



What Litigation Hold? Failing to Image Hard Drives and Other Discovery Mistakes

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Plunk v. Vill. of Elwood, 2009 U.S. Dist. LEXIS 42952 (N.D. Ill. May 20, 2009) is a civil rights case with a summer time trial date against a local government, village officials and the police department. The Plaintiffs took the Defendants to task for failing to image six hard drives that the Defendants had agreed to image after discovery requests in March 2007.

The Plaintiff argued the Defendants:

- (1) Destroyed and failed to preserve relevant ESI on police department computers;
- (2) Failed to preserve ESI on six computer hard drives; and
- (3) Failed to back-up any relevant ESI. *Plunk*, 36.

The Plaintiffs' expert determined evidence wiping software had been installed on two of the Defendants computers. Adding to the drama, the Defendants admitted in a court hearing that 6 hard drives were not imaged and that the Defendants had known this for 11 months. Moreover, no action was taken to preserve the ESI on these drives during the 11 months. *Plunk*, 10-11.

The Defendants also withdrew their own computer expert when she could not state whether two of the hard drives had been wiped or not. *Plunk*, 10 and 37. However, she did state the two computers at issue had been "defragged" prior to imaging, "which would have destroyed any evidence of a deliberate effort to wipe the computers." *Plunk*, 37-38.

After creating a preservation auto accident, the Defendants brought a motion to strike the Plaintiffs' expert's supplemental report and to reopen discovery so they could designate another computer expert. *Plunk*, 10-11. This effectively would derail the summer time trial date with a new series of expert reports and depositions.

All in the all, the Defendants lost. In the words of the Court, it was the Defendants' "dilatatory discovery tactics" of not imaging the hard drives that required the Plaintiffs' expert to amend his report that kicked off the motion practice. *Plunk*, 15. The Defendants were allowed a short follow-up deposition, provided they paid the Plaintiffs' expert's costs, plus the costs for one of the Plaintiffs' attorneys. The Defendants were denied designating a new computer expert, which would have resulted in a new round of dueling expert reports. *Plunk*, 15-16.



Court's Analysis for Sanctions

The Court called the Defendants to account for their discovery tactics resulting in several sanctions.



The Plaintiff sought sanctions for spoliation of evidence. The Court engaged in the following four point analysis:

- (1) Was there a duty to preserve the specific documents/evidence?
- (2) Was that duty breached?
- (3) Were plaintiffs harmed by the breach?
- (4) Was there willfulness, bad faith or fault? *Plunk*, 27-28.

The Court also had to evaluate must “whether the proposed sanction can ameliorate the prejudice from the breach or whether there is a lesser sanction available, which will accomplish that goal.” *Plunk*, 27-

28.

Further making things interesting for the Court, the Defendants admitted they did not have a document retention policy AND did not enact any sort of litigation hold. *Plunk*, 37.

The Defendants argued the wiping and “defragging” hard drives routine and any destruction was accidental. *Plunk*, 38.

The Court did not accept the Defendants’ “accidental” arguments. First, there was sufficient evidence to show the Defendants acted recklessly. There was also evidence some of the drives were intentionally wiped. *Plunk*, 39-40.

Plaintiff's Relief

The Court required witness testimony before it could find bad faith justifying the sanctions the Plaintiffs request. The Court did find that Defendants acted recklessly and ordered the following sanctions:

- 1) The jury will be informed that the defendants failed to preserve information which existed on its computers even though it was on notice that it should preserve that evidence in this lawsuit.
- 2) The defendants will be precluded from arguing that the absence of any documents supporting plaintiffs’ contentions should be considered by the jury against plaintiffs.
- 3) The jury will be instructed that it may (but does not have to) infer that the failure to preserve relevant evidence which defendants had a duty to preserve means that the evidence contained on the computer hard drives was not favorable to defendants. *Plunk*, 40-41.

Looking Ahead

Intentional wiping of hard drives aside, this sort of fact pattern where a party does not have a document retention policy and does not enact a litigation hold will probably be fairly normal for the near future. Many small companies, local governments or even individuals do not create document retention policies for themselves to follow. Until these polices are developed and followed as standard operating

procedure, parties might be at risk for spoliation, depending on the nature of a case.

Attorneys and parties also need to vet and understand their experts. While withdrawing experts is nothing new to litigation, knowing your expert's subject matter experience can help determine the right person for a case.