

Considerations for Selecting a Form of Production

When it comes to the production of electronic data, the form of production is often one of the most debated and misunderstood aspects of discovery. Electronically stored information can be maintained, stored, and transferred in any number of formats.

Under Federal Rule of Civil Procedure (FRCP) Rule 34(b), a requesting party must choose between paper and electronic document production. Absent a court order, a party does not have to produce both. However, a party that has documents available both electronically and in hard copy form must disclose both formats to the opposing parties. If a requesting party requests electronically stored information, it may also choose to receive the documents as they are “ordinarily maintained” by the responding party or in a “reasonably usable” format.

Once electronic data is requested, a responding party must serve a timely written response and state its intent to comply with the document request. If the responding party objects to any portion or the entire requested format, the responding party must state its objections and provide a detailed reason for the objection to the production format. Rule 34(b). In addition, the responding party must specify the form or forms that it intends to use. If the requesting party does not specify a form or forms for production in its document request, the responding party must state the form or forms that it intends to use. In either event, a receiving party unsatisfied with the responding party’s form of production may make a motion to compel the desired form under Rule 37(a).

It is unclear how the courts will interpret Rule 34’s mandate that documents be produced either as they are “ordinarily maintained” or in a “reasonably usable” form. Although some commentators have opined that courts will consider “ordinarily maintained” tantamount to a “native file” format, that interpretation is unlikely given the inherent limitations of a true native file production.

A native format is the default format of a file, and access to this file is typically provided through the software program on which it was created or through which it was viewed. For example, if a user created and saved a file in Microsoft Outlook, it would most likely be viewed and modified in Outlook. If the file was transferred to a computer that does not have Microsoft® Outlook® installed, the file may not be viewable. A party receiving native Outlook files would require a licensed copy of the program on their computer to view the files. Considering there are hundreds of native file formats, only a few of which would be shared between parties, it is likely that certain files produced in their native format would not be reasonably usable. In this case, the court may require a responding party to translate or convert the data from its native form into a “reasonably usable” format prior to production.

Often, a file cannot be viewed in its native format because it has been altered for storage or in a manner designed to maximize hard drive space. Thus, in order to be viewed, a file must be uncompressed or otherwise restored for it to be reasonably usable. The files may be converted to a Tagged Image File Format (TIFF) or Portable Document Format (PDF), which are inalterable images of the file.

TIFF and PDF format are secure and reliable formats (i.e., reasonably usable) for the production of electronically stored information. In *In re Priceline.com, Inc. Securities Litigation*, 233 F.R.D. 88, 91 (D. Conn. 2005), the court ordered defendants to produce responsive information contained in stored data files in a TIFF or PDF format noting that both were the most secure format for the production of documents given the sheer volume of discoverable information in the case.

Native format production is also discouraged because it does not afford a party the ability to redact documents. This can lead to problems when privileged or protected material appears in an otherwise discoverable document. Native files also cannot be Bates numbered, the absence of which would wreak havoc on document management in large scale or multiparty litigation. Moreover, native files can be easily manipulated, either intentionally or inadvertently, by an opposing party. Indeed, a receiving party may unwittingly alter documents or their underlying metadata and present them at deposition or at trial as if they were the original document “ordinarily maintained” by the responding party.

Metadata are the real issue

The few courts that have delved into form of production issues are less concerned with whether a document is produced in a native format, but more protective of the preservation and production of the underlying metadata. See e.g., *Williams v. Sprint United Management Co.*, 230 F.R.D. 640, 643, 2005 U.S. Dist. LEXIS 21966 (D. Kan. 2005) (Metadata describe the history, tracking, or management of an electronic document, and includes such useful information as file names, users, format, creation and access dates.).

Metadata can have two purposes. On the one hand, it can be relevant in the litigation. The *Sprint* court held a party ordered to produce electronic documents as they are maintained in the ordinary course of business should produce the electronic documents with their metadata intact, because the formulas contained in the Microsoft® Excel® spreadsheet at issue in that case could only be revealed through metadata. Thus, the question of whether a party must produce metadata will depend upon its relevance in litigation. Because Excel spreadsheets can only display formulas in their native format, native production of those particular documents was required in that case.

On the other hand, where, as in most cases, metadata may have limited relevance for purposes of the substantive issues in the case, metadata can also be extracted and harnessed for powerful search functionality in most “PDF” formats. This cannot be done with native files.

There is no clear-cut answer as to the “right” form of production for each case. Parties should meet and confer and determine whether a native format might be appropriate for limited file formats, or whether it would be more appropriate under the circumstances for the responding party to produce searchable, Bates-numbered PDF files that retain their metadata.

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