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Since When do Attorneys Have to Pay the Opposing Counsel Fees?!

Attorneys can be Held Responsible for Opposing Legal Fees if Discovery Rules are Neglected

This may be a question that has never crossed your mind. If so, then good for you. It means you've likely never been faced with sanctions. However, just because you haven't, doesn't mean you shouldn't be aware of the possibility.

What happens when your client is served discovery requests that require review of a large number of documents prior to production to the other side, yet, your client refuses to be involved in the review? What if not only does your client refuse to engage in the review, but also refuses to engage in any negotiations aimed at making the review more manageable? Quite clearly, these actions likely won't bode well for your client. Even more unfortunately for you, as this client's attorney, you yourself could land in hot water with the court, even resulting in you being personally responsible for a portion of opposing counsel's fees.

As we all know, some jurisdictions are more lenient when it comes to discovery rules while others – not so much. To that extent, it is crucial to be familiar with the discovery rules for the jurisdiction you're in. Moreover, the growing importance of becoming aware of the potential ramifications of not complying with those discovery rules cannot be understated.

In a recent case out of Second District Court of Appeals of Ohio, an attorney learned the hard way what happens when you let the client run the show.[1] As attorneys, our duty is obviously to be zealous advocates for our clients and to provide them with advice and guidance related to their case. However, we need to recognize that

during the course of our representation, it becomes our responsibility to ensure that the client is doing what the court has ordered.

This particular discovery and sanctions issue arose out of a civil action where Plaintiff alleged that Defendant engaged in tortious interference with business relationships, defamation, invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. During the discovery phase, which began in December 2017, the Defense served Plaintiff with several requests for document production. In Plaintiff's interrogatory responses, Plaintiff identified 68 witnesses as having information related to his claims. Defense counsel proposed that Plaintiff provide his multiple email accounts and their passwords to the Defense's expert, who would then run searches for the 68 witness names. The Court approved of the plan; however, the Plaintiff did not, arguing that this approach did not account for the protection of privileged information.

On appeal, the case was remanded and the parties came to an agreement regarding production wherein the first search the expert would conduct would be the names of privileged individuals. The results of that search would go to Plaintiff counsel to review and produce a privilege log related to those documents. The remainder of the non-privileged emails that hit on the 68 witness names would then be produced. Defense counsel provided a list of potential search terms to Plaintiff counsel, who had no objections or modifications to the list. Herein appears to be the end of Plaintiff's cooperation in the discovery process.

The search for privileged names returned roughly 3,200 emails. Plaintiff's counsel identified roughly 2,700 of them as actually being privileged and produced a privilege log, though woefully insufficient. The second search, for the 68 witness names, returned roughly 50,000 emails. Following the second search, Defense counsel requested that Plaintiff modify his discovery responses. This would assist in modifying the search term list in an attempt to cull out potentially non-responsive results to make the potentially responsive population easier to manage. Defense counsel didn't hear anything from Plaintiff counsel for two weeks, at which point the Plaintiff refused to modify the discovery responses. Plaintiff did suggest that Defense counsel somehow modify the search term list to be able to discern between "material" and "relevant" discoverable information, yet provided no suggestion on how this might be accomplished. Plaintiff counsel also informed Defense counsel

that Plaintiff blatantly refused to review any emails prior to 2013, arguing that there is no way they could be relevant. Defense counsel continued attempting to negotiate with Plaintiff to methodically deal with the large population of emails; however, Plaintiff counsel never responded to Defense counsel's suggestions.

After roughly 15 months, the Defense filed a motion for sanctions, arguing that Plaintiff (1) refused to provide a sufficient privilege log, (2) refused to review or provide any emails from pre-2013, (3) refused to review or provide any emails related to the second search, and (4) failed to respond or negotiate regarding any suggestions made by the Defendant to move forward in the discovery phase. At the sanctions hearing, Plaintiff counsel wasn't in any position to help himself or his client. Plaintiff admitted that he didn't review a single email out of the 50,000 that resulted from the search, saying that he glanced at the list but found it overwhelming, repeatedly stating that the expert never actually ran the search terms. In response to being asked about the pre-2013 emails, Plaintiff said, "I did not even [expletive] know the defendant during that time and it wasn't relevant to this particular action." The Defense claimed they were relevant for two reasons – first to prove that Plaintiff routinely engaged in vexatious litigation, and second to prove that Plaintiff had been engaging with the witnesses as early as 2010 due to his involvement with the Defendant's church business.

Eventually, Judge Hall granted the sanctions motion, finding Plaintiff in contempt for failing to comply with the December 2018 agreed discovery order. A few months later, a hearing was held on the matter of attorneys' fees, of which the court ordered Plaintiff and Plaintiff counsel, jointly and severally, to pay Defense counsel's attorney fees, totaling $11,835.00.

In its analysis, the Court routinely returned to the fact that Plaintiff not only failed to review any of the documents, but that he blatantly refused to do so. The Court noted that the discovery order to which the parties had agreed did not give Plaintiff the option to choose to review the emails but rather the *duty* to do so. Plaintiff alleged more than once that the list of documents to review was overwhelming; however, Plaintiff refused to engage in any negotiations with the Defense regarding potential modifications to make the population more manageable.

In Ohio, the civil rules allow for an attorney to be sanctioned for failing to comply with discovery orders per Civ. R. 37(B)(3). The Court, in granting sanctions against Plaintiff counsel, argued that Plaintiff counsel continued to repeat baseless allegations about Defense counsel's motives and that it was "especially egregious" for Plaintiff counsel to continually blame the Defendant for Plaintiff's negligent conduct regarding discovery.

This case, while unfortunate for Plaintiff and Plaintiff counsel, should serve as a reminder to attorneys of the need to be genuine in their efforts regarding discovery. It should go without saying that, due to attorney ethics and candor requirements, attorneys are responsible for following orders issued by the court and that failure to do so could result in the misbehaving attorney being found personally responsible for a portion of opposing counsel's fees.

Moral of the Story

Not only is it important to understand what is required with regard to jurisdictional discovery rules, but also to understand what could happen if the rules aren't followed.

This blog post was drafted by Deena Duffy, an attorney in the Spencer Fane Minneapolis, MN office. For more information, visit www.spencerfane.com.

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[1] *Barrow v. Living Word Dayton*, 2021 WL 222930 (Ohio Ct. App. 2021).