

## THE GANG THAT COULDN'T SPOLIATE STRAIGHT

Daniel Q. Harrington • 215.665.2126 • [dharrington@cozen.com](mailto:dharrington@cozen.com)

Seasoned subrogation professionals know they need to attempt to afford potential adversaries the opportunity to inspect a loss site before the site, and evidence on the site, has been significantly altered or disturbed. Making such entreaties to an experienced practitioner essentially amounts to “preaching to the choir.”

However, even the seemingly well-developed law regarding spoliation occasionally finds new frontiers to cross. Until recently, the worst-case scenario in spoliation litigation seemed to be the ominously named “terminating sanction,” which would result in dismissal of a claim. However, in September 2010, a U.S. Magistrate Judge in Maryland (aptly surnamed “Grimm”) attempted to up the ante and impose sanctions upon a spoliator which could potentially have included up to two years’ imprisonment. [Victor Stanley, Inc. v. Creative Pipe, Inc.](#), (D.Md. C.A. No. MJG-06-2662, September 9, 2010).

The conduct at issue in the [Victor Stanley](#) case involved a defendant’s willful and methodical destruction of electronic records during the course of litigation, in violation of several specific court orders. The defendant and his agents were so inept in their attempts to destroy information and then cover up their tracks that Magistrate Judge Grimm dubbed them “The gang that couldn’t spoliolate straight.” Such conduct is clearly not even remotely akin to an insurer’s asserted failure to preserve a loss site, or artifacts from the site, to the satisfaction of an eventual defendant in a subrogation claim.

On appeal from Magistrate Judge Grimm’s order, the U.S. district judge’s brief opinion held that imprisonment was not an appropriate sanction under the circumstances (the court upheld the imposition of a default judgment and assessment of \$337,000 in attorney’s fees and costs and left open the possibility of civil contempt penalties – including imprisonment – if the monetary penalties were not promptly paid). Nevertheless, Magistrate Judge Grimm’s 89-page memorandum, order and recommendation includes a thorough dissertation on the evolution of spoliation law in the federal courts (accompanied by a handy, circuit-by-circuit reference chart) (for a copy of the memorandum or the reference chart, contact Dan Harrington at [dharrington@cozen.com](mailto:dharrington@cozen.com)), and a facially plausible discussion regarding selection of sanctions that are proportionate both to the degree of misconduct at issue and to the prejudice to the adversary. This discussion ultimately leads to the magistrate judge’s endorsement of jail time as an appropriate sanction for discovery misconduct.

Magistrate Judge Grimm’s analysis leaves open whether a negligent spoliator whose conduct causes great prejudice could be subjected to harsher sanctions than an intentional spoliator whose actions cause little or no prejudice. It is therefore not beyond the pale that an even harsher sanction than the so-called “terminating sanction” could still be in the offing in an appropriate future case.