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Always conduct diligent, reasonable discovery

"[I]mprisoned for a period not to exceed two years."

The above quote is courtesy of Chief Magistrate Judge Paul W. Grimm, who recently issued a jarring opinion from the District of Maryland, *Victor Stanley Inc. v. Creative Pipe Inc.* (*Victor Stanley II*).

In this case, the plaintiff sought sanctions alleging the Maryland-based defendants intentionally destroyed evidence among other litigation and discovery misconduct. Judge Grimm agreed with the plaintiff's assessment, finding the defendants — in particular the president of the defendant company — committed eight discrete preservation failures.

These shortcomings included the failure to implement a litigation hold, deletion of electronically stored information (ESI), failure to preserve an external hard drive, files and e-mails, use of wiping software and repeated failure to adhere to court orders.

Judge Grimm's decision is perhaps the most extreme example of how inadequate ESI policies can harm an organization or individual. But the fact remains that e-discovery is a topic that many companies continue to struggle with, despite having been accountable for the discovery of ESI under the Federal Rules of Civil Procedure for almost four years.

In fact, a recent Kroll Ontrack survey of IT departments and in-house counsel throughout the U.S. found the number of e-discovery cases has grown consistently every year for the last ten years nationwide.

As demonstrated in the severity of sanctions in the recent *Victory Stanley II* ruling — which included a default judgment on one of the claims, and a finding of civil contempt of court that will land the defendant president/CEO in prison for a period of two years — the growing frustration in the judiciary regarding discovery misconduct has reached a boiling point. Companies must now be prepared to defend their ESI protocols in litigation or



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face harsh penalties from the courts.

According to Judge Grimm, one of the major challenges for companies who are trying to implement proper ESI protocols is that case law is inconsistent regarding what steps a party must undertake to navigate data preservation successfully. Furthermore, the inconsistency in preservation practice is most troubling to "institutional clients" — including corporations — since companies generally do not conduct business in a sole jurisdiction.

So, then, what is Judge Grimm's advice for companies? Follow the requirements

of the "toughest court" who has issued an opinion regarding preservation. Although this may seem unfair to companies who conduct business across jurisdictional lines, it is better to play it safe than sorry with regard to fulfilling discovery obligations.

Satisfying strict preservation requirements may appear to be a daunting task, but proactive information management practices will help ensure an organization is properly equipped when the inevitable request for ESI occurs. Creating a data map and instituting an archiving solution that allows for the automated implementation of a legal hold are no longer "nice to haves" but rather essential tools for today's corporations.

Victor Stanley II may strike fear into the hearts of companies and litigators alike, but the most important lesson from this case is that courts are expecting companies to act reasonably — not perfectly. Recent case law instructs that corporations must conduct discovery in good-faith, with a documented process to help avoid serious consequences in the courtroom and beyond.

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