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Practical Considerations for Responding to Government Formatting Requests Relating to Paper Document Collections

BY COLM F. CONNOLLY & JASON BELMONT CONN

Over the last several years, numerous legal articles have addressed the inner workings of producing electronic data (eData). The substantial expense and often challenging technical issues associated with the collection, review, and formatting of electronically stored data have also made eData production a major focus of negotiations with the government when a client receives a grand-jury subpoena. Indeed, eData production has generated so much attention that practitioners sometimes treat the production of paper collections in response to a subpoena as an afterthought. However, as described herein, corporate clients would be well

advised to include considerations about paper collections in formulating a strategic response to a grand-jury subpoena.

As most practitioners know, the cost of responding to a grand-jury subpoena is frustrating for corporate counsel. Whereas a civil defendant entering the thicket of discovery may negotiate a cost-sharing agreement with the opposing party, the recipient of a grand-jury subpoena will likely absorb the costs of production even if it achieves its goal of government declination. In recent years, those production costs have increased substantially, in part because companies have electronically scanned and formatted existing hard-copy document

collections to meet the production demands of prosecutors.

Sometimes overlooked, however, is the fact that the rules governing the production formatting of hard-copy documents differ from the rules applicable to eData records. In particular, the processing, scanning, and electronic formatting of paper document collections—unlike eData records—are not legally required. Thus, when the government makes onerous demands with respect to the electronic imaging and formatting of hard-copy records responsive to grand-jury subpoenas, a company is wise to leverage its willingness to comply with those demands,

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SEC v. Bank of America: Back to the Drawing Board

BY JEFFREY PLOTKIN & DOREEN KLEIN

In a scathing decision issued in September 2009, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York rejected as unfair, unreasonable, and inadequate a proposed settlement between the Securities and Exchange Commission (SEC) and Bank of America Corporation, setting the case down for trial in February 2010.¹ The court's well-founded skepticism toward the SEC and its methods would find few dissenters these days. Notwithstanding the

logic underlying Judge Rakoff's decision, however, and the ire that it barely keeps contained, it remains to be seen whether the decision will achieve a rational and just result. Whatever the outcome, it raises vital questions about how the SEC perceives its own mandate, for the aftermath of the Madoff debacle has lifted the curtain on a beleaguered agency, which appears to have ceded to state attorney generals and private plaintiffs the task of ferreting out facts and pursuing remedies on behalf of investors.

Background

The case arose out of the SEC's allegations against Bank of America, concerning its acquisition of Merrill Lynch & Co. The SEC alleged that Bank of America's publicly filed proxy statement was misleading. According to the complaint, notwithstanding the proxy statement's implication that Merrill was prohibited from paying bonuses under the terms of the merger agreement, the day before the merger

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Message from the Editor

On behalf of the Criminal Litigation newsletter, I want to thank all of our committee members and devoted readers for their continued support. Any attorney who wishes to contribute to the newsletter is encouraged to do so. The submission deadlines are May 1 for the Spring 2010 issue and August 1 for Summer 2010.

Please forward your submissions to me (either electronically or in hard copy):

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Also, if you have any ideas for topics that you would like to see addressed in the newsletter, please let me know.

Jon Monson

to her that the defendants were working "24-7" in an effort to save the funds.

Although investigations continue in the wake of the financial crisis, and there is increased funding and statutory authority pursuant to the Financial Enforcement and Recovery Act signed in May 2009, in the end this verdict reminds us that the government must still put on its proof and meet its burden. Even in the age of email, an exchange that is highly suggestive is not necessarily enough to prevail.

As always, if there are other topics you would like to see us address, or if you would like to become more involved in the committee, please contact one of us. ■

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to narrow the substantive scope of the subpoena and/or to ensure that the prosecutors credit the costs and efforts the company expends in formatting the production as evidence of the company's overall cooperation with the government's investigation.

Substance: Position of Weakness

Practitioners with corporate clients that have been on the receiving end of a government subpoena have probably fielded the question "How can we fight this subpoena?" A client's visceral reaction to a government subpoena may be to "take up arms" and prepare for a litigious battle, but seasoned practitioners know that a government subpoena is not the same as a set of document requests in traditional corporate litigation. The government is not a traditional opponent, and a more diplomatic approach to negotiations with government attorneys may be beneficial for two primary reasons: (i) the case law on challenges to the scope of grand jury subpoenas is unforgiving and well established; and (ii) cooperation has become the fundamental means of cushioning the blow of a government criminal investigation.

The Depth of the Case Law

One of the most deflating conversations that outside counsel has to have with a corporate client that has just received a government subpoena revolves around the options for challenging the scope of a grand-jury subpoena in the federal courts. Federal Rule of Criminal Procedure 17(c) allows the recipient of a grand-jury subpoena to file a motion to quash or modify a subpoena on the grounds that the subpoena is "unreasonable or oppressive."¹ There is no formula for a court to decide such a motion; however, the Supreme Court has stated that "relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry."¹ The probability of succeeding with such a motion is slim, as long as the government can demonstrate that the documents sought by the subpoena reasonably relate to the

subject matter of its investigation. As the Supreme Court reiterated in *United States v. R. Enterprises, Inc.*, where "a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation."²

Generally, a corporation's immediate reaction to the subpoena—that the cost of production is oppressive—rarely wins the day.³ Thus, a discussion of a possible challenge to the scope of a subpoena on cost grounds is generally a non-starter. Corporate counsel should certainly evaluate the fact-specific considerations that may permit a corporation to challenge or shift the burdens associated with a grand-jury subpoena. However, as the Supreme Court noted in *United States v. Hurtado*, "[i]t is beyond dispute that there is in fact a public obligation to provide evidence, and that this obligation persists no matter how financially burdensome it may be."⁴

The Importance of Cooperation

If the "stick" of unsupportive case law hitting a corporate recipient of a grand-jury subpoena is not enough to discourage the corporate client from an aggressive attack on a grand-jury subpoena, perhaps the "carrot" of the benefits received through cooperation with a government investigation will be enough to encourage the inclusion of diplomacy in the corporation's grand-jury-subpoena strategic response plan. While defense counsel should always be prepared to try the case, in most cases it is important for a company to consider compromises that may help limit the damage of a prosecution and potential conviction. Given the increased focus on corporate prosecutions and the limitations placed on the discretion of individual prosecutors to negotiate guilty pleas, it is imperative for a company that is under investigation to promptly retain experienced defense counsel to establish and maintain communications with the prosecutor to best attempt to persuade the government to decline prosecution, not to pursue an indictment on certain charges; or if a prosecution is

unavoidable, to explore options regarding negotiating the best possible pre-indictment resolution.

The U.S. Attorney's Manual (USAM) specifically identifies the importance of a corporation's cooperation with a government investigation. In section 9-28.700, entitled "The Value of Cooperation," prosecutors are told that:

In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's . . . cooperation with the government's investigation may be [a] relevant factor[.]. In gauging the extent of the corporation's cooperation, the prosecutor may consider . . . the corporation's willingness to provide relevant information and evidence. . . .

The Request

It is within this context of overwhelming legal precedent and a desire to be viewed as cooperative that a corporate target must develop its strategic response to a government subpoena. As should be obvious, the playing field is anything but level. The leverage entering discovery negotiations in civil litigation may be reciprocity or the desire of both sides to minimize costs. In contrast, in a government investigation, corporate criminal defense practitioners enter negotiations from a point of relative weakness. Knowing this, in recent years, government prosecutors have ratcheted up their "wish lists" when it comes to responding to a subpoena, not the least of which is related to one of the most overwhelming and unmanageable aspects of a government investigation: vast amounts of paper documents that are expensive and difficult to interpret, trace, organize, and review.

For this reason, one of the first requests that a defense attorney receives once the lines of communication between the prosecution and defense are opened is for the corporation to process its paper document collections, using optical character recognition (OCR) electronic scans. In many cases, the government will request detailed production keys and the insertion of certain searchable "metadata" fields to facilitate the document-review process. Today, this

request may come in the form of an attachment or cover correspondence to a grand jury subpoena such that the unseasoned practitioner or inexperienced corporate target believes that the form of production is incorporated into the substantive requests or is a prerequisite of cooperation with the government's investigation.

Form: Position of Power

Even though the corporate target of a government investigation may enter discussions regarding the *scope and substance* of requests in a grand jury subpoena as relatively powerless, the corporation enters discussions concerning the *format* of paper document productions from much higher ground. This should be obvious, but is often ignored because of the corporation's desire to be deemed cooperative in as quick a fashion as possible, or clouded by the fact that there are so many legal requirements when producing eData.

Government offices are perpetually understaffed, and government investigators and prosecutors can feel overextended when up against private corporations that have more fluid resources and generally arrive linked up with attentive and focused law firms. Although eData has become a major source of investigative findings, certain types of government investigations still rely heavily on handwritten notes, personnel files, expense reports, and other types of documents that are still, and have historically been, maintained in paper form. Thus, underfunded government offices often initiate investigations with the anticipation that they will receive searchable versions of paper documents in electronic format to minimize the resources they must dedicate—both in terms of expense and personnel—when faced with vast amounts of responsive paper documents in need of some type of review for purposes of developing their case.

The point of this discussion is not to suggest that the corporate target would be well served by ignoring the government's requests for electronic scans of paper documents and instead delivering truckloads of boxes of paper; the point is that the corporate target has something that is valuable to the government, and it should

leverage its position as to the form of production when negotiating the substantive scope of the subpoena and earning credit for its cooperation with the prosecutors. In other words, practitioners should remember that these formatting and processing requests are a starting point for negotiations, and they should not permit clients to commit too quickly to expensive processing without any return and without a full understanding of the two sides' positions within the negotiation.

The Legal Framework

The case law concerning the substance of grand-jury-subpoena requests provides the government with its muscle in the negotiations, but there is reinforcing case law for the corporate target when it comes to form of production. Federal Rule of Criminal Procedure 17, which governs subpoena responses, does not specify the form in which a document production in response to a subpoena must be made. However, courts have consistently applied corresponding civil case law to situations involving criminal discovery. Attorneys must look to civil case law to find the boundaries of formatting requirements attached to grand-jury requests.⁵

The authors of the recent amendments to the Federal Rules of Civil Procedure envisioned the negotiation of the form of production between two parties as a part of the pretrial experience. Rule 34(b)(2)(E), which provides instructions for "Producing the Documents or Electronically Stored Information," begins with the phrase "[u]nless otherwise stipulated." And Rule 26, as amended, specifically references a discussion of "the form or forms" of production as a subject for the Rule 26 discussions. If the parties cannot reach an agreement when producing paper documents:

- i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
- (ii) If a request does not specify a form for producing electronically stored

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information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.⁹

Applying these rules and concepts to the grand-jury subpoena, it would appear that the default position, as detailed in Rule 34, would be the production of documents in their ordinary course. In the case of paper files, this should be interpreted to mean a photocopy of the paper files in the order in which they are ordinarily maintained with all applicable file folders and existing organizing documentation. Recent civil case law has buttressed this position by asserting that the requesting party has to pay for formatting requests it makes that exceed the requirements of the procedural rules.¹⁰ Any agreement to produce electronic scans of paper files to the government is thus a concession made by the corporation and can be viewed as an agreed-upon departure akin to a stipulation in the civil context.

Despite the concessionary nature of such an agreement, government prosecutors may begin from the default position that this processing of paper files is the “standard practice for their office.” However, it is important to remember that this position is supported more by the government’s desire to efficiently run its investigation than it is well grounded in any legal requirement placed upon the recipient of a subpoena. The requirements for paper productions under Rule 34 are that the party make a copy set of the responsive documents and “reproduce those file folders and place the appropriate documents in them so that the production replicates the manner in which they were originally kept.”¹¹ As long as the documents are produced “in some kind of organized, indexed fashion rather than as a mass of undifferentiated, unlabeled documents,”¹² the producing party is in compliance with the discovery rules.

There is simply no legal basis for the

government to require the scanning, organizing, or insertion of metadata when producing paper documents. This is reinforced by the fact that Rule 34 has been found to be “premised on the expectation that the requesting party copies the documents once they have been produced, [even though] the more common experience is that the producing party copies the documents for the requesting party.”¹³

Conclusion

Government prosecutors are increasingly imposing complex and laborious scanning requirements in making requests for paper documents. The default position under the Federal Rules is to produce documents as they are maintained in the ordinary course, but prosecutors often assume that the recipient of a grand-jury subpoena will process paper documents into electronic scans and insert metadata fields or provide a production key, at a significant cost to the corporation. A review of the procedural rules and case law suggests that there is no legal basis to enforce a request to scan and process paper documents. But where a corporation finds itself at the mercy of government prosecutors, cautious negotiation, as opposed to a call to arms, may be the more effective and beneficial approach by the recipient of such a request.

Practitioners should use the corporation’s agreement to produce paper files in the preferred format to elicit positive gains for the corporation by perhaps requesting the modification of the government’s substantive subpoena requests or by requesting an acknowledgment that the government will view the corporation’s concession as a form of cooperation under the USAM. In this way, we are not recommending that you insist on producing paper files in paper format or that you fight to the death with the government over the processing of documents. However, too often practitioners go to the opposite extreme in the hope of being viewed as cooperative while government attorneys treat the processing of paper collections as nothing more than a standard practice.

Until the case law interpreting the government’s grand-jury subpoena power, and the Federal Rules of Criminal Procedure

account for the imbalance of power that is found within the context of a government criminal investigation, corporate targets will have to use what little power they have in the cooperative-response context, and this article has provided a road map to one such pocket of power that can be leveraged by the corporate recipient of a grand-jury subpoena. ■

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Endnotes

1. Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946).
2. 498 U.S. 292, 301 (1991).
3. See, e.g., *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1215 (D. Haw. 1989) (Financial hardship alone will not warrant quashing a subpoena.).
4. 410 U.S. 578, 589 (1973).
5. As noted above, because the civil rules are designed for an adversarial posture between two equal negotiating parties, this legal posture in which the courts have placed criminal discovery does not generally favor the recipient of a grand-jury subpoena who enters negotiations from a position of weakness.
6. Although the purpose of this article is not to provide a full road map to responding to a subpoena, it is worth emphasizing that we recommend that a corporation that receives a grand-jury subpoena immediately secure experienced counsel to navigate its response to the government. As the framework described above exemplifies, there are unique issues in play during a government investigation that may be foreign to the civil litigator.
7. This is an important consideration. Courts have found that, where a party modifies its documents for purposes of its own internal litigation purposes, the party may be required to produce the documents in this more user-friendly format. See, e.g., *Dahl*, U.S. Dist. LEXIS 52551.
8. Remember that a party does not get to choose whether it produces in electronic or paper format. See *Covad Communs. Co. v. Revonet, Inc.*, 2009 U.S. Dist. LEXIS 75325 (D.D.C. Aug. 25, 2009).
9. FED. R. CIV. P. 34(b)(2)(E).
10. See, e.g., *Dahl v. Bain Capital Partners, LLC*, 2009 U.S. Dist. LEXIS 52551 (D. Mass. June 22, 2009).
11. *United States v. O’Keefe*, 537 F. Supp. 2d 14, 20 (D.D.C. 2008).
12. *Sparton Corp. v. United States*, 77 Fed. Cl. 10, 17 (Fed. Cl. 2007).
13. *United States v. O’Keefe*, 537 F. Supp. 2d 14, 19 (D.D.C. 2008).