

ALERT

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IN HOUSE COUNSEL SANCTIONED FOR FAILURE TO ISSUE LITIGATION HOLD

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In *Swofford v. Eslinger*, ___ F. Supp. 2d ___, 2009 WL 3818593 (M.D. Fla. Sept. 28, 2009), the United States District Court for the Middle District of Florida imposed severe sanctions for failure to preserve electronically stored information.

On April 20, 2006, two deputies for the Seminole County Sheriff's Office ("SCSO") shot plaintiff Robert Swofford seven times. The deputies claimed to be in pursuit of two burglary suspects. Plaintiff Swofford brought suit against the sheriff in his official capacity, and against the deputies individually.

On August 24, 2006, the Plaintiff's counsel sent a letter to the SCSO requesting that all evidence in the SCSO's possession related to the shooting be maintained in its original order. The Plaintiff's counsel sent a second letter to the SCSO, dated February 6, 2007, also requesting that all evidence related to the shooting be preserved and listing specific types of evidence, including firearms, clips and ammunition, and training records. In addition to the preservation letters, on or about February 26, 2007, the Plaintiff's counsel served on the SCSO a notice letter pursuant to Florida statute § 768.28, informing the Sheriff that a claim would be filed against the Sheriff and his deputies.

Despite acknowledgement by the relevant defendants that they received the preservation letters, evidence was nonetheless destroyed. Specifically, relevant electronically stored information on a laptop used by one of the deputies after the shooting was fully erased. Additionally, lost radios and emails connected to the deputies involved in the shooting were permanently lost. No litigation holds to suspend orders, practices, or policies that could lead to the destruction of evidence relevant to this case were ever issued by anyone in the SCSO. None of the six senior employees of the SCSO who received copies of the preservation letters issued any directive to employees to preserve any of the evidence mentioned in the preservation letters.

In a June 2009 evidentiary hearing, the court set out the legal standard for imposing sanctions for spoliation. The court noted

that bad faith must be shown prior to imposing sanctions. Additionally, the court identified a series of factors relevant to the severity of sanctions imposed for failure to preserve evidence: the willfulness of the destroying party, the degree of prejudice sustained, and what is necessary to cure the prejudice. In the case at hand, the court noted: "it is a case of knowing and willful disregard for the clear obligation to preserve evidence that was solely within the possession and control of the Defendants and whose contents have no other source than that which has now been spoliated. Thus, the bad faith is clear, and the prejudice to the Plaintiffs is substantial."

In addressing the imposition of sanctions, the court made the following findings:

- 1) On the fully erased laptop, the court found that an adverse inference was the appropriate sanction for failure to preserve electronically stored information on the laptop. Specifically, the jury was instructed that it could infer that the deputy's laptop computer contained information detrimental to the SCSO's and the deputy's defense of the case;
- 2) The court found that the SCSO did not direct any employees to preserve emails. Additionally, the court found that the SCSO had a computer policy that allowed individual officers to permanently delete their emails. The court concluded that a litigation hold should have been issued pursuant to the preservation letters and that an adverse inference should be imposed against all defendants for the destruction of emails during the period when officers were able to delete emails. The jury was instructed that it could infer that the deleted emails contained information detrimental to all defendants in the case;
- 3) As to the lost radios, the court imposed a presumption in favor of the Plaintiff that the radios and their missing

accessories would yield evidence adverse to defendants' case had they been produced.

The court also found that the General Counsel for the SCSO represented all of the defendants in the case, and that he had violated his duties under the Federal Rules of Civil Procedure. The court noted that the General Counsel "professed not to have ever read the Federal Rules of Civil Procedure to ascertain on even a rudimentary level what his and his client's obligations were in this regard..." The court imposed attorneys' fees against all of the defendants in the case. In recognizing the General

Counsel's role in failing to preserve evidence, the court made him jointly and severally liable for all costs and fees.

Given that the defendants failed to preserve evidence, the United States District Court for the Middle District of Florida granted the Plaintiff's motion for spoliation sanctions.

To discuss any questions you may have regarding the decision discussed in this Alert, or how it may apply to your particular circumstances, please contact Tom Jones (tjones@cozen.com) or Dan Ward (dward@cozen.com)