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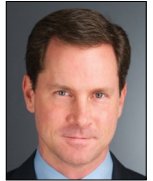
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### FEDERAL E-DISCOVERY

## Court Determines iPhone Evidence To Be Fabricated



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At the start of the era of e-discovery, electronically stored information (ESI)—a term not even coined at the time—was relatively straightforward. One could perhaps expect to encounter a small set of WordPerfect documents and a PST file or two. Times have changed; today we can expect ESI to be comprised of vast quantities of information from a multitude of communication and office systems. What has not changed—and indeed is now more crucial than ever—is the need for parties and counsel to maintain technological expertise around ESI and the e-discovery process. This was demonstrated in a recent decision from the Southern District of New York, where the defense’s adept handling of key evidence they suspected had been fabricated resulted in severe sanctions against the plaintiff and her counsel, including a dismissal with prejudice.

### ‘Rossbach v. Montefiore Med. Ctr.’

In the employment discrimination case *Rossbach v. Montefiore Med. Ctr.*, 2021

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WL 3421569 (S.D.N.Y. Aug. 5, 2021), the plaintiff alleged that her supervisor sexually harassed her on multiple occasions and that her objections to the harassment led to retaliation and her firing. As her primary documentary evidence of the alleged harassment, the plaintiff offered an image purportedly depicting three inappropriate text messages sent to her iPhone 5 in June and November of 2017. See *id.* at \*2.

The authenticity of this image quickly came into question. Attempting to explain the provenance of the image, the plaintiff testified at her Oct. 29, 2020 deposition

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that her iPhone 5 screen had cracked and later developed an “ink bleed,” so she took a picture of the text messages with her new iPhone X and forwarded the image to her attorney for production; the attorney produced the image as a PDF file. See *id.* The defendants’ forensics service provider had inspected the plaintiff’s



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iPhone 5 and determined that the screen was cracked as alleged by the plaintiff, but “there was no apparent ‘ink bleed’ or flickering on the screen.” *Id.* at \*3. The service provider also tried to conduct a forensic examination of the iPhone 5’s content and metadata—both key to the case—but was unable to since the plaintiff provided the incorrect device passcode. See *id.* After the deposition, the defendants requested the original image file; in response, the plaintiff’s counsel produced a JPEG file, identical to the PDF, except for file format. See *id.* at \*2. Following this deposition, “the defendants notified the plaintiff that they were contesting the authenticity of the text messages[.]” *Id.*

Soon thereafter, at a Feb. 11, 2021 meeting between the defendants’ expert and the parties’ counsel, the expert “described the basis for his conclusion that the image was a fabrication, including the obvious point that the [ ] image did not show any cracks on the screen of her iPhone 5.” *Id.* at \*3. A few weeks

later, the defendants sought from the court leave to move to dismiss the plaintiff's remaining harassment claims with prejudice and for sanctions against the plaintiff and her counsel, alleging that the plaintiff not only perjured herself during her deposition, but also spoliated evidence and fabricated documentary evidence. See *id.* at \*1. The court scheduled an evidentiary hearing for April 22, 2021. See *id.* Prior to the hearing, the plaintiff submitted a declaration on March 19, 2021, where she "changed her explanation of the state of her iPhone 5," *id.* at \*2, stating that the screen crack and ink bleed occurred when the phone dropped onto kitchen tile floor after having taken the picture with the iPhone X. See *id.* at n.3. She added, for the first time, that since "the iPhone 5's screen was broken and flickered erratically[.]" *id.* at \*2, she used her finger to pause the flickering long enough to capture the iPhone X picture that was later produced as a PDF image.

### Evidentiary Hearing; Dismissal and Sanctions

At the evidentiary hearing, the defendants' expert's testimony helped convince the court that the plaintiff had "provided inconsistent sworn testimony regarding the creation of the image on three occasions—in her deposition, in the March 19 Declaration, and at the evidentiary hearing[.]" *Id.* at \*9. And, as to the produced image itself, the court bluntly stated, "This image is a fabrication ... . The image as produced does not show any signs of a cracked screen, an ink bleed, flickering, or Rossbach's finger." *Id.* at \*2. Moreover, the alleged picture of her iPhone 5 screen that was produced "lacked characteristic metadata attached to photographs taken with the iPhone X. The absence of this metadata indicates that the image is not a photograph taken by an iPhone

X. Additionally, analysis of the image's color characteristics, as well as a visual assessment of the image, indicates that it is not a photograph at all." *Id.* at \*4.

The court noted additional indicia of fabrication, such as the lack of specific "visual characteristics of text messages displayed on that iPhone." *Id.* Examples included "the icon depicting the phone's level of battery charge; the font size and style in the header; the icons in the lower portion of the header; the design of a 'heart eyes' emoji in the purported message ...; and the icon for the iMessage Apps feature in the footer." *Id.* To make matters worse, the produced JPEG file "contained elements that are not consistent with *any* iPhone OS," *id.* at \*5, such as name appearance, text entry box style, and text message font.

By the end of the evidentiary hearing, the court "found by clear and convincing evidence that Rossbach had fabricated the disputed text message evidence and had given false testimony about how the evidence had been produced." *Id.* at \*1. Specifically, the court determined that the "evidence at the evidentiary hearing conclusively demonstrated that the image was not of text messages received on an iPhone 5, that it was not a photograph taken by an iPhone X, that the image is not an authentic representation of how text messages received on an iPhone would be displayed, and that the image was not even a photograph." *Id.* at \*5.

The court granted the defendants' request and the defendants, in turn, filed the instant motion for dismissal and for monetary sanctions under the Court's inherent authority, 28 U.S.C. §1927, and Federal Rule of Civil Procedure 37(e). See *id.* Given the "overwhelming evidence that the image purporting to depict text messages was inauthentic and intentionally fabricated ... [and that] ... Rossbach engaged in an 'unconscionable scheme

calculated to interfere with the judicial system's ability impartially to adjudicate the action[.]" *id.* at \*6, the court determined that such conduct warranted dismissal with prejudice, both as part of its inherent power and under Rule 37(e). The court also found justification for awarding monetary sanctions for the significant amount of time and money spent litigating the issue, including against the plaintiff's counsel and his law firm because, citing 28 U.S.C. §1927, counsel "unreasonably and vexatiously" multiplied proceedings in this case[.]" *id.* at \*9, and "at every step of these proceedings, [the plaintiff's counsel] failed to take reasonable steps to preserve critical evidence and failed to recognize the gravity of his client's misconduct and its implications for his own duties." *Id.* at \*10.

### Conclusion

With the proliferation of new and varied modes of communication, it is essential for parties and their counsel to maintain and leverage technological expertise as part of e-discovery practice. And, in this era of Photoshopping and deep fakes, prior assumptions about the validity of electronic evidence may no longer be valid. In *Rossbach*, a judge with a wealth of discovery experience, guided by a knowledgeable discovery expert and well-informed defense counsel, reviewed key evidence of fabrication to reach a sound determination. As this may not always be the case, *Rossbach* is instructional as an example of the critical importance of counsel with technological competence, the availability of authoritative discovery experts, and attention to authenticity of electronic evidence.