Electronic Discovery in Surrogate's Court Litigation
Part II: Surrogate's Court Decisions

By Angelo Grasso

This is the second article on electronic discovery and how it has been treated in Surrogate's Court litigation. The first article[1] gave a primer on the fundamentals of electronic discovery, analyzed key federal cases such as *Zubulake v. U.B.S. Warburg*[2] and *Montreal Pension Plan v. Bank of America Securities, LLC*,[3] and discussed critical concepts such as electronically stored information (ESI) and predictive coding. This article focuses on the few Surrogate's Court decisions that have dealt with electronic discovery issues, including cloning and non-party discovery.

In the matrimonial case *Schreiber v. Schreiber*,[4] Justice Delores Thomas aptly summed up the delicate balancing act trial courts frequently have to employ concerning electronic discovery:

> Electronic discovery may be crucial in the proper cases to determine and confirm the existence of vital information. In others, it may be a weapon of abuse which will further clog a system that is already in dire need of relief. The difficulty lies in the fact that a computer system or a hard drive is not a mere thing to produce and copy which a party has a right to have produced for inspection under CPLR 3120. They are qualitatively different from other objects because of the difficulty in apprehending all that they contain.[5]

While electronic discovery is litigated less frequently in Surrogate's Court than it is in Supreme Court, when it is litigated, similar issues have arisen. Surrogates have generally embraced a pragmatic, "brass tacks" approach by weighing the cost and burden of the electronic discovery sought against its relevance to the issues in the underlying litigation and privacy concerns.

How to Produce ESI: *In re Tamer*

Even if there is no dispute about what electronic discovery is being produced, a threshold issue is how to produce it. This was addressed by Surrogate Scarpino in the contested accounting proceeding *In re Tamer*.[6] The trustees in *Tamer* demanded a panoply of documents from the objectants, including "all letters, correspondence and memoranda from each objectant to any other party."[7] In response, the objectants produced over 6,000 documents on a CD-ROM and DVD, including hundreds of emails as native files.[8] The trustees objected, and asked the court to direct the objectants to produce paper copies of all documents.[9]

The court's analysis began by noting that ordinarily, a request for electronic discovery begets an electronic response:

> It is implicit that where a party seeks electronic discovery, the responding party will produce the information sought by some form of electronic means...In federal practice, the courts have held that the production of documents must be made in a reasonably usable form, such as pdf format—a familiar format for electronic files that is easily accessible on most computers, which has been held to be presumptively a reasonably useable form.[10]

The court then looked to CPLR 3122(c), which provides that documents are to be produced as kept in the regular course of business, and noted that CPLR 3122(c) and 3122(d) do not "limit delivery of a complete and accurate copy to a paper copy."[11] As such, the court held that a party may produce documents by electronic files.[12] However, the court required the producing party to provide an index identifying the documents produced in response to each demand and the electronic file in which the document has been stored —essentially, adopting CPLR 3122(c) in the context of electronic discovery and attempting to mitigate how voluminous e-discovery can be.[13]

Hard Drive Cloning

One of the most frequently litigated issues is "cloning" hard drives. Cloning is precisely what it sounds like: making an identical copy of a hard drive onto another storage device, while retaining all of the original drive's ESI, including its data, metadata,[14] settings, files, partitions, and boot records. In the everyday world, individuals frequently clone hard drives to create backups, perform a "reboot and restore," or to upgrade a hard drive while retaining original data and settings. Indeed, many law firms (perhaps unknowingly) clone their hard drives and servers daily or weekly when they perform a backup to avoid data loss.

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In litigation, drives are cloned to permit the litigants to use the cloned drive for discovery while the owner of the original drive can continue to use the machine or server.

The drawbacks of cloning are readily apparent. While cloning is relatively inexpensive and easy to perform, it will interrupt the owner's ability to use her computer or server. More problematically, cloning is a blunt instrument that ensures that all data on a particular hard drive is preserved. It does not perform a content-based analysis, meaning there is significant risk that privileged or confidential information will be inadvertently disclosed. This is particularly true if an attorney's hard drive or server is being cloned, unless he or she has a special practice and handles only one client.[15] Without taking the proper precautions, cloning an attorney's hard drive will result in a stranger receiving gigabytes of clients' ESI without their permission, creating ethical issues for the attorney.

One of the earliest state court cases to address cloning was the matrimonial action *Etzion v. Etzion,*[16] where the plaintiff brought an order to show cause to "impound, clone and inspect" various computer servers, drives, work stations and computers belonging to her husband.[17] The basis for her electronic fishing expedition was her claim that her spouse had engaged in years of fraudulent conduct, such as diverting millions of dollars from assets in which she had an interest.[18] Thus, she took a "preemptive strike" to prevent destruction of the records on the machines that would likely contain the damning information.[19] In a decision balancing the importance of full discovery with the need for privacy and confidentiality, the court required the defendant to present the hard drives to the plaintiff's expert for cloning. The cloned drives would then be turned over to a referee, who would examine the contents of the drives, and create hard copies of the relevant records in accordance with detailed guidelines set forth in the decision.[20]

While the court's solution in *Etzion* balanced the competing interests, it had an obvious drawback: it was expensive. The court declined to shift any of the cost of the electronic discovery to the defendant, holding that under the CPLR, the party seeking discovery generally incurs the costs of producing the material.[21] Here, that was at *least* $30,000 for the expert and attorney's fees, plus a portion of the referee's fee. Because a large amount of money at stake in *Etzion,* the cost potentially justified the expense. In most Surrogate's Court cases, a $30,000 cost for some discovery would be a significant impediment.

Non-Party Discovery: *In re Maura*

While *Etzion* concerned electronic discovery from a party, *In re Maura*[22] was one of the first Surrogate's Court cases to consider electronic discovery of a non-party. In *Maura*, decedent and his spouse executed a prenuptial agreement drafted by the same attorney, in which both renounced their spousal right of election.[23] The decedent's will did not provide for his spouse.[24] After the surviving spouse filed and served her notice of election, the estate fiduciaries commenced a proceeding to deny the widow her elective share.[25] The widow responded that the prenuptial agreement was the product of fraud, undue influence and deception, that she was not represented by counsel (even though she shared an attorney with her husband), and that the prenuptial agreement was altered or amended.[26]

After the attorney-drafter's three-day deposition, the widow served a subpoena *duces tecum* on both the attorney and the firm at which the attorney was "of counsel,"[27] demanding four types of ESI to ascertain whether any deletions, insertions or alterations were made to the prenuptial agreement:

- All existing and deleted records of the prenuptial agreement;
- Recreations of the attorney's and firm's billing records for estate planning and the prenuptial agreement;
- All other records concerning estate planning for the Decedent; and
- Sample copies of other prenuptial agreements prepared by the attorney.[28]

After both the attorney and the firm objected to the subpoena, the widow moved to compel.[29] As part of her motion to compel, the widow submitted a proposal from a computer expert as to how the electronic discovery would be conducted. The expert recommended taking the attorneys' hard drive, cloning it at the expert's office, downloading the necessary documents, placing them in a sealed envelope to be delivered to the court, and allowing the non-party attorney and firm to make any privilege objections within ten days.[30] While the widow was willing to bear the cost of the electronic discovery, she argued that if the non-party attorneys wanted their own expert to oversee the project, then that cost should be borne by them.[31]

Unsurprisingly, the non-parties opposed the motion, arguing the discovery sought was invasive, as cloning the hard drive would give the widow unfettered access to information and data well beyond the scope of the subpoena, including "the firm's personal and personnel information" and currently pending cases.[32] As a compromise, the non-parties proposed acquiring the requested information from the firm's backup tape.[33] Problematically, the non-parties conceded that the information on the tape would not be in retrievable form—meaning a forensic expert would be required, increasing the cost—and that this method would not provide information on changes or dele-

tions to the prenuptial agreement.[34] The non-party attorneys further demanded that in any event, the widow should bear all costs.[35]

The court denied all discovery concerning the firm's billing records relating to estate planning and the electronic version of the estate planning file, holding the information sought had no bearing on the validity of the prenuptial agreement, as the widow had the hard copy of the estate file and there was no allegation that she needed to determine whether those files had been altered or deleted.[36] It also rejected the widow's request for other clients' prenuptial agreements as privileged, unduly burdensome, and irrelevant to the widow's claim the subject prenuptial agreement was altered.[37] By contrast, the court found that the widow's request for access to the attorney's computer to copy all billing records relating to the prenuptial agreement and the existing and deleted records concerning the prenuptial agreement were "material and necessary," as they bore on the agreement's authenticity.[38]

The court then turned to the question of how to conduct that discovery and who should bear the cost, noting that New York courts frequently look to federal courts for guidance on electronic discovery, and that the federal rules in effect at the time provide protection for non-parties against onerous e-discovery.[39] While noting that cloning or system access should be allowed sparingly because it raises "inevitable conflicts," the court permitted cloning instead of using the tape backup, as the latter, while less burdensome, "will not yield the deleted or altered information" that was the "gravamen" of the authenticity claim.[40] The court then set forth a detailed procedure for cloning, which included an expert of the law firm's selection, submitting a written proposal, the widow approving it in writing, how objections to specific records would be interposed, and the dissemination of the mined data.[41] The court allocated all of the cost to the party seeking discovery.[42]

Cloning Part Two: *In re Tilimbo* and *In re Catalano*

The limits of cloning were explored in *In re Tilimbo*[43] and *In re Catalano.*[44] *Tilimbo* concerned an action to set aside a deed under Article 15 of the Real Property Actions and Proceedings Law, which was transferred to the Surrogate's Court of Bronx County, where it proceeded concurrently with a will contest.[45] A key witness was the non-party attorney who drafted both the propounded will and purported deed. After the attorney-drafter's deposition, he was directed to search his computer (and other files) for other responsive documents and produce them, or provide an affirmation stating a diligent search had been conducted for responsive documents and none were found.[46] After doing so, the attorney provided an affirmation stating all he found were older estate planning documents, as he had lost most of his file.[47]

Given the paucity of the production, the petitioner moved for permission to clone the attorney's hard drive (at petitioner's own cost) for the limited purpose of enabling petitioner's computer forensic expert to search for documents related to Decedent, her will, and the disputed deed transfer.[48] The non-party attorney opposed, noting that he had already complied with the subpoena as he was deposed and conducted a diligent search of his computer.[49] The non-party attorney attempted to distinguish *In re Maura* by claiming petitioner's request was not limited to relevant documents.[50]

For precedence, the court looked to the First Department's decision in *Tener v. Cremer*,[51] which concerned a subpoena a plaintiff served upon non-party NYU Hospital seeking "the identity of all persons who accessed the Internet" on a specific date from a specific Internet Protocol (IP) address.[52] NYU objected, claiming it did not have the capability to retrieve the information sought.[53] On reply, the plaintiff submitted an affidavit from a computer expert setting forth a method by which the requested data could be retrieved.[54]

The *Tener* Court sided with the plaintiff, noting that the discovery of ESI has become "commonplace," and that courts have promulgated guidelines and rules to facilitate e-discovery, such as 22 N.Y.C.R.R. §202.12(c), Rule 45 of the Federal Rules of Civil Procedure, and the Commercial Division Rules of the Supreme Court of Nassau County ("Nassau Guidelines").[55] Upon reviewing all three methodologies, the First Department found that the Nassau Guidelines "provide a practical approach" as they require "a cost/benefit analysis involving how difficult and costly it would be to retrieve it."[56] The court further noted that when a non-party is involved, the CPLR required the requesting party to defray the non-party's reasonable production expenses, including the cost of disruption to the business operations of the non-party.[57]

Based on *Tener*, the *Tilimbo* Court began by noting that ESI such as raw computer data and electronic documents are discoverable under CPLR 3101(a), and that ESI is "discoverable even when a hard copy is provided."[58] The court then rejected the non-party's argument that he already produced hard copies of documents, as that does not preclude producing the ESI for the same documents.[59] Although the petitioner did not set forth the details of how the cloning would occur, the court found that based on the record, it appeared the process would only require access to the attorney's computer for a limited period of time, which should not cause an "unreasonable burden" upon the attorney.[60] Regardless, cognizant of the fact that the attorney was a solo practitioner, the court set forth a detailed method to ensure the non-party's disruption

was minimal, including requiring that a weekday cloning take less than four hours at a date and time of the attorney's choosing, or over a weekend, and placing strict guidelines on how the cloning should occur if the scope exceeds one computer and needed to be outside of the attorney's office.[61] As to privilege issues, the court directed that the forensic examiners may only examine the hard drives for documents related to the decedent, that all recovered documents were to be sent to the attorney's counsel, who would review for privilege, and in the event any documents are deemed privileged, would be sent to the Court for an in camera review.[62]

In re Catalano took a more restrictive view, holding that cloning was to be sparingly allowed only under certain circumstances. *Catalano* was a SCPA 2103 proceeding in the Surrogate's Court of Nassau County, where the issues were the assets and operations of several entities that owned and operated a supermarket in which the decedent's estate had an interest.[63] Upon a prior order, the respondents were directed to turnover to petitioner the computer taken from Decedent's home. When the respondents turned over the wrong computer and averred that they could not differentiate which was the correct computer, petitioner sought to clone all of decedent's computers.[64] In response, the respondent had the technical director for the company clone and produce the hard drives for all the cash registers at the stores, which were turned over to the petitioner.[65]

Since the petitioner had yet to review these documents, his motion to compel was denied with leave to renew. More critically, the court adopted the First Department's holding in *Melcher v. Apollo Med. Fund Mgt. LLC,*[66] and held that "in the absence of proof that a party intentionally destroyed or withheld evidence, the court should not direct the cloning of that party's hard drives."[67] That said, the court directed that the respondents " refrain from removing or altering any data contained within the hard drives of the computers... pending further order of this court,"[68] tacitly acknowledging that the possibility existed that this evidence would be produced at a later date.

"I Have a Guy": *In re Nunz*

A final case where cloning and electronic discovery were an issue was *In re Nunz*, a will contest in Erie County.[69] In *Nunz*, the Decedent was survived by his wife and six children from a prior marriage.[70] The propounded will left the entire residuary estate to the surviving spouse.[71] After SCPA 1404 examinations, objections to probate were filed by five of the children.[72]

As part of post-objection discovery, a subpoena *duces tecum* was served upon the attorney-drafter seeking production of his documents and notes concerning the preparation of the purported will.[73] After producing his handwritten notes, the attorney-drafter signed an affidavit stating that he had prepared the will using Microsoft Word, that he had deleted the digital file immediately after printing a copy of the will, and that any computer files related to preparation of the will that "were created and/or stored in electronic or digital format have been destroyed and no longer exist."[74] The objectants responded by serving another subpoena upon the attorney, now seeking the computer the attorney used in preparing the will.[75] With the subpoena came objectants' attorney's cover letter:

> 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 [the surviving spouse]. 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.[76]

The surviving spouse moved to quash the subpoena and for a protective order, also seeking an order barring objectant's attorney from any further contact with the attorney-drafter.[77]

The court began by revisiting the *Tener* Court's comment that deleting a file "usually only makes the data more difficult to access."[78] The court's subsequent analysis hinged on two sources: the Fourth Department's decision in *Irwin v. Onondaga Cty. Resource Recovery Agency*,[79] and the New York State Bar Association's E-Discovery Guidelines.[80] *Irwin* concerned a Freedom of Information Law (FOIL) request for certain electronically stored photographs and all "associated metadata."[81] *Irwin* broke down metadata into three categories:

- **Substantive metadata**, which is the "information created by the software used to create the document, reflecting editing changes or comments." This information is generally useful in showing how a docu-

ment was created and the history of proposed changes.[82]

- **System metadata**, which is "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 created by the computer and its operating system, and is not application specific. It is useful in proving a document's authenticity or who received it.[83]
- **Embedded metadata**, which is "data that is inputted into a file by its creators or users, but that cannot be seen in the document's display." Embedded metadata is frequently an issue in spreadsheets, as it can include formulas, hidden columns, fields or linked files, and can be used to explain the contents of cells.[84]

Irwin concluded by allowing the limited disclosure of system metadata related to the subject photographs, while expressly holding the decision was limited to the facts at issue, and reached no conclusion on whether "metadata of any nature is subject to disclosure under the CPLR."[85]

As to the State Bar's guidelines, the *Nunz* Court took particular notice of Guideline No. 9:

> Parties should carefully evaluate how to collect ESI because certain methods of collection may inadvertently alter, damage, or destroy ESI. In considering various methods of collecting ESI, parties should balance the costs of collection with the risk of altering, damaging or destroying ESI and the effect that may have on the lawsuit.[86]

Taking this into consideration, the court concluded that the objectants' counsel's letter, which merely speculated that his "guy" "should be able to" retrieve the desired document and metadata, was insufficient. Specifically, the court held that "given the potential for harm in the forensic examination process," it would not permit any e-discovery simply based on a letter by counsel.[87] Instead, the court directed objectants' counsel to obtain an affidavit from his computer expert setting forth, *inter alia*, the expert's qualifications, his opinion concerning the ability to retrieve the relevant ESI, the proposed method for retrieving the ESI, and how the expert would identify and protect ESI subject to the attorney-client privilege.[88] The court concluded by deferring determination of the motion until the affidavit was submitted, but directed the attorney to preserve the subject computer.[89]

Nunz II was issued by the court a year later after an evidentiary hearing was held on the issue.[90] After testimony by the forensic computer expert, the court concluded that there was "a proper basis...to order production" of the attorney-drafter's computer and permit a forensic analysis of the hard drive.[91] To preserve confidentiality, the court ordered that once the expert received the computer, the expert:

> Shall not communicate in any manner whatsoever with the [] objectants, or with their attorney, or with [the attorney-drafter] or with the attorney for this estate (except to return the computer), or with anyone except the three employees involved with the project, and [the expert] shall direct any and all communications, including any reports about its findings, directly and only to this Court by confidential correspondence only.[92]

Beyond ensuring confidentiality, the court struggled to issue a protocol for the expert to follow in conducting the search, while noting that the parties had made no attempt to resolve this issue, and that left to their own devices, it was unlikely the parties would come to a consensus.[93] As such, the court directed the parties to subsequently appear for a "protocol conference."[94] The court directed that at the conference, the parties provide written proposals for consideration, and strongly suggested the parties "reflect on the guidelines" set forth in *Tener* and by the Nassau County Commercial Division.[95]

Conclusion

As these cases demonstrate, the Surrogate's Court has been receptive to electronic discovery when the party seeking discovery has set forth a detailed protocol for how the electronic discovery will be conducted, so long as it takes into consideration privacy and privilege issues, and is willing to pay for it. A future article will discuss the practitioner's obligations in collecting and preserving electronic discovery, as well as ethical issues that arise in electronic discovery disputes.

Endnotes

1. Angelo M. Grasso, *Electronic Discovery in Surrogate's Court Litigation—Part I: An Introduction to Electronic Discovery Concepts*, NYSBA Trusts & Estates Law Section Newsletter, Winter 2017, Vol. 50, No. 4.
2. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y. 2003); 230 F.R.D. 290 (S.D.N.Y. 2003); 216 F.R.D. 280 (S.D.N.Y. 2003); 220 F.R.D. 212 (S.D.N.Y. 2003); 229 F.R.D. 422 (S.D.N.Y. 2004).
3. *Montreal Pension Plan v. Bank of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).
4. 29 Misc. 3d 171, 904 N.Y.S.2d 886 (Sup. Ct., Kings Co. 2010).
5. 29 Misc. 3d at 177, 904 N.Y.S.2d at 891 (internal citations omitted).

6. 24 Misc. 3d 768, 877 N.Y.S.2d 874 (Sur. Ct., Westchester Co. 2009). *In re Tamer* is often cited as *In re O. Winston Link Revocable Trust*.
7. 24 Misc. 3d at 770, 877 N.Y.S.2d at 875. Erroneously, the trustees requested the production of documents in response to their demand for a bill of particulars, which the Court noted "is not a discovery device." Regardless, because the objectants produced documents, the court decided the motion to compel. *Id*.
8. *Id*.
9. *Id*.
10. 24 Misc. 3d at 770, 877 N.Y.S.2d at 876 (internal citations omitted).
11. *Id*.
12. 24 Misc. 3d at 771, 877 N.Y.S.2d at 876-77.
13. *See also Dartnell Enter. v. Hewlett Packard Co*., 33 Misc. 3d 1202(A), 938 N.Y.S.2d 226 at *3 (Sup. Ct., Monroe Co. 2011) ["where Plaintiff requests electronic discovery, such discovery should be produced in an electronic format"].
14. As a refresher, "metadata" is information embedded in a Native File that is ordinarily neither viewable nor printable, but is generated when a file is created, modified, deleted, sent, received and/or manipulated.
15. It is almost certainly fortunate for the Corleone family that Tom Hagen never had to conduct electronic discovery.
16. 7 Misc. 3d 940, 796 N.Y.S.2d 844 (Sup. Ct., Nassau Co. 2005).
17. 7 Misc. 3d at 941, 796 N.Y.S.2d at 844.
18. *Id*.
19. 7 Misc. 3d at 941-42, 796 N.Y.S.2d at 845.
20. 7 Misc. 3d at 945-46, 796 N.Y.S.2d at 847-48.
21. 7 Misc. 3d at 945, 796 N.Y.S.2d at 847, citing *Schroeder v. Centro Pariso Tropical*, 233 A.D.2d 314, 649 N.Y.S.2d 820 (2d Dep't 1996); and *Rubin v. Alamo Rent–A–Car,* 190 A.D.2d 661, 593 N.Y.S.2d 284 (2d Dep't 1993).
22. 17 Misc. 3d 237, 842 N.Y.S.2d 851 (Sur. Ct., Nassau Co. 2007).
23. 17 Misc. 3d at 238, 842 N.Y.S.2d at 853.
24. *Id*.
25. *Id*.
26. *Id*.
27. The surviving spouse first subpoenaed the attorney-drafter for various documents, including the estate plan for the Decedent and his first wife. This motion was largely denied as not being on sufficient notice. *In re Maura*, 2005 WL 6750997 (Sur. Ct., Nassau Co., Aug. 18, 2005).
28. 17 Misc. 3d at 241, 842 N.Y.S.2d at 855.
29. 17 Misc. 3d at 239, 842 N.Y.S.2d at 853.
30. 17 Misc. 3d at 242, 842 N.Y.S.2d at 855.
31. 17 Misc. 3d at 242, 842 N.Y.S.2d at 855-56.
32. 17 Misc. 3d at 243, 842 N.Y.S.2d at 856.
33. 17 Misc. 3d at 243-44, 842 N.Y.S.2d at 856.
34. *Id*.
35. 17 Misc. 3d at 244, 842 N.Y.S.2d at 856-57.
36. 17 Misc. 3d at 244-45, 842 N.Y.S.2d at 857.
37. 17 Misc. 3d at 245, 842 N.Y.S.2d at 857-58.
38. 17 Misc. 3d at 245, 842 N.Y.S.2d at 858.
39. 17 Misc. 3d at 245-46, 842 N.Y.S.2d at 858.
40. 17 Misc. 3d at 246-47, 842 N.Y.S.2d at 858.
41. 17 Misc. 3d at 247, 842 N.Y.S.2d at 859.
42. *Id*.
43. 36 Misc. 3d 1232(A), 959 N.Y.S.2d 92 (Sur. Ct., Bronx Co. 2012).
44. 2012 Slip Op. 30015(U) (Sur. Ct., Nassau Co. 2012).
45. 36 Misc. 3d 1232(A) at *2.
46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. 89 A.D.3d 75, 931 N.Y.S.2d 552 (1st Dep't 2011).
52. 89 A.D.3d 76, 931 N.Y.S.2d at 553. An IP address is a numerical label assigned to a device connected to a computer network that uses the internet to ensure that the data flows to and from the correct device. It is analogous to a post office address.
53. 89 A.D.3d at 77, 931 N.Y.S.2d at 553.
54. 89 A.D.3d at 77, 931 N.Y.S.2d at 553-54.
55. 89 A.D.3d at 78-79, 931 N.Y.S.2d at 554.
56. 89 A.D.3d at 78-79, 81, 931 N.Y.S.2d at 555-56.
57. 89 A.D.3d at 82, 931 N.Y.S.2d at 557.
58. *Tilimbo* at *3.
59. *Id*. at *4.
60. *Id*.
61. *Id*.
62. *Id*. at *5.
63. *Catalano* at *3.
64. As a fake olive branch, respondents first volunteered "to reimburse the estate for the value of the decedent's computer equipment that was not delivered to the petitioner or her counsel." Since petitioner was looking for the data on the computers, not the hardware, the court scoffed at this faux-offer and deemed it "disingenuous." *Id*.
65. *Id*. at *5-6.
66. 52 A.D.3d 244, 859 N.Y.S.2d 160 (1st Dep't 2008). *See also* Schreiber*, supra* ["outside of the matrimonial context, courts have been loathe to sanction an intrusive examination of an opponent's computer hard disk drive as a matter of course"].
67. *Catalano* at *6.
68. *Id*.
69. 53 Misc. 3d 483, 36 N.Y.S.3d 346 (Sur. Ct., Erie Co. 2015) ("*Nunz* I"); 52 Misc. 36 1216(A), 43 N.Y.S.3d 768 (Sur. Ct., Erie Co. 2016) ("Nunz II").
70. *Nunz* I, 53 Misc. 3d at 484, 36 N.Y.S.3d at 347.
71. *Id*.
72. Several of the children had previously signed waivers and consents, which they were permitted to withdraw. 53 Misc. 3d at 484-85, 36 N.Y.S.3d at 347.
73. 53 Misc. 3d at 485, 36 N.Y.S.2d at 347-48.
74. 53 Misc. 3d at 485, 36 N.Y.S.2d at 348.
75. *Id*.
76. *Id*.
77. 53 Misc. 3d 485-85, 36 N.Y.S.2d 348.
78. 53 Misc. 3d 488, 36 N.Y.S.2d 350. Or as Rocco Lampone famously told Tom Hagen and Michael Corleone: "Difficult. Not impossible."
79. 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dep't 2010).

80. https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/ediscoveryFinalGuidelines_pdf.html.

81. 72 A.D.3d at 315, 895 N.Y.S.2d at 263-64.

82. 72 A.D.3d at 320-21, 895 N.Y.S.2d at 267.

83. 72 A.D.3d at 321, 895 N.Y.S.2d at 267.

84. *Id*.

85. 72 A.D.3d at 322, 895 N.Y.S.2d at 267.

86. https://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/ Reports/ediscoveryFinalGuidelines_pdf.html; cited at Nunz I, 53 Misc. 3d at 491, 36 N.Y.S.3d at 352.

87. 53 Misc. 3d at 493, 36 N.Y.S.3d at 353.

88. 53 Misc. 3d at 493-94, 36 N.Y.S.3d at 353.

89. 53 Misc. 3d at 495, 36 N.Y.S.3d at 353.

90. *Nunz* II at *1.

91. *Id*. at *6.

92. *Id*. at *7.

93. *Id*.

94. *Id*. at *7.

95. *Id*.

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