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Name that Form of Production: Converting ESI to TIFF without Metadata is Not a Reasonably Useable Form

Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 2009 U.S. Dist. LEXIS 21250 (M.D. Fla. Mar. 4, 2009) is a lengthy opinion covering Rule 34 requests, form of production issues concerning metadata, reasonably useable form of production, ethical responsibilities for candor to the Court and Opposing Parties and sanctions. One could imagine the fact pattern on a Bar exam for issue spotting.

The Procedural History Highlights

Defendant Lexington Ins. Company requested electronically stored information “in native form without deletion or alteration of metadata” from Plaintiff Bray & Gillespie. *Bray & Gillespie*, 13. Bray & Gillespie (B&G) instead produced non-searchable TIFFs stripped of metadata. Several attorneys from Reed Smith also withheld material information and made misrepresentations to the Court and Opposing Counsel as the motion to compel saga played out.

Lexington Ins. Company sought sanctions against the Plaintiffs and to compel the production of ESI with metadata.

Short Overview of ESI Collection

B&G had student interns download electronically stored information and scan paper documents. This information was copied to a “Target Hard Drive” and given to the law firm Anderson, Kill & Olick, P.C. Extractiva was then used to convert the ESI to static images (TIFFs) and extract metadata. This ESI was then loaded onto an Introspect review database. *Bray & Gillespie*, 7-8.

Reed Smith became the attorneys for B&G after one of the lawyers left Anderson, Kill & Olick, P.C.



The Discovery Request & Production

After Lexington made discovery requests for electronically stored information, the Plaintiffs produced paper documents on disk and agreed to a “rolling production.” *Bray & Gillespie*, 14-15. The Defendants brought a motion to compel several months later when the Plaintiffs had not begun a “rolling production.” *Bray & Gillespie*, 17.

Nearly four months after the rolling production agreement, the Plaintiff produced some ESI from the Introspect database on disk. *Bray & Gillespie*, 18.

The Defendants renewed a motion to compel shortly after the first ESI production. *Bray & Gillespie*, 20. A second production followed after a Court order.

As the Defendants began reviewing the ESI productions, they learned the ESI was in TIFF format, with no metadata or extracted text for author, data, or subject. *Bray & Gillespie*, 22-23.

Producing ESI in a Reasonably Useable Form

The Court stated that producing the ESI in TIFF format without metadata eliminated the search capabilities compared to producing the ESI in native form. As such, the ESI production was not in a reasonably useable form. *Bray & Gillespie*, 23.

There were two options for making the production searchable: Option 1) OCR the TIFFs and then run ALCoder over the OCR to populate database fields for author, date, etc. This would cause an additional cost to the Defendants, since the material was already searchable in native file form. Option 2) Produce ESI in native form with extracted text, which makes use of the already searchable native files.

...and then Things Get Worse with Misrepresentation to Court on ESI Collection



You know someone is getting sanctioned when a Judge uses a lawyer's name and the phrase "concocted a story" in an opinion.

One of the Plaintiff lawyers represented to the Opposing Party and the Court that the Plaintiff printed all of the ESI and it was then scanned as TIFFs. *Bray & Gillespie*, 25.

The Court summed up the "concocted story" as ignoring readily available or known facts pertaining to the collection and production of ESI. *Bray & Gillespie*, 25-26.

Enter the Sanctions Motion

The Defendants were not happy. The Defendants claimed the Plaintiffs violated the Court order to produce ESI according to the form of production stated in the discovery requests. The Defendants sought production of ESI according to the discovery requests, striking portions of the Plaintiffs' claims and reasonable costs. *Bray & Gillespie*, 28.

The Court ordered B&G to produce to the Defendants the Plaintiffs' Introspect database, minus any privileged ESI. *Bray & Gillespie*, 66. Additionally, B&G was ordered to pay all costs, including buying software or hiring someone to copy the litigation support database. *Bray & Gillespie*, 67-68.

The Plaintiffs were also required to allow a Defense computer expert direct access to the Plaintiffs' Introspect database to confirm all non-privileged information had been produced. *Bray & Gillespie*, 67-68.

The lead attorney for the Plaintiffs was sanctioned and ordered to pay attorney's fees and costs, which included the testifying expert and the Court reporter for transcribing the sanctions hearing. *Bray & Gillespie*, 71-72. Others were sanctioned as well.

This is a very lengthy case that is fact intensive. Every detail is not summarized in this blog. The case is worth reviewing for the discussion on the reasonably useable form of production, discovery misconduct and the sanctions motion.