Coates' Canons Blog: Local Governments and their “In House” Counsel Not Immune from E-Discovery Sanctions

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There is an old adage among attorneys that “bad facts make bad law.” Along those lines, there may be a tendency to dismiss a recent e-discovery opinion as a case where “bizarre facts make bad e-discovery sanctions.” However, local government attorneys, particularly “in-house” counsel, and the governments they represent, ignore the lessons of ***Swofford v. Eslinger*****, No. 6:08-cv-00066-Orl-35DAB (M.D. Fla. Sept. 28, 2009),** at their peril.

Like it or not, we are well entrenched in the digital age. Computers are constant fixtures in our daily lives, and with the migration from desktops to mobile platforms, the ability to “stay connected” is virtually limitless. And the natural result of the ability to produce data anywhere, anytime is an exponential proliferation of actual data produced. The benefits to organizations (including local governments) of the ability to generate and store all of this data are legion. But, so are the potential burdens. Local governments and other public sector entities, in particular, are subject to fairly detailed statutory requirements governing the retention and dissemination of certain public information—compliance with which is made exponentially more complicated by the volume and dispersion of electronic information. So too is compliance with discovery obligations if a unit finds itself involved in civil litigation. And, all too often, local units ignore these obligations, and the complications presented by electronic data, until it is too late. As ***Swofford v. Eslinger***, illustrates, however, ignorance of the relevant obligations is no excuse. (Nor, by the way, is a lack of resources.) In fact, failure to recognize, and comply with, data preservation and production requirements in civil litigation increasingly is likely to lead to (potentially costly) sanctions against a local unit and its attorney.

What is Discovery?

As a bit of background, discovery is a pretrial phase in civil litigation in which each party to the litigation may compel the production of, among other things, documents, electronically stored information, and other evidence that is potentially relevant to the litigation from the other parties (and, at times, from non-parties). Furthermore, once a potential party to a civil suit deems that the litigation is “reasonably foreseeable” (which may occur long before a suit actually is filed) the potential party generally has a duty to preserve all information, including electronically stored information, that might be relevant to the litigation.

Swofford v. Eslinger

Facts

That brings us to ***Swofford v. Eslinger***.The facts of the case are, indeed, bizarre. In April 2006, Robert Swofford, a recent multi-million dollar Florida state lottery winner, was shot in his backyard seven times by two sheriff’s deputies in pursuit of burglary suspects. Mr. Swofford subsequently sued the sheriff (in his official capacity) and the two deputies, claiming, among other things, use of excessive force and unlawful entry onto his property.

In August 2006, Mr. Swofford's attorney sent the first of two letters requesting that the sheriff's office preserve all evidence within its possession related to the shooting. That letter did not specifically reference electronic information. In February 2007, Mr. Swofford's attorney sent a second preservation letter and a notice of claim as required by Florida statute. The second letter listed specific types of evidence, including firearms, clips and ammunition, training records, and electronic evidence. (Also during this time period, Mr. Swofford's attorney filed a number of public records requests with the sheriff's office requesting certain information related to the shooting investigation, including e-mail communications. All of these requests went unanswered.)

So, how did the sheriff's office respond to the preservation requests? Did it, in fact, preserve all relevant evidence? Not exactly. Apparently, upon receipt of the letters from Mr. Swofford's attorney, a paralegal working for the sheriff's office's general counsel (in-house attorney) reviewed the letters and forwarded copies to six senior employees in the department, including the sheriff, but not including the two deputies involved in the shooting incident. No further direction was given to anyone in the sheriff's office. In particular, the general counsel did not issue any directives or "litigation hold" memos to suspend all orders, practices, or policies that could lead to the destruction of evidence relevant to the case. Nor did the general counsel follow up with the employees and officials to ensure preservation of the appropriate evidence. In what can only be described as an "ignorance is bliss" defense, the general counsel subsequently testified that he was not familiar with the Rules of Civil Procedure governing a litigant's discovery obligations.

To make matters worse, the employees who received the letters with the preservation requests also made no effort to sequester or preserve evidence. (Nor did they inform the deputies involved in the shooting of the preservation requests.) And, in fact, there was sufficient evidence to infer the opposite—that information was deleted or destroyed in light of the preservation demand letters. At the very least, relevant electronic data and other evidence clearly was lost. Both deputies admitted that they routinely deleted their e-mails during the relevant time period, and a laptop issued to one defendant-deputy actually was scrubbed and recycled. It did not end there. Even though there was an on-going internal investigation related to the shooting, not to mention a duty to preserve evidence for the civil suit, the deputies dismembered their guns, recycled their radios, and destroyed their uniforms.

Discovery Sanctions

Upon a motion for discovery sanctions for failure to preserve and produce potentially relevant evidence, the court found the defendant's behavior "inexplicable and inexcusable," and consequently, imposed severe sanctions. But who actually was sanctioned? The answer is all of the defendants and, somewhat surprisingly because he was not the attorney of record or a named party in the case, the general counsel. Significantly, the court rejected the deputies' argument that no sanctions should be imposed against them because they did not receive copies of the preservation letters. The court held that the general counsel was acting as counsel for all defendants at the time he received copies of the preservation letters and that the deputies therefore "received their preservation letters…through their counsel . . . ." And, with respect to the general counsel, the court held, in relevant part, that it is insufficient for in-house counsel to simply notify employees of preservation notices, but rather counsel "must take affirmative steps to monitor compliance" to ensure preservation. In the words of the court:

> Additionally, 28 U.S.C. § 1927 permits the Court to sanction "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably or vexatiously." As when the court sanctions parties pursuant to its inherent authority, a showing of "bad faith" is required to impose sanctions under § 1927. *Schwartz v. Millon Air, Inc.,* 341 F.3d 1220, 1225 (11th Cir. 2003). "While an attorney's conduct must be tantamount to bad faith, 'for the purposes of § 1927, bad faith turns not on the attorney's subjective intent, but on the attorney's objective conduct.'" *Hudson v. International Computer Negotiations, Inc.,* 499 F.3d 1252, 1262 (11th Cir. 2007)(citation omitted). The Court finds appropriate the imposition of fees and costs against [the general counsel] in light of his complete failure to fulfill his duty, both in his official capacity as General Counsel for the [sheriff's office] and as initial counsel for all Defendants in this case, to take affirmative steps to monitor compliance so that all relevant, discoverable information is identified, retained and produced. *In re: Seroqual Products Liability Litigation,* 244 F.R.D. 650, 663 (M.D. Fla. 2007)(*citing Zubulake,* 229 F.R.D. at 432). Therefore, the award of fees and costs will be imposed jointly and severally against each of the three Defendants and [the General Counsel], each in his official capacity.

As I stated at the outset of this post, some may argue that this case is merely an egregious outlier—with little relevance to most local government officials, employees, and attorneys, who presumably act in good faith (and are aware of all relevant legal obligations). However, the increasing number of cases involving the imposition of discovery sanctions (against both private and public sector entities) suggests that the underlying result in this case—the failure to preserve relevant evidence to a civil dispute—is not unique. Local counsel are well advised to review their data management processes and systems, and work with appropriate information technology and management personnel, to determine proper data capture and preservation practices. And, if, and when, litigation becomes "reasonably foreseeable," local counsel must ensure that all potentially relevant information is, in fact, preserved.

For more information on local governments' discovery obligations, the intersection between these obligations and public records requirements, and potential tools to aid in containing the costs and burdens of litigating in the digital age, see **Electronic Discovery in North Carolina: A Guide for Public Sector Entities to the Rules and Tools for Litigating in the Digital Age**.

Links

- www.ediscoverylaw.com/uploads/file/swofford-v-eslinger-sheriff-spoil-sanctions.pdf
- www.sog.unc.edu/pubs/electronicversions/pdfs/ediscovery09.pdf