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STATE E-DISCOVERY

Recent Decisions Focus on Duty To Preserve ESI and Metadata

By **Mark A. Berman**

New York state courts issue sanctions for the failure to maintain electronically stored information (ESI) that fall, as the First Department recently aptly coined, within the "zone of the preservation duty" of a party.[1] Seeking to describe the parameters of that "zone," the New York State Bar Association's "Best Practices in E-Discovery in New York State and Federal Courts Version 2.0,"[2] in addressing the point where a party's duty to preserve ESI may be "triggered," states:

> [C]ase law illustrates a wide variety of triggers, from the common (e.g., a credible litigation threat letter from a lawyer) to the more controversial (e.g., lawsuits alleging product defects filed against other businesses in the same industry). There are no bright line rules defining with specificity the point at which the preservation obligation is "triggered."
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> Accordingly, general conclusions can be drawn as to what events trigger the duty to preserve. The legal duty to preserve relevant information arises when a legal proceeding is reasonably anticipated. But circumstances other than suing or being sued may also give rise to preservation duties, such as a regulatory investigation, a non-party subpoena, or a regulation requiring retention of information. Participation in any legal process where production of ESI may be required could also trigger the preservation obligation. Accordingly, the actual filing of a lawsuit or receipt of a subpoena may be the latest possible point triggering the preservation obligation. When a client receives notice of litigation or a claim regarding which the client holds relevant information, the preservation duty may be triggered, regardless of what documents have or have not been filed with a court, or formally served.

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This article discusses recent decisions addressing the duty to preserve ESI and related metadata concerns issued since the author's May 2013 article entitled "The Duty to Preserve: *Voom* One Year Later."[3]

In *Harry Weiss v. Moskowitz*,[4] plaintiff's bookkeeper testified that "a litigation hold, either written or oral, was never issued directing him to preserve electronic data," which the First Department held supported a finding that "plaintiff's disposal of the subject computer was, at the very least, grossly negligent." The court noted that "by discarding the computer after its duty to preserve had attached without giving notice to defendants, plaintiff deprived defendants of the opportunity to have their own expert examine the computer to determine if the deleted files could be restored." Defendants asserted that plaintiff's "spoliation of critical evidence compromised" defendants' ability to prosecute their counterclaims. In addressing plaintiff's argument that its disposal of the computer did not cause defendants prejudice because many of the files were printed prior to its disposal, the court noted "converting the files from their native format to hard-copy form would have resulted in the loss of discoverable metadata." Accordingly, the First Department sustained the motion court's ruling that "preclusion" was an appropriate spoliation sanction.

Courts in ESI spoliation decisions acknowledge that, under certain circumstances, a party not being provided with specific ESI in native format containing metadata may be prejudiced in its ability

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to prove or defend against a claim. As addressed in *Suffolk P.E.T. Management v. Anand*,[5] if a court on the proper record[6] permits an adverse party's computer to be forensically examined, a determination might then be able to be made that relevant ESI was not searched for, let alone properly preserved. In *Suffolk P.E.T.*, a "forensic study of defendants' computer hard drives revealed evidence that conflicted with defendants' assertions that all relevant documents, including electronic information, had been produced." The First Department noted that "many of the records that plaintiffs sought and were not provided with were material to plaintiffs' case, and were required to be maintained by defendants," as per the parties' contract. In addition, the evidence demonstrated that "over [a] two-year period, defendants failed to conduct timely searches for requested documents, failed to preserve material documents despite awareness of the action, and otherwise affirmatively interfered with plaintiffs' efforts to collect discoverable material."

The court further noted that "defendants were alerted to the potential consequences of incomplete disclosure during the several hearings conducted by the [motion] court on the discovery issues." As such, the First Department affirmed the motion court's confirmation of a report recommending that defendants' answer be stricken for noncompliance with discovery orders and that a default judgment be entered against defendants on liability. Based on the above, the First Department held that the record supported the findings that defendants "engaged in willful and contumacious conduct by their failure to comply with the court's discovery orders and directives."

In *QK Healthcare v. Forest Laboratories*,[7] a case seeking to recover damages based upon defendant's refusal to make payment upon the return of unsold merchandise, it was learned as a result of discovery that the former vice-president of purchasing and current president of plaintiff experienced a computer crash, and thus all of his electronic files created, sent, received and stored were lost. This occurred before the litigation had begun, but after the subject dispute had arisen. In addition, the computer of the person responsible for handling the return goods at issue was purportedly reformatted by plaintiff's IT department three months after the litigation had begun.

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The motion court found that the computer crash occurred at a time litigation was reasonably anticipated as defendant already had denied plaintiff's request for credit for the return of merchandise, which finding was further substantiated by entries on plaintiff's privilege log. As such, the court held that plaintiff's duty to preserve had been "triggered." Noting that a "culpable state of mind…includes ordinary negligence" for spoliation of evidence purposes, the motion court found that "at a minimum, the deletion of [the President's] files and the destruction [of files of the person in charge of return goods] consisted of negligence." The court then noted that:

> given the inherent unfairness of asking a party to prove that the destroyed evidence is relevant even though it no longer exists and cannot be specifically identified as a result of the spoliator's own misconduct, courts will usually reject an argument that the deprived party cannot establish the relevance of the evidence.

However, the motion court found that since the case turns on the language of two different return policies, and the author of those policies had been deposed and can testify as to the meaning of them and their intention, the evidence "destroyed or lost" was "not crucial to defendant's defense." As such, the motion court held that the appropriate sanction for spoliation would be an "adverse instruction at the time of trial against [defendant] with respect to its application to the returns at issue."

Lastly, the importance of being able to forensically examine an electronic device in order to analyze ESI metadata is highlighted in the case of *Alfano v. LC Main*,[8] where metadata associated with a digital photograph established that it had not been taken at the time of the event, and thus was not probative of the condition of the scene at the time of the accident. Defendants submitted an affidavit from a forensic computer examiner who performed a forensic analysis of the metadata associated with plaintiffs' photographs and, as a result, concluded that plaintiffs' photographs were taken 12 days after the snowstorm, and therefore did "not accurately depict the scene of the accident as it appeared at the time of the accident, as plaintiff claims."

While the "zone" of a party's preservation duty may be somewhat fluid, counsel and client must be cognizant of their obligations to timely preserve appropriate and relevant ESI. Case law appreciates that the loss of ESI is significant not just due to the potential prejudice associated with not having the opportunity to review the substance of an electronic communication, but from the concomitant loss of relevant metadata associated with such communication, which could equally be as prejudicial to a party where such metadata is needed to defend against a claim.

1. *OrthoTec v. HealthpointCapital*, 106 A.D.3d 472, 964 N.Y.S.2d 421, 422 (1st Dept. 2013) (citing *Voom HD Holdings v. EchoStar Satellite*, 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dept. 2012)).
2. Report of The Report of the E-Discovery Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, dated December 2012, and approved by the New York State Bar Association Executive Committee April 5, 2013.
3. NYLJ, Vol. 249, No. 87, May 7, 2013.
4. __N.Y.S.2d__, 106 A.D.3d 668, 2013 WL 2341806 (1st Dept. 2013).
5. 105 A.D.3d 462, 962 N.Y.S.2d 138 (1st Dept. 2013).
6. See *OrthoTec*, 106 A.D.3d at 472, 964 N.Y.S.2d at 422 (affirming denial of defendants' motion for spoliation sanctions where the "evidence of plaintiff's preservation and collection of any such documents is inadequate to show the degree of its culpability").
7. Index No. 117407/2009 (Sup. Ct. N.Y. Co. May 13, 2013).
8. 38 Misc. 3d 1233(A), 2013 WL 1111969 (Sup. Ct. Westchester Co. March 18, 2013).