E-Discovery Quarterly: Recent Rulings On Metadata

By **Tom Paskowitz, Colleen Kenney and Matt Jackson** (November 6, 2024)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving disputes over the forms in which parties produce electronically stored information.

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Given the increasing complexity inherent in producing electronically stored information, or ESI, parties are expected to cooperate to reach agreement on critical areas up front to avoid disputes later on.[1]

This is certainly true with respect to the form of producing ESI, which is addressed in Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure. This rule provides:

> Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (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 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.[2]

Under the rule, if the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable.

But as the advisory committee notes to the 2006 amendments to Rule 34 explain,

> the option to produce in a reasonably usable form does not mean that a responding party is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.[3]

Search functionality is often critical to this determination. The notes continue, "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."[4]

Several recent court opinions reflect how these competing considerations play out when the parties dispute the form of production for ESI.

For example, in Bah v. Sampson Bladen Oil Co. Inc.,[5] the U.S. District Court for the Eastern District of North Carolina addressed a situation in which the parties had agreed in their joint report pursuant to Rule 26(f) that most ESI should be produced in TIFF format, but that some types of ESI — e.g., Excel and PowerPoint files — should be produced in native format.[6]

The parties had also agreed that ESI produced in TIFF format would "include metadata and searchable, extracted text," but the report did not specify which metadata should be produced.[7]

After the defendant produced over 13,000 pages in TIFF format accompanied by searchable, extracted text and 13 metadata fields, the plaintiff complained that the "production was 'completely unusable'" because, among other reasons, "she [could] not filter the documents by date" or categorize documents by file type.[8]

The plaintiff moved to compel the defendant to produce all available metadata fields for its production, requiring the court to resolve the ambiguity in the parties' joint Rule 26(f) report as to whether the requirement to "include metadata and searchable, extracted text" meant "all available metadata," or something less.[9]

To resolve this ambiguity, the court looked to Rule 34, which "encourages the parties to be explicit about issues related to the form of production for ESI."[10]

In its August decision, the court explained that under the rule, "[t]he requesting party should explicitly state its desired form of production and the responding party should explicitly state the form in which it is willing to produce ESI."[11]

Quoting the advisory committee note to the 2006 amendments to Rule 34, the court also noted that "[t]hese requirements are designed to avoid the very problems confronting the court and the parties here" by facilitating "the orderly, efficient, and cost-effective discovery of electronically stored information."[12]

After surveying the case law relevant to the parties' dispute, the court summarized, quoting precedent, that "if a party wants metadata, it should '[a]sk for it. Up front. Otherwise, if [the party] ask[s] too late or ha[s] already received the document in another form, [it] may be out of luck."[13]

As related to the parties' dispute, the court also noted that "a party who wants ESI produced in non-native format to be accompanied by all available metadata must say so."

Ultimately, the court concluded that the parties' use of the term "metadata" in their joint Rule 26(f) report, without more, entitled neither party to all available metadata.[14]

Having found that the plaintiff was not entitled to all available metadata, the court turned to the question of how much metadata was enough. Again relying on Rule 34(b)(2)(E), the court explained that "unless a request for production contains more specific instructions, any ESI produced in nonnative format must include enough metadata to be reasonably usable to the requesting party."[15]

The court cited several prior decisions supporting the proposition that, in most cases, courts

find that "a production is reasonably usable if it is text searchable."[16] In particular, "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

Ultimately, the court found that the defendant's production was produced "in a reasonably usable form" because the plaintiff was able to access, review and text-search the ESI produced, and there was "nothing in the record establishing that the production [was] less searchable for [the plaintiff] than it would be for [the defendant.]"[17]

The court rejected an argument that the lack of metadata allowing the plaintiff to filter documents by date and to categorize documents by file type rendered the defendant's production unusable, concluding that Rule 34 does "not require that ESI be produced in the form the requesting party prefers or the one that is the most easily usable by the requesting party."[18]

Because the defendant's production was text-searchable, it met the requirement that ESI be produced in a reasonably usable format.[19]

In June, the U.S. Bankruptcy Court for the Eastern District of Virginia reached a similar conclusion in In re: Health Diagnostic Laboratory Inc.[20] In that case, the defendants had filed a motion in limine to strike an expert report, claiming that they had not been provided with native versions of spreadsheets the expert had used.[21]

While the spreadsheets were produced in Excel format, they did not include formulas that the defendants believed would have been embedded in the original versions of the spreadsheets.[22]

The court found that the defendants were not entitled to production of metadata because they had not asked for it. The court explained that, "[t]o obtain metadata, the caselaw indicates that the requesting party must either ask for the native format of the ESI or specifically request the metadata."[23]

But the defendants' document requests required production of ESI in "computerized or digital form," which "is not the same thing as a request for 'native format.'"[24] The court noted that "[t]he requesting party is 'the master of its production requests; it must be satisfied with what it asks for.'"[25]

As in Bah, the court in Health Diagnostic found that the spreadsheets were produced in a reasonably usable form under Rule 34, because the spreadsheets "simply tracked the transactions" and "there [was] nothing 'complex' about" them.[26]

Another court addressed a similar issue in August with respect to whether spreadsheets were produced in a reasonably usable form under Rule 34.[27]

In Weisshaus v. Port Authority of New York and New Jersey, the plaintiff sought to strike an expert affidavit proffered by the defendant that was based on an analysis of general ledger information on the ground that the plaintiff could not perform calculations within the spreadsheets that the defendant downloaded from the general ledger and produced to the plaintiff.[28]

But the U.S. District Court for the Southern District of New York disagreed, finding that because the data in the spreadsheets could be sorted, "nothing indicates that the

spreadsheets provided to Plaintiff are not in a reasonably usable form."[29]

The court rejected the plaintiff's argument based on the fact that the plaintiff could not create calculations within the spreadsheets, finding that nothing indicated that the plaintiff "would not be able to create his own calculations using the data to which he now has access."[30]

Takeaways

The cases discussed above reflect that parties should carefully consider the ways in which they produce documents to ensure that they will be able to comply with Rule 34's goal of a fair and reasonable approach to the form of production, and avoid disputes that arise postproduction.[31]

In particular, a party requesting ESI should consider the form — including categories of metadata — as well as the functionality of ESI the party will want, and include relevant instructions in its requests for production.

For example, parties may consider whether search functionality for documents produced in TIFF format warrants requesting specific metadata fields to avoid a dispute like the one in Bah v. Sampson Bladen, or specific functionality within spreadsheets like in Weisshaus v. Port Authority.

Parties responding to discovery, meanwhile, should consider the form requested and if it is reasonable or feasible in light of the circumstances.

If no specific form is requested, a responding party may consider, prior to processing ESI for production, whether the form of production is reasonably usable.

Relevant considerations in this regard may include whether processing of ESI has changed or reduced any functionality inherent to the ESI, whether the producing party will have more capabilities to manipulate or use the ESI, and whether the ESI is searchable or sortable.

Although the cases above do not set a high bar for what constitutes a reasonably usable format, consideration of these questions ahead of time will avoid costly disputes after the time and expense of production have been incurred.

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[1] See, e.g., The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle 3 ("As soon as

practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information."); Fed. R. Civ. P. 26, Advisory Committee Notes to 2000 Amendments ("In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.").

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

[3] Fed. R. Civ. P. 34, Advisory Committee Notes to 2006 Amendments.

[4] Id.

[5] Bah v. Sampson Bladen Oil Company, Inc., No. 23-CV-00330, 2024 WL 3678337 (E.D.N.C. Aug. 5, 2024).

[6] Id. at *1.

[7] Id.

[8] Id. at *2.

[9] Id. at *4.

[10] Id. at *4.

[11] Id.

[12] Id.

[13] Bah, at *4 (quoting Aguilar v. ICE, 255 F.R.D. 350, 357 (S.D.N.Y. 2008) (internal quotations omitted)). Delay in requesting metadata can result in waiving a party's right to request it. See, e.g., Karlyg v. City of New York, 20 CV 991 (PKC) (CLP), 2024 WL 4333858, *4 (declining to grant spoliation sanctions for photograph metadata because, among other reasons, the defendants accepted the photographs in PDF format, defendants made no requests for the metadata until two years later); but see Moore v. Garnand, No. CV 19-00290 TUC RM (MAA), 2024 WL 3291810, *2 (D. Ariz. July 3, 2024) (granting motion to compel reproduction of photographs previously produced without metadata because the photographs and their metadata should have been part of the defendants' initial discovery disclosure and reproduction would not impose undue burden).

[14] Id. *4.

[15] Id. at *4.

[16] Id. at *6.

[17] Id. at *6.

[18] Id. at *6.

[19] Id. at *6.

[20] In re Health Diagnostic Laboratory, Inc., No. 15-32919-KRH, 2024 WL 2930904 (E.D. Va. June 10, 2024).

[21] Id. at *9.

[22] Id. at *10.

[23] Id. at *10 (citing Aguilar).

[24] Id.

[25] Id. (citing cases).

[26] Id. at *11.

[27] Weisshaus v. Port Authority of New York and New Jersey, No. 11 Civ. 6616 (RKE), 2024 WL 3904591 (S.D.N.Y. Aug 22, 2024).

[28] Id. at *1.

[29] Id. at *2.

[30] Id. See also Myers v. Mercedes-Benz USA, LLC, No. 23-cv-755 (DJN), 2024 WL 3835076, *7 (E.D. Va. Aug. 15, 2024) (finding that plaintiffs' difficulty with printing warranty data did not render the data "unusable" because "comprehensive data charts and spreadsheets often must be printed on numerous pages for readability.").

[31] See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production.