CHAPTER 90 – THE SUMMARY OF EVIDENCE, PERJURY AND DESTRUCTION

By Tim Rote

Employees desperate for a $1 million pay day can be enticed by an unscrupulous attorney to lie, cheat, steal and destroy in an effort to prevail on a claim. This blog has spent an extraordinary amount of time weighing the evidence and exposing the lies. Let's use this time to bring it all together.

In 2001 Max Zweizig joined one of my companies as the IT Director, in charge of that department. He was a highly paid contract employee. But he wasn't satisfied and in 2002 he joined Paul Bower (President) and Bret Mullins (Call Center Director) in a new venture to create a new company as owners. Naturally it was a breach of their employment agreements. But for the fact that they reached out to one of my sales staff, I may not have not have found about it. In response I went out to Delaware where Bower and Zweizig worked, took control of that company (Superior Results Marketing), got rid of Paul and demoted Zweizig. But I forgave him recognizing that our relationship would not last long.

In May 2003 I went out to visit Max, to evaluate the IT programs and staffing mandate, as well as roll out my plans for a site in the Dominican Republic. While reviewing the software, Max's computer crashed and claimed then that he had lost a bunch of reports he needed to recreate and left the meeting for a while for him to work. I went to a local office supply store and picked up a replacement hard drive. I brought that drive to him and met him later for dinner.

From that time forward Max launched a coordinated attack on the company with the company's assistant manager Chris Cox. We had several confrontations over that summer and it all came to a head as it were in September when I found out that Max and Chris had not processed and returned data file to our largest client since May. That client threatened to suspend or contract if the files were not processed correctly and sent by the end of September. A few days before the end of September Max still hadn't sent the files and demanded a raise to complete them. I did not capitulate to those demands and he threatened to quit. He did not quit and did process and transmit those files on September 30th and he was given notice of his termination on October 2, 2003.

Max has been engaged to the same attorney for about 15 years. She is an attorney but no longer practices. The two of them designed and perpetrated a scheme against the company and it's not over, now more than 13 years later. No good deed goes unpunished.

THE EVIDENCE

1. Zweizig was terminated via email and a letter sent by regular mail. The email is arb document #14. The letter is arb document#13.
2. The email was preserved in its digital form, in the outlook account from which it was sent and from the computer. Three forensic experts examined the email and confirmed that the email was sent on October 2, 2003. Williams testified in confirmation at Doc #120-14. Mark Cox testified in confirmation at Doc #120-13. Zweizig's expert McAnn testified in confirmation at Doc #120-15. William's forensic report is Doc #120-19.
3. Zweizig denied that he received the email and the letter. Doc #120- 1, page 7.
4. CEO Rote and two other witnesses testified that the letter was sent and copies of the email were filed in Zweizig's personnel file on or around October 2, 2003; so three witnesses, forensic reports and testimony all support the exit date of the email as being October 2, 2003. Doc #120-5, starting at page 10.
5. CEO Rote testified that the email was sent on October 2, 2003. That was supported by all three experts. Docs #120-5, 120-13, 120-14, 120-15, 120-19.
6. Zweizig testified that sent and received emails from his outlook account contained on the 120 gig and 60 gig hard drives. Doc # 120-1, page 158.Thus our experts went looking for the termination email on the 60 gig hard drive.
7. Zweizig's email account was not found on the 60 gig hard drive. See Doc #120-3, Doc #120-14, Doc #120-15 and Doc #120-16. All forensic experts agreed that they found no email for Zweizig on the 60 gig hard drive. In fact the outlook pst account was only set up the day before his last day.
8. Zweizig's email after May 6, 2003 was not found on the 120 gig hard drive. But he reformatted the hard drive on November 13, 2003, just before his last day. Doc #120-13,120-14, 120-15, 120-17, 120-18.
9. On October 25, 2003 Zweizig alleged he received a spreadsheet via email and sent that spreadsheet to CEO Rote. Doc #120-1, page 198 forward.
10. Zweizig never produced the email. Doc #120-1, 201.
11. Zweizig admitted to hiring an attorney to file a complaint with the ODJ. That attorney resigned soon after. Doc #120-8, page 123 (250).
12. The ODJ closed the file within a few days. Doc #120-8, page 126.
13. After given notice Zweizig was asked to produce FoxPro programs and train staff hired to do that reporting. He refused. Doc #120-8, page 178.
14. On his last day, CEO Rote flew to New Jersey to take possession of the computer. After getting back to his room determined that there was no email account and no FoxPro programs. Doc #120-1, page 165. The point of going back to get the hard drive was to ensure that the FoxPro programs were secure.

15. But the programs could not be found anywhere. The company shut down and brought in a FoxPro expert to recreate the programs. Doc #120-5, starting at page 44.
16. The expert searched but could not find the programs. Chris Cox did not assist. Doc #120-5, starting at page 44. It took him about 4 days to recreate the programs.
17. And so the case was on. Zweizig's withholding of the programs and destruction of the ones on the 120 gig hard drive resulted in the shut down and should have cut off his claim.
18. NDT files a motion for summary judgment based on the attempted extortion by Zweizig just before his termination and the fact that the termination email and letter were sent on October 2, 2003, well before his complaint. The arbitrator denied the motion. Doc #120-9.
19. Later we filed a motion for summary judgment based on the fact that the claims of over-billing, however de minimis or material, are not issues of public concern and further that the plaintiff's claims were not timely brought. Motion denied. Doc #120- 10.
20. During the discovery stage we found out that the 120 gig hard drive had not crashed as Zweizig claimed, but rather was in use by him the entire time, from May 2003 to his last day of employment. The hard drive was used to download, store and access videos. And there was a lot of activity through a file sharing site. Doc #120-17 and 120-18.
21. Zweizig did not reformat the 120 gig hard drive as he claimed. Doc #120-17 and 120-18.
22. However, when he did reformat the hard drive in November 2003 he destroyed FoxPro programs, code and data belonging to his employer. Doc #120-2.
23. And we further evaluated his suggestion that a lot of the porn and other material could have been placed on his computer by Rote using PCAnywhere. There was virtually no activity of PCAnywhere on the 60 gig or 120 gig hard drives or Rote's laptop. Doc #120-20.
24. The conclusion reached in Doc #120-20 confirms that Zweizig was doing his work from another computer or from yet another hard drive on the same computer. Thus when we asked him if he was using the Sony Vaio to send and receive emails he could have been telling the truth without revealing that the outlook account was on another hard drive. Doc #120-1, page 167.
25. Late in the arbitration Rote determined that the arbitrator worked together at Miller Nash.
26. Upon raising that issue in the post hearing memo, the arbitrator recused himself. Opposing counsel objected. The arbitration Service of Portland confirmed he could continue.
27. In spite of 10 witnesses and hundreds of pages of forensics in our favor supporting both his termination before the complaint and the destruction of evidence, he won.
28. Naturally the arbitrator was antagonistic in his Opinion.
29. Just a few months ago we found out the arbitrator actually referred the case to Zweizig.

The Destruction of Evidence

1. As is clear by the references above, Zweizig destroyed or withheld key evidence.
2. The most important was the FoxPro programs. Hiding those, or creating the active programs on a separate hard drive or computer was obviously destructive and results in the shut down for about 10 days, during which time 150 employees were laid off. No programs were found on the 60 gig hard drive, dialer, IT server, or back up tapes.
3. Thereafter keeping his email from May 2003 to his last day of employment in November 2003 on a separate hard drive preserved his lie but was obvious destruction. His employer owned those emails. He turned over only those he wanted to from a source never identified.
4. While it's true that Zweizig did not delete the emails from the 60 gig hard drive, he did have them elsewhere. So his refusal to turn over that other hard drive and destroy his personal computers was demonstrative.
5. Zweizig never turned over the email by which he claimed to have received the spreadsheet.
6. No one on our side admitted to making it or having it. The spreadsheet was never corroborated. We tore it apart. Some of it was accurate. Some of it was fabricated. None of it reflected the amounts we invoiced.
7. Telling us that the 120 gig hard drive had failed obviously gave him an opportunity to convert that hard drive to his personal use and mislead us at a time when we might have been able to recover FoxPro programs.
8. Instead he reformatted the 120 gig hard drive destroying hundreds of FoxPro programs owned by his employer. He destroyed those files just before his last day.
9. We had a few of our own problems. We should have made forensic images of 5 or more hard drives when his claims first appeared, say within 3 months of his final day but did not. We were not advised by counsel to do so. And some of our equipment costs $200,000 and we are not permitted by contract to release a forensic image. We did keep the back-up tapes without modification. We did take forensic images of 5 hard drives a year later. What we did not do is destroy computers, destroy hard drives, destroy emails. They remained there for the review and no evidence was tarnished.

The Perjury

1. The **first** act of perjury was, as just noted, that he now admits but first *denied that he **was in fact the person who downloaded the porn**, movies and music to the 120 gig hard* drive, which he denied in the arbitration. Doc #120- 1, starting at page 162. The forensic report confirmed that the 120 gig hard drive was in continuous use. Doc # 116-5.
2. The **second** act of perjury was ***testimony that the 120 gig hard drive had crashed*** in May 2003. Doc #120- 1, page 159 and beyond several times. The porn was accessed multiple times and well after the date in May in which the plaintiff claimed the hard drive had crashed. Doc # 116-5.
3. The **third** act of perjury was his testimony that *the **plaintiff reformatted the 120 gig hard drive in May 2003*** and placed the hard drive in his fireproof safe, where it remained for six months. Doc #120- 1, page 165. Plaintiff alleged that he reformatted the 120 gig hard drive because it had already crashed. In fact it had not been reformatted until the last day of his employment.Doc # 116-5.
4. The **fourth** act of perjury was the plaintiff's **denial that he had not destroyed** *FoxPro programs and code*. Plaintiff confirmed that there were FoxPro programs on the 120 gig hard drive. Doc #120- 1, page 174. In fact there was hundreds of FoxPro programming as well as historical data records, destroyed by the plaintiff when he chose to reformat the 120 gig hard drive before his last day. The forensic report on the FoxPro programs destroyed is Doc #120- 2.
5. The **fifth** act of perjury was that his ***outlook email account*** *was deposited exclusively on the 120 gig hard drive* and that he had no other source of his emails up to the time the hard drive allegedly crashed in May 2003.Doc #120- 1, page 159. Emails from the time period leading up to the time of the alleged crash were provided by the plaintiff from a source that had not been reformatted, such as his personal computer or other source which he destroyed while under a litigation hold. Plaintiff claimed that he may have used

a ribbon attachment to remove his pst files. Doc #120- 1, page 161. In fact the use of the ribbon was unnecessary since the hard drive was in continuous use. Doc # 116-5.

6. The **sixth** act of perjury was that the ***FoxPro programs and code for generating report and data were on the IT computer, the 60*** *gig hard drive*, the EIS server in Eugene or Iowa. Doc #120- 1, page 176. None of it was found. Doc #120- 5, starting at page 44. In fact the FoxPro program itself was not placed on the 60 gig hard drive until November 13,2003. Chris Cox joined that fraud by alleging the programs were there, but not using them or accessing for the benefit of his employer. Instead he just sat back and enjoyed the destroyed. Doc #120- 15. I'm not sure what makes these IT guys so indifferent to the needs of others, but as a result of their conspiracy some 150 people were laid off for a week.
7. The **seventh** act of perjury was that ***the 60 gig hard drive contained the emails*** from May 2003 through Zweizig's last day of employment. Doc #120- 1, page 167. But the emails were not found on that 60 gig hard drive. No remnants. What was found was that the outlook pst account was not even created until November 13, 2003, at 12:27 am. He was up late.
8. The **eighth** act of perjury was that he received an email with a spreadsheet attached that showed over-billing. *He did not acquire a spreadsheet via an email.* This evidence if provide would have been compelling, but he did not provide it. He admits to not turning the email over in discovery. Doc #120- 1, page 201.
9. The **ninth** act of perjury was that he examined the spreadsheet and did some due diligence to determine its voracity. He claimed he called Anna, an employee in Eugene. *He did not call Anna*. Doc #120- 7, Page 23 (44). Anna denied that. Doc #120- 15, page 154.

10. The **tenth** act of perjury was that Zweizig *did not engage in setting up a company with former president, called Superior Results Marketing*. The Delaware registry documents where the LLC was registered shows he was a 49% owner. Doc #120- 1, page 121.
11. The **eleventh** act of perjury was that the FoxPro program code developed by Zweizig to generate *client reports could not be used by other IT* staff. Doc #120- 1, page 184. In fact Jamie Gedye created programs that were used for years. And Chris Cox claimed that he had produced reports from these very programs. Doc #120- 15, page 163. He also claimed that during the shutdown he was never asked to find the programs. Page 162.
12. The **twelfth** act of perjury by Zweizig was that he *received the spreadsheet evidence via email*. Recall he would not for 5 years identify the person who sent the email nor provide the email. He did eventually identify who he claimed sent him the email. Doc #120- 7, page 59 (117). There was no email. When you look at the properties for the spreadsheet you see that it was created by an IT person named Gunawan (IT staff) and saved last by bmullins (Manager). However, that does not mean that either of these two sent an email with this attached. In fact it means that neither did so. Had Zweizig received he spreadsheet via email the Meta data or detailed properties section of the spreadsheet would have listed MZ as the person who last saved it. It did not. Therefore, the attachment to the email sent to Rote was from another computer, presumably Bret Mullins's.
13. The **thirteenth** act of perjury by Zweizig was that *he accessed the IT network on October 23rd to do some specific body of work*. We had an email in evidence in which Zweizig requested the password from Chris Cox that very night. Doc #120- 7, page 69. Naturally he does not remember. So it is clear that he accessed the network well after Mullins had gone home and grabbed a spreadsheet used for admin purposes, the contents of which he created to support his claim. He claimed he did not know who created the content. Doc #120- 7 page 59 (117). The support for this claim is that the spreadsheet evidence was not

saved to a Zweizig computer. It came directly from another computer. Had it been saved to one of Zweizig's computer it would have reflected that in the metadata. It did not.

14. The **fourteenth** act of perjury came from the Zweizig team, the forensic expert Justin McAnn. During the course of Rote's examination he testified that he moved the Zweizig termination email from a sent folder to a subdirectory in his outlook account. Rote's forensic team identified that as an event that could have changed the modified date of the email. McAnn also testified that moving it to a subdirectory would change the modification date. Doc #120- 15, page 69(72). Marshall then lead him down a path of confirming that something else may have happened to change the email modification date, *claiming that there were two emails*. Pages 70-71 (74). He seems genuinely confused about where Marshall is attempting to lead him. His report mentions nothing of two emails See Doc #125-4. His linkedin account is referenced as Exhibit 23. His personal websites is identified as "awesomecorgis.com", but when clicked went nowhere. His business website is identified as "bytemeinc.com" and again the link did not work. These sites were not found. McAnn cannot be found.
15. The **fifteenth** act of perjury came from the Zweizig team, the forensic expert Justin McAnn, when he testified that a copy of *a forensic image was deteriorated* and that each forensic image is not an exact copy. See Doc #120- 15, page 137 (145). That is an absolute lie. Mark Cox, one of our forensic experts refuted this lie in his testimony declaration as provided in Exhibit 24.
16. The **sixteenth** act of perjury came from the Zweizig team, the forensic expert Justin McAnn, when he testified that a *log file would have been created* if the time and date function on Rote's computer had been changed. And he needed to see the log file right away or else it would be over written. See Doc #120- 15, page 57 (60). Another lie. Mark Cox testified via declaration that there are no logs for that event. Cox testified that the date and time components are identified in the registry file, that he was in fact hired to

refute the email date evidence and was unable to refute it. The email dated October 2, 2003 terminating Zweizig was not refuted. Doc #125-4.

17. The **seventeenth** act of perjury by Zweizig was an act of omission. The only way that Zweizig could have access to emails destroyed in the reformatting of the 120 gig hard drive and not maintaining his email from May 2003 through his last day of employment on a personal computer, was to have a third hard drive. So this is what he did. He copied his emails from the 120 gig hard drive to his undisclosed third hard drive. He maintained his email from May 2003 through his last day in November on that same third drive. He can be truthful about it not being on his personal computer, because he maintained it on the business computer and simply removed it before his last day. See Doc #125-3, Zweizig's declaration. He confirmed in testimony Doc #120- 1, page 159. He would have been telling the truth about the Sony Vaio being used, while not explaining that he had a third hard drive. Doc #120- 1, page 169. Whether that was my attorney's mistake in not crossing Zweizig well and ferreting out the existence of the third drive, I'll leave the readers to decide. That does not mitigate the fact the Zweizig knew he was lying. The emails were not on the 60 gig hard drive as he had claimed. Doc #120- 6, page 260 (519).

For almost every act of perjury by the Zweizig team there is an act by attorney Marshall to cover it up, knowing that the lie is material, that it compromises her client's case in its entirety. But there is also an endorsement of the lie. Consider that when Zweizig testified that he sent and received email from his email account on the 60 gig hard drive, he knew and Marshall knew that their own expert, Justin McAnn, was going to testify that there was no email or email account for Zweizig on that hard drive. In fact an Outlook email was only created the day before Zweizig returned the 60 gig hard drive. Yet they attempted to perpetrate that lie.

When Zweizig testified that the FoxPro client report code was on the 60 gig hard drive, they knew McAnn was going to testify that the only FoxPro programs found (active or deleted)

were created after Zweizig returned the 60 gig hard drive. In fact, the FoxPro program was not even loaded to that hard drive until the day before it was returned. Why would Marshall want to endorse this lie?

When Zweizig testified that the 120 gig hard drive had failed and he quickly reformatted the hard drive and placed it in his fire proof safe, he and Marshall knew that McAnn was going to testify that hard drive had been actively used during that time period and only reformatted the day before it was returned by Zweizig…and that reformatting destroyed more than 1900 FoxPro files, email, etc. Why then perpetrate this lie on the tribunal of one?

And so Ms. Marshall I would remind you of the following:

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false;

(4) conceal or fail to disclose to a tribunal that which the lawyer is required by law to reveal; or

(5) engage in other illegal conduct or conduct contrary to these Rules.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, unless compliance requires disclosure of information otherwise protected by Rule 1.6.

> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Believe it or not Zweizig was seeking more than $1 million in damages. Marshall's motivations were clear.

Mr. Crow was at that time of the hearing a partner in the law firm of Schwabe Williamson, one of our city's largest law firms. Mr. Crow is the past president of the Oregon State Bar Association. Mr. Crow is the past Chairman (2012) of the Oregon Disciplinary Board, the section of the Oregon State Bar tasked with discipline including disbarment. In 2010 and 2009 Mr. Crow was the Region 5 Chairman of the Oregon Disciplinary Board. He is not an evil man. While I struggle with evidence of absolute acuity at the time of the hearing there was also evidence of confusion. Not disclosing his referral of Marshall to Zweizig, speaks to that confusion if you believe that he would not have in a million years done so as an arbitrator under normal circumstance; so I am reticent to broadly paint him with the responsibility of this tragedy. The BAR Association needs a procedure to identify and remove those dangerous to the integrity of the process.

In the post hearing memorandum Rote raised the issue that the arbitrator had not disclosed the extent of his former relationship with opposing counsel Marshall. Neither had Marshall disclosed this prior relationship. Arbitrator Crow resigned. Marshall demanded that the Arbitration Service of Portland decide, which they did and in favor of allowing arbitrator Crow to stay in the case. Two months ago Rote found out that the arbitrator had actually referred Linda Marshall to Zweizig. Linda Marshall did not reveal that even when the arbitrator first resigned.

Mr. Zweizig brought a claim of retaliation based on a spreadsheet he claimed to receive via an email from an unnamed employee. The spreadsheet showed about $400 in adjustment in a month in which his employer billed $400,000. He refused to provide the email. He refused to identify who sent the email. He withdrew his conclusion that this $400 was criminal, but adding that discounting services for any reason is inappropriate because it makes you more competitive.

He could not corroborate the spreadsheet and no one testified on his behalf. He claimed he was not fired before he complained about the spreadsheet, but the experts refuted that noting he had been fired weeks before. He destroyed and withheld software programming code, also confirmed by experts. He shut down the company in retaliation for his termination. He destroyed his email account and material evidence. He converted assets owned by the company to his personal use. He committed multiple acts of perjury. His acts of destruction caused a shutdown resulting in 150 people being laid off for a week, just before thanksgiving.

The goal of my blog is to expose judicial corruption when we find it. And that has been done. In this case, the arbitrator may not have had the cognitive skills to discern the truth from the lies. He relied in faith on a former partner who led him astray. No one intervened to protect the law, to protect the arbitrator or to protect my company.

REFERENCES

3:14-CV-00406

3:15-CV-02401: Doc #s 116, 120, 125.

Exhibits: https://wordpress.com/media/thefirstdutyportland.wordpress.com