

October 26, 2010

Complying with the duty to preserve potentially relevant information remains one of the most daunting practical challenges in modern litigation. Recently, in an 89-page decision, Chief Magistrate Judge Grimm of the District of Maryland analyzed the nuances of the duty to preserve electronically-stored information and provided guidance on what must be proved in a motion for sanctions for spoliation. He also summarized the multiple and sometimes inconsistent standards between jurisdictions that litigants must navigate. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Civil No. MJG-06-2662, Dkt. No. 377 (D. Md. Sept. 9, 2010) ("*Victor Stanley II*").¹ *Victor Stanley II* includes language about the importance of considering the proportionality and "reasonableness" of efforts to preserve, injecting some realm of practicality to the overwhelming preservation obligation with which litigants must comply.

Proportionality

Judge Grimm spends considerable time explaining that "reasonableness"—in terms of the action a party takes to prevent spoliation of evidence—and the duty to preserve evidence are highly dependent on individual circumstances. He further noted that most courts fail to account for these nuances:

"[T]he scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.... [C]ourts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality."²

Thus, when a court makes the determination as to whether a party has fulfilled its duty to preserve evidence, it should consider reasonableness *and* proportionality. The proportionality analysis, a concept built into the Federal Rules, is sometimes missed when determining what actions—in hindsight—were reasonable. In circumstances where there are no bad actors, but in which potential evidence may have been lost, a spoliation motion can become a "case within a case," diverting attention and resources away from the merits. Applying the proportionality analysis emphasized by Judge Grimm keeps the parties focused on the merits of the overall case, including the value of the case and the potential evidentiary value of the material that may be lost.

Multiple standards for sanctions

Victor Stanley II is one of three significant decisions in 2010 that analyze the appropriate level of sanctions for spoliation of electronic evidence.³ The result is a series of opinions that analyze the broad spectrum of conduct ranging between negligence and bad faith in the loss of electronic evidence. In discussing the differences among circuits, Judge Grimm outlines the basic elements that must be met to impose sanctions for spoliation:

1. The party having control over the evidence had an obligation to preserve it when it was destroyed or altered;
2. The destruction or loss was accompanied by a 'culpable state of mind';
3. The evidence that was destroyed or altered was 'relevant' to the claims or defenses of the party that sought discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.⁴

Judge Grimm notes that federal courts differ regarding what is required to satisfy each of these elements. *Victor Stanley II* provides a detailed discussion of how these standards differ by jurisdiction and includes an appendix that contains a side-by-side comparison of each circuit. He emphasized his intent in the opinion: "I hope that this analysis will provide counsel with an analytical framework that may enable them to resolve preservation/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions."⁵ For a copy of the opinion and the appendix, please contact us.

Preparation and planning

Preparation and having a response plan are the best ways to minimize the risk of losing potentially relevant information and having to defend a spoliation motion. Proactively managing data and information for regulatory compliance and to preserve information when a potential claim is reasonably foreseeable will help keep costs down and manage risk. How a company prepares to respond depends on many factors. There is no magic formula to follow. But, the more a company can do to demonstrate that reasonable steps were taken to ensure the information was not lost when it had a duty to preserve, the better position it will be in if it has to defend a spoliation motion. The process can seem overwhelming, but practical steps can be implemented cost-effectively that will manage risk in this area. Contact us with questions regarding information management and eDiscovery questions.

Notes

1 In 2008, Judge Grimm issued another influential and frequently cited decision regarding search protocols and protecting privilege in electronic document reviews. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2008 WL 2221841 (D. Md. May 29, 2008).

2 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Civil No. MJG-06-2662, Dkt. No. 377 at p. 50, (D. Md. Sept. 9, 2010)

3 In *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), which involved negligent destruction of evidence, the court ruled that the jury would be instructed to presume that the plaintiffs were grossly negligent in their obligations to preserve evidence unless facts suggested otherwise. In *Rimkus v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010), which involved intentional destruction of evidence, the court took a more lenient approach and left it up to the jurors to decide if the defendants conduct rose to the level of bad faith. The *Rimkus* court also determined that an award of costs and fees would have a similar deterrent against failure to preserve evidence.

4 *Victor Stanley, Inc. v. Creative Pipe, Inc., et al*, Civil No. MJG-06-2662, Dkt. No. 377 at p. 46 (D. Md. Sept. 9, 2010)

5 *Id.*, at 38.

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Key Contacts

Michelle Galloway Palo Alto	mgalloway@cooley.com +1 650 843 5161
Ruth Hauswirth San Diego	rhauswirth@cooley.com +1 858 550 6108

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