

# To Tiff or Not to Tiff – Reasoning, Perils, and Pitfalls of Producing Documents as Part of the eDiscovery Process

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**LIGHTHOUSE**

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The production format of evidence as part of an investigation or dispute has long been debated in the legal arena. Should the producer of the evidence give the receiver access to the documents in their native form (e.g. as a Word document, Excel spreadsheet, or as an email) or will the document be produced as a viewable rendition of the document in TIFF or PDF format—that is the big question!

## UK Practice Direction

When the UK Civil Procedure Rules (CPR) on disclosure were drafted in their current form, although they took into account the proliferation of electronic documents in the discovery process, there were still enough paper documents floating around in a typical discovery exercise to justify converting all electronic and paper files into an image and then reviewing and producing accordingly. Electronic documents now form around 99.9% of the documents we process in a typical ediscovery exercise. Yet for a multitude of reasons the process is still primarily built around the concept of converting all documents to a format which was created 25 years ago. A sign of great technology is that which stands the test of time. However, as flexible and easy as TIFF documents are to create and distribute, it comes from a technology era where the concept of mobile television was in its early stages in the form of the mighty Sony Watchman. A black and white, two-inch CRT screen which had an insatiable appetite for AA batteries and an inability to show anything other than Gardening shows on BBC2 as I recall (yes, I did have one of these).



Twenty five years later we can now watch on demand, high-definition television content on our mobile phones. Naturally, the way documents are created and stored has also evolved. Word, Excel, PowerPoint, and others have become increasingly complex and multi-tiered. This increased sophistication is driven by how users want to create and access their content, and as a result, the software used to process, analyze, and review these documents in the legal space has had to become equally sophisticated to handle this increasingly complex data. It can seem to the outside observer a bit archaic to convert perfectly readable, searchable, and usable documents from their native format to a static, less

usable version. A bit like paying £3,000 for the latest OLED ultra high-definition television only to watch black and white Charlie Chaplin films. I have nothing against Charlie Chaplin or black and white films, but I would be as well saving the £3k and dusting off my old Sony Watchman.

Spurious analogies aside, there is a more serious point here. Most ediscovery tasks have a lot at stake and there is an inordinate amount of focus put on the detail, as the consequences of getting things wrong can have significant commercial and reputation implications.

In England and Wales, the CPRs differentiate between disclosure and inspection of documents. For clarity, disclosure means that the party needs to state that the document exists (or existed) and inspection refers to the right the receiving party has to inspect the document. If a party has a document in their possession which they believe the inspecting party does not have a right to inspect, then they need to detail this in the disclosure statement.

Section 31 of the Practice Direction goes into more detail concerning the actual format the document is disclosed in, particularly section 6 (4) where the Direction states that “Electronic documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, review and display the document as the party giving disclosure.” The Practice Direction continues by stating in 31B (33), “Save where otherwise agreed or ordered, electronic copies of disclosed documents should be provided in their native format, in a manner which preserves metadata relating to the date of creation of each document.”

## The Rules in Ireland and the US

Given the global nature of litigation and regulatory investigations, there would seem to be a benefit in having a consistent and homogenous approach when devising a production protocol.

When looking at international procedural rules on this disclosure, there seems to be a fairly clear requirement that, save for specific circumstances, documents should be produced natively. However, when parties are disclosing documents there will frequently be parts of the document that is either confidential or privileged. The party is within its rights to blank out portions of these documents and produce only the images of redacted version. Whilst there are tools available which can redact native files, this technology is not still being adopted and not yet widespread. Clients and their counsel generally have more comfort in knowing that the native document has been converted to a TIFF image and any underlying text, comments, or formulae, cannot inadvertently be sent to the receiving party. Ultimately, it comes down to the interpretation of the rules, the nature of the dispute or investigation, and what has been agreed between the parties.

What commonly happens is a hybrid approach is adopted, whereby file types such as Microsoft Excel and PowerPoint are produced natively (as they do not render accurately when converted to TIFF images). Other documents such as emails are converted to a more usable format such as MHTML so that attachments are stripped out and the user does not inadvertently use their email software to open, inspect, or reply to the email. Documents which are subject to redaction are almost always converted to a digital representation of the document such as an image.

# A Consistent Approach

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This hybrid approach seems to contradict some countries' specific rules in spirit rather than in law. For example, in the Republic of Ireland, Order 31 of the Rules of the Superior Courts states that the requesting party can, "seek(s) the production of any documents in searchable form" and that the court at its discretion can, "order that the documents or classes of documents specified in such order be provided electronically in the searchable form in which they are held by the party ordered to make discovery."

In the US, the Federal Rules of Civil Procedure (and many states' comparable rules) include a specific rule on this. Rule 34(b)(2)(E)(i-iii) specifically states, "that a party must produce documents as they are kept in the usual course of business...and in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." Regulators such as the DOJ and SEC are increasingly interpreting this language to reject production of images for electronic files such as Excel, Word, and PowerPoint. Specifically, the US SEC issued updated Data Delivery Standards in July 2016, which now explicitly requires that "Electronic files must be produced in their native format, i.e. the format in which they are ordinarily used and maintained during the normal course of business". Plaintiffs' bar is also increasingly seeking production of native Excels and other files relying on the "usable form" language in FRCP Rule 34, as well as inherent imperfections experienced when conducting conversion of dynamic native file formats to static image format.

“You can build a strong argument to support any format of exchange, the key is communicating and maintaining consistency throughout the disclosure.”

—Greg Child,  
eDiscovery Expert<sup>1</sup>

<sup>1</sup> Greg Child is an ediscovery practitioner with over 9 years experience in the industry working with top 10 US and UK law firms.

# What is the “Right Way” to Produce?

From an ediscovery professional’s perspective, whilst most of us would agree that there is not a single ‘right way’ to produce, it is generally easier and more efficient to disclose in the native format. If you disclose natively, then you would usually expect to receive natives as part of what is agreed in the exchange protocol. There are clearly benefits to this from a logistical and strategic perspective. Ask your ediscovery provider to walk you and your counsel through the risks and benefits, as well as what needs to be considered, before conferring with the receiving party and agreeing upon a disclosure/production protocol.

Here are some recommended points for consideration when deciding between native vs. TIFF/PDF production:

- Tracked changes on Microsoft Word documents can be problematic, hard to review, and there are some concerns about the ability of established processing tools to identify tracked changes in a consistent manner.
- Reviewing native documents takes longer (e.g. un-hiding hidden rows in Excel spreadsheets, or turning on the track changes viewer in Word documents).
- Conversely, reviewing TIFF or PDF documents means that you can’t unhide hidden rows or view multiple markup versions.
- The “near-native” viewers in some ediscovery processing tools and review databases do not always render natives fully or accurately.
- Excel can’t be produced as TIFF images without costly and time-consuming reformatting, which can effectively make the file unreadable.



- In a static or imaged format, you cannot interact with an Excel to take actions such as sorting, resizing, changing the layout, or reviewing formulas.
- Animations and sounds in Microsoft PowerPoint documents do not image well. Documents like PowerPoint with rich color do not image well in black and white.
- Microsoft Project is not represented well in a paginated format. There are many different views in a Project document and the Gantt chart can be many pages high and many pages wide.
- TIFFing is expensive, time-consuming, and requires considerable quality control before release.
- The size of images is different than the size of the native. Depending on the composition of your data, this can go either way. We regularly see documents with larger image sizes as well as documents where the natives are larger than the images.
- Some documents will always need to be converted to a TIFF (e.g., redactions can only be applied to a native Excel or an image of the document).
- Text cutoff, margin issues, inaccurate or incomplete rendering of review comments, and embedded objects are all risks that have to be mitigated or prepared for when converting from native into an image.
- If you produce images of a Word document with tracked changes think carefully about how the document will look on the TIFF images. Showing all mark-ups may be the requirement, but the document will be difficult to understand.
- If you agree with the other party to produce native files then you would generally expect them to also produce native files. This can be beneficial when trying to review and analyse the data you have received, especially when comparing with the data you already have in your possession.
- It is a lot easier to deduplicate native files you receive against your own corpus of data. There are no tools that allow the effective deduplication of imaged documents and extracted text against natives.
- Different systems will prefer to output single or multi-page TIFFs.
- It is difficult to review single-page TIFF files unless you are using a software tool designed to present these as a conjoined document.

“ I question the value of a wholesale exchange of imaged documents instead of providing the native files (subject to those which are redacted), with the technology available today, there is little justification for disclosing a fully imaged set of documents ”

—Greg Child,  
eDiscovery Expert

- Consider if you disclose a TIFF but later rely on a native version of the document. How do you address this without contradicting the ethos of the disclosure format protocol?
- An image is a representation of the original native. As such, misrepresentation could exist due to changes in native file format, native application versions, and image conversion software.
- Native files sometimes require the end user to have proprietary software installed such as Microsoft Project or Visio, which they may not have. Investigate some of the 'native redact' tools available on the market. Whilst they vary in their efficacy some are very clever. RTK.EXCELREDACT, in particular, is a very useful tool for redacting parts of spreadsheets, which are frequently tricky to disclose if they contain confidential or privileged information.
- It is unwise to disclose certain documents like email in their pure native format. They may be inadvertently opened and manipulated if the reviewer has not taken precautions to either review in an ediscovery platform, which will prohibit changes being made to the document, or worse, in the case of emails by sending read receipts to the original email author.

Clearly, there are several issues to consider when deciding on the production format. Whether in the UK, Ireland, US, or anywhere else, establishing a dialogue with the opposing party will be paramount. Taking time before disclosure to agree on the production format will help save costs, avoid confusion, and ultimately will take some of the pain out of what can be an unnecessarily arduous part of the process. Lighthouse's recommendation is to provide all non-redacted Microsoft Office documents in their native format. Our standard is to produce all Word, Excel, and PowerPoint documents in their native format. The effort and time required to produce your documents increases in correlation to the number of images in the production.

In the age of artificial intelligence and the desire to standardize and automate, it can sometimes seem that some technological developments are created for the sake of it. Innovation is not always beneficial. Document production formats are like any other part of the ediscovery process, they're either a benefit or a hazard. If they're a benefit, it's not a problem. But, increasingly TIFF productions are starting to look like a hazard. Perhaps it is time to consign the old Black and White TIFF production approach to the same part of the closet the Sony Watchman is now gathering dust in.

If you would like to discuss this topic further, please reach out to us at [info@lhediscovery.com](mailto:info@lhediscovery.com).



## About Lighthouse

For 25 years, Lighthouse has provided innovative software and services to manage the increasingly complex landscape of enterprise data for compliance and legal teams. Lighthouse leads by developing proprietary technology that integrates with industry-leading third-party software, automating workflows, and creating an easy-to-use, end-to-end platform. Lighthouse also delivers unique proprietary applications and advisory services that are highly valuable for large, complex matters, and a new SaaS platform designed for in-house teams. Whether reacting to incidents like litigation or governmental investigations, or designing programs to proactively minimize the potential for future incidents, Lighthouse partners with multinational industry leaders, top global law firms, and the world's leading software provider as a channel partner.

Contact us to find out what Lighthouse can do for your business.

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