New York Law Journal
Technology Today
WWW.NYLJ.COM
An ALM Publication
VOLUME 249 —NO. 87
TUESDAY, MAY 7, 2013

STATE E-DISCOVERY

The Duty to Preserve: 'VOOM' One Year Later

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In January 2012, the Appellate Division, First Department, issued its landmark decision, *VOOM HD Holdings v. EchoStar Satellite*,[1] (*Voom*), which clarified when electronically stored information (ESI) needs to be preserved and a "litigation hold" needs to be put in place. The First Department held:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents…. A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense…. A "culpable state of mind" for purposes of a spoliation sanction includes ordinary negligence.

The First Department stated that, in implementing a litigation hold, a company "must direct appropriate employees to preserve all relevant records, electronic or otherwise, and create a mechanism for collecting the preserved records so they might be searched by someone other than the employee." "The hold should, with as much specificity as possible, describe the ESI at issue, direct that routine destruction policies such as auto-delete functions and rewriting over emails cease, and describe the consequences for failure to so preserve electronically stored evidence." The court noted that this "must" be done with "the guidance and supervision of counsel."

Since it was issued, the *Voom* decision has received a great deal of press and has been the talk of the e-discovery community. Its holdings and dicta have been supported by many practitioners, and criticized by just as many—positions no doubt guided by the nature of such counsel's practice, whether counsel's clients are typically plaintiffs or defendants, the type of client, and/or the area of business involved. The *Voom* standards place burdens on in-house and outside lawyers, requiring them to adhere to what some contend is not a sufficiently clear "reasonably anticipates" standard when implementing a "litigation hold"—thereby, according to some, making the timing of when to actually implement a litigation hold arbitrary, with a lawyer's judgment subject to being "second guessed" during a litigation years after the "hold" was effectuated.

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While it is not possible to determine whether *Voom* actually has altered corporate practices in preserving ESI or other information or whether and/or to what degree in-house or outside counsel have changed the advice they provide clients, the few reported and unreported decisions citing to *Voom* reveal that they provide clearer rulings dealing with issues involving the deletion of ESI as it relates to a party's obligation to preserve. In the spoliation context, decisions now emphasize timing and determining the appropriate specific sanction or remedy for ESI spoliation.

In its most recent decision citing to *Voom*, the First Department, in *General Motors Acceptance v. New York Cent. Mut. Fire Ins.*,[2] was confronted with the issue of a party's failure, after being ordered on multiple occasions, to produce relevant ESI that was known to have existed, and the party's concomitant failure to provide an adequate affidavit explaining defendant's reasons

for not locating certain ESI earlier and turning over other ESI. After noting that defendant's actions were "willful and contumacious," the First Department, citing to *Voom*, ruled that the motion court "did not abuse its discretion in finding that certain evidence may have existed, but was not produced by defendant either because it was destroyed or withheld." The motion court imposed the sanction of an adverse inference charge, as that would "prevent defendant from using the absence of these documents at trial to its tactical advantage." The First Department, however, modified the motion court's order to make clear that "the conditional order of preclusion is limited to those documents identified therein as either missing, or not disclosed."

In *Suazo v. Linden Plaza Associates*,[3] another recent First Department decision, the court modified a spoliation sanction to the extent of reducing it to an adverse inference charge at trial. In an action seeking to hold defendants liable for assault as a result of security breaches, the court, relying on *Voom*, noted that, since defendants were "on notice of a credible probability that [they would] become involved in litigation, plaintiff demonstrated that defendants' failure to take active steps to halt the process of automatically recording over 30- to 45-day-old surveillance video and to preserve it for litigation constituted spoliation of evidence." However, because the loss of the video did not "leave[] [plaintiff] prejudicially bereft of appropriate means to confront

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a claim [or defense] with incisive evidence," the court ruled that the motion court erred in striking defendants' answer.

In *150 Centreville v. Lin Associates Architects*,[4] an architectural malpractice action, the motion court characterized the issue as "whether there should be any consequences to plaintiffs who commenced a litigation, but failed to preserve and safeguard the documents necessary to provide responses to defendants during discovery, and what ramifications and/or sanctions should flow from the failure." The motion court, citing to *Voom*, held:

> The issue here is a party's gross negligence in not preserving essential records, papers, and documents, and repeated violations of court orders mandating discovery, accompanied by dilatory, wasteful motion practice. While this action is not a spoliation of evidence case per se, reference and citation to spoliation cases are, nevertheless, helpful, since courts have talked of a party placing a "litigation hold" on papers, records, documents, emails, and videotaped evidence the moment that litigation either has commenced or is contemplated.

The motion court stated the obvious when it noted that plaintiffs "should have secured their papers in a safe place and should certainly have done so at the first hint of an alleged problem with their former landlord. Most plaintiffs, in addition, in garden variety civil litigation, at the start of a lawsuit—and even before an action is filed—usually make a copy of all pertinent documents for their counsel."

In *Hameroff and Sons v. Plank*,[5] the issue was defendant's failure to provide emails of its contract administrator. The motion court noted:

> Since the settlement failed, the punch list was not completed and litigation was threatened, it finds [the administrator's] explanation that he simply destroyed all of his project e-mails as a standard practice completely implausible and violative of the *Zubalake* preservation standard. Worse yet, plaintiff has actually documented that [the administrator] had retained copies of his project e-mails as he had e-mailed copies of project e-mails to plaintiff's former counsel.

As a result, the motion court granted plaintiff's motion for "spoliation sanctions to the extent of precluding defendant from offering any documentation or the testimony of [the administrator]…or any other employee or former employee concerning the [settlement] upon the trial of this action with respect to both defendant's counterclaim and/or its defense to plaintiff's complaint."

In *Mangione v. Jacobs*,[6] the motion court addressed what it characterized as an "issue of first impression." Before defendants could schedule" her court-ordered Independent Medical Examinations (IME), plaintiff, who had a pending personal injury action, underwent surgery for the physical problems she allegedly sustained as a result of an accident, and the issue before the court was whether this constituted spoliation of evidence. The motion court, citing *Voom*, found that plaintiff and her counsel knowingly scheduled the surgery to frustrate the court-ordered IMEs, and held that a "plaintiff undergoing non-emergency and non-life-threatening surgery, thereby depriving the defendants of a court-ordered IME, can and does constitute the spoliation of evidence." The motion court noted:

> A court should consider whether the damage and prejudice to a victim of spoliation are irreparable or may be remedied by the imposition of lesser spoliation sanctions, short of outright dismissal of a pleading. In the calculus of appropriate sanctions, a court must also consider, as discussed above, deterring other would-be spoliators; otherwise, a judicial opinion that simply slaps a wayward litigant on the wrist for disobeying three court orders might embolden and reward miscreants who would destroy, rather than preserve and furnish, an important piece of evidence. A court should not give its imprimatur to an intentional destruction of evidence and thwarting of court orders, if it intends to stem a contagion of spoliation.

Ultimately, "considering the irreparable prejudice to defendants of the spoliation, where [plaintiff's] surgery has eviscerated the means of defense…of tracing the causal connection of [plaintiff's] ailments to the most recent accident," the motion court held that dismissal of the complaint was the appropriate sanction.

The 'Voom' holdings and dicta have been supported by many practitioners, and criticized by just as many—positions no doubt guided by the nature of such counsel's practice and clients.

In *Estee Lauder v. OneBeacon Insurance Group*,[7] plaintiffs, relying on *Voom*, asserted that it was entitled to a negative inference at trial because an unknown quantity of relevant information had been destroyed due to defendant's affirmative failure to issue a "litigation hold." Defendants argued that its agent did not have an automatic deletion feature on its emails, and instead had a policy of maintaining all documents and correspondence relating to a particular claim. In fact, defendant affirmatively stated that it would *not* issue a litigation hold because that would risk confusion with its policy to "preserve all documents in all formats for all files." Defendant asserted that it continually "verifies that all emails and electronic documents are stored on an active server." The motion court found that the policy defendant "had in place is the functional equivalent of a litigation hold. If there is no automatic deletion, there is nothing to hold." The court found that under *Voom* where plaintiff "could not establish that documents were destroyed in bad faith, it is not entitled to sanctions."

In *915 Broadway Associates v. Paul, Hastings, Janofsky & Walker*,[8] the motion court found that defendant's conduct warranted sanctions where defendant actively deleted electronic documents concerning a key period related to the transaction at a time when he had an obligation to preserve those documents, as a "litigation hold" had been circulated. The motion court found that documents were deleted intentionally and then permanently destroyed beyond any possible recovery either intentionally or as the result of gross negligence. The motion court found that defendant "continued his routine deletion practices and completely failed to instruct his firm's IT department to suspend the routine destruction policy that resulted in the permanent destruction of every email that he intentionally deleted." The motion court noted that defendant could not know exactly what documents were destroyed as a result of 915 Broadway's misconduct, but that it was clear that the record was tainted. The motion court ruled: "It is fundamentally unfair to require Paul Hastings to defend itself in a vacuum. Dismissal is therefore warranted."

In *Carr v. Bovis Lend Lease*,[9] defendant served a demand to preserve electronic information, claiming that preservation of the BlackBerry and its memory card were "necessary for authentication purposes based on potential third party access." As such, citing to *Voom*, the motion court ordered that plaintiff "maintain and preserve videos, and metadata, including memory cards, [i]n connection with uploading information onto all social media sites from the date of the accident to the present."

1. 93 A.D.3d 33, 939 N.Y.S.2d 321 (1st Dept. 2012).
2. 104 A.D.3d 523, 961 N.Y.S.2d 142 (1st Dept. 2013).
3. 102 A.D.3d 570, 958 N.Y.S.2d 389 (1st Dept. 2013).
4. —N.Y.S.2d—, 2013 WL 618240 (Sup. Ct. Queens Co. Feb. 6, 2013).
5. 36 Misc. 3d 1229(A), 959 N.Y.S.2d 89 (Sup. Ct. Albany Co., 2012).
6. 37 Misc. 3d 711, 950 N.Y.S.2d 457 (Sup. Ct. Queens Co. 2012).
7. Index No. 602379/2005 (Sup. Ct. New York Co. April 15, 2013).
8. 34 Misc. 3d 1229(A), 950 N.Y.S.2d 724 (Sup. Ct. N.Y. Co. 2012).
9. Index No. 107413/2010 (Sup. Ct. N.Y. Co. Sept. 5, 2012).

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