# Procrastination and Objecting to the Form of Production Don't Mix

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*It is beyond cavil that this entire problem could have been avoided had there been an explicit agreement between the parties as to production, but as that ship has sailed, it is without question unduly burdensome to a party months after production to require that party to reconstitute their entire production to appease a late objection.*

United States Magistrate Judge Ester Salas, *Ford Motor Co. v. Edgewood Props.,* 2009 U.S. Dist. LEXIS 42001, 21 (D.N.J. May 18, 2009)

Ford Motor Company and Edgewood were locked in a series of disputes. One portion of the dispute was over a discovery request for native files with metadata and the Responding Party's production.

Edgewood requested electronically stored information in native file format with metadata. Ford instead produced the ESI as static images (TIFFS) with searchable text. *Ford,* 13-14.

Federal Rule of Civil Procedure Rule 34 allows for a requesting to state the form of production and request metadata. Pursuant to Fed. R. Civ. P. 34(b)(2)(D), "If the responding party objects . . . the responding party must state "the form or forms it intends to use for its production of ESI." *Ford,* 15. The requesting party can object to a counter form of production, which should be followed by a meet and confer over the dueling forms of production. Fed. R. Civ. P. 34.

That is not what happened here…at least not in a reasonable period of time.

**The Discovery Production**

There were three productions in the Producing Party's counter-form of production over an 8 month period. *Ford,* 19.

The Requesting Party waited 8 months to object to the static production with searchable text. *Id.*

The Court stated the Requesting Party's delay was "patently unreasonable." *Id.*

While not setting out a rigid rule on timelines to object to a form of production(which would probably result in case law chaos given the nature of ESI), the Court held it was unreasonable to wait 8 months to object when the production was nearly finished. *Ford,* 20.

Reasonableness is king when it comes to discovery and waiting 8 months was not reasonable.

The Court further stated:

One may reasonably expect that if document production is proceeding on a rolling basis where the temporal gap in production is almost half a year apart, a receiving party will have reviewed the first production for adequacy and compliance issues for a reason as obvious as to ensure that the next production of documents will be in conformity with the first production or need to be altered. It was incumbent on Edgewood to review the adequacy of the first production so as to preserve any objections. *Ford,* 19-20.

The Court held the Requesting Party's objection was untimely and requiring the Producing Party to produce ESI as native files to be unduly burdensome. Ford, 21.

**What the Party Should Have Done**

The Requesting Party was required under Fed. R. Civ. P. 34 to object to the Producing Party's proposed form of production. If they were unable to reach an agreement on how to produce the ESI, the Requesting Party was required "to alert the Court within a reasonable period of time." *Ford,* 20.

Now, what is reasonable? That will turn on the nature of the case, how involved the parties are in the meet and confer process and other factors showing reasonableness.