

Federal court finds TennCare officials failed to preserve evidence; court contemplates sanctions.

In 2004, Governor Bredesen expressed frustration with federal court agreements that he had negotiated the preceding year with the Tennessee Justice Center. The public interest law firm represented TennCare patients in several lawsuits involving different aspects of the troubled program's management. The Governor declared that he was hiring four "first class, world class" law firms from Washington, as well as the Nashville firm of Neal & Harwell, to take over those cases for the state and get the agreements set aside. The Governor and lawmakers declared that the pricey out-of-state lawyers were well worth the expense. The state made the Washington firm of Cooper & Kirk lead counsel in the cases, with orders to overturn the state's prior agreements.

Cooper & Kirk bills itself as "one of the Nation's premier litigation firms", and the firm's website touts its expertise in managing electronic discovery in complex litigation. The firm also promotes its aggressive approach to litigation, which is expressed in the motto on the firm's flag: Vincere aut Mori ("Victory or Death"). The firm's senior partner, Charles J. Cooper, is a power lawyer with friends in the White House, Congress and on the Supreme Court. An officer of the Republican National Lawyer's Association and former official of the Reagan Justice Department, Cooper is a member of the Committee on Rules of Practice and Procedure of the Judicial Conference, that proposed last year's electronic discovery amendments to the Federal Rules of Civil Procedure.

In 2005, the state was partially successful in getting relief from consent decrees in two of the TennCare cases, and the Governor declared victory. The Bredesen Administration proceeded to dismantle TennCare in all but name, cutting off 170,000 adults and cutting benefits for those who remained on the program. The Governor insisted that children would not feel the effects of the cuts.

The state's lawyers continued to push, however, to get out from under orders in a federal case known as in *John B. v. Goetz*, No. 98-168 (M.D. Tenn.). The plaintiff class in *John B.* is comprised of all 640,000 children enrolled in TennCare. The *John B.* consent decree requires TennCare to meet federal quality of care standards for children. Following a lengthy trial in 2001, the court found that the state had never complied with the federal law. In 2003, the Bredesen Administration reaffirmed the state's commitment to comply, but earlier this year independent monitors found in a 249-page report that the state could not demonstrate its compliance with any of the fundamental requirements of the law. With its signature aggressive style, Cooper & Kirk attacked the report and even unsuccessfully petitioned the Supreme Court to disqualify the monitors.

The court has recently taken the state and its counsel to task for their failure to preserve discoverable evidence, and for failing to make discovery as ordered last year. On October 10, the District Court issued a 187-page ruling relating to written discovery requests that the plaintiffs propounded in March 2006. They sought information and documents relating to the state's claim that it was in compliance with the consent decree.

The decision is noteworthy because:

- The ruling contains an extensive analysis and application of the 2006 amendments to the Federal Rules of Civil Procedure governing electronic discovery, and a discussion of the continuing applicability of case law developed prior to the 2006 amendments. The court found that the defendants' conduct regarding the preservation and production of ESI justified an order compelling discovery and the possible imposition of sanctions.
- The State failed over an eight-year period to implement an effective litigation hold, resulting in the routine destruction of responsive electronic and hard copy documents by both state agencies and their contractors. The Governor's counsel and the state's Attorney General's office issued a litigation hold shortly before the Washington firms were hired in May 2004. But the court found that the litigation hold was not effectively implemented. Cooper & Kirk contended that it had no duty to ensure that the hold was actually in effect, but the lawyers have since backed away from that position, which conflicts with controlling case law.
- The court criticized the "questionable" conduct of defense counsel and its failure to preserve and produce responsive materials.
- The court found that defense counsel had waived several privileges, including executive and attorney-client privileges, with respect to numerous documents.
- The court ordered the inspection of forensic copies of all computers used by 160 state employees, including senior state officials, whom the state had identified as "key custodians" of responsive materials. Plaintiffs' technical expert will determine whether any changes have been made that impeded discovery that the state had been ordered to produce.
- The court ordered the production of large volumes of electronically stored information (ESI) in the custody of non-party state contractors, and the ruling strongly implied that the state, rather than the contractors, would be required to bear the cost.
- The court weighed and rejected the state's objections of cost and burdensomeness, finding that defense counsel's failure to implement an effective litigation hold was responsible for most of the present cost of production.
- The court noted that the defendants had repeatedly been found in violation of the consent decree and underlying federal laws protecting children, and that the state had unjustifiably delayed discovery.
- The court will appoint a monitor to oversee the production by the state and its contractors.
- The court found that "[t]he combination of the Defendants' violations of this Congressional mandate for children's medical care, the medical needs of the children, the Defendants' receipt of \$7 billion dollars of federal funds to meet this mandate and the Defendants' violations of this Court's Orders to enforce that mandate, presents issues of utmost importance. . . . The expenditure of these federal funds without delivery of the requisite services to a significant percentage of class members presents a serious issue. . . . At stake are billions of federal funds that are not being expended to comply with federal law."