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Ignorance Isn't Bliss: Federal Sanctions Imposed for Party's Failure to Timely Search Its Email Server

A recent decision from the Eastern District of Pennsylvania underscores an important lesson on attorneys' duty of competence, which requires a practical and well-rounded understanding of technology in order to execute their clients' e-discovery obligations. Indeed, as [Ondigo LLC v. intelliARMOR LLC](#) reflects, ignorance of the various sources of e-discovery cannot shield attorneys or parties from sanctions under Federal Rules of Civil Procedure 26(g) or 37(e).

During the course of a bench trial, Judge Elizabeth T. Hey requested emails from defense counsel that would corroborate testimony from the defendant's president. Specifically, Judge Hey ordered the defendant to provide emails on the status of production and certification of various accessories for cellphones that formed the basis of the contract plaintiff Ondigo LLC claimed the defendant had breached.

In response to Judge Hey's request, defense counsel confirmed that responsive emails existed and indicated that he would include those communications in post-trial briefing. As promised, the defendant appended the responsive communications to its supplemental proposed findings of fact and conclusions of law. Significantly, however, those additional communications had not been admitted into evidence, and some were never produced to the plaintiff in the normal course of discovery. The plaintiff responded by filing motions for sanctions under Rules 11, 26(g)(3), and 37(e) for the defendant's failure to produce all records within its possession, custody, or control that were responsive to the plaintiff's discovery requests.

How did the defendant find itself in this predicament? Following the court's request, the defendant undertook a seemingly innocent but renewed search for electronic documents in a way that differed from its initial search. Specifically, the defendant expanded the

electronic data set for its keyword searches to include not only those communications saved locally, but also those saved on the company's server. This belated search resulted in the defendant's uncovering of additional responsive communications. Ironically, Judge Hey's decision reflects that she intended for defense counsel to furnish emails that were **already** part of the record.

In its motions for sanctions, the plaintiff asked the court to prohibit the defendant from introducing and relying on the previously undisclosed emails. If the court found that the defendant had deliberately concealed the undisclosed communications, the plaintiff requested monetary sanctions among other consequences. In addition, the plaintiff also argued that Rule 11 sanctions were warranted because the defendant's proposed findings of fact and conclusions of law contained numerous factual contentions that were unsupported by the record.

With respect to the plaintiff's request for Rule 11 sanctions, Judge Hey found that the plaintiff's position amounted to a mere disagreement – she did not find that the defendant's contentions lacked evidentiary support. The more concerning issue centered on the defendant's belated search for and its untimely delivery of documents via post-trial briefing. The defendant conceded that these responsive communications were not previously produced because its local storage device automatically deleted documents that exceeded a certain file size. Nonetheless, the defendant admitted that these communications were retrievable on the server by logging in and entering specific search terms. This concession, coupled with the defendant's swift search of its server after trial, led Judge Hey to find that the defendant was clearly capable of conducting the necessary search of its server before trial. Indeed, the defendant's quick search following trial revealed emails that the court deemed "critical" to the case and illustrated "the inadequacy of its original search." Ultimately, Judge Hey held that the defendant's explanation was insufficient to excuse its failure to undertake a comprehensive search of its server in the first instance during the normal course of fact discovery.

In light of the foregoing, Judge Hey concluded that the certification provided by defense counsel in connection with its original

document production was unreasonable under Rule 26(g) for failing to conduct the appropriate inquiry as to the defendant's email data. Thus, two types of discovery sanctions were warranted. *First*, Judge Hey prohibited the defendant's reliance on the previously non-disclosed discovery under Rule 37(c)(1). Accordingly, the defendant could not hide behind the mere fact that a search through locally saved emails failed to locate all responsive documents. *Second*, Judge Hey awarded the plaintiff modest attorney fees for its pursuit of sanctions under Rule 37(c)(1)(A) because she did not find that the defendant deliberately failed to search its server. It is worth noting that although the plaintiff moved for more serious spoliation-related sanctions under Rule 37(e), the conduct here did not implicate spoliation, *i.e.*, the loss or destruction of evidence, and did not otherwise meet the requirements of that rule. The court therefore properly focused its analysis on the defendant's incomplete discovery, failed compliance, and improper certification under Rules 37(c)(1) and 26(g).

Ondigo provides yet another important lesson for counsel: the duty of competence remains the same no matter how technology evolves or where e-discovery exists – on devices, servers, the cloud, or third-party applications. In citing the seminal case [DR Distributors, LLC v. 21 Century Smoking, Inc.](#), Judge Hey recognized the growing number of courts that are unwilling to tolerate even unintentional failures to conduct thorough and comprehensive searches of the various electronic data that litigants accumulate in our digital era. As *Ondigo* and other opinions make clear, these failures can lead to serious sanctions – both substantive and monetary – for litigants as well as their attorneys.

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