

## **Defendant ordered to jail in spoliation eye-opener**

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A recent e-discovery decision provides important lessons for lawyers and companies about spoliation sanctions.

The defendant's e-discovery failures in *Victor Stanley, Inc. v. Creative Pipe, Inc.* – known as *Victor Stanley II* – were so serious that the company accepted a default judgment on the primary claim filed in the case.

And U.S. District Court Judge Paul Grimm was so angered by the actions of company president Mark Pappas that he ordered Pappas to serve two years in prison for contempt of court, unless and until he pays attorney fees and costs to the plaintiff.

The case, Grimm said, featured “the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly 14 years on the bench.”

The order of jail time “gives lawyers another way to convince their clients of the seriousness of the preservation obligation in discovery, as well as the importance of memorializing” their actions throughout the e-discovery process, said Robert Brownstone, Law and Technology Director and Co-Chair of the Electronic Information Management group at Fenwick & West in Silicon Valley, Calif.

In addition to being an eye-opener for clients – who may not realize that their electronic discovery missteps could land them in jail – the ruling provides a valuable lesson for lawyers.

The decision “is a fantastic educational resource for practitioners,” said Kelly Kubacki, a staff attorney at Kroll OnTrack, an Eden Prairie, Minn. computer forensics company that specializes in electronic evidence. “Lawyers must stay educated on electronic discovery and this case will help them understand what their duties are.”

As an appendix to his decision, Grimm provided a 12-page chart that breaks down the law on spoliation and sanctions in each federal circuit.

This chart will be useful because “lawyers need to know what the standard will be in their jurisdiction whether they are trying to prove spoliation or defend it,” said Craig Ball, an Austin, Texas, trial lawyer and technologist.

While the conduct in this case may seem “unusual or extreme,” Ball noted that it is “all too commonplace. Your clients, wittingly or unwittingly, are destroying evidence or losing evidence in ways that may constitute spoliation in your jurisdiction.”

### **Delete, destroy and obstruct**

Victor Stanley, the manufacturer of a line of furnishings, filed a copyright infringement suit against Creative Pipe in 2006, launching a four-year discovery battle.

In 2008, Grimm ruled in *Victor Stanley I* that the defendants had waived the attorney-client privilege for certain electronic documents because they failed to conduct a reasonable privilege review prior to production, and failed to explain their methodology for choosing search terms.

But the defendants continued to make a mess of the discovery process over the next two years. In the 89-page *Victory Stanley II* opinion, Grimm documented these failures, which included production delays, large-scale deletion of electronically stored information (ESI) on the eve of scheduled discovery, a lack of a litigation hold, failure to preserve an external hard drive and the use of a defragmenter program on Pappas' computer.

Despite the defendants' argument that their wrongdoing was negligent, Grimm determined that the record "convincingly demonstrate[d]" that the defendants "set out to delete, destroy, or hide thousands of files containing highly relevant ESI pertaining to [the] plaintiff's claims. ... [T]he spoliating parties lied about their ESI production; obstructed the discovery process; and intentionally destroyed evidence when they were aware of the lawsuit."

Further, the evidence of prejudice to the plaintiff was "manifest," he wrote.

Grimm declined to recommend the entry of a default judgment on all the plaintiffs' claims or to refer the actions of Pappas to the U.S. Attorney's Office for criminal contempt proceedings, determining this would be a further drain on the court's resources.

Instead, he recommended a default judgment on the plaintiff's primary claim and ordered spoliation sanctions that would cover costs related to uncovering the defendants' discovery abuses, retaining ESI vendors and preparing, filing and arguing all of the plaintiff's ESI motions.

Grimm further recommended that Pappas be imprisoned for two years for contempt of court based on his "pervasive and willful violation of serial court orders" unless or until he pays the plaintiff's attorney fees and costs.

### **Preservation – and spoliation**

The decision offers both a primer on sanctions law across the country and a roadmap for avoiding a similar outcome.

"We've seen across the country that judges are increasingly intolerant of e-discovery failure," Kubacki said. Lawyers need to "manage data from the outset."

She suggested advising clients to "have a proper information management strategy and e-mail and file archiving solution to efficiently manage and produce ESI."

Brownstone said the decision can show clients "how important it is to make a conscious decision to be thorough and ... to make a record of what they are doing and why."

"In any kind of scenario where the client comes under a challenge [from] the other side, it is a huge benefit to have a written record to show why certain decisions were made, and some information preserved and some was not," he explained.

Still, said Kubacki, practitioners should remember that "none of the courts are asking for perfection. They are asking for reasonableness and a well-documented process of what the client has done."

U.S. District Court for the District of Maryland. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662. Sept. 9, 2010. Lawyers USA No. 993-2287.

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