

Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

Why and How to Request Native File Formats in Requests for ESI Production

BY GEORGE BELLAS & LESLIE NELSON

As more of daily life continues to shift online—now accelerated due to the pandemic—the importance of Electronically Stored Information (ESI) will undoubtedly continue to increase across all litigation. As such, attorneys will need to seriously consider the most advantageous file formats for obtaining needed information in discovery.

ESI includes a wide variety of formats

(emails, word documents, spreadsheets, digital photos, videos, etc.), ESI is typically produced in one of two reasonably usable formats: Native File Format (“NFF”) or Tagged Image File Format (“TIFF”) with load files containing the text of the document as well as certain metadata makes the documents searchable.¹

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Defense Attorney's Closing Argument Went Too Far, Case Reversed & Remanded: *Michael Konewko v. Advocate Health & Hospitals Corp.*

BY ROBERT HANDLEY

Plaintiff filed a medical malpractice suit against Defendant Hospital. Following a nine-day trial, which the appellate court characterized as a “closely balanced case,” the jury returned a verdict for the Defendant. Plaintiff moved for a new trial

alleging Defendant's closing argument was improper.

Prior to the trial, the trial judge ruled on a motion *in limine*, which “barr[ed] any attorney or witness from making reference to, comments about, [and] barr[ed] any

evidence which relates to the wealth, poverty or financial status of any party including reference to any other Advocate facility for purposes of showing wealth of the party.” The trial judge also found that,

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TIFF

While TIFF is a widely supported graphic image file format, it has many different possible compression formats and resolutions possible (e.g., a Microsoft Word file would be produced as a series of images, similar to a PDF). TIFF is the more commonly used format for its three purported benefits: (1) TIFF documents can be Bates numbered; (2) redacted; and (3) it is harder, albeit not impossible, to alter data presented in TIFF inadvertently or deliberately.² However, the major drawbacks of TIFF are: (1) they typically much larger files than their native counterparts; (2) require time and expense to convert from NFF to TIFF; and (3) metadata does not normally appear on a printed page and thus survive TIFF regeneration, though it can be partially preserved or recreated in a separate load file (known as “TIFF+”).³ Practitioners should be mindful in production requests to insist on a production with metadata in any TIFF production. In the absence of a specific production request for particular file formats, some courts have held that TIFF with no metadata is sufficient production.⁴ However, it is arguable whether TIFF with no metadata is sufficient production.⁵

Native File Format

NFF retains the file structure associated with the original creation of the file (i.e., if the file requested is a Microsoft Word file, it is produced as a Microsoft word file). NFF, in contrast to TIFF, does preserve all of the metadata associated with each file. Though some attorneys may be loath to consider technical aspects of ESI, working knowledge of metadata is worth taking the time to understand.

Metadata

“Metadata” is often described as data about data⁶ and can be divided into two categories: “system metadata” and “application metadata” (sometimes also called “document metadata”).⁷ System

Metadata is not embedded within the file it describes, but rather is stored externally (on a computer or other external device).⁸ System metadata is used by the computer’s file system to track file locations (the file’s “path”) and store information about each file’s name, size, creation, modification, and usage.⁹ Application metadata may also contain information about when a document was created, viewed, saved, or printed.¹⁰ What separates application and system metadata is whether it is embedded in the file in question. Application metadata, unlike system metadata, which is left behind where the file was stored, is information that is embedded in the file it describes and moves with the file when the file is moved or copied.¹¹ The application metadata of an email, for instance, includes roughly 1,200 or more properties, such as the dates the email was sent, received, replied to, forwarded, blind carbon copy (“bcc”) information, and sender address book information.¹²

While one might easily imagine that such data could be extremely useful in the context of lawsuits, there are some caveats to keep in mind. While there is some overlap in the information saved as application metadata and system metadata, they are not always simple apples to apples comparisons. For example, application metadata time and date stamps in Microsoft Office files are “much less susceptible to causal modification” than system metadata date stamps. Activities like moving or copying a file will update one or more system metadata dates, but will sometimes leave application metadata dates unchanged.¹³ It is also not unusual to have instances where application metadata will not necessarily contain corresponding fields, and even if it does, the application metadata may not convey the same information as the system metadata.¹⁴ In addition, application metadata is not always accurate. For example, when a user at a law firm creates a memorandum on Microsoft Word using a

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memorandum template created by someone else at the firm, the metadata for the new memorandum may incorrectly identify whoever created the template as the author of the new memorandum.¹⁵ Attorneys should also keep in mind that metadata is neither created by nor normally accessible to an average computer user and there may be additional costs associated with extracting it.¹⁶

Generally speaking, metadata is discoverable as long as the relevance threshold of Rule 26(b)(1) is satisfied, regardless of the metadata's "present format and level of accessibility"¹⁷ And in some jurisdictions, courts have even included deleted computer files as discoverable.¹⁸ Metadata is relevant when the process by which a document was created is in issue, or there are questions concerning a document's authenticity.¹⁹ The extent to which metadata will be produced depends primarily on the facts and circumstances of each individual case. The Sedona Principles outlined three considerations for litigants:

- (a) what metadata is ordinarily maintained;
- (b) the potential relevance of the metadata to the dispute (e.g., is the metadata needed to prove a claim or defense, such as the transmittal of an incriminating statement); and
- (c) the importance of reasonably accessible metadata to facilitating the parties' review, production, and use of the information.²⁰

Beyond potentially bearing upon the merits of a case, metadata also may perform a functional role in the usability of ESI. For instance, system metadata may allow for efficient sorting of files by dates or other information captured in metadata; application metadata may allow for varied displays of documents. Both system and application metadata may be important when using external "technology platforms for searching, culling, and analyzing large volumes of ESI."²¹

Benefits of NFF

Production in NFF has many benefits. Many have argued that ESI in NFF is cheaper to produce, retains otherwise discoverable metadata, and is easier to use, search, and

sort.²² In the last 20 years, information storage has grown from kilobytes and megabytes to terabytes and petabytes; the volume of ESI requiring review can easily reach gargantuan proportions.²³ This is where production in NFF has tremendous cost saving potential as it avoids the expense of converting files into static images, which can be a lengthy process with a high volume of discovery.²⁴ Additionally, it is difficult to display multi-dimension, dynamic content in a static image format (e.g., navigation panels, hyperlinks, videos, or the formulas in an excel spreadsheet).²⁵

The major reasons offered for preferring TIFF to NFF are 1) ability to redact privileged information, 2) potential for alteration, and 3) ease of Bates numbering. While documents requiring redaction may be best suited for static image production, it is unlikely that every single document in discovery will require redaction. Thus, limiting all production to TIFF formats is unnecessary.²⁶ Regarding alteration, any malicious alteration by opposing counsel would of course carry a threat of heavy sanctions under F.R.C.P. §37(e). In addition, the producing party can include a legend stating that the materials are subject to a protective order.²⁷ However, if one were truly bent on altering evidence despite consequences, TIFF offers no security advantages as it is not that difficult to alter a TIFF file either. In the event of an inadvertent change to a file, the producing party will still retain its original files and can identify any inadvertent changes to documents.

Lastly, before considering Bates numbering, it should be considered that many items produced in discovery may not end up being used in proceedings, as not all discoverable material need be admissible. However, if Bates numbering is required for NFF ESI it can be accomplished in one of two ways: (a) if Bates numbers are needed during trial or on motion papers, file identifiers and page numbers can be easily stamped on printouts or images of specific documents in question; and (b) the name of an electronic file can be changed without altering its content—it is simple and inexpensive to add a Bates numbering system to filenames.²⁸

But before rushing to request all documents in NFF, litigators should be aware that there is a general presumption in many courts—albeit a dated approach—against the relevance and thus production of all metadata. For instance, in a case where plaintiffs sought metadata for all ESI production, the court held that "that emerging standards of electronic discovery appear to articulate a general presumption against the production of metadata."²⁹ In a similar case with a broad ESI metadata production request, another jurisdiction held that parties "should tailor their metadata requests to specific word documents, specific e-mails or specific sets of e-mail."³⁰ As this furthermore "reflects the general uneasiness that courts hold over metadata's contribution in assuring prudent and efficient litigation."³¹ In many of cases, courts deny production requests for similar reasons: 1) failure to establish an agreement at the FRCP 26(f) conference regarding the format of ESI files, 2) parties waited until after initial discovery production was completed to request metadata, and 3) parties could not show particularized need for the metadata of any specific documents.³² This illustrates an established trend in multiple jurisdictions: if parties do not make specifically tailored production requests for NFF early, they are likely to be denied.

In Illinois federal courts, to have any hope of success in a motion to compel the production of metadata, the initial document request must contain requests for metadata. "On the other hand, if metadata is not sought in the initial document request, and particularly if the producing party already has produced the documents in another form, courts tend to deny late requests, often concluding that the metadata is not relevant."³³ The 7th Circuit E-Discovery Program developed clear standards for ESI Production requests and provided that ESI production requests "should be reasonably targeted, clear and as specific as possible."³⁴ Shotgun production requests that seek "any and all" even loosely relevant ESI violate "the spirit, if not the letter, of these principles."³⁵ Moreover, attempts to overwhelm opposing counsel through a dump of electronic documents would similarly be prohibited.³⁶

The Sedona Conference cautioned

that parties should not demand forms of production, including native files and metadata fields, “for which they have no practical use or that do not materially aid in the discovery process.”³⁷ However, the goal of the rules on ESI are to “encourage forms of production that would facilitate the orderly, efficient, and cost-effective production of ESI and which allow the requesting party to meaningfully analyze, search, and display the produced electronic data.”³⁸ If parties consider the potential benefits of NFF and metadata prior to the FRCP 26(f) conference or the Illinois Supreme Court Rule 218 Conference and include particularized needs in initial requests for production, they will have a substantial leg up on those that have not taken the time to develop working knowledge of ESI formats. ■

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1. *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225, 228 (S.D. Cal. 2015).
2. *Id.* at 244.
3. *Id.* at 228.
4. *In re Porsche Cars N. Am., Inc., Plastic Coolant Prods. Litig.*, 279 F.R.D. 447, 449 (S.D. Ohio 2012).
5. *In re Instinet Grp., Inc. Shareholders Litig.*, 2005 WL 3501708, at 3 (Del. Ch. 2005).
6. *Network, LLC v. Centraal Corp.*, 242 F.3d 1347, 1354 (Fed. Cir. 2001).

7. *Teledyne Instruments, Inc. v. Cairns*, 2013 WL 5781274, at 4 (M.D. Fla. 2013).
8. *The Sedona Conference, The Sedona Principles: Second Edition—Best Practice Recommendations & Principles for Addressing Electronic Document Production 4* (2d 2007).
9. *Id.*
10. Eoghan Casey, *Handbook of Digital Forensics and Investigation*, p. 231 (1st ed. 2009).
11. *Supra* note 7, at 4.
12. *Supra* note 7, at 3.
13. *Supra* note 6, at 6.
14. *Id.*
15. *Supra* note 7, at 4.
16. *Supra* note 6, at 3.
17. *John B. v. Goetz*, 879 F.Supp.2d 787, 877–78 (M.D. Tenn. 2010); See also *Aguilar v. Immigration & Customs Enforcement Div., U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 355–56 (S.D.N.Y.2008). (“with its potential relevance under Rule 26(b) unquestioned, the metadata of both archival and active ESI has been found to be discoverable.”)
18. *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002)
19. *Kingsway Financial Services, Inc. v. PricewaterhouseCoopers LLP*, 2008 WL 5423316, 6 (S.D. N.Y. 2008).
20. *The Sedona Conference, The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Document Production*, Comment to Principle 12, 61 (2d 2007)
21. *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, THE SEDONA CONFERENCE*, 88 (2017 Public Comment Version).
22. *Supra* note 1, at 229.
23. Oliver Fuchsberger, *IT Tips for Ediscovery Best Practices*, Wyo. Law. 32 (2007).
24. Michael M. Wechsler & Michele C.S. Lange, *Today’s Discovery Demands Require Proficiency in Searching Electronic Documents*, N.Y. St. B.J. 18, 24 (2004).
25. Fuchsberger, at 32.
26. Craig D. Ball, *The Case For Native Production*, *Practical Law The Journal* 37 (2014)
27. *Id.* at 35.
28. *Id.*
29. *Kentucky Speedway, LLC v. National Ass’n. of Stock Car Auto Racing*, 2006 WL 5097354 (E.D. Ky. 2006). See also *Wyeth v. Impax Laboratories, Inc.*, 248 F.R.D. 169 (D. Del. 2006).
30. *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 150 (D. Mass. 2009).
31. *Id.*
32. *Id.* See also *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556 (N.D.

- Ill. 2008), (defendant motion to compel production of metadata was denied because the defense did not ask for it as part of discovery requests nor as part of previously filed motions to compel earlier in the action. Without the request, the plaintiff’s production without metadata complied with ordinary meaning of Fed. R. Civ. P. § 34.); See *Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 F.R.D. 350, 352 (S.D. N.Y. 2008) (the court denied plaintiff’s request for metadata because of the small amount of data and the late requests for document metadata occurred after production); See *D’Onofrio v. SFX Sports Group, Inc.*, 247 F.R.D. 43, 48, 102 Fair Empl. Prac. Cas. (BNA) 1499 (D.D.C. 2008) (where plaintiff’s request for the defendant’s business plan in native file format with accompanying metadata was denied as the plaintiff failed to request metadata as part of her initial discovery demands); See *R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13, 43–44 (S.D. N.Y. 2010) (where plaintiff’s late requests to the defendant via motion for certain system metadata, which could not be tied back to specific earlier discovery demands, was denied as the plaintiff failed to request it at the outset.); *Covad Communications Co. v. Revonet, Inc.*, 267 F.R.D. 14, 20 (D.D.C. 2010) (re-production of information in electronic native format, with metadata, at late stage of protracted litigation was not necessary and would not be compelled, where that information already had been produced as hard copy documents, that format was usable, and party requesting that information did not state why it needed native format to analyze and use hard copy it already had); See *U.S. ex rel. Carter v. Bridgepoint Educ., Inc.*, 305 F.R.D. 225 (S.D. Cal. 2015) (Court held that plaintiffs impliedly conceded they did not “specify” a format when they first proffered their document requests for “original documents.”).
33. *Autotech Technologies Ltd. Partnership v. Automationdirect.com, Inc.*, 248 F.R.D. 556, 559 (N.D. Ill. 2008).
34. The Seventh Circuit E-Discovery Pilot Program, *Statement of Purpose and Preparation of Principles*, 11 (2009).
35. Steven M. Puiszis, “The Seventh Circuit Electronic Discovery Pilot Program—Hope for the Future,” 20 *IDC Quarterly* 2, 2 (2016).
36. *Id.*
37. *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 *Sedona Conf. J.* 1, 173 (2018).
38. *Id.* at 172.

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“[it] is prejudicial error to ask a jury to put itself in a position of a party.”

Nonetheless, throughout the trial, Defendant repeatedly characterized its agent, nurse Lisa Begler, as a “sympathetic figure who would have to work years to earn the amount of money that Plaintiff requested in damages.”

Closing Arguments

Plaintiff’s closing argument stated in part

as follows:

“[Y]our verdict must not be based on speculation, prejudice, or sympathy. ***

The concept of empathy, on the other hand, is a little different, and the concept of empathy and understanding what somebody has gone through can certainly play a role in this case.”

Plaintiff then essentially accused Nurse Begler of lying stating as follows:

“She knows . . . Levin (one of Plaintiff’s experts) . . . is critical of (her) for failing to take proper precautions (such as) using a walker . . .

She is aware of that *so uh-uh, in our disclosure, I am going to say I used a walker*. It doesn’t work that way. You know what, if you used it, put it in your record. If you used it, after you’re describing everything you did at the deposition, say it in the deposition. That

doesn't wash 7-1/2 years later.

Careful and meticulous? Doubt it! Alright?"

Plaintiff asked the jury for approximately \$800,000.00 in damages in total.

Defendant, in turn, began its closing argument by informing the jury that this was a serious matter:

"(You may not have liked my jokes throughout the trial) but Lisa Begler's reputation as a Nurse(,) the dedication that she does in and out, going back decades, starting as a patient care tech. Whatever you ultimately decide in this case as to whether Barbara Levin or Barbaralevin.com convinced you that she violated the standard of care, is not a laughing matter, it's not something to be chuckled about, it's not something to be taken lightly.

We take it seriously. (Begler) takes it seriously, (Sales) takes it seriously. That's why we're here."

With respect to Plaintiff's request for damages, Defendant further argued as follows:

"So you were asked to award . . . almost \$800,000.00. And the first thing that popped into my mind was how many shifts, how many years, a nurse and a physical therapist in their life would have to work to earn \$800,000.00."

Plaintiff's counsel objected and the trial court sustained the objection and directed the jury to disregard the comment.

Arguing further, Defendant's counsel stated as follows:

"And I think you learned it's not possible to document everything, that in real life nurses are not able to take someone to the bathroom and then go back to the chart at the nurse's station and type out exactly how they took the patient to the bathroom, where their hands were. . . ."

What does professionally negligent mean? It means she was not reasonably careful.

"So put yourself in Lisa Begler's" – whereupon Plaintiff's counsel objected and the court sustained the objection and said, "Strike that."

Further arguing, Defendant's counsel stated as follows:

"So what I would ask you to do . . . is render a verdict in favor of the Defense if

(Plaintiff) did not prove (his) case.

And I would submit to you that exploiting people's lack of memory and having them on the stand for hours and basically openly mocking them – whereupon Plaintiff's counsel objected. The court sustained the objection and stated, let's withdraw the phrase 'mocking them'"

Defense counsel went on to say:

"And then asking with all the expert witnesses that have made all this money in this case, then asking to award a sum of money that would take years for a nurse and physical therapist – whereupon Plaintiff's counsel objected.

The court stated as follows:

"That is sustained and stricken from the record. Please, Mr. Johnson."

Defendant's attorney went on as follows:

"I'll submit to you . . . there was (no) negligence by (our) therapist and nurses and that you'll find in favor of (us).

I am confident that that will be the verdict."

During deliberation, the jury asked whether it could award medical expenses but find that Defendant's agents did not act negligently. The jury also answered a special interrogatory in the negative, finding that Defendant's agents (Begler) did not act negligently. The jury returned a verdict for Defendant.

Post-Trial Motion

Plaintiff filed a post-trial motion arguing that Defendant's improper comments during the closing argument warranted a new trial and pointed to the following offending comments:

(1) "How many years a nurse . . . would have to work to earn \$800,000.00";

(2) "Put yourself in Lisa Begler's – ";

(3) "Basically openly mocking (witnesses)"; and

(4) "Asking with all the experts witnesses that have made all this money in this case, then asking to award a sum of money that would take years for nurses and physical therapists - ."

Plaintiff elaborated at the hearing that it considered Defendant's improper closing argument to be the "most disturbing" aspect of the case. He noted that Defendant's counsel knew the law and had been

practicing with a "good firm" for over 20 years, and, thus, he could only infer that counsel deliberately tried to inflame the jury's passion and "somehow get [the jurors] to think that this poor nurse is the one [who is] going to bear the brunt of the jury's verdict." Plaintiff noted that this was a close, hard-fought case and that "every little increment is that much more important."

Defendant responded that his closing arguments were not improper because Begler was not a party to the case and therefore his comments were not violative of the Motion *in Limine*. Defendant also argued that the comments were not a significant portion of the proceedings and the trial court cured any impropriety by sustaining the objections.

The trial court denied the post-trial motion for a new trial.

Analysis

On appeal, Plaintiff argued that he was entitled to a new Trial or a JNOV based on the manifest weight of the evidence. According to the appellate court, Defendant did not strenuously dispute that, if these comments had been made in reference to Advocate itself, rather than its agent, reversal would be warranted. Rather, in attempting to distinguish each of Plaintiff's cited cases, Defendant repeatedly notes that the comments at issue in those cases pertained to a party. The trial court subscribed to Defendant's position on the agency distinction in denying the post-trial motion.

In assessing Defendant's argument, the appellate court concluded "we think it matters not whether the comments refer to a party or the party's agent, but whether the comments prejudice the jury in favor of or against a party. To hold otherwise would be to allow an attorney to make any number of improper, inflammatory remarks, perhaps in contravention of motion *in limine* orders, or at least the underlying purpose of those orders, and be excused merely because the comments pertained to a party's agent and not the party itself. This position would lead to gamesmanship, allowing an attorney to subvert the purpose of a motion *in limine* order, and opportunism, as a party's agent might be more relatable, more human, and therefore more sympathetic than the party itself."

The appellate court focused its analysis on the improper appeal to the sympathy of the jury during closing argument starting from the premise that arguments are improper if they encourage the jury to depart from neutrality and reason and appeal to sympathy or inject other improper elements in the case. Also, it found that it is improper to refer to a party's financial position or to direct the jury's attention to the effect an adverse verdict upon the Defendant's professional reputation. It is also improper to suggest that a Defendant will be personally responsible for the satisfaction of the money judgment.

After a thorough analysis of applicable case law and parsing the defense attorney's

actual language, the court concluded that even though it is a matter of discretion for the trial court as to whether to deny a motion for a new trial based on improper comments, in this instance the trial judge failed to properly exercise his discretion; and he incorrectly found that the improper comments did not warrant a reversal because they pertain to a non-party.

In this instance, based on the questions from the jury and the response to the special interrogatory it was clear that the jury was concerned about Nurse Begler's reputation and wanted to ensure that she would not be responsible. They wanted her to be free from "blame." And based on all of the comments made, regarding how many years a nurse

would have to work to earn \$800,000.00, putting yourself in the nurse's shoes, accusing the Plaintiff of mocking the nurse, and referring to all of the money that the experts were making in the case, Plaintiff was entitled to a new trial.

The takeaway from this case is that a nine-day trial and an appeal have now been added to this litigation due to these injudicious comments. As often happens, prudence can trump unnecessary risk. And now the Plaintiff has a second bite at the apple. ■



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