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Choosing Time Standards Wisely in E-Discovery

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Top of mind for in-house counsel in this age of Big Data is controlling costs in e-discovery. Those costs can be enormous. One recent study: *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, Nicholas M. Pace and Laura Zakaras, RAND Institute for Civil Justice 2012, found that e-discovery costs in civil cases hover around $18,000 per gigabyte, but that a substantial number of cases involve costs in the range of $150,000 to $350,000 per gigabyte.

In complex litigation, poor choices at the outset of discovery can dramatically increase these already sky-high costs. Among the many choices that must be made in e-discovery — Who are the key custodians? Where are their files? How should duplicates be handled? — is the choice of what time standards to use for producing emails and other documents.

When discovery was mostly in paper, form of production was rarely an issue. However, with e-discovery, electronic documents can be produced in a multitude of forms, and inadvertence or gamesmanship by producing parties can result in court-ordered reproduction of an entire document production, potentially doubling e-discovery costs. Nowhere is this truer than with respect to time standards. Microsoft Outlook files preserve email dates and times in Universal Coordinated Time — essentially Greenwich Mean Time — but displays them in the user's local time zone. For ease of de-duplication and consistency across productions, many vendors recommend "normalizing" a production to one time zone, such as UCT. But the time decision is too important (and potentially too costly) to be left to vendors. The right choice will vary from case to case, and should be a considered decision of the legal team, in consultation with in-house counsel, before millions are spent on a production.

In many cases, the time zone of the place where most of the events giving rise to the lawsuit occurred, or where most of the key players are located, will be the right choice. Producing documents in the time of Greenwich, England makes little sense in a case where everyone involved conducts business in Houston, Texas and in Central Time. Furthermore, producing in a time zone "foreign" to the email's custodian will likely confuse witnesses in depositions and juries at trial. Unless the email's time stamp shows otherwise, witnesses and juries will assume that the time on the email reflects the local time of the person who sent or received it.

In cases involving multiple countries and witnesses across the globe, UCT may be appropriate. Although an unfamiliar time standard for most people, the advantages of a single standard to compare and understand the order of communications and events taking place in multiple, unfamiliar time zones are likely to outweigh the disadvantages of explaining UCT to a witness or the jury.

Regardless of what decision is made, best practices should include the formatting of emails' time stamps to indicate clearly the time standard used. If UCT is used, not only should "UCT" follow the time, but the time stamp should include an offset number indicating the difference in hours between the time indicated and the custodian's local time. Just like omitting "a.m." or "p.m."

from the time stamp would leave the reader unable to determine whether the email was sent in the morning or evening, omitting the time zone or offset information can hamper development of a case chronology, leave witnesses and jurors with misleading impressions about the timing of communications, and require unnecessary efforts by attorneys to clear up confusion in depositions and trial.

A further consideration in lawsuits involving productions from multiple parties and even non-parties is consistency. If each of the parties makes different decisions about time standards in their productions, confusion and the risk of costly re-production of documents will be the inevitable results. In federal court, the perfect time to discuss these matters with other parties is during the Rule 26(f) conference. Federal Rule of Civil Procedure 26(f)(3)(C) requires that the parties' discovery plan "state the parties' views and proposals on . . . any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced." Obtaining agreement ahead of time on forms of production, including time standards, not only ensures consistency, but avoids later claims that the form chosen was burdensome.

If the time issue never comes up with opposing counsel, take note that Rule 34(b)(2)(D) of the Federal Rules requires the producing party to "state the form or forms it intends to use" in its production. This puts the burden on the producing party to let the requesting party know in advance what time standards the producing party plans to use. This allows the parties to potentially resolve any disputes before the expense and work of production occurs. As the notes to the 2006 Amendment to Rule 34(b) warn, "[a] party that responds to a discovery request simply by producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form."

Bottom line: Not telling opposing counsel in advance about the time standards used could result in court-ordered reproduction of an entire document production in a different time standard — an unforced e-discovery error which can be as costly to the client as the original production.

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