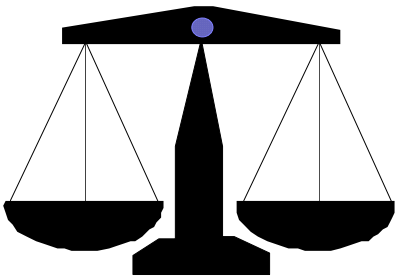

GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

The Nightmare

It is the litigant's and lawyer's worse nightmare. They are called to a hearing before an angry and exasperated federal court judge, who strongly believes that the litigant, through his lawyer, has violated both his obligations under the Federal Rules of Civil Procedure and the judge's specific orders to divulge information pertinent to the lawsuit.

The judge cuts off the lawyer's attempt to explain his client's position that the information is privileged, and therefore needs not be produced. The judge thunders:

> I kept telling you to produce stuff. You ducked. You wove. You did everything to keep from producing them. … Now what the hell do you not understand? You must produce them. Jesus Christ, I don't want any more ducking and weaving from you …. Now, tell me why else you don't think I ought to dismiss this case …. You better tell me. I'm about ready to throw this thing out. …

After a further, futile attempt by the lawyer to explain, the judge again interrupts:

> That's it. I'm done. I am granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. … This case is gone. I am dismissing it. What a disgrace to the legal system…. We're done. We are done, done, done. ….

This nightmare became reality in *Sentis Group, Inc. v. Shell Oil Co.,* a case brought by a multi-site operator, who alleged that Shell had fraudulently induced him to enter into a supply arrangement, and then had systematically miscalculated the expense payments that it was obligated to make to the operator. The operator claimed over twenty-eight million dollars in damages.

Soon the litigation devolved from a dispute on the merits to a continuing squabble about whether the plaintiff had satisfied his discovery obligations.

Over a period of months, Shell submitted a series of motions to the court complaining about the plaintiff's alleged failures to provide discovery, and successfully obtained orders compelling production from the judge.

These discovery disputes culminated in the hearing described above, and in the trial court's dismissal of the lawsuit with prejudice for the plaintiff's failure to comply with his discovery obligations.

On appeal, the Eighth Circuit of Appeals ruled in a 2-to-1 decision to reverse the trial court's decision and to reassign the case for further consideration by a different judge. *Sentis Group, Inc. v. Shell Oil Co.,* 559 F.3rd 888 (8th Cir. 2009).

The majority opinion condemned Shell's litigation strategy, observing that its "goal shifted from conducting effective discovery to fanning the flames of the court's frustration in building a case for sanctions."

But the majority's disapproval spread to both parties. It observed that "neither party behaved in a manner consistent with the spirit of cooperation, openness, and candor owed to fellow litigants and the court and called for in modern discovery."

The dissenting judge would have affirmed the trial court's decision to dismiss the lawsuit altogether. Thus, of the four judges who considered the actions of the parties and their counsel, two believed that dismissal was warranted and two remained unconvinced. It can't get much closer than that.

This case demonstrates the pitfalls that may arise in litigation when discovery rules come into play. The most meritorious claim may be lost when discovery sanctions are applied.

It is absolutely essential that parties fully comply with all of their obligations under the applicable rules of procedure, federal or state, that require production of all materials that may lead to the discovery of pertinent evidence.

The danger that discovery sanctions may be applied is particularly great where the claimant faces off against a sophisticated opponent, such as major oil company, whose strategy often is to attempt to divert attention away from the underlying merits of the dispute by emphasizing the claimant's supposed discovery lapses.

With the advent of electronically stored information -- email, databases, and the like -- complying with discovery requests has become more arduous and expensive. Nevertheless, full disclosure remains the rule and violations may be severely punished.

Simply put, if a party is not prepared to make full production of computer-related and other materials, he or she should not litigate. Otherwise, a nightmare may ensue.

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