

Spoliation Sanctions and Concerns Over the Lack of Uniform Standards

A recent must-read opinion for federal litigators is the case of *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497 (D. Md. 2010). The opinion is authored by United States Magistrate Judge Paul Grimm and provides a valuable overview on the standards for sanctioning a party's discovery misconduct. Indeed, *Victor Stanley* includes a 12-page chart that outlines the various standards applied by the federal circuits. But more importantly, it offers a detailed analysis regarding the lack of uniform standards governing the imposition of spoliation sanctions. This article will tell you what you need to know about *Victor Stanley* and the current state of preservation and spoliation standards in the Eighth Circuit.

Summary of *Victor Stanley*

According to Magistrate Judge Grimm, he was confronted with 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." *Victor Stanley*, 269 F.R.D. at 515. He wasn't exaggerating. Mark Pappas, the president of the corporate defendant, made a regular practice of delaying, deleting, destroying, and failing to preserve the defendant's electronically stored information ("ESI"); misrepresenting the completeness of the defendant's ESI production; and violating court orders. *Id.* at 502-15. 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 claim in the case—copyright infringement on furniture designs. *Id.* at 538. Judge

Grimm also found Pappas in civil contempt of court and ordered that he "be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs." *Id.* at 541-42.

Lack of Uniform Standards For Spoliation Sanctions

While the obvious misconduct at issue in *Victor Stanley* would ordinarily make for a relatively open-and-shut decision, Judge Grimm took the opportunity to provide detailed guidance on a problem that lawyers and clients across the country are very concerned about:

the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence 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.

Id. at 516.

Judge Grimm used the following framework to evaluate the appropriateness and level of sanctions:

1. Duty to Preserve Evidence.

It is well established that the duty to preserve evidence arises not only during litigation, but "from the moment that litigation is reasonably anticipated." *Id.* at 521 (citation omitted). Of course, whether a party should have anticipated litigation is a subjective and fact-specific inquiry. See, e.g., *Rinkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010).

Despite these general guidelines, Judge Grimm noted that the standards relating to the scope of the duty to preserve are not consistent across the circuits, or

even within individual districts. *Victor Stanley*, 269 F.R.D. at 523. For example, the definition of "control" varies by circuit. *Id.* In the Eighth Circuit, a party must preserve potentially relevant documents in their possession. *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993). Similarly, district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence. *Victor Stanley*, 269 F.R.D. at 523. But in the First, Fourth, and Sixth Circuits, the duty to preserve extends to evidence controlled by third parties. *Id.*

2. Degree of Culpability.

A party seeking spoliation sanctions must establish some level of fault. But the degree of culpability—bad faith, willfulness, gross negligence or ordinary negligence—also varies by circuit. For example, in the Fourth Circuit, "to impose an adverse jury instruction, the court must only find that the spoliator acted willfully in the destruction of evidence." *Id.* at 536 (internal quotations and citations omitted). However, in the Second Circuit, an adverse jury instruction may be warranted based on negligence or gross negligence. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); see also *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (stating that adverse jury instruction was warranted for grossly negligent, but unintentional, conduct).

In the Eighth Circuit, if spoliation occurs before litigation commences, there must be evidence of bad faith for the court to impose an adverse inference instruction, but if spoliation occurs during litigation, the

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Diversity Committee Plans Diversity Summit, CLE with MABL

In the coming months, the Chapter's Diversity Committee in conjunction with Leonard, Street and Deinard, P.A., is planning a special summit and reception entitled, "Minnesota Diversity: Waves of the Future," to take place on **February 25, 2011** from **3:00-5:00 p.m.** at Leonard, Street and Deinard. The purpose of the summit is to bring together diverse organizations to share resource information in hopes of creating a website that will be a single point of contact for information about programs, activities, and other information related to diversity.

The Committee is also in the process of working with the Minnesota Association of Black Lawyers ("MABL") to put together a special CLE program to take place at Robins, Kaplan, Miller & Ciresi L.L.P. in March 2011. Please be on the look out for additional information.

For more information about either event, please contact Diversity Committee Co-Chairs, Magistrate Judge Jeanne J. Graham (jjgraham@mnd.uscourts.gov) or Ann Anaya (ann.anaya@usdoj.gov).

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court may impose an adverse inference instruction "even absent an explicit bad faith finding." *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 745, 747 (8th Cir. 2004).

Furthermore, various courts "differ in the fault they assign when a party fails to implement a litigation hold." *Victor Stanley*, 269 F.R.D. at 524. For example, in a case from the Southern District of New York, the court concluded that the failure to implement a written litigation hold constitutes gross negligence *per se*. *Pension Comm.*, 685 F. Supp. 2d at 466. However, in a case from the Northern District of Illinois, the court held that while the failure to institute a litigation hold was a relevant consideration, it was not *per se* evidence of sanctionable conduct. *Haynes v. Dart*, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010). And, under some circumstances, a formal litigation hold may not be necessary at all. *Victor Stanley*, 269 F.R.D. at 524.

The Eighth Circuit has not addressed the implications of a party's failure to issue a litigation hold.

3. Relevance of Lost Evidence and Resulting Prejudice.

A party seeking spoliation sanctions must also show that the lost evidence is relevant and that the resulting loss of evidence is prejudicial. 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."

Victor Stanley, 269 F.R.D. at 531 (citations omitted). Prejudice exists when "the party claiming spoliation cannot present evidence essential to its underlying claim." *Id.* at 532 (internal quotations and citation omitted).

Nevertheless, inconsistent standards exist among the circuits as to whether relevance may be presumed depending on the spoliator's level of culpability. In the Fourth Circuit, negligent or even grossly negligent conduct is not sufficient to raise a presumption of relevance regarding lost evidence; instead, relevance of the lost evidence is presumed only when a party willfully fails to preserve it. *Id.* (citations omitted). Similarly, in the Seventh Circuit, unintentional conduct is insufficient to raise a presumption of relevance when spoliation sanctions are sought. *Id.* (citation omitted).

This issue has not been addressed by the Eighth Circuit, but the court has stated that there is no presumption of irrelevance for intentionally destroyed documents. *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205 (8th Cir. 1982). By contrast, in the Second Circuit, both "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Victor Stanley*, 269 F.R.D. at 532 (emphasis added) (quoting *Pension Comm.*, 685 F. Supp. 2d at 467.) Thus, a party in the Second Circuit that fails to issue a litigation hold may be found to have acted in a grossly negligent manner and be vulnerable to sanctions even absent a showing that the lost evi-

dence was relevant and prejudicial. *Victor Stanley*, 269 F.R.D. at 532, n. 34.

As Judge Grimm aptly pointed out by, "the lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to conduct themselves in a way that will comply with multiple, inconsistent standards." *Id.* at 532. Under these circumstances, corporations should strongly consider developing preservation policies that comply "with 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 expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities." *Id.* at 523.

Conclusion

While the ultimate impact of the *Victor Stanley* decision remains to be seen, there is no doubt that Judge Grimm has provided the federal bar with a valuable framework for analyzing spoliation sanctions and has advanced the discussion regarding the problems that are created because of the lack of uniform federal standards.

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