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***Victor Stanley II* – Imprisonment as a Sanction for Intentional E-Discovery Violations**

Judge Paul Grimm's May 2008 decision in *Victor Stanley, Inc. v. Creative Pipe, Inc.* is widely regarded as an invaluable guide for practitioners regarding the use of keywords to locate, screen for privilege and produce relevant documents. See *Victor Stanley, Inc. v. Creative Pipe*, 2008 U.S. Dist. LEXIS 42025 (D. Md. May 29, 2008). His most recent decision in the *Victor Stanley* case ("*Victory Stanley II*"), provides an equally helpful guide regarding standards for sanctioning a party's discovery misconduct. See *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010). As detailed in Judge Grimm's [September 2010 Memorandum, Order and Recommendation](#), the sanctions for "pervasive and willful" misconduct can be severe.

Mark Pappas, the president of the corporate defendant in *Victor Stanley*, made a regular practice of delaying the defendant's ESI production; deleting, destroying and failing to preserve the defendant's ESI; misrepresenting the completeness of the defendant's ESI production; and violating court orders. In *Victory Stanley II*, Judge Grimm described the defendant's misconduct as the "single most egregious example of spoliation that [he has] encountered in any case that [he has] handled or in any case described in the legion of spoliation cases [he has] read in nearly fourteen years on the bench." Pappas' actions included:

- failure to implement a litigation hold;

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- deletion of ESI soon after the suit was filed;
- failure to preserve his external hard drive after plaintiff demanded preservation of ESI;
- failure to preserve files and emails after plaintiff demanded their preservation;
- deletion of ESI after the court issued its first preservation order;
- continued deletion of ESI and use of programs to permanently remove files after the court admonished the parties of their duty to preserve evidence and issued its second preservation order;
- failure to preserve ESI when defendant replaced its server; and
- further use of programs to permanently delete ESI after the court issued numerous production orders.

As a result of the defendant's repeated and willful misconduct, Judge Grimm granted plaintiff's motion for sanctions and entered default judgment against defendant as to the primary count in the lawsuit. Interestingly, and perhaps telling of defendant's culpability, the defendant was willing to acquiesce to the entry of default judgment. Apparently unsatisfied with what is ordinarily described as the most severe or harsh sanction, i.e., default judgment, or perhaps appalled by defendant's intentional and willful misconduct, Judge Grimm went a step further than simply awarding attorneys' fees and costs to the plaintiff as the prevailing party. To ensure that those attorneys' fees and costs were paid, Judge Grimm found Pappas' behavior to constitute civil contempt and ordered Pappas "be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs." *Id.*

Analysis of Spoliation Sanction

Although the severe sanction of dismissal and even more severe sanction of civil contempt are rarely ordered by the judiciary, the repeated, willful misconduct by Pappas warranted the sanctions Judge Grimm imposed in *Victor Stanley II*. Nevertheless, Judge Grimm took the opportunity to address a problem plaguing lawyers and clients across the country: the "lack of a uniform national standard governing when the duty to preserve potentially relevant evidence

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commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by the same principles of proportionality that Fed. R. Civ. P. 26(b)(2)(C) applies to all discovery in civil cases." The Court attached a [12-page chart](#) summarizing the current state of preservation and spoliation standards in all circuits. Judge Grimm enumerated the following framework for determining the appropriateness and level of sanctions:

- **The Spoliator Breached an Existing Duty to Preserve the Lost Evidence.** All circuits recognize that the duty to preserve arises when litigation is reasonably anticipated. While the duty to preserve is clearly triggered by the filing of a lawsuit, it extends to the period before a lawsuit is filed when a party reasonably should have known that the evidence may be relevant to anticipated litigation. Furthermore, the duty to preserve evidence, once triggered, extends to documents in a company's possession, custody or control, but, as detailed in the court's chart, the scope of control varies by circuit. All preservation obligations should be tempered by an element of proportionality so that the costs and burden of preservation do not exceed the amount in controversy.
- **The Spoliator Acted Culpably.** Although each case must be decided on its own facts, the level of culpability – bad faith, willfulness, gross negligence or ordinary negligence – that must be proven varies by circuit.
- **The Relevance of the Lost Evidence and Resulting Prejudice.** For purposes of a spoliation sanction, the party seeking the sanction must not only show that the lost evidence is relevant but also that the innocent party is prejudiced as a result of the loss. The lost evidence is relevant if "a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it" (citation omitted). Spoliation of evidence is prejudicial when the spoliation substantially denies a party the ability to support or defend a claim. Delays in producing documents may be found prejudicial. Further, some courts presume relevance and/or prejudice depending on the level of culpability.

Judge Grimm made clear that in ordering sanctions for a party's spoliation of evidence, the court should "impose the least harsh sanction that can provide an

adequate remedy" to "(1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"

Conclusion

While *Victor Stanley II* will receive the most attention for the order of civil contempt and potential prison time, the more important lesson is the clarity Judge Grimm brings to the varying standards for the imposition of spoliation sanctions in the federal courts.

For more information about *Victor Stanley II*, the imposition of spoliation sanctions or other electronic discovery matters, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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