

eTERA Consulting
 1100 17th Street, NW
 Suite 605
 Washington, DC 20036
 Direct: 315-566-9330
info@eteraconsulting.com
www.eteraconsulting.com



“single most egregious example of spoliation that I have ever encountered”

“Alas! How difficult it is not to betray one's guilt by one's looks.” Ovid. Judge Grimm's ruling demonstrates the serious consequences that can arise when parties engage in the intentional spoliation of evidence. This Insight Bulletin will summarize the case and resulting sanctions and provide practical advice for how your organization may prevent a similar situation.

MATTER

Victor Stanley, Inc. v. Creative Pipe, Inc. et al. 269 F.R.D. at 501

BACKGROUND

This matter arises out of allegations of copyright infringement, patent infringement, and unfair competition among other claims that centered on the unauthorized download of proprietary design drawings of Victor Stanley, Inc. (VSI). VSI alleged that Creative Pipe, Inc. (CPI), a direct competitor of VSI, downloaded schematic drawings without paying appropriate limited licensing agreements. VSI alleged that CPI then sent the drawings out of the country so that CPI could then have them re-branded and used in their proposals for new business.

VSI, the Plaintiff, alleged that CPI, the Defendant, executed a systematic plan to destroy electronically stored information (ESI) that was relevant to VSI's claims for copyright infringement during a discovery period that lasted four years. VSI identified to the Court eight distinct examples of the Defendant's malfeasance and failure to uphold their duty to preserve ESI.

1. CPI's failure to implement a litigation hold;
2. CPI's deletion of ESI soon after VSI filed suit;
3. CPI's failure to preserve the external hard drive of CPI's President, Mark Pappas, after VSI demanded preservation of ESI;
4. CPI's failure to preserve files and emails after VSI demanded their preservation;

5. CPI's deletion of ESI after the Court issued its first preservation order;
6. CPI's 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;
7. CPI's failure to preserve ESI when CPI replaced their server; and
8. VSI's further use of programs to permanently delete ESI after the Court issued numerous production orders.

FINDINGS BY THE COURT

Judge Grimm analyzed a number of key factors to determine if spoliation occurred and, if so, what effect spoliation had on the matter.

Questions that Judge Grimm addressed include:

1. Was there a duty to preserve particular evidence?
2. Was the duty to preserve breached?
3. Was the Plaintiff harmed by the breach?
4. Does the breach amount to willful or gross negligence?

Duty to Preserve. To determine if there was a duty to preserve particular evidence, Judge Grimm relies on the 4th Circuit's holding that “(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 the discovery of the spoliated evidence, to the extent that a reasonable fact-finder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it” 269 F.R.D. at 520-21 quoting *Thompson v. U.S. Dep’t of Housing & Urban Development*, 219 F.R.D. 93, 101 (D. Md 2003).

Judge Grimm wrote that the duty to preserve should be “analyzed in absolute terms; it requires nuance because the duty cannot be defined with precision” *Id* at 522 . He stated that courts should determine the reasonableness to preserve on more of a case by case basis. *See Rimkus Consulting Group, Inc. v. Cammarata, et al., S.D. Texas, No. H-07-0405, 2/19/1.* Judge Grimm also states that the duty to preserve should be weighed against the worth of the controversy. Judge Grimm also pointed to the fact that case law is not consistent across courts, and pointed out the potential risks for national companies, stating that their best bet would be to adhere to the most stringent preservation local rule and apply that across the company. As a sub point under his analysis for preservation, Judge Grimm wrote about an organization’s duty to suspend retention policies and implement a litigation hold for potentially responsive information.

Breach of Preservation. Judge Grimm wrote that it is reasonable for the duty to preserve begins when an organization suspects that litigation will arise. He also notes that this is somewhat of a moving object, but concluded that CPI’s President, Mark Pappas, should have instituted a preservation order as soon as he was served with the first document request. He did not comply with this request, and systemically continued to delete files, change servers, and try to get employees to cooperate with his scheme. Judge Grimm also stated that failure to preserve focuses more light on electronic discovery issues than on the merits of the case, causing costs to increase and unnecessarily dragging out discovery.

Harm. Judge Grimm found that the actions of CPI prejudiced VSI because VSI’s case was weaker without the presumed relevant information that was no longer available.

Negligence. As to negligence, Judge Grimm analyzed the differences of the various courts findings on culpability of the state of mind, including Judge Scheindlin’s Pension Committee ruling, where she concludes that the absence of a formal written litigation hold policy amounted to gross negligence. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

Judge Grimm ruled that the Defendant, CPI, in this matter was found to have acted in a grossly negligent manner when CPI did not comply with the court’s four orders to preserve documents. It was also found that CPI’s President, Mark Pappas, acted in a gross negligent fashion when he personally deleted over 5,000 files after being ordered not to do so. Judge Grimm found that CPI is indistinguishable from other cases in which the spoliating party was found to have acted in bad faith... [the defendant] set out to delete, destroy, or hide thousands of files containing highly relevant ESI pertaining to the plaintiff’s claims” *Id* at *531.

CONCLUSION

Judge Grimm found that the eight instances “[t]aken individually, each [example] demonstrates intentional misconduct done with the purpose of concealing or destroying evidence. Collectively, they constitute the single most egregious example of spoliation that I have ever encountered in any case” 269 F.R.D. at 515.

Judge Grimm found that the defendant in this matter was subject to the harshest of sanctions, a default judgment on liability of the copyright claim, and ordered the defendant to pay monetary sanctions equivalent to attorneys fees and costs associated with discovery, later determined to be \$1,049,850.04.



ADVICE FOR INSIDE COUNSEL

1. **Don't assume it can't happen to you.** What makes Victor Stanley such interesting reading is the extreme extent of human behavior. What also makes this a very unique situation is the direct action of the president of CPI to destroy damaging information through a level of technical savvy he thought he possessed. Don't assume nobody is deleting files; put protocols in place to ensure this cannot happen to you.
2. **Legal Hold Planning.** Have a plan and protocols developed for implementation of litigation hold policies. This plan should include identification of data sources and locations, preserving the most recent backups and halting data destruction activity.

ADVICE FOR CORPORATE IT

1. **Disposition of Systems.** Your records management policy should include requirements and procedures for the preservation of data from systems that are either at end-of-life or being re-assigned to other employees. This includes not just computers but smart phones and tablets.

ADVICE FOR OUTSIDE COUNSEL

1. **Obligation to Preserve.** Do not presume a litigation hold letter to your client is sufficient instruction. Even if you have worked with your client to develop a written document providing the scope and your client's obligations to preserve, hold a meeting that includes your client's counsel, IT staff and any third-party providers to review the litigation hold requirements.

2. **Understand your Client's Business.** It is also important for outside counsel to understand their client's regular course of business. Understanding how employees manage data on a day-to-day basis should enable outside counsel to have a better understanding of the scope of the legal hold that is required.
3. **Control of Collected Data.** If your client does not have protocols in place to properly store and preserve collected data, you should work with your client to either have your firm take possession of the collected data or use a third-party who can assume this responsibility.

About eTERA Consulting

eTERA Consulting specializes in helping organizations improve information governance, compliance and discovery management. We are a technology independent consultancy with a broad range of services from strategic information consulting to project-based engagements. Because we are not locked into a particular vendor's technology, our clients benefit from flexible service delivery and pricing options.

A unique differentiator for eTERA Consulting is our Early Information AssessmentSM (EIA) methodology which we use to help clients implement a proactive approach to integrating the management of corporate information as it relates to risk management, regulatory compliance, electronic discovery, litigation hold, records management and IT storage.

Headquartered in Washington, DC, eTERA has served the legal industry since 2004. The company also maintains additional offices across the United States. eTERA was named to The Inc. 500 list of fastest-growing private U.S. companies in 2010.

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