

Form of Production Issues to Consider

What Rules Govern?

- Rule 34(b)(1)(C): The request may specify the form or forms in which electronically stored information is to be produced
- No Colorado state rule; eDiscovery Task Force of District Court of Colorado is currently considering guidelines for attorneys
- Best example preparation checklist is from Judge Grimm in District of Maryland
- 39 states now with eDiscovery rules and each may treat this issue slightly differently
- You will have to educate most judges on these issues, so be prepared

GOLDEN RULE: Produce unto others what you want produced to you.

Requesting party

- What is your strategy for dealing with ESI?
- What software will you use to handle it and what format does it require?
- What is the value of the case/budget for eDiscovery – should you look at the cheapest solution?

Producing Party

- What is the requested form?
- Is the data available in that format?
- If no form requested, what is reasonably useable format?
 - Is TIFF is reasonably useable format?
 - *Saliga v. Chemtura Corp.*, 2013 WL 6182227 (D. Conn. Nov. 25, 2013):
 - Plaintiff in *Saliga* sought native production; the defendant objected and sought to produce TIFF or PDF images arguing “that its standard practice is to produce ESI in [TIFF] and there is no ‘basis or need’ to produce” in native format. 2013 WL 6182227 *2. Defendant did not argue that

producing natively would be unduly burdensome or be unreasonably expensive, but did argue that native images cannot be Bates stamped or marked confidential and that working with the documents in the litigation would be more difficult. The court agreed that “TIFF is the most common choice”, but found that the rule permits the requesting party to choose, and that none of the reasons defendant argued were compelling. The court required native production.

- Courts will NOT interfere if the parties agree on a format, even if it makes the proceedings more expensive and the judge knows a better way
- How will previous productions be handled?
 - If in paper?
 - If in different format?

Specific Production Issues to be Addressed:

- How will redacted documents be produced? Altering a native document creates a new document with a new hash value.
- What about Databases?
 - *Castillon v. Corr. Corp. of Am.*, 2014 U.S. Dist. LEXIS 17950, 9-10 (D. Idaho Feb. 7, 2014).
- If producing in other than native format, how will spreadsheets be produced?
 - *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 50114, 3-4 (N.D. Ind. Apr. 10, 2014)
- Email attachments?
 - *Skepnek v. Roper & Twardowsky, LLC*, 2014 U.S. Dist. LEXIS 11894, at *3-4 (D. Kan. Jan. 27, 2014)
- How will the documents be used during the litigation? Do parties want to agree to use TIFFs? If so, who will pay?
 - *Race Tires Amer., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3rd Cir. 2012)
- What metadata fields to be included in production?