

SECOND LOOK

Organizing ESI Production: What do Federal Rule 34 and State Equivalents Really Mean?[1]

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Forms of permitted production under Rule 34.

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.

Fed. R. Civ. P. 34(b)(2)(E)(i).

We have all read the rule about how document and ESI production must be organized a thousand times. So often that we probably have ceased actually reading it as our eyes jump to another provision. That may be a mistake if a new Northern District of California magistrate judge's decision becomes a leading case.[2] This decision requires labelling of ESI produced in the form or forms ordinarily maintained to indicate custodians or other source/location. This is not a practice that I have observed – and not one that I think should normally be required absent court order or party stipulation.

I read Rule 34(b)(2)(E) to allow for the following production organization options for "documents" and to not include any organization or labelling requirement for ESI:

1. As the parties may stipulate[3];
2. As directed by a judge's order[4];
3. Documents as kept in the ordinary course of business[5]
4. Documents organized and labeled to correspond to the categories in the request.[6]

Rule 34(b)(2)(E)(i) governs the organization and labelling of non-ESI documents. This provision does NOT govern the organization of ESI production. Rule 34(b)(2)(E)(ii) governs the "form or forms" of ESI production, not the organization or labeling of such production. There is no provision in Rule 34(b)(2)(E) governing the organization or labelling of ESI production, just as there is nothing in the rule directing the "form or forms" of non-ESI paper documents.

This makes sense. There is no need to specify a "form" for producing paper. Paper documents will be produced on paper unless the parties stipulate or the court orders otherwise. In practice, assuming no formal agreement or stipulation, if one party's RFP requests production of paper documents in PDF format the producing party's compliance creates a stipulation for production in PDF, at least for the producing party's papers. If the producing party refuses to produce its paper documents in electronic form the court can always make an order. Similarly, I do not think that that specifying the organization or labelling of ESI should ordinarily be required. If the files are in the form or forms specified in an RFP or in the form in which they are "ordinarily maintained" they usually will be searchable or at least include metadata that will provide file properties. Further information if needed can be obtained via interrogatories or depositions if timely requested.[7]

The Venture Corp. Gloss on Rule 34's Organizational Requirements.

Magistrate Judge Grewal read Rule 34(b)(2)(E) to combine the requirements of subdivisions (i) and (ii) so that they each apply both to documents and to ESI.

This prong of *Venture Corp.* ignored the plain language of the rule, which plainly distinguishes between "ESI" and "documents" – treating the organization of paper discovery in subdivision (i) and the form of ESI production in subdivision (ii). Moreover, the distinct and separate treatment of ESI and other documents as I read Rule 35(b)(2)(E) is required by the unambiguous language of the rule and is consistent with the existence of special rules for ESI discovery in Federal Rule of Civil Procedure 26(b)(2)(B) (standards for not producing "not reasonably accessible" ESI or shifting associated costs, without mention of any similar rule of production of paper documents) and 26(f)(3)(C) (pretrial conference can cover ESI discovery issues "including the form or forms in which it should be produced"). Significantly, Rule 26(f)(3)(C) does not call for conferring about the organization or labelling of ESI production, nor the "form" of production of paper documents.

The BTLB entry supports the *Venture Corp.* result on the ground that litigants often need more information about ESI and should not have to search the ESI to get it. I agree with those sentiments, but do not agree that this requires a re-writing of Rule 34 as accomplished, in my view, by *Venture Corp.*

Venture Corp. also adopted requirements that a party producing "documents" (but in context the court clearly included ESI in this term) label the materials with the name of the custodian or otherwise indicate the organization

of the materials as they were ordinarily kept:

"A party selecting the alternative method of production bears the burden of demonstrating that the documents made available were in fact produced consistent with that mandate.... To carry this burden, a party must do more than merely represent to the court and the requesting party that the documents have been produced as they are maintained."[19] At a minimum, the court would expect to see the documents and ESI kept by the name of the employee from whom the documents were obtained or at least which Venture entity had produced the documents.[20] But here, there was nothing in the way of any such source information.

19. *See Pass & Seymour, Inc. v. Hubbell Inc.*, 255 F.R.D. 331, 334 (N.D.N.Y.2008) (*citing Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 540–41 (D.Kan.2006); *Cardenas v. Dorel Juvenile Group, Inc.*, 230 F.R.D. 611, 618 (D.Kan.2005)). *See also Google, Inc. v. American Blind & Wallpaper Factory, Inc.*, Case No. 03–cv–5340, 2006 WL 5349265, at *3 (N.D.Cal. Feb. 8, 2006).

20. *Cf. MGP Ingredients, Inc. v. Mars, Inc.*, Case No. 06–2318–JWL–DJW, 2007 Wl 2010343, at *1 *(D.Kan. Oct. 15, 2007).*[8]

Providing information about how documents and ESI are kept under subsection (i) "[a]t a minimum ... mean[s] that the disclosing party should provide information about each document which ideally would include, in some fashion, the identity of the custodian or person from whom the documents were obtained, an indication of whether they are retained in hard copy or digital format, assurance that the documents have been produced in the order in which they are maintained, and a general description of the filing system from which they were recovered."[25]

25. *Pass & Seymour, Inc.,* 255 F.R.D. at 337.[9]

However, as I stated above, I do not believe that subdivision (i) of Rule 34(b)(2)(E) applies to ESI at all, and that sufficient information about produced ESI is either available in metadata or easily discoverable through interrogatories and depositions. If a party wants to ensure that it will get certain information about the ESI that it received in discovery, that can be achieved by insisting that "ESI" includes metadata identifying the author, source location, and other information about each file, and by carefully specifying the form or forms for ESI production.

Conclusion.

My reservations about *Venture Corp.* are limited to the court's construction of Rule 34 and the imposition of new default obligations on parties to produce ESI. There is no question that under Rule 34(b)(2)(E) a court could impose the additional labelling requirements for ESI that the *Venture Corp.* court holds to be required by the Rule without judicial intervention. I just do not agree that ediscovery requires the additional organizational and labelling mandates for every case absent court order or party stipulation. I also fear that routinely requiring labelling for ESI production could significantly increase the burden and expense of ediscovery with little corresponding benefit.

Notes

1. I wish that I could treat the term document to include electronically stored information ("ESI") for this column, but to make my point I will have to respect the federal rules distinction between the two data types. Federal Rule 34 and the corresponding state discovery rules that I have read continue to distinguish between ESI, as the federal rules call electronic or magnetic data, and other (usually paper) documents. The state rules sometimes have their own definitions for electronic and magnetic data instead of ESI. One cannot assume that the state definitions are always necessarily synonymous with the federal definition of ESI, so we must check before applying federal decisions to state rules on ediscovery. I think the distinction has become counterproductive and just plain silly. I always define "documents" to include "ESI" in my requests for production ("RFP") and hope all practitioners do. Failure to do so, in additional to probably being malpractice except in unusual situations where we seek only paper documents, merely sets up a "gotcha," invites unnecessary pretrial motions, and fails to advance the discovery process. The Committee Notes to the 2006 amendments to Rule 34 explain that the rule uses ESI to capture dynamic data bases is an example of ESI that might not have any precise equivalent in "documents." This concern should be addressed by simply defining "documents" to include ESI. However, to avoid confusion, that definition should be for purposes of what must be produced but not for purposes of the organization or labeling of production. I do not see dynamic data bases as fundamentally different from the contents of a file or filing cabinet of paper documents. The computerized data can be more readily indexed, searched, and queried than papers, but both the electronic database and the paper file set are subject to addition, deletion, and amendment of specific data over time. In response to an RFP they both are subject to production as they exist when the RFP is served – a snapshot of a dynamic data set. I think that obligations to supplement production would apply to paper files and databases in the same way too. However, for purposes of organizing production, Rule 34 imposes differing rules between ESI and paper, a critical point that Magistrate Judge Grewal does not recognize.

2. The decision is Order re: Motion to Compel, Venture Corp. Ltd. v. Barrett, No. 5:13-CV-03384-PSG, ECF No. 44, 2014 WL 5305575, 2014 U.S. Dist. LEXIS 147643 (N.D. Cal. Oct. 16, 2014) (Paul S. Grewal, M.J.) ("*Venture Corp.*"). It was thoughtfully parsed and favorably discussed in the always-worthwhile e-discovery blawg, Bow Tie Law's Blog ("BTLB") (by Joshua Gilliland), on November 26, 2014, in "Rule 34: As Basic As You Get | Bow Tie Law's Blog," https://bowtielaw.wordpress.com/2014/11/26/rule-34-as-basic-as-you-get/ (last visited Nov. 28, 2014). Also on November 26, I posted a link to the BTLB entry on my CityAttorneyTech blawg in post # 22718. *See* "ND Cal:?Rule 34: As Basic As You Get | Bow Tie Law's Blog" City Attorney Tech - Yahoo Groups, https://groups.yahoo.com/neo/groups/CityAttorneyTech/conversations/messages/22718 (last visited Nov. 28, 2014) (free registration & membership approval required).

3. Fed. R. Civ. P. 34(b)(2)(E).

4. *Id.*

5. Fed. R. Civ. P. 34(b)(2)(E)(i).

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42. Fort Meyers Beach Development Code Ch. 34 sec. 622k. http://www.fortmyersbeachfl.gov/DocumentCenter/Home/View/320
43. http://www.azcentral.com/community/gilbert/articles/2010/05/14/20100514gilbert-vacation-homes-0515.html
44. http://www.kdrv.com/short-term-rentals-against-city-code/
45. http://austintexas.gov/str
46. http://www.statesman.com/news/news/local/as-austin-short-term-rental-rules-take-effect-hund/nSZbj
47. http://austintexas.gov/sites/default/files/files/Code_Compliance/STRs/S ML

Day in the Life *Cont'd from page 20*

the mayor's office, and even a state senator. Because of the community's demands for immediate action, several governmental entities felt compelled to join an already complicated situation.

On Sept. 5, the final show cause hearing for the tenant's eviction was held. The tenant failed to appear at the hearing, the order was issued, and the King County Sheriff posted notice the following day. Over the next week, I visited the home with officers and the home owner, verified that the tenants had not yet vacated, and developed a timeline with the sheriff's detective assigned to execute the eviction. Additionally, I was the point person to keep the increasing number of governmental agencies up to date on our progress and plans.

As eviction day grew closer it became evident that simply kicking the tenants out would not solve all the problems. Their mess still had to be cleaned up and it was clear that the tenants weren't going to do it. One of our office's land use attorneys, Tamera Van Ness, pushed DPD to issue a citation and expedite the abatement process. Once the citation was posted, the owner consented to a voluntary abatement. This cleared the City to have the property cleared immediately after the eviction.

In the weeks leading up to the eviction I worked closely with SPD to make sure all the pieces were in place. I maintained contact with the sheriff's office to make sure all parties would be present as required. The owner, with neighborhood cooperation, secured a contractor to board up the doors and windows of the home. The owner and neighborhood volunteers would clear out any "valuables" left behind by the tenant. CPT conferenced with the Conservation Corps to confirm they had the necessary tools, namely a large dumpster, standing by to clear the garbage off the property.

Finally, the day had arrived. On Sept. 18, we all headed out to the property for the 10 a.m. eviction. When we arrived, the Conservation Corps was ready to go with a large dumpster and a back hoe! This was important because as we quickly realized using a hand shovel to clear the garbage would have taken days. All we needed was the sheriff and the owner, who both arrived on schedule. The eviction went smoothly and the tenants left peacefully, despite the media's attempts at encouraging confrontation. Once the tenants had left, the cleanup frenzy began and, by 3:00 p.m., the place was unrecognizable. Almost everything proceeded according to plan. The only issue remaining was a need for a second dumpster that we were told we just couldn't have; that was easily remedied with calls from the North Precinct operations lieutenant and an assistant city attorney doing his best to sound intimidating. Overall, the day went smoothly, and the biggest reward was the neighbors' gratitude that the tenants were gone and the property was clean.

Since the property is still in the process of being listed as a short sale and technically abandoned, I worked with the owner to draft and sign a trespass agreement. That gives SPD authority similar to that in the retail trespass program (http://www.seattle.gov/law/precinct_liaisons/seattletrespass.htm). Between the neighbors' vigilance and SPD's ability to enforce trespassing with the owner's permission, the home should remain secure until it is sold and demolished. ML

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6. *Id.*
7. Although the magistrate judge makes light of this fact, the requesting party in *Venture Corp*. waited until shortly before the end of discovery to seek clarification about the produced ESI and documents, and may therefore have improperly sought to extend discovery. *See* 2014 WL 5305575 *2.
8. 2014 WL 5305575 *2.
9. 2014 WL 5305575 *3.

Code Enforcement *Cont'd from page 19*

ordinance. One of the orders the city may seek is closure of the building for a period of not less than 30 days. With the possibility of a closure order being put in place where the landlord would potentially lose rental income, we anticipate that landlords will be far more likely to address the problems at their property once they receive a notice from the city. In fact, we have used this tactic with successful results.

One peripheral issue that has arisen with respect to nuisance ordinances of this nature was framed in an e-mail from IMLA Executive Director Chuck Thompson. His note related that the ACLU is challenging these types of ordinances on the basis that they can have a negative impact on victims of crime. An example they cite is a woman who was being evicted from her residence—because the property had been found to violate nuisance ordinances due to her repeated calls to law enforcement about domestic violence against her, taking place in her rental. In essence, her complaining about intolerable (and likely criminal) actions occurring against her in her own apartment caused the property to be classed as a nuisance and taken off the rental rolls.

These are challenging problems. Like many issues in municipal law, there are valid concerns to be considered on both (or many) sides of the argument. I believe that nuisance ordinances can be drafted to accommodate the concerns raised by the ACLU. (I would encourage those of us who use these types of ordinances to send a copy to IMLA, along with any comments on your experience with the provision; as IMLA seeks to work with the ACLU on this issue, I am certain that any additional information would be useful).

To sum up, one element of a successful college town – whether home to a major university or a smaller community college—is adequate student housing. When a younger, transient student population lives within established, stable neighborhoods, conflicts are sure to arise. I am confident most of these issues can be resolved via some of the ideas I have referenced above, including carefully crafted housing ordinances. ML