E-DISCOVERY: WHAT TO REQUEST WHEN YOU'RE REQUESTING

BY BRIANA HULET

What is sometimes overlooked in drafting and negotiating discovery requests is the *form* of document production. Specifying the form of production within discovery requests can save a significant amount of time and money in the document review phase and lead to the production of valuable data that would not otherwise be produced at all. While some of the categories discussed below may seem obvious, in our experience even law firms with extensive litigation and e-discovery experience have at times failed to request this data and been disadvantaged as a result.

Metadata

All productions of electronic documents should at minimum contain certain basic metadata fields, including:

- File name
- File created and modified dates
- Email sent date
- Custodian
- Author
- Last modified by
- Recipients (including blind copies (bcc))
- Source path
- Subject line

The purpose of metadata is to preserve information about documents that would be lost if, for instance, you printed out a document and handed it to opposing counsel. Who wrote the document? Who received it, and when? Where important data is not available on the face of the document, success can turn on the ability to analyze this metadata.

Not only does this information provide key facts not apparent from the document, it also assists in the efficient and accurate review of the documents. Analyzing metadata is one of the key ways that the document review team can intelligently identify privileged, key, and responsive documents without having to engage in a linear, manual review.

Document Format: TIFFs and Natives

While TIFF format is an acceptable form of production for many documents, certain file types need to be produced in native format.

For certain documents, significant content, such as speaker notes in presentations or track changes and comments in word processing documents, is lost in the TIFFing process. For others, such as Excel spreadsheets, the TIFF format no longer presents data in the coherent manner that the native file does. Specifying the types of files that must be produced in native format at the beginning of the discovery process allows for a more accurate review and negates the delay inherent in having to request the documents be produced again in native format (if that's even possible).

The additional information in these documents can also be very useful in crafting a document review strategy. Documents that contain comments and tracked changes, for example, are often more likely to contain privileged and/or interesting information. Spreadsheets and presentations often focus on the key issues in a matter in a predictable way and prioritizing review of certain categories or sub-categories of document types can enable the front-loading of documents that are most likely to be important, allowing for the law firm and the client to gain a more complete understanding of the facts earlier in the discovery process.

Define "Documents"

It is also important to specify all types of data being requested. While it is standard to request the production of all paper and electronic documents, failure to individually list all categories of requested "documents" can lead to the omission of key data sources and important information. Consider the specifics of your litigation and whether circumstances are such that it is likely that unusual data, such as chats, texts, shared drives, structured data, specific databases, voicemails, and telephonic recordings may be involved.

Requesting these types of documents in discovery requests ensures that the client gets the facts and communications central to building the case, especially in industries that are known to rely on these forms of communications.

When considering what types of documents to request, it is important to keep in mind that you, in turn, will most likely also be asked to produce those types of documents as well. If a party believes that the burden will be much greater on themselves than the opposing party to review and produce a certain category of document, and this burden is not outweighed by the possible benefit of receiving the other party's production of the same data, it makes sense to modify the discovery requests accordingly. Careful consideration of the players involved, the type of industry, and other specifics of the litigation at

hand should be undertaken to ensure that you are focusing on the types of documents most likely to contain the information needed.

Requesting ESI is a process that can be fraught with pitfalls. The processes outlined above provide some helpful steps that can assist you in avoiding those pitfalls, allowing for a streamlined and efficient review of ESI and the development of a complete understanding of the facts and issues involved in your case.

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