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APPLYING THE RULES

As we announced in May, Applied Discovery and *BNA's Digital Discovery and E-Evidence* have become industry partners. The combination of our collective e-discovery expertise will provide the readers of *DDEE* with an unparalleled collection of information and resources. As part of our partnership, BNA and Applied Discovery will be sponsoring an Advanced E-Discovery Conference in metropolitan Washington, D.C. on Sept. 18 and 19. Leading up to the conference, Applied Discovery will be providing a monthly column featuring some of the topics, speakers and issues that will be showcased at the conference. This month's article, the second in the series focuses on Federal Rule 34(b)(2)(E). While by now we are all familiar with the amended Federal Rules, the case law has begun to shape how we practice. We hope you will join us for the conference this fall, when we will discuss Rule 34(b) and the other rules in depth.

Federal Rule 34(b): You Must Be the Master of Your Requests and Production

BY COURTNEY INGRAFFIA BARTON, ESQ.

Over a year ago, when we were all still discussing the new rules, the debate around Rule 34(b)(2)(E) was whether the ''ordinarily maintained'' language in that rule required production in native format. Since December 1, 2006, however, the courts have had little to say about Rule 34(b) as it relates to form of production. This appears to be because parties are taking advantage of their obligations under Rule 26(f) and discussing form of production in their meet and confer.

Interestingly, although native production and metadata still seem to be at the center of the few published opinions where parties could not agree, the courts have not been interpreting the ''ordinarily maintained'' language, but rather have been looking at whether the procedures laid out in the rule for requesting or objecting to native file and metadata production have been followed. *See, e.g., In re Payment Card*, 2007 U.S. Dist LEXIS 2650 (E.D.N.Y. Jan 12, 2007)(although in the court's opinion the plaintiff's production ran afoul of the requirements in Rule 34, because defendant did not object to the form used by plaintiff, there was no requirement to re-produce in native format).

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The courts have been methodical in their approach: if one of the parties has not complied with the procedures required by the rule, the inquiry ends there. The party who has followed the rule typically wins the battle.

If, on the other hand, procedures for requesting and objecting have been met, the inquiry then shifts outside of the language of Rule 34, to the broader issue of whether native files and metadata are relevant in light of costs and burdens.

Recent Opinions. For example, in *Schmidt v. Levi Strauss & Co.*, 2007 U.S. Dist. LEXIS 69791 (N.D. Cal. Sept 10, 2007) the court, applying pre-amended Rules, held that because plaintiff did not object to party's production in hard copy, re-production in electronic, native format was not required.

In *Lawson v. Sun Microsystems, Inc.*, 2007 U.S. Dist. LEXIS 65530 (S.D.N.Y. Sept. 4, 2007), although the requesting party properly requested production in native format, it was the producing party that did not timely object or seek agreement with plaintiff before producing in hard copy. The court required re-production in native format.

By contrast, in *Michigan First Credit Union v. Cumis Ins. Society,* 2007 U.S. Dist. LEXIS 84842 (E.D. Mich. Nov. 16, 2007), the plaintiff properly requested production in native format with metadata and defendant timely objected, so the analysis shifted to relevance of data and burden of such production.

Thus, both parties have an obligation to timely object if they are not satisfied with the form requested or produced. Only when the parties have conformed to procedures will the court entertain arguments on the merits.

Follow the Rules. This emphasis on ''following the rules'' in the production of native files and metadata was crystallized in an opinion earlier this year. In *D'Onofrio v. SFX Sports Group Inc.,* 2008 U.S. Dist. LEXUS 4252 (D.D.C. Jan. 23, 2008), the court made clear that even before parties object, the requesting party must be unambiguous about what they are seeking.

In that case, plaintiff D'Onofrio filed a motion to compel defendant to produce a business plan and e-mails in their ''original format'' with metadata as she had requested. The court found, however, that she had not so requested and held that the instructions in plaintiff's interrogatories—that documents be produced in their files or ''in such a manner to preserve and identify'' the file from which the documents were taken—pertained to physical file cabinets or folders.

Straining to read the instruction to apply to electronic documents, the court held that the instruction's alternative of production via ''preserving and identifying the file'' from which it was taken could pertain to a trailer at the bottom of a printed electronic document. This interpretation would suggest that the plaintiff had not, in fact, requested the information be produced exclusively in native form with metadata. Because plaintiff did not specify the forms or forms, the inquiry ended there; there was no need to further analyze whether native files and metadata were warranted in the case.

Following *D'Onofrio*. Similarly, in *Autotech Techs Ltd. P'ship v. Automationdirect.com, Inc.*, 2008 U.S. Dist. LEXIS 23498 (N.D. Ill. March 25, 2008), the defendant was advised by its consultant to request certain documents in a certain format. After the plaintiff complied, the defendant claimed that the production was unsatisfactory. The court showed little sympathy for the defendant because it had received exactly what it had asked for. The court nevertheless required the parties to meet and confer to resolve the issue, albeit with cost-shifting ordered for any additionally obtained information.

In a later opinion in the same case, the defendant sought to receive a certain document in its native format. The plaintiff had already produced the document in PDF and in hard copy. The defendant claimed that it wanted the metadata.

Citing *D'Onofrio,* the court stated that ''it seems a little late to ask for metadata after documents responsive to the 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.'' The court went on to say that ''[t]here was no request for metadata here until recently – after production. [The defendant] was the master of its production requests; it must be satisfied with what it asked for.'' *Autotech,* 2008 U.S. Dist. LEXIS 27962 (N. D. Ill., April 2, 2008). The court denied the motion to compel.

Approval for the Courts' Approach. The approach taken by the courts that have addressed the form of production issue is the right one. Form of production is an issue that should be agreed upon by the parties. Each case is different; each has different documents, file formats, and requirements, and no one format fits all.

Because form can be complicated, parties must be explicit about what they want and timely object when they can't or do not want to produce in a particular format, or when they receive a production that does not comply with a proper request.

It will be interesting to see if the trend in Rule 34, with courts mandating agreement on e-discovery issues—a trend that we are seeing in all of the rules—will continue. If so, then the rules are having their desired effect.

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