

VESTIGE CASE LAW ALERT 6/16/04

Where a company reasonably anticipates litigation when it institutes a document retention policy, and pursuant to that policy destroys documents related to subsequent litigation, the company is guilty of spoliation of evidence; documents that contain communications or work product related to the document retention policy may not be protected by attorney-client and/or work product privileges on the ground that the “crime/fraud” exception to privilege applies to spoliation of evidence.

Case: Rambus, Inc., v. Infineon Technologies AG, et. al. 220 F.R.D. 264, 2004 U.S. Dist. LEXIS 4577 (E.D. Va., March 17, 2004).

Judge: Robert E. Payne.

In this patent litigation, plaintiff Rambus identified several documents that it refused to produce in response to Infineon’s Request for Production of Documents on the ground the documents were privileged as attorney-client communications and/or work product. Infineon filed its Motion Compel arguing that these documents all related to Rambus document retention policy instituted in 1998, at a time when, according to Infineon, Rambus anticipated it would initiate patent infringement litigation against Infineon and others in the future.

The District Court initially concluded that the “crime fraud” exception to the attorney-client and work product privilege applied to materials or communications created for planning or in furtherance of spoliation. However, in order for the “crime/fraud” exception to apply to the facts of this case, Infineon was required to show (1) that Rambus was engaged in or planning a scheme of spoliation when it sought the advice of counsel or the input of the lawyers’ work product to further the scheme and (2) that the documents containing the communications or work product bear a close relationship to Rambus’ scheme to engage in spoliation

The District Court held that Infineon had satisfied the first element of the “crime/fraud” exception when Infineon presented evidence that strongly indicated that Rambus explicitly linked development of its document retention policy and the shredding of documents with preparing for patent litigation. This evidence included the following:

1. Findings of fact in prior post-trial motion for attorney’s fees that Rambus, in 1998, contemplated that it might be bringing patent infringement suits if its licensing efforts were not successful;
2. Rambus executive Allen Roberts testified that one of the reasons for the document destruction was that the documents might be discoverable in future litigation, although he also stated that the policy was just a “house-keeping thing”;

3. Conclusions from related FTC litigation that Rambus knew or should have known that, at the time Rambus chose to commence its document retention program in 1998, it knew or reasonably could anticipate that it would initiate patent infringement litigation in the future;
4. Rambus' privilege log prepared in response to Infineon's Request for Production of Documents contained entries for memoranda written in early 1998 from in-house legal counsel to Rampus executive Karp entitled: "legal strategy in anticipation of litigation", "strategic patent litigation", and "preliminary infringement study". Karp was the Rampus executive that created the Rambus document retention policy in 1998.
5. Depositions of Rambus executives and employees that the document policy was, in part, initiated because the documents were discoverable in subsequent litigation.
6. A 1999 Rambus document created by the Intellectual Property team that outlined goals including:
 - a. Initiate reverse engineering of infringing devices as required for litigation purposes;
 - b. Prepare litigation strategy against 1 of 3 manufacturers.
 - c. Organize shredding party at Rambus.
7. Entry on Rambus privilege log identifying a document, created in 1998, that contained legal advice pertaining to the legal strategy of enforcement of Rambus' patents, for which document Rambus claimed both the attorney-client and work product privilege. The court noted that "work product" is only available if the document was created in anticipation of litigation at a time when Rambus was also instituting its document retention policy.

In order to determine whether Infineon satisfied the second leg of the "crime/fraud" exception, the District Court ordered an in-camera review of the documents that Rambus had claimed to be privileged to determine whether these documents bear a close relationship to the Rambus document retention policy, which the Court labeled "Rambus' spoliation scheme".

LESSONS FOR CLIENTS AND THEIR ATTORNEYS:

Initiating a document retention policy is a fairly standard business practice. In most cases the reasons for having such a policy are mixed. In almost all cases, however, the basis of the policy includes a concern that having to produce enormous quantities of documents will sap vital human resources. As Rambus' executives testified:

I don't recall [Karp] being so much worried about documents that were harmful to Rambus in that it would reveal you know, some dastardly secret. What I do remember is that, yeah, we are pack rats and the amount of stuff that we had was enormous. And the concern was that if we had to go and grind through all that and produce it, it would just kill us. We'd get no engineering done. All our resources would be consumed by plowing through old stuff.

Rambus at page 21.

As a result of this decision, clients and attorneys will have a more difficult time creating effective document retention policies where clients are also “anticipating” litigation. It is significant to note that at the time Rambus created the document retention policy, Rambus had no reasonable anticipation of litigation with Infineon specifically. In a footnote the District Court rejected the notion that a company must reasonably anticipate litigation with a known party:

Rambus submits that, before a court can find spoliation, it must find that the alleged spoliator reasonably anticipated litigation with the specific party who later alleges the spoliation. Indeed, most of the decisional law discussing spoliation involves a situation wherein the spoliating party anticipated litigation with the very party that later accuses it of spoliation. **No case, however, expressly states that the would-be spoliator must anticipate litigation with the specific party who later brings the suit;** rather, it just stands as a matter of logic that if a company is on notice that litigation is likely to ensue, that the company will realize, at least on a broad level, who the anticipated litigation will involve (emphasis added).

Rambus at page 22.

The District Court emphasized that Rambus was preparing for a business campaign comprised of attempts to license patent technology combined with litigation where licensing failed. Under this circumstance, Rambus “reasonably anticipated” litigation in the future as part of its business policy. Creating a document retention policy at the same time, and partially linking the policy to discovery of documents in future litigation, caused the retention policy to be labeled by the Court a “spoliation scheme”. Indeed, the Court noted that “in other words, even if [Rambus] was merely instituting a valid purging program, even valid purging programs need to be put on hold when litigation is ‘reasonably foreseeable’...(citations omitted). Thus, even if Rambus did not institute its document retention policy in bad faith, if it reasonably anticipated litigation when it did so, it is guilty of spoliation”. Rambus at page 22.

Based on this case, it seems logical litigants will inquire about their respective document retention policies, the timing of their institution, and the existence of any contemporaneous or subsequent litigation. By linking contemporaneous and subsequent litigation to the time period in which a document retention policy is created, parties may be able to re-characterize a document retention program as a spoliation scheme to which no privilege attaches. Parties ought to be able to then discover privilege and work product communications and documents related to the document retention policy.