirements are satisfied. The first step is to obtain the medical records. Traditionally, the records are subpoenaed. Most firms make the subpoena returnable to the subpoenaed records room in the courthouse. However, there are also firms that make the subpoenas returnable to their office. On August 11, 2014, CPLR 3122-a was amended to add sub-section (d), which eliminates the need for a subpoena so long as the records are accompanied by a property certification. The certification must be sworn in the form of an affidavit stating the following: (1) the affiant is the custodian or other qualified witness and has authority to make the certification; (2) the records or copies are accurate versions of the documents described in the subpoena; (3) the records are complete, or if not, an explanation as which documents are missing and an explanation for their absence; and (4) the records were made by the personnel of the business or persons acting under their control in the regular course of business, at the time of the transaction, act, occurrence, or event recorded, or a reasonable time thereafter. This listing of the requirements is abridged. Please refer to CPLR 3122-a for the complete text of the requirements.

If you subpoenaed the records, be sure to promptly serve a copy of any subpoenas on all parties pursuant to CPLR 2303(a). Returning to the requirements of CPLR 3122-a, the final step is to give notice to the other parties of your intent to offer business records into evidence pursuant to this rule. The notice must be made at least 30 days before trial. The party upon whom such notice is served may object no later than 10 days before trial. Unless such an objection is made or an objection at trial is made based upon evidence which could not have been previously discovered by the exercise of due diligence, business records certified in accordance with CPLR 3122-a shall be deemed to satisfy the requirements of CPLR 4518(a). It should also be noted that Rule 4518(c), referring to Rule 2306, provides in sum that subpoenaed and certified hospital records are prima facie evidence of the facts they contain.

Keep in mind that merely because records are subpoenaed does not automatically mean they are admissible at trial. In fact, a subpoena is no longer necessary. If the records at issue are favorable to your case, then make certain that all of the requirements listed above have been satisfied. On the other hand, if the records at issue are unfavorable to your case, you may have a valid objection if any of the requirements have not been satisfied. Of course, records contained in one medical provider's file that were created by a different provider do not satisfy the requirements of this rule.

Note: Paul Devlin is an associate at Russo & Tambasco where his practice focuses on personal injury litigation. He is an active member of the SCBA, serving as co-chair of the Young Lawyers Committee and Treasurer of the Suffolk Academy of Law.

Is Contract Repudiated When a Party Brings Suit for Rescission and Reformation?

(Continued from page 10)

But what if the breaching party has "repudiated" the contract in advance of its performance? Does the injured party still have to keep itself ready to perform even if it knows or has reason to know that the breaching party will not perform? Must the injured party wait until the time for performance has come and gone before it can deem itself free of any obligation to perform? The doctrine of "anticipatory breach" addresses this issue. Under this doctrine, a contract has been "repudiated" when a party, by words or conduct, makes a statement that it cannot or will not perform and such statement is "sufficiently positive to be reasonably understood as meaning that the breach will actually occur."

Under Princes Point, the Court of Appeals held that there was no "positive and unequivocal repudiation" given that the amended complaint sought "reformation of the amendments to the contract and *specific performance of the original agreement*" (emphasis added). It determined that the action for rescission and reformation was seeking "at bottom . . . a judicial determination as to the terms of a contract and the mere act of asking for judicial approval to avoid a performance obligation is not the same as establishing that one will not perform that obligation absent such approval."

The court's ruling is narrow in that it acknowledges that the action brought by Princes Point sought to invalidate the terms of the amendment, but since Princes Point also requested reformation and specific performance, Princes Point cannot be deemed to have wholly refused to perform its obligations under the contract. Hence, Princes Point has not repudiated the contract and Muss Development is not free of its performance obligations under the contract.

Note: Gisella Rivera, Esq., CPA, is the principal of G. Rivera Law Office, PLLC. Prior to opening her law practice, Gisella was a partner in the Corporate and Business Group of Meltzer, Lippe, Goldstein & Breitstone, LLP, and worked as an associate attorney in the Capital Markets Practice of White & Case, LLP, a major Global Law Firm. Gisella worked as an accountant for over 15 years, amongst others, as the chief financial officer of a prominent mental health care provider in Suffolk County and as the North-East Regional Finance Director of an assisted living company ranked 3rd largest in 2015 by Provider Magazine. Gisella combines her business experience with her legal training in representing and serving her clients. Contact Gisella at gisellarivera@griveralaw.com, or at (631) 353-7230.

An e-Discovery Checklist

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Search

The search methods, that will be used to identify discoverable ESI and filter out ESI that is not subject to discovery must be identified and disclosed.

The producing party must identify and fully describe the quality-control method(s) they will use to evaluate whether a production is missing relevant ESI – the problem of Recall – or contains substantial amounts of irrelevant ESI — the problem of Precision and the associated problem of duplication.

Phasing

Phasing may not be necessary if all that is needed is produced in the first phase and the sources of ESI most likely to contain discoverable information are properly identified.

Phasing, however, permits discovery of ESI from disputed custodians and secondary custodians that only might possibly have important information or discovery of ESI from disputed time periods to be postponed or often avoided.

Production

A producing party should provide its ESI in the format requested, unless cost becomes an issue, provided any inherent searchability of ESI has not been and is not degraded during production.

The extent, if any, to which metadata will be produced and the fields of metadata to be produced should be clearly stated.

Privilege

Privileged or work-product or other protected information will not be produced, only logged. However, the parties should look towards agreement on alternative ways to identify documents withheld to reduce the burdens of such identification. The place to start is with the privilege log. E.g. a party should not have to log communications made after suit was filed.

Never allow a Rule 26 conference to conclude without a stipulation and order under *Federal Rule of Evidence* 502(d) that addresses inadvertent or other inappropriate production.

Note: Victor John Yannacone Jr. is an advocate, trial lawyer, and litigator practicing today in the manner of a British barrister by serving of counsel to attorneys and law firms locally and throughout the United States in complex matters. Mr. Yannacone has been continuously involved in computer science since the days of the first transistors in 1955 and actively involved in design, development, and management of relational databases. He pioneered in the development of environmental systems science and was a cofounder of the Environmental Defense Fund. He can be reached at (631) 475–0231, or vyannacone@yannalaw.com, and through his website https://yannalaw.com.

[1] *Federal Rule of Civil Procedure* 26(b)(2)(B).
[2] This is required of all parties, attorneys and judges under the 2015 revision to Rule 1, FRCP. So too is "speedy" and "just."

Exclusive Use, Occupancy Standard

(Continued from page 12)

of the parties. See *Blumenfeld v. Blumenfeld*, 46 N.Y.S.2d 63 (2nd Dept. 1983). Recognizing the potential for an appeal, Judge Dollinger doubled down on his "marital strife" analysis as it relates to the "best interests of the children" and held:

"[T]his court determines to err on the side of reducing the children's exposure to abuse, regardless of whether it can properly and justifiably pinpoint the perpetrator at this early stage of the proceeding."

While there were other extenuating factors that Judge Dollinger relied on in rendering his decision, he emphasized that marital strife should be the standard for exclusive use when litigants are residing together. In taking his analysis a step further, he explained that the impact that marital strife has on children residing in the house is paramount:

"In the face of all of these complications, this court must implement New York's 'zero tolerance' policy on domestic violence in all its forms. The current standard for granting exclusive use or possession — safety of persons or property — is cast in the language and images of the 1970s and even unfortunately implies that "persons" and "property" have equivalent weight to the emotional security of children."

By supplanting the "safety of persons" test with the "marital strife" standard, Justice Dollinger erased the antiquated need for physical abuse as a condition precedent and replaced it with a standard that safeguards the emotional well-being of children in the hopes that they will not be caught in the harmful wake created by their parents.

Note: Michael F. LoFrumento is a partner at Barnes, Catterson, LoFrumento & Barnes, LLP with offices in Garden City, Melville and Manhattan and practices matrimonial and family law. He can be reached at MFL@BCLBLAWGROUP.COM or (516) 222-6500.

Thou Shalt Not Hold

(Continued from page 21)

of his in-kind contribution of other property to the partnership, the distribution will be treated as a taxable event as to the contributor-partner. IRC Sec. 737.

In addition, the so-called "disguised sale" rules may cause a distribution of RP to be treated as a sale of the property; for example, where the partnership encumbers the RP with a mortgage (a "non-qualified liability") just before distributing the RP to the partner who assumes or takes subject to the mortgage. Treas. Reg. Sec. 1.707-5.

Even where the disguised sale rules do not apply, a distribution of RP may be treated, for tax purposes, as including a cash component where the distributee partner is "relieved" of an amount of partnership debt that is greater than the amount of debt encumbering the RP. Treas. Reg. Sec. 1.752-1.

"Choose wisely you must" – Yoda

The foregoing represents a simple outline of the tax consequences that must be considered before a taxpayer decides to acquire or place RP in a corporation or in a partnership.

There may be other, non-tax, considerations that also have to be factored into the taxpayer's thinking, and that may even outweigh the tax benefits.

All-in-all, however, a closely held partnership is a much more tax efficient vehicle than a corporation for holding, operating, and disposing of real property.

Yes, some of the tax rules applicable to partnerships are complicated, but that should not be the decisive factor. Indeed, with proper planning, these rules can be negotiated without adverse effects, and may even be turned to one's advantage.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritz.com.