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Vogt v. MEnD et al: Adverse inference instruction and attorney fees granted as sanction for imputed spoliation

By: Trevor S. Johnson

A recent Minnesota court ruling emphasizes the need to proactively preserve evidence that documents a major incident and its aftermath. In the case of *Vogt v. MEnD Corr. Care et al* (21-CV-1055, D. Minn.), regarding the death of a jail inmate, the Minnesota District Court granted plaintiff's motion for spoliation sanctions, allowing an adverse inference instruction regarding missing surveillance footage and awarding plaintiff attorney fees and costs. Plaintiff alleged that footage from one ("Camera 18") of three cameras that covered the area in question was not preserved. Though motions for sanctions based on spoliation are rare (a 2011 report[1] found that motions related to spoliation were filed in only 0.15% of civil cases), when sanctions are imposed, the adverse inference jury instruction is the most common. In the 8th Circuit, the court must find that the party acted in bad faith. *See, e.g., Hallmark Cards, Inc. v. Murley,* 703 F.3d 456, 461 (8th Cir. 2013). In *Vogt*, the court made the requisite finding of bad faith on behalf of the county and the responsible administrators, and imputed their culpability for the spoliation to the individual defendants, who "themselves were not involved in the preservation of the video footage[.]"

Obligation to Preserve Accrues Immediately; Bad Faith Inferred from Circumstantial Evidence

A party must preserve evidence once the party knows or should know that the evidence is relevant to future or current litigation. As the court observed, a "variety of events may alert a party to the prospect of litigation." Here, the court held that the in-custody death was a "major incident" that triggered preservation obligations. Even without direct threats of litigation, the court found that the county was aware that investigations into the incident (internal and from the state) were inevitable, and that video footage would be crucial. Most damning, in the Court's eyes, was the jail administrator's testimony establishing that he actually watched the Camera 18 footage as part of his own investigation but failed to preserve it for potential litigation. The court's reasoning emphasizes that an organization's internal treatment of a major incident – such as classifying it as "critical" or conducting internal investigations – may be seen as evidence that litigation was foreseeable.

The court found that the county's failure to preserve the footage warranted a finding of bad faith on three grounds: first, the county knew that the footage from Camera 18 would be relevant; second, the county preserved other camera angles and had no credible explanation for not preserving Camera 18; and finally, allowing the footage to be deleted was not a "passive failure." The court found that, as part of the county's investigation into Vogt's death, it had actively reviewed the footage and could have saved it. Therefore, its failure to preserve the footage was not "passive." The court found that this combination of factors made it reasonable to infer that the county intended to destroy the footage for the purpose of suppressing evidence. The court seemed to give particular weight to the "selective preservation" of evidence, which showed that the county had engaged in a deliberative process about which evidence to save and demonstrated that it would have been possible to save the spoiled evidence.

Destroyed Evidence "Need Not Amount to the Proverbial Smoking Gun"

The defendants argued that plaintiff was not prejudiced, given the available footage from two other cameras covering the same area. The court found that even if the spoliated evidence is cumulative, its loss may be prejudicial. The lost

evidence does not need to be a "smoking gun" — simply providing additional information that a jury could use to evaluate witness credibility or better "understand the tenor of events" may be enough to support a finding that the loss was prejudicial.

Culpability Imputed to Individual Defendants

When plaintiff's motion for sanctions came before the court, the only claims remaining in the suit were against three correctional officers in their individual capacities. Plaintiff's claims against the other defendants, including the county and the jail administrator, had been dismissed. The court acknowledged that the individual officers were not responsible for the preservation of video and were not at fault for its loss. Rather, the county itself and the jail administrator were to blame. Nevertheless, the court decided that the culpability for the lost evidence should be imputed to the individual officers. The court cited the "uniquely intertwined relationship" between corrections officers and their employers, and also stated that, because of the county's indemnity responsibilities to its employees, a sanction against the individual officers would be, "in many important respects a sanction felt most acutely" by the county itself.

The court distinguished *Burris v. Gulf Underwriters Insurance Co.*, 787 F.3d 875 (8th Cir. 2015), in which an adverse instruction was requested against an insurer based on spoliation carried out by its insured. The Eighth Circuit explained that because the insurer played no part in the alleged spoliation, "it defies the purpose of the sanction" to impose sanctions against it. While acknowledging that "an analogy could arguably be made" between the individual defendants here and the insurer in *Burris*, the court noted that, in *Vogt*, the lost evidence was controlled by the individual defendants' employer (the county), and that the individual defendants *could have* requested that their employer preserve the evidence. Essentially, whereas the insurer-insured relationship was too attenuated, the employee-employer relationship is direct enough to sustain the imputation of fault. Notably, the justification for imputing fault in this way was not entirely dependent on the fact that the defendants were government employees or that *Vogt* was a civil rights case. While the court acknowledged that there are unique civil rights concerns in the jail or prison setting, the court's reasoning about imputing culpability for spoliation could also be applicable to private employers.

Conclusion

The takeaways from *Vogt* are (1) that any organization that gathers surveillance footage in the regular course of business should understand that the very occurrence of a critical event likely triggers a duty to preserve, (2) that an organization's internal classification of an event as "critical" or "major," as evidenced by internal investigations into the incident, may be seen as evidence that litigation was foreseeable, and (3) that selective preservation of video surveillance footage could be seen as proof of bad faith in a spoliation motion. After a critical event, all video evidence should be immediately preserved.

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[1] *Motions for Sanctions Based Upon Spoliation of Evidence in Civil Cases*, Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center 2011.

Congratulations to **Pat Skoglund** and **Jake Peden**

who obtained a summary judgment dismissal for a skilled nursing facility in a wrongful death case. The patient's estate sued bringing a negligence action alleging that the facility did not properly follow the patient's care plan for safety measures to prevent her fall from bed. The district court held that both plaintiff's experts, a nurse and physician, failed to meet their burden of proof to identify the standard of care, the breach of that standard, or the required chain-of-causation to prove that the death was caused by the fall. In granting Summary Judgment, the district court held that Plaintiff failed to comply with the Expert Affidavit requirement of Minn. Stat. 145.682, and also found that both experts did not have the foundational reliability for their opinions to be admissible under Minn. R. Evid. 702.

The Common Interest Doctrine:
A new tool in the toolbox that requires careful consideration.

By: Jake W. Peden & Chasse R. Thomas

Introduction

In *Energy Policy Advocates v. Ellison*, the Minnesota Supreme Court formally recognized the "common interest doctrine" in applying it to documents requested pursuant to a Minnesota Government Data Practices Act (Minn. Stat. § 13.01 *et seq.*) request to the Minnesota Attorney General's Office (AGO).[1] The common interest doctrine has previously been recognized federally and in many other states[2], and it permits parties with the common legal interests to share documents and strategies without losing the protections of attorney-client privilege or the work-product doctrine.[3]

Background

Energy Policy Advocates v. Ellison, arose after the Attorney General received a MGPDA request for a keyword search of communications to and from a person within the AGO. The AGO responded that its search produced "no public data that is responsive" to the request and then asserted claims of privilege.[4] This prompted a lawsuit from the environmental group, which was dismissed at the district court level based on the common interest doctrine, but the Minnesota Court of Appeals then reversed its decision on the basis that the common interest doctrine had not yet been recognized in Minnesota.[5]

The Minnesota Supreme Court granted review, and in recognizing the common interest doctrine, the Court adopted the following test for when it applies:

> [W]hen (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy.

This formulation is generally consistent with how the common interest doctrine has been applied by federal courts in Minnesota, and how it is stated in the Restatement (Third) of the Law Governing Lawyers § 76.[6] Of note, in *Energy Policy Advocates v. Ellison*, neither party seriously disputed that Minnesota should recognized the common interest doctrine, and the central dispute for the Supreme Court was what test to adopt.[7]

Energy Policy Advocates sought for the Supreme Court to adopt a balancing test similar to the test required by Minn. Stat. § 13.03, subd. 6: "the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the entity maintaining the data", but this was rejected with the Court finding the "the Legislature knows how to impose balancing tests, [and] did not impose one on the protections of [Minn. Stat. §] 13.393, which concerns government attorneys."[8] Additionally, while the common interest doctrine is derived from attorney-client privilege, the Supreme Court concluded it extends to attorney work product as well.

Pros, Cons, and Considerations

The common interest doctrine provides several benefits. Chiefly, it allows parties to exchange information that they would not otherwise receive. Normally attorney-client privilege is waived when a third party hears or is made aware of the communications between a lawyer and their client, and work-product protection is waived when the work-product is shared with other parties. Through the common interest doctrine, lawyers can more efficiently allocate their time by collaborating with other lawyers in formulating a litigation strategy without waiving protections of attorney-client privilege and the work-product doctrine. Another benefit is that parties can streamline litigation and decrease discovery significantly when they can communicate and share with parties that have a common a legal interest. Pooling work-product among attorneys working on the case can substantially cut down on legal expenses as it allows the attorneys to divide and conquer their work and present arguments on a united front.

On the other hand, the common interest doctrine presents many complications. First, the common interest must be a "legal interest", versus a commercial, political, or policy interest which would not qualify for protection under the common interest doctrine. Courts apply the "predominant purpose"

test, which applies attorney-client privilege "only if the predominant purpose of the communication is to render or solicit legal advice."[9]

Another uncertainty is that the common interest doctrine is not applied uniformly across various jurisdictions, and another state's common interest doctrine may be determined the binding law for a particular person or case. While the Minnesota Supreme Court recognized work-product protection can apply through the common interest doctrine, it declined to delineate on circumstances involving internal communications between lawyers at a public law office which would qualify under the common interest doctrine, recognizing that a fact-intensive inquiry must be conducted. Further case law will define the extent to which the common interest doctrine in the attorney work-product context.

Perhaps the largest concern is that while the law is well-defined on duties a lawyer owes to their client, the law is not very clear on what duties a lawyer owes to non-clients.[10] For this reason, in practice, it is almost always advisable to enter into an agreement in writing defining the parties' duties prior to sharing information subject to the common interest doctrine. The agreement should:

- Identify which parties are agreeing to share information and with whom
- Identify the litigation or matter giving rise to potential litigation
- Identify the mutuality of interests of the parties
- Provide explicit terms for the sharing of information, and that all information shared pursuant to the agreement is confidential, without any party waiving attorney client privilege or work-product protection
- Allow the parties to withdraw from the agreement in the event that the mutuality of interests changes throughout litigation

After the agreement is executed, the parties should be clear to mark that any communications or documents shared pursuant to the agreement are "confidential" and "privileged." Only attorneys, and not their clients, should communicate about the legal representation. As a general rule, best practice is to remember the elements of attorney-client privilege and apply those same elements to communications between attorneys when doing so pursuant to the common interest doctrine or a joint defense agreement.

In the end, the common interest doctrine is an effective tool for parties with a common legal interest to collaborate and streamline litigation. Despite this, attorneys and their clients must be very careful when engaging in such an arrangement.

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[1] *Energy Policy Advocates v. Ellison*, 980 N.W.2d 146 (Minn. 2022).

[2] Since the common interest doctrine derives from common law, it has been acknowledged and considered in all jurisdictions, but only certain states have formally recognized it through legislation or a decision from the state's highest court. *See, e.g.* Wis. Stat. § 905.03(2).

[3] *See Id.*, at 152.

[4] *See Id.*, at 151.

[5] *See Energy Policy Advocates v. Ellison,* 963 N.W.2d 485, 501-502 (Minn. Ct. App. 2021).

[6] *See* 980 N.W.2d 146 at 153 (citing *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012)).

[7] *See Id.*, at 152.

[8] *See Id.*, at 154.

[9] *See Thompson v. Polaris, Inc. (In re Polaris, Inc.)*, 967 N.W.2d 397, 407 (Minn. 2021)

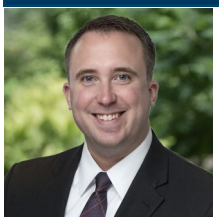
[10] *See* ABA Model Rules of Professional Conduct, Rules 1.1-1.18; Minn. Stat. § 595.02(b).

Congratulations

Congratulations to the Firm's Office Manager, Bernie Theis, for her recent graduation from Metropolitan State University with a Bachelor of Science in Human Resource Management.

Further congratulations go out to Bernie for joining the 2023-2024 Association of Legal Administrators Minnesota (ALAMN) Board of Directors as the new Administrative Director. As the Administrative Director, Bernie will be responsible for facilitating the day-to-day business operations of ALAMN. She joined ALAMN in 2018 and has since been involved with the Diversity, Equity, Inclusion & Accessibility Team, having served as a member and co-chair. She recently attended the national 2023 ALA Annual Conference in Seattle, WA. She's very excited to be a part of the Board and to start this new role.

About the Authors



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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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