

Guerrilla Raids on the Honey Pot: Going Straight for Email

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There are several reasons why your discovery efforts should, in most cases, focus on email messages first, and as soon as possible:

1. Email messages are the most likely source of candid revelations about the thoughts and actions of the opposing parties.

It is hard to explain what it is about email that prompts people to let down their hair and speak bluntly (and often carelessly) about what they think. Perhaps it is the persistent erroneous belief that email messages are ethereal, that they can, like paper, be erased and discarded without a trace. Maybe it is because email messages are so instantaneous and easy to reply to that people don't spend any appreciable time reflecting on their responses. Maybe it's the computers people can hide behind that embolden them to write things they would never say directly to somebody.

Whatever the reason, litigators are becoming increasingly aware that email messages are more likely to expose the unadorned truth (or emotion) than some carefully crafted memo or letter.

In one example, a \$250,000 settlement was reached in a sexual harassment case on the basis of one horrific email message ("I want you to get that [redacted] tight-assed bitch out of here. I don't care what you have to do"). In the infamous Rodney King case, electronic messages sent immediately after the event via mobile data terminal starkly revealed the racist attitudes of some of the officers involved, destroying the credibility of their denials ("Oops, I haven't beaten anyone so bad in a long time"; "Sounds almost [as] exciting as our last call.... It was right out of 'Gorillas in the Mist.'"). It took the offensive email messages of only 4 employees at Chevron to produce a \$2,200,000 settlement in another sexual harassment case. In the Fen-Phen litigation that ultimately settled for \$3.75 billion, an executive for the manufacturer of the product was caught crowing about fooling the FDA into thinking a warning label wasn't necessary ("The meeting with the FDA yesterday was a tremendous success! No black box [warning]!"). I bet he would like to take that one back!

Such examples as these will only multiply as Americans increasingly use email as their major means of communication.¹

¹ A recent UC Berkeley study indicates that "[o]ver 93 percent of the information produced in 1999 was in digital format," and "[e]mail has become one of the most widespread ways of communication in today's society. A white-collar worker receives about 40 email messages in his office every day. Aggregately, based on different estimates, there will be from 610 billion to 1100 billion messages sent this year alone." "How Much Information?" assembled by Researchers: Peter Lyman and Hal R. Varian and published on the Web on October 20, 2000 at <http://info.berkeley.edu/how-much-info/>.

Once created, email messages are about as difficult to kill as crabgrass. They sit on individual computer work stations, both sender and receiver, unobtrusively piling up on today's high-capacity, multi-gigabyte hard drives. They also accumulate on network backup tapes and remain there even if deleted from work stations.

The trick in discovery is to move immediately to make sure the other parties preserve backup tapes from spoliation before they are overwritten with new data in the course of a company's tape recycling process.²

2. Email messages and the documents attached to them are often the most likely sources of significant relevant information.

At least as important as email messages themselves are their attachments. These can be spreadsheets, word-processed documents of every kind, photos, graphics, CAD files – you name it. Critical enterprise documents are often shared for peer review and approval by higher-ups. Thus, key documents can be expected to “float to the top” via the vehicle of email circulation. And if you request, for example, source electronic e-mailbox files for each key individual, *you may also receive any documents attached to the individuals' email messages as if preserved in amber, even if the “original” documents have long since been erased.* Thus, any revisions are preserved, and (assuming you have properly requested the email files in easily searchable electronic form and not as paper printouts which cannot be reliably linked to attached documents) you also overcome any authenticity problems with the attachments.

3. Focusing on email keeps your first discovery requests modest and limited, and it will more likely find favor with the judge if you need to move to compel compliance.

Which of the following requests will stand a better chance of surviving objections to a judge for being overly broad and burdensome?

1. Please produce all word-processed documents, spreadsheets, databases, CAD files and email message of all persons working for or on behalf of XYZ, Inc.

or

2. Please produce the email messages, in native electronic format, (e.g. contained in the Outlook .pst and server files), sent and received between June of 1998 and July of 1999 by the following persons::
 - a. John Jones
 - b. Sally Smith
 - c. Ronald McDonald
 - d. Peter Piper
 - e. Jolene Upton

² A useful tool in that regard is the “spoliation letter,” specifying in detail the digital data the opposing side must retain for the duration of the lawsuit. Fios provides its customers with a number of useful forms and discovery tools, among them a very comprehensive spoliation letter. A party ignores such a letter at its considerable peril.

No contest, right? You've focused on the key players in the lawsuit, and you've limited your requests to a specific time period.

If the other side objects to discovery based on one or more privileges or relevance, then fine: let them make a privilege log of all email messages they plan to exclude and a log of all email messages withheld as irrelevant. They can then produce the rest, still in electronic format. Fios can help you (and, yes, even the other side as a third-party neutral expert working under the court's supervision) to segregate such email messages and produce the rest to you -- all as searchable as the case law you plough through with WestLaw or Lexis/Nexis. And you get the metadata and attachments associated with each email message. For more information about metadata ("data about data") that cling to electronic files, see our White Paper, [*Rock, Scissors, Paper...Electrons! Why You Should Insist on Electronic Document Originals Instead of Printouts*](#).

This foray into email, of course, will probably be only your *first* request for electronic evidence. You can continue to submit additional requests with the same modesty or with a much larger scope, justified perhaps by what you learn from the first sets of email messages you look through.

4. Searching email first is cost-effective (if you insist on the electronic originals and not print-outs).

By quickly and efficiently searching through email messages, and being able to annotate and share your analyses with colleagues and co-counsel through Fios' "*io*TM" Web application (which is Internet Explorer browser-based requiring no additional software on your part), you can find the "hot docs" you're looking for in minutes rather than weeks using an army of paralegals.

Indeed, you may find that your initial "guerrilla raid" at the heart of the oppositions' data universe may be all the discovery you'll need to prove your case.