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Taming the Metadata Beast

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The most recent federal decision[1] weighing in on the hot-button issue of discovery of metadata[2] and documents in their "native format," i.e., "the way it is stored and used in the normal course of business,"[3] offers some simple, common-sense advice on how to best achieve that discovery objective:

Ask for it. Up front.

Otherwise, if you ask too late or have already received the documents in another format, you may be out of luck.

In *Autotech Technologies LP v. Automationdirect.com Inc.,* No. 05 C 5488, 2008 WL 902957 (N.D. Ill. April 2, 2008), defendant ADC filed a motion to compel Autotech to produce an electronic copy of a document it had already produced in .PDF and paper format. ADC claimed that Autotech's production of this document in non-native format was insufficient, because the formats in which Autotech produced the document lacked the accompanying, underlying metadata, including when the document: (1) was created; (2) was modified; and (3) was designated confidential.

ADC, in turn, claimed that it had already produced the document in question in Microsoft Word format and thus fulfilled its discovery obligations. While the document appeared to be lacking metadata, a chronological list of changes to the document could be viewed on the face of the document itself, in a section called "Document Modification History."[4]

As the court explained, Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure governs the production of electronically stored information:

> (E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
> (ii) *If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms;* and
> (iii) A party need not produce the same electronically stored information in more than one form. (emphasis added).[5]

As ADC did not specify the form of production it wished, Autotech had the option of producing the document in either: (1) the form it was ordinarily maintained, or (2) a reasonably usable form.

In the Form Ordinarily Maintained

With respect to Rule 34(b)(2)(E)(ii)'s first production option, ADC relied on its own unsupported representation that the document was converted from Microsoft Word to .PDF format, and was thus not produced in the form in which it was ordinarily maintained. The court found, however, that ADC had provided no evidence beyond its own uncorroborated statement in a brief, which was insufficient to support this argument.[6] Autotech's own contradictory submissions to the court were of no help. Indeed, in its proffered declarations, Autotech represented that the document was saved onto a CD-ROM in Microsoft Word format, while in its reply brief, Autotech implied that the document was converted to .PDF format to be moved to the disc.[7]

In a Reasonably Usable Form

Because it was unclear what format in which Autotech actually produced the file, the court considered the latter half of Rule 34(b)(2)(E)(ii), namely, whether hard copy or .PDF formats are "reasonably usable forms," and, thus, satisfactory production options under that rule. ADC argued that the document was not usable, because it lacked metadata containing, among other things, an electronic history of the document. However, the document in question was somewhat unique, in that while it lacked metadata, it included, in hard copy, a history of all changes to the document. As such, the court noted that ADC's real problem was that the document in question lacked the metadata that is normally attendant to any electronic document.[8]

Not Specifying Metadata Up Front

ADC's ultimate undoing, as the court observed, was that it never initially asked for metadata, neither in its discovery requests nor in its earlier motions to compel. Compounded with ADC's receipt of the document in question in hard copy and .PDF format, the court held that ADC was a little late to ask for the document in a third format. The court further observed that motions to compel production of metadata will ordinarily not be granted where a party did not make it part of its initial request.[9]

In closing, the court looked to the prin-

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ciples developed by the Sedona Conference, which courts have looked to for guidance on emerging or developing discovery issues, including electronic discovery and metadata production.[10]

As the Sedona Conference explained, a producing party complies with the requirements of Rule 34 where it produces documents in a format that does not include metadata (such as .PDF or .TIF format) absent: (1) a specific request for metadata (a reasonable basis to conclude the metadata was relevant to the claims or defenses in the case); and (2) a prior order of court based on a showing of need for the metadata in conjunction with the particular circumstances of the specific case.[11]

Conclusion

The area of electronic discovery and metadata production continues to quickly develop and this case is obviously only one of many in which courts and counsel attempt to parse and reach equitable resolution on these matters. This case, however, serves as an important reminder that, in discovery, a requesting party is the "master of its production requests" and must craft and pursue those discovery requests to ensure that they are able to get the documents and information they need to best represent their clients.[12] As such, best practices for seeking (and ultimately successfully obtaining) metadata include:

- ***Clearly ask for it in your initial discovery requests.*** The *Autotech* court and other courts appear to conclude that metadata is something that needs to be gathered the first time a producing party reviews and gathers responsive documents for production.[13] To make the producing party go back to the electronic document well a second time to harvest metadata would be prejudicial and wasteful.
- ***Carefully consider whether your client is willing to shoulder the burden of gathering, processing, and producing its own metadata.*** "Caution should be exercised in demanding that electronically stored information be produced in native format with metadata intact, as the other party may then insist upon the same."[14] Of course, nothing in the Federal Rules requires reciprocity in production of electronically stored information. Even if one party produces documents in electronic format, the other is free to argue that production in electronic format is not appropriate "as not reasonably accessible because of undue burden or cost."[15] The relative burdens of gathering, processing, and producing metadata as compared to its benefits will often differ based not only on the nature of parties themselves, but based on the type and relative importance of the metadata sought. Nevertheless, while courts should not rigidly apply an "equivalence" standard and insist on reciprocal metadata productions without undergoing the analysis contemplated by Rule 26 and described herein, the reciprocal approach may be attractive to courts for its simplicity, so be forewarned.
- ***Be prepared to explain why you need it.*** While metadata is a potentially important and useful tool in your discovery and litigation arsenal, it is not necessarily obtainable simply for the asking. Your likelihood of being successful in your request will be increased if you can provide a cogent argument (or arguments) as to why it is important in the context of your case and why this importance outweighs any "burden" arguments the producing party may have. In addition, the importance of metadata can vary based on the type of documents sought. "As a general rule of thumb, the more interactive the application, the more important the metadata is to understanding the application's output."[16] For example, word-processing documents can generally be understood just by reading them, without the need for metadata, although certain useful metadata, including draft revision histories, author information and the like, often render its production vital. On the other hand, in "a database application where the database is a completely undifferentiated mass of tables of data[,] [t]he metadata is the key to showing the relationships between the data; without such metadata, the tables of data would have little meaning."[17] Other types of documents may fall somewhere between these two ends of the spectrum, providing both a means to understanding the document itself in addition to providing a wealth of additional, and often illuminating, background information.

ADC said Autotech's production of the document in non-native format was insufficient, because the formats lacked the underlying metadata, including when the document was: created, modified, and designated confidential.

Hopefully these strategic tips will prove useful the next time you seek metadata and native format documents in your discovery requests. As with many things in life, communicating in a clear and precise manner about what you want, and why you want it, can go a long way.

1. *Autotech Technologies LP v. Automationdirect.com Inc.,* No. 05 C 5488, 2008 WL 902957 (N.D. Ill. April 2, 2008).
2. "Metadata, commonly described as 'data about data,' is defined as 'a set of data that describes and gives information about other data' or 'information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information).' It includes all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records. Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or path name), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept." Id. at *1 n.1 (citations omitted).
3. Id. at *1.
4. Id.
5. *Autotech Technologies,* 2008 WL 902957, at *2.
6. "ADC argues that the document at issue was converted from Microsoft Word to .PDF; i.e., that it was not produced in the form in which it was ordinarily maintained. But that is all it is—an argument—and ADC does not provide evidence, such as an affidavit to support its version of the production. An uncorroborated statement in a brief doesn't count." Id. (citations omitted).
7. Id.
8. As the court explained: "the real problem for ADC is that the hard copy does not include the metadata that would be associated with the document as it is stored on Autotech's engineering computer. According to ADC, that is why the two versions Autotech produced are not 'reasonably usable.'" Id. at *3.
9. "It seems a little late to ask for metadata after documents responsive to a request have been produced in both paper and electronic format. Ordinarily, courts will not compel the production of metadata when a party did not make that a part of its request." Id. (citing *D'Onofrio v. SFX Sports Group Inc.,* 247 F.R.D. 43, 48 (D.D.C. 2008); *Wyeth v. Impax Labs. Inc.,* No. Civ. A. 06-222-JJF, 2006 WL 3091331, at *1-2 (D. Del. Oct. 26, 2006); *Treppel v. Biovail Corp.,* 233 F.R.D. 363, 374 (S.D.N.Y. 2006); Ralph C. Losey, "E-Discovery, Current Trends and Cases" 158-59 (2007).
10. The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery (The Sedona Conference Working Group Series, July 2005 Version), available generally at www.thesedonaconference.org. "The Sedona Conference is a nonprofit legal policy research and educational organization which sponsors Working Groups on cutting-edge issues of law. The Working Group on Electronic Document Production is comprised of judges, attorneys, and technologists experienced in electronic discovery and document management matters." *Autotech Technologies,* 2008 WL 902957, at *3 n.3.
11. Id. at *3-*4.
12. Id. at *4.
13. See supra n.11.
14. Jay E. Grenig and William C. Gleisner, III with general consultants Troy Larson and John L. Carroll, 1 eDiscovery & Digital Evidence §7:7 (2007).
15. Fed. R. Civ. P. Rule 26(b)(2)(B).
16. See, e.g., *Williams v. Sprint/United Management Co.,* 230 F.R.D. 640, 647 (D. Kan. 2005).
17. Id.