

September 21, 2010

Victor Stanley v. Creative Pipe, Inc.

On September 9, Magistrate Judge Paul W. Grimm of the District of Maryland wrote what one hopes will be the final chapter in *Victor Stanley*, a case that has become the poster child for e-discovery misconduct. *Victor Stanley v. Creative Pipe, Inc.*, 8:06-cv-02662 (MJG), ECF No. 377, 378 (D. Md. Sept. 9, 2010) (“*Victor Stanley II*”). We do not expect litigants will see themselves in the misconduct catalogued in *Victor Stanley II* – misconduct that caused Judge Grimm to enter default judgment in “the primary claim” in the case, find that the defendant’s “pervasive and willful violation” of court orders to preserve and produce electronically stored information (“ESI”) constituted contempt of court, and order that defendant be *imprisoned* (for up to two years) unless and until he pays plaintiffs’ attorney’s fees and costs. ECF No. 377 at 3. Nevertheless, Judge Grimm’s opinion offers an excellent overview and summary of the confused state of the law governing sanctions and preservation obligations that is a useful aid for any attorney seeking to keep track of the developing case law in this area.

At the outset, Judge Grimm noted that the facts underlying the sanctions motion were “convoluted and cannot be summarized easily.” *Id.* at 4. Suffice to say that *Victor Stanley II* involved a pattern of repeated discovery abuses by a defendant over the four-year history of discovery in the case. Ultimately, in addition to repeated delays caused by the defendant’s violations, the plaintiff identified a number of discrete preservation failures and a number of instances of willful deletion of ESI subject to preservation orders. The defendant acknowledged that the majority of the plaintiff’s allegations were accurate and, without conceding any inappropriate motive, acquiesced in the entry of a default judgment. *Id.*

While the severe sanctions in the case were a product of the extreme nature of the violations, the court expressed the growing sentiment that determining whether spoliation sanctions are appropriate in cases involving failure to preserve ESI has “proven to be one of the most challenging tasks for judges, lawyers, and clients.” *Id.* at 36. The court identified a number of areas in which the lack of uniform legal standards presents challenges to parties seeking to appropriately manage their electronic documents. Judge Grimm sought to rectify this problem by providing a comprehensive overview of the law governing the preservation of ESI (including a detailed 12-page chart of sanctions imposed for spoliation in various jurisdictions). The opinion catalogues the many ways in which the lack of legal uniformity poses practical challenges for institutions seeking to fashion workable policies for the retention of ESI. For example, the decision notes that the scope of an organization’s preservation obligation, *id.* at 51-54, the fault assigned for various preservation failures, *id.* at 63, and the consequences faced by an organization for failure to preserve, *id.* at 70, all differ from circuit to circuit in the United States. In addition to providing a road map to help lawyers and their clients navigate the uncertainties surrounding preservation of ESI, in *Victor Stanley II*, Judge Grimm makes a compelling case for the development of uniform standards for the imposition of sanctions for spoliation of evidence.

We hope that the focus of those reviewing *Victor Stanley II* is not on the misconduct at issue, but rather on Judge Grimm's call for greater certainty and uniformity – perhaps via amendments to the Federal Rules of Civil Procedure – on the standards governing preservation of ESI.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

H. Christopher Boehning 212-373-3061 Joyce S. Huang 212-373-3150
Daniel J. Toal 212-373-3869

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410