Electronically Stored Information

Discovery, Authentication and Admissibility

Hon. Saliann Scarpulla
Supreme Court, New York County
Commercial Division

WHAT MAKES ESI DIFFERENT

- Voluminous and distributed
- Capable of taking many forms
- Contains non-apparent information
- Created and maintained in complex systems

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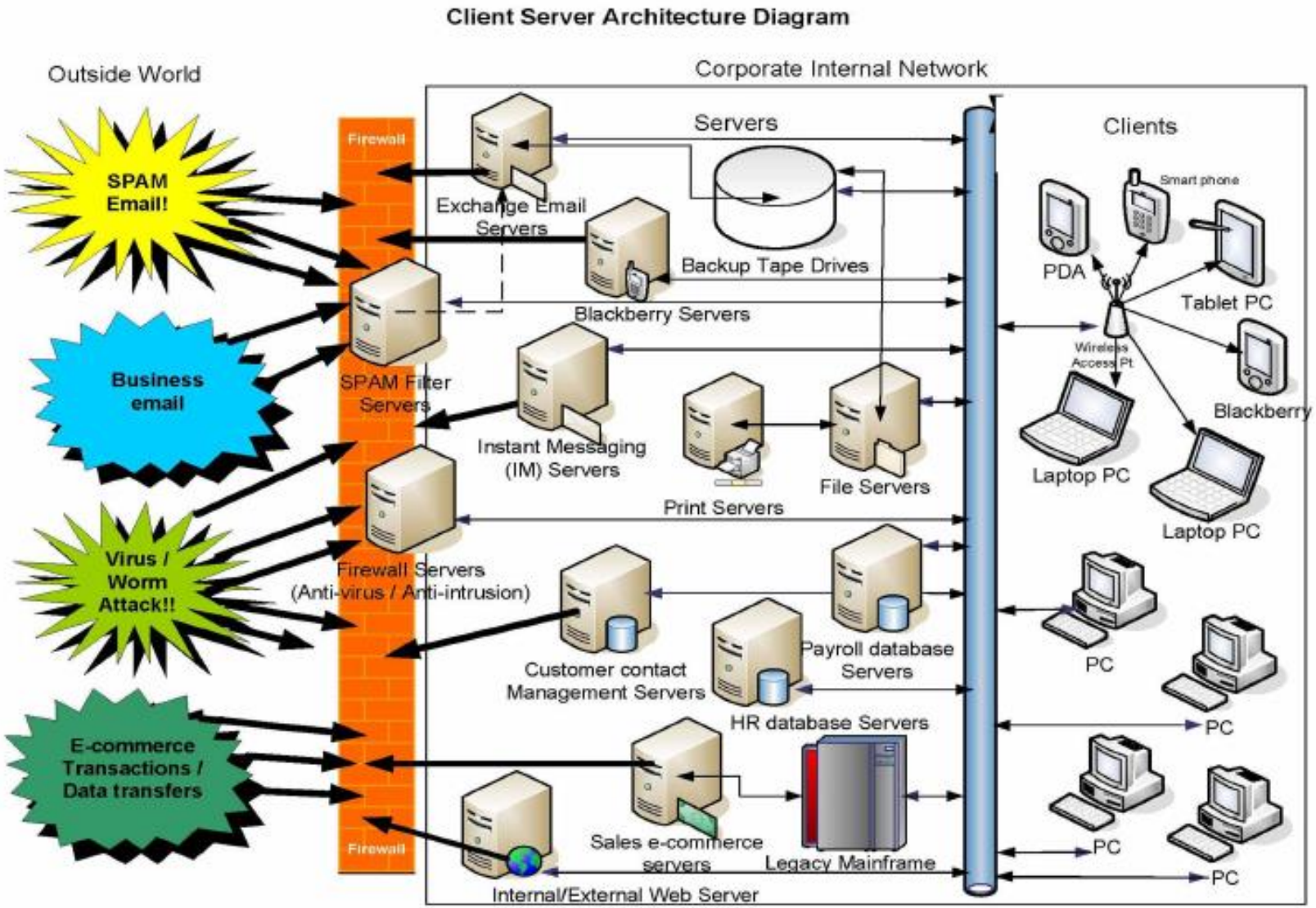

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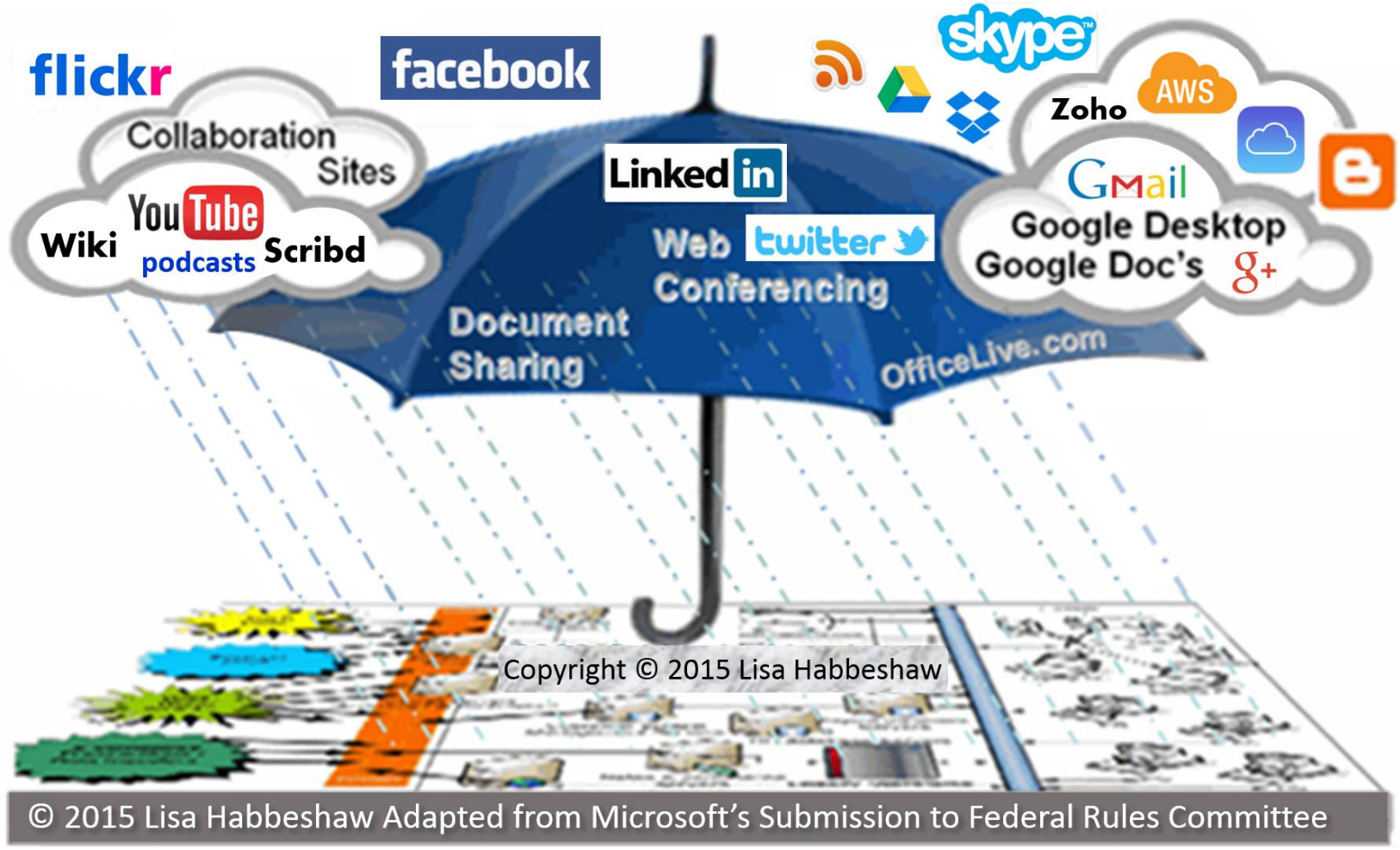

SOURCES OF ESI

- Personal computers at work and/or home
- Laptop computers, phones and tablets
- Networked devices (*i.e.,* “the Internet of Things”)
- Photocopiers
- Removable media

LESS OBVIOUS SOURCES OF ESI

- Third-party providers (incl. social media)
- Vehicular ESI
- Drones
- Body Cameras
- Random Access Memory (“RAM”)
- Slack space
- Residual data
- System data
- Disaster recovery backup media

E-DISCOVERY PROTOCOL IN NEW YORK

Preliminary Conference - 22 NYCRR 202.12(b)

“Where a case is reasonably likely to include electronic discovery counsel shall, prior to the preliminary conference, confer with regard to any anticipated electronic discovery issues. Further, counsel for all parties who appear at the preliminary conference must be sufficiently versed in matters relating to their clients' technological systems to discuss competently all issues relating to electronic discovery: counsel may bring a client representative or outside expert to assist in such e-discovery discussions.

CONSIDERATIONS FOR THE PRODUCTION OF ESI

202.12(b) provides a non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery is:

Does potentially relevant electronically stored information (”ESI”) exist;

Do any of the parties intend to seek or rely upon ESI;

Are there less costly or less burdensome alternatives to secure the necessary information without recourse to discovery of ESI;

Are the cost and burden of preserving and producing ESI proportionate to the amount in controversy; and

What is the likelihood that discovery of ESI will aid in the resolution of the dispute.”

SCOPE OF ESI PRODUCTION

Uniform Civil Rules of the Supreme Court 22 NYCRR 202.12(c)(3)

"Where the court deems appropriate, it may establish the method and scope of any electronic discovery. In establishing the method and scope of electronic discovery, the court may consider the following non-exhaustive list, including but not limited to:

(i) identification of potentially relevant types or categories of ESI and the relevant time frame;

(ii) disclosure of the applications and manner in which the ESI is maintained;

(iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(iv) implementation of a preservation plan for potentially relevant ESI;

(v) identification of the individual(s) responsible for preservation of ESI;

(vi) the scope, extent, order, and form of production;

(vii) identification, redaction, labeling, and logging of privileged or confidential ESI;

(viii) claw-back or other provisions for privileged or protected ESI;

(ix) the scope or method for searching and reviewing ESI; and

(x) the anticipated cost and burden of data recovery and proposed initial allocation of such cost."

SCOPE OF ESI PRODCUTION – “MATERIAL AND NECESSARY”

“[T]he words, ‘material and necessary’, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. . . The statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise.” *Forman v Henkin*, 30 NY3d 656, 661 (2018) (citations and quotation marks omitted).

SCOPE OF PRODUCTION OF ESI – SOCIAL MEDIA

- “Private social media information can be discoverable to the extent it contradicts or conflicts with [a] plaintiff's alleged . . . claims.” *Vasquez-Santos v Mathew*, 168 AD3d 587, 587-88 (1st Dept 2019) (citations and quotation marks omitted).
- “[C]ourts addressing disputes over the scope of social media discovery should employ our well-established rules—there is no need for a specialized or heightened factual predicate to avoid improper ‘fishing expeditions.’” *Forman v Henkin*, 30 NY3d 656, 665 (2018).

COOPERATION AND PROPORTIONALITY

- 22 NYCRR 202.70, Appendix A. “A party seeking ESI discovery … should reasonably limit its discovery requests, taking into consideration the following proportionality factors:
  - A. The importance of the issues at stake in the litigation;
  - B. The amount in controversy;
  - C. The expected importance of the requested ESI;
  - D. The availability of the ESI from another source, including a party;
  - E. The ‘accessibility’ of the ESI, as defined in applicable case law; and
  - F. The expected burden and cost to the nonparty.”

ESI IN SMALL CASES

- Ask for litigation budgets
- Set firm trial date
- Discuss “value” of the case vs. discovery costs
- Limit scope of discovery
- Pursue proportionality through party agreements or orders
- Phase discovery
- Encourage informal presentation and resolution of discovery disputes
- Discuss privilege logs and nonwaiver agreements

Admissibility of Electronically Stored Information

Admissibility of Electronically Stored Information

New York Technology Law § 302 provides that:

2. “Electronic record” shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities.

New York Technology Law § 306 provides that:

In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice law and rules including, but not limited to section four thousand five hundred thirty-nine of such law and rules.

Provisions of the CPLR Which May Apply to Electronically Stored Information

- CPLR 4506 – recorded conversations.
- CPLR 4545 – impeachment by prior inconsistent statement.
- CPLR 4518 – business records exception to the hearsay rule.
- *See People v. Kangas*, 28 NY3d 984 (2016).

Common Law Exceptions to the Hearsay Rule Which May Be Applicable to Electronically Stored Information

- Admission/Statement against Pecuniary or Penal Interest:
- *See People v. Hughes*, 114 AD3d 1021 (3d Dept. 2014) (text messages); *People v. Clevenstine*, 68 AD3d 1448 (3d Dept. 2009) (Myspace Posting); *People v. Pierre*, 41 AD3d 289 (1st Dept. 2007) (text message).
- Admission by Adopted Statement –YouTube Video
- Excited Utterance – *People v. Johnson*, 1 NY3d 302, 306 (2003)

Authentication of Electronically Stored Information

Authentication Generally

We have explained that "[t]he foundation necessary to establish [authenticity] may differ according to the nature of the evidence sought to be admitted" (citation omitted). For example, mere identification by one familiar with an item of evidence may suffice where the item is distinct or unique (citations omitted). Where a party seeks to admit tape recordings, authenticity may often be established by testimony from a participant in the conversation attesting to the fact that the recording is a fair and accurate reproduction of the conversation (citations omitted).

People v Price, 29 NY3d 472 (2017)

SOME RECENT AND RELEVANT EXAMPLES

Authentication of an E-Mail, Text, Linked In Page, Web Page, Etc. as a Business Record

Business Record

R 4518. Business records

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

People v. Price, 29 NY3d 472 (2017).

- For social media information, the Court of Appeals adhered to the general authenticity standard set out in *People v. McGee, i.e.*, '[a]ccuracy or authenticity is established by proof that the offered evidence is genuine and there has been no tampering with it . . .The foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted." People v. McGee, 49 NY2d 48, 59 (1979).
- "With respect to photographs, we have long held that the proper foundation should be established through testimony that the photograph 'accurately represent[s] the subject matter depicted since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify,' or an expert may testify that the photograph has not been altered." *Price*, 19 NY3d at 477.

People v. Price, 29 NY3d 472 (2017)

Footnote 3 (Part 1):

We disagree with the assertion of our concurring colleagues that we should not decide this appeal without conclusively adopting a general and comprehensive test for authentication to be applied, not only in this case, but in all cases involving authentication of photographs found on a social network web page. Because we conclude that the proffer was insufficient under any potential standard for authentication — whether it be the traditional method of authenticating a photograph or the standard offered by the People (or some variation thereof) — we need not go any further than deciding the case presently before us . . . "We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered."

People v Price, 29 NY3d 472, 480 (2017)

People v. Price, 29 NY3d 472 (2017)

Footnote 3 (Part 2):

In our view, it is more prudent to proceed with caution in a new and unsettled area of law such as this. We prefer to allow the law to develop with input from the courts below and with a better understanding of the numerous factual variations that will undoubtedly be presented to the trial courts. Because we necessarily decide each case based on the facts presented therein, it would be premature to decide whether the People's proffer would have been sufficient had the prosecution, hypothetically, established that the website was controlled by defendant. At this time, it is sufficient and appropriate for us to hold that, based on the proffer actually made, the photograph was not admissible.

People v Price, 29 NY3d 472, 480 (2017)

Authentication of Facebook Page – Another Decision

We conclude that the father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat in that manner "would support a finding of neglect" (citations omitted), and that the child's statements about the incident were corroborated by the screenshot (citation omitted), which was properly admitted in evidence at the fact-finding hearing based on the mother's testimony that it accurately represented the father's Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past (citations omitted).

Matter of Montalbano v Babcock, 155 AD3d 1636, 1637 (4th Dep't 2017)

Authentication of Facebook Page – a Third Decision

We disagree with the Supreme Court's determination admitting photographs depicting the defendant found on Facebook and Instagram, inasmuch as the People failed to present sufficient evidence that the photographs were accurate and authentic (citation omitted). However, the admission of the photographs was harmless, as the proof of the defendant's guilt was overwhelming and there is no significant probability that the jury would have acquitted had the photographs not been admitted (citation omitted).

People v Wells, 2018 NY Slip Op 03862 (2d Dep’t 2018)

Screenshot Of Text Message

Finally, with respect to authentication based on the contents of the text messages, the messages in the screen shot indicate that the mother has more than one child as shown by her reference to picking up "her oldest" and that the mother lives on the west side of Manhattan as shown by her answer "West" when the sender asked if she was "on the east or west side." The mother does in fact have two children and resides on the west side of Manhattan. While these two statements are not needed to provide a foundation for the texts at issue and would certainly not be sufficient alone to authenticate the text messages, they provide some additional indicia of authenticity.

Matter of R.D. (C.L.), 58 Misc 3d 780, 787-788 (Fam Ct 2017)

YouTube Video

[A]uthenticity is established by proof that the offered evidence is genuine and that there has been no tampering with it," and "[t]he foundation necessary to establish these elements may differ according to the nature of the evidence sought to be admitted" (citation omitted). Here, the YouTube video was properly authenticated by a YouTube certification, which indicated when the video was posted online, by a police officer who viewed the video at or about the time that it was posted online, and by the defendant's own admissions about the video made in a phone call while he was housed at Rikers Island Detention Center (citations omitted). The video was further authenticated by its appearance, contents, substance, internal patterns, and other distinctive characteristics (citation omitted). The quantum of authenticating evidence is greater here than what the Court of Appeals found to be inadequate in *People v Price* (citation omitted).

People v Franzese, 154 AD3d 706, 706-707 (2d Dep’t 2017)