nography. Police executed the warrant and seized Bach's computer and Post It notes displaying names and telephone numbers.

In the state case, Bach sought to suppress the evidence seized from his home because it was acquired pursuant to the faxed Ramsey County warrant. Bypassing the issue of whether the Ramsey County warrant was executed unlawfully, the Minnesota Court of Appeals concluded that the Hennepin County warrant stood, even if the Ramsey County warrant was not valid. The court pointed out that sufficient information was provided in the Hennepin Count warrant independent of that offered in the Ramsey County warrant.

Orth said Bach will be appealing the decision of the Eighth Circuit, but not the Minnesota state court decision.

Best Practices

Certifying E-discovery Compliance and Avoiding Potential Sanctions

By Larry G. Johnson, J.D.

Over the past decade, it has not been uncommon for electronic discovery to be accomplished by lumping selected computer files together on floppies, CDs or a hard drive, with a cover letter that says in effect, "Here are the relevant electronic documents subject to your Request for Production of Documents."

Does such a "production dump" pass muster under Rule 34(b), Rule 26(g) and, if applicable, the strictures imposed in the landmark opinion *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union,* 2003 WL 186645 (S.D. N.Y., decided January 28, 2003)?

Metropolitan Opera created quite a stir since, due to the discovery abuses committed by defendant and its counsel, the harshest sanction was imposed: entry of judgment against defendant, with only the issue of plaintiff's damages left for trial.[1]

Requirements under the Rules

Fed. R. Civ. P. 34(b) and its state court equivalents state in pertinent part: "[a] party who produces documents for inspection shall produce them *as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request*" (emphasis added). It can be argued that an attorney's certification as an officer of the court required by Rule 26(g)—that a discovery production "is complete and correct as of the time it is made"—is true only if the "completeness" includes compliance with Rule 34(b),[2] that is, either produced as kept in the ordinary course or organized and labeled consistent with the discovery request.

As with other rules of civil procedure originally promulgated in a paper-centric world, the unique nature of electronic documents might appear to render moot the "organized collection" requirements of 34(b). One court, for example, found compliance with 34(b) so long as electronic files produced in discovery were "in a form that was usable to other parties."[3] And while important paper documents can be hidden in the blizzard of a large, undifferentiated paper production, electronic documents ("kept in the usual course of business" as unstructured data on users' hard drives and backups anyway) can't hide when subjected to keyword or contextual searches.[4]

Judicial Constructions

But there are nuances in Rule 34(b) as construed by the courts that relate to *the quality of a party's organization of its documents,* both pre-litigation and during the course of discovery, that bear on the Rule's two production options. Total disorganization may foreclose either option, rendering any attorney's 26(g) certification under those circumstances suspect or worse. For example, construing Rule 34(b), the court in *Renda Marine v. United States*, 2003 U.S. Claims LEXIS 260, *Digital Discovery & e-Evidence*, December 2003, p. 13 (Fed. Cir. Aug. 29, 2003) observed:

> There is a split in the persuasive authorities concerning whether the option to produce documents as they are kept in the ordinary course of business is an absolute privilege belonging to the party producing the documents. See, e.g., *Bd. of Educ.v. Admiral Heating and Ventilating, Inc*., 104 F.R.D. 23, 36 n.20 (N.D. Ill. 1984) (view that the rule should not be interpreted as giving the sole choice to the producing party). But see *C & T Assocs., Inc. v. Township of Abington*, 1986 WL 14548, n.3 (E.D. Pa. Dec. 19, 1986) (finding that rule appears to give the producing party the option of how to produce the documents). The split in the case

law apparently stems from the 1980 amendment to Fed. R. Civ. P. 34, which was designed to prevent the specific discovery abuse of parties "deliberately . . . mix[ing] critical documents with others in the hope of obscuring [the documents'] significance." Advisory Committee Note to Rule 34(b), Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 532 (1980). See also Edward F. Sherman & Stephen O. Kinnard, *Federal Court Discovery in the 80's — Making the Rules Work*, 95 F.R.D. 245, 255 (1983); 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure: Federal Rules of Civil Procedure §2213* (2d ed. 1994) ("Whether this provision should be viewed as giving the responding party the option to produce in the manner it prefers has been the subject of some debate."); *7 Moore's Federal Practice — Civil §34.14[3]* (3d ed. 1987) ("I]t is not clear whether the producing party has the exclusive option to determine which of the two alternative methods will be used.").

It appears that the pivotal consideration in deciding discovery challenges under Rule 34(b), like defendant's in this case, where a large number of documents have been produced based on an "as they are kept in the usual course of business" election is whether the filing system for the produced documents "is so disorganized that it is unreasonable for the [party to whom the documents have been produced] to make [its] own review." *Natural Res. Def. Council, Inc. v. Fox*, 1996 WL 497024, n.3 (S.D. N.Y. 1996). See *Wagner v. Dryvit Sys., Inc.,* 208 F.R.D. 606, 610-11 (D. Neb. 2001) ("producing large amount of documents in no apparent order does not comply with a party's obligation under Rule 34"); *Rowlin v. Alabama Dep't of Public Safety*, 200 F.R.D. 459, 462 (M.D. Ala. 2001) (finding producing party may elect how to produce its records "provided that the records have not been maintained in bad faith"); *Kozlowski v. Sears, Roebuck & Co*., 73 F.R.D. 73, 76 (D. Mass. 1976) (stating that a party "may not excuse itself from compliance with Rule 34 … by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition").

Certainly, simply producing floppy disks, CDs or a hard drive with a large number of "responsive documents" would fall under the "no apparent order" and "disorganization" indicators discussed in *Renda Marine*. Unfortunately, it is an aspect of "the usual course of business" that the digital data of most modern enterprises remain largely unstructured on individual users' hard drives or commingled with the work of others in shared folders on network systems. Sorting out this disorder to comply with Rule 34(b) may be beyond the capabilities of corporate IT, corporate counsel and outside litigation counsel.

The *Met Opera* Guidelines

But that doesn't mean courts are going to excuse such a state of affairs. Indeed, in *Metropolitan Opera*, Judge Preska put the burden on *counsel* to devise a document retention plan and litigation response system for the client if the client proved incapable of coming up with one on its own, writing, "[C]ounsel knew the Union's files were in disarray and that it had no document retention policy but failed to cause a retention policy to be adopted to prevent destruction of responsive documents, both paper and electronic."

The *Metropolitan Opera* court linked this failure, along with other important omissions and misrepresentations of counsel, to Rule 26(g) and the sanctions that can be imposed under Rule 37 for failure to satisfy 26(g)'s officer-of-the-court obligations:[5]

> Rule 26(g) imposes on counsel an affirmative duty to engage in pretrial discovery responsibly and "is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment. Furthermore, the Rule provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests."

The lawyers for the defendant also failed in other duties with respect to discovery that deserve mention here, since they relate to the requirements of Rules 34(b) and 26(g) and further outline what *not* to do when gathering electronic discovery responses from a client. Judge Preska found these additional omissions:

> … counsel failed to explain to the non-lawyer in charge of document production, inter alia, that a document included a draft or other non-identical copy and included documents in electronic form;
>
> … the non-lawyer the Union put in charge of document production failed to speak to all persons who might have relevant documents, never followed up

with the people he did speak to (instead merely picked up "Met-related" documents that some of the employees he did speak to placed in a box when they remembered to do so) and failed to contact all of the Union's internet service providers ('ISPs') to attempt to retrieve deleted e-mails as counsel represented to the Court that he would;

"… no lawyer ever doubled back to inquire of the Union employee in charge of document production whether he conducted a search and what steps he took to assure complete production;

"… in the face of Met counsel's constant assertions that no adequate document search had been conducted and responsive documents had not been produced, Union counsel failed to inquire of several important witnesses about documents until the night before their depositions."

Some Solutions

The best way to avoid sloppiness of this sort, of course, is to utilize the resources and time available *before* litigation to devise a Litigation Preparedness Plan.[6] Another is to seek advice from consultants familiar with document and project management software that can be used by corporate counsel and the law firms they hire. A good system is one that will not only keep an audit trail of which employee(s) provided which e-document in response to which interrogatory or request for production and in which matter, but can assure timely notifications and responses from all involved to assure completeness of discovery compliance per Rule 26(g).

One such tool is the Litigation Response System (LRS) developed at Legal Technology Group that consists of three major components: 1) a Response Team headed by a corporate counsel Legal Operations Administrator whose main duties are monitoring all data productions in all lawsuits from corporate employees to outside counsel, and who administers the LRS software; 2) the software (plus an optional web application) that creates an e-mail-driven notification and response system that automatically routes documents to and from designated "data owners" (and gives automated reminder notices to the tardy); and 3) a database that keeps track of all aspects of productions, including the matter, the data owner, document type, the document gathered, the specific, related interrogatory or request for production number(s), such that a compliant e-document production under option two of Rule 34(b) can be made at the press of a button.

No doubt there are other creative ways to meet these obligations, but one thing is clear: courts increasingly expect lawyers and their clients to manage and monitor discovery and their document productions, both paper and electronic. As to the latter, with so many digital tools available to handle digital evidence, data dumps on CDs or hard drives clearly no longer pass muster.

Endnotes

[1] For two articles that analyze the *Metropolitan Opera* case, see "A Discovery Disaster of Operatic Proportions" and "Practical Guide for Avoiding *Metropolitan Opera* Mishaps" by Virginia Llewellyn, in the March 2003 issue of *Digital Discovery & e-Evidence*, Volume 3, Number 3.

[2] See, e.g., *Dealing with Discovery In the* Too Much *Information Age*; Frank H. Gassler, www.thefederation.org/Public/Quarterly/Spring02/Gassler-Sp02.htm: "…under Rule 33(d), wholesale dumping of documents is not allowed.[footnote omitted] In short, a response to a discovery request must not only be complete; it also must assume a form that complies with the Federal Rules."

[3] Ibid., citing *Bd. of Educ. of Evanston Township High School v. Admiral Heating & Ventilating, Inc*., 104 F.R.D. 23 (N.D. Ill. 1984).

[4] "Contextual search" here means finding relevant documents through words' semantic relationships to other words within a data store, using software from vendors such as DolphinSearch, Engenium, Syngence, Attenex and others.

[5] Judge Preska's decision prompted the union's lawyers to seek a motion for reconsideration and a request that she recuse herself for alleged bias directed against them based on comments she made at a recent BNA seminar.

[6] For a discussion on this subject, see my article "Do Your Clients Have Litigation Preparedness Plans," August 2003 issue of *Digital Discovery & e-Evidence*, Volume 3, Number 8, also available at www.legaltechnologygroup.com/lpp.pdf; and *Challenges for Corporate Counsel in the Land of E-Discovery: Lessons from a Case Study*, by Daniel L. Pelc and Jonathan M. Redgrave, January 21, 2002, Vol. 3, Iss. 5, edition of *E-Business Law Bulletin*, also available at www.krollontrack.com/LawLibrary/Publications/ebusinesslaw.pdf.

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