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STATE E-DISCOVERY

On Metadata and Native Format Productions

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Sophisticated litigation often requires the production of information in electronic format in order for counsel and client to appropriately understand the information's significance and to have the ability to manipulate the information in furtherance of the party's analysis.

Information in electronic form is also sometimes needed to analyze the metadata[1] of a native[2] electronic record of, for instance, a document previously reviewed or received in paper form, to determine whether it is forged; who authored it; and when it was created, modified, deleted, forwarded and/or reviewed, and by whom.

Notwithstanding counsel's often awareness of the importance of reviewing particular discovery material in electronic format, obtaining information from one's adversary in such form is not necessarily easy and, for a variety of reasons, a party may be unwilling or unable to produce it.

Thus, counsel must heed the guidance of recent case law as it relates to when and how to request such information, paying particular attention to being timely in the request, the ability to justify requiring production of a document in electronic form, and appropriately limiting the request for electronic information so as not to be overbroad and not duplicative of a prior production that took place in a differentform.

Recent New York State precedent provides such assistance.

Practitioners should look to the decision in *150 Nassau Associates LLC v. RC Dolner LLC*[3] for guidance as to the form of production and issues that may be encountered when not initially demanding that particular information be produced in electronic form.

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NYLJ

There, plaintiff moved to compel access to defendant's electronic accounting records. Defendant had produced materials in "pdf" form[4] and not in native format, and plaintiff argued that pdfs were "difficult to use" and failed to provide all the information requested.[5]

Defendant claimed the request for production in the "raw, electronic (i.e., native) format" was new; that plaintiff had not shown any prejudice by having been provided with documents in a pdf format; and that there was "no way to duplicate and provide in a raw, electronic form" defendant's accounting records maintained in a certain database, instead maintaining that all that could be done was to print out certain reports and produce them in pdf form. Defendant's expert stated that, even if a "data dump" of the requested materials could be performed, the information that would be produced "would be exactly the same as that which can be found" in the documents produced in pdf form and, further, because the database was used in many projects, the information sought by plaintiff limited to the project at issue could not be "singularly extracted."

The court characterized the dispute as being whether defendant "has to now re-provide certain information in electronic form so that [plaintiff] is satisfied that [defendant] is not hiding anything and to make [plaintiff's] task of reconciling the information thus far provided easier."[6] The court found that defendant has provided plaintiff with the information it has in the same form it uses the information. [Defendant] does not "dump" the raw data from its electronic database or computer, but generates reports as needed.[7] Although [plaintiff's] expert suggests that [defendant] "should" be required to produce the data from its [database] in an electronic form so it can be used more effectively by [plaintiff], he does not provide any statement that this is how that information is most commonly used. Importantly, [plaintiff] has not identified any inconsistencies in the information provided that would suggest [defendant] is withholding information. …Here neither side has addressed the cost of providing the material in raw form, but simply whether one form is preferable to another. …Even assuming the [database] could be manipulated by a computer forensic expert to coax out something akin to a "general ledger," the database does not just contain information about the [project in question], but all of [defendant's] projects. [Plaintiff] does not dispute that the raw data they seek to have "dumped" from the database cannot be provided without also providing information to which [plaintiff] is clearly not entitled to and which could adversely impact persons and entities that are not parties to this action. Claims by [plaintiff], that [defendant] maybe has something to "hide," are little more than bald accusations and not a reason to order [defendant] to provide in raw, electronic or "native" form the data it has already provided in PDF documents or hard copies just so [plaintiff] can more easily reconcile these amounts.

As such, the court denied plaintiff's motion to, among other things, compel production of the requested documents in their native form.

In *Pludeman v. Northern Leasing Systems Inc.*,[8] a class action involving the enforceability of form leases, plaintiffs sought defendant's electronic lease database, "containing all leases and lease-related

information for class members in a readable and searchable format."

Defendant asserted that it previously provided certain information on a CD and in paper form, and further contended that it had provided plaintiff with access to the requested database earlier in the litigation and plaintiffs failed to take advantage of such access.

Ultimately, defendant produced a portion of its electronic database pertaining to class members, but not the entire database of lessees and guarantors sought by plaintiffs.

The court found such electronic materials to be "material and relevant," and thus ordered that the "entire" electronic database be produced "in a readable and searchable format."

Sanctions

Sanctions may be awarded against parties who fail to comply with requests for the production of documents in native form.

Kowalski v. Ritterbrand[9] was a medical malpractice action where plaintiffs sought electronic data from defendants' Pentacam machine used to capture measurements stored in a three-dimensional electronic format of a patient's eyes.

At the preliminary conference, defendants were directed to produce their studies in electronic form; however, defendants only provided print images.

Plaintiff advised that their expert required the electronic images as stored on defendants' computer, and sought production on a USB drive, DVD or floppy disc.

The court directed defendants to determine whether they had the technology to secure the data in the requested form.

Plaintiff's expert opined that the electronic studies were necessary as the colors of an actual printout vary and that "printed data cannot be manipulated the way that electronic data can," and there would be views of the images that might not be represented in a stable printout.

Even though defendants objected that there was "no way to access and produce the raw electronic data that plaintiffs were seeking," the court found access to the stored records was possible, and directed defendants to produce the "electronic records as they were maintained on defendants' computer."

Defendants ultimately provided the data, but plaintiff sought sanctions for defendants' repeated failure to comply with court orders, which cost plaintiffs over $10,000 and forced them to prematurely disclose the name of their expert.

The court declined to strike defendants' answer, but imposed a monetary sanction, pursuant to CPLR Rule 3216, noting that "the delay tactics that defendants utilized regarding the electronic data at issue are indefensible."

The court noted that "especially troubling were the delays caused by [defendant's] position that it was impossible to produce the electronic data in the format plaintiffs were seeking. …This [sanction] is meant to compensate plaintiffs for the costs they incurred due to defendants' unnecessary delay in producing the electronic data and their failure to expeditiously rectify their mistake once they knew that the wrong patients' data had been produced."

Use of Metadata

In *Constantine v. Teachers College*,[10] the court emphasized that timing is critical in a litigation when seeking metadata and obtaining an appropriate forensic report.

Petitioner began an Article 78 proceeding seeking to review her termination of employment on grounds of plagiarism and to address findings that she had fabricated documents that she presented in her defense.

Counsel should not assume that courts will order re-production of already-produced paper documents in electronic form, nor should they assume that belated requests for or an analysis of metadata will be permitted.

The court entered judgment in favor of the employer and found that petitioner failed to demonstrate that the employer had acted in a manner that was arbitrary or capricious, and declined to vacate the faculty advisory committee's decision.

Petitioner thereafter sought to vacate the motion court's judgment on the grounds that, among other things, metadata from the hard drive of her computer supported her claims that the documents she relied on were created before the documents she was accused of plagiarizing.[11]

Although petitioner retrieved her hard drive from storage approximately one year before the underlying hearings, she did not obtain a report from a forensic expert concerning the dates documents were allegedly created and modified until a year after the hearing.

The court noted petitioner's "information, based on an analysis of the evidence in her possession before the…hearing (and, therefore, before commencement of the Article 78 proceeding), could have been previously discovered by the exercise of due diligence, so it does not form a legitimate basis for a CPLR 5015(a) motion."

Had petitioner obtained the forensic analysis sooner, and early on recognized the importance of the metadata, petitioner would have had at least the opportunity to assert such defenses in the underlying hearings against her former employer.

Conclusion

It is critical for counsel and their clients to think through electronic discovery strategy during the initial phases of litigation so that appropriate metadata is requested early on in discovery.

Counsel should not assume that courts will order re-production of already-produced paper documents in electronic form, nor should they assume that belated requests for or an analysis of metadata will be permitted.

Thus, failing to request appropriate metadata, and/or to review it at the early stages of an action could result in a disadvantageous litigation position.

1. "Metadata is 'data about data. It describes how and when and by whom a particular set of data was collected, and how the data is formatted.'" *Buck Consultants, LLC v. Cavanaugh Macdonald Consulting, LLC*, Index No. 603187/05 (Sup. Ct. N.Y. Co. Feb. 15, 2007) (internal citation omitted).

2. "Native" form is the original form in which a document or file is created by a software application, such as Microsoft Word or Excel. See "Sedona Conference Glossary: E-Discovery & Digital Information Management," p. 29 (May 2005), http://www.thesedonaconference.org/content/miscFiles/publications_html.

3. 30 Misc. 3d 1224(A), 2011 WL 556290 (Sup. Ct. N.Y. Co. Feb. 14, 2011).

4. See *Matter of Irwin v. Onondaga*, 72 A.D.3d 314, 895 N.Y.S.2d 262 (4th Dept. 2010) (producing ESI in these "pdf" of "tiff" formats may limit the information provided to the reviewing party to the actual text or superficial content of the document). "Pdf," which stands for Portable Document Format, is software that converts single or multi-page documents into a proprietary format that captures the document's original formatting features and enables display across a variety of computer platforms. "Pdf" provides security, navigation tools, search, and other features that facilitate document exchange. "Tiff," which stands for Tagged Image File Format, is a widely used graphic file format for storing bit-mapped images. See "Sedona Conference Glossary: E-Discovery & Digital Information Management," p. 33, 42 (May 2005), http://www.thesedonaconference.org/content/miscFiles/publications_html.

5. See generally, *Bohrer v. International Banknote Co.*, 150 A.D.2d 196, 540 N.Y.S.2d 445 (1st Dept. 1989) (requiring respondent to provide petitioner with computer processing data necessary to make use of the information disclosed).

6. See *Team Marketing USA, Corp. v. Energy Brands Inc.*, 913 N.Y.S.2d 874, 875 (Sup. Ct. Ulster Co. 2010) (plaintiff was denied production of documents in their native format, following the production of the same in PDF format).

7. CPLR Rule 3122(c) provides that when documents are to be produced for inspection, they shall be produced "as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request."

8. Index No. 101059/2004 (Sup. Ct. N.Y. Co. June 17, 2011).

9. Index No. 116846/2008 (Sup. Ct. N.Y. Co. June 24, 2011).

10. Index No. 113663/2009 (Sup. Ct. N.Y. Co. May 27, 2011).

11. See *Buck Consultants*, at 1, 2 (plaintiffs claimed that metadata was altered to conceal "potentially damaging evidence" and sought to determine when particular files were created, as the files produced indicated they were created in 2006, while the computerized filename indicated that they were created in 2004; court found the file creation dates to be "relevant and necessary" and directed defendant to produce the requested discovery in identifiable form.).

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