



GENERAL COUNSEL CORNER

By Peter H. Gunst, Esquire

Digging Up The Email

When litigating against a large corporation, like an oil company, it is crucial to obtain access to its email. Email is the common mode of communication among corporate employees. Access to it is the best way of showing what the defendant was doing and what its motivation was. In addition, because of the informal and quasi-conversational nature of email, a corporate employee is likely to be less guarded as to his or her true intent in email.

Recent amendments to the Federal Rules of Civil Procedure, which govern the conduct of civil litigation in federal courts throughout the land, tacitly acknowledge the importance of full email discovery. Those amendments, effective December 2006, provide for early communication between opposing counsel concerning the disclosure and discovery of electronically stored information and also expressly provide for its production in civil litigation.

Too often in litigating against large corporations one gets the feeling that the opponent's effort to preserve and produce electronically stored information is lackadaisical at best. The recent amendments to the federal rules appear to intended to address just such concerns.

That such rule reforms can have real teeth is demonstrated by a recent decision by Judge Hochberg, a federal district court judge in New Jersey, who emphatically enforced local court rules

that were closely analogous to the newly amended federal rules.

In complex and drawn out civil litigation, Judge Hochberg took the unusual step of conducting an eleven-day "Integrity Hearing" to get to the bottom of the plaintiffs' repeated complaints that the defendant, Health Net, Inc., had consistently sabotaged the plaintiffs' discovery efforts and ignored its discovery obligations by failing to maintain and produce a wealth of pertinent emails, which tended to establish that Health Net had knowingly submitted false cost data.

After hearing detailed testimony concerning Health Net's tactics, Judge Hochberg released an exhaustive written opinion on December 6, 2006, appropriately the day before Pearl Harbor Day.

The court's written opinion, *Wachtel v. Health Net, Inc.*, F.R.D., 2006 WL 3538935 (D.N.J. 2006), leaves no doubt that Judge Hochberg was displeased mightily with what the Integrity Hearing had revealed. At one point castigating Health Net and its counsel, Judge Hochberg wrote:

Defendants' strategy has been a concerted war to waste huge time and resources of plaintiffs in pursuing this litigation. It gives "scorched earth litigation" a new standard of brashness. Defendants

have also forced the court to devote years to police discovery abuses over and over again. Defendants continue to ignore the court's rulings over and over again. Defendants' persistent pattern of delay, defiance of Court Orders, evasive responses to Plaintiffs' discovery requests and lack of candor have resulted in crushing prejudice to Plaintiffs in the form of forgetful witnesses and extraordinary expenditures of time, effort, and money. The wanton waste of judicial resources caused by Health Net, as exemplified herein, is equally staggering.

To redress Health Net's misconduct and that of its counsel, Judge Hochberg imposed a variety of sanctions that stopped just short of rendering a default judgment against Health Net. These sanctions were imposed:

1. Crucial facts at issue concerning Health Net's knowing and willful use of outdated cost data to defraud the plaintiffs were deemed admitted because of its repeated suppression of emails pertaining to its submission of the outdated data.
2. Health Net was precluded from using at trial 20,000 pages of documents upon

which it relied because of its failure to produce the documentation until after the close of discovery.

3. Health Net's claim that numerous documents were immune from discovery because they revealed communications with its attorneys was rejected because Health Net failed to provide a privilege log identifying the documents and stating the basis for its claim of privilege.
4. Health Net was required to pay monetary sanctions in an amount to be determined, which will be quite substantial, to reimburse the plaintiffs for the attorney's fees and expenses that they encountered as a result of Health Net's misconduct.
5. The court ordered the deployment of an independent "discovery monitor" to ensure that Health Net met all of its discovery obligations.

Finally, the court reserved the question of whether to impose sanctions personally against one of Health Net's lead counsel pending its review of a Report and Recommendation by a Magistrate Judge, who had found that sanctionable conduct had in fact occurred.

Judge Hochberg's opinion demonstrates that email discovery abuses can be dealt with effectively and in a

meaningful manner. The recent amendments to the federal rules appear to invite just such a response where appropriate.

It must be emphasized that the rules concerning production of electronically stored information cut both ways. Plaintiffs, too, have an obligation to preserve and produce all relevant emails. Plaintiff's counsel must not only diligently ensure that the corporate defendant's emails are produced, but also that his or her client also provides full and forthright discovery.

pgunst@agtlawyers.com

To access the latest articles by the Service Station Dealer's legal counsel, please visit the "Service Station Dealers: Legal Issues" section of the Astrachan Gunst & Thomas P.C. website at:
<http://www.agtlawyers.com/resources/petroleum.html>.