

## Electronic Discovery &amp; Records Management

## Tip of the Month

**Cost- and Risk-Reducing Options for Production of Electronic Data****Scenario**

A large financial firm is defending a class action law suit which includes fraud claims. The firm's investment process generates mountains of data, including not only email but also databases, spreadsheets, and proprietary file formats used by internal systems. Metadata will likely also constitute responsive data. The company's General Counsel is interested in minimizing the litigation costs, including the cost of production.

**Measuring Production Costs**

When deciding which production method would be most cost-efficient, it is important first to decide how costs should be measured. In cases with substantial data produced by both sides, it makes sense to consider not only the cost of producing one's own data, but also that of reviewing files produced by the opposing side. Conversely, if the bulk of the data is produced by one party, the cost of reviewing materials produced by the other side is not directly relevant. Even then, a production method that saves the other side money may be used as a bargaining chip during initial pre-trial conferences.

Note that the monetary cost of alternative discovery methods does not tell the whole story. Sometimes a method that costs more now can save money and reduce risk later. For instance, a more painstaking redaction process increases up-front costs but could prevent a damaging waiver of privilege. Parties should weigh known costs against resulting risk to determine which approach best suits their financial situation and risk tolerance in each litigation.

**Producing Summaries or Compilations**

With document review commonly accounting for the lion's share of discovery costs, many litigants overlook opportunities to save production costs by considering alternatives to the common approach of mailing DVDs of tagged image file format (TIFF) files. Creating a summary or compilation of voluminous data can be an effective way to save time and resources when producing data, particularly when a database is responsive to a discovery request.

Databases are huge files that can change frequently. Often a snapshot of the database is produced in full, but this method may sever links to other parts of the database, rendering its macros and other internal links unusable. This can cause disputes when the receiving party cannot fully use the data. However, if only a small percentage of the data is relevant and responsive, the requesting party might accept targeted database *reports*, summarizing relevant slices of the database, in lieu of a database snapshot.

Similarly, relevant data might be spread across thousands of documents from which privileged or irrelevant data must be redacted prior to production. The producing party can consider generating a summary encapsulating all the relevant data from the underlying documents. This can save on both review and redaction costs.

Discussing options for data summaries or compilations is appropriate at initial pre-trial conferences pursuant to Federal Rule of Civil Procedure 26(f) or analogous state or regulatory rules.

### **Native Format vs. TIFF**

Data is often produced in TIFF format, but it may be more efficient to skip the TIFF conversion and deliver files in their native format.

Native-format production eliminates the conversion step, which can be costly and complicated for large files such as spreadsheets, databases and computer aided design (CAD) drawings. When metadata is important, native-format production curtails the debate over the sufficiency of such production because all of the metadata is automatically included. This approach also retains complex relationships that are not easily represented in two-dimensional TIFF files, making spreadsheets and engineering drawings significantly easier to review and understand.

Alternatively, conversion to a non-modifiable, printable format, such as TIFF, brings several advantages. TIFF files are easy to redact, while redaction in native format is technically more complicated and could bring the risk of a spoliation claim. Further, with TIFF production, what you see is what you get, while native formats may contain hidden data that must be revealed and reviewed prior to production. Also, conversion to TIFF is predictable and repeatable, which can simplify foundational questions and allay fears of fabrication.

However, this need not be an all-or-nothing decision. Production could proceed in native format for some data, such as spreadsheets and drawings, and in TIFF for others, including emails and text documents. This takes into account the capabilities of the chosen document review tools, the amount of information lost in conversion to TIFF from each format, and the various formats' respective propensities to hide potentially privileged or confidential materials. Similarly, native format could be used for some custodians, while those custodians likely to possess privileged or private information can have their materials converted to TIFF, to enhance the ability to review and redact, prior to production.

### **Transfer Method**

Finally, when the files have been gathered and redacted, how should counsel deliver them to the opposing side? Typically, a hard drive, CD or DVD is mailed or hand delivered to opposing counsel, but secure ftp sites offer an alternative that could reduce both cost and risk.

With traditional mailing or delivery, the disk could be lost or misdirected, resulting in delay and possible security breaches. Alternatively, materials uploaded to a secure site are encrypted with keys known only to the two parties, reducing the risk of misdirection and increasing the speed of transfer. These "cloud" solutions facilitate rolling productions, as files can be uploaded as they are ready to be produced, without the need to wait for a sufficient amount of data to justify generating a new disk.

### **Conclusion**

The final stage of discovery, in which materials are actually delivered to the opposing side, might seem like a routine occurrence offering few significant choices. However, considering the generation of compilations or summaries, evaluating TIFF and native-format production, and opting for non-physical delivery could all offer substantial savings in suitable circumstances.

Litigants can benefit by actively considering such innovative solutions at the beginning of the discovery process and discussing them with opposing counsel well in advance of actual production.

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