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BEWARE EVIDENCE ELIMINATOR! CASE SHOULD BE DISMISSED WITH PREJUDICE AFTER PLAINTIFF USES "EVIDENCE ELIMINATOR" SOFTWARE TO CLEAN HARD DRIVES PRIOR TO INSPECTION BY DEFENDANT

[Kucala Enterprises, Ltd. v. Auto Wax Company, Inc., 2003 U.S. Dist. LEXIS 8833 (D.C. Utah May 23, 2003).]

Kucala Enterprises brought an action for patent infringement against Auto Wax Company. Plaintiff had been ordered to produce computer files or hard copies of documents. Finally, after a third order granting discovery, plaintiff's principal, Kucala, made his desktop computer available for inspection. A computer specialist was hired by defendant to inspect the computer and discovered that between midnight and 4 a.m. of the morning of the inspection, 12,212 files were deleted and overwritten using a program called "Evidence Eliminator." Defendant brought a motion for sanctions.

Evidence Eliminator is available at www.evidence-eliminator.com and claims that it can defeat EnCase and other Forensic Analysis equipment.

Kucala admitted to first attempting to clean his hard drive by removing files and then purchasing Evidence Eliminator to completely remove "irrelevant" files from his computer. He further testified that it is not part of his normal course of business to print every document and that if documents were deleted they were no longer in his possession. He also claimed that he was afraid that defendant, Auto Wax, would not honor the protective order. He based this concern on a communication he claimed to have received from a party to another litigation with Auto Wax, Mark V, regarding Auto Wax's behavior in an unrelated litigation.

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Information is discoverable if it is "reasonably calculated to lead to the discovery of admissible evidence." F.R.Civ.P. 26. "Parties in litigation have a fundamental duty to preserve relevant evidence 'over which the non-preserving entity has control and reasonably knew or could reasonably foresee was material to a potential legal action.'" Kucala at *14 citing *China Ocean Shipping (Group) Co. v. Simone Metals, Inc.* 1999 U.S. Dist. LEXIS 16264 (N.D. Ill. Sep. 30 1999).

The Magistrate Judge was not convinced that Kucala's actions were innocent or reasonably prompted by fear based on the Mark V report. First, he noted that "[a]ny reasonable person can deduce, if not from the name of the product itself, then by reading the website, that Evidence Eliminator is a product used to circumvent discovery. Especially telling is that the product claims to be able to defeat EnCase, the forensic imaging program used by Auto Wax to inspect Kucala's computer." Kucala at *18. Further, Kucala proceeded to use the software even after he was advised by his attorney not to use the software. There was also evidence presented that Kucala was in possession of some relevant information but failed to preserve it. Although he admitted that he knew the importance of discovery and preserving evidence, it appeared to the court that "Kucala was deciding for himself what he deemed relevant and discarding anything he deemed irrelevant." *Id.* at *20.

With respect to the fears based on the Mark V litigation, the Magistrate Judge did not find Kucala's paranoia to be reasonable. The court noted that "[a] reasonable person would not ignore a court order based on a 'damning statement' made by a single third party, a disgruntled litigant, no less; and if Kucala had bothered to investigate the matter before he himself proceeded to violate a court order, he would have learned that Auto Wax was not found to have violated the protective order in the Mark V Litigation." *Id.* at *22.

Based on these facts, the Magistrate Judge recommended that the case be dismissed with prejudice.