

2. An order from the Northern District of Illinois granting sanctions against Defendant for converting Excel files into PDF files before producing them, which rendered them not “reasonably usable” under Federal Rule of Civil Procedure 34, and ordering Defendant to produce the native Excel files.

In *Haywood v. Wexford Health Sources, Inc.*, 2021 WL 2254968 (N.D. Ill. June 3, 2021), U.S. Magistrate Judge Heather K. McShain granted Plaintiff’s motion for sanctions against Defendant, finding that Defendant’s conversion of native Excels into PDFs prior to production rendered them not “reasonably usable” under Federal Rule of Civil Procedure 34.

In this deliberate-indifference case under 42 U.S.C. §1983, Plaintiff, a state prisoner, alleged multiple counts of deliberate indifference to his serious mental illness and one count of First Amendment retaliation against Defendants, Wexford Health Sources (Wexford) and other individuals affiliated with the Illinois Department of Corrections. During discovery, Plaintiff requested the production of all documents related to his mental health, including out-of-cell trackers, crisis trackers, and records of evaluation and treatment by mental health providers. Plaintiff did not specify the format in which the data was to be produced, and there was no active order governing discovery in the matter. *Id.* at *1.

Defendant Wexford produced approximately 15,000 pages of documents in PDF format without first informing Plaintiff of the intended form of its production as required by Rule 34(b)(2)(D). Though the requested information was maintained by Defendant Wexford in Excel spreadsheet format, Wexford converted the files to PDF format prior to production to allow Wexford to Bates stamp the documents, sort their content, and redact certain health information of nonparty inmates. Plaintiff took issue with the production, arguing that (1) Wexford’s ESI production equated to a “[v]oluminous production of nonresponsive, irrelevant documents” that was not labeled or organized in any way that made it useful; (2) Wexford failed to comply with Federal Rule of Civil Procedure 34 because the ESI was not produced in either its native or a reasonably usable form; and (3) Wexford redacted an unnecessarily large volume of the contents of the production. In response to these complaints, Wexford supplemented its production with an index indicating which documents were responsive to which requests, but it refused to produce the documents in their original format. *Id.* at *2–*3. Plaintiff filed a motion for sanctions against Wexford requesting an order requiring Wexford to pay more than \$60,000 in attorney’s fees for time spent reviewing the production and an order that Wexford produce all responsive documents in native format. *Id.* at *3.

Magistrate Judge McShain evaluated the parties’ arguments under Rule 34, which provides that a responding party may produce “any designated documents or electronically stored information ... stored in any medium from which information can be obtained either directly, or, if necessary, after translation by the responding party into a reasonably usable form.” *Id.* at *4 (quoting Fed. R. Civ. P. 34(a)(1)(A)).

Defendant Wexford argued that the conversion to PDF for the sake of redaction was necessary to comply with the Health Insurance Portability and Accountability Act (HIPAA) and Illinois law that required the protection of nonparty health information. Magistrate Judge McShain determined that neither HIPAA nor Illinois law required Defendant Wexford to convert the ESI from Excel to PDF in order to redact certain information. HIPAA permits disclosure of personal health

information as long as the “covered entity receives satisfactory assurance ... from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order” that “prohibits the parties from using or disclosing the information for any purpose other than the litigation for which such information was requested” and requires destruction or return of the information following such proceeding. *Id.* at *5 (quoting 45 C.F.R. §164.512(e)(1)). Magistrate Judge McShain determined that the protective order in this case met those requirements. Furthermore, because this was a federal question case, the law of Illinois did not apply.

Magistrate Judge McShain then discussed whether the PDFs provided to Plaintiff were “reasonably usable.” There is no obligation to produce ESI in its native form; however, “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.” *Id.* at *7 (quoting Fed. R. Civ. P. 34(b) Advisory Committee’s Note on 2006 Amendment). “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.” *Id.* (quoting Fed. R. Civ. P. 34(b) Advisory Committee’s Note on 2006 Amendment).

Magistrate Judge McShain found that the PDFs produced by Wexford were not reasonably usable. First, the conversion to PDF had resulted in several column headers that were unreadable or obscured, hundreds of pages of empty spreadsheets, and hundreds of pages consisting of the same entries on different pages. Second, the conversion from Excel to PDF had removed the ability to sort and organize the data included in the documents. For example, Plaintiff had noted to Wexford during a meet-and-confer that receiving the native documents in Excel format would allow Plaintiff to calculate and sort certain data. Magistrate Judge McShain agreed. “Excel spreadsheets do not exist simply to collect and store data. One of the unique strengths of Excel software is the ability to implement calculations and formulae that are not evident in a PDF version, so merely a PDF imprint of the surface information is not sufficient.” *Id.* at *8 (internal quotation omitted). By producing the Excel spreadsheets in PDF form, Wexford eliminated the ability to use the spreadsheets efficiently and, further, increased the burden on Plaintiff by requiring him to review more than 270,000 pages of information, large portions of which were redacted or illegible. Therefore, Wexford had “significantly degraded the functionality of the ESI.” The court found that Wexford did not produce the ESI in a reasonably usable format as required by Rule 34 and ordered Wexford to produce the spreadsheets in native Excel format. *Id.* at *9.

Regarding the attorney’s fees requested by Plaintiff, Magistrate Judge McShain explained that when a motion to compel is granted, “the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” *Id.* (quoting Fed. R. Civ. P. 37(a)(5)). However, she noted that a court may not award fees if the opposing party’s response was substantially justified, which is tested by whether there was a genuine dispute.

Magistrate Judge McShain determined that Wexford’s position was not substantially justified. Per the Advisory Committee’s Note on the 2006 Amendments, the responding party is required to

specify in advance of production the format in which the requested information will be produced. Wexford's failure to comply with this requirement had caused the dispute in this matter. Had Wexford notified Plaintiff that it intended to produce the Excel spreadsheets in PDF format, "it is reasonable to infer — based on counsel's experience in other litigation with Wexford as well as plaintiff's communications with Wexford shortly after the initial PDF production — that plaintiff would have objected and asked for the ESI in native Excel format." Wexford even continued to produce documents in PDF format after it was aware of Plaintiff's objections. Furthermore, Seventh Circuit case law makes clear that Wexford's HIPAA-related rationale for converting the documents had no basis in law. Finally, there was no genuine dispute that the spreadsheets in PDF format are reasonably usable under Rule 34(b). Wexford's briefing had not even addressed the two primary downfalls of the conversion: the lack of usability and functionality of the ESI and the illegibility of large portions of the spreadsheet. *Id.* at *9–*10.

Magistrate Judge McShain then determined appropriate hourly rates for each of the attorneys and the reasonable number of hours expended to review and organize the original, voluminous production by Wexford, to develop the deficiencies in the production, and to brief the motion for sanctions. Ultimately, she awarded Plaintiff \$25,311.50 in attorney's fees. *Id.* at *10–*15.