

## **Reasonably Usable Form for ESI: Court Orders Party to Produce Documents in Fully Searchable Electronic Form**

**January 4, 2011**

In a recent federal district court case addressing a defendant's motion to compel, *Jannx Medical Systems, Inc. v. The Methodist Hospitals, Inc.*, 2010 WL 4789275, U.S. Magistrate Judge Paul R. Cherry found a plaintiff's production of electronic documents in PDF format without searchable text did not comply with Federal Rule of Civil Procedure 34 (Rule 34). As highlighted by this opinion, parties cannot rely on the absence of an agreement regarding form of production, or lack of specified form of production in discovery requests, as a basis for producing documents in a form that removes or degrades the ability to perform electronic searches.

### **Background**

Defendant Methodist Hospitals, third-party defendant Propoco, Inc., and plaintiff Jannx Medical Systems, Inc. conferred regarding discovery, but did not agree as to the form of production for electronically stored information (ESI). The plaintiff subsequently produced information from an electronic database as PDFs without associated searchable text.

As a result, the defendants filed a motion to compel the plaintiff to produce responsive documents in reasonably usable electronic form, compliant with Rule 34(b)(2)(E). The defendants argued that the documents were originally maintained in a format that enabled searching, while the produced PDFs did not include searchable text, hampering their ability to analyze the documents.

### **Analysis**

The plaintiff claimed that its production in PDF format was not in violation of Rule 34 because the defendants did not specify a specific format for production, citing *Pace v. International Mill Service, Inc.*, 2007 WL 1385385, (N.D. Ind. May 7, 2007), and *The Scotts Company LLC v. Liberty Mutual Insurance Company*, 2007 WL 1723509 (S.D. Ohio June 12, 2007). However, the court distinguished *Pace* in that it analyzed an "earlier version of Rule 34, before the 2006 amendment." The court found further that the plaintiff "ignored the rest of the Southern District of Ohio's decision discussing the Advisory Committee Note on the 2006 Amendments, which address circumstances when a party's selected form of production does not comply with the requirement to be 'reasonably usable.'" Indeed, Magistrate Judge Cherry noted that the *Scotts* court went on to say that if a party "ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information

should not be produced in a form that removes or significantly degrades this feature.”

The plaintiff did not dispute that it produced PDFs without the ability to perform searches that was available in the original electronic documents. Rather, plaintiff argued that because the defendants did not request a specific form of ESI production, they were free to produce in any format it chose. Magistrate Judge Cherry disagreed, quoting the Advisory Committee Note on the 2006 Amendment: “[T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information . . . to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.” Magistrate Judge Cherry found the plaintiff’s production in PDF format without searchable text had not complied with Rule 34, and had in fact increased the defendants’ burden. As a result, the court ordered the plaintiff to “produce responsive information in an electronic database format that allows the information to be reasonably usable, i.e., fully searchable and manipulable, with the connections between data fields intact,” and pay attorneys’ fees and costs related to the defendants’ motion to compel.

### **Lessons from *Jannx***

Magistrate Judge Cherry’s decision in *Jannx* cautions that the absence of agreement between parties, or lack of specificity in discovery requests, as to form of production does not provide license for litigants to convert and produce ESI in a form that removes or degrades the searchability and thus increases the expense or burden to the requesting party. In the absence of an agreement or specified form of production, parties should carefully consider whether their chosen form of production is “reasonably usable” before deciding on a course of action.

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