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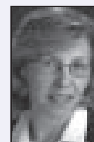

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Letter from the Chair

by: Thomas F. Cavalier

For a profession that prides itself on championing the rights of the oppressed, empowering the disenfranchised, and swinging wide the doors of justice, the statistics of the bar's own progress towards equality and diversity are a sobering reminder of how far we have to go. Nationwide, the legal profession lags far behind other professions in the representation of minorities among its ranks. In 2009, 4.7% of lawyers were African-American, 4.1% were Asian and 2.8% were Hispanic.[1] In contrast, the 2009 statistics for physicians are 5.7% (African-American), 16.4% (Asian) and 6.3% (Hispanic).[2] For college professors, the figures are 5.3% (African-American), 11.3% (Asian) and 4.6% (Hispanic).[3] The racial and ethnic make-up of the legal profession is far less diverse than the professions as a whole where 9.4% are African-American, and Asians and Hispanics each represent 7.1%.[4]

The Michigan statistics for lawyers are no better than the national picture. In 2009, 4.4% of Michigan lawyers were African-American, 5.5% were Asian and 3.5% were Hispanic.[5] Over the last decade, the trend is encouraging for Asians and Hispanics, whose 2000 numbers were 2.4% and 1.2%, respectively.[6] But the trend for African-Americans is the reverse, dropping from 7.9% of the profession in 2000.[7]

Due to this under-representation of racial, ethnic and other minorities, the State Bar of Michigan has launched a program to promote diversity in the profession. The most visible part of that project is the Michigan Pledge to Achieve Diversity and Inclusion. In January 2011, the Litigation Section signed the Pledge, joining a growing number of lawyers, law firms and bar associations who are committed to bringing more racial and ethnic minorities, women, the handicapped and members of the lesbian-gay-bisexual-transgender community into our profession.

Diversity is the latest frontier in our country's exploration of the concept of equality. It is not affirmative action, which is designed to remedy the devastating effects on minorities of past discrimination. Diversity – in a company, a university or a profession – benefits not just under-represented segments of the population, but *everyone* in the group.

Diversity plays a particularly important role in the legal profession. Lawyers, especially litigators, are in the business of understanding human behavior – deciphering the motives of clients and opposing parties, divining the biases of jurors and figuring out how witnesses interpret reality. There is a growing recognition that exposure to diverse viewpoints promotes a better understanding of the world. Studies of group performance suggest that a diverse membership fosters greater exchange of expertise, attitudes and values.[8] This information sharing has been found in racially diverse juries. They "deliberated longer, discussed more trial evidence, and made few factually inaccurate statements in discussing the evidence than did all-White juries."[9] Education is another example. Diversity in a student body fosters "enlightening and interesting" discussions, "promotes learning outcomes" and develops "skills needed in today's increasingly global market place[.]"[10]

Diversity is likely to confer the same benefit on the bar. Ours is at its best a collegial and deliberative profession. We turn to each other for insight into jurors, judges, witnesses, opposing parties – even our own clients. We work together to better understand the social forces that shape the particular case we are handling. Having access to colleagues with a diversity of viewpoints, experiences and values can only help us to better serve our clients. Diversity will not only express the bar's longstanding commitment to equal opportunity – it will also make us better lawyers.

ENDNOTES

1. Labor Force Characteristics by Race and Ethnicity, 2009, U.S. Bureau of Labor Statistics (August 2009).
2. *Id.*
3. *Id.*
4. *Id.*
5. Information provided by the State Bar of Michigan at October 2010 Section Leader Orientation.
6. *Id.*
7. *Id.*
8. S. R. Sommers, *Race and the decision making of juries.* *Legal and Criminological Psychology,* 12: 171-187 (2007)
9. *Id.*
10. *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003)

The Duty to Preserve and Collect: The Danger of Delegation

*by: Dari Bargy**

As lawyers, we are expected to be familiar with evolving law and conform fully to its requirements. Most litigators perceive little danger in forwarding discovery requests to their clients and tasking them with the identification, preservation and collection of responsive data. After all, clients are in the best position to identify the relevant facts, documents and witnesses involved in their case. Additionally, clients often request that the lion's share of data preservation and collection be conducted in-house in order to save substantial legal costs.

The risks associated with this model seem remote. As the Federal Rules of Civil Procedure dictate, "discovery should generally be obtained from the most convenient, least burdensome, and least expensive source."[1] Under evolving e-discovery jurisprudence, however, counsel has an affirmative obligation to diligently oversee the execution of preservation and collection of data in good faith.[2] Failure to do so may lead to dire consequences.

In an opinion rendered in January 2010 (amended in May 2010), Judge Shira Scheindlin, author of the landmark *Zubulake* decisions, warned that counsel should not delegate preservation and collection efforts to clients or their employees who are ill-equipped to effectively manage the process.[3] In *Montreal Pension*, defendant filed an omnibus motion for sanctions after gaps appeared in plaintiffs' document productions.

The gross insufficiencies of plaintiffs' document productions were in large part attributable to counsels' failure to adequately supervise the preservation and collection of data. For example, some custodians collected paper documents, but did not take sufficient steps to preserve electronic data. Plaintiffs were also criticized for unilaterally limiting collection efforts to "key players" or "decision makers" and not collecting documents from all custodians who had "some involvement" in the transactions at issue in the litigation. Some of the plaintiffs were found to have been grossly negligent because they delegated document collection responsibilities to employees with no experience conducting electronic searches. These employees received no instructions concerning how to identify relevant data and were not supervised during the collection process. Employees also failed to follow up on supplemental requests for documents and did not seek assistance in collecting or preserving documents.

These and numerous other deficiencies in the plaintiffs' approach to discovery cumulatively resulted in adverse jury instructions, monetary sanctions and, for certain plaintiffs, an order to conduct further discovery at the plaintiffs' own expense. *Montreal Pension* set the stage for a host of other opinions in 2010 sanctioning parties for deficient document retention and collection practices which could have been avoided with the assistance of attentive counsel.[4]

As more courts take Judge Scheindlin's lead, sanctions will be increasingly harsh, and litigants will be forced to turn to new methods of preserving and collecting electronic data. While counsel may find meeting these heightened preservation and collection standards increasingly daunting, Judge Scheindlin's criticisms in *Montreal Pension* offer some practical guidance:

- **Ensure the Adequacy of the Litigation Hold.** Oversee the issuance and compliance with a timely, written litigation hold notice, when your client reasonably anticipates litigation. Indicate that the litigation hold applies to both hard copy documents and electronically stored information.

- **Identify Relevant Document Custodians.** As *Montreal Pension* illustrates, identifying only the "key players" may not suffice in all cases. Depending on the circumstances, it may be advisable to confer with opposing counsel at the onset of the case and agree upon relevant custodians.

- **Identify Relevant Data Sources.** Have a thorough understanding of your client's data sources and identify where potentially responsive data may be stored, including handheld devices, home computers and data clouds.

- **Supervise the Collection of Data, and Clearly Document These Efforts.** Create a discovery plan that includes employee training so that designated personnel know how to identify where potentially relevant data is located and understand how to preserve and produce that data in a timely fashion. Without training and/or use of an e-discovery vendor, litigants will inevitably experience inconsistent execution among different employees, incur substantially higher discovery costs in collecting and producing data, and assume additional and avoidable discovery-related litigation risk.

While courts do not expect perfection, both litigants and their counsel must conform to higher standards when conducting discovery.

ENDNOTES

1. FRCP 26(b)(2)(C).

2. As Judge Shira Scheindlin noted, "[a] party cannot reasonably be trusted to receive the 'litigation hold' instruction once and to fully comply with it without the active supervision of counsel." *Zubulake v. UBS Warburg LLC,* 229 F.R.D. 422, 433 (S.D.N.Y. 2004) *("Zubulake V").*

3. *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of America Securities LLC ("Montreal Pension")*, 685 F.Supp.2d 456 (S.D.N.Y. Jan 15, 2010) (as amended May 28, 2010).

4. In *Jones v. Bremen High School Dist.* 228, No. 08C3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010) Defendant school district was grossly negligent in its attempt to secure relevant documents in former employee's race discrimination action and was subject to discovery sanctions. The district breached its duty to preserve relevant documents by requesting that only three other employees retain relevant emails. Further, defendant allowed employees to discern which emails were relevant, leaving open the distinct possibility that relevant emails were destroyed. In *D'Onofrio v. SFX Sports Group, Inc.,* No. 06-687, 2010 WL 3324964 (D.D.C. Aug. 24, 2010), Judge John M. Facciola provided further emphasis on the importance of preservation after defendant did not search all potentially relevant data sources and utilized a security officer and its vice president of finance to search electronically stored information. The vice president of finance "scrapped" the plaintiff's computer after he decided it could not be used. An evidentiary hearing was needed to resolve factual issues before sanctions could be issued. *See also Victor Stanley v. Creative Pipe, Inc.,* 269 F.R.D. 497 (D. Md., 2010) for a compendium of circuit court precedent for e-discovery practitioners.

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Avoiding E-Discovery Heartburn

by: Dante Stella*

Late in the life of a commercial case, just before the close of discovery, opposing counsel calls to ask whether your client produced documents from a specific source of electronically stored information (ESI). ESI had never come up before, and though you told your client to issue a litigation hold to preserve evidence, you have no idea whether (or how) the client executed the hold or searched the data. Hanging up, you feel uneasy about what could hit if the data is gone: a discovery motion, sanctions for spoliation, or an adverse jury inference. You have, after all, been reading the horror stories.

It is possible to reduce ESI anxiety by effectively managing electronic discovery: being proactive in defining the scope, understanding preservation obligations and protections, and taking reasonable steps calculated to protect potentially relevant information (PRI). A good first step is reading the article on electronic discovery under the Federal Rules of Civil Procedure by Derek S. Witte and D. Andrew Portinga in the March 2007 Michigan Bar Journal.[1] With that as background, you can work on conquering the uncertainties of electronic discovery.

Proactively Managing Information Issues

ESI discovery is expensive and complicated. Often, the best thing that comes out of it is nothing. But simply letting ESI issues ride risks even more trouble and expense. Parties to a case in a Michigan state court can (and should) proactively discuss key ESI questions:

- Will ESI come into play to a significant degree?
- What ESI will be preserved?
- How will ESI be searched and what date, divisional, organization, and geographic limitations will apply?
- How will ESI be produced?
- What, if anything, will be necessary to authenticate ESI for trial?

The time for these inquiries is at the beginning – not months into discovery, on the day a computer fails, or when backup systems become hopelessly overloaded. If the parties can agree on the answers, they can put the judicial seal on ESI agreements. One way is to incorporate an ESI agreement into a scheduling order using MCR 2.401(B)(2)(c). Although circuit courts often issue "stock" scheduling orders, MCR 2.401(B)(2)(a) allows more than one order to be entered. A second avenue is a protective order under MCR 2.302(C) (also useful for opponents who will not cooperate). A third is MCR 2.501(A)(1)(d), the catchall rule for pretrial orders.

Understanding Preservation Obligations

Because ESI-related risks cannot always be eliminated up front, it is important to understand obligations for preserving evidence and "safe harbors" in discovery. Duties to preserve relevant evidence (and sanctions for failure to do so) are independent of the Michigan Court Rules. Under Michigan common law, the duty to preserve arises when a party has notice of the information's relevance to litigation or impending litigation.[2] Unfortunately, notice is often examined in hindsight, and Michigan law provides little, if any, bright-line guidance on when a preservation obligation arises. Federal courts analyzing the issue examine things like

(a) knowledge that a suit will be filed,[3]

(b) investigation of a possible claim by a plaintiff's attorney,[4]

(c) prelitigation correspondence or prelitigation discussions between counsel,[5] and

(d) filing of an administrative claim.[6]

Federal courts have also held that amending a pleading to include additional allegations does not create retroactive notice where it would not have existed before.[7] Once a party has notice, that party must preserve PRI. Failure to do so can constitute spoliation, punishable by sanctions within the "inherent powers" of a Michigan trial court,[8] tailored to remedy the loss of "material and relevant evidence."[9] Michigan courts are instructed to "den[y] the party the fruits of the party's misconduct, but… not interfere with the party's right to produce other relevant evidence," and sanctions may include exclusion of certain evidence or adverse jury instructions.[10] In more extreme cases, sanctions that end the lawsuit (like summary disposition or default judgment) may be on the table.[11]

The Michigan Court Rules now provide a limited safe harbor—but only from sanctions based on a violation of discovery orders. Effective January 2009, the Michigan Supreme Court amended MCR 2.302(B)(5) and MCR 2.313(E). MCR 2.302(B)(5) now provides:

> A party has the same obligation to preserve electronically stored information as it does for all other types of information. *Absent extraordinary circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.* [Emphasis added.]

MCR 2.313(E) contains identical language but omits the first sentence. This safe-harbor language is identical to FR Civ P 37(e). The new Michigan safe-harbor provisions should be understood as narrow and applicable when discovery has been compelled and a party ordered to produce ESI comes up empty-handed. Despite superficial similarities between spoliation sanctions and discovery sanctions (similar stated purpose, discretionary application, and remedies), the Michigan Court of Appeals has specifically recognized the difference between discovery sanctions and spoliation sanctions[12] and therefore the inapplicability of the safe harbor to claims of spoliation. Furthermore, the safe-harbor provisions hinge on taking "reasonable" precautions.

First, in *Brenner v Kolk,* the Michigan Court of Appeals explicitly distinguished spoliation sanctions from discovery sanctions under MCR 2.313. The *Brenner* plaintiff disposed of key evidence years before filing suit. The trial court reacted by granting summary disposition to the defendant. The Court of Appeals reasoned that MCR 2.313 did not apply because it required a violation of court order[13] but upheld the result on grounds that spoliation sanctions derive from the trial court's "inherent powers."[14] In 2009, the Michigan Court of Appeals, albeit in an unpublished decision, reiterated this point as it relates to newly amended MCR 2.313(E).[15] The *Brenner* Court also made it clear that sanctions issued under "inherent powers" are discretionary.[16] Because interlocutory appeals on sanctions are rarely if ever granted – and because abuse of discretion is a highly deferential standard of review – sanctions can be effectively immune from appeal unless and until the final judgment itself is appealed.

In the federal rules, the limited nature of the safe harbor in FR Civ P 37(e) is clarified by the advisory committee notes stating that "[t]he protection provided by Rule 37[e] applies only to sanctions 'under these rules.' It does not affect other sources of authority to impose sanctions or rules of professional responsibility." The extra statement in MCR 2.302(B)(5) that "[a] party has the same obligation to preserve electronically stored information as does for all other types of information" changes nothing. Preservation obligations arise at common law, and court rules have always addressed ESI, at least with a broad brush, by discussing data compilations…[in]…reasonably usable form."[17]

Second, the standard of behavior is different. Under the law of spoliation, some corrective measure may result from any loss of unique, relevant data,[18] while the federal and Michigan safe harbors

involve a standard of care: "routine, good-faith operation."[19] The latter clearly rules out the extraordinary, intentional destruction of evidence – which is never routine or in good faith – but leaves the question of what constitutes "good faith." The staff comment to the amendments of MCR 2.302(B)(5) and 2.313(E) (which is not the official position of the Michigan Supreme Court[20]) states that "[g]ood faith may be shown by a party's actions to attempt to preserve information as part of a 'litigation hold' that would otherwise have been lost or destroyed under an electronic information system." The advisory committee notes to the federal rules lay out a standard most similar to that used for negligence:

(a) A party may not exploit the automatic operation of a data system to destroy information it has a duty to preserve;

(b) depending on the circumstances, a party may have the duty to intervene to prevent the automatic destruction of data;

(c) safe harbor applies only to information lost as a result of routine operations, which include "the alteration and overwriting of information, often without the operator's specific direction or awareness....";

(d) factors in determining "good faith" include "the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information"; and

(e) a party's duty to take steps to prevent loss of information from sources designated as "not readily accessible" under FR Civ P 26(b)(2) depends on the circumstances of each case. "One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources."[21]

One federal commentator notes that the good-faith standard is embryonic and will require additional development.[22] The same should be understood to be the case under the state rule.

Taking Precautions to Prevent Discovery and Spoliation Sanctions

The spoliation doctrine is concerned with results, but the safe-harbor language in the Michigan Court Rules measures efforts. Satisfying either standard can be difficult because companies cannot simply shut down when litigation commences or is threatened.[23] The federal advisory committee stated in its submission notes that the federal safe harbor

> recognizes that all electronic information systems are designed to recycle, overwrite, and change information in routine operation, not because of any relationship between the content of particular information and litigation, but because they are necessary functions of regular business operations. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart in managing hard-copy information.[24]

The good-faith component of the safe harbor requires reasonable steps to head off preventable losses of PRI while the parties (sometimes with judicial "assistance") resolve the scope of discovery. Reasonable steps, if actually effective, can also minimize the risk of claims of spoliation. And whatever steps you take, record what has been done and why.

Issuing a Litigation Hold Memo

A prompt litigation hold is often the most valuable tool for preventing user-initiated or automatic loss of PRI. Litigation holds can contain simple or ornate descriptions of the subject matter of the data to be preserved, and their distribution can be focused or company-wide. But in every case, the recipients should include any known custodians, relevant business unit managers (who can inform subordinates), and information technology staff, who may even have prearranged procedures in place for holds.

Identifying People and Systems with Responsive Information

Preserving, processing, and reviewing data from users and systems with no connection to a case is

needlessly expensive, but casting the net too narrowly risks discovery or spoliation sanctions. Identify custodians early and do not be afraid to concentrate more intensive preservation on key players, *i.e.,* those closest to the action.

Making Best Efforts to Retain Relevant, Preexisting Backups

There is no general requirement that parties keep every single byte of every single data backup, but parties may be obligated to preserve backups if (1) they can identify where in the backups particular employees' data would be stored, (2) the backups contain the key players' data, and (3) the relevant information is not otherwise available from readily accessible sources.[25] Although parties often designate backups "not readily accessible" under MCR 2.302(b)(6) and therefore make them presumptively nondiscoverable, backups may come into play when discovery problems arise with current, readily accessible data. One potential (albeit expensive and extreme) solution is to preserve all existing backups. But if data volumes or backup methods make this impossible, a reasonable course of action is to do what is possible in the near term, based on present knowledge of the case, and adjust the scope as internal investigations progress.

Suspending System-Wide Automatic Deletion of E-mail

Systems that automatically delete e-mail after a certain time might circumvent litigation holds. Federal decisions suggest that if such deletion continues after the duty to preserve arises, attendant data loss is outside the safe harbor in the discovery rules.[26] Auto-delete rules, if they pose a threat, should be deactivated for personnel potentially holding PRI until that PRI is captured or evaluated.

Avoiding Changes to Data Retention Practices During Litigation

Litigation holds serve as exceptions to record-retention policies, and record-retention policies should not be instituted or modified during litigation when doing so risks destroying PRI.[27] Likewise, your client should not change practices with regard to on-server retention of "deleted messages" or allow custodians to engage in "cleanup" activities during litigation.[28]

Closely Monitoring Leases, Redeployments, and Reloads

Lease turn-ins, redeployment of equipment to other employees, and "reloading" of malfunctioning computers can result in data-loss situations outside the safe harbor. Information technology personnel should be made aware of which personnel are subject to litigation holds, and before any extraordinary activity, the contents of the affected persons' hard drives should be preserved (if possible).

Watching Departing Employees' Data

On an employee's departure, many organizations start a countdown to deleting that user's data (e-mail and files) from local computers and servers. When identifying personnel with PRI, do not ignore departed employees – and as soon as they are identified, capture any surviving data associated with them.

Conclusion

Under the new Michigan Court Rules, as under the old, the best way to manage the risks of sanctions associated with e-discovery is cooperation to define its scope. Absent mutual agreement or a court order, risks associated with the loss of electronic data can be managed by taking steps that are both calculated to achieve – and actually result in – the preservation of PRI.

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ENDNOTES

1. Witte & Portinga, *E-discovery and the new Federal Rules of Civil Procedure: They apply to you,* 86 Mich B J 36 (March 2007).

2. See, e.g., *Bloemendaal v Town & Country Sports Ctr, Inc,* 255 Mich App 207, 212; 659 NW2d 684 (2002); *MASB-SEG Prop Cas Pool, Inc v Metalux,* 231 Mich App 393, 400; 586 NW2d 549 (1998); *Brenner v Kolk,* 226 Mich App 149, 162; 573 NW2d 65 (1997).

3. See, e.g., *Dillon v Nissan Motor Co,* 986 F2d 263, 266–269 (CA 8, 1993); *Struthers Patent Corp v Nestlé Co,* 558 F Supp 747, 765 (D NJ, 1981); *Alliance to End Repression v Rochford,* 75 FRD 438, 440 (ND Ill, 1976).

4. *Headley v Chrysler Motors Corp,* 141 FRD 362, 362–363 (D Mass, 1991).

5. *Computer Assoc Int'l v American Fundware, Inc,* 133 FRD 166, 169 (D Colo, 1990); *Wm T Thompson Co v Gen Nutrition Corp,* 593 F Supp 1443, 1446 (CD Cal, 1984).

6. *Byrnie v Town of Cromwell,* 243 F3d 93, 107–108 (CA 2, 2001); *Couveau v American Airlines, Inc,* 218 F3d 1078, 1084 (CA 9, 2000).

7. *Stephenson v United States,* 37 Fed Cl 396, 405–406 (1997).

8. *Bloemendaal,* 255 Mich App at 211; *Persichini v William Beaumont Hosp,* 238 Mich App 626, 638–640; 607 NW2d 100 (1999).

9. *Martinez v Gen Motors Corp,* unpublished opinion *per curiam* of the Court of Appeals, issued May 15, 2007 (Docket Nos. 26612 and 267218), available at 2007 WL 1429632; see also *Brenner,* 226 Mich App at 160.

10. *Id.* at 161.

11. *Bloemendaal,* 255 Mich App at 215.

12. *Brenner,* 226 Mich App at 158 –159.

13. See MCR 2.313(B)(2).

14. *Brenner,* 226 Mich App at 156–160.

15. *Gillett v Mich Farm Bureau,* unpublished opinion *per curiam* of the Court of Appeals, issued December 22, 2009 (Docket No. 286076), available at 2009 WL 4981193, at *1.

16. *Brenner,* 226 Mich App at 160–161.

17. MCR 2.310(A)(1).

18. *Hamann v Ridge Tool Co,* 213 Mich App 252, 255; 539 NW2d 753 (1995); *Brenner,* 226 Mich App at 162.

19. MCR 2.302(B)(5); MCR 2.313(E); FR Civ P 37(e).

20. MCR 1.101, staff comment; see also *People v Grove,* 455 Mich 439, 456; 566 NW2d 547 (1997).

21. Order adopting amendments of the Federal Rules of Civil Procedure, 234 FRD 219, 243–244 (December 1, 2006) (excerpts from December 2004 federal advisory committee notes).

22. See 8B Wright & Miller, Federal Practice & Procedure (3d ed), §2284.1.

23. *Lorraine v Markel American Ins Co,* 241 FRD 534, 580 (D Md, 2007).

24. Order, 234 FRD at 282 (excerpts from September 2005 federal advisory committee notes).

25. See *Forest Laboratories, Inc v Caraco Pharmaceutical Laboratories, Ltd,* unpublished opinion of the United States District Court for the Eastern District of Michigan, entered April 14, 2009 (No. 06-CV-13143), available at 2009 WL 998402, at *5, citing *Zubulake v UBS Warburg LLC,* 220 FRD 212, 218 (SD NY, 2003).

26. *Disability Rights Council of Greater Washington v Washington Metro Transit Auth,* 242 FRD 139, 145–146 (D DC, 2007); *Pandora Jewelry LLC v Chamilia LLC,* unpublished memorandum opinion of the United States District Court for the District of Maryland, entered September 30, 2008 (No. CCB-06-3041), available at 2008 WL 4533902, at *8–9.

27. *Rambus, Inc v Infineon Techs, AG,* 220 FRD 264, 281 (D Va, 2004).

28. See *Technical Sales Assoc v Ohio Star Forge Co,* unpublished order of the United States District Court for the Eastern District, entered March 19, 2009 (Docket Nos. 07-11745 and 08-13365), available at 2009 WL 728520.

Organization Before Tutti Frutti: Model Witness Examinations

by: David C. Sarnacki*

I start where the last man left off.
–Thomas A. Edison

I never accepted the idea that I had to be guided by some pattern or blueprint.
–Little Richard

Trials are hard enough. Do you really want to reinvent the wheel of foundational questions for each witness? There's something appealing about starting with a set of blueprints – in this case sample questions – and then improving the design, tailoring them to the witness and the flow of the examination to build a strong, persuasive structure for your argument. Begin where Paul Mark Sandler and James Archibald left off and be guided by their blueprints.

This third edition of Model Witness Examinations packs over three hundred pages into a trim 6 x 9 paperback. It takes the Rules of Evidence and puts them into the real life flow of question-answer format so that your facts come into evidence efficiently and your theory of the case unfolds. The samples will help you offer direct examination, challenge and impeach witnesses on cross-examination, and respond to cross on your redirect.

The core principle at work in these examination blueprints is simplicity and fundamentals before refinement and artistry. Take stress out of the equation. Start with a simple organization and basic questions that meet evidentiary challenges. Then add your own style and strategy.

The examination blueprints address the most common evidentiary issues that arise at trial and guide you in how to effectively combine your facts with the rules of evidence. The examples cover a variety of situations by presenting a hypothetical fact pattern, the question-answer structure, and then comments. The comments explain key concepts and refer to rules, secondary authorities and federal cases that illustrate the concepts in action.

Here's an excerpt from a sample blueprint for E-Mail Chains/Strings:

Q: *And do you receive e-mails in the course of the day from faculty and administrators at the college?*

A: Yes, several dozen a day.

Q: *Dean Keyes, please review exhibit 1 for identification. Can you identify it?*

A: Yes.

Q: *What is it?*

A: This is a document I received containing a string of e-mails.

Q: *Can you identify who sent you these e-mails?*

A: Yes, according to the "From" field on these e-mails, they were sent by LEllison@Chase.edu, which is the e-mail address of Lionel Ellison, the Dean of Students.

Q: *Could you describe what you see in the subject field for this e-mail?*

A: Yes. It has the term "Forward" followed by a colon, which indicates that Dean Ellison was sending me an e-mail he had received from someone else. The subject of that e-mail was "Professor Roger's ancient studies class."

Q: *Please describe the contents of the e-mail itself.*

A: Dean Ellison wrote a note to me: "This is the third complaint about Professor Roger's inappropriate touching of students." Below that is a copy of the e-mail that he received, showing his e-mail address as the recipient. That e-mail contains the complaint of improper conduct.

Q: *And who was the sender of the e-mail that Dean Ellison received?*

A: In the "sender" field for that e-mail, there's an address: KWein001@Chase.edu.

Q: *What if any significance does that e-mail address have for you?*

A: I recognized it as the e-mail account of a Chase College student. You see, faculty, staff, and administrator e-mail addresses have our first initial followed by our entire last name. Student e-mail addresses have the first letter of the student's first name, followed by the first four letters of the student's last name, followed by a three-digit number.

The comment to this sample includes a four-page discussion of evidentiary matters, such as authentication, personal knowledge, fraudulent emails, hearsay, privilege and discovery.

For ease of access, the examination blueprints are broken into three categories: direct examination, cross-examination and redirect, and discovery responses in trial. Subcategories include: recollection, documents, best evidence or original document problems, demonstrative and real evidence, opinions of the lay witness, opinions of the expert, character, habit and custom, general interest, prior inconsistent statement and use of textbooks, redirect, depositions and interrogatories. If that table of contents is not easy enough, there's always the index, which is detailed and will point you in the right direction.

The first edition had a solid beginning, and the examination blueprints have been improved with the most recent editions. The second edition addressed amendments to the rules of evidence and added samples for immunizing the witness, present sense impressions, excited utterances, dying declarations, subsequent remedial measures, initial examination of a child, lifting stay in bankruptcy, tangible objects, and lay witness opinions of intoxication. The third edition moved the book forward, especially in keeping with advances in technology. The new blueprints include email chains/strings, digital images, computer simulations, preferential transfers in bankruptcy and nondischargeability matters.

Sandler and Archibald are Baltimore trial attorneys with a passion for helping other attorneys in their trial preparations and performances. Sandler is an active trial lawyer and accomplished author with numerous trial advocacy publications, including Anatomy of a Trial, Discovery Problems and Their Solutions, and The 12 Secrets of Persuasive Argument. Archibald has a diverse litigation practice and is the former president of the Maryland Association of Defense Trial Counsel. Together, the Sandler-Archibald team has published several Maryland treatises on trial advocacy.

So in the end, it comes down to accepting Thomas Edison's advice for the courtroom and saving your inner Little Richard for the weekends. Science before art, I suppose. Start where Sandler and Archibald left off. Accept their sample questions as your blueprints. Improve upon their design by tailoring them to the witness and the examination. And build a sound structure for your argument. The result? A-wop-bop-a-loo-bop-a-lop-bam-boom!

Paul Mark Sandler and James K. Archibald, Model Witness Examinations (3d ed. 2010, American Bar Association). $79.95.

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

by: Evan A. Burkholder
and Dennis R. Kiker

Those familiar with the tales by the Brothers Grimm – not the softer, updated tales of our youths, but the dark, original Germanic versions – understand the feelings of fear and dread that those folktales must have evoked. Images of these tales are easily imagined when reading Chief Magistrate Judge Paul Grimm's recent opinion in *Victor Stanley v. Creative Pipe*[1] (widely referred to as *Victor Stanley II)*. 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 of 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."[2]

But, wait – why should Michigan attorneys care what a magistrate judge in Maryland has to say, particularly here, where the most draconian sanction – imprisonment for contempt – was overturned by the district court?[3] The answer is two-fold. First, in states such as Michigan, where there is little local case law on e-discovery and the rules of civil procedure borrow heavily from their federal counterparts, state and federal courts will look to the law in other federal jurisdictions for guidance.[4] Second, with respect to e-discovery issues, Chief Magistrate Judge Paul Grimm is the Merrill Lynch of jurists (or at least one of them). When Judge Grimm talks, people listen, including other judges. Judge Grimm is widely considered among the most knowledgeable, thoughtful and prolific of the sitting judges writing on e-discovery. Consider, for example, his opinion in *Lorraine v. Markel Am. Ins. Co.,*[5] highly recommended for its treatise-like treatment of the admissibility of electronically stored information (ESI); the original *Victor Stanley*[6] opinion, widely cited for its discussion of the assertion of the attorney-client privilege in connection with text-searchable ESI; *Mancia v. Mayflower Textile Servs. Co.,*[7] which emphasizes the need for cooperation between advocates; *Goodman v. Praxair Servs., Inc.,*[8] a detailed discussion of the duty to preserve evidence; and *Hopson v. Mayor & City Council of Baltimore,*[9] dealing with the increasingly common challenge of privilege waiver. All of Judge Grimm's e-discovery opinions are meticulous in their research and exhaustive in their discussion. *Victor Stanley II* is no exception.

The facts of the case, as Judge Grimm points out, "are convoluted and cannot be summarized succinctly."[10] 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.

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):

- 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 it 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 are 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.[11]

As Judge Grimm acknowledges, a "national corporation cannot have a different preservation policy for each federal circuit and state in which it operates."[12] So, what can companies do, when the standards vary, sometime significantly, across the country? Fortunately, there are several specific actions that every company can take to protect itself from spoliation charges.

- **Have a Plan.** A documented discovery response plan is the single most important step a company can take.[13] Discovery is not a dark art, and litigators are not gunslingers reacting with lightning speed to the changing dynamics of every lawsuit. Certainly each case has its own nuances, but a discovery response plan – the identification, preservation and collection of potentially relevant information – is, or should be, a repeatable business process. This is not to say that discovery response is "cookie-cutter," and that companies can predetermine the legal decisions they must make in the course of litigation. Rather, what companies require is a framework within which legal decisions can be made, and, once made, executed predictably and consistently. A well-designed discovery response plan will outline the various legal decisions that must be made once litigation is reasonably anticipated, and the procedures that must be followed to put those decisions into effect. It should include, at a minimum, (1) defined processes for identifying individual custodians and information systems that might maintain relevant data; (2) drafting, issuing, and tracking legal hold notices to the identified custodians and information systems managers; and (3) collecting potentially relevant information as required in a manner appropriate to the case. As much as possible, the plan should employ the use of templates so that information is documented and communicated consistently.

- **Prepare to respond.** The unfortunate truth in America is that, if you manufacture a product or provide a service, sooner or later, someone will sue you. The good news is that it is not entirely unpredictable. Financial services companies can be fairly certain that no strict products liability suits will come through the door, and baseball bat manufacturers will rarely see ANDA litigation. Thus, it is possible to identify the key events that will trigger reasonable anticipation of litigation for any given enterprise, and it is important to do so. Identifying the events that can give rise to a duty to preserve, and educating company employees to be aware of and report such events, will ensure that the company is able to quickly execute its discovery response plan.[14]

- **Train the responders.** Every person in the company routinely involved with discovery, as well as outside counsel, should understand his role as set forth in the discovery response plan, beginning with the triggering event(s). Again, legal decisions must be made based upon the facts and circumstances prevailing at the time. But, once made, those legal decisions affecting discovery response should be consistently implemented. Issuing a legal hold notice should not be something that is done differently in every case. The process for drafting, issuing and tracking the notice should be consistent, and the people responsible should be trained on the process. Similarly, if company attorneys will follow a disciplined process to identify and document sources of potentially relevant information, they are much less likely to overlook something. Legal decisions require judgment and creativity. Discovery response requires predictability and repeatability. And that comes through documentation and training.

- **Document Everything.** Companies are rarely challenged over what happened last week. Indeed, critical decisions and actions related to the identification and preservation of information often take place months, even years before those decisions and actions are questioned. No matter how smart your paralegal and IT liaison are, memories are finite and faulty. As noted, the company should have a documented discovery response plan, something the company can reference as the governing policies and processes that are executed in each and every case. But it is critical to the success of the discovery response plan that the decisions and actions made while executing the plan are well documented, for this will be the record that will demonstrate reasonableness and good faith if the company's actions are ever questioned.[15]

Victor Stanley II, like so many e-discovery cases, arises from egregious conduct in which very few corporate litigants would ever engage. The case is nevertheless instructive even for well-meaning companies, as it helps to level expectations for both courts and litigants, recognizing that corporations are faced with inconsistent standards and finite resources. Even so, the bar seems to be moving higher with each passing year, and conduct that might have been excusable in December, 2006, may not pass muster today. Therefore, corporations and their outside counsel should invest proactively in processes and procedures that will demonstrate good faith and reasonableness.

ENDNOTES

1. *Victor Stanley v. Creative Pipe* , 269 F.R.D. 497 (D. Md. 2010)(hereafter *Victor Stanley II*).
2. *Id.* at 541
2. *Victor Stanley v. Creative Pipe,* No. MJG-08-06-2662 (D. Md. Nov. 1, 2010) (affirming magistrate's orders and recommendations with the exception of the finding of contempt and possible imprisonment).
3. *See, e.g., Henry v. Dow Chem. Co.,* 484 Mich. 483, 522 (2009) (though not controlling, "federal caselaw interpreting the Federal Rules of Civil Procedure can be instructive").
4. *Lorraine v. Markel American Ins. Co,* 241 F.R.D. 534 (D. Md. 2007).
5. *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 251 (D. Md. May 29, 2008).
7. *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008).
8. *Goodman v. Praxair Services, Inc.,* 632 F. Supp. 2d 494 (D.Md. 2009).
9. *Hopson v. Mayor and City Council of Baltimore,* 232 F.R.D. 228 (D. Md. Nov. 22, 2005).
10. *Victor Stanley II* at * 8.
11. *Id.* at * 91.
12. *Id.*
13. *See, e.g.,* The Sedona Conference WG1, "The Sedona Conference Commentary on Legal Holds: The Trigger and the Process," 11 The Sedona Conference Journal 265, 269 (Fall 2010).
14. *Id.*
15. *Id.* at 270.

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