

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ERIK ADAM IBARRA, ET. AL	§	
	§	
Plaintiffs	§	CIVIL ACTION NO. H-04-0186
	§	JURY DEMANDED
V.	§	
HARRIS COUNTY, ET. AL	§	
Defendants		

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PLAINTIFFS' MOTION FOR CONTEMPT AND MOTION FOR SANCTIONS AND  
PLAINTIFFS' REQUEST FOR AN EMERGENCY HEARING AS TO  
CHARLES A. ROSENTHAL, JR.'S THIRD MOTION FOR PROTECTION

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TO THE HONORABLE JUDGE OF SAID COURT:

Chuck Rosenthal has intentionally misled the Court and has now admitted under oath that after receiving the document subpoenas, and after the Court specifically denied his request for protection and the Court issued an order compelling the production of documents, **Mr. Rosenthal sat down at his computer and began deleting the requested e-mails.** As soon as the transcript is available, Plaintiffs intend to supplement this motion for contempt with Mr. Rosenthal's actual testimony.

At this point, Plaintiffs oppose Mr. Rosenthal's **THIRD** Motion for Protection. First, and foremost, Mr. Rosenthal blatantly refused to follow the procedure outlined on the record at the hearing before the Court on November 20, 2007. By intentionally refusing to follow the appropriate procedure, Mr. Rosenthal waived his opportunity to withhold documents and now claim that certain documents are privileged. Specifically, the Court instructed the parties to permit Plaintiffs counsel to review the e-mails at issue in Mr. Rosenthal's office. As the e-mails were being viewed, if Plaintiffs requested a particular e-mail, then a copy would immediately be made of said e-mail. Mr. Rosenthal would have his counsel there to make a judgment as to

whether they wanted to produce the document or claim a privilege. Then, the e-mail would go into one of two files. One file would be immediately produced and the other would be submitted to the Court on Wednesday for an in-camera inspection. The purpose of this procedure was so that any dispute over privilege would be addressed by the Court before Rosenthal's oral deposition was scheduled to commence. The Court expressly stated that the Protective Order it was signing was modified to accommodate the instructions as elaborated on the record. Instead, Mr. Rosenthal continued his pattern of waiting until the last possible moment and using delay as a tactical weapon.

On Monday, November 26, 2007, Plaintiffs' counsel showed up at Mr. Rosenthal's office earlier than previously expected. Counsel was kept waiting for some time because Mr. Rosenthal's office was not ready. When Plaintiffs' counsel asked to start with Mr. Rosenthal's e-mails, counsel was informed Rosenthal's e-mails were not "ready." Mr. Rosenthal's general counsel, Scott Durfee, informed Plaintiffs' counsel that they were not going to follow the procedure outlined at the hearing but instead were intentionally not going to hook-up a printer. Instead, over Plaintiffs' counsel's objection, Mr. Durfee stated that any e-mail requested was to be highlighted on a print-out of e-mails. Throughout the day, Mr. Rosenthal assigned several members of his staff to monitor Plaintiffs' counsel's viewing of the e-mails. Shortly after 5:00 PM, Mr. Durfee instructed Plaintiffs' counsel to cease work. Plaintiffs' counsel informed Mr. Durfee that he was willing to work later but this offer was rejected. Plaintiffs' counsel provided Mr. Durfee with the days completed e-mail request.

Plaintiffs' counsel then asked about the status of Mr. Rosenthal's e-mails. Mr. Durfee gave Plaintiffs' counsel no explanation as to why Rosenthal's e-mail was unavailable. Plaintiffs' counsel again informed Mr. Durfee that Plaintiffs' counsel wanted to start with Rosenthal's e-

mails first thing in the morning because Rosenthal's deposition was scheduled first for Thursday morning and the in-camera inspection had to occur on Wednesday.

On Tuesday, when Plaintiff's counsel arrived at approximately 8:45 AM, he was again informed that Rosenthal's e-mails were not available. Plaintiffs' counsel then spent the time looking on at the log of e-mails for Mr. Graham to make effective use of the time. Eventually, Mr. Rosenthal's e-mails were provided however they gave no explanation as to the delay. After reviewing some of Rosenthal's e-mails, Plaintiffs' counsel noticed something different about Rosenthal's e-mails from Mr. Graham's or Mr. Durfee's e-mails. Mr. Gary Zallar, Mr. Rosenthal's IT person explained to Plaintiffs' counsel that Mr. Rosenthal had deleted his e-mails necessitating the re-creation of his e-mails. Mr. Zallar also stated that they were only maintained 10 days of back-up. Mr. Zallar could not assure Plaintiffs' counsel that all of the e-mails Mr. Rosenthal had deleted had been restored.

Plaintiffs' counsel completed examination of Mr. Rosenthal's e-mails on Tuesday evening and handed the requested e-mails to Rosenthal's staff. Again, Plaintiffs' counsel expressed concern about following the Court's procedure for securing an in-camera inspection on Wednesday so that Rosenthal's deposition could proceed on Thursday.

On Wednesday, Plaintiff's counsel again arrived early and completed reviewing of the remaining e-mails before noon and again asked Rosenthal's staff if they were going to make an effort to print the documents. Plaintiffs' counsel specifically requested them to identify the documents they were not going to claim were privilege and make those available before the end of the day and to provide the Court with those that they claimed for immediate review. Rosenthal's staff did not even contact Plaintiffs' counsel 5:00 on Wednesday. They stated they had no documents to produce and were still reviewing the e-mails. Plaintiffs' counsel requested

whatever documents they could produce at any time that evening and supplied a cell phone so that late contact could be made for a late pick-up. Rosenthal's staff never contacted Plaintiffs' counsel again that evening.

Instead, Mr. Durfee showed up at the time scheduled for Mr. Rosenthal's deposition and handed Plaintiffs' counsel some documents they were not going to claim were "privileged" but were still classifying as "confidential." Mr. Durfee admitted that Rosenthal had not even begun to review the requested documents or begin to make copies of the documents until after Plaintiffs' counsel left their offices on Wednesday.

Of even greater importance, Mr. Durfee then informed Plaintiffs' counsel that under his interpretation of the Court's written order, not a single e-mail that had been produced could be used or discussed during the deposition because of the presence in the room of the lawyers representing Harris County, the Deputies and Sheriff Thomas. Mr. Durfee refused to recognize that the Court had specifically modified his proposed protective order and permitted the Defendant parties to this case to be present at the deposition and to participate if they desired. Further, any documents that were being produced to Plaintiffs' counsel were not supposed to be "privileged" and therefore available for use in the deposition and available to be seen by Defendants' counsel. Mr. Durfee demanded that none of the e-mails be used or shown during the deposition with the presence of Defendants' counsel. Mr. Durfee continued to refer to the literal language of the Protective Order that he had submitted and refused to recognize any change or clarification that had taken place on the record at the hearing.

Rosenthal's actions in changing the Court's procedure and in changing the Court's instructions left Plaintiffs' counsel unable to use the e-mails at all during the examination of Mr. Rosenthal and effectively manipulated the situation to perform an end-run around the Court's

order. Effectively, Rosenthal nullified the Court's order,

Now, Mr. Rosenthal wants to hide the basis for his contempt under a motion for protection submitted under seal. Mr. Rosenthal's basis for keeping the most damaging e-mails private is his claim for an unrecognized personal privacy privilege on the basis of "*Roe v. Wade*." See page 15 of Rosenthal's Motion for Protection. Mr. Rosenthal's motion is absolutely frivolous. Rosenthal is claiming a "privacy" privilege for approximately 50 e-mails. Mr. Rosenthal, a publicly elected official, admitted all of the e-mails at issue were exchanged over the Harris County e-mail system. None of the e-mails were exchanged over Mr. Rosenthal's private e-mail system that he maintains at his home. Mr. Rosenthal argues that the "zones of privacy" implicated in the individual's interest in independently making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* Rosenthal goes on to assert that "Similar privacy claims have been recognized with respect to personal communications of an intimate nature." *Id.* Rosenthal wants the Court to shield him under a "common decency" standard. *Id.* However, the cases Rosenthal cites are where the individual owned the e-mails. In this case, Mr. Rosenthal does not own the e-mails. The public owns the computers the telephone wires as well as the e-mail servers and the system itself. Nothing about these e-mails can be claimed as "owned" by Mr. Rosenthal. Even under the Texas Open Records Act, Mr. Rosenthal could not hope to succeed in keeping these e-mails secret.

Rosenthal's previous argument as to privacy was that the e-mails would identify social security numbers or other such personal information. Plaintiffs agreed even then that it was not seeking such information. After reviewing the documents, none of them contained any such information. This claim was nothing more than a ruse. Mr. Rosenthal's motion claims that

since he has “formally objected to the production of these 130 electronic mail messages ... the Ibarra’s attempt to seek production of them is foreclosed pending further order from this Court.” *Id.* at 20.

The Court signed the second motion to compel on November 16, 2007. It takes the cake for Rosenthal to have been sitting in the Court on November 20, 2007 and not to have voluntarily informed the Court that e-mails had been intentionally deleted such that full compliance with the Court’s orders could not be assured. Instead, Rosenthal and his counsel misled the Court and gave every assurance that everything was ready for inspection as of that day, November 20, 2007. Rosenthal has testified that he had even brought his IT person, Gary Zallar, to the hearing on November 20, 2007. And, yet, not once did they disclose to the Court that they were in fact not in compliance with the Court’s order. Plaintiffs’ counsel should not have had to learn by accident that e-mails had been deleted and that on November 26, 2007 Rosenthal’s IT person was hurriedly re-creating the files.

During the deposition, Mr. Rosenthal refused to answer question relating to communications with his wife citing the spousal privilege. Now, Rosenthal wants to expand his right-of-privacy privilege to include numerous other e-mails that are un-related to his wife. Such gamesmanship should be dismissed by the Court.

Rosenthal originally sought to hide some 12,000 electronic e-mails. Out of that number, Plaintiffs’ counsel only requested 860 e-mails be produced. Most of these e-mails consist of a few lines. Given that Plaintiffs’ counsel was able to review 12,000 e-mails in approximately two full days, Rosenthal’s staff should have been able to review 860 e-mails in less than a few hours. Thus, it is in-excusable that Rosenthal did not even attempt to seek Court review on Wednesday of the 130 e-mails that Rosenthal now claims are privileged. Rosenthal should not be rewarded

for his dilatory tactics. Two years ago, it was Harris County that engaged in such tactics. Now, it is the Harris County District Attorney. The Court's decisive action two years ago put an end to the endless haranguing and Plaintiffs request the Court to again put an end to such gamesmanship.

As to the rest of Rosenthal's grounds to withhold documents, first, no criminal matters or grievance matters were even shown to Plaintiffs' counsel for review. Thus, all that is left is matters of privilege under the Federal Rules of Evidence. To expedite the process, Plaintiffs have agreed to permit Mr. Rosenthal to keep e-mails 1-7, and 16, 17-20 pursuant to Mr. Durfee's claim of attorney-client privilege. Plaintiffs agree to permit Rosenthal to keep e-mails 24-26, 33, 56, 65, 70, and 71. As to e-mails 72-73 and 78, these e-mails were addressed and agreed to by all parties on the record during Mr. Rosenthal's deposition so that they are no longer at issue.

As to the remaining e-mails, Plaintiffs disagree that Rosenthal's "deliberative process" attaches to the remaining e-mails. Plaintiffs are unable to make any response to the remaining e-mails without having access to the e-mail document.

Plaintiffs' counsel asks that the Court reject Mr. Rosenthal's claims of privilege and require him to produce the remaining documents without further delay. Mr. Rosenthal's conduct clearly warrants sanctions. Any legitimate claim of privilege was waived with Rosenthal intentionally refused to follow the procedure dictated on the record at the hearing November 20, 2007. Rosenthal and his counsel previously refused to comply with the Court's orders and even admitted in their filings that they had not complied. Plaintiffs re-urge the previous grounds for contempt and sanctions filed in the previous motion and urge the Court to hold a hearing as to Rosenthal and his counsel's further actions of blatant contempt. Because of the obvious attempt to win by simply running out the clock, Plaintiffs ask for an emergency hearing to consider the

