

CORPORATE COUNSEL

Tales From the Grimm Teacher: Discovery Misconduct Can Land You in the Dungeon

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We've heard the horror stories of e-discovery. We've read about default judgments, adverse jury instructions, monetary penalties and orders to pay the other side's attorney fees. But we've never heard about jail time.

Until now.

Addressing "the single most egregious" case of discovery misconduct that he has ever seen in his "nearly fourteen years on the bench," Chief U.S. Magistrate Judge Paul W. Grimm not only recommended that the plaintiff win the case, but also found that the defendants' intentional destruction of relevant electronic data rose to the level of civil contempt.

Moreover, he found the misconduct to be worthy of a two-year prison term if the defendant did not pay the attorney's fees and costs to which the plaintiff would be entitled as a prevailing party. *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. Sept. 9, 2010). That's interesting reading, even for non-lawyers.

The *Victor Stanley* defendants displayed appalling chutzpah, destroying e-mails and running programs like "Disk Cleanup," "Easy Cleaner" and "CCleaner" to get rid of damning information.

But their dishonesty was the least of it: The *Victor Stanley* ruling also in-



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cludes a recounting of the defendants' ludicrous inability to delete the information they were trying to delete (prompting such references as the "gang that couldn't spoliage straight"). As for confidentiality, here they demonstrated really breathtaking ineptitude, returning drives chock-full of relevant information to Office Max.

These aren't the only reasons you should read the *Victor Stanley* opinion. You should also read it because it contains a thoughtful and well-written discussion of the disorganized state of the law that relates to a litigant's duty to preserve electronically stored information and the types of conduct that warrant discovery sanctions.

Now, you might be surprised that a case that involves this level of litigation misconduct also provided a teaching moment for all of us, the

vast majority of whom would never do the terrible things the judge found the *Victor Stanley* defendants to have done. Given his massive caseload, Judge Grimm could have written a much shorter opinion scolding the defendants and moved on to another of his many cases.

Indeed, it took the judge and his law clerk "hundreds of hours" to chronicle the factual background alone, so it would have been completely understandable if the judge decided against spending what is likely hundreds of additional hours in drafting sections of the opinion designed to educate lawyers and corporations on these confusing areas of law.

Thankfully, however, Judge Grimm did not simply punish the defendants and put down his pen.

Rather than focusing exclusively on the law in the Fourth Circuit, in which the District of Maryland sits, he opted instead to spend what was clearly a substantial amount of time providing the entire federal bar with a thoughtful legal discussion of the "broader legal context in which preservation/spoliation issues are playing out in litigation across the country" in order to "provide counsel with an analytical framework that may enable them [— us —] to resolve preserva-

tion/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions."

As a general matter, a discovery sanction is warranted if (1) the litigant had an obligation to preserve certain information, (2) the information was destroyed with a "culpable state of mind," and (3) the information was somehow "relevant" to the claims or defenses of the requesting party and, therefore, the absence of the information in some way prejudiced the other side.

But, as Judge Grimm explained, what the obligation is, when it is triggered, who it is owed to, what the level of "culpable state of mind" must be, and what makes something "relevant" are all questions that have been answered differently by different courts in the federal circuits. Indeed, Judge Grimm's opinion and accompanying appendix demonstrates that sometimes the answers are different even among districts within the same circuit.

As a result of a lack of a single set of standards, the assessment of appropriate sanctions for a failure to preserve data can be a complex task, even in cases like *Victor Stanley*, where the record seems pretty clear that the defendants intentionally and repeatedly tried to destroy information for the sole purpose of thwarting the plaintiff's ability to prove its case.

The lack of a set of standards particularly affects national corporations who, right now, are forced to design a preservation policy that meets the "most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and ex-

penses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities."

That's where the value of Judge Grimm's analysis comes in.

Judge Grimm recognized that a more "narrow analysis would be of little use to lawyers and their clients who are forced, on a daily basis, to make important decisions in their cases ... and for whom a more expansive examination of the broader issue[s] might be of some assistance."

He went above and beyond the call when he "synthesize[d] not only the law of [his] District and Circuit, but also to put it within the context of the state of the law in other circuits as well." He spent more than a hundred pages recounting the legal inconsistencies and discussing why those inconsistencies can be problematic.

Judge Grimm stopped short of reconciling the varying laws, likely out of deference to his fellow jurists. However, his newest *Victor Stanley* opinion teed up these important issues for additional discussion.

Judge Grimm should be commended for his initiative and willingness to take the opportunity to teach at a time when he could have simply punished the defendants and turned to the next entry on his burgeoning task list. His recent *Victor Stanley* opinion identifies the numerous and significant legal discrepancies with which multi-jurisdictional lawyers and clients are faced.

Judge Grimm has carried the baton for at least the first leg of this important medley. We can only hope that he or one of his esteemed colleagues on the federal bench can continue carrying the baton to the next leg by answering

the important questions that he raised in *Victor Stanley* and achieving the goal of creating a single set of national standards on which we can justifiably rely.

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