Arkfeld on Electronic Discovery and Evidence

Third Edition

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Lawparener
PUBLISHING, LLC

mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

§ 7.6(B) Purpose

Interrogatories are written questions regarding any matter, not privileged, addressed and served on other parties to a lawsuit. Interrogatories, along with depositions and requests for production of documents, are standard discovery tools.

Under Rule 33(d), a party responding to an interrogatory may, under the conditions specified in the rule, answer the interrogatory by specifying the records from which the answer may be obtained and by making the records available for inspection.

In responding to interrogatories, a party must either answer the interrogatory or object with specificity to the request. FED. R. CIV. P. 33(b)(3)-(4). If the party does not properly object to the interrogatory, the objection is waived unless the Court decides to excuse the failure. FED. R. CIV. P. 33(b)(4).

Failure to answer properly interrogatories may subject a party to sanctions under Rule 37. *Marroquin-Manrizuez v. I.N.S.,* 699 F.2d 129, 134 (3d Cir. 1983) (Court's ruling will be reviewed under an abuse of discretion standard); *Susquehanna Commer. Fin., Inc. v. Vascular Res., Inc.,* 2010 U.S. Dist. LEXIS 127125 (M.D. Pa. Dec. 1, 2010).

Interrogatories can be served early in the lawsuit, and thereby provide a party with initial information about the claims or defenses in the case. Interrogatories are also well suited to identify witnesses (especially computer personnel) known to have knowledge about the case. This would include the names and addresses of computer personnel, computer job duties, employment dates, and other information.

Interrogatories that "ask another party to indicate what it contends, to state all the facts on which it bases its contentions, to state all the evidence on which it bases its contentions, or to explain how the law applies to the facts often are referred to as 'contention interrogatories.' ... They are distinct from interrogatories that request identification of witnesses or documents that bear on the allegations." *Susquehanna Commer. Fin., Inc. v. Vascular Res., Inc.,* 2010 U.S. Dist. LEXIS 127125, 29-33 (M.D. Pa. Dec. 1, 2010) (party serving contention interrogatories early in discovery must justify their use); *Hypertherm, Inc. v. Am. Torch Tip Co.,* No. 05-373, 2008 U.S. Dist. LEXIS 108269 (D.N.H. Dec. 29, 2008) ("contention" interrogatories were required to be answered).

Today, most business records are in an electronic format and answer to interrogatories can be derived from these records. *United States ex rel. Fago v. M & T Mortg. Corp.,* 235 F.R.D. 11 (D.D.C. 2006) (Court ruled that answer to the interrogatory could be derived from electronically stored records and should be produced from this data); *Parrick v. FedEx Grounds Package Sys.,*

2010 U.S. Dist. LEXIS 72814, 4-6 (D. Mont. July 19, 2010) (Count found answers to interrogatories could be accessed from company's public web site).

In electronic discovery cases, propounding interrogatories may assist in later framing specific requests for Rule 34 production of document requests as well as Rule 30(b)(6) depositions. If framed properly in a specific, straightforward manner valuable information can be obtained regarding sources of electronic information, document retention policies, and identification of key IT personnel such as network administrators. *Simon Property Group LP v. mySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000) (Court required the defendant to answer an interrogatory to identify each office and home computer, computer server, and electronic recording device used by corporate employees).

One alternative to obtaining computer discovery information, other than by interrogatories, is by conducting a Rule 30(b)(6) deposition. Unlike interrogatories, depositions allow you to ask detailed questions and then follow-up on initial answers that may be evasive or not responsive. Also, since some computer terminology is susceptible to more than one meaning, the deposition would allow you to clarify the opposing party's answers.

For a list of information technology questions that can be used for a pretrial conference, interrogatories, etc. see the document entitled *Information Technology Discovery Questions* included in the EDE *Appendix — Checklists, Forms and Guidelines* on the CD-ROM that accompanied the *Electronic Discovery and Evidence* treatise.

Initial disclosures

The initial disclosure requirements of FED. R. CIV. P. 26(a)(1)(A) do away with the need for many standard interrogatories. *Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 504(D. Kan. 2006). Under Rule 26(a)(1)(A)(i), initial disclosures, a party is required to disclose the name, address, and telephone number of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Such a disclosure should contain the identification of a party's management information systems (MIS) managers as persons with discoverable information.

There is a limit on the number of interrogatories that can be propounded, so it is important that the initial disclosure be in compliance so that you do not have to use interrogatories to obtain the information. *Superior Communs. v. Earhugger, Inc.*, 257 F.R.D. 215, 218 (C.D. Cal. 2009) (subparts directed at eliciting details concerning a "common theme" should generally be considered a single question); *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 373-374 (S.D.N.Y. 2006) (questionnaire appended to a proposed e-discovery stipulation would be treated as interrogatories and allowed in the interest of justice since the plaintiff had already exceeded the twenty-five permitted).

Making available business records

Amended Rule 33(d) permits parties to answer interrogatories by making available for inspection and copying business records, including "compilations," where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." *Jackson v. City of San Antonio*, No. 03-0049, 2006 U.S. Dist. LEXIS 8091 (W.D. Tex., Jan. 31, 2006) (Court ruled "burden of culling out the requested information [from business records] is no greater for plaintiffs than it would be for defendants" and was not a "data dump"); *McCaffrey v. Long Island R.R. Co.*, 2010 U.S. Dist. LEXIS 116963, at *21-22 (S.D.N.Y. Nov. 1, 2010) (Court found access to online business records satisfied Rule 33); *San Francisco Bay Area Transit Dist. v. Spencer*, No. 04-04632, 2007 U.S. Dist. LEXIS 11693 (D. Cal. Feb. 5, 2007); *Ak-Chin Indian Cmty. v. United States*, 2009 U.S. Claims LEXIS 7, at *8-9 (Fed. Cl. Jan. 14, 2009) (responding party had not met the requirement that the burden of disclosure would be substantially the same for either party); *Covad Communs. Co. v. Revonet, Inc.*, 258 F.R.D. 17 (D.D.C. 2009)(sanctions issued for refusing to specify responsive documents to interrogatories).

Rule 33(d) has always allowed a party to answer an interrogatory by specifying business records where the answer is located. The amendment to Rule 33(d) now allows a party to point to ESI to answer the interrogatory. In *L.H. v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 73752, at *11-13 (D. Cal. 2007) the Court criticized and imposed fees and cost on a state government agency for failing to properly respond to interrogatories. The Court noted that the State may respond by referencing ESI records. However, the Court stated that the reference must be:

> [S]pecific and designed to provide the information requested. . . . not to avoid answering them. To answer an interrogatory, a responding party has the duty to specify, by category and location, the records from which answers to interrogatories can be derived.(citation omitted) The responding party may not avoid answers by imposing on the interrogating party a mass of business records from which the answers cannot be ascertained by a person unfamiliar with them. . . . The records must be offered 'in a manner that permits the same direct and economical access that is available to the [responding] party.' If compilations and summaries exist, these should be made available. . . . A responding party's familiarity with the method of record retention and organization may facilitate review of records based on this knowledge that is unavailable to the opposing party. . . . The response referring to business records must at a minimum provide the category and location of records which will provide the answers, and if the records are voluminous, the response must include an index guiding the party to the responsive

> documents. . . . . If the party cannot identify which specific documents contain the answer to the interrogatories, they must completely answer the interrogatories without referring to the documents.

See also, Graske v. Auto-Owners Ins. Co., 647 F. Supp. 2d 1105, 1108 (D. Neb. 2009) (Court ordered party to identify location on CD-ROM of each responsive document; word searching capability is not adequate); *Bayview Loan Servicing, LLC v. Boland,* 259 F.R.D. 516, 519 (D. Colo. 2009) (Court found disclosure of CD's that contained the indexed business records of the producing party insufficient and required additional detail to permit the requesting party to locate and identify relevant documents).

Sufficient Detail and Format

Answers to interrogatories must contain sufficient detail or otherwise the Courts will order further responses. *Systemic Formulas, Inc. v. Kim,* No. 07-159, 2009 U.S. Dist. LEXIS 43632 (D. Utah May 20, 2009) (responses regarding ESI, were not identified with sufficient detail to enable plaintiff to locate the relevant information); *Sonnino v. Univ. of Kansas Hosp. Auth.,* 220 F.R.D. 633, 655 (D.Kan. 2004) (Court ordered complete and full response to interrogatory seeking information about computer and e mail systems since the defendant's "very brief and general response" was insufficient); *Berster Techs., LLC v. Christmas, 2011* U.S. Dist. LEXIS 114499 (E.D. Cal. Oct. 3, 2011)(Court rejected a party's interrogatory objections to a party's "'dumping' [of] 14,000 electronic files without labeling the files, thus rendering it difficult for plaintiff to locate answers to its discovery requests. . . . [since they were] easily searchable").

Timeliness

Failure to respond properly and in a timely manner to an interrogatory regarding ESI may subject the responding party to sanctions. *Moore v. Napolitano,* No. 00-953, 2009 U.S. Dist. LEXIS 69319 (D.D.C. Aug. 7, 2009) (government precluded from using documents not timely produced in response to interrogatories); *Oklahoma v. Tyson Foods, Inc.,* No. 05-329, 2009 U.S. Dist. LEXIS 106380 (N.D. Okla. Nov. 4, 2009)(failure of counsel to disclose the existence of protected work product in response to interrogatory resulted in sanctions); *Zaremba v. Fed. Ins. Co. (In re Cont'l Capital Inv. Servs.),* 2011 Bankr. LEXIS 3853 (Bankr. N.D. Ohio Sept. 30, 2011)(waiver of objections granted for failure to timely respond); *Mancia v. Mayflower Textile Servs. Co.,* 253 F.R.D. 354 (D. Md. 2008) (conduct may be sanctionable under FED. R. CIV. P. 26(g)); *Argus & Assocs. v. Prof'l Benefits Servs.,* No. 08-10531, 2009 U.S. Dist. LEXIS 39437 (E.D. Mich. May 8, 2009) (party could not use its reliance on its expert's delayed evaluation of ESI as an excuse for its failure to comply with a court order to answer interrogatories).

§ 7.6(C) Reported Cases

- *ReedHycalog UK, Ltd. v. United Diamond Drilling Servs.*, No. 07-251, 2008 U.S. Dist. LEXIS 93177, at *8-9 (E.D. Tex. Oct. 3, 2008). The Court found that both sides were engaging in an electronic "data dump" in responding to interrogatories and stated "a producing party may not bury those relevant documents in the hope that opposing counsel will overlook the proverbial 'smoking gun' as he wades through an ocean of production. . . . [both parties] production practices amount to a data dump with an instruction to 'go fish.' . . . That this fishing is done electronically is of no consequence."
- *Powerhouse Marks, L.L.C. v. Chi Hsin Impex, Inc.*, No. 04-73923, 2006 U.S. Dist. LEXIS 2767, at *9-11 (E. D. Mich. Jan. 12, 2006), *vacated on other grounds*, 2006 U.S. LEXIS 16457 (E.D. Mich. Apr. 5, 2006). In response to interrogatories, the defendant was ordered "to compute and provide in summary fashion [database information of] annual sales figures and expenditures for specific products."
- *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 832 (8th Cir. 1977). The Court refused to require party to respond to interrogatories seeking information in computer-readable form since the data existed in "500 to 2,000 different file and report formats," and the data had already been produced in other previous discovery.
- *Greyhound Computer Corp., Inc. v. IBM*, 3 Comp. L. Serv. Rep. 138 (D. Minn. 1971). *Greyhound* sent interrogatories to *IBM* and in response received a recitation of source materials and locations where the information could be found. After *Greyhound's* counsel found rooms full of thousands of documents, the Court ordered that where information was on computer tapes it should be produced. Also, the defendant was to provide someone familiar with the material and assist the plaintiff's counsel and to furnish printouts of any taped information. *See also, International Asso. of Machinists v. United Aircraft Corp.*, 220 F. Supp. 19 (D. Conn. 1963), *aff'd on other grounds*, 337 F.2d 5 (2d Cir. 1964).

§ 7.7 REQUEST TO PRODUCE AND INSPECT

§ 7.7(A) FED. R. CIV. P. 34

FED. R. CIV. P. 34(a) states:

> Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(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; or

(B) any *designated* tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

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

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(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 (emphasis added).

(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 (emphasis added):

(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 (emphasis added).

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

FED. R. CIV. P. 34, Advisory Committee Note of 2006

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34

applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as email. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See*, *In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34(a)(1) is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

Subdivision (b). Rule 34(b) provides 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 discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production

may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, email messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form it which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. 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.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37(f) applies only to information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation [or legal] hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the

responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

§ 7.7(A)(1) Purpose

FED. R. CIV. P. 34 provides a discovery tool for a party "to inspect, copy, test, or sample" documents and ESI that are subject to the control of the opposing party. Rule 34 fundamentally has changed production nomenclature by introducing "electronically stored information" (ESI) into discovery. The text of Rule 34 permits the discovery of any "ESI," "documents," "data," "images," and "data compilations" from which information can be obtained, translated, if necessary, by the respondent . . . stored in any medium . . . into reasonably useful form."

The FED. R. CIV. P. 34, Advisory Committee Note of 2006 recognized that:

ESI should be viewed in the context of systems that create and store this information;

Rule 34 applies to information that is "fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined;"

"Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both;" and

"Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them."

A Rule 34 discovery request may not be served until after the time specified in Rule 26(b) unless discovery is expedited by the court pursuant to Rule 26(d) or the parties enter into a written stipulation. *See* EDE § 7.4(J), *Expedited Discovery and Supplementation — Rule 26(d) and (e).*

A late request for ESI may preclude its production. *Wild v. Alster,* 377 F. Supp. 2d 186, 195 (D.D.C. 2005); *Jones v. Goord,* No. 95-8026, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 16, 2002). In addition, failure to timely object to a request for ESI may result in waiver of objections and privileged content. *Zaremba v. Fed. Ins. Co. (In re Cont'l Capital Inv. Servs.),* 2011 Bankr. LEXIS 3853 (Bankr. N.D. Ohio Sept. 30, 2011).

The party that is served with a request to produce electronic data may object based on relevancy, overbroad, burdensome, etc. *Soto v. Castlerock Farming & Transp., Inc.*, 2012 U.S. Dist. LEXIS 60248 (E.D. Cal. Apr. 30, 2012)(general overview of the request to produce process for electronic data); *Novelty, Inc. v. Mt. View Mktg.,* 265 F.R.D. 370 (S.D. Ind. 2009) (obligations when responding to a request for production of documents); *See* EDE § 7.4(F),

Scope of Discovery — Rule 26(b)(1), EDE § 7.4(F)(3), *Relevancy and Overbroad Concerns,* EDE § 7.4(G)(2), *Burdensome — Rule 26(b)(2)(C)* and EDE § 7.4(G), *Limiting Discovery — Rule 26(b)(2).* If discovery is contested, then the party needs to "meet and confer, and then if unsuccessful, file a motion to compel pursuant to Rule 37." *See, e.g., GFI Computer Indus., Inc. v. Fry,* 476 F.2d 1, 3 (5th Cir. 1973); § 7.9(B), *Sanctions — Fed. R. Civ. P. 37.*

In addition to Rule 34, there are several other ways to obtain ESI in a case. Initial disclosures of ESI should be forthcoming under Rule 26. *See* EDE § 7.4(C), *Initial Disclosure of ESI — Rule 26(a)(1)(A)(ii).* Rule 33(d) requires answers to ESI interrogatories. *See* EDE § 7.6, *Interrogatories to Party.* Individuals noticed for a deposition can be required to produce data by a subpoena duces tecum. *See* EDE § 7.5, *Depositions.* Finally, third parties can be compelled to disclose data pursuant to Rule 45. *See* EDE § 7.10, *Obtaining ESI From Third Parties*; *Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc.,* 2011 U.S. Dist. LEXIS 16022 (E.D. Mich. Feb. 17, 2011)(Court construed party's requests for a "data map, document retention policies, tracking records and/or requests for restores, and backup policies" as informal discovery requests and responding party did not have to comply); *Arista Records LLC v. Lime Group LLC,* 2011 U.S. Dist. LEXIS 20709 (S.D.N.Y. Mar. 1, 2011)(licensing documents located with nonparty social networking providers must be obtained from party, unless discrepancy can be shown).

The Committee Note recognized the broad application of ESI to discovery tools. It provides, "[r]eferences elsewhere in the rules to 'electronically stored information' should be understood to invoke this expansive approach . . . More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1)."

Depending on the request, in your Rule 34 response and/or objections you may want to consider setting forth what steps have been taken to produce responsive electronic data and documents. This may deter a motion to compel if a production protocol is provided along with the disclosure of the documents. *See* EDE § 7.7(I)(4), *Certification of Search Methodology.*

§ 7.7(B) "Document" and "Electronically Stored Information (ESI)"

§ 7.7(B)(1) In General

The basic building block of federal civil discovery, as far as discovery is concerned, is the "document" and, now, "electronically stored information (ESI)." In order to make initial disclosures under FED. R. CIV. P. 26, to answer an interrogatory under Rule 33 or to respond to requests for production under Rule 34 or Rule 45, you must understand what constitutes a "document" and "ESI."

Rule 34(a) defines "documents" and "electronically stored information" as "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." *See* EDE Chapter 2, *Creation and Storage of Electronic Information* and EDE Chapter 3, *Structure and Type of Electronic Information.*

The Advisory Committee Note clarifies the concept of ESI and explains that:

> Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents. . . . The items listed in Rule 34(a) show different ways in which information may be recorded or stored. . . . The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. . . . Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

O'Bar v. Lowe's Home Ctrs., Inc., No. 04-00019, 2007 U.S. Dist. LEXIS 32497, at *23 n.5 (D.N.C. May 2, 2007)("A 'dynamic system' is a system that remains in use during the pendency of the litigation and in which ESI changes on a routine and regular basis, including the automatic deletion or overwriting of such ESI.").

Even prior to the passage of the 2006 amendments, the Courts held that the definition of "documents" under Rule 34 includes "paper" and all types of computer data, as well as "deleted" data. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) ("today it is blackletter law that computerized data is discoverable if relevant"); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985); *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003); FTC v. MaxTheater, Inc., No. 05-0069, 2005 U.S. LEXIS 33581, at *4, 7-8 (E.D.Wash. Mar. 31, 2005) (Court ordered preservation of instant messages);

MOSAID Technologies Inc. v. Samsung Electronics Co., Ltd., 348 F. Supp. 2d 332, 336-337 (D.N.J. 2004) (term "e-mail" implied when party asked for correspondence and other communications); *Kleiner v. Burns,* No. 00-2160, 2000 U.S. Dist. LEXIS 21850, at *11-12 (D. Kan. Dec. 22, 2000).

In *Kleiner,* the Court stated that the term "documents" included: "computerized data and other electronically-recorded information" [which] will include but not be limited to 'voice mail messages and files, backup voice mail files, e mail messages and files, backup e mail files, deleted e mail, data files, program files, backup and archival tapes, temporary files, system history files, web site information stored in textual, graphical or audio format, web site log files, cache files, cookies and other electronically recorded information.'" The Court did not intend for the list to be exhaustive.

This has been reaffirmed in the Committee Note where it states that "a Rule 34 request for production of 'documents' should be understood to encompass, and the response should include, electronically stored information."

However, though a party is entitled to discover "compilations, it does not require the producing party to create "compilations and summaries" to respond to a discovery request. *Flying J, Inc. v. Pilot Travel Ctrs. LLC,* No. 06-00030, 2009 U.S. Dist. LEXIS 55283, at *9 (D. Utah June 25, 2009); *Seed Research Equip. Solutions, LLC v. Gary W. Clem, Inc.,* 2011 U.S. Dist. LEXIS 99087 (D. Kan. Sept. 1, 2011)(party not required to create and compile data reports, but underlying ESI is discoverable).

Originals and Drafts

The concept of an "original" document in the electronic context is becoming more difficult to determine as the capability to change or convert a document increases. *Bull v. UPS,* 665 F.3d 68 (3d Cir. N.J. 2012). For example, if a word processing document is converted from a Word to a PDF document and then is subsequently edited while in the PDF version, which is the "original?"

The Courts generally hold that "drafts" of documents do not need to be retained. *McGuire v. Acufex Microsurgical, Inc.,* 175 F.R.D. 149, 155-156 (D. Mass. 1997). In *McGuire,* the Court ruled that not all prior drafts of a "document" had to be retained for preservation purposes in a claim for sexual harassment. One of the defendant's supervisors [not the harasser] had deleted a portion of a draft of an internal memorandum prior to including it in the plaintiff's personnel file because the human resources' staff had decided that the paragraph in question was "inappropriate." The court held that employers can edit drafts of memos in the sexual harassment context when those edits concern "obvious errors made by someone other than the accused harasser." The court explained that "to hold otherwise would be to create a new set of affirmative obligations for employers, unheard of in the law — to preserve all