

Over the next several weeks the E-Discovery Alert will focus on the strategy and tactics for handling sixteen specific ESI issues throughout pretrial discovery. Whether it is a "meet and confer" or request for production these are the critical issues to focus in requesting or producing ESI. The legal issue excerpts will be derived from the *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009). The Guide is cross-referenced and hyperlinked with the *Arkfeld on Electronic Discovery and Evidence* (2nd ed.) treatise and part of the CD-ROM.

ISSUE: DOES RULE 34 SET FORTH MANDATES REGARDING THE "FORM OR FORMS" OF "ELECTRONICALLY STORED INFORMATION" FOR DISCLOSURE PURPOSES?

ANSWER: YES

Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics (2008-2009)

§ 3.10 RULE 34 AND FORM OF PRODUCTION

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A. Overview

During the early stages of electronic discovery, critical decisions have to be made as to the ESI form(s) that will be disclosed to, or received by a party. These decisions will impact, from that point forward, every aspect of the electronic discovery production and disclosure process. For example, they will determine whether the data is searchable and whether metadata is disclosed. They will also impact the cost of managing your litigation information. Failure to request or to disclose the proper ESI form(s) can have severe consequences.

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There are several different ESI forms that should be considered when discussing the disclosure of ESI:

- Native File;
- Database;
- Spreadsheet;
- Image;
- ASCII, Text, and Conversion Formats;
- Video and Audio;
- Paper; and
- ALS and Online ESI repository.

To assure you have the latest definitions of the form or forms of discovery visit the eLawExchange web site located at <http://www.elawexchange.com>.

Cross-references

- 5.3, ESI Forms and Disclosure Formats
- 7.7(G), ESI Form(s) (legal analysis and cases regarding the form of ESI)

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B. Kept in the Usual Course of Business or Labeled

Rule 34(b)(2)(E)(i) directs that “[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the request”

Cross-references

- 7.7(E), Kept in the Usual Course of Business or Labeled

C. Translated Into Reasonably Usable Form or Ordinarily Maintained

Rule 34(a)(1)(A) permits the discovery of any documents or electronically stored information . . . after translation by the responding party into a reasonably usable form . . . (emphasis added).

The default disclosure format for ESI is reasonably usable or as ordinarily maintained. This terminology is repeated in the latter part of Rule 34 under Rule 34(b)(ii) where it provides that if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable . . . (emphasis added).

Cross-reference

- 7.7(F), Translated Into Reasonably Usable Form or Ordinarily Maintained

D. Procedure Determining Form(s) of ESI

Rule 34. Producing Documents, Electronically [aussie pokies](#) Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

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(b) Procedure.

(1) Contents of the Request. The request:

* * *

(C) may specify the form or forms in which electronically stored information is to be produced.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form or if no form was specified in the request the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

Multiple Forms of Same ESI

Rule 34(b) provides, [u]nless the parties otherwise agree, or the court otherwise orders . . . (iii) a party need not produce the same electronically stored information in more than one form (emphasis added).

Multiple Forms of Different ESI

The Fed. R. Civ. P. 34, Advisory Committee Note of 2006 provides, [t]he rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

Searchable Feature Degraded

The Fed. R. Civ. P. 34, Advisory Committee Note of 2006 recognizes that: If the responding 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.

Cross-references

- 7.7(H), Procedure Determining Form(s) of ESI

E. Requesting Party Strategy

- Prior to any discussion with the producing party make sure you have knowledge of the most advantageous forms in which to receive production of ESI.
- Identify potentially relevant electronic information and the format in which it might be stored, such as e-mail, graphics files, or word processing files.

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F. Producing Party Strategy

- Prior to any discussion with the requesting party, make sure you have knowledge of the most advantageous forms in which to disclose ESI.
- Argue against production of metadata because of the necessity to review the metadata for privileged data which will make disclosure burdensome.

*** * * G. Checklist**

Do you have a detailed understanding of the different forms available for disclosure under Rule 34?

Is the ESI form to be disclosed searchable?

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