



Lessons for Practitioners Emerge from E-mail Dump

by Gene Klimov, CTO

It's probably not surprising that a **court imposed sanctions on defendants who produced more than 80,000 e-mail messages within weeks of a trial date** in a case that had been pending for almost nine years—particularly since they had run afoul of a previous discovery order. The court, however, took this albeit dramatic but essentially routine breach as an opportunity to present findings on the **scope of discovery of electronically-stored information, the duty to preserve, and the consequence of a party's failure to produce**—e-discovery issues that had not been previously addressed in the District of Maryland. The Memorandum Opinion by Magistrate Judge Paul Grimm provides unique insights into how a judge will fashion sanctions appropriate to the discovery failure, and still preserve the parties' rights to a fair trial.

The Case

The underlying case involved allegations of purposeful discrimination by the defendants in connection with the operation of public housing in Baltimore that spanned three-quarters of a century. *Thompson v. U.S. Department of Housing and Urban Development*, 2003 WL 22963931 (D. Md., decided December 12, 2003).

The central premise for Magistrate Judge Grimm's analysis is that **"the most important ingredient for the analytical process to produce a fair result is a particularization of the facts to support any challenge to discovery of electronic records."** This is because under Rule 26, the court has significant flexibility in the approach it follows to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. He continues, "The [options](#) available are limited only by the court's own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors."

"But," concludes the Magistrate Judge, "[i]t can do none of these things in a factual vacuum, and ipse dixit assertions by counsel that requested discovery of electronic records is overbroad, burdensome, or prohibitively expensive provide no help at all to the court."

The Five Factors

The 80,000 e-mail records were from former employees; their discovery flies in the face of the defendants' prior representations that such records either did not exist or had been completely produced. Accordingly, sanctions were appropriate. But what form should those sanctions take? **For guidance, the court used the five-factor test set forth in *Southern States Rack and Fixture, Inc. v. Sherwin Williams*, 318 F.3d 592 (4th Cir. 2003) for determining sanctions under Rule 37:**

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1. the surprise to the party against whom the evidence would be offered;
2. the ability of the party to cure the surprise;
3. the extent to which allowing the evidence would disrupt the trial;
4. the importance of the discovery; and
5. the explanation of the non-disclosing party for its failure to provide the discovery.

All five of the factors favor sanctions in this case.

Plaintiffs were certainly surprised by the avalanche of e-mails produced long after discovery had closed; defendant's counsel herself claimed surprise. Furthermore, given the volume of the production and the imminence of the trial date, a cure was effectively impossible. The volume of the production also meant the potential for trial disruption was high. While the importance of the e-mails has not been established with certainty, "given [their] volume, the importance of their authors and recipients as potential fact witnesses, and comparing them to the substantive content of e-mails that were in fact produced during discovery, it is reasonable to conclude that the 80,000 e-mail records related to important issues in the case." But perhaps most damaging of all is that the defendants gave no explanation as to why the 80,000 e-mails were not produced earlier.

The Sanctions

The court concludes that totally precluding the witnesses from testifying would be fatal to the defendants' case. Wishing to avoid this result because of the "somewhat murky factual backdrop of the dispute regarding the production of e-mail records,"

the court imposed the following sanctions:

- precluding the defendants from introducing into evidence any of the 80,000 e-mail records;
- forbidding defendants' counsel from using any of the 80,000 records to prepare witnesses to testify or to refresh their recollection at trial;
- permitting plaintiffs to use any of the 80,000 records during their case and to cross-examine any of the defendants' witnesses;
- shifting any expense the plaintiffs incur in reviewing the 80,000 records to defendants, upon further motion to the court;
- and preserving the possibility of a contempt citation to defendants if trial developments so warrant. An adverse inference instruction was deemed inappropriate as the case was proceeding as a bench trial.

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