UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
CHARLES A. ROSENTHAL, JR.,	§	
	§	CIVIL ACTION NO. H-04-186
BERT GRAHAM AND	§	
	§	
SCOTT A. DURFEE	§	
	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Court is the movants, Eric Ibarra and Sean Ibarra's, motion for contempt and for sanctions (No. 386) filed in response to the respondent, Charles A. Rosenthal, Jr.'s ("Rosenthal") motion for protection (No. 384). Also before the Court is the movants' supplement to their motion for contempt (No. 388) and the respondents, Rosenthal, Herbert E. ("Bert") Graham ("Graham"),[1] and Scott A. Durfee's ("Durfee") response and opposition to the movants' motion (No. 394). The Court has received the written arguments of counsel, and the testimonial and documentary evidence presented in this proceeding and determines that the movants' motion for contempt and sanctions should be granted in part.

II. FACTUAL BACKGROUND

This proceeding arises as a result of a discovery dispute between the movants and the respondents. The movants are plaintiffs in a civil rights suit against Harris County Texas, the Harris County Sheriff and several Harris County deputies. Suit was filed as a result of an incident on January 4, 2002, when Harris County deputies raided the movants' home after

[1] There is no evidence that Herbert E. Graham engaged in any conduct that violated the subpoenas or Orders of the Court. Therefore, as to Graham, the motion is Denied.

observing Sean Ibarra taking photographs while the deputies were executing a search warrant at an adjacent neighbor's house. The raid resulted in the movants' cameras being seized and both movants being arrested and transported to the Harris County Jail where they were charged with "Evading Detention" and "Resisting Arrest." Separate juries found the movants "Not Guilty" of "Resisting Arrest." The charge of "Evading Detention" against Sean Ibarra was subsequently dismissed. However, when their cameras were returned to them, one was damaged with the film having been destroyed, while the video recorder was missing its memory stick.

The defendants in the case, Harris County, the Harris County Sheriff and the Harris County deputies, sought summary judgment based on, *inter alia*, qualified immunity. The Court denied the defendants' motion for summary judgment and an appeal was taken. The Fifth Circuit Court of Appeals denied various substantive claims and remanded the case to this Court for further proceedings. After remand, the Court conducted a status conference and determined that the remaining proceedings included discovery concerning documents held by the Harris County Sheriff's Office and the Harris County District Attorney's Office, especially communications between the two offices relative to the movants' request for an investigation of the deputies' conduct during the raid. Specifically, the movants sought to know the whereabouts and the disposition of their complaints against the deputies. The Harris County Sheriff directed the movants to the District Attorney and the District Attorney, in turn, directed the movants to the Harris County Sheriff.

III. PROCEDURAL HISTORY

On October 3, 2007,[2] and October 31, 2007, the movants served a *subpoena duces tecum* and *subpoenas ad testificandum* on the respondents, seeking their investigative documents concerning the January 4 raid as well as their depositions. The October 3, subpoenas were directed to the respondents, Rosenthal and Graham, and sought the following information: (a) documents from January 1, 1999 to October 3, 2007 relating to the movants, Marie Ibarra, Madalyn Valdez and/or the movants' counsel; (b) documents from January 1, 1999 to October 3, 2007 evidencing communications between the Harris County Sheriff and the District Attorney relating to the deputies involved in the events of January 4, 2002; (c) documents relating to any investigations concerning the raid that occurred at the movants' residence; and, (d) documents evidencing communications with the Department of Justice or the FBI concerning the same raid.

The respondents moved to quash the October 3 subpoenas (No. 350) asserting that to comply would require them to disclose "privileged and/or protected" matters. Moreover, they asserted that the movants' request was "unduly burdensome." In addition to their request to quash the document requests, the respondents also sought to quash the depositions. The respondents asserted that their testimonies were unnecessary to the movants' litigation in that they had no "personal knowledge of any facts in controversy in [the] litigation." The Court reviewed the respondents' motion to quash (No. 350) and determined that the subpoenaed documents were not irrelevant to the litigation, not necessarily private or privileged, and that production was not necessarily "unduly burdensome." Therefore, the Court denied the

[2] On October 3, 2007, the movants served two subpoenas seeking production of the documents listed above as well as the depositions of Graham and Rosenthal on October 15 and 16, 2007, respectively.

respondents' motion to quash and ordered that the documents be produced on or before October 23 (No. 354).

On October 31, the movants served a third *subpoena duces tecum* on the respondents. On this occasion, it was directed only to Rosenthal, but sought all e-mails sent or received by the three respondents between July 1, 2007 and October 15, 2007. On November 7, the movants filed a motion for contempt and motion to compel compliance with the subpoenas and the Court's October 16 Order (No. 369). On November 8, counsel for the respondents filed a motion to quash the October 31 subpoena (No. 374).

In that motion, the respondents informed the Court that they had produced responsive documents to the October 3 subpoena and that they "[had] fully complied with [it]. To [their] knowledge, there were *no* documents responsive to the original subpoena and the Court's order that had not been produced." The respondents' counsel further informed the Court that there were 12,785 e-mails responsive to the October 31 subpoena and that only 61 referenced the movants and their attorney. He further represented that those e-mails had been produced to movants' counsel. The respondents also took the opportunity to inform the Court that the October 31 subpoena was directed at 4,934 e-mails in Graham's e-mail folders, 4,792 e-mails in Rosenthal's e-mail folders and 3,059 e-mails in Durfee's e-mail folders. To assist the Court in reviewing their motion to quash, the respondents produced a summary log of the remaining e-mails classifying them in four categories: (a) matters relating to pending and past criminal litigation; (b) matters relating to pending and past civil litigation; (c) matters relating to the administration of the District Attorney's office; and (d) matters relating to personal communications to family and friends. And, once again, the respondents asserted that the subpoenas were burdensome, too broad and sought privileged and private communications.

The movants responded to the respondents' motion to quash and separately sought compliance via a motion to compel (No. 377). Hence, the Court entered a second Order addressing the parties' subpoena dispute (No. 378). The Court held that the respondents' claims of privilege under the Open Records Act did not apply and that personal data could be redacted. The Court was also of the opinion that, with a proper protective order and/or confidentiality agreement, counsel for the movants should be permitted to view the e-mails and that the parties should come to an understanding of what, if anything, was proper for trial. Moreover, the "unduly burdensome" claim would be resolved by an "attorney eyes" only viewing prior to production. Afterward, the Court would be in a position to rule on the respondents' objections, if any remained. The Court further held that providing a table of 12,785 e-mails to the Court and requesting that the Court examine the "subject matter" line and determine the propriety of the respondents' privilege claims, passed to the Court labor that, of necessity, must remain on counsel. Therefore, the Court denied the respondents' request for a "global application" of privilege, and ordered the parties to accommodate each other in viewing and identifying documents that required Court intervention based on the respondents' privacy and privilege claims.

On November 19, the respondents filed a response to the movants' November 7 motion for contempt (No. 379). On the next day, the Court conducted a hearing on the movants' motion for contempt concerning the October 3 subpoenas and denied it based on the respondents' representations (No. 381). Concurrently, the parties entered into a protective order that was approved by the Court (No. 382). A part of the "in court" protective order provided that the movants' counsel would view all e-mails and designate those that he desired to use in deposing the respondents, Rosenthal and Graham, on November 29. The respondents were to provide

access to the e-mails to the movants' counsel for viewing on Monday, November 26. Objections to selected e-mails were to be presented to the Court no later than November 28.

Nevertheless, on November 29, the respondents filed two motions for protection (No. 383 and 384). The next day, the movants filed a second motion for contempt and for sanctions and requested a hearing (No. 386). The movants supplemented their motion for sanctions on December 2 (No. 388). The respondents, in turn, filed their response and brief on December 18 (No. 394), and a supplemental response the following day (No. 395). An Order to Show Cause entered on January 2, 2008, set the movants' motion for contempt and for sanctions for hearing on January 31, 2008 (No. 404).

IV. CONTENTIONS OF THE PARTIES

A. The Movants' Contentions

The movants contend that the respondents violated the October 3 and October 31 subpoenas and the Court's Order dated October 16. In addition, the movants contend that the respondents violated the Court's November 16 Order that specifically required the production of respondents' e-mails from July 1, 2007 to October 15, 2007. In this regard, the movants assert that the respondents were fully aware of the scope of the October 3 and October 31 subpoenas and the information requested. Yet, they intentionally: (1) delayed production of responsive documents; (2) delayed disclosure of the fact that Rosenthal had deleted over 2,500 e-mails[3] until the e-mails could no longer be recovered from the back-up tapes; and (3) misrepresented to the Court that they were in full compliance with the Court's orders. The movants assert that only after the e-mails could not be restored from back-up tapes did the respondents disclose to the

[3] Rosenthal testified that he deleted the lost e-mails on November 5. Evidence shows that at that time he was aware of the nature of the information sought by the October 31 subpoena.

movants' counsel that Rosenthal had deleted over 2,500 e-mails. Therefore, the movants seek monetary sanctions and penalties.

B. The Respondents' Contentions

The respondents admit that Rosenthal deleted e-mails that were the subject of the October 31 subpoena. However, they argue that he did not delete or attempt to delete all e-mails responsive to that subpoena. Rosenthal also asserts that he did not act in concert with the other respondents or seek help from anyone in deleting his e-mails. He contends that at the time that he deleted his e-mails, he believed them to be available for an indefinite period of time on back-up tapes maintained by Harris County Information Systems personnel. Further, Rosenthal contends that he committed error by deleting the e-mails only because he assumed that his counsel, Durfee, while preparing the table of e-mails from his directory, had also printed a hard copy of each e-mail.

Additionally, the respondents assert that no sanctions or contempt citation is appropriate in this instance, particularly, against Graham and Durfee. They contend that neither Graham nor Durfee knew about Rosenthal deletions until November 20. Upon learning of his conduct, they contend that they made every effort to restore the e-mails to the system. Finally, the respondents assert that the movants were not prejudiced by Rosenthal's conduct because the evidence in the case was not adversely affected.

V. STANDARD OF REVIEW

The movants seek civil contempt sanctions and penalties against the respondents pursuant to Rules 26 and 45(e) of the Federal Rules of Civil Procedure. Specifically, the relevant provisions of Federal Rule 26(b)(1) provide that:

> [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the

> existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. . . . information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1). Additionally, Rule 26(g) states, in pertinent part:

> (2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . .The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response, or objection is:
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> > (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
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> > (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
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> > (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. . . .
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> (3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. (Emphasis added).

Fed. R. Civ. P. 26(g). Further, Rule 45(e) of the Federal Rules of Civil Procedure provides that the "[f]ailure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." FED. R. CIV. P. 45(e).

The burden of proving contempt rests on the party seeking the same "to demonstrate, by clear and convincing evidence, that: (1) a court order was in effect; (2) the order required certain conduct by the respondent; and, (3) the respondent failed to comply with the court's order." *Lyn-*

Lea Travel Corp. v. American Airlines, Inc., 283 F.3d 282, 291 (5th Cir. 2002) (quoting *FDIC v. LeGrand,* 43 F.3d 163, 170 (5th Cir. 1995). And, where a subpoena has issued, the movant need only demonstrate that the alleged contemnor violated a prior court order. *See National Organization for Women v. Operation Rescue*, 37 F.3d 646, 662 (D.C. Cir. 1994). In these proceedings, the intent of the alleged contemnor is irrelevant to a finding of civil contempt. *See Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir. 1987) (citing *Jim Walter Resources v. Int'l Union, United Mine Workers of America,* 609 F.2d 165, 168 (5th Cir. 1980)). Hence, good faith is not a defense. *Id.* Rather, the sole issue in a civil contempt proceeding such as the one at bar, "is whether the alleged contemnors have complied with the court's order." *Id.* A good faith exception may arise, however, where electronically stored information ("ESI") is the subject of the subpoena or Court Order and the documents have been lost or destroyed.

A federal court may also exercise its inherent power when necessary to ensure justice. "[I]t is firmly established that '[t]he power to punish for contempt is inherent in all courts.' " *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 2132 (1991) (quoting *Ex parte Robinson,* 19 Wall. 505, 510, 22 L. Ed. 205 (1874)). This inherent power reaches conduct demonstrated both in the presence of the court and conduct committed beyond the confines of the court, when "[t]he underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings, [but are acts of disobedience], regardless of whether such disobedience interfered with the conduct of trial." *Chambers,* 501 U.S. at 44, 111 S. Ct. at 2132 (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798, 107 S. Ct. 2124, 2132, 95 L. Ed.2d 740 (1987)) (internal citations omitted). Of particular significance in these instances, is the court's inherent power to manage its own affairs and address conduct that

is both violative of its orders and threatening to the integrity of the judicial process. *See Chambers*, 501 U.S. at 43, 111 S. Ct. at 2132.

In regard to inherent power, the Fifth Circuit has reasoned, "[w]hen a party's deplorable conduct is not effectively sanctionable pursuant to an existing rule or statute, it is appropriate for a district court to rely on its inherent power to impose sanctions." *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 952 (5th Cir. 2001) (quoting *Carroll v. The Jaques Admiralty Law Firm, P.C.*, 110 F.3d 290, 292 (5th Cir. 1997)). In doing so, however, "[a] court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." *Carroll*, 110 F.3d at 292 – 93 (quoting *Chambers*, 501 U.S. at 50, 111 S. Ct. at 2136.); *see also* Thomas E. Baker, *Symposium: Turbulence in the Federal Rules of Civil Procedure: The 1993 Amendments and Beyond*, 14 REV. LITIG. 195, 199 - 00 (1994) (noting that "[t]o exercise its inherent sanctioning authority, a federal court may act *sua sponte* or upon a motion to conduct an independent investigation--as long as its actions are consonant with the basic procedural due process guarantees of reasonable notice, a meaningful opportunity to be heard, and particularized findings.") "Presumably, any sanction contemplated under federal statutes and rules can be imposed incident to the [court's] inherent power as well." Thomas E. Baker, *Symposium: Turbulence in the Federal Rules of Civil Procedure: The 1993 Amendments and Beyond*, 14 REV. LITIG. at 200.

All due process requirements necessary for the imposition of civil contempt sanctions have been satisfied in this case in that the Court, pursuant to its Order to Show Cause, provided the respondents with adequate notice of the time and place of the scheduled contempt hearing, and permitted a reasonable opportunity to explain any deficient conduct. *See Newton v. A.C. &*

S., Inc., 918 F.2d 1121, 1127 (3d Cir. 1990) (noting that "[d]ue process requires that a potential contemnor be given notice and a hearing regardless of whether the contempt is civil or criminal in nature.") The record in this case reflects that prior to the hearing, the respondents filed their response and opposition to the plaintiffs' motions for contempt and sanctions, statement of contested fact issues, witness lists and exhibit lists, and motion for protection. Accordingly, the Court will now consider the conduct complained of by the movants in determining whether civil contempt sanctions should be assessed in this case.

VI. ANALYSIS AND DISCUSSION

A. Separate Subpoenas Give Rise to Separate Duties to Comply

The October 3 and October 31 subpoenas sought the same information although the October 31 subpoena was more direct in its language. As noted, the October 3 subpoenas sought all documents that related to the movants and their counsel, all communications between the Harris County Sheriff and the District Attorney's Office relating to the deputies involved in the events of January 4 and any documents relating to any investigations by or communications with the Department of Justice or FBI concerning the raid at the movants' residence. These requests included e-mail communications relating to any investigations concerning the Ibarras or the deputies. And, in fact, the respondents understood the subpoenas to include relevant e-mail communications. The October 31 subpoena was narrowly defined, yet broader in scope. It requested "all" e-mails that had been sent and received by the respondents from July 1 to October 15, 2007. In seeking "all" e-mails, the movants sought to clarify that e-mails for the relevant period were specifically being requested and that none should be excluded by inadvertence. Hence, the October 31 subpoena was both a clarification of the October 3 subpoenas and, simultaneously, an entirely new production request.

As previously set forth, on November 7, the movants filed the first of their two motions for contempt, to compel and for sanctions. The first motion concerned the respondents' alleged non-compliance with the October 3 subpoenas. The movants specifically alleged that the respondents failed or refused to comply with the Court's October 16 Order and sought full compliance. The Court, relying on the respondents repeated representations that they were in full compliance, declined to find that the respondents were in violation of its Order. However, at that time, the Court was unaware that more than 2,500 e-mails had been deleted by Rosenthal from his e-mail directory. The Court was first made aware of the e-mail deletions on November 30, when the movants filed their second motion for contempt and for sanctions. In light of this revelation, and because the October 3 and October 31 subpoenas constituted seamless discovery requests, the Court finds it judicially appropriate and necessary to re-visit its earlier decision and reassess whether one or more of the respondents failed to comply or, otherwise, frustrated compliance with the Court's October 16 Order.

B. Hindsight: Did the Respondents Violate the October 16 Order?

In order for the Court to determine that its October 16 Order was violated, there must be "clear and convincing" evidence that e-mails responsive to the October 3 subpoenas remain outstanding despite the respondents' assurances to the contrary, or that the respondents have stated an adequate excuse for non-compliance.

The respondents represented on more than one occasion that they had diligently searched for responsive e-mails and produced what was found. The first production to the October 3 subpoenas came on October 23.[4] In an accompanying letter, counsel for the respondents stated: "To [his] knowledge, what has been produced appears to be everything the District Attorney's

[4] On October 23, 2007, the respondents produced 703 documents responsive to the October 3 subpoenas. These initial documents included, among other things, several e-mails.

Office has possession, custody, or control over that is responsive to [the October 3] subpoena." Nevertheless, soon after the October 31 subpoena was served, the respondents supplemented their initial production with responsive e-mails discovered on Durfee's desktop.[5] Despite this effort, responsive e-mails remained outstanding as evidenced by the respondents' November 7 production. Additional responsive e-mails had been discovered in Rosenthal and Graham's directories.[6] In total, 61 e-mails, that had not previously been disclosed, were produced. Once more, the respondents reiterated that there were no further documents responsive to the October 3 subpoenas that had not been produced. As a result, the Court declined to hold any of the respondents in contempt of the subpoenas or its Order.

Whether in fact additional responsive e-mails to the October 3 subpoenas remain outstanding has not, to date, been fully revealed. While it is true that at least one responsive e-mail was discovered and produced after November 20,[7] the Court finds that a full scale search for additional responsive e-mails, notably after the destruction of over 2,500 e-mails, is beyond reach and to continue such a search, would be both wasteful and futile. In deleting more than 2,500 e-mails, Rosenthal made it impossible for the Court to conclusively determine whether any additional relevant documents existed. Personnel from Information Systems for the Harris County District Attorney's Office testified that while many of the deleted e-mails could be restored, many others are forever lost. The movants have not disputed this fact. Hence, the

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[5] Durfee explained in an accompanying letter that "[i]n preparing Chuck and Bert's response to [the October 3 subpoenas], [he] mistakenly concentrated on gathering their records and missed [his] own."

[6] Durfee explained that, with respect to Graham's e-mails, "[t]hese e-mails had been missed because the earlier computer search of Graham's e-mail directory had been imperfectly executed."

[7] On January 31, 2008, the morning the contempt hearing was scheduled to begin, the respondents provided counsel for the movants a responsive e-mail to the original subpoena from Graham's directory that had not previously been disclosed.

Court is without clear and convincing evidence that one or more of the respondents violated the October 3 subpoenas or the Court's October 16 Order.

C. The Respondents' Non-Compliance with the October 31 Subpoena

While the Court stands by its prior decision that the respondents did not violate the October 3 subpoenas and the Court's October 16 Order, the same acts or omissions of the respondents – particularly those of Rosenthal concerning the October 31 subpoena – lead to the conclusion that Rosenthal knowingly violated the October 31 subpoena in the face of the Court's October 16 Order.

Rosenthal openly admits that he deleted more than 2,500 e-mails from his desktop on November 5.[8] Arguably, all of the e-mails deleted were responsive to the October 31 subpoena. The movants suggest that Rosenthal continued to delete e-mails after the Court issued its November 16 Order denying his motion to quash. However, the evidence adduced to date does not clearly and convincingly support a finding that Rosenthal deleted e-mails after November 5, the date that he testified as the operative date. Regardless of whether Rosenthal deleted e-mails after November 16, a court order was in effect at the time of the November 5 deletions. And, irrespective as to whether the e-mails were relevant to disputed issues in the Ibarras' trial, Rosenthal may also be held in contempt for his conduct, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

A subpoena is a court order that requires a person to whom it is directed to give testimony or produce evidence. *See* 9 CHARLES R. RICHEY, MOORE'S FEDERAL PRACTICE § 45.02[1] (3d ed. 2007). Rosenthal, a non-party to the underlying suit, was served with a subpoena under Rule 45 of the Federal Rules of Civil Procedure. As noted, Rule 45 authorizes a

[8] During his testimony, Rosenthal testified that his e-mail deletions were not selectively made. This testimony contradicted assertions made under oath in his December 18, Declaration. Rosenthal's Supplemental Declaration [March 12, 2008] does not address this contradiction.

court to hold a person in contempt who fails, without adequate excuse, to obey a subpoena. Thus, if a person disregards a subpoena and fails to comply without filing timely objections, the person may be found in contempt of court regardless of whether a court order is in effect.[9] The record is clear that the October 31 subpoena was served on Rosenthal before November 5, the date that Rosenthal testified that he deleted e-mails. The record is also clear that the October 16 Order was in effect and that it covered the e-mails sought by the October 31 subpoena.

1. Rosenthal's Failure to Comply with the October 31 Subpoena

At the outset, it is important to note that Rosenthal was familiar with the rules governing the discovery process and the tools and resources lawyers use to obtain information in the hands of others. Indeed, during the relevant period, he was the District Attorney of Harris County, Texas with more than 40 years of legal experience. Hence, the mission of his office and certainly the nature of his work imparts a familiarity with subpoenas, the discovery process generally, the preeminence of compliance, and the grave consequences that follow intentional non-compliance. Above all else, Rosenthal is an officer of the court. Thus, he has a separate and overarching duty, apart from his duty as a non-party witness, to protect and preserve discoverable information, particularly when the information sought has been specifically identified and demanded under the authority of the Court. The standard, by which Rosenthal's conduct is examined, therefore, is justifiably intensified. Having carefully reviewed the record,

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[9] 9 CHARLES R. RICHEY, MOORE'S FEDERAL PRACTICE § 45.62[3] (3d ed. 2007) ("Because the subpoena is an order of the court . . . contempt sanctions are available merely for the initial disobedience of the subpoena, and a prior court order compelling compliance with the subpoena is not invariably required"); *see also Pennwalt Corp. v. Durand-Wayland, Inc*., 708 F.2d 492, 494 (9th Cir. 1983) ("A subpoena [under Rule 45] is itself a court order, and non-compliance may warrant contempt sanctions"); *United States v. Bryan*, 339 U.S. 323 (1950) ("A subpoena is a lawfully issued mandate of the court issued by the clerk thereof. It is the responsibility of every citizen to respond to this mandate"); *Fisher v. Marubeni Cotton Corp*., 526 F.2d 1338, 1341 (8th Cir. 1975) ("Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued"); *Waste Conversion, Inc. v. Rollins Envtl. Srvcs. (NJ), Inc*., 893 F.2d 605, 608 (3d Cir. 1990) (en banc) (assuming "for purposes of this appeal" that a failure to comply with a Rule 45 subpoena could subject a person to contempt").

the Court finds several areas of contradictions and misrepresentations that render his testimony unreliable and incredible. Moreover, the Court views his conduct as venomous and hostile to the judicial process.

Rosenthal has advanced multiple explanations for deleting more than 2,500 e-mails. First, in his deposition given on November 29, he testified that at the time he made the deletions he was under the impression that Durfee had printed hard copies of his e-mails, rather than a mere snap-shot of the folders. In the same deposition, he testified that it was his understanding that the e-mails were permanently stored in the network's back-up tapes and, if needed, could be retrieved at any time. It is significant that Rosenthal came to this conclusion without any investigation or consultation with the personnel in his Information Systems Department.

Despite the reasons stated in his deposition, Rosenthal revealed in his December 18 affidavit that he performed the deletions to "reduce the large volume of email[s] visible at [his] desktop." Undaunted by his previous representations, Rosenthal testified during the contempt proceeding that he deleted the e-mails simply to be more efficient in his work. Adding yet another explanation, he testified that he performed the deletions to free memory space on his computer. Again in his affidavit, he stated that he selectively deleted all e-mails in his in-box folder that were older than May 3. However, upon questioning during the contempt hearing, he admitted that this sworn statement was inaccurate because at least two e-mails older than May 3 remained in his in-box.

There is no evidence that Rosenthal's computer memory space was threatened by additional e-mails or that, in fact, it was short of space. Hence, these reasons--all implausible inconsistencies--defy the law of common sense. It is quite clear that Rosenthal was informed about the October 31 subpoena as well as the contents of the information demanded by it.

Undoubtedly, Rosenthal was also fully knowledgeable at the time he made the deletions, that the deleted items were the subject of the October 31 subpoena and that, at the very least, he had a duty to preserve them. Moreover, even if his e-mail directory was incapable of storing additional e-mails, Rosenthal's conduct reflects an intentional willfulness to disobey the law. This conduct reveals a man confident in his status, entrenched in his brand of law. He would not or could not acknowledge an authority beyond himself. And, like the County Attorneys who appeared earlier in this case, Rosenthal reposes in the idolatry of their own perverted wisdom. *See* (Instrument No. 245, Order on Motion for Sanctions, Re: Baker and Sanders).

Further, "[a] person responding [to a production request for electronically stored information] must produce it in a form or forms in which it is ordinarily maintained." FED. R. CIV. P. 45(d)(1)(B). Thus, when a responding person intentionally deletes a document or moves it from its location, a claim of obstruction arises. This is so because the document is considered to be under the scrutiny and supervision of a court. Based on the evidence presented, it is undisputed that responsive e-mails were readily available on Rosenthal's desktop at a time when he was aware of both the Court's October 16 Order and the October 31 subpoena. As such, his removal or deletion of such e-mails constitutes unexcused, egregious conduct.

The Court is ineffably troubled by Rosenthal's delay in bringing his actions to light. His silence on this account is deafening. Consider, Rosenthal remained silent while his counsel sought to quash the October 31 subpoena. He was present in Court and remained silent as the Court issued its order directing him to either produce the e-mails in hard copy or permit the movants' counsel to view them. He was present in Court and remained silent while his counsel promised to produce e-mails that he alone knew had been deleted. Nevertheless, although present and saddled with a separate duty to protect the documents, Rosenthal sat mute knowing

that he had already deleted the very e-mails that were at issue. Such conduct creates a great chasm between his professed "excuse" and his intemperate conduct--a chasm that defies bridging by either the law of common sense or the law of reason. Consequently, the excuse of mistake is wholly inapplicable in this case.

The Court FINDS and HOLDS Rosenthal in CONTEMPT of Court and awards attorneys' fee sanctions against Rosenthal in the amount of $18,900. In this regard, the Court approves a fee rate of $350 per hour for lead counsel, $250 per hour for associate counsel, and $100 per hour for a legal assistant. The Court reserves the right to award reasonable and necessary appellate fees, if an appeal is taken, and to enforce this Order as any judgment or writ.

It is Ordered that Rosenthal shall pay sanctions in the amount of $18,900 on or before April 30, 2008.

2. Durfee's Neglect of Duty as Counsel

Next, the movants contend that Durfee aided and abetted Rosenthal, after the fact, in hiding Rosenthal's willful conduct. His act of aiding and abetting, they argue began with his failure to promptly advise Rosenthal of his separate duty to preserve documents. Moreover, the movants contend that Durfee, after learning of Rosenthal's conduct, failed to seek court relief. They argue, upon learning of Rosenthal's conduct, Durfee obstructed justice by trying to cover-up and/or minimize the magnitude of Rosenthal's actions.

In opposition, Durfee argues that: (a) there is no evidence that he knew that Rosenthal would delete e-mails subject to the subpoena; (b) there is no evidence that he knew that Rosenthal had deleted e-mails prior to the November 20 hearing; and (c) there is no evidence that the October 31 subpoena was ever served on him personally, or that he did anything to obstruct Rosenthal's compliance with the October 31 subpoena.

While it is true that no subpoena was issued to Durfee in his individual capacity, it is undisputed that he was fully aware that the October 31 subpoena had been served on the attorney designated to receive legal documents. And, as Chief of the General Litigation Division, he is fully responsible for, and charged with, managing the records of the District Attorney's Office in all litigation involving the office, including the receipt and management of legal process served on office employees. In this role, he is responsible to his client(s) and the courts with respect to documents that are the subject of a subpoena. While there is no evidence that Durfee committed affirmative obstructive acts, the evidence is abundant and compelling that he "omitted" to act or advise his client when his professional and ethical duties required that he do so. In this respect, an act of omission is as grave as any act of commission that could have been made.

During the contempt hearing, Durfee testified that he made representations in Court without knowledge that e-mails had been deleted. According to Durfee, it was not until around 5:00 p.m., on November 21, 2007, after speaking with the Harris County District Attorney's Information Systems Director, Gary Zallar, that he learned that many of Rosenthal's e-mails had been deleted. Durfee stated that on November 25, he informed Graham of his discovery and on November 26, he raised this issue *for the very first time* with Rosenthal. Thereafter, he made no attempt to apprise the movants' counsel or the Court of this pertinent information. He, like Rosenthal, chose to remain silent despite the mandate of the subpoena, the Order of the Court and his *own* misrepresentations to the Court. And while he admits that he spoke to Rosenthal on or before November 5 about the October 31 subpoena, it is evident that he failed to make a reasonable inquiry as to whether Rosenthal: (1) understood the nature of the documents sought by the subpoena; (2) had begun searching for and/or assembling documents responsive to the subpoena; (3) had located any documents that were responsive to the subpoena; or (4) *more*

importantly, recognized his duty to maintain and preserve any e-mails that were potentially responsive to the subpoena. Instead, he proceeded with filing a motion to quash the subpoena, without ever making a reasonable effort to assure that documents responsive to the subpoena would be available to them, should the Court make a ruling adverse to them on their motion to quash.

Even more telling, are Durfee's *own* admissions that he understood that he had a duty, as Rosenthal's legal counsel, to advise him of his obligation to maintain and preserve any documents identified by the October 31 subpoena and to warn him against deleting any such items from his e-mail directory. Yet, despite these admitted duties, Durfee said nothing.

Durfee also recognized that he had a duty, as an officer of the Court,[10] to cooperate in discovery and to maintain and preserve any documents identified by the October 31 subpoena, separate and apart from his obligation to advise Rosenthal. Again, in spite of this admitted duty, he took no steps to preserve any responsive documents himself or to notify his client of his separate obligation to do so. Indeed, the undisputed evidence in the record reveals that Durfee, as Rosenthal's legal counsel, was responsible for coordinating Rosenthal's discovery efforts. In this regard, the Court finds that Durfee failed to properly oversee Rosenthal's discovery efforts in a number of important ways, both in terms of his duty to locate relevant information and his duty to preserve and timely produce such information. With respect to locating relevant information, Durfee failed to: (1) give adequate instructions about what discovery was sought by the October 31 subpoena; (2) communicate with Rosenthal concerning the scope of documents

[10] Section 1.01(b) of the Texas Disciplinary Rules of Professional Conduct provides that "[i]n representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients." The term "neglect" as used in this rule denotes "inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.01(b).

reasonably available and responsive to the October 31 subpoena; and (3) communicate with Rosenthal concerning methods for storing the electronic data or other documents requested.

With regard to ensuring that relevant data was retained in compliance with the subpoena, Durfee also failed in a number of important respects, including: (1) implementing a systematic procedure for the production or retention of documents responsive to the October 31 subpoena; (2) communicating any preservation or "litigation hold" instructions to Rosenthal with regard to documents potentially relevant to the October 31 subpoena; (3) ensuring that certain relevant backup tapes were preserved in the event that information subject to the subpoena became lost or unavailable; and (4) making baseless representations about the completeness of the respondents' production in light of the fact that many of the documents called for by the subpoena had not been adequately searched for, had been deleted and/or were no longer available. Moreover, the Court finds that Durfee's communication with Rosenthal was sorely lacking in other instances when one-to-one contact was essential.

Further, the evidence adduced also indicates that by failing to disclose the fact that many of the documents sought by the October 31 subpoena had been deleted by Rosenthal immediately upon becoming aware of this fact, Durfee violated Rules 3.03(a)[11] and 4.01(b)[12] of the TEX.

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[11] Section 3.03(a) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

> (a)A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
> (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;
> (3) in an ex parte proceeding, fail to disclose to the tribunal an unprivileged fact which the lawyer reasonably believes should be known by that entity for it to make an informed decision;
> (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (5) offer or use evidence that the lawyer knows to be false.

TEX. DISCIPLINARY R. PROF'L CONDUCT 3.03(a).

DISCIPLINARY R. PROF'L CONDUCT, which require a lawyer to disclose a material fact to a tribunal and/or third party when disclosure is necessary. By failing to bring Rosenthal's actions to light upon becoming aware of them, Durfee violated Rule 8.04[13] of the TEX. DISCIPLINARY R. PROF'L CONDUCT, which provides that a lawyer shall not violate these rules, knowingly assist or induce another to do so, or do so through the acts of another; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; or engage in conduct constituting obstruction of justice. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04(1)(3), (4).

In sum, while it is undisputed that Rosenthal deleted the e-mails sought by the subpoenas, it is also apparent that copies of many of these e-mails were belatedly produced and/or lost as a result of Durfee's dereliction of duty. Under circumstances such as these, where a lawyer exhibits negligence or a reckless failure to perform his responsibilities as an officer of the Court, sanctions may be warranted, even in the absence of bad faith, pursuant to the Court's inherent power "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of

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[12]Section 4.01(b) of the Texas Disciplinary Rules of Professional Conduct provides as follows:

> In the course of representing a client a lawyer shall not knowingly:
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

TEX. DISCIPLINARY R. PROF'L CONDUCT 4.01(b).

[13] Section 8.04 of the Texas Disciplinary Rules of Professional Conduct provides, in relevant part, as follows:

> (a) A lawyer shall not:
>
> (1) violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship; . . .
> (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (4) engage in conduct constituting obstruction of justice; . . . .

TEX. DISCIPLINARY R. PROF'L CONDUCT 8.04.

cases." *Chambers*, 501 U.S. at 43, 111 S.Ct. 2123 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630 – 31, 82 S.Ct. 1386, 1388 – 89, 8 L.Ed.2d 734 (1962)). "These powers include the authority to punish for contempt in order to maintain obedience to court orders and the authority to impose reasonable and appropriate sanctions on errant lawyers practicing before the court." *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) (citing *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993), *cert. denied*, 510 U.S. 1073, 114 S.Ct. 882, 127 L.Ed.2d 77 (1994) (quoting *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968)).

Based on the foregoing, the Court FINDS that Durfee's actions in this case were unprincipled and dilatory, at best, constituting a deliberate indifference to the Court's Orders and subpoena. With this in mind, the Court finds that Durfee manifested a deliberate indifference towards his duty under the rules of discovery, both to his client and to the Court, and therefore, finds him in violation of Rules 26 and 45 of the Federal Rules of Civil Procedure. *See Chambers*, 501 U.S. at 62 (noting that a district court can punish contempt of its authority, including sanctioning any party and/or his attorney for baseless discovery requests or objections, FED. R. CIV. P. 26(g); and punishing any person who fails to obey a subpoena, FED. R. CIV. P. 45). As a consequence, the Court FINDS and HOLDS Durfee in CONTEMPT of Court.

Having found such misconduct, this Court must now determine the appropriate sanction. In so doing, the Court recognizes that a major consideration in choosing an appropriate sanction, along with punishing the contemnors and deterring future misconduct, is to restore the movants to the position that they would have been had the respondents faithfully discharged their obligations under the rules governing discovery. Only monetary sanctions are appropriate in this

circumstance. Therefore, of the $18,900 in sanctions awarded against Rosenthal, $5,000 is jointly and severally awarded against Durfee.

It is ORDERED that Durfee shall pay sanctions in the amount of $5,000 on or before April 30, 2008.

SIGNED and ENTERED this 28th day of March, 2008.

Kenneth M. Hoyt
United States District Judge