E-Discovery Alert: Court Provides Essential Guidance Concerning the Production of Electronic Materials in a Recent Decision

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While the electronic discovery movement has spawned a wealth of resources purporting to provide "best practices" for complying with discovery obligations imposed by the electronic age, affirmations of these practices from the bench have been paltry to date. This scarcity of guidance has left practitioners in state and federal courts to their own devices in implementing reasonable electronic discovery practices and procedures. However, Judge Edward Harrington of the United States District Court for the District of Massachusetts provides essential guidance concerning the production of electronic materials in a recent decision, *Dahl v. Bain Capital Partners, LLC*.[1]

This decision is required reading for any Massachusetts litigant.

In *Dahl*, a group of class action plaintiffs sought the production of responsive documents from multiple corporate defendants in an electronic and fully text-searchable format, no matter how those documents were kept in the ordinary course of business. This meant that the defendants would have to convert all of their hard copy documents and non-text-readable electronic documents into an electronic and text-readable format. The defendants agreed to do so, but only if the plaintiffs would pay the cost of these conversions, a condition that the plaintiffs refused.

The plaintiffs also sought the production of responsive Excel spreadsheets in native (electronic) format. While most defendants agreed to this request, certain defendants objected, citing the risk of disclosure of proprietary business information (in particular, formulas used to value potential business acquisition targets).

Finally, the plaintiffs sought the production of a broad spectrum of metadata fields associated with each responsive electronic document. The plaintiffs refused to agree to proposals by the defendants to narrow the scope of metadata to be produced.

Unable to reach agreement with the defendants, the plaintiffs sought judicial intervention on these issues.

In resolving this dispute, Judge Harrington acknowledged that the proper handling of electronic discovery is a new and developing area of state and federal practice devoid of guidance from local rules. Nevertheless, Judge Harrington's decision—based largely on the practicalities of this case—signals increasing judicial approval of the following electronic discovery practices:

- A party producing documents must bear the cost to produce responsive documents in their native format.

- Excel spreadsheets must be produced in native (electronic) format.
- Absent compelling circumstances, a requesting party is not entitled to blanket requests for all metadata associated with a document production.

In planning and executing any electronic discovery project, practitioners should bear in mind the following recommendations with regard to each of Judge Harrington's holdings:

1. *Consider seeking agreement with opposing counsel to produce documents in the method that your client or corporation will use for its own litigation purposes.*

   Under Judge Harrington's view of electronic discovery cost-shifting, if a party produces documents in hard copy, but later scans those documents for its own litigation purposes, the producing party must make the scanned documents available to the requesting party. In those situations, the producing party can recover only the cost of preparing the disc containing the copy set.

   In practice, Judge Harrington's holding has the potential to create a waiting game between the parties to see who will scan the documents first and, therefore, will be stuck holding the bag on those conversion costs. To stymie this potential logjam, parties should discuss and agree upon a production protocol that will allow the parties to produce the documents in the format in which they will ultimately be used during the litigation. In this manner, each party need only convert its own documents and will receive the opposing side's documents in the format that will be used to review the documents going forward.

   While such an approach may be less effective in a situation where one party is a corporation with millions of potentially responsive documents and the other is an individual or class of plaintiffs with few documents, the ability to produce documents in the format that a party will use for its own litigation purposes will safeguard against needless conversion costs above those a party would already spend on its own.

   Finally, if a requesting party insists on production of documents in a different format than that being used by the producing party, that party should be prepared to bear any additional costs associated with the format so specified.

2. *Understand how your company or client uses spreadsheets and what information might lurk "behind the cells."*

   Should other courts follow Judge Harrington's holding and require parties to produce spreadsheets in their native format, parties should be aware of the risks associated with the electronic production of spreadsheets. Here, what you can't see can hurt you. Proprietary formulas, subjective assumptions, demographic information, or valuable trade secrets may be contained in cells on spreadsheets and may not show up on printouts. Also, spreadsheets in native format allow an adversary to manipulate formulas and generate its own interpretations of your client's or corporation's data.

   Prior to any discovery effort, in-house and outside counsel should be sure they understand the extent to which their corporation maintains spreadsheets and what may be revealed when those spreadsheets are produced in native format. If producing a spreadsheet in native format

could reveal proprietary or trade secret information, the producing party should not produce the files unless there is a protective order in place to restrict disclosure of confidential documents, and then must take appropriate steps to ensure that the spreadsheet files are marked and identified in the manner specified in the protective order.

3. *Oppose blanket requests for metadata and seek agreement with opposing counsel regarding specific documents for which metadata will be provided, if any.*

   Judge Harrington's view with regard to the discoverability of metadata echoes decisions in other jurisdictions, making clear that absent compelling circumstances, a requesting party is not entitled to metadata associated with each document produced. Instead, this judicial trend requires a requesting party to tailor its metadata request to specific documents or e-mails for which associated metadata should be produced.

   This is good news for corporations concerned with the high cost of maintaining or producing metadata in each case. Relying on Judge Harrington's guidance, the stage has been set for confident opposition to efforts to obtain scores of metadata. This translates into massive discovery cost savings and blunts the power that a receiving party traditionally holds over a producing party, wielding the threat of metadata production.

4. *Meet-and-confer sessions remain the best method by which parties can narrow and streamline discovery protocols for electronic and hard copy materials.*

   Above all else, practitioners must attempt to negotiate production issues and all matters related to production scope, format, timing, and protocol. Meet-and-confer sessions—now commonly a judicial expectation—allow parties to make their own discovery rules that are appropriate to their case. Only when the parties cannot agree should the parties approach a court for intervention. Rarely does either party claim victory when a discovery dispute is decided by a court.

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Mintz Levin's Electronic Discovery Practice

The litigation reaching court dockets today stems from disputes that have arisen in the age of e-mail and other electronic communications. Congress and the courts are drafting and amending rules and opinions concerning document review, non-disclosure agreements, waivers of privilege, and other questions specific to e-discovery.

Building on our experience as litigators, Mintz Levin's e-discovery team consults with clients who are preparing for specific litigation. We provide these services in cases where Mintz Levin is handling the litigation, or as an independent consultant, advising in-house lawyers or other outside counsel. In both situations, Mintz Levin's attorneys and dedicated IT professionals work with clients to tailor an effective and responsive process which encompasses extracting the appropriate documents, reviewing them for privilege and relevance, managing production, and responding to opposing counsel and the court in the event of a dispute. Our process is carefully tailored to each client's specific needs, addressing and finding appropriate solutions to concerns about costs and resources.

Endnotes

[1] Civ. Action No. 07-12388-EFH, 2009 WL 1748526, (D. Mass. June 22, 2009) (Harrington, J.).

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