Swimming in the Deep End: Treading Water in e-Discovery Cases

Joshua Gilliland, Esq.
Professional Development Manager, D4 LLC

This motion centers on electronic discovery. The proper handling of electronic discovery is a new and developing area of law practice. The Federal Rules first addressed electronic discovery in 2006 and the Local Rules of this court have yet to provide any guidance on electronic discovery. Therefore, the court appreciates that it treads in what still are largely unknown waters. Dahl v. Bain Capital Ptnrs, LLC, 2009 U.S. Dist. LEXIS 52551 (D. Mass. June 22, 2009)

Not every judge has the experiences of Magistrate Judges Facciola, Waxse, Grimm or Peck when it comes to electronically stored information. Some District Court judges are just now issuing their first ESI opinions, over 2.5 years since the December 2006 Amendments. And for those who have not followed the news, California state judges will now be facing these issues since California enacted its own Civil Discovery Act addressing e-Discovery.

The District Court Judge swam into the deep end of the pool in *Dahl v. Bain Capital Ptnrs, LLC* to address four issues regarding electronically stored information:

(1) Costs;

(2) Metadata;

(3) Excel spreadsheets; and

(4) Privilege logs.

Dahl, 4.

Cost Shifting

The general rule in discovery is the producing party pays their own costs, unless there is a showing that 1) ESI is not reasonably accessible and 2) undue burden or cost. *Dahl,* 4-5.

The Producing Party failed to show any reason to justify cost shifting. There was no showing the ESI was not reasonably accessible or any showing of undue burden or costs. *Dahl,* 4-5. As such, the Court did not order costing shifting in this case.

Form of Production: Paper & OCR

The Court did order something different with the paper documents that might cause commentators to scratch their heads: The producing party had to only produce the paper

discovery in the form the paper was ordinarily maintained; any "modification" had to be paid for by the requesting party. *Dahl,* 6-7.

The paper documents were to be produced as they were ordinarily maintained. *Dahl,* 6. Therefore, the Requesting party had to pay for "(1) for scanning and optical character recognition ("OCR") for paper documents; and (2) for OCR for those electronic documents without text search capabilities." *Dahl,* 6.

Narrowly Tailored Metadata Production

The Requesting party sought "all metadata" associated with the electronically stored information. *Dahl,* 7. The Producing Party wanted to only produce 12 metadata fields. *Id.* The Court sided with the Producing Party.

As a practical matter, "all metadata" could include 144 fields of information for certain types of ESI. Searching could become complex and ugly. Depending on which 12 fields the Producing Party was willing to produce, the Requesting Party might get everything they want.

For more on the different types of metadata, see Production of Metadata and the Importance of the Meet & Confer Process, which includes a discussion on system metadata, substantive metadata and embedded metadata.

The Court explained its justification on that "[metadata] does not lead to admissible evidence and that it can waste parties time and money." *Dahl,* 7, citing, *Wyeth v. Impax Labs., Inc.,* 248 F.R.D. 169, 171 (D. Del. 2006). The Court also explained Rule 34 "militates against the broad, open disclosure of metadata…" *Dahl,* 8.

The Court held the following:

Rather than a sweeping request for metadata, the Shareholders should tailor their requests to specific word documents, specific emails or specific sets of email, an arrangement that, according to their memorandum, suits the PE Firms. This more focused approach will, the court hopes, reduce the parties' costs and work. Furthermore, it reflects the general uneasiness that courts hold over metadata's contribution in assuring prudent and efficient litigation. Dahl, 8.

Form of Production: Spreadsheets

The Court held that Excel spreadsheets were to be produced in native file format. *Dahl,* 8-9.

The Court explained that Federal Rule of Civil Procedure Rule 34 requires "documents" [I presume the Court meant ESI] to be produced "as they are kept in the usual course of business." *Dahl,* 9 citing Fed. R. Civ. P. 34(b)(2)(E)(i).

Since the Producing Party maintained Excel spreadsheets in native file format that was the form the spreadsheets were to be produced in. *Dahl,* 9.

A Footnote on Footnote 1

The Court in Footnote 1 stated that it held a different view of metadata in Excel files verse email or Word documents. The Court stated, "Maintaining spreadsheets in their native format is necessary to assure the integral elements of a spreadsheet remain undisturbed." *Dahl,* 9, fn 1.

Privilege Log

The Court ordered the Producing Party to produce privilege logs in native file format. *Dahl,* 9-10. The Court did not explain its reasoning, other then I can guess this was for the privilege log to be searchable.

Bow Tie Lessons

I have a different view from the Court's on the form of production analysis that producing paper as scanned images with OCR somehow "modified" the documents.

I believe the Court kept paper as paper based on Federal Rule of Civil Procedure Rule 34(b)(2)(E)(i), which states:

A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

Since these were "documents," apparently the Court saw scanning and OCR-ing them as "modifying" the documents.

If the Court is concerned about "modifying" paper into a digital form, I challenge any cost misconceptions. Paper documents would need to be scanned and then printed. There is a cost with printing paper, cost to storing boxes, potentially printing working copies or a cost to scan it all

over again to digital instead of more paper. (See, Court Orders OCR of Scanned Paper Documents, or Don't Go to Court Claiming OCR will Cost $200,000 with a different view then the present Court's).

Please put your seatbelt on for this shocker: It is cheaper to scan and OCR paper documents then it is to scan and print as paper. Scanning cost for both projects is the same. Printing costs are approximately TWICE the OCR costs. While it might only be a .03 difference a page, as that is multiplied out across a production, a party will feel the cost acceleration.

I think the Court's view on "modifying" is contrary to Federal Rule of Civil Procedure Rule 1, which states, "[the FRCP] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Telling a party that paper must be copied as paper and then scanned again to make the paper in a litigation support system arguably frustrates the goal of Rule 1.

As for ESI, a requesting party is not limited to the form of production being in the "ordinary course of business" with electronically stored information, but can specify the form of production in their request pursuant to Federal Rule of Civil Procedure Rule 34(b)(1)(C).

The Producing Party can produce or object to a Requesting Party's form of production, which then is followed by a meet and confer if the parties cannot resolve their dispute on the form of production. Federal Rule of Civil Rule 34(b)(2)(D) specifically states:

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.

Federal Rule of Civil Procedure Rule 34(b)(2)(E)(i) does not "trump" a requesting party's right to specify a form of production 34(b)(1)(C). Rule 34(b)(2)(E)(i) arguably pertains to how a production is organized, such as file names used in the ordinary course of business or with a control list that states which documents relate to which requests.

The form of production is NOT limited to how the ESI is "ordinarily maintained." Federal Rule of Civil Procedure Rule 34(b)(2)(E)(ii) states (emphasis added):

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;

Rule 34(b)(2)(E)(ii) begins with the proviso, "If the request does not specify a form for producing…" which then brings up the issue of "ordinarily maintained" OR "a reasonably useable form or forms" if there is a "form" void from a requesting party not stating a form of production.

There is no shortage of case law where the issue is a "reasonably useable form," which includes TIFF and PDF productions. For example, if the "ordinary course of business" would require specialized software to review building plans, a Court's analysis would likely focus on the production being in a reasonably useable form.

If a party wants ESI as TIFFS with associated extracted text there is plenty of case law supporting that practice. (See, Check Please: Challenging a PDF Form of Production, Procrastination and Objecting to the Form of Production Don't Mix, Name that Form of Production: Converting ESI to TIFF without Metadata is Not a Reasonably Useable Form, plus others on different form of production cases.)

For those not conceived that it is more cost effective to manage scanned paper with OCR in a litigation support system over a paper production, try this little test. Get out a stop watch. Print everything from the *P. Franc v. K. Morris* demo case in CT Summation iBlaze. Have one person with CT Summation iBlaze with the *P. Franc v. K. Morris* case open. Here are the Requests for Production you must answer:

1. Any and all documents **PERTAINING TO** the gabion wall.

2. Any and all documents **PERTAINING TO** "energy dissipater."

Time how long it takes to find the responsive documents in the database verse the paper hard copies, and ask yourself which process better furthers Federal Rule of Civil Procedure Rule 1.