eDiscovery Legal Hold Working Group

IMLA
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Pete Haskel
214-670-3038
peter.haskel@dallascityhall.com

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Agenda

- Organization of ESI Production
- Proportionality
- Forms
- Suggestions/topics from attendees

Organization of ESI Production Fed. R. Civ. P. 34(b)(2)(E)

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) (emphases added)

Organization of ESI Production; Definition of "Documents" for purposes of production (Fed. R. Civ. P. 34(a)(1)(A))

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents ***or*** electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; . . .

Fed. R. Civ. P. 34(a)(1)(A) (emphasis added)

How to Produce ESI?

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.):

Parties must label (capture metadata from) produced ESI to indicate custodians or other source/location.

1. No question that a court can require this or that parties can agree to include this metadata in ESI production.
2. *Venture Corp.* court held that this was required by R. 34(b)(2)(E)(i) – apply organization of produced "documents" (as ordinarily organized) to production of ESI
3. *I don't think this is required absent court order or agreement.*
4. *But retaining such metadata absolutely best practice.*

Analysis of *Venture Corp.* – Further Reading

1. 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.*") 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).
2. Also on November 26, 2014, 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. My thoughts previously featured in **Municipal Lawyer Magazine** (Second Looks column)

Searchable Metadata for ESI Substitutes for Document Organization

- RFP re ESI: include metadata showing author, recipients, date, native format, (Bates #s if used or can be required)
- Agreed discovery order or Rule 11 Agreement: Include this metadata
- Tailor metadata production scope to what you really need or specify native format
- Avoid requiring labeling (adding metadata) to ESI (added work & expense)

Proportionality Now in Discovery Scope Amendments to Fed. R. Civ. P. 26(b)(1)

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.** ~~—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

Proportionality no Longer in Undue Burden Amendment to Fed. R. Civ. P. 26(b)(2)(C)(iii)

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *

(b) Discovery Scope and Limits. * * *

(2) *Limitations on Frequency and Extent*. * * *

(B) *Specific Limitations on Electronically Stored Information*. [SEE NEXT SLIDE for "not reasonably accessible"] * * *

(C) *When Required*. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the ~~burden or expense of~~ **proposed discovery** **is outside the scope permitted by Rule 26(b)(1)**.~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

Proportionality

Fed. R. Civ. P. 26. **Duty to Disclose; General Provisions Governing Discovery** * * *

(b) Discovery Scope and Limits. * * *

(2) *Limitations on Frequency and Extent*

(B) *Specific Limitations on Electronically Stored Information*. A party need not provide discovery of electronically stored information from sources that the party identifies as **not reasonably accessible** because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

PROPORTIONALITY TAKE-AWAY

- Proportionality now clearly a basis for objection grounded on scope of discovery, not just undue burden standard

- Party resisting discovery can still identify “not reasonably accessible” ESI & try to prevent production or at least get cost-shifting

BUT LOCAL GOVERNMENTS MAY BE AT DISADVANTAGE IN LITIGATING PROPORTIONALITY AND UNDUE BURDEN

- STATE LAW DUTY TO PRESERVE ESI
- STATE LAW DUTY PROMPTLY TO RESPOND TO OPEN RECORDS REQUESTS (WHICH SOMETIMES COMPEL ABILITY TO ACCESS BACKUPS & SUBSTANTIVELY NON-UNIQUE ESI (different metadata makes different record)
- Preexisting duties could impose higher threshold for establishing disproportionality or undue burden (but courts haven't yet grocked?)

Forms

1. Legal hold demand to potential or actual adversary
2. Response to legal hold demand from adversary
3. Internal legal hold memo to clients
4. Internal legal hold memo/policies to IT Dept
5. Follow up legal hold memo(s) to clients
6. Meet & confer preparation checklist
7. Meet & confer disclosures
8. ESI Interrogatories (where permitted)
9. Agreed order provisions on ESI discovery
10. Objections/Brief to requests for production (ESI)
11. Motion/Brief to compel production and responses to objections to production of ESI
12. Internal memo to clients ending legal hold
13. Letter demanding termination of demand from adversary to preserve documents
14. Others?

Online Discussion Groups

- IMLA eDiscovery/Legal Hold Working Group ListServ:

  To Join: email Chuck Thompson (cthompson@imla.org) or Jennifer Ruhe (jruhe@imla.org) expressing interest.

- CityAttorneyTech Discussion Group: https://groups.yahoo.com/neo/groups/CityAttorneyTech/info

  To Join: Email to cityattorneytech-subscribe@yahoogroups.com from address you want to use for the group