



Smarter Discovery™

Follow the Court Order

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Gamesmanship is the harbinger of bad lawyer reputations. Not obeying Court orders can be the death warrant on how the judge will view you every time you appear in her courtroom. One can imagine how things will go for a party when this is the opening line of an opinion:

This is the second needless discovery motion in this case – needless because plaintiff's counsel simply refuses to follow the letter of court orders, and in this case, not even the spirit. *Ajaxo Inc. v. Bank of Am. Tech. & Operations, Inc.*, 2008 U.S. Dist. LEXIS 97602, 1 (E.D. Cal. Dec. 1, 2008).

Ignoring the Form of Production in a Court Order



The Court ordered ESI be produced in a searchable form and Plaintiffs agreed to searchable PDF's.

The Plaintiffs instead produced 119 static images (TIFFs) WITHOUT extracted text for searching, any pagination, or a load file for a litigation support review system. *Ajaxo Inc.*, 3.

The Plaintiff's expert material was produced at first late in non-searchable format on 5 CD's. *Ajaxo Inc.*, 3. A searchable production was made months later after the motion to compel was filed. *Id.*

Preparing for an expert deposition with 5 CD's worth of non-searchable material does not sound like a good time.

The Court found the Defendants were prejudiced because they could not adequately prepare for the expert's deposition with the large volume of documents.

Prejudice was encountered with respect to the Hampton CDs in that the Bank could not adequately prepare for Hampton's deposition given the volume of documents. *Ajaxo Inc.*, 3.

The Plaintiffs were ordered to produce both productions in a searchable format and instead disregarded the Court Order. This did not go unnoticed by the Judge. *Ajaxo Inc.*, 3.

Things Judge's Don't Like: Excuses



The Court was not thrilled with the Plaintiffs claiming the Federal Rules of Civil Procedure do not require ESI productions in searchable format.

The Court bluntly stated, “[Plaintiffs’] belief that the Federal Rules may not require production in searchable format is not only wrong, but again ignores the terms of the specific order.” *Ajaxo Inc.*, 4.

Federal Rule of Civil Procedure Rule 34 Review

The Court included the following summary on form of production protocols from the Federal Rules of Civil Procedure, the Advisory Committee notes and case law:

Fed. R. Civ. P. 34(b) permits the requesting party to specify the format of electronically produced documents, subject to objection by the producing party with a statement in the Rule 34 response specifying the form in which the documents will be produced. This objection may be sustained or overruled by a court. In the absence of a court order, and if no specific request is made, the producing party may produce the documents in native format, or in a “reasonably usable” form. *Ajaxo Inc.*, 4, citing Rule 34(b)(2)(E).

A responding party may not change the form of production to make what was ordinarily searchable, non-searchable. Rule 34 Advisory Committee Notes 2006 amendment. Courts may order electronic documents to be produced in searchable format. *Ajaxo Inc.*, 4-5, citing, *In re Seroquel Product Liability Litigation*, 244 F.R.D. 650, 654-55 (M/D. Fla. 2007); *Hagenbuch v. 3B6 Sistemi etc.*, 2006 U.S. Dist. LEXIS 10838, 2006 WL 665005 (N.D. Ill. 2006).

Enter the Sanctions Motion

The Defendants sought the following sanctions pursuant to the Court's inherent powers and Federal Rule of Civil Procedure Rule 37(b) (2):

- (1) Order it established that Ajaxo and KCM are alter egos;
- (2) Order plaintiffs precluded from relying on Hampton's expert report to support their claims for damages;
- (3) Monetary sanctions in the amount of \$ 12, 592.50 for fees incurred to date. *Ajaxo Inc.*, 5.

Perspective from the Bench: Not Happy, but Not Fatal to the Plaintiffs' Case

The Court directly stated:

[Plaintiffs'] counsel may not pick and choose when to comply with a court order depending on counsel's unilaterally determined excuses or justifications not to comply with the order. The order is either obeyed or appealed. Nor should courts issue orders which they are unwilling to enforce. There is importance per se in not allowing a party to ignore orders – the litigation process would otherwise descend into chaos. Thus, sanctions must be imposed here. *Ajaxo Inc.*, 7.

The Court's sanctions analysis focused on the Plaintiff counsel's willful disobedience of the Court order and the prejudice the Defendants incurred. *Ajaxo Inc.*, 7.

The Court was not ready to decimate the Plaintiffs' case by striking their expert because of the attorney's conduct. The Court "barely" believed that Plaintiffs' counsel acted in ignorance of the law and not in "contumacious disrespect" of it. *Ajaxo Inc.*, 8.

The Court ordered the Plaintiffs to re-produce their expert for deposition, because the Defendants did not have adequate time to prepare for the expert's original deposition. *Ajaxo Inc.*, 9.

The Court further ordered the costs of the deposition and motion. *Ajaxo Inc.*, 9-10.

Final Thoughts

Attorneys need to understand the procedures for requesting ESI, form of production requirements and complying with Court orders for electronic discovery to best serve their clients. The sheer volume of electronically stored information requires all lawyers to have a basic understanding of contemporary discovery.