

# LITIGATORS CORNER:

## A New Tactic: Document Dumps



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The advent of the paperless era was supposed to reduce paperwork, thus preserving the world's forests from the predations of lawyers, rivaling the havoc wreaked by the Dutch Elm beetle. I know that the paperless era has worked to some degree, because I no longer have paper copies of briefs, deposition transcripts, memos, subpoenas, objections to subpoenas, deposition notices, Rule 30(b)(6) deposition notices, objections to Rule 30(b)(6) notices, summonses, complaints, appearances, civil cover sheets, answers, counterclaims, replies, motions, responses, declarations, affidavits, expert reports, rebuttal reports, memorandum opinions, court orders, protective orders, initial disclosures, pretrial schedules, local rules, faxed letters, mailed letters, confirmation copies of faxed or emailed letters, confirmation copies of emailed letters, patents, articles, prior art, claim charts, interrogatories, objections and responses to interrogatories, document requests, objections and responses to document requests, requests for admissions, documents produced, hearing transcripts, *et cetera, et cetera, et cetera*, to quote the King of Siam, from "The King and I."

But it hasn't worked out as well as we would like. In a new mania, we are actually turning the convenience of the paperless era into a new form of electronic warfare. In one of our cases, the defendant produced about three million documents. Over one million

of them were produced as discovery was about to close. In another case, the defendant produced about one million documents. We estimated that it would take thirty-five forty-hour weeks to review them. In yet another, a defendant has produced over six hundred thousand documents. Production of a staggering number of documents has become routine, without regard to the simplicity or complexity of a case, or of the issues in dispute.

Now, instead of paper, we get gigabytes of un-indexed documents on a hard drive.

Many, many of these documents are emails, often interspersed with other kinds of documents, such as patents or financial records. A whole cottage industry of consultants on "eDiscovery," replete with expensive advice and software, has sprung up around the preservation and production of emails.

Rule 34 was revised to deal with the production of information in electronic rather than paper form. Rule 34 requires that electronic information must be produced in the form in which it is ordinarily maintained, or in a reasonably usable form.

But the document "dump" strategy, used by so many lawyers, is designed deliberately to foil Rule 34. Such productions are, in my opinion, meant to provide a tactical advantage to the producing party by burying the adversary in a huge number of documents, many of which are of little or no relevance. These productions have nothing at all to do with minimizing the expense to one's client, or with focusing on the disputed issues in the litigation. Once again, some lawyers demonstrate their best imagination in turning rules inside out, if not actually perverting the rules.

So what can we do about this? I have some suggestions from my own personal experiences. While I cannot say that they are sure-fire solutions, I believe they can help.

First, don't put up with document dumps. A number of courts have frowned on document dumps, and have done something about them. In *Pass & Seymour, Inc., v. Hubbell Inc.*, 2008 U.S. Dist. Lexis 85830 (N.D.N.Y. September 12, 2008), a party produced over 400,000 documents, without indexing or labeling them in any way. The court held that the absence of "any index or table to help illuminate the organization regime utilized by [the producing party] falls short of meeting the obligations imposed under Rule 34(b)(2)." The producing party argued that the documents produced were searchable, but the court said that was not good enough. It required that the party produc-

ing the documents identify the custodian of the documents, provide a description of the filing system, and assure everyone that the documents were produced in the order in which they were maintained in the ordinary course of business.

*Residential Constructors LLC v. Ace Property and Casualty Insurance Co.*, 2006 U.S. Dist. LEXIS 36943 (D. Nev. 2006) held:

The Court disagrees that simply producing for inspection 41 boxes of documents, or producing documents in a computer imaged format, complies with Plaintiff's obligation under Rule 34. Although Plaintiff alleges that the documents are organized in the manner in which they kept in the usual course of business, Plaintiff has gathered these documents together from different entities and locations and has assembled the documents together in the boxes, which have now been imaged onto a computer data base. Clearly some form of table of contents or index of the materials produced should be provided.

Both opinions cite other decisions to the same effect. Other useful cases are *In re Sulfuric Acid*, 231 F.R.D. 351 (N.D. Ill. 2005), *Covad Communications Co. v. Revonet*, 254 F.R.D. 147 (D.C. D.C. 2008), *GP Industries, LLC v. Bachman*, 2008 WL 1733606 (D.Neb. April 10, 2008), *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606 (D.R.I. 2001), *Coopervision, Inc. v. Ciba Vision Corp.*, 2007 WL 2264848 (E.D. Tx. Aug. 6, 2007), and *MGP Ingredients, Inc. v. Mars, Inc.*, 2007 WL 3010343 (D. Kan. Oct. 15, 2007).

So, if you get dumped on, tell the other party that you want an index, or that you want to see the documents as they are kept in the ordinary course of business. If you don't get what you need, ask your court for some help. You will likely get at least part of what you need.

Next, when formulating your document requests, don't write them in ways that encourage your adversary to dump documents on you. So, control the scope of your requests. It is common for lawyers to ask for "all documents relating to" a given subject. It is a natural thing to do, because you should be concerned that something significant might not be turned over. I have issued such requests. But keep in mind that the producing party is going to exercise its judgment under Rule 34, no matter how your request is phrased. I argue that it is better to refrain from asking for all documents. Instead, ask for those that are reasonably relevant in the

meaning of Rule 26(b)(1) or Rule 401 of the Federal Rules of Evidence.

Do not make too many document requests. This necessarily varies from case to case. There may be more than one patent involved. There may be a handful of claims that are alleged to be infringed, or there may be many. There may be a number of counterclaims, or none at all. My initial set often, though not always, includes only twenty to thirty requests. Keeping the number of requests down prevents a defendant from arguing that numerous requests (one of the cases I cited involved over six hundred requests) are so comprehensive, and so sweeping in scope, that very broad production is required.

Be reasonably specific in your requests. Don't ask for all documents viewed during preparation of interrogatory responses, or for all documents relating to the patent in suit. You aren't going to get them, anyway. Ask only for documents sufficient to understand the design and operation of specific products, such as instruction manuals or service manuals. Don't ask for documents about the "design, architecture, testing, operation, features, use, sales, and marketing of all of any of plaintiff's products or services," unless you are prepared to look at hundreds of megabytes — or even gigabytes — of data.

Don't use a lot of definitions and instructions in your requests. I see opposing parties in our cases provide long lists of documents to be produced. Here's one recent example:

As used herein, "document" has the same broad meaning as in Rule 34 of the Federal Rules of Civil Procedure, and includes any written or graphic matter or any medium of any type or description upon which intelligence or information is recorded or from which intelligence or information can be recorded, which is or has been in the possession, control, or custody of plaintiff, or of which plaintiff has knowledge, including the original and any non-identical copy (whether different from the original because of notes made on said copy or otherwise) of any advertising literature; agreement; bank: record or statement; blueprint; book; white paper; presentation; blog; website; journal; article; book of account; booklet; brochure; calendar; chart; check; circular; coding form communication (intra- or inter-company); computer printout; computer-readable form; contract; copy; correspondence; data base; diary; schedule; agenda; personal

calendar (electronic or otherwise); display; draft of any document; drawing; electronic mail or "e-mail"; film; film transparency; flyer; forecast; graph; index; instruction; instruction manual or sheet; invoice; job requisition; letter; license; magnetic media of all kinds (including disks, tapes, or other media) containing computer software with supporting indices, data, documentation, flow charts, comments, object code, source code, and computer programs relating thereto; manual; map; memoranda; minute; newspaper or other clipping; note; notebook; opinion; pamphlet; paper; periodical or other publication; photograph; price list; print; printed circuit board; promotional literature; receipt; record; recorded Read-Only-Memory (ROM); recording; report; solicitation; statement; statistical compilation; stenographic notes; study; summary (including any memoranda, minutes, notes, records, or summary of any (a) telephone, intercom, or voicemail conversation or message, (b) personal conversation or interview, or (c) meeting or confer-

ence); telegram; telephone log; travel or expense records; video recording; video tape; voice recording; voucher; worksheet or working paper; writing or other handwritten, printed, reproduced, recorded, typewritten, or otherwise produced graphic material from which the information required may be obtained, or any other documentary material of any nature.

Telegrams? Good grief. These kinds of definitions make you look like you intend to excessively burden your adversary, and you always run the risk of creating a loophole. Besides, if "document" has a broad meaning under the Federal Rules, why start narrowing it with a laundry list? Using definitions like this will only justify your opponent's giving you a jillion documents.

Remember that you can issue additional requests that are broader or narrower, as necessary. You do not need to accomplish everything in one set of requests.

Insisting on production as required by Rule 34, and keeping the scope of your requests reasonable, are two good ways to avoid the document dump. If you are inundated nevertheless, then ask your court for some help. **(IPT)**

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