

Victor Stanley v. Creative Pipe:

New Breakthrough Opinion Sheds Light on Serious Dangers of Destroying Electronic Evidence

A Magistrate Judge for the U.S. District Court in Maryland imposed heavy sanctions on a litigant last week after finding he had intentionally destroyed electronic evidence in defiance of repeated orders not to do so. In an 89-page attack, Judge Paul Grimm held Mark Pappas – the President of Creative Pipe, Inc. – liable for civil contempt, and ordered that he be placed in prison for up to two years unless he pays plaintiff's costs and fees associated with claims for spoliation of evidence.

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, plaintiff Victor Stanley sued Creative Pipe and Pappas on claims of patent infringement, copyright infringement, and unfair competition, alleging that several designs had been stolen off its web site. Then the discovery infractions began. In 2008, already more than a year into the litigation, Judge Grimm issued an opinion holding that the defendants had waived the attorney-client and work-product protections after they inadvertently produced more than 150 electronically-stored documents during initial discovery.

After two more years of contentious discovery, the penalties were much stiffer the next time around for Pappas and Creative Pipe. In what may prove to be a landmark opinion regarding the retention of electronically stored information (ESI), Judge Grimm threw the proverbial book at the defendants. Despite several court orders, Pappas intentionally and willingly committed discovery violation after discovery violation, among them:

- Requesting third-party businesses to delete relevant e-mails;
- Failing to implement a litigation hold;
- Lying to the Court about the thoroughness of Creative Pipe's production;
- Deleting more than 13,000 files from his work computer;
- Destroying an external hard drive, even after plaintiff demanded preservation of ESI; and
- Destroying evidence of files during an upgrade to a new server.

In discussing defendant's consistently poor behavior, Judge Grimm noted that what he had seen could easily be classified as "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." As a result, the court granted a default judgment as to plaintiff's copyright claims.

Although the conduct of this defendant was particularly egregious and arguably justified the heavy sanctions, this case should not be dismissed as simply an extreme example of why "bad facts make bad law." The lasting legacy of *Victor Stanley* may be that Judge Grimm, a highly respected and well-known authority on discovery matters, attempted to lay down a framework for businesses to follow to preserve evidence when ESI stands to be a major factor. Such guidance has desperately been needed, due to "the lack of a national standard . . . about what standards should govern preservation [and] spoliation issues."

Recognizing the difficulty of laying down a hard-and-fast framework to govern an area of

law that is still in its relative infancy, Judge Grimm instead opined that “reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.” As a result, a business worried about what types and to what extent ESI should be preserved in anticipation of litigation must weigh the costs and expenses of maintaining documents against the relevance of the information contained in those documents. Business should thus attempt to take some helpful steps to preserve necessary electronic records prior to litigation, including:

- Consult with counsel to determine the best methods for maintaining and preserving relevant electronic documents, including implementation of a document retention system.
- Upon notice of potential litigation, implement a litigation hold to key employees notifying them to retain relevant documents; and
- Install document management software to assist in retaining pertinent documents.

If you have any questions, please feel free to contact [Leah Gerbitz](#), [Jen Klos](#), or any other member of Miller & Martin's [Labor & Employment](#) or [Litigation](#) practice groups.

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