



FDCC CLASS ACTION AND MDL SECTION NEWSLETTER

SEPTEMBER, 2010

PLEASE GIVE US FIVE (5) MINUTES OF YOUR TIME TO READ THIS!

Section Update

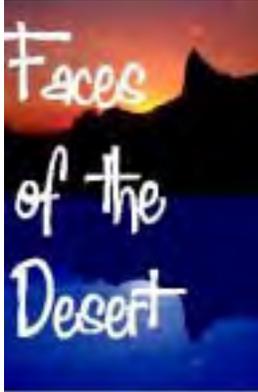
Welcome everyone to a new year in the Class and MDL Section. I am honored to have been appointed your new Section Chair this *75th anniversary year of the Federation*. I want us all to thank Gray Culbreath for his tremendous efforts these last two (2) years. Congratulations too to our new, current Vice-Chairs, Joan Holloway from Cardiac Rhythm Disease Management/Medtronic and Richards Ford from Orlando, who will help shepherd us through this next year.

I am typing this as I return from a terrific Planning & Objectives (P & O) Meeting in Philadelphia with all the officers of the FDCC and all the Section Chairs. Every Section was represented at this meeting, a tribute to the high regard in which the Federation is held by its new leaders.

I want this next year to be an active, aggressive programming and attendance year for our Section. There are many new developments in the class action law on both the state and federal levels, and I want us to tutor and teach each other in the latest tactics and techniques to obtain success for our clients. I will be contacting each and every listed member of the Section to obtain input on programs you would like to see, topics you want covered, and ideas you have for our section and for the good of the Federation order. I also want this Section to cultivate newer members for programming and leadership tracks. If you have an interest in becoming involved, contact me and I will make it happen!

Thanks for the privilege of leading the Section this year! I look forward to working hard for you!

Kurtis B. Reeg
kreeg@reeglawfirm.com
314-446-3350



Winter Meeting at Indian Hills (Palm Springs), CA. February 26-March 5, 2010

PLEASE COME TO THE WINTER MEETING!

To kick off our year in style, I invite you all to attend the Mid-Year Meeting, to be held in the desert in the midst of winter! What a better way to obtain respite from the cold than to come to the world famous Palm Springs area for a week of highly educational and relevant programs and some of the most gorgeous scenery in the West. The theme of this year's meeting is "looking forward" in our practices, careers and personal lives. Plenary Programs will include: discussions of environmental issues, the significant changes in the Federal Rules of civil Procedure and new pleadings requirements in the state and federal courts; the current state of e-discovery; and social networking sites and living in a digital world.

We have an exciting line-up of three (3) programs for our section meeting to be held on Thursday, March 3, 2010. First, Ed Ruff will lead a discussion of the in's and out's of *trying the Bellwether case in an MDL proceeding*; next, Gray Culbreath will present a unique paper on *prosecuting and defending a defendant class*; and finally, David Schooler will speak to us regarding several scenarios regarding *electronic privacy concerns in the employment context*. I invite ALL section members, and those with some experience in or currently involved in any class action litigation, to join us at this meeting. During our short business meeting, we will be hearing from you, the members, about your ideas on what you want to see, hear and do in this Section and in the wider Federation.

Annual Meeting, Colonial Williamsburg Resort, VA. July 24-31, 2011.

PLEASE PLAN TO ATTEND THE SUMMER MEETING!



The 75th Annual Meeting will be held in historic Williamsburg. Programming around our theme of "The Lost Colony of Professionalism" is well underway. Our Section has already identified three (3) programs which will be presented next summer. First, we will hear about and discuss *Protective Orders and Confidential Designations* thereunder. We will also receive an update on the latest cutting edge developments regarding *the four (4) prerequisites to obtain class certification*: numerosity, common questions, adequacy of the class representative and the adequacy of class relief. Finally, I will

present a paper on the *Self-Critical Analysis Privilege*, and trumpet my Section theme for this year: **Pitch the Privilege!** In my view, the self-critical/self-evaluative privilege is an under-recognized, under-utilized privilege available to business and corporations of all types, and we need to educate each other and the judiciary in its background, usefulness and propriety. I want our Section to spread the word this year regarding increased recognition of this important protection for our business and other clients.

Recent Cases

Important Decision on Preservation Obligations & Spoliation Relating to Electronically Stored Information (ESI)

As reported by the Mayer Brown 2010 News ©, “Magistrate Judge Paul W. Grimm of the District of Maryland issued an 89-page opinion on September 9, 2010, addressing a motion for terminating and other sanctions arising out of the defendants’ intentional destruction of evidence that includes a detailed analysis of the current state of the law relating to preservation and spoliation. The opinion may have important implications for litigants beleaguered by the escalating costs of implementing expansive preservation programs relating to electronically stored information (ESI) and concerned about potential spoliation claims.

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, the Court levied sanctions upon the defendants who admittedly breached—in a particularly egregious fashion—their duty to preserve ESI relevant to ongoing litigation, violating several court orders in the process. As discussed more fully below, Judge Grimm recognizes the “collective anxiety” among lawyers and their clients regarding the lack of uniform national standards governing preservation and spoliation, stating that “it is not an exaggeration to say that many lawyers, as well as institutional, organizational, or governmental litigants, view preservation obligations as one of the greatest contributors to the cost of litigation being disproportionately expensive in cases where ESI will play an evidentiary role.”

Further, Judge Grimm explicitly held “that courts must consider issues of proportionality and reasonableness of the alleged spoliator’s conduct in determining whether there has been a breach of the preservation duty.” The proportionality and reasonableness principles articulated by Judge Grimm may prove to be valuable tools for litigants.

Plaintiff Victor Stanley, Inc. (VSI) sued defendants Creative Pipe, Inc. (CPI), and Mark Pappas, the President of CPI (Pappas) (among others) alleging, *inter alia*, unfair competition and certain copyright and patent violations. After the suit was initiated, Pappas engaged for years in “a cat and mouse game” to hide harmful ESI from production during discovery. In addition to the deletion of certain ESI, the Court identified eight discrete preservation failures by CPI and Pappas (whose misconduct, according to the Court, was attributable to him individually as well as to CPI). Among other misdeeds, Pappas asked a business contact to delete relevant emails, lied to the Court about the completeness of defendants’ ESI production and

knowingly and willfully destroyed files in defiance of multiple Court orders.

Judge Grimm opined that the collective breaches constituted “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.” In the end, even defense counsel was forced to concede that relevant ESI had been destroyed and that entry of a default judgment as to plaintiffs’ copyright claims was appropriate under the circumstances.

Noteworthy in Judge Grimm’s opinion was his cautious approach to sanctions despite defendants’ egregious conduct. While Judge Grimm recommended a default judgment and permanent injunction in plaintiff’s favor as to liability on plaintiffs’ copyright claim and ordered Pappas to pay attorneys fees and costs to avoid jail time for civil contempt of court, the Judge refused plaintiff’s request to issue a judgment on monetary damages on the copyright claim or to recommend a default judgment as to any of plaintiffs’ remaining claims. Judge Grimm reasoned that despite clear evidence of defendants’ spoliation, plaintiffs had yet to show that the lost information was likely to be relevant to monetary damages or their non-copyright claims.

Finally, setting aside the conduct at issue in *Victor Stanley*, Judge Grimm attempted to provide an analytical framework for litigants to assist them in the navigating the disparate laws governing preservation and spoliation in the federal courts; the Judge even went so far as to affix to the opinion a 12-page chart identifying the relevant standards for the most common preservation and spoliation issues. Among his most significant observations:

- Recognizing that the duty to preserve “requires nuance, because the duty ‘cannot be defined with precision,’” Judge Grimm held that “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.” In other words, the burden or expense of the proposed discovery should be weighed against its likely benefit. He noted that, with few exceptions, courts have tended to overlook the importance of the proportionality principle of Fed. R. Civ. P. 26(b)(2)(C) in evaluating the sufficiency of a party’s preservation efforts.
- Judge Grimm also cautioned litigants that in most jurisdictions the duty to preserve evidence is owed to *the court*, not to a party’s adversary. He explained that preservation is critical to “‘the integrity of the judicial process’ so that litigants do not lose ‘confidence that the process works to uncover the truth,’” and found that a court’s decision regarding appropriate spoliation sanctions should be informed by recalling that the duty is owed to the court itself.

While the ultimate import of the *Victor Stanley* decision remains to be seen, Judge Grimm’s decision is one of the first to recognize the immense burden that preservation can impose on an organization and to explicitly acknowledge that the proportionality principle of Rule 26 should apply equally to preservation and production. In many ways, *Victor Stanley* validates the concerns raised by many commentators and may be a step in the direction of bringing clarity to the still uncertain law relating to preservation and spoliation.”

P & O Meeting

The first P & O Meeting of the year was a smash! Your section chairs were challenged by President Tom Cordell and Chair Steve Farrar to aim high, work hard, keep a stiff upper lip, always be professional and celebrate our victories. President Cordell's watchword this year is MAGIS, meaning the more, or making the FDCC better in as many ways as possible. Toward that end, new efforts will be launched for Rapid Response programs to immediately address major legal, business, or governmental incidents, environmental catastrophes, and the like. There will be new Outreach efforts to increase corporate counsel involvement (our potential clients!), find out what the members want to see from the FDCC itself, what interests the members, and what you like and do not like. There is a new project to heighten awareness of the FDCC in the legal and business communities. Each section is also committed to recommending two (2) new members to the Federation, and every member's input is very important to this mission.

In furtherance of our MAGIS initiative, my **goal for the Section is to become highly visible to the Federation** through conscious efforts and discipline to educate each other, present programs that extend beyond our title and reach across the membership, and be a source of expertise to each other, especially our current corporate and associate members, and the greater legal and industry communities we serve. I also want us to reach out to our sister IADC Class Action Section colleagues and undertake some cross-pollination in both education and the provision of legal services. Those of you, new or senior, who want to help lead the way on this mission, make a difference, contribute to the good of the order, and improve the standing of the Federation are challenged now to come forward and be seen, heard and recognized. You can do this through plenary or section educational programming, the Section Newsletter, identifying Hot Cases for the Federation web site or contributing to the Section web site, among others. This Section will give you a platform so you can show your professional colleagues, and your adversaries, that you are making a difference in this organization and the legal profession.

ROSES AND BITCHES

I challenge each and every section member to be brutally honest with your Chair and Vice-Chairs about how the Section and the Federation can serve you better. Most of you knowing me to be the not-so-bashful type, I pledge to take your issues, concerns, and kudos through appropriate channels, but all the way to the top if and when necessary. Your Section officers are here to serve and help you. We can only succeed with your input. Let your voice be heard; call me or write me anytime, about anything that involves the FDCC or the Class Action and MDL Section. Your voice will be heard! KBR