

Chief Judge Imposes Privilege Waiver Sanctions Against Defendant for Repeated Discovery Misconduct in *DL v. District of Columbia*

May 20, 2011

Chief Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia sent a clear message to litigants last week: repeated discovery violations will not be tolerated and may subject the violator to harsh sanctions, including waiver of privilege. In his May 9 ruling in *DL v. District of Columbia*,¹ Judge Lamberth denied defendant District of Columbia's (District's) request for reconsideration of his April 7, 2011 order, which imposed privilege waiver sanctions with regard to all of the District's as-yet unproduced email and ordered the District to produce all such email within one week after the close of trial.

The plaintiffs in this Individuals with Disabilities and Education Act (IDEA) case had been waiting almost six years for trial. Beginning on the first day of trial (April 6, 2011), however, the central issue in the case quickly became the District's failure to timely meet its discovery obligations when the plaintiffs' counsel informed the court that "document production from the District was still flooding into his office," including the production of "thousands of e-mails just days before trial." Indeed, the District intended to "continue to produce thousands of e-mails on a 'rolling' basis even *after* the trial concluded." As the unproduced e-mails were from more than two years prior, no basis existed for such a lengthy delay in production, especially in a case in which discovery had been closed for more than two years. The court found the District's explanation for its untimely rolling productions of email (which the District described as the result of a "supplemental search" that had been "ongoing for months") completely unacceptable. The court especially noted the District's failure to bring its delayed production to the court's attention at either the pretrial conference or at any number of pretrial proceedings.

Among the District's numerous discovery violations, the court highlighted the following:

- Failure to timely produce relevant documents
- Violation of multiple discovery orders
- Failure to timely provide a privilege log
- Failure to inform the court of any delays in production in order to request appropriate extensions

1. Case No. 1:05-cv-01437-RCL (D.D.C. May 9, 2011). Plaintiffs in this class action suit sued their local school district, the District of Columbia, over the District's failure to provide them with a free appropriate public education, as required by law.

The court may have been more lenient had the District not requested and been granted an extension of its discovery deadlines from June 27, 2008 until October 14, 2008. The District, despite being recently sanctioned for discovery violations, failed to comply with several discovery milestones ordered by the court, including the submission of a privilege log. In addition, the District's certification that it had completed its production was not only late, but also inaccurate since the District clearly had not yet completed its production. Furthermore, on September 22, 2010, the district court ordered both parties to supplement their discovery responses and document productions up until the date of the trial, an order that the was also violated by the District.

In its ruling, the court emphasized the District's failure to (a) alert the court to the delayed production of email and (b) seek an appropriate extension. "If at any point the District realized that it was behind, or for any other reason could not comply with this Court's Orders, it should have informed the Court of the problem. . . . It could have said something at any of the multiple status conferences held in this case or at the pretrial conference. Instead, the District failed to produce documents for over two years, violated multiple Court Orders in the process, and instead of informing the Court of the situation at any point along the way, it simply sprung the news on the first day of trial."

Further, the court stated that, absent entering a default judgment in the case, the order granting privilege waiver sanctions and compelling production of all remaining e-mail within one week of trial was the only realistic alternative. Otherwise, the parties would face extremely burdensome delays and increased litigation time and costs, which would also affect the court's already overloaded trial docket. The court stated state that the District "should not be surprised that its misconduct has caught up with it."

This case underscores the importance to companies involved in litigation of diligently complying with all discovery deadlines and promptly bringing to the court's attention any delays in compliance. Failure to do so may result in severe sanctions, including privilege waivers.

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