

ITEM 9.10 | REQUESTING PRODUCTION AND MAKING PRODUCTION OF ESI

Effective September 1, 2012, the Florida Rules of Civil Procedure establish a workable framework for production of electronically stored information. The most prominent issue for production of ESI involves the form of production, which can implicate the completeness and utility of the ESI produced as well of the cost of production if the ESI must be translated or converted into the requested form. Fortunately, the rules contemplate these issues as will be discussed below. Nonetheless, the most prudent course for counsel on both sides is to confer and cooperate on the form of production beforehand to avoid disappointment, non-productive effort, and needless cost of repeated production.

A request for electronically stored information may specify the form or forms in which electronically stored information is to be produced.⁸⁸ The form should usually be specified. The requesting party should take into account the reasons for specifying a given form, such as: (1) Will the document's native functionality be needed, such as a spreadsheet's embedded calculations? (2) Will the native form⁸⁹ of the document be needed in order to determine the context in which the document was created or stored? (3) What are the format requirements of the software that the requesting party plans to use to review the production?

If the responding party objects to a requested form, or if no form is specified in the request, the responding party must state the form or forms it intends to use.⁹⁰ This is a quite sensible provision that essentially directs the parties to address any issues in the form of production. For example, if a responding party specifies a form of production and the requesting party fails to object to the form of production, the court has a meaningful record on which to determine whether production in another format will be required and which party should be required to pay the cost of the additional production. If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms, which is almost always the native format.⁹¹ Again, this is a sensible process that tells the producing party that they are not permitted to degrade or convert the electronic documents to a less useful format for production.⁹²



Example: Party A requests Party B's discoverable emails in native format. Party B's attorney dislikes using electronic forms in handling discovery and evidence, so he requests a printed copies of every one of Party B's several thousand emails and sends a copy to Party A. When Party A objects, the attorney for Party B states that he has given up every email (which, of course includes everything that would be relevant or discoverable) and "you have everything I have." Is this adequate production under the rules? Answer: No. Party B's attorney should have objected to the requested form (native) rather than producing in another form without involving Party A or the Court in the decision.⁹³ While technically every discoverable email may be included in the production, the printed out versions do not contain metadata, which may be discoverable. In addition, the printed version is not "reasonably usable" because a non-electronic version is not searchable, which can be a valuable tool with large numbers and volumes of emails. Party A, having made a proper request, is entitled to receive the emails in the form requested unless there is an objection followed by an agreement by the parties or court determination on form. In a sense, production of all the emails rather than discoverable emails can be a form of "data dump" exacerbated by the lack of ability to electronically search, sort, deduplicate, and manage the information. The dispute may have been avoided if Party B's counsel contacted Party A before going through the extra expense of providing paper copies.

The form of production may also be an issue when exercising the option to produce records in lieu of answering interrogatories, so the amendments to the civil rules effective September 1, 2012, (1) specifically authorize the production of electronically stored information in lieu of answers to interrogatories, and (2) set out the procedure for determining the form in which to produce the ESI.⁹⁴ If the records to be produced consist of electronically stored information, the records must be produced in a form or forms in which they are ordinarily maintained or in a reasonably usable form or forms.⁹⁵

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Footnotes

⁸⁸ Fla. R. Civ. P. 1.350(b).

⁸⁹ Native format is a copy of the original electronic file. For example, e-mail from an Outlook e-mail program would be produced in a *.pst file. Native format files include the metadata of the original file. Native format files also are easy to modify. This presents difficulties in ensuring that the data has not altered after being produced. Cooperation of counsel and well-documented procedures are required to allow effective use of native format evidence at depositions and trial.

⁹⁰ Fla. R. Civ. P. 1.350(b).

⁹¹ Id. ESI is usually “ordinarily maintained” in its native format, meaning the format used by the software in which the ESI was created.

⁹² Such an effort would be equivalent to the unsavory practice of shuffling unnumbered pages or removing file labels from folders before producing paper discovery to the opponent.

⁹³ Fla. R. Civ. P. 1.350(b).

⁹⁴ Fla. R. Civ. P. 1.340(c).

⁹⁵ Id.

