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Legal Strategies. Business Solutions.

Another "Grimm" Tale: Business and Government Entities to Comply with Most Rigorous Evidence Preservation Standards

by Dennis Kiker

Those familiar with the tales by the Brothers Grimm -- not the softer, updated tales of our youths, but the dark, original Germanic folktales -- understand the feelings of fear and dread that the stories evoked. Images of these tales are easily surmised when reading Chief Magistrate Judge Paul Grimm's latest opinion in *Victor Stanley v. Creative Pipe*, U.S. Dist. Lexis 93644 (D. Md. Sep. 9, 2010). Put bluntly, this case is scary.

Among the sanctions imposed, Judge Grimm ordered that the defendant's "acts of spoliation be treated as contempt of...court, and that, as a sanction, he be imprisoned for a period not to exceed two years, unless and until he pays...attorneys fees and costs associated not only with filing this motion, but also with respect to all efforts expended throughout this case to demonstrate the nature and effect of [his] spoliation." *Id.* at *156.

The facts of the case, as Judge Grimm points out, "are convoluted and cannot be summarized succinctly." *Id.* at *8. Indeed, like Judge Grimm's other important e-discovery opinions, this one is quite lengthy, spanning nearly 90 pages, not including the 12-page appendix summarizing the law in each federal circuit on the scope of the duty to preserve and culpability and prejudice requirements for spoliation sanctions (arguably the most useful part of the opinion, which appears to be included only in the original opinion and not with the Lexis® version).

To make a long story short, this opinion deals with numerous egregious acts of actual and attempted spoliation by the defendant, including (but not limited to):

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Meet DSP

Vikas Pall's Multifaceted Business Approach Boosts Team Capabilities

One way LeClairRyan's Discovery Solutions Practice (DSP) stands out among the competition is how it applies its legal and business process experience and technical knowledge to complex discovery challenges. As a full-time discovery solutions consultant at DSP, Vikas Pall brings added depth to the team's existing competitive edge with his extensive background in business process and information systems deployments. Vikas works extensively with corporations and government agencies to facilitate and improve information management and

- Failure to implement a legal hold;
- Intentional deletion of electronically stored information (ESI) shortly after the suit was filed;
- Intentional deletion of ESI shortly before a court-ordered forensic image of a computer was to be taken;
- Use of several software programs that eliminate deleted and fragmented files;
- Instructing third parties to delete relevant information;
- Disposing of an external hard drive containing relevant information during the course of litigation; and
- Intentional deletion of ESI after issuance of a court order specifically requiring that it be preserved.

The extraordinary lengths to which the defendant apparently went to destroy data and delay discovery is reflected by the fact that he ultimately acknowledged that default judgment on a copyright claim was an appropriate sanction.

The most important parts of this case, as with other seminal opinions by Judge Grimm, are not those related to the specific facts of the case, but rather to the dicta provided to educate the bar on difficult questions of e-discovery law, which in this case is the duty to preserve evidence and the standards governing imposition of sanctions. Recognizing that inconsistent case law on these issues "causes...concern and anxiety, particularly to institutional clients such as corporations, businesses or governments, because their activities – and vulnerability to being sued – often extends to multiple jurisdictions," Judge Grimm very helpfully canvasses the law in each federal circuit, even appending a useful table of his results to the opinion. *Id.* at *91.

As Judge Grimm acknowledges, a "national corporation cannot have a different preservation policy for each federal circuit and state in which it operates." *Id.* Thus, it is important for companies to understand the different standards that are applied and ensure that the preservation policies and procedures that are in place comply with the most rigorous standards to which the company might be subject.

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discovery response capabilities, including the development and re-engineering of internal and external business and legal processes.

Vikas specializes in bringing together in-house counsel, business personnel, information technology professionals, and records and information management professionals to develop defensible, practical and cost-effective business solutions to information governance and e-discovery challenges.

Prior to joining DSP, Vikas held several consulting positions. Most recently, he was a senior manager in the consulting group at Fios, an electronic data processing provider headquartered in Portland, Oregon. While there, Vikas led comprehensive consulting engagements that resulted in repeatable processes for efficiently and defensibly managing discovery related to complex litigation, audits and government investigations. Previously, Vikas was a technology integration consultant at Deloitte Consulting LLP, managing the deployment of complex information systems, including electronic health record systems.

Vikas now works with DSP professionals to bring a multidisciplinary, process-oriented business approach to clients' discovery challenges, creating solutions that are sound from a legal and business perspective.

[Learn more about DSP](#)

What's New at DSP

DSP Offers Client-Centric Process with Alternative Fee

Engagements

Large document discovery projects and high-cost litigation can create immense budget pressures for a business in the midst of a legal proceeding. In an effort to counteract this reality, LeClairRyan's Discovery Solutions Practice (DSP) is committed to creating alternative fee engagements that are tailored to a client's unique goals and business considerations. In addition to the traditional competitive hourly rate structure, DSP offers clients per-document pricing, blended hourly rates and flat-fee pricing rate structures on many new projects.

PER-DOCUMENT PRICING

The business and legal professionals at DSP understand the need for transparency and certainty in pricing and the difficulties involved in predicting the size and complexity of large document reviews. Per-document pricing helps clients estimate the cost of their projects based on the number of documents and project-specific factors.

To determine an appropriate per-document price, DSP relies on its more than 20 years of combined experience to gather information about the complexity, format and volume of the documents to be reviewed. DSP professionals also take into consideration the project goals to determine an accurate and fair per-document price. Per-document pricing helps to eliminate billing uncertainty and provides a straightforward approach for determining project costs.

BLENDED HOURLY RATE

Another way DSP alleviates the stress of mounting document discovery expenses is by offering clients blended hourly rates. Often it is difficult to understand layers of pricing at different rates. However, blended-rate billing, which is a hybrid of the hourly rate structure, can simplify project expenses. Instead of specific hourly rates for each type of professional working on a matter, one hourly rate applies to all time billed. A blended hourly rate structure also generates easy-to-read bills, saving clients time and eliminating frustration.

FLAT-FEE PRICING

In many cases, a flat fee for a particular scope of work is the best way to simplify the billing process. DSP's depth of experience handling projects and documents of varying types and complexities enables the team to accurately determine the time and resources required to complete a project. With a solid understanding of a project's size, scope and goals, DSP professionals are able to set an attractive fixed price for the client.

Businesses today are monitoring expenses closely, and DSP recognizes the relevance of alternative pricing options. That's why DSP

takes the time to understand a business' goals and shares its insights into potential solutions and pricing structures for each document discovery challenge it encounters.

CASE RESULTS DEPEND UPON A VARIETY OF FACTORS UNIQUE TO EACH CASE AND DO NOT GUARANTEE OR PREDICT A SIMILAR RESULT IN ANY FUTURE CASE

DSP Leverages Technology and Capacity to Meet Tight Discovery Deadline

A major financial services corporation recently turned to DSP for help when it found itself confronted with a discovery deadline less than a month away and more than 250,000 documents that required review for privilege and confidentiality.

The first step was to select a review platform and data processing vendor with the capacity and stability required for a large-scale, short-term project, while maintaining the versatility to implement creative solutions to streamline the review process. Within a matter of days, the DSP team worked with the client's IT department to load the data and quickly staffed a review team of 80 attorneys and non-attorneys to work in its dedicated review space.

DSP professionals then used concept searching and e-mail threading technologies to bundle similar documents for review, minimizing coding disparity and maximizing review efficiency. Potentially privileged documents were quickly identified and routed to a team specializing in privilege review. Leveraging the available technology, DSP was able to eliminate nearly a quarter of the documents from the review population based on the minimal likelihood they contained responsive information. The project was completed with days to spare, ahead of schedule and under budget.

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