

# NY COURTS

## NEWSLETTER

ISSUE NO. 3 February 2010

*This newsletter is intended to provide you with meaningful and timely information on industry trends, hot topics, best practices and how to leverage the LexisNexis services to meet your unique needs.*

### Hot Topics

Keep pace with developments in New York statutes, regulations, court decisions, administrative rulings, and other news with our NY Courts Newsletter.

#### Computer Stored Data Is Discoverable

In [Etzion v. Etzion, 2009 N.Y. App. Div. LEXIS 3643 62 A.D.3d 646, 880 N.Y.S.2d 79, 2009 N.Y. App. Div. LEXIS 3643 \(2d Dept. 2009\)](#), the court held that subject to the same rules governing other types of discovery, computer-stored data is discoverable under CPLR 3101(a), and, given the viability of the former wife's cause of action sounding in fraud, discovery should have been allowed with respect to any computer stored data either held in escrow or in the former husband's and other defendants' business or personal computers bearing on whether the husband misrepresented to the wife, in the stipulation of divorce settlement, that, at the time they entered into the memorandum agreement, he was not engaged in any active deals or pending negotiations for the sale of warehouse property subject to the agreement. See [Bender's New York Evidence-CPLR](#).

#### E-Filing "Pilot" Project

The e-filing "pilot" project has been converted to a permanent part of the civil justice system. The Chief Administrative Judge was authorized to promulgate rules for the expansion of the program. E-filing will remain voluntary except that the Chief Administrative Judge can promulgate a mandatory e-filing program for certain actions, subject to the right to opt out if the party is pro se or the attorney lacks the necessary equipment or expertise to file electronically. The legislation requires the Chief Administrative Judge to submit by April 1, 2012 a report evaluating the e-filing program. Authorization for a mandatory electronic filing program will expire September 1, 2012. [L. 2009, ch. 416, eff. Sept. 1, 2009](#). See [New York Civil Practice: CPLR](#).

**Reminder:** A complete discussion of the amendments and full text of the [Power of Attorney Legislation for New York](#) are available in pamphlet and pdf form from our bookstore.

[Power of Attorney Legislation for New York \(pdf\)](#) or [Power of Attorney Legislation for New York \(pamphlet\)](#)

### What's new?

#### Unique LexisNexis Practice Guide New York e-Discovery and Evidence Now Available

This one-of-a-kind product is the only place where attorneys will find practical, results-oriented guidance on how to preserve, obtain and use electronically stored information (ESI) in both federal and state court litigation in New York.

Author Kyle C. Bisceglie is a partner with Olshan Grundman Frome Rosenzweig & Wolosky LLP in New York City. He maintains a national practice counseling domestic and foreign corporations, partnerships and individuals in a wide variety of complex commercial and financial litigation, alternative dispute resolution, risk analysis and litigation avoidance. His many accomplishments in 2009 include establishing precedent in August by winning dismissal of all claims for the return of art under New York's Art & Cultural Affairs Law, and, in October, obtaining a \$44.2 million verdict after a 3½ week trial in federal court in New Mexico for breach of contract, unfair trade practices and false advertising. Electronic discovery has been an integral part of Kyle's practice for his entire career and he has written and lectured extensively on the subject. He points out that the following are the key features that distinguish [LexisNexis Practice Guide New York e-Discovery and Evidence](#) (Pub no.1549):

- A master checklist for all phases of e-discovery.
- Concise, practical guidance to all e-discovery issues.
- Complete discussion of the technical issues in e-discovery (including how to establish best practices for electronically stored information).
- A glossary of technical terms.
- A chapter devoted to the ethical issues in e-discovery, including the duty of competence.
- Unique examination of how to discover ESI stored in foreign jurisdictions.
- Explanation of how to admit ESI as evidence.

#### Debut of New York Court Rules Annotated

Rules of court governing trial procedure in New York have increasingly become more critical in recent years as the courts use the rules to alter court procedure, rather than seeking changes through the legislature. [LexisNexis New York Court Rules Annotated](#) offers practitioners the rules they need, organized to accommodate quick reference by trial attorneys. Plus, the rules are fully annotated, providing practitioners the key insights in how courts will apply and interpret the procedural dictates. LexisNexis is the only provider of annotated New York rules of court, and [New York Court Rules Annotated](#) is the best source for fully annotated court rules in New York (Pub no. 41231).

#### New release of Warren's Negligence in New York Courts

The new release of [Warren's Negligence in the New York Courts](#) features significant new case law, and revisions to 85 chapters of the treatise, affecting all seven volumes of the publication and covering all eight major Part groupings: Essentials of Negligence, Defenses to Action, Parties Negligent, Persons Injured, Places, Instrumentalities, Types of Actions, and Damages.

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**New York Insurance Law:****[New Appleman New York Insurance Law, Second Edition](#)**

The newly released second edition of NY Insurance Law still includes four volumes, but chapters have been reorganized to follow the practice of insurance law according to the work flow of insurance attorneys. There is an introductory scope section at the beginning of each chapter to give users a quick overview, and descriptive section headings for each chapter to make it easy to scan chapters and find the essential information you need. The content of each chapter is now organized to quickly get inexperienced and experienced users alike to the correct information. The second edition is also integrated with the Lexis electronic database providing search queries and strategies to find the most current New York and federal cases on-point. The second edition also includes updated forms, sample policies, and cross references to cases, statutes, and New York Insurance Department regulations.

**Online Tip: Quickly Navigate to Statutory Sections Affected by Recent Acts**

You can quickly find what statutes are impacted by a particular act in New York with this tip:

For example, if you would like to know what statutes are impacted by the amendment to the wage hour law mentioned in the “*Did you know*” segment of this newsletter, simply enter the year and Chapter number of the act, e.g., 2009, ch 372 in the Search box at the top of the Table of Contents for the NY Consolidated Laws Service (with Terms and Connectors chosen above the Search box). Click “Search” and your results should include sections enacted or amended by that act: [NY CLS Labor §198](#), [§ 215](#) and [§ 663](#).

**Reminder:** You can access the **Litigation Resource Center**, a new web community for litigators, at: <http://law.lexisnexis.com/practiceareas/LitigationResourceCenter>

**Questions? Contact:****Karen Leikkanen**Sr. Legal Analyst, Content Development  
karen.leikkanen@lexisnexis.com**Did you know... the wage hour law was strengthened to protect employees?**

Employers have a new reason to increase vigilance in their compliance with wage and hour requirements. New York has shifted a significant burden of proof regarding liquidated damages, and enacted new protections for employees who are punished for attempting to assert wage and other rights granted by law. Governor David A. Paterson signed bill [A. 6963 \(L. 2009, ch. 372\)](#) into law which took effect on November 24, 2009. (See our *Research Tips* to find statutory sections impacted by this law.)

The law increases penalties against employers who are found to have retaliated against employees for exercising workers' rights under New York State's Labor Laws. Minimum penalties are increased from \$200 to \$1,000, and maximum penalties are increased from \$2,000 to \$10,000.

The bill also provides that when a determination is made that an employer has violated New York State Wage Laws, liquidated damages of 25 percent of the unpaid wages *shall* be added *unless* the employer proves a “good faith belief that the underpayment complied with the law.” Accordingly, the new law shifts the burden of proof regarding the assessment of liquidated damages from the employee to the employer. Under the prior law, liquidated damages were awarded only upon a finding that the employer's failure to pay the required wage was “willful”. The new law provides that once a violation of law is established, to avoid liquidated damages, the employer must now prove by an affirmative showing of evidence that the failure to pay the required wage was made in “good faith”. If the employer fails to prove “good faith” the violation will be found to be “willful”. Upon a finding the violation was willful, additional liquidated damages of 25% of the back wages found due are assessed.

As a result, New York now treats the burden of proof regarding liquidated damages just as the federal law does, the Fair Labor Standards Act (“FLSA”), where the award of liquidated damages is the norm, and the award of simple wages the exception. Since the statute of limitations is six years for violation of New York State's Labor Laws, liquidated damages of 25% can be significant indeed. (Douglas Weiner, Esq., Senior Trial Counsel, EpsteinBeckerGreen, PC)

**Did you know... that training for all “attorneys for children” is now required?**

[Section 249-b of the Family Court Act](#) was recently amended by [L. 2009, ch. 476](#), to require that the Chief Administrator of the Courts promulgate a rule to: “provide for the development of training programs with the input of and in consultation with the state office for the prevention of domestic violence. Such training programs must include the dynamics of domestic violence and its effect on victims and on children, and the relationship between such dynamics and the issues considered by the court, including, but not limited to, custody, visitation and child support. Such training programs along with the providers of such training must be approved by the office of court administration following consultation with and input from the state office for the prevention of domestic violence; and require that all attorneys for children, including new and veteran attorneys, receive initial and ongoing training as provided for in this section.” On and effective November 18, 2009, the Chief Administrator of the Courts promulgated new [Rule 127.6 \(NY CLS Standards & Admin Pol § 127.6\)](#) to comply with the statutory requirement.

**Did you know... recent amendments to the Domestic Relations Law, Family Court Act and Social Services Law were added**

to revised chapters of New York Civil Practice: Family Court Proceedings, including the repeal of Family Court Act § 516 (compromise agreements), changes to DRL § 240(1-b)(c)(5) and FCA §§ 413(c)(5) and 416 regarding parental responsibility for health insurance, and the significant amendment to DRL § 240(1-b)(c)(2) and FCA § 413(1)(c)(2) replacing the \$80,000 cap applicable to child support determinations with the amount set forth in SSL § 111-i(2)(b)? Under this latter amendment, which is scheduled to take effect on January 31, 2010, the applicable cap will be \$130,000 and will increase every two years based on the Consumer Price Index. See [New York Civil Practice: Family Court Proceedings](#).