

## MARYLAND FEDERAL DISTRICT COURT IMPOSES POSSIBLE JAIL TIME FOR EDISCOVERY MISCONDUCT

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In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. Lexis 93644 (2010 D. Maryland Sept. 9, 2010), the United States District Court for the District of Maryland imposed sanctions for some of the most egregious eDiscovery misconduct ever reported in any decision. The court entered a default judgment, awarded attorneys' fees and costs allocable to spoliation of evidence. Additionally, the court directed one of the defendants to be "imprisoned for a period not to exceed two years" unless and until he pays the award for attorneys' fees and costs. The court even went so far as to consider referring the matter to the U.S. Attorney's Office for possible criminal prosecution.

The Plaintiff Victor Stanley, Inc., ("VSI") a manufacturer of site furnishings, sued Creative Pipe, Inc ("CPI") and its president Mark Pappas for alleged violation of copyrights, patents, and unfair competition. In short, VSI alleged that someone from CPI logged into VSI's website to download design drawings and specifications using the pseudonym "Fred Bass." CPI allegedly then used the drawings to develop products that would directly compete with similar VSI products. The court eventually became convinced that "Mr. Bass" was either CPI President Mark Pappas or another person at CPI working under his direction.

After nearly four years of discovery, the plaintiff filed a motion for sanctions for defendant Mark Pappas's conduct in frustrating the discovery process. The court noted: "[f]or years, Pappas engaged in a cat and mouse game to hide harmful ESI from production during discovery, repeatedly trying to stall or prevent VSI from discovering evidence that he improperly accessed or used VSI's website or drawings."

Among the long list of eDiscovery misconduct, the court highlighted the fact that the defendants did not even

consider, let alone implement a litigation hold after the plaintiff filed suit or even after the court issued preservation orders. The court concluded that "ESI would be lost or modified biweekly, under the best of circumstances" because no measures were taken to preserve potentially relevant electronic data.

The acts of eDiscovery misconduct at issue in this case are almost too numerous to list, but some of the most notable include:

- Just after VSI filed suit, computer forensics indicated 353 user-initiated deletions of files from CPI President Pappas's laptop.
- Pappas sent an email to an Argentine business contact instructing him to "destroy various emails and attachments relating to the VSI drawings"—drawings that the Argentine contact was going to convert to CPI drawings.
- Pappas "attempted to delete over 5,000 files," and later claimed to have moved the emails to a deleted items folder for "storage purposes."
- Pappas "delayed in producing relevant ESI after Plaintiff identified it and requested it in discovery, and he lied about the completeness of Defendants' ESI production."
- On the eve of a scheduled discovery hearing, "Pappas deleted 9,234 files from his work computer."
- Four days prior to the plaintiff's scheduled imaging of Pappas's work computer, "Pappas deleted almost 4,000 files."

- Forensic examination of Pappas's work computer revealed that he had used an external hard drive ("EHD"); the EHD contained 62,071 files that were copied from the work computer. The EHD was never produced and Pappas claimed that he had returned it to "Bob from Office Max."
- 9,282 user-initiated deletions of files from Pappas's work computer occurred after the court issued a preservation order.

In recognizing the severity of the defendants' acts, the court recognized:

"Collectively, they constitute the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench."

Undoubtedly, *Victor Stanley, Inc. v. Creative Pipe, Inc.* is going to be widely cited in the eDiscovery context throughout the country. In an 89-page opinion, Chief Magistrate Judge Paul Grimm provided a survey of national case-law on preservation/spoliation issues, which is, as he put it, "an analytical framework" that will enable counsel to "resolve preservation/spoliation issues with a greater level of comfort." The opinion is also a welcome articulation of the different spoliation standards applied nationwide. The variance in these standards often makes predictability on preservation issues difficult.

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*To discuss any questions you may have regarding the decision discussed in this Alert, or how it may apply to your particular circumstances, please contact Tom Jones ([tjones@cozen.com](mailto:tjones@cozen.com)), or Dan Ward ([dward@cozen.com](mailto:dward@cozen.com)). For a more detailed report on this case, please visit the Cozen O'Connor eDiscovery blog: <http://www.ediscoverylawreview.com>.*