

Consilio Institute: Practice Guide

# ■ THE FINAL COUNTDOWN: PRODUCTION FUNDAMENTALS

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# THE FINAL COUNTDOWN: PRODUCTION FUNDAMENTALS

Production is another discovery activity, like collection and processing, in which technical decisions can have logistical and legal effects. For this reason, it is important for practitioners to understand the fundamentals of production. How materials are produced affects how long they take to prepare and how easily they can be searched, reviewed, and used later in depositions and at trial.

ESI productions may be anything from a few PDF files to a custom-configured online repository. Negotiating production format, including details like whether and what metadata will be provided, can both ensure maximum usability of what you receive and preempt disputes over what you produce and how you produce it. Failure to understand these options and negotiate effectively about them in advance still leads to frequent disputes today.

Beyond simply being important, the ability to successfully prepare and deliver productions of relevant ESI may also be an ethical requirement for attorneys to fulfill their duty of technology competence. For example, the [California duty of technology competence for eDiscovery](#),<sup>1</sup> explicitly names proper production of ESI as one of its nine core requirements: “produce responsive non-privileged ESI in a recognized and appropriate manner.”

## About this Practice Guide

In this practice guide, we will discuss the fundamentals about production that all eDiscovery practitioners should know, including: primary production formats, production format specifics, who gets to decide, example disputes, production preparation, and privilege and production logs.

## PRIMARY PRODUCTION FORMATS

The first production decision that needs to be made is the format or formats in which the relevant, non-privileged documents will be produced. That decision will determine the workflow that follows for actually preparing, validating, and delivering the production. Broadly speaking, there are four primary production formats available: paper, near-paper, native, and near-native.

### 1. Paper

In a paper production of ESI, the materials to be produced are printed out and produced as paper documents as in a traditional document production. Per-page Bates numbering, other endorsements, and redactions may be applied. While superficially simple, paper productions can still create technical issues, such as how to display review markup in printed Word documents, how to format large spreadsheets to letter-size pages, or how to handle presentation decks with speaker notes and comments.

<sup>1</sup> The State Bar of California Standing Committee On Professional Responsibility and Conduct, Formal Opinion No. 2015-193 (June 30, 2015), available at [https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL\\_2015-193\\_%5B11-0004%5D\\_\(06-30-15\) - FINAL.pdf](https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL_2015-193_%5B11-0004%5D_(06-30-15) - FINAL.pdf).

Although, technically, paper production of ESI is an option, it is only logistically viable for matters with few documents and only legally viable for matters with a negotiated agreement to such production. Absent such an agreement, paper production of ESI does not meet the format requirements in the Federal Rules of Civil Procedure we will discuss below.

## 2. Near-Paper

In a near-paper production, the materials to be produced are converted to image files that simulate printed, paper versions of the documents. Each page image can then have per-page Bates numbering, other endorsements, and redactions applied before production. Such image collections are paired with a load file that records document breaks, provides selected metadata for the documents, and includes (or links to) extracted text for searching. This collection of images and related information can be loaded by the recipient into a document review tool like Relativity.

A near-paper production is a popular choice that combines some of the benefits of a paper production (e.g., per-page numbering, redactions) with some of the benefits of a native or near-native production (e.g., associated metadata, searchable text). It also retains some of paper’s drawbacks (e.g., questions of what’s visible, unsuitable document types) and creates some new technical issues of its own (e.g., time and cost of image creation, reconciling extracted text with image redactions).

## 3. Native

In a native production, materials are produced in their native formats, as they are created and kept in the ordinary course of business. Such native file collections may also be paired with a load file containing extracted metadata, searchable text, and other information for loading into a document review tool like Relativity, although outside software will still have to be launched to open some types of native files.

A native production can generally be prepared with less time and expense than a near-paper production,

and native productions eliminate questions of what’s visible in printouts or images and of what metadata is included. Native productions are not without drawbacks, however, as per-page numbering, other endorsements, and redactions are not possible. Moreover, some types of materials may not be reasonably usable in their native format (e.g., email databases, chat logs), and you must be very careful to ensure review of all metadata and hidden content before production. There is also some risk of inadvertent alteration of the native files by the recipient during their review (e.g., auto-date fields in documents updating to display the review date).

## 4. Near Native

A near-native production involves the conversion of native files into another electronic format that approximates the native format. For example, native message logs might be unitized by day or conversation and converted into many separate HTML or XML files. Near-native productions are typically paired with a load file containing extracted metadata, searchable text, and other information. This collection of near-native files and related information can be loaded into a document review tool like Relativity.

A near-native production carries similar advantages and drawbacks to a native production. Certain document types can be presented in a more useful way than they can with a true native production, but you also reintroduce questions of what’s visible, of how it’s presented, and of what metadata is included. Moreover, per-page numbering, other endorsements, and redactions are still generally not possible.

## Hybrid Approaches

In reality, most productions today utilize a combination of near-paper, native, and near-native approaches, applying different handling to different document types to maximize later usability. For example, most documents in a production might be produced as near-paper images (to facilitate per-page numbering, endorsements, and redactions), with spreadsheets

being produced as native files (to facilitate readability and formulae access), and with mobile device data being produced as near-native files (to facilitate readability and usability). In many cases, near-paper image productions will also be accompanied by the native files. Which combination of production formats is right for your matter will depend on the composition of your materials, your available technology, your negotiated agreements, and other factors.

## PRODUCTION FORMAT SPECIFICS

Beyond just deciding on your optimal combination of paper, near-paper, native, and near-native production options, there are a range of more-specific options for you to consider. Among the most important are options related to load files, metadata, unitization, redactions, numbering and endorsements, and paper integration.

### Load Files

As noted above, many productions are accompanied by a load file that contains information about the various documents and images being produced and that makes it possible for those materials to be imported together into a document review platform. These load files can provide links to native or near-native files, to rendered images, and to extracted text files, and they can contain a variety of fields of metadata and other extracted data for each document.

Load files are essentially large spreadsheets themselves, though their specific formatting requirements and applicable field delimiters vary some from system to system. The specific load file format employed is less important than making sure the parties are on the same page about what format will be used to ensure it's something that works for everyone's platforms.

Decisions will also need to be made (or negotiated) regarding what fields the load file should include, how they should be labeled, and what custom fields – if any – should be created. For example, a field might be included documenting the request number(s) in response to which each document is being produced, or a field might indicate the documents to which a protective order applies.

### Metadata

Metadata has tremendous value, both as potential evidence (e.g., [revealing when and by who something was modified](#)<sup>2</sup>) and as the basis of many filtering, sorting, and searching options within document review tools. Thus, the metadata fields included in productions will have both evidentiary and usability impacts for the recipients. An appropriate eDiscovery expert can assist you with determining what fields are necessary to meet your needs in a specific case.

In addition to figuring out what metadata fields should be included, you may also need to address what names will be used for those fields, what formats will be used for the values in them, and what time zone should be used to normalize dates and times. The creation of custom fields and values may need to be considered too. For example, should there be a master date field? If so, how should the master date for each document be determined?

For a generic example of essential fields, the EDRM organization's model XML load file [includes the following standard metadata and extracted data fields](#)<sup>3</sup>:

- ▶ File Elements
  - ▶ FileName, FilePath, FileSize, Hash

<sup>2</sup> Mark A. Berman, *Audit Trail 'Meta Data' Leaves Tell-Tale Signs in Medical Malpractice Actions*, NEW YORK LAW JOURNAL, <https://www.law.com/newyorklawjournal/2019/05/06/audit-trail-meta-data-leaves-tell-tale-signs-in-medical-malpractice-actions/> (May 6, 2019).

<sup>3</sup> Production Guide, EDRM, <https://www.edrm.net/resources/frameworks-and-standards/edrm-model/production/> (Nov. 4, 2010).

- ▶ Metadata Tags – All Documents
  - ▶ Language, StartPage, EndPage, ReviewComment
- ▶ Metadata Tags – Messages
  - ▶ From, To, CC, BCC, Subject, Header, DateSent, DateReceived, HasAttachments, AttachmentCount, Attachment Names, ReadFlag, ImportanceFlag, MessageClass, FlagStatus
- ▶ Metadata Tags – Files
  - ▶ FileName, FileExtension, FileSize, DateCreated, DateAccessed, DateModified, DatePrinted, Title, Subject, Author, Company, Category, Keywords, Comments

## Unitization

The proliferation of mobile device sources, social media sources, and collaboration tool sources has made message thread unitization a common question for eDiscovery. These source types frequently include ongoing threads of back-and-forth messages (e.g., text message threads, direct message threads, Slack channel threads, etc.), which can span long periods of time. Although the specifics vary by source, these message threads are often maintained in ongoing logs that are not conducive to efficient review or later use as evidence. Rather than present weeks or months of messages in a single document, it is typical to unitize these logs into separate, shorter documents for review and production.

When doing so, some judgment must be exercised about what size the units should be. Individual messages stripped of thread context are also not ideal (as courts have pointed out<sup>4</sup>), so some middle ground between massive logs and single messages is preferred. It is common to unitize such materials into 24-hour chunks, so that each day's communications become a single document, but other divisions may be rational depending on your materials and case.

This unitization is typically performed during processing, prior to ECA, review, and production, but production implications should be considered when making the determination, as parties can disagree over the best way to unitize and produce such materials.

## Redactions

As noted above, primary production format affects your ability to perform redactions within documents. Generally speaking, native and near-native files cannot be effectively redacted, while near-paper and paper productions can. The availability of effective redactions is one of the reasons for the continued popularity of near-paper, image-based productions.

When preparing a production that will involve redactions, you will need to consider how redactions should appear on the page (e.g., blackout, whiteout, pattern-filled), including whether redaction type (privilege, PII, etc.) affects appearance or requires a label. Additionally, if extracted document text is being provided (to facilitate searching), the extracted text for documents bearing redactions will have to be either excluded or replaced. It can be replaced by performing optical character recognition (OCR) on the page images generated after the redactions have been applied.

## Numbering and Endorsements

Also as noted above, primary production format affects your options with regard to numbering and endorsements. For numbering, paper and near-paper productions allow for per-page Bates numbering, while native and near-native formats generally only allow for per-file numbering to be applied. Combination approaches require coordinating per-page numbering for some documents with per-file numbering for others.

For endorsements, confidentiality warnings or

<sup>4</sup> See, e.g., *Laub v. Horbaczewski*, 331 F.R.D. 516 (C.D. Cal. Apr. 22, 2019) (Magistrate Judge expressing a preference for "aggregated" formats preserving "the integrity of the threads of communication reflected in the text messages"), available at <https://casetext.com/case/laub-v-horbaczewski>.



protective order language work the same way. Paper and near-paper productions can have consistent endorsements applied in the headers and/or footers of each page, while native and near-native productions cannot. For native and near-native productions (and, often, for near-paper productions too), custom load file fields may be created that document confidential status, protective order applicability, and other endorsement content for each document.

## Paper Integration

Another element to consider is how you will handle paper materials collected during discovery along with all of your ESI. Rather than producing such materials in paper format, you have the option of incorporating them into your electronic production. This can be accomplished by scanning the documents into page images, performing OCR to extract the available text for searching, and manually entering relevant “metadata” values (e.g., bibliographic and source information).

## What to Request

The number of potential formats and specific options available can make it daunting to figure out what to ask for when you are negotiating production format or specifying the format in a particular discovery request, and there are technical specifications that may be necessary beyond what we have discussed here (e.g., image format, load file format). Many practitioners find

it helpful to consult with an appropriate eDiscovery expert who can guide their selections for a particular case, including providing the relevant technical specifications. Some practitioners also turn to publicly-available production protocols from [federal](#)<sup>5</sup> [agencies](#)<sup>6</sup> as models they can use for their own production planning.

Despite the many variations possible, the following is a good place to start for many cases:

- ▶ Request a hybrid format production, based on file types
  - ▶ Near-paper image format for all suitable file types (e.g., email, Word, PDF)
  - ▶ Native format for the unsuitable file types (e.g., spreadsheets, multimedia)
- ▶ Request production in complete family groups for context
  - ▶ If applicable, specify your preferred unitization approach for message threads
- ▶ Request the production of extracted text and metadata in an accompanying load file
  - ▶ Specify the categories or specific fields of metadata you want to receive
  - ▶ Specify any custom metadata fields you seek, such as request number

## WHO GETS TO DECIDE

Who gets to decide on the formats and options to be used in a particular case? Pursuant to the Federal Rules of Civil Procedure (FRCP), both parties have opportunities for a say in the production format at three different points in the process:

- ▶ First, during meet and confer negotiations
- ▶ Second, through actual requests and objections
- ▶ Third, through motions to compel and protect

<sup>5</sup> Antitrust Division, DOJ Standard Specifications for Production of ESI, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/atr/case-document/doj-standard-specifications-production-esi> (June 30, 2015).

<sup>6</sup> Data Delivery Standards, U.S. SEC. AND EXCH. COMM'n, <https://www.sec.gov/divisions/enforce/datadeliverystandards.pdf> (Dec. 2020).

## Negotiation in FRCP 26

Production format selection for ESI first comes up in [FRCP 26\(f\)](#)<sup>7</sup> as part of the required meet and confer. FRCP 26(f)(1) specifies that “the parties must confer as soon as practicable,” and 26(f)(2) specifies that, among other things, the parties must use the conference to “develop a proposed discovery plan.” FRCP 26(f)(3) describes what this discovery plan must address, including “(C) any issues about disclosure, discovery, or preservation of electronically stored information, **including the form or forms in which it should be produced**” [emphasis added].

Good faith efforts to fulfill this requirement are expected of the parties. [FRCP 37](#)<sup>8</sup> specifies the consequences for failure in this area:

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney **fails to participate in good faith** in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, **require that party or attorney to pay to any other party the reasonable expenses, including attorney’s fees, caused by the failure.**

Thus, in an ideal case, the parties discuss the available production formats and other options during their initial conference, reach a mutually-acceptable agreement, and document that agreement in a written discovery plan that both parties then follow.

## Requests and Objections in FRCP 34

Unfortunately, many cases do not follow that ideal path, and the specifics of production preferences and expectations remain unaddressed until later in the discovery process. In such cases, [FRCP 34](#)<sup>9</sup> provides the next set of instructions for who gets to decide on production format.

In cases where a prior agreement has not been negotiated, FRCP 34(b)(1)(C) allows parties requesting production of ESI to “specify the form or forms in which electronically stored information is to be produced.” If the responding party does not want to produce in the requested form, FRCP 34(b)(2)(D) allows them to object to the requested form and state their proposed alternative:

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an **objection to a requested form for producing electronically stored information.** If the responding party objects to a requested form – or if no form was specified in the request – **the party must state the form or forms it intends to use.**

If a request does not specify a form (and no form was previously negotiated or ordered), FRCP 34(b)(2)(E)(ii) lays out the ESI production format options from which a responding party can choose: “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**” [emphasis added].

This translates to a choice between producing ESI in native format (the “form or forms in which it is ordinarily maintained”) or in some other “reasonably usable form or forms,” which typically means near-paper or near-native, accompanied by a load file with relevant metadata and searchable text. Additionally, FRCP 34(b)(2)(E)(i) requires that (unless agreed or ordered otherwise) produced ESI must be organized either as it is “kept in the usual course of business” or labeled “to correspond to the categories in the request.”

## Motions to Compel and Protect in FRCP 37 and 26

In the event, the request and objection process

<sup>7</sup> Fed. R. Civ. P. 26(f), available at [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

<sup>8</sup> Fed. R. Civ. P. 37, available at [https://www.law.cornell.edu/rules/frcp/rule\\_37](https://www.law.cornell.edu/rules/frcp/rule_37).

<sup>9</sup> Fed. R. Civ. P. 34, available at [https://www.law.cornell.edu/rules/frcp/rule\\_34](https://www.law.cornell.edu/rules/frcp/rule_34).



described above leads to an irreconcilable dispute over the appropriate production format, a requesting party's final recourse is to submit a motion to compel the requested discovery, in the requested format, pursuant to [FRCP 37\(a\)](#).<sup>10</sup> Before doing so, however, the requesting party must make a good faith effort to confer with the responding party to resolve the issue: "The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."

In parallel, a responding party can also seek a protective order, pursuant to [FRCP 26\(c\)](#),<sup>11</sup> protecting it from having to provide the requested discovery, in the requested format. FRCP 26(c)(1)(A)-(C) allows that:

... The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or

**undue burden or expense**, including one or more of the following:

- A. **forbidding** the disclosure or discovery;
- B. **specifying terms**, including time and place or the allocation of expenses, for the disclosure or discovery;
- C. **prescribing a discovery method** other than the one selected by the party seeking discovery;

[emphasis added]

The same limitation on seeking a protective order applies however: the responding party must first make a good faith effort to confer with the requesting party to resolve the issue.

It should also be noted that, depending on the outcome, either type of motion can result in an award of expenses, including fees, pursuant to [FRCP 37\(a\)](#).

## PRODUCTION FORMAT DISPUTES

Now that we have reviewed how the production format selection process is supposed to work under the FRCP, let's take a look at some example cases to see the disputes that arise and how courts are applying those rules in practice.

(5).<sup>12</sup>

### A Joint Failure

In *Baker v. Santa Clara Univ.*,<sup>13</sup> the plaintiff sought an order compelling production of requested ESI in native format. During discovery, she "served 54 requests for the production of documents" including "a single request that purports to cover the format of production for all documents responsive to the other 53 requests." That request stated:

With respect to each request, **produce all**

**documents in native format, including electronically stored information, metadata, and all metadata fields.** Do not do anything that strips, removes, changes, limits, or otherwise alters the actual electronically stored information and metadata fields of any document that exists in an electronic format. Ensure that all such evidence remains intact, undisturbed, and is produced with each and every electronic document [emphasis added].

Despite this request, the defendant produced over 2,500 pages of materials in PDF format without metadata, and the plaintiff moved to compel

<sup>10</sup> Fed. R. Civ. P. 37(a), available at [https://www.law.cornell.edu/rules/frcp/rule\\_37](https://www.law.cornell.edu/rules/frcp/rule_37).

<sup>11</sup> Fed. R. Civ. P. 26(c), available at [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

<sup>12</sup> Fed. R. Civ. P. 37(a)(5), available at [https://www.law.cornell.edu/rules/frcp/rule\\_37](https://www.law.cornell.edu/rules/frcp/rule_37).

<sup>13</sup> *Baker v. Santa Clara Univ.*, 2018 WL 3629838 (N.D. Cal. July 31, 2018).

reproduction of the materials in native format with metadata.

The plaintiff argued, primarily, that “having these documents in native format will allow her to more easily discover if [the defendant] has omitted responsive documents from its production.” The defendant argued that it had attempted to meet and confer about ESI production issues “more than a year ago” pursuant to FRCP 26(f), but that the plaintiff’s counsel “did not meaningfully engage in the required discussion.” It argued that reproducing now in native format would be “time consuming, burdensome, and expensive.”

The court concluded that “[n]either party ha[d] complied with the rules and guidelines that govern the production of electronically stored information,” the plaintiff having failed to meet and confer and the defendant having failed to properly object and produce in accordance with FRCP 34(b). The court then looked to “the dual requirements of relevance and proportionality” and concluded that:

Absent a specific, articulable basis for believing [the defendant] has not complied with its discovery obligations, [the plaintiff] does not have a compelling reason for demanding that [the defendant] re-produce its entire responsive document production in native format simply because she might find something missing.

## A Protocol Deviation

In *In re Syngenta AG MIR 162 Corn Litigation*,<sup>14</sup> “the parties [] asked the court to resolve a dispute concerning the format of electronic discovery to be produced” by one of the plaintiffs, which proposed “to meet the current document-production deadlines **by producing electronic discovery in native format, rather than in TIFF image format as required by the ESI Protocol Order**” [footnote omitted; emphasis added].

After already having been granted an extension to meet its production obligations, this plaintiff “produced a large number of documents in native format . . . in order to

get the documents to [the defendant] as expeditiously as possible.” This plaintiff claimed that converting documents to TIFF would add “substantial time to production.” The defendant objected, emphasizing the requirements of the ESI Protocol Order and the inability to use per-page Bates numbering for depositions, and [this plaintiff] then asked the court “to relieve it from the production requirements of the ESI Protocol Order.”

The court found this plaintiff’s arguments unpersuasive and denied its request:

First, there is no dispute that **documents in TIFF format are easier to work with and enable depositions and court proceedings to run more smoothly. . . .**

Second, the ESI Protocol Order requires a party seeking to deviate from the image/TIFF-format production to “promptly” notify the requesting party as soon as it identifies a source of data to which the protocol should not apply (because it would be unduly burdensome or impractical). Here, **[this plaintiff] did not notify [the defendant] or the court before producing documents in native format. . . .**

Third, [this plaintiff] has **offered no evidence** to support its “burdensome” and “impracticality” arguments [emphasis added].

## A Waived Objection

In *McDonnel Grp., LLC v. Starr Surplus Lines Ins. Co.*,<sup>15</sup> the defendants requested production of “all construction schedules for the Project in their native format (as native files).” Rather than objecting specifically to the requested form of production and proposing an alternative as required, the plaintiffs offered only a boilerplate objection to the overall request.

The court concluded that, “[b]y failing to object to production in native format,” the objection had been waived. Moreover, the court stated that:

<sup>14</sup> *In re Syngenta AG MIR 162 Corn Litigation*, MDL 2591, 2018 WL 4609112 (D. Kan. Sep. 25, 2018).

<sup>15</sup> *McDonnel Grp., LLC v. Starr Surplus Lines Ins. Co.*, 2018 WL 4775063 (E.D. La. Oct. 3, 2018), available at <https://casetext.com/case/mcdonnel-grp-llc-v-starr-surplus-lines-ins-co>.

... **the need for production in the requested, unobjected-to native format, with its associated metadata, is self-evident in this instance.** Metadata provides information such as “the author, date/time of creation and date modified.” **Such information in the construction schedule context, with its frequent alterations, change orders, and time sensitive but often disturbed deadlines, is relevant.** The PDF files chosen by plaintiff for production are merely pictures of the materials that do not provide metadata. [internal citation omitted; emphasis added]

The plaintiff also attempted to rely upon FRCP 34(b)(2)(E)(iii), which provides that “[a] party need not produce the same electronically stored information in more than one form,” but the court concluded it had also “dispossessed itself of this protection” when it failed to object as required:

To permit a responding party, in the face of a request that ESI be produced in a particular form, arbitrarily to choose some other form, **would disrupt and undermine the orderly request/response/objection/confer structure and requirements of the remainder of the Rule concerning ESI** [emphasis added].

## Usability and Expenses

In [Johnson v. Italian Shoemakers, Inc.](#),<sup>16</sup> numerous issues arose regarding the plaintiffs’ productions’ completeness, timeliness, and format. With regard to format, the plaintiffs repeatedly produced emails in PDF format rather than in native format with metadata. The court found that to be an unjustified deviation from its discovery order:

... the Court finds that Plaintiffs’ August 14, 2018 production failed to comply with this Court’s Order. Plaintiffs’ August 14, 2018 **production consisted of emails in PDF format, which is not how emails are maintained in the regular course of business.** Further, Plaintiffs’

documents were not labeled to correspond to the respective discovery request [internal citations omitted; emphasis added].

Ultimately, the court not only ordered that production be completed as previously ordered, but also awarded sanctions:

**The Court imposes reasonable expenses, including attorney’s fees,** relating to the Motion to Compel, Motion for Sanctions, and any ongoing attorney fees related to this discovery. Further, the Court orders Plaintiffs to produce all discovery requests, including attachments, **in usable form** by the close of business on October 24, 2018 [emphasis added].

In its analysis, the court explained that the requirement in FRCP 34(b)(2)(E)(ii) to produce ESI “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms” is satisfied “when the party provides documents that are **searchable and/or sortable by metadata fields**” [emphasis added].

## PDFs and Metadata Requests

In [Metlife Inv’rs. USA Ins. Co. v. Lindsey](#),<sup>17</sup> the parties’ initial plan stated that “[a]ll ESI produced electronically will be produced in native format to the extent possible.” Despite this, the plaintiff “generally produced documents in nonsearchable PDF format,” over the defendants’ repeated objections:

... MetLife concedes that the method in which it produced the documents **is not how they are kept “in the usual course of business,”** as required by Rule 34(b)(2)(E)(i). Although MetLife repeatedly states that PDF is the “most usable” format, **it cites no authority showing that this satisfies its obligations under Rule 34.** Moreover, MetLife’s production was **not consistent with what the parties discussed at the beginning of discovery** [emphasis added].

The plaintiff also argued that producing the materials again in native format would impose a

<sup>16</sup> David A. Johnson & Alda, Inc. v. Italian Shoemakers, Inc., 2018 WL 5266853 (W.D.N.C. Oct. 23, 2018), available at <https://casetext.com/case/david-a-johnson-aldainc-v-italian-shoemakers-inc>.

<sup>17</sup> Metlife Inv’rs. USA Ins. Co. v. Lindsey, 2018 WL 5292222 (N.D. Ind. Oct. 25, 2018), available at <https://casetext.com/case/metlife-investors-us-ins-co-v-lindsey-2>.

disproportionate burden, but the court was not persuaded:

... MetLife offers no argument on that point beyond objecting to the relevance and stating that the production would be duplicative. MetLife does not discuss the volume of the additional information sought, the expense involved, or the risk of revealing any confidential or privileged information; nor has it moved for a protective order. **A request to produce documents is not disproportionate or unreasonable simply because some of the material sought has already been produced, particularly when the initial production did not conform to the rules** [emphasis added].

Ultimately, the court ordered the plaintiff to reproduce the materials in native format and left open the possibility of an award of expenses.

## PREPARING THE PRODUCTION

This preparation of a production is a collaboration between the members of the case team, the managers of any document review teams, and the internal or external technical professionals responsible for administering the chosen processing and review platforms. It typically involves four phases of activity: final pre-production checks, actual preparation, quality control, and delivery preparation.

### Final Pre-Production Checks

The first part of this process rests with the case team, in collaboration with any review team managers. Before the actual production can be prepared, the final set of materials to be produced must be identified and final checks must be run on those materials, including:

- ▶ Checks to be sure all documents in the proposed production set are tagged as having been reviewed and as being both responsive and non-privileged (this check of tagging may be backstopped by running term searches for key privilege indicators and double-checking any results)
- ▶ Checks to make sure that the proposed production set is family group complete (if that is what has been chosen) and that all family group members have also been reviewed and determined to be non-privileged
- ▶ Checks for correct handling of email thread members and for consistent handling across near-duplicates
- ▶ Checks that all needed redactions have been correctly completed and that any protected status flags (or other indicators for endorsements) have been correctly applied

- ▶ Checks to confirm the phrasing and position to be used for required endorsements and to confirm the prefix, starting number, and position to be used for Bates numbers

Once all necessary checks have been completed, and the finalized set of materials and instructions has been confirmed, the production preparation process moves to the internal or external technical professionals responsible for administering the processing and review platforms.

### Actual Preparation

At this point in the process, the relevant technical professionals will engage in a series of platform-specific and production format-specific steps to actually generate the final production set for delivery, potentially including:

- ▶ Gathering together the original native files to be produced
- ▶ Generating TIFF images of them, with required endorsements
- ▶ Gathering (or creating) extracted text files for them

- ▶ Including using OCR on redacted images to create redacted extracted text
- ▶ Programmatically renaming and organizing all natives, images, text files, etc.
- ▶ Generating load files that link all those pieces together, in the right format, with required metadata fields included and properly named
- ▶ Including creating any custom fields and values required (e.g., protected status, request number, etc.)

Depending on the specific production format and steps required, this process can take anywhere from a few hours to a few days. In particular, generating large numbers of TIFF page images can take a significant amount of time, and for this reason, it is often begun well ahead of final production preparation to avoid last-minute time crunch.

## Quality Control

Depending on the format choices made, the prepared production set may include thousands of native files, thousands of extracted text files, thousands of TIFF images, and a load file with numerous details about each of those thousands of files. Before delivery, this prepared production set will be subjected to some combination of quality control checks. Typically, these are performed by the same technical professionals that prepared the production, but some may also be performed by review team managers, project managers, or the case team.

Common quality control checks for a prepared production include:

- ▶ Confirming that file counts in the prepared production match expected counts
- ▶ Spot checking a sampling of metadata fields to verify field names are right, values are right, and value formats are right
- ▶ Verifying that file path links to associated native files, page images, and extracted text

files are working correctly

- ▶ Double-checking that all redactions were in fact applied to relevant page images
- ▶ Including double-checking that extracted text for those documents has been either excluded or replaced with OCR text instead
- ▶ Verifying that endorsements have been applied to the correct documents, in the correct location, and using the correct language
- ▶ Including verifying that Bates numbers have been applied starting at the correct number, with the correct prefix, and in the correct location

Members of the case team may also repeat some of the substantive checks performed prior to production preparation to ensure that no privileged or unreviewed materials have been inadvertently pulled into the production set during the actual preparation.

## Delivery Preparation

Finally, once all quality control checks have been completed, the production set must be prepared for delivery to the requesting party. Options for delivery include delivery on data CDs or DVDs, delivery on flash drives or hard drives, transfer via secure file transfer protocol (SFTP), and delivery via cloud-based repositories. The primary determinant of which you use will be the size of the production:

- ▶ CDs hold around 700 megabytes
- ▶ DVDs typically hold around either 4 or 8 gigabytes
- ▶ Flash drives typically hold dozens or hundreds of gigabytes
- ▶ Hard drives typically hold hundreds of gigabytes or a few terabytes
- ▶ SFTP transfers do not have a hard limit like physical media, but are practically limited by

upload and download speeds; typically, suitable for productions up to a few GB in size

- ▶ Cloud-based repositories are functionally unlimited in size

In addition to size, another factor to consider is the security of your chosen delivery method – particularly when delivering on discs or drives:

- ▶ Can you encrypt the production data you are providing on the chosen media?
- ▶ Does the chosen drive offer hardware or software level encryption?
- ▶ How will the physical media or drive be delivered?
  - ▶ By what separate method will the decryption key be provided?
- ▶ Can you protect the production data from inadvertent alteration during access?

If you are delivering via a cloud-based repository, such as a dedicated Relativity database, there are additional questions to address:

- ▶ Who, specifically, will be granted access to the repository?
- ▶ What features and abilities will be made available to them?
  - ▶ Will they be allowed to annotate documents? To export them? To print them?
- ▶ What files and formats will the database include?
  - ▶ Will it include native files? Near-native renderings? Images?
- ▶ What metadata fields will be made available in the database?
- ▶ Who will pay for hosting, for user accounts, and for any needed training?

## PRIVILEGE AND PRODUCTION LOGS

As you approach the end of your production efforts, there are two additional steps that should be taken prior to delivery of the prepared production. First, if any materials have been withheld due to privilege or work product protection, those materials will need to be documented in a privilege log. Second, for your own records, you should prepare a production log documenting your production.

### Privilege Logs

Protecting privileged materials from inadvertent disclosure is of paramount importance during discovery, both because attorneys have an ethical duty to protect client confidentiality (see, e.g., [ABA Model Rule of Professional Conduct 1.6](#)<sup>18</sup>) and because inadvertent disclosures can lead to privilege waiver if reasonable steps to prevent the disclosure weren't taken (see [Federal Rule of Evidence 502\(b\)](#)<sup>19</sup>). The final step in that privilege protection process is the preparation of some type of privilege log to accompany

your production set delivery.

[FRCP 26\(b\)\(5\)\(A\)](#)<sup>20</sup> provides the basis for this requirement in federal courts:

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not

<sup>18</sup> ABA Model Rules of Prof'l Conduct R. 1.6 (2021), available at [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1.6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1.6_confidentiality_of_information/).

<sup>19</sup> Fed. R. Evid. 502(b), available at [https://www.law.cornell.edu/rules/fre/rule\\_502](https://www.law.cornell.edu/rules/fre/rule_502).

<sup>20</sup> Fed. R. Civ. P. 26(b)(5)(A), available at [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).



produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

The preparation of traditional privilege logs can be a time consuming process, since each individual document withheld must be recorded, the claim for it articulated, and an adequate description written, and since, in larger cases, the total number of documents requiring logging can be quite high. As a result, it is common to begin planning and preparation for privilege log creation during the document review phase of an eDiscovery project.

It is common during document review to have reviewers designate not just general privileged status, but also to select the applicable legal basis from pre-written options so that those fields can be automatically populated during privilege log creation. To facilitate this, many document review platforms include features for privilege log creation, including the ability to automatically populate the log with key details about documents (e.g., date, file name, file type, sender, recipients, subject line, etc.).

There are also [alternative approaches](#)<sup>21</sup> to privilege log preparation that focus on defining categories of materials withheld rather than creating document-by-document log entries. In the face of ever-increasing

data volumes, these categorical approaches are growing in popularity and [finding favor in some courts](#).<sup>22</sup>

## Production Logs

In addition to creating the privilege log that you will provide with your production set delivery, it is also important to create and maintain a production log for yourself. In this era of large ESI volumes, it is common to complete multiple productions on a rolling basis, providing responses to different requests or materials from different sources as work on them is completed. Additionally, matters with an open-ended period of relevance may require supplemental productions to be made as new responsive materials are generated.

A production history log documents all of the details you might need to know later (or be able to demonstrate to someone else later) about all of those productions. Key details to document include: what you produced, what formats you produced it in, when you produced it, how you delivered it, to whom you delivered it, the requests to which it responded, and the Bates ranges it contained.

<sup>21</sup> Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 2009 FED. CTS. L. REV. 4 (Nov. 2009), available at <https://www.fltr.org/fltr/articles/html/2009/facciolaredgrave.pdf>.

<sup>22</sup> *Several Courts Allow Categorical Privilege Logs*, MCGUIREWOODS, <https://www.mcguirewoods.com/client-resources/privilege-ethics/Privilege-Points/2021/1/several-courts-allow-categorical-privilege-logs> (Jan. 20, 2021).

## Key Takeaways

There are six key takeaways from this practice guide to remember:

1. Effective production of ESI is both a requirement of the rules and one element of fulfilling an attorney's duty of technology competence for eDiscovery
2. Productions can be made in paper, near-paper, native, and near native formats (or combinations thereof), and they may require decisions about load files, metadata, unitization, redactions, endorsements, scanned physical documents, and other specifics
3. The production format and related specifics should be negotiated between the parties as part of their initial meet-and-confer, but when no agreement has been negotiated, parties can also later request responses in a particular format, object to a requested format, and if necessary, seek orders to compel or protect
4. In the absence of an agreement, request, or order otherwise, ESI must be produced either:
  - a. Formatted as it is kept in the ordinary course of business (*i.e.*, native format), organized as it is kept in the ordinary course of business
  - b. In another reasonably usable format (*i.e.*, one that is searchable and that is sortable by metadata), labeled to correspond to the categories in the request
5. Thorough quality control checks should be performed to ensure: that the right materials are designated for inclusion in the production, that those materials (and only those) actually appear in the prepared production, and that the prepared production matches the required production specifications
6. In addition to the production set deliverable itself, you must also prepare a detailed privilege log for the requesting party and a detailed production log for yourself

## ABOUT THE AUTHOR

Matthew Verga is an attorney, consultant, and eDiscovery expert proficient at leveraging his legal experience, his technical knowledge, and his communication skills to make complex eDiscovery topics accessible to diverse audiences. A fourteen-year industry veteran, Matthew has worked across every phase of the EDRM and at every level, from the project trenches to enterprise program design. As Director of Education for Consilio, he leverages this background to produce engaging educational content to empower practitioners at all levels with knowledge they can use to improve their projects, their careers, and their organizations.



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