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Crafting Customized ESI Agreements in E-Discovery: The Importance of Specificity of Document Production Formats

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Written by **Russell P. Beets**

In litigation, especially in dealing with E-Discovery, the importance of an effective electronically stored information agreement (“ESI Agreement”) between the parties is a must to help prevent discovery disputes. This is most important when dealing with the format chosen for production. Courts are generally reluctant to require additional production in native formats if ESI has already been produced in a “reasonably usable” format. This article looks at a current case that dealt with this issue.

Babakhanov v. Ahuja

In *Babakhanov v. Ahuja*, the Southern District of New York dealt with a dispute over the production of electronic medical records (“EMRs”) in a lawsuit alleging systemic fraud within a medical organization.^[1] Plaintiffs accused Defendants of engaging in fraudulent activities related to billing practices that were under a state Medicaid audit, claiming that financial statements did not adhere to generally accepted accounting principles.

Defendants sought to compel the production of EMRs in their native format, arguing that this format was essential for assessing various important elements, including chart template functions and comprehensive patient records. However, the Plaintiffs contended that they had already provided the EMRs in PDF format, which they argued was a “reasonably usable form” in line with their regular business practices.

The Court sided with the Plaintiffs, denying the motion to compel. It emphasized that requiring the production of EMRs in native format would impose an undue burden on the Plaintiffs and noted that Defendants were aware of the format in which records were kept.

The ruling reinforced the principle that parties must clearly articulate their discovery requests from the outset, otherwise courts will have to step in.

Reasonably Usable Format

Federal Rule of Civil Procedure 34(b)(2)(E) sets forth the procedures applicable to the production of electronically stored information (“ESI”).^[2] In pertinent part, the rule states that

“[u]nless otherwise stipulated or ordered by the court ...

(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 information, a party must produce it in the 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.”^[3]

As the rule does not define what is a “reasonably usable form,” it is imperative that parties clearly define what formats are acceptable; otherwise, they will end up leaving it for the courts to interpret, and depending on the issues in the case, courts decide what formats are reasonably usable in different ways.

Cases Where Courts Declined to Compel Production in Native Format

In *Smith v. TFI Family Services Inc.*, Plaintiff sought a contempt ruling against a non-party for producing records in PDF rather than native format with metadata in response to a subpoena.^[4] The court ruled that the format of production was not specified, either in the subpoena or a related prior court order, and native format would not yield additional relevant information.

In *Frey v. Minter*, Minter’s motion to compel additional discovery was based on Frey’s production being in an unusable format.^[5] The court found Frey’s single 156-page PDF, despite being a non-standard format, was reasonably usable. Requiring Frey to redo his production was deemed unwarranted, except for a few email chains that the court determined needed to be fully reproduced.

Cases Where Courts Compelled Production in Native Format

In *Dewey v. Bechthold*, Plaintiff requested tax returns and financial documents in native format from a non-party financial services practitioner, citing relevance to potential misconduct.^[6] The court ordered production of proprietary documents in native format, highlighting the importance of format for revealing critical information. Dewey was ordered to reimburse Nyholm for reasonable compliance costs associated with producing the native documents.

A dispute arose over production formats in *Urban 8 Fox Lake Corp. v. Nationwide Affordable Housing Fund 4 LLC*, with plaintiffs requesting documents in native format while defendants produced them in TIFF.^[7] The court emphasized that native format is the default under Federal Rules but noted the need for parties to agree on formats. Ultimately, the court ordered production in native format and criticized both sides for failing to effectively communicate and resolve the issue beforehand.

Crafting Appropriate Production Language in ESI Agreements

As detailed in the cases above, it is imperative that the parties come to agreement on the format(s) that are acceptable for production to prevent any discovery disputes, and to prevent having the court be the ultimate arbiter.

Our firm regularly handles ESI Agreements and insists that the parties meet and confer on which production format is acceptable. Below is standard language we generally include:

Native Format. Parties may produce agreed-upon ESI in native format, such as spreadsheets (e.g., excel, google sheets, OpenOffice, CSV, TSV, etc.) and other files that cannot be converted to TIFF (such as audio, video, and XML files). Native files should contain the Bates number and confidentiality designation of the file in the file title. In addition, native files should be accompanied by an image (TIFF) placeholder that contains the beginning Bates number and confidentiality designation. Wherever feasible, the producing party shall include accompanying metadata in the load file. The Parties agree not to remove metadata from native production. Additionally, if after reviewing production of other ESI in a non-native format, a Receiving Party believes that it is necessary to review a certain document or documents in native format, the parties agree to engage in discussion regarding production of discrete documents in native form, which production will not be unreasonably withheld.

Additionally, it is important to determine what metadata should be produced, bearing in mind that certain model ESI orders may restrict the metadata fields available. Where metadata is concerned, effective communication about collection strategy is essential. If data collection is done improperly, critical metadata may be altered or lost, rendering it impossible to produce. Attorneys need to understand the methods of data collection to avoid making unsupported claims about whether and what metadata can be produced. Other key points to address in an ESI Agreement include the production of emails with attachments, the process for Bates stamping or numbering documents, and whether the volume of information necessitates rolling productions.

Conclusion

The crafting of customized ESI agreements is an essential practice in the realm of e-discovery, particularly when it comes to specifying document production formats. The cases discussed illustrate the variability in court rulings regarding the necessity and appropriateness of native format production, underscoring the importance of specificity in discovery requests. By proactively defining what constitutes a "reasonably usable form" and engaging in meaningful discussions at the beginning of a litigation, parties can mitigate the risk of disputes and avoid unnecessary court intervention. A well-articulated ESI agreement not only streamlines the discovery process but also ensures that all parties have a clear understanding of their obligations, leading to a more efficient and effective resolution of the case.

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[1] No. 23-cv-2785 (LJL), 2023 WL 6977394 (S.D.N.Y. Oct. 23, 2023).

[2] Fed. R. Civ. P. 34(b)(2)(E).

[3] *Id.*

[4] No. 17-2235-JWB (D. Kan. Sept. 4, 2019).

[5] No. 4:18-CV-191 (CDL) 2019 WL 5268548 (M.D. Ga. Oct. 17, 2019).

[6] No. 18-CV-1739 (JPS) 2019 WL 5429373 (E.D. Wis. Oct. 23, 2019).

[7] No. 18 C 6109, 2019 WL 5963644 (N.D. Ill. Nov. 13, 2019).

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Russell P. Beets

t 312.628.7878

rbeets@ktslaw.com