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FEDERAL E-DISCOVERY

Expert Analysis

'Victor Stanley II' Shows Need For Standard in Preserving ESI


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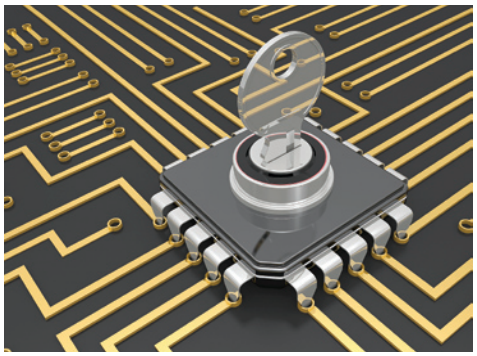
Over the last five years, U.S. Magistrate Judge Paul Grimm of the District of Maryland has written a number of important opinions concerning electronic discovery that have established him as one of the leading voices in the field. His past opinions have addressed privilege waiver and the potential pitfalls of "quick peek" and "claw back" agreements;[1] the admissibility of electronically stored information (ESI);[2] and, in *Victor Stanley*, appropriate ESI search methodologies.[3]

On Sept. 9, Magistrate Judge Grimm wrote what one hopes will be the final chapter in *Victor Stanley*, a case that has now become the poster child for e-discovery misconduct.[4]

Victor Stanley II involves serious and repeated discovery misconduct by the defendant, including deletion, destruction, and other failures to preserve ESI in violation of court orders. The court made clear that the facts in the case did not present a close legal call: There was no dispute that intentional destruction of evidence took place, relevant evidence was lost, and that the plaintiff was prejudiced. The sanctions reflect the seriousness of the misconduct: Magistrate Judge Grimm entered a default judgment in "the primary claim" in the case, found that the defendant's "pervasive and willful violation" of court orders to preserve and produce ESI constituted contempt of court, and ordered that the defendant be imprisoned for up to two years unless and until he pays the plaintiffs attorney's fees and costs.[5]

But the real story of *Victor Stanley II* is not the misconduct or sanctions. Rather, it is that, once again, Magistrate Judge Grimm has drafted a thoughtful opinion that reaches beyond the narrow question presented to offer an excellent overview and summary of the confused state of the law governing sanctions and preservation obligations. His opinion highlights the need for more uniform legal standards regarding parties' obligations to preserve ESI.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While the severe sanctions in the case were a product of the extreme nature of the violations, the court expressed its view that determining whether spoliation sanctions are appropriate in cases involving failure to properly preserve ESI has "proven to be one of the most challenging tasks for judges, lawyers, and clients…[and] [t]he lack of a national standard, or even a consensus among courts in different jurisdictions about what standards should govern preservation/spoliation issues, appears to have exacerbated the problem."

In light of this view, despite the fact that the defendant in *Victor Stanley II* did not dispute that spoliation took place, the court attempted in its opinion to provide an analytical framework to allow counsel and clients to resolve more easily issues concerning the preservation of ESI. In particular, the court identified a number of areas in which the lack of uniform legal standards presents challenges to parties seeking to manage ESI.

Duty to Preserve

The legal community has struggled for years to create predictable rules regarding preservation of ESI. When the Advisory Committee on Civil Rules formulated and considered the 2006 changes to the Federal Rules of Civil Procedure regarding electronic discovery, "[m]any requests were made for an express preservation rule."[6] However, the topic was "considered but put aside."

At the committee's most recent conference in March, there were once again many calls for a rule providing clarity in this area.[7] In the face of these calls, the committee acknowledged that "[t]he need large organizations feel for a rule, both for planning their affairs and for achieving some uniformity, is acute."

Nonetheless, the committee signaled that it still does not believe that the nature of a party's preservation obligations is ripe for rulemaking.

However, as *Victor Stanley II* makes clear, uncertainty over preservation obligations and the potential consequences of failure to preserve continues to impose real costs on both parties to litigations and to the courts.

Magistrate Judge Grimm first explained that under the law of most circuits, to prove spoliation of evidence warrants a sanction a party must show: (1) that the party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) that the destruction or loss of the evidence was accompanied by a culpable state of mind; and (3) that the evidence that was destroyed or altered was relevant to the claims or defenses of the party seeking discovery.[8] However, as the court explained, while the factors are widely accepted, they continue to be applied inconsistently.

The first factor asks whether the alleged spoliator "had a duty to preserve the lost evidence and breached that duty." This factor has proven the most troublesome. There is no general duty to preserve evidence. However, such a duty may arise from "statutes, regulations, court orders, or the common law…a contract, or another special circumstance." In particular, the common law imposes an obligation to preserve relevant evidence from the moment that litigation is reasonably anticipated. This duty applies whether the party is the initiator or the target

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of the litigation and "includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation."

However, it is often unclear when litigation is reasonably anticipated. The obligation to preserve relevant evidence is clearly triggered by the initiation of an action and almost certainly by a preservation notice or other explicit notice that a party is contemplating filing suit. However, other events may cause a more speculative anticipation of litigation, such as litigation challenging conduct in which a nonparty was also engaged.

Scope of Obligation

Assuming that litigation is reasonably anticipated and the obligation to preserve has been triggered, there are disagreements over the scope of the obligation. The preservation obligation is generally understood to include preservation of any documents in the "control" of the party. However, the court noted that in the U.S. Court of Appeals for the Second Circuit (and the Fourth Circuit), "'documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.'"[9]

Additionally, while the First, Fourth and Sixth circuits impose a duty to notify the opposing party of evidence in the hands of third parties, the Third, Fifth and Ninth circuits do not impose such a duty. Such inconsistency poses serious problems for parties acting in multiple jurisdictions seeking to craft effective document preservation policies. Such parties cannot practically have different preservation policies for each jurisdiction in which they operate.

Thus, as Magistrate Judge Grimm explained, the prudent party must follow the most stringent requirement expressed by a court, despite the fact that this standard may impose burdens and expenses that are far greater than what is required in most jurisdictions in which the party does business.

Once a court has found that a party has failed to preserve evidence in the face of a duty to do so, this conduct will be sanctionable if the party acted with a culpable state of mind.

Again, the courts differ in their application of this requirement. Some courts require a showing of bad faith before any form of sanction is imposed. Other courts require a showing of bad faith only before imposition of "certain more serious sanctions." Still others do not require bad faith, but require a showing of something more than simple negligence. Finally, in other circuits, including under the Fourth Circuit law governing in *Victor Stanley II*, any level of fault, including ordinary negligence, is sufficient to grant sanctions for spoliation.

In addition to differences in the level of fault required to find sanctionable spoliation, the courts have differed in their views of whether specific conduct represents any particular level of fault. For example, the court noted that while another court in the District of Maryland had in a past case found the failure to implement a litigation hold to constitute simple negligence, "in marked contrast," a court in the Southern District of New York found that such failure was per se gross negligence.[10]

Thus, Magistrate Judge Grimm explained that "the variety of standards employed by courts throughout the United States and the lack of a uniform or consistent approach have caused considerable concern among lawyers and clients regarding what is required, and the risks and consequences of noncompliance."

Finally, in considering whether sanctionable spoliation has occurred, courts must consider whether the lost or destroyed evidence was relevant. Under this standard, 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."

Additionally, in order for the information to be found relevant for spoliation purposes, the party seeking it must have been prejudiced by its loss or destruction. Such prejudice occurs when, as a result of the spoliation, the party claiming spoliation "cannot present evidence essential to its underlying claim."

Inherent Difficulty

The inquiry into the relevance of lost or destroyed evidence involves an inherent difficulty: the court cannot evaluate evidence that has been lost or destroyed. As a result, several circuits have established presumptions of relevance under some circumstances.

However, once again, the circuits differ in their application of these presumptions. For example, in the Fourth and Seventh circuits, a presumption of relevance is only triggered by willful failure to preserve evidence. The Fifth Circuit has not explicitly adopted a presumption of relevance even in cases of bad faith destruction.

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The court objected to the rule in the Second Circuit, where relevance and prejudice may be presumed "when the spoliating party acted in bad faith or in a grossly negligent manner."[11] As noted above, the Southern District of New York has found failure to implement a litigation hold to constitute gross negligence per se. This means that, if there is a duty to preserve, failure to implement a litigation hold can lead to a presumption that lost information was relevant and that its loss prejudiced the party seeking the information.

In other words, failure to implement a litigation hold in and of itself could be sufficient ground for spoliation sanctions in the Southern District of New York, unless the alleged spoliator can overcome the presumption by offering evidence demonstrating "that the innocent party has not been prejudiced by the absence of the missing information."

The consequences of the operation of this presumption are potentially severe. As the court noted, in the Southern District, an adverse evidentiary inference may be ordered in cases of grossly negligent but unintentional conduct.

Once again, Magistrate Judge Grimm expressed his view that "lack of uniform standards regarding the level of culpability required to warrant spoliation sanctions has created uncertainty" for organizations seeking to "conduct themselves in a way that will comply with multiple inconsistent standards."

Conclusion

Magistrate Judge Grimm's opinion in *Victor Stanley II* is another important addition to the law of e-discovery for a number of reasons. It contains a broad overview of several important topics in the area (including a detailed 12-page chart of sanctions imposed for spoliation in various jurisdictions).

Perhaps most importantly, the opinion draws attention to the current lack of legal uniformity regarding the duty to preserve evidence and the consequences for failing to do so.

The opinion also highlights the challenges this lack of uniformity poses for parties seeking to operate within the law. The unpredictability caused is particularly burdensome for organizations seeking to fashion workable policies for the retention of ESI. In addition to providing a road map to help lawyers and their clients navigate the uncertainties surrounding preservation of ESI, in *Victor Stanley II*, Magistrate Judge Grimm makes a compelling case for the development of uniform standards for the imposition of sanctions for spoliation of evidence.

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1. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. (D. Md. 2005). For a discussion of *Hopson*, see John F. Baughman and H. Christopher Boehning, "'Hopson' Is a Good Reminder That There Are No Shortcuts," NYLJ (Feb. 28, 2006).
2. *Lorraine v. Markel Amer. Ins.*, 2007 WL 1300739 (D. Md. May 4, 2007).
3. *Victor Stanley v. Creative Pipe Inc.*, 2008 WL 2221841 (D. Md. May 2009, 2008). For a discussion of *Victor Stanley*, see H. Christopher Boehning and Daniel J. Toal, "Poorly Executed Privilege Review Can Lead to Waiver," NYLJ (June 17, 2008).
4. *Victor Stanley v. Creative Pipe Inc.*, 8:06-cv-02662 (MJG), ECF No. 377, 378 (D. Md. Sept. 9, 2010) (*Victor Stanley II*).
5. ECF No. 377 at 3.
6. Report of the Civil Rules Advisory Committee, May 17, 2010, at 12.
7. Id. (reporting that "Discovery proposals were abundant" and "The most complex and daunting proposals address the duty to preserve information").
8. ECF No. 377 at 46.
9. Id. at 51 (quoting *Goodman v. Praxair Servs., LLC*, 632 F. Supp. 2d 494, 515 (D. Md. 2009; *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007).
10. Id. at 65 (citing *Sampson v. City of Cambridge*, 251 F.R.D. 172, 181-182 (D. Md. 2008), and *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010) (Scheindlin, J.).
11. Id. (citing *Pension Comm.*, 685 F. Supp. 2d at 467).