Lead Texas Atty In Google Suit Tells Team Not To Use Gmail

By **Bryan Koenig**

Law360 (February 4, 2021, 7:26 PM EST) -- Attorneys representing the Texas-led coalition of attorneys general suing Google over its display advertising business are under orders from their lead counsel not to use Gmail for fear the company could somehow mine emails to its advantage.

W. Mark Lanier of The Lanier Firm PC said on a call with reporters Thursday following a status conference for the Eastern District of Texas case that he has no evidence that Google is mining emails, and he noted that it would be illegal for Google to actually read an individual's email to help the company in the litigation.

"But it's not illegal for them to data mine," said Lanier, who asserted that he would be shocked if Google wasn't doing so.

As an example, Lanier noted that internet searches for a product promptly elicit online advertising for it, and he brought up that ability in his warning for attorneys working the case not to use Gmail.

"I don't expect they would ever tell me they do," Lanier said. "We just foreclose the opportunity for them to do it."

Lanier's admonition not to use Gmail plays into a broader dispute over how to shape the protective order that will control the use of sensitive information in the case. He told reporters he expected the parties to come to a resolution by the end of next week or be forced to put the matter to the judge.

That fight springs from the leak of an unredacted draft of the complaint to The New York Times and The Wall Street Journal, which the Times said gave previously undisclosed details of an alleged deal between Google and Facebook that would have spared Google from facing a competing advertising platform from Facebook.

The disclosure, Google attorney R. Paul Yetter of Yetter Coleman LLP said, must have come from the plaintiffs' side, but there's nothing Google can do about it without knowing who had access. When Google asked the attorneys general, they refused to answer, according to Yetter.

To prevent other leaks, Google is pushing for a protective order that would require parties to be notified when sensitive information is disclosed to outside consultants. If those consultants, whose names are normally kept secret, know that all parties are aware of what they're receiving, "It will have a

prophylactic effect," said Yetter during Thursday's hearing before U.S. District Judge Sean D. Jordan.

Yetter also argued that a protective order mandating such disclosure is the standard for the Western District of Texas.

Google blasted any assertion that it would use its data-mining to its advantage.

"We don't do that, we never have, and there's not a hint of evidence to the contrary," a Google spokesperson said in a statement Thursday.

The parties will only put the protection order matter to Judge Jordan if they can't come to an agreement. But both sides nevertheless telegraphed the dispute Thursday, with Lanier arguing that he is concerned about divulging the names of consultants to "the information giant" that would allow Google to data mine.

"It's a touchy situation because of who the parties are," Lanier said, asserting that the attorneys general have tried to find the source of the leak and don't believe it came from any of the enforcers in the coalition.

Lanier told reporters afterward that the draft complaint was sent out to 35 attorneys general asking if any would join it. He anticipated that more will likely sign on to pursue one of three enforcer cases against Google, alongside the U.S. Department of Justice and a larger group of attorneys general. The other two cases, in D.C. federal court, are targeting Google's search and search advertising business.

Lanier is looking at a far faster timetable for the Texas case, especially if his coalition can prevent Google from transferring the suit from the East Texas "rocket docket" to California, where at least half a dozen private class actions are similarly targeting the search giant's display advertising business.

While the DOJ case may go to trial in September 2023, Lanier told reporters that the Texas coalition wants a trial in January or February 2022. According to Lanier, Google has said talk of a trial date is premature, but he said Google should have no problem readying itself for trial

"You can Google everything," said Lanier, who noted that the company has vast financial resources that has allowed it to stock its legal defense with powerhouse law firms.

Asked why he expects the case to go so much faster than the DOJ suit, Lanier said Texas hired an outside law firm to take the lead "because of the need to move with more expediency."

The Texas case and the class actions in California all accuse Google of violating Section 2 of the Sherman Act for the company's alleged monopolization of the display advertising market. In seeking to transfer the Texas suit last month, Google said it and the other suits implicate much of the same alleged activity, including the leveraging of its position in search and search advertising to take over the market for display ads.

They also target Google's alleged tying of products together and its position as the broker for both buyers and sellers of display ads, as well as the operator of the exchange where display ads are bought and sold.

The DOJ case in turn claims Google pays "billions of dollars each year" through a web of contracts with

mobile device manufacturers, wireless carriers and software developers to make its search engine the default on many devices. Google has called the DOJ case "deeply flawed" in public statements and has denied that there is anything wrong with the agreements it implicates.

A contingent of 38 attorneys general filed a separate complaint in December in D.C. federal court, also claiming Google illegally maintained its monopolies in search and search advertising. That case is going after conduct beyond the agreements at issue in the DOJ case to include deals over smart speakers and connected cars, limitations on specialty search sites, and the use of a marketing tool to steer advertisers away from Microsoft's Bing search engine.

The D.C. cases have also been a source of drama for Google, thanks to a fight over whether to limit discovery. The coalition of attorneys general, led by Colorado, has pushed for 30 depositions on top of the 65 granted to the DOJ, while Google has argued for 70 depositions total that would limit the Colorado coalition to only five.

D.C. U.S. District Judge Amit P. Mehta split the difference Wednesday, permitting a total of 80 depositions between the two cases for each side and increasing discovery caps beyond those sought by Google, including for interrogatories, "to ensure that the Colorado plaintiffs can adequately develop their separate theory of monopolistic conduct."

Judge Mehta otherwise largely adhered to Google's wishes, issuing a single case management order and rejecting a separate discovery coordination order.

"Google's proposal of collective caps on the plaintiffs parties' discovery has the benefit of encouraging coordination among the plaintiff parties and increasing efficiencies with respect to their common theories of liability," the judge said. "Affording each set of plaintiffs their own complete set of written discovery, as the Colorado plaintiffs have proposed, would disincentivize cooperation in advance of propounding such discovery."

Texas and the other states are represented by the offices of their attorneys general.

Texas is also represented by W. Mark Lanier, Alex J. Brown and Zeke DeRose III of The Lanier Firm PC and Ashley Keller and Warren Postman of Keller Lenkner LLC.

Google is represented by R. Paul Yetter and Bryce L. Callahan of Yetter Coleman LLP.

The case is State of Texas et al. v. Google LLC, case number 4:20-cv-00957, in the U.S. District Court for the Eastern District of Texas.

--Additional reporting by Matthew Perlman, Lauren Berg and Julia Arciga. Editing by Adam LoBelia.