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for 2007**

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## REQUESTING AND PRODUCING ELECTRONIC DISCOVERY

On December 1, 2006, amended Rule 34(b) of the Federal Rules of Civil Procedure (FRCP) gives requesting parties the right to specify the form in which discoverable “electronically stored information” (ESI) is produced. The producing party must deliver ESI in the specified format or make an objection, stating the reasons for not providing the requested format and stating the format it intends to provide. Alternate formats must be either those in which the ESI is ordinarily maintained or that are “reasonably usable.” This is a giant leap forward for requesting parties, who get ESI produced in the format of their choice or at least in a way that is electronically searchable.

### FORMS OF ESI

One of the biggest mistakes requesting parties make is requesting or accepting production of electronic evidence in a format ill-suited to their needs. ESI production takes five principal forms: (1) hard copies; (2) images of data; (3) exported data; (4) native data; and (5) hosted data. A requesting party’s format specification should hinge on the nature of the data and the requesting party’s capabilities for dealing with it.

**Hard Copies.** Converting searchable electronic data to costly and cumbersome paper is usually a step backward, but paper still has its place. If the entire production consists of a few hundred e-mails and several thousand e-documents, paper remains as good a medium as any. Once the volume or complexity increases beyond that which you can easily manage by memory, you’re better off insisting on production in electronically searchable forms.

**Images of Data.** Production of images consists of files that are digital pictures of the documents, e-mails, and other electronic records. As long as the information lends itself to a printed format and is electronically searchable, image formats work reasonably well. For embedded information (such as the formulas in spreadsheets), or when the evidence moves beyond the confines of printable information (such as voicemail, databases, or video), image production breaks down. Requesting parties should be aware that the images themselves do not include all the searchable data layers or metadata.

**Exported Data.** Some electronic evidence adapts to multiple production formats, so sometimes you’ll want exported, delimited data to work with in the application of your choice. For example, e-mail may be readable in any of several programs or in generic e-mail formats (.eml, .msg). The contents of simple databases like contact lists can be exported to generic formats and imported into compatible applications, such as Microsoft’s Excel spreadsheets or Access databases. The key is to be sure that important data or the ability to manipulate it isn’t lost in the export/import process.

**Native Data.** Native production is when the producing party furnishes exact duplicates of the actual data files. A requesting party who has the applicable software programs (or compatible viewers of the program) can see the evidence as it appears to the other side. It sounds great, but native production is not without its problems. The applications required to view the data in its native format may be prohibitively expensive or difficult to operate without extensive training.

Additionally, care must be taken not to change the native data while viewing it. Native production is best, but only when you have the experience, expertise, and resources to manage native data. Producing parties often fight native production because of the difficulty in redacting privileged information. An Outlook post office (.pst) file can hold both discoverable e-mail and privileged attor-

ney-client communications. Since it's a unified and complex database file, it's challenging to separate the two. Native data can also contain embedded information.

**Hosted Data.** Hosted data is information that resides on a controlled-access Web site. The data is viewed through an online application (similar to a Web browser) capable of displaying information from a variety of electronic formats. Generally, counsel for the producing party searches the hosted data for relevant information and then provides the requesting party with images on a CD or DVD.

## CHOOSING AN ESI FORM

Here are some things to consider in selecting a form of production for the kinds of data most often seen in e-discovery.

**Word-Processed Documents.** In small productions (e.g., less than 5,000 pages), hard copies and images (PDF and .tif) remain viable. However, because amended FRCP 34(b) contemplates that producing parties not remove or significantly degrade the searchability of ESI, both parties must explicitly agree to use printouts and "naked" image files in lieu of electronically searchable forms. When the volume of documents requires electronic searchability, image formats are inadequate unless they include a searchable data layer or load file. Otherwise, hosted or native production (.doc, .wpd, .rtf) would be the best formats.

Pitfalls in native production include embedded macros and auto-date features that alter the document when opened in its native application. Moreover, word-processed files can change their appearance and pagination depending on the fonts or the printer of the computer used to view the file. Be careful when referring to particular pages or paragraphs because the version you see may format differently from the original.

Consider whether system and file metadata are important to the issues in your case. If so, require the original metadata to be preserved and a spreadsheet or other log of the original system metadata be produced along with the files.

**E-Mail.** As above, if the volume of e-mail that must be produced is large, only electronically searchable formats will suffice. These can take the form of individual e-mails exported to a generic e-mail format (.eml or .msg files), image files (PDF or .tif) coupled with a data layer or load file, hosted production, or native production in one of the major e-mail storage formats (.pst for Outlook, .nsf for Lotus Notes, .dbx for Outlook Express).

**Spreadsheets.** If the spreadsheet is just a conve-

nient way to present tabular data, a printout or image may suffice. Printed spreadsheets aren't electronically searchable and lack the very thing that separates a spreadsheet from a table – the formulas beneath the cells. If you need to examine the methodology behind calculations or test different theories by changing variables and assumptions, you'll need native file production.

Hosted production that allows virtual operation may also suffice. When working with native spreadsheets, be mindful that embedded variables – such as the current date – may update automatically on opening the file, changing the data you see from that previously seen by others. Also, metadata about use of the spreadsheet may change each time the spreadsheet is loaded into its native application. Once again, decide whether metadata is important and require its preservation when appropriate.

**PowerPoint Presentations.** You can produce a simple PowerPoint presentation as an electronically searchable image file in PDF or .tif, but if the presentation is animated, the animated objects may be invisible or they may distort the image. Instead, native or hosted production is appropriate. Like spreadsheets, native production necessitates preservation of original metadata, which may change by viewing the presentation.

**Voicemail.** As voicemail converges with e-mail in integrated messaging systems, it's increasingly common to see voicemail messages in e-mail boxes.

Seek production of voicemail in common sound formats such as .wav or .mp3. To obtain information about the intended recipient of the voice message or time of its receipt, you will need to request the voicemail metadata that is correlated to the audio – it is typically not a part of the voice message.

**Instant Messaging.** Instant messaging (IM) is similar to e-mail except that exchanges are in real time and messages generally aren't stored unless the user activates logging or the network captures traffic. Individual users control whether to log IM exchanges, so a responding party must examine each user's local machine. Most IM traffic easily converts to plain text and can be produced as an ASCII file or a word processor-compatible file.

**Databases.** An approach that sometimes works for simpler databases is to request an export of records and fields for import to applications like Microsoft's Access or Excel. One common export format is the Comma Separated Variable or CSV file, also called a Comma Delimited File. In a CSV file, each record is a single line and a comma separates each field. Not all databases lend themselves to the use of exported

records for analysis, and even those that do may oblige you to jump through hoops or engage an expert.

If you aren't confident that the producing party's interrogation of the database will disgorge responsive data, consider formulating your own queries using the application's query language and structure. For that, you'll need to understand the application or get expert help, for example, by deposing a knowledgeable employee of your opponent to learn how to structure a query.

If you seek the dataset, specify in your request for production the appropriate backup procedure for the database application geared to capture all of the data libraries, templates, and configuration files required to load and run the database. If you simply request the data without securing a backup of the entire database environment, you may miss an essential component. By demanding that data be backed up according to the publisher's recommended methodology, you'll have an easier time restoring that data.

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