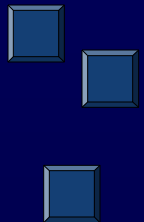


■ ■ Issues In The Admissibility of ■ ■ Electronically Stored Evidence (ESI)

2015 Family Court Attorneys Training
123 William St. New York
October 15, 2015

Hon. Arthur M. Diamond
NYS Supreme Court





No One Way To Do The Analysis


Laying the foundation is the Key-Approach as if any other
type of evidence

See CPLR 4518(a)-business record/electric record
Kolchins v. Evolution Markets, 128 AD3d 47(1st 2015)
emails qualify as 'documentary' evidence for CPLR 3211
motions

Start with PRESERVATION!-has moving party properly
sought to preserve

Litigation hold is required-no responsibility or sanction
without it

Letter suffices-Zubulake v. UBS Warburg 220 FRD 212
(2002)





Spoliation

Sekisui American Corp v. Hart 2013 WL 4116322 (SDNY)

Overrules


Residential Funding Corp v. DeGeorge Financial Corp. 30 F. 3d 99 (2d Cir. 2002)

The *Residential* standard for adverse inference instruction:

- 1- controlling party had obligation to preserve at time destroyed
- 2- records destroyed with culpable state of mind
- 3- destroyed evidence was relevant to claim or defense
- 4- party was prejudiced by destruction

In *Sekisui* Judge Scheindlin holds:

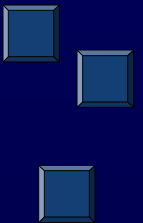
“Prejudice is presumed...where as here evidence is willfully destroyed by the spoliating party.”





Must be showing of relevance

see for example AJ Holdings v. IP Holdings
NY Slip Op 04943 (1st June 2015)





The Family Computer

Expectation of Privacy?

Email Accounts Shared? Locked?

Cloning of Hard Drive

Etzion v. Etzion 7 Misc. 3d 940 (Sup. Ct. Nass. 2005)

Compare Schreiber v. Schreiber 2010 NY Slip Op 20271 (Sup. Ct. King. 2010)

Business emails-US v. Finazzo 2013 WL 619572 (EDNY)



■ Lorraine v. Markel Am Ins C.

■ 241 F.R.D. 534 (2007 D Md)

5 Prong Test for Admitted Email

Relevance - R. 104, 401, 402

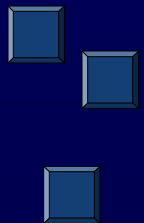
Authentic - R. 901, 902

H/S? - Offered for truth? R.801- 807

Original writing R.1001-1008

Prejudice R. 403

Remember in your cases most of the emails will
qualify as admissions against interest





Authentication 901 (o)

Most familiar methods:

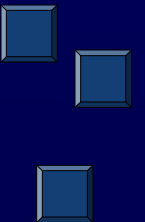
Testimony of witness with knowledge

Non-expert opinion on handwriting

Comparison by trier or expert witness

Distinctive characteristics

Voice identification



U.S. v. Siddiqui - 235 F. 3d 1318 (11th 2000)

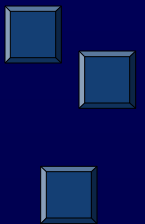
Email bore sender's known email

Reply automatically went there

Context - author clearly knew details

Used nickname

Extrinsic Circumstances - recipient talked about contents
immediately after





Facebook & related issues

AD v. CA NYLJ 1202735606003 (Aug. 15, 2015)

Romano v. Steelcase 30 Misc. 3d 426 (Sup.Ct. Suff. 2010)

Patterson v. Turner Construction Company, 88 A.D. 3d 617
(1st Dept. 2011)

Fawcett v. Altieri, 38 Misc. 3d 1022
(Sup. Ct. Richmond Co. 2013)

People v. Lenihan 30 Misc. 2d 289 (Sup. Ct. Queens 2010)

People v. Griffin 19 A 3d 415

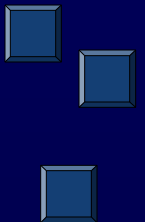
Most familiar use is impeachment





US v. Vayner, 769 F.3d 125 (2d Cir 2014)

Court held requirements of FRE 901 not satisfied
insufficient evidence that item is what proponent
claims it to be





Subpoena issues and social media

In re 381 Search Warrants v. NY County D.A.
2015 NY Slip Op 06201 (1st July 15, 2015)

