

ELECTRONIC DISCOVERY

A SPECIAL REPORT

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Rethinking wholesale native-format productions

Litigants need to understand the advantages and disadvantages of both native and traditional static-image formats so that ESI production meets — rather than dictates — litigation strategy.

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Right now, the tides of e-discovery favor production of electronically stored information (ESI) in native form — i.e., within the original application in which it was created. Because no outlay is needed to convert the data to a static image, those going with e-discovery's current flow believe that native productions cost less and should thus serve as the default production format for all e-discovery.

But leaping into a wholesale native production without consideration of the format's potential significant hidden costs and case-management problems can put some litigants in over their heads. A more thorough

examination of the issues associated with native-format productions, along with a more nuanced approach to ESI production overall, show that the best format for e-discovery really depends on the specific circumstances of each case. To craft a strategic e-discovery plan, litigants need to understand the advantages and disadvantages associated with production in both native and traditional static-image format so that ESI production meets — rather than dictates — litigation strategy.

Native-format production has certain clear benefits. Production of data within their original application results in significant up-front savings compared with the cost of

converting the data into a static-image format such as TIFF or PDF. Some applications just work better in their native format, allowing access to formulas, hidden comments and editing information.

For example, PowerPoint documents containing multimedia information and speaker notes may be more efficiently reviewed and produced in native format because of challenges associated with producing usable images from the application. The same is true for Excel files. Other proprietary or custom databases may also be unintelligible as static images and may similarly require production in native format. Finally, production in native format allows the receiv-

ing party to see each document as it existed when created, potentially providing important information regarding the context as well as the content of the information produced.

Production in native format, however, may produce unexpected costs as well as create unanticipated problems with data and case management throughout all phases of the litigation. While early case assessment-related activities are usually best conducted in native format, actual review in native format can result in unforeseen attorney costs.

For example, the time an attorney has to wait to launch an application to view a PowerPoint or Word document can add up to hours of wasted time. When looking only at native documents, reviewing attorneys may also spend a great deal more time looking for and analyzing the hidden information, such as track-changes edits or hidden comments, that exist in some native documents — time that is not necessary when the documents have already been rendered into an image format with all hidden data displayed for review. And any review of native files will require a separate process to redact documents. This will involve identifying the documents that need to be redacted, converting them to a redactable format, redacting them, and then re-reviewing them before production.

Additionally, parties should recognize that by producing all e-mails in native format, they will be unable to produce responsive portions of e-mail families while withholding any privileged portions of the family. Unlike static images, native e-mails,

with their embedded attachments, must be produced or withheld as a complete unit and cannot be separated.

ADDITIONAL EXPENSES

The cost of printing documents produced in native format represents another potential source of unanticipated expense. Unlike image-format productions, which can easily and cheaply be printed in large batches by a print operator, printing native files frequently takes much more time and expertise. When printing native documents, a lot of times an operator must open each file and verify the print settings for the version to be printed before sending it to the printer. This could potentially add hundreds of hours of time to the costs of a large production. The cost of software acquisition can also increase native-production costs. For example, in order to view data produced within its original application, a reviewing party must have that application on its own computer. If the party doesn't have that application and lacks the database tools necessary to render a view, the party will need to incur the cost of purchasing or licensing the application in order to view the data, and if the application is unavailable, data produced in that application will be unviewable.

Native-format productions also present case-management challenges that need to be considered. For example, native files can't be endorsed with a numbering system or a confidentiality designation. The e-discovery community continues to develop a reliable system of native-file endorsement, but a fail-safe

method has yet to emerge, resulting in a new set of problems. For instance, documents used during depositions will not have a shared page-level Bates number, and highly sensitive documents can lack necessary confidentiality designations on the printed page.

Additionally, depending on the application and its setting, modifications to documents produced in native format may occur accidentally — for example, with auto-date features — creating difficulties with authentication and introduction at trial. Issues with authentication might also arise with natively produced documents because identical documents printed from a native format may not resemble each other due to printer settings or other operator inputs. These issues should not be taken lightly. They can make it difficult to manage the documents during discovery and at trial — issues that may not be readily apparent when considering a production format. Finally, wholesale native productions might also provide access to metadata outside the scope of discovery in the litigation. Litigants don't always understand that they are granting this access when they produce in native format.

Converting native files to static images addresses several major drawbacks to native-format production. But unquestioned dedication to a static-image format ignores the problems with the production method that is seen in the native-format trend. For example, up-front costs for conversion can be daunting. And, unlike native-format productions, text in static-image files can't

be searched, and separate, searchable “text” files must be created along with DAT files to show associated metadata. In addition, static-image conversion does not work for complex data such as source code and Excel files, and can miss embedded text, hidden comments and speaker notes.

Given each format’s strengths and weaknesses, rigid adherence to production in any single format unnecessarily limits e-discovery options. Rather, the production format used in a given matter should be based on strategy and the circumstances of the situation at hand.

WHICH FORMAT, WHEN?

Choosing a production format, or combination of production formats, requires analysis of multiple variables including the size of the litigation, the client’s role in the litigation, the kind of data involved, and applicable litigation and discovery deadlines. Parties should take into consideration the types and scope of ESI they will produce before deciding on a preferred production format.

Parties producing a large amount of data may choose a hybrid approach. For many litigants, producing a combination of static images and native files provides the best of both worlds. This hybrid approach acknowledges that some documents, such as Excels, PowerPoints and computer source code, don’t convert to image format very easily. But for those file types that can be more readily converted, such as e-mails and Word documents, the benefit of producing as static images is not trivial. Some of these benefits include

the ability to review a wider variety of documents without needing corresponding software applications. Case-management efficiencies will also be gained by having page-level Bates numbering for common use and reference, and the assurance that confidential documents will always contain the designation on the face of each page.

On the other hand, depending on the nature of the litigation, if a party knows one set of data may be produced in many different cases, a native-format production may be preferred, so they don’t need to worry about customizing or modifying the image format every time the documents are produced. Third parties may choose to use native format to limit up-front expenditures.

Conversely, parties with a small amount of data may prefer the control and simplicity offered by static-image production, as may litigants for whom a static-image format offers inherent organization benefits and assurances regarding production of required elements of proof.

Irrespective of the size of the production, the specific facts of a case may belie a more generally accepted presumption regarding each format’s perceived benefits. Taking the time to perform a detailed cost-benefit analysis, tied to the expected data volume and case objectives, provides the best assurances that a selected format, or formats, serve to advance the particular interests of a particular client in a particular case.

No ESI production method offers a one-size-fits-all solution for every litigation. Instead, fluency in the

benefits and challenges of available production formats allows for the creation of an e-discovery plan that best meets case objectives while contemplating the most effective management of e-discovery costs — a balanced approach challenging the e-discovery trend that it’s better to “go native.”

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