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Federal Court Re-Affirms E-Discovery Requests Must Be Specific About Format and Metadata

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The adage "ask me no questions and I'll tell you no lies"[1] highlights the impact of the failure to ask an important question. In the e-discovery context, this conundrum occurs when parties do not make the right discovery request. As reflected in a decision recently issued by the U.S. District Court for the Northern District of Illinois, the failure to make the right request to an opposing party can dramatically affect the outcome of litigation, particularly if the case involves "metadata," i.e., the data embedded in electronic documents.[2]

The instructions and definitions in discovery requests require an understanding of the specific electronic information that is needed in the case. The most recent case about production of electronically stored information ("ESI") in native format[3] with metadata, *Chapman v. General Bd. of Pension and Health Benefits of United Methodist Church Inc.*, No. 1:09-cv-03474, 2010 WL 2679961 (N.D. Ill. July 6, 2010), illustrates the importance of following the procedures outlined in Fed. R. Civ. P. 34(b)(2)(E) for specifying production formats in written discovery requests and responses.

In *Chapman,* an employment discrimination case, the court held that the federal rules do not require the production of electronic records in their native format, with metadata, when not specifically requested. The court denied the plaintiff's request for sanctions for the defendant's failure to produce documents in native format without metadata because the plaintiff did not specifically request production in that format.

The *Chapman* court also addressed the fact that the right to request the production in native format with metadata may be waived if not made at the beginning of discovery. Clearly specifying the format of document production early with the opposing side – even if it means seeking court intervention to get production in native format with metadata if the opposing party objects – is essential.

The *Chapman* Case

In *Chapman*, the plaintiff filed a motion for sanctions, attorneys' fees and costs against the defendant, her former employer, for alleged discovery failures. The plaintiff's initial request for production of documents did not request that production be made in electronic or native format and did not request the production of metadata. The plaintiff requested "documents" and "documentation" about her work performance and ability to work, but the instructions in her initial request for production of documents merely stated that "the term 'document' also includes electronically stored information" and stated a definition of "electronically stored information" that did not include metadata. In response, the defendant produced documents in hard copy form, and the plaintiff did not object to the form in which the documents were produced. After retaining new counsel, the plaintiff issued a supplemental request

for production seeking "all documents generated by Defendant's Human Resources Department on Defendant's computers previously produced during discovery in their native format including previous drafts and metadata," including certain key memoranda.

Although the former employer had already produced the key memoranda in hard copy format, it searched for the native files and ultimately responded that the documents could not be located in their electronic form. After a conference between the parties' respective information technology experts and after some difficulties in searching archives for the requested documents, the defendant located the electronic files with metadata that the plaintiff requested. Nonetheless, the plaintiff filed a motion to amend her complaint to add a count for intentional spoliation of evidence, citing additional unspecified documents that were missing in electronic format and documents the plaintiff suspected the defendant had destroyed or modified. The plaintiff also filed a motion for sanctions.

Unlike the amended complaint, the plaintiff's motion for sanctions did not allege spoliation but instead a "flagrant violation of both the letter and the spirit of the Discovery rules." The plaintiff asserted that the defendant refused to provide information to her in electronic format until required to do so in her motion to amend her complaint to allege spoliation. The defendant contended that it had no duty to produce electronic versions of the key memoranda because it had previously produced them in hard copy format.

The court agreed with the defendant. Citing Fed. R. Civ. P. 34(b)(e)(E)(iii), the court noted that "a party need not produce the same electronically stored information in more than one form." In addition, the court stated that, if the form of production is not specified by a party agreement or court order, the responding party must "produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Fed. R. Civ. P. 34(b)(2)(E)(iii). The court found that, because the plaintiff's original document production request made no mention of native form or metadata and did not define the term "documents" to require production of anything other than paper copies, the defendant's production of hard copy files was entirely acceptable.

The court stated: "Ms. Chapman's implicit contention that the General Board was obligated, unconditionally, to produce any and all relevant documents in native format and with metadata ignores and is contrary to the plain language of Rule 34." "[P]arties who do not specifically request metadata are not typically entitled to it if the responding party has already produced the documents in another reasonably usable form." The court also stated: "What's more, Ms. Chapman never objected to the General Board's hard-copy production, and she certainly gives no reason here as to why that form is not reasonably usable or why she did not request the electronic versions in the first place."

The court noted that several other cases have likewise found that production in native format with metadata is not required unless it is specifically requested by the responding party. *See, e.g.*, *India Brewing, Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194 (E.D. Wis. 2006) ("A party may request information in a specific electronic format, but if it instead simply asks for "documents" . . . production in electronic form is not required"); *D'Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48 (D.D.C. 2008) (requesting party did not specifically request metadata); *Ponca Tribe of Indians of Oklahoma v. Continental Carbon Co.*, 2006 WL 2927878, at *6 (W.D. Okla. 2006) ("The original document requests issued by Plaintiffs failed to specify the manner in which electronic or computer information should be produced.").

The court further emphasized the lack of utility in forcing parties to re-produce prior productions in native format when a requesting party fails to originally request native format or metadata production. *Autotech Technologies Ltd. Partnership v. AutomationDirect.com, Inc.*, 248 F.R.D. 556, 559 (N.D. Ill.

2008) ("It seems a little late to ask for metadata after documents responsive to a request have already been produced in both paper and electronic format."); *ICE Corp. v. Hamilton Sundstrand Corp.*, 2007 WL 4239453 (D. Kan. 2007) (denying request to re-produce documents in electronic form because request did not specify electronic form); *Wyeth v. Impax Laboratories, Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) ("Since the parties never agreed that electronic documents would be produced in any particular format, Wyeth complied with its discovery obligation by producing image files.").

The court also stated that the fact that the defendant ultimately agreed to re-produce the documents in native format that had been previously produced in hard copy was to be commended, not sanctioned.

Practical Tips

Chapman illustrates why it is critical for counsel to specifically request production of ESI such as native files and metadata. Refusals to do so should be addressed by invoking the meet-and-confer process to attempt to reach an agreement before any production occurs.

If no agreement can be reached, the party seeking the data must consider filing a motion to compel production. Often the circumstances of the case will render metadata vital, particularly if issues exist regarding the timing of events, the dates and times that documents were authored, or allegations of fraud that could be proved or disproved by looking at the documents in electronic form with metadata.

The lesson learned from the *Chapman* case is that, even if ESI is mentioned and defined in a document request, if the definition of ESI does not specifically include metadata and documents are not specifically requested to be produced electronically in native format with metadata, the opposing party is under no obligation to provide documents in that format.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] Oliver Goldsmith.

[2] "Metadata" is often described as "data about data" and can include the author, date the document was created, date the document was last modified, and modifications that were made to the document. Excellent definitions for terms relating to e-discovery can be found in *The Sedona Conference® Glossary: E-Discovery & Digital Information Management (Second Edition)*, available at http://www.sedonaconference.com/content/miscFiles/publications_html?grp=wgs110.

[3] "Native format" is the format of a file as it was created inside a computer software format. For example, documents generated in Microsoft Word have a ".doc" native format; documents generated in Microsoft Excel have an ".xls" native format. In contrast, conversion of a Word document to an image of "pdf" file and production of the resulting "pdf" file is not production in native format.