



*Native files refer to electronically stored information (ESI) stored in the format originally used by the fact witness or other custodian, without conversion to TIFF, PDF or other paginated formats for review. Examples are Word, Excel, and Powerpoint or Outlook Email. Counsel increasingly request and courts grant, these production requests. This checklist for attorneys, litigation paralegals and legal technology professionals should help you sort out the complications.*

## Planning Issues

-  **Consider An ESI Agreement or Order --** Production format issues are best handled in properly drafted ESI Orders and Agreements. Specifics can include load file requirements, how email, redacted and privileged documents are handled. Lexbe provide a sample ESI order for your consideration on request.
-  **Utilize Meet and Confer Opportunities and Use of Technical Experts --** FRCP 26(f) offers litigants the opportunity to meet and confer early in the case to facilitate e-Discovery. Consider utilizing "meet and confer" opportunities to understand what native file types your opponent is requesting and why, and establish how burdensome and expensive it will be for you to meet these requests. If needed, engage a technical expert to consult with you on technical issues regarding the ESI you producing.
-  **Identify Review Software to Be Used --** Consider the review technology system you will use. Not all software will enable full searchability of native files, which can confound privilege and redaction review and lead to production difficulties and mistakes.

## Production Requirements

-  **Determine Specific File Types to Be Produced Natively --** Determine the file types requested and that you will produce in Native Format. Common options include: (1) only as needed/requested, (2) only Excel/spreadsheets, (3) spreadsheets and presentations, (4) Email and Office files generally, and (5) native files generally unless excluded.
-  **Follow Rule 34 Requirements --** FRCP 34 is very specific about how file format issues will be handled, with specific outcomes depending on the request and response. Failure to follow this could result in waiver.
-  **Exact Duplicate Removal --** Consider if exact duplicates of email and other files will be removed prior to production. If done between custodians (horizontal dedupe) removed files should be logged by custodian.
-  **Bates-Stamping --** Native files by themselves cannot be Bates stamped at the page level. Many attorneys prefer this and request natives and paginated version (PDF or TIFF) for Bates numbering. The native version and the paginated version are associated in the loadfile. The Lexbe eDiscovery Platform utilizes text-based PDFs for this purpose.

### **Request a Free Consultation**

Request a free project consultation from one of our eDiscovery Sales Consultants. Demo the Lexbe eDiscovery Platform for Native Review

**Call us today at 800.401.7809 x22,  
or email us at [sales@Lexbe.com](mailto:sales@Lexbe.com)**



## Privilege Review and Redaction

-  **Handling Redacted and Privileged Documents** -- Determine how redacted, privileged and work-product documents will be produced as native versions cannot be delivered. Litigation document review systems like the Lexbe eDiscovery Platform will withhold native versions of work-product and privileged documents and substitute paginated versions.
-  **Assure Searchability** -- Native files without eDiscovery processing will only be partially searchable. This is because the some files will benefit from the application of optical character recognition (OCR) of converting a non-searchable native format to a searchable format. Preprocessing may be needed or use of an integrated approach like the Lexbe eDiscovery Platform that automatically processes image-based native files with OCR. Without a comprehensive approach to searchability the likelihood of inadvertently producing privileged documents increases.
-  **Quality Control of Privileged and Redacted Documents** -- Build in time to do quality control procedures for privileged, work product and redacted documents. A number of automated approaches exist in modern litigation review platforms like Lexbe.
-  **Consider Near-Duplicate Identification Technology** -- Grouping Near-Dupes (at least 50% the same) is a robust and helpful approach to help assure that all versions of privileged and confidential documents have been properly identified before production release.
-  **Use a Claw-Back Agreement** -- Negotiate or utilize a claw-back agreement in an ESI agreement or order to protect against the inadvertent release of privileged ESI and possible resulting waiver.
-  **Speed Privilege Logging** -- Automatic metadata extraction and fielding in a litigation database like the Lexbe eDiscovery Platform speeds logging. Also consider negotiated categorical logging in document intensive case.

## Other Issues

-  **Hash Produced Natives** -- Generate an MD5 Hash of all produced native files. This will help assure that you can determine if any native files have been altered after your production.
-  **Challenge Excessive Production Requests** -- It's no longer good enough to make a document request and answer a challenge that the production would be relevant or lead to relevant evidence. Courts today require that the proponent carry the burden of proof of proportionality. The benefits of a discovery request must outweigh the costs and burdens, and the evidence should not be available through other less burdensome means.

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