WHITE PAPER

NEGOTIATING THE FORM OF PRODUCTION FOR ESI

DigitalWarRoom

INTRODUCTION

Most people think an exchange protocol is simply a load file that is automatically included with documents that you produce or receive but the term really means much more than that. First and foremost, it is the required result of a required process.

FRCP 26(a)(1) requires initial disclosures and FRCP 26(f) dictates a "conference of the parties" (also known as the "meet and confer") to discuss, among other things, including a requested format for production of documents. Opposing counsel can propose their own format for delivery and that's where the ESI protocol comes in – it is designed to formalize the way in which the parties eventually agree to exchange their documents.

Second, it's a way to resolve disputes before they happen, especially disputes re: proportionality. And given that there were 889 case law decisions involving proportionality disputes in 2020, which is even more than sanctions disputes, exchange protocols are an important tool.

Dorothea Brande, the respected New York writer and editor, once said of writing projects that "A problem clearly stated is a problem half solved." Doug Austin of EDIscovery today couched it in more compelling terms stated that the exchange protocol is " ... literally your "blueprint" for discovery."

1 THE RULES

Relevant rules from the FRCP include:

FRCP 26(a)(1) - Initial disclosure forms are required (even without pending discovery requests):

1. the names and contact information of any party who may have knowledge of or access to discoverable information, or evidence that could support or contradict the fundamental claims of a case;

2. a catalog of all electronic documents and data that will be used to make our case;

3. a complete breakdown of all damages sought by disclosing parties, including how those figures were determined; and

4. disclosure of any expert testimony.

FRCP 26(a)(f) – The meet and confer

1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

FRCP Rule 34 (a) (1) states a party request any other party to produce items "within it possession, custody, or control"

FRCP Rule 34 (a) (1) (A) states this includes 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

FRCP Rule 34 (b) details the procedure for such requests as follows:

(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.

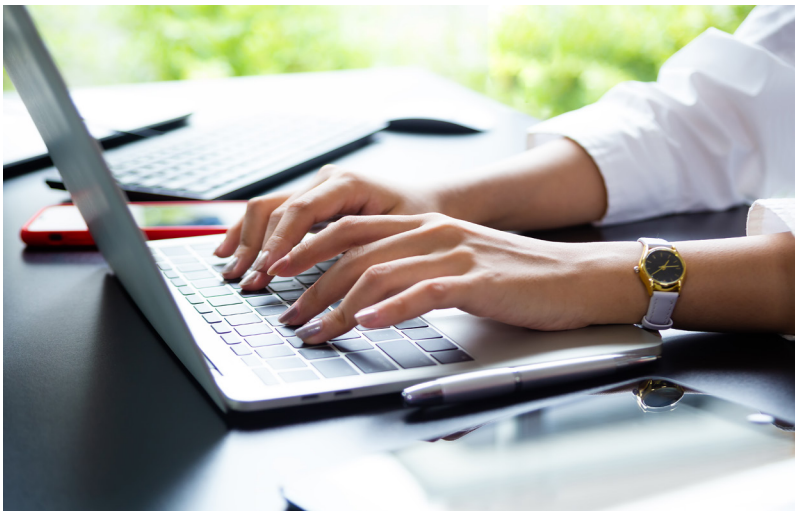
FRCP Rule 34 (b) (2) (D) deals with Responses and Objections and states:

(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



2 INITIAL DISCLOSURES

FRCP 26 (a) (1) Required Disclosures; Methods to Discover

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the 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, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures if any are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

In addition, it should be noted that FRCP 26 (g) (1) holds that:

"Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. ***The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made."***

My emphasis added.

3 FORMS OF PRODUCTION

ESI is fundamentally different from paper information in that it is dynamic, created and stored in different forms, and has a substantial amount of metadata and other nonvisible data associated with it. Metadata, which is often embedded in a file and may reflect modifications to the document, such as prior edits or comments, may be critical or completely irrelevant, depending on the facts and circumstances of any particular case.

The four forms in which ESI may be produced are:

1. Native
2. Near-native (files that need to be converted to a different file type for production purpose)
3. Image (PDF or TIFF, also known as "near-paper")
4. Paper.

Federal Rule of Civil Procedure 34 (b) require that the request must specify with reasonable particularity each item or category of new items to be inspected and encourages requesting parties to specify the form in which production is to be made. The 2006 advisory committee notes recognize that different forms of production may be appropriate for different types of ESI. (CF, Appendix A)

The rule also provides for production in a form in which the information is ordinarily maintained — its native format — or in a "reasonably usable form." The rule does not define "reasonably usable," however, leading to disputes regarding the proper production format.

Since native format is not the default form of production, the responding party may object to it if they feel producing in native format would be unduly burdensome and unfair to do so.

Many if not most eDiscovery companies have their roots in the early days of Windows based imaging systems and have thus settled on a common standard form of production that uses PDF documents or TIFF, images, accompanied by selected metadata in load files which relate the metadata to the correct images thru a software program.

This format may enable the recipient to search and review the documents on their chosen review platform but it is not ESI in it's native format with all the original metadata directly attached.

If no agreement is reached, the parties must include the exchange format in the agenda for the 26(f) conference and attempt to work out their differences before seeking court intervention. The Committee Notes make clear that the rules do not require a party to produce ESI in the form in which it is ordinarily maintained as long as it is produced in a reasonably usable form. If a party maintains information in a searchable form, it should not produce that information in a form that degrades that feature. What does that mean?

Subdivison (b) of the Notes to the 2006 Amendments states that " ... 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." (CF Appendix A)

And it is clear that any objection to the requested format must be specifically stated. In Morgan Hill Concerned Parents Ass'n v. Cal. Dep't of Educ., No. 2:11-cv-03471 (E.D. Cal. Feb. 1, 2017), Plaintiffs served CDE with a request for production which included the instruction that any ESI be produced "in [its] native electronic format together with all metadata and other information associated with each document in its native electronic format."

CDE ignored that request and without objecting produced its ESI in "load file" format.

The Court found that no party can ignore a specific request and produce in some other format so long as the production is in a "'usable form, e.g., electronically searchable and paired with essential metadata.'", finding that this argument is "... directly contrary to the text of the discovery rules. The Court went on to note that comment 12(b) of the Sedona Conference The Sedona Principles: (Second Edition) Best Practices Recommendations & Principles for Addressing Electronic Document Production says states that load files are "[i]n an effort to replicate the usefulness of native files while retaining the advantages of static productions..." but are not considered any sort of a preferred standard.

So absent any agreed protocol the parties must take their discussion to the Rule 26 (f) conference.

4 MEET AND CONFER

1. Rule 26 (f), Meeting of Parties; Planning for Discovery

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), and to develop a proposed discovery plan that indicates the parties; views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be cmpleted, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

2. Contents of an ESI Protocol

Although there are no established best practices for ediscovery protocols, the obvious first question is, "do I need one?' EDiscovery attorney Kelly Twigger says in her five part series on protocols that they are essential (https://www.ediscoveryassistant.com/blog/).

Digital WarRoom views a good protocol as the "blueprint" for eDiscovery

Recommendations for working with protocols:

- Start with a Template
- Customize the Protocol to Your Case
- Get An Expert

But since ESI protocols will vary depending upon case type, number of documents, variety of document types and case deadlines the result is that an exchange protocol can vary from matter to matter.

To meet the recommendations above, we recommend your protocol should include the following components:

- Definitions
- Ongoing Collection Standards
- Preservation Standards
- Naming of Data Sources
- Handling of Non-Common Data Types
- Handling of Privilege Documents
- Redaction Methodology
- Search Term Agreements
- Manner of Production (delivery including rolling productions)
- Form(s) of Production (actual data exchange)
- Naming of Liaison(s)

Forms of production is often the most detailed (and contentious) section of the ESI protocol, addressing everything from handling paper vs. electronic documents, production of electronic documents in image vs. native format and the list of metadata fields to be produced. There can even be variations for handling certain types of documents differently, from items as complex as HR databases in an SQL format to those as simple, but prolific, as Excel spreadsheets.

We will touch on this issue more in Section III below.

3. Discovery Plan

As noted above, FRCP 26(a)(f) (3) requires a Discovery Plan that MUST (my emphasis added) state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

In the heat of negotiations, the discovery plan is often overlooked by the parties. But it is the key "takeaway" document from the 26(f) conference designed to present the court with a comprehensive plan that will cover the identification, preservation and production of electronic evidence.

Alternatively, it can provide the court with an overview of where there are gaps in the discovery process. Finally, a good strategy is to be prepared to present the court with a draft ESI that affords the court an opportunity to direct the steps of the process itself.

5 EXAMPLES OF PRODUCTION FORMATS

Digital WarRoom software with no customizations or extra work on your part can produce sets of standard load files for use by common and current ediscovery platforms and more than fulfill your obligations in reasonable production. Vendors often refer to OPT files as 'opticon' load files and DAT files as 'concordance' load files because they were the two most common formats in the early days of document imaging as propounded by those two companies.

Load files will use some sort of distinguisher or "delimiter" between fields and may include links to both associated files of text from the original data as well as the original or "native" files themselves. Nearly all platforms also provide, and infer upon receipt, that matched set of plain text OCR files exist with identical bates number file names as any image files, and often will properly address those even without a load file.

In generating load files, keep in mind that although including metadata is relatively easy, identifying relevant metadata is not always so easy. It will be part of the negotiations of the eDiscovery protocol discussed above and may became technical because of the large and varied types and amounts of metadata in existence. For a basic discussion, **see** https://craigball.net/2018/11/02/mad-about-metadata/ but this is an area where you will want the assistance of a technical expert if there is pushback from opposing counsel.

As a general rule, the following meta data fields are available.

- BEG BATES
- END BATES
- BEGATTACH
- ENDATTACH
- CUSTODIAN
- CREATED
- MODIFIED
- TITLE (FILENAME OR EMAIL SUBJECT AS APPROPRIATE)
- EXT (FILE EXTENSION)
- MD5 (HASH VALUE)
- PATH (FILE PATH OR LOCATION ON DISK OR EMAIL FOLDERS WHERE ITEM LOCATED)
- SIZE

AUTHOR (application meta-data - often blank or junk)

- TO
- FROM
- BCC
- CC
- RECEIVED
- SENT
- THREAD GROUP

The following are not 'meta-data', but used by programs to support ingestion

NATIVELINK (link to any included native files where slip-sheets have been delivered)

OCRPATH (link to OCR / extracted text files for associated images)

Computers store the date and time as a single attribute in standard format. Splitting them into separate date and time fields is not difficult but can be troublesome. It may be easier to store them in one field or simply parse out the time if it is not necessary.

The created / modified / sent / received metadata all save different but valuable information. We also tend to suggest that folks include a 'SORT DATE' or 'DATE' field that is a unified date for an email and it's attachments. This makes it easier to chronologically order a review, yet still keep emails and attachments together. Some programs will now do that threading function for you as part of processing.

There are many more attributes available in application meta data (MS Word, PowerPoint, Excel for example) like 'last printed', 'revisions', 'doc title', 'tags', and such, but their value will depend on your case and it's specific needs.

Sample ESI Agreement

In this example, electronic documents should be provided to the following specifications.

1) Single Page TIFs

Except as discussed below in section 6, all documents existing in electronic format shall be produced in a Group IV TIF compression, single-page, black and white format at a resolution of at least 300 dpi.

2) Document Level Text Files

For each document, a text file shall be provided along with the TIF images. The text of native files shall be extracted directly from native files, one text file per document. Each text file will be named with the first production number of the images which comprise the original document followed by the extension TXT. Documents for which no text is extracted will be OCR scanned using best reasonable efforts by the parties and such text provided as separate text files, one text file per document.

3) Unique ID Numbering

Each TIF file shall be named with a unique production number followed by the extension ".TIF." In addition, each text file (whether derived from direct extracted or from OCR) shall be named with the unique production number of the corresponding TIF image, followed by the extension ".TXT." Each media produced shall be uniquely named with a sequential number that includes an identifier unique to each party. The parties will cooperate to ensure that the logistics of production are efficient and economical, including production media, and naming conventions and procedures for directories and subdirectories.

4) Load Files

Both electronic documents and hardcopy sourced documents will be provided with 4 load files:

1) an IPRO delimited file;

2) a Concordance delimited file or Concordance database;

3) an Opticon delimited file

4) a metadata load file with the fields noted in paragraph

Every electronic document must be referenced in a load file.

Metadata and any objective coding provided should be provided in the following format:

- Metadata should be pipe (|) delimited;
- String values within the metadata file should be enclosed with carats (^};
- The first line should contain metadata headers and below the first line there should be exactly one line for each document; and
- Each row of metadata must contain the same amount of files as the header row.

5) Metadata Fields

The parties shall identify and produce metadata fields, as set forth below, for all electronic documents. Specifically, in addition to the text file associated with the TIF images a separate load file with accompanying metadata will be provided.

Metadata load files shall also be provided for certain hard copy and scanned documents where manual coding has been conducted. If manual coding has been conducted and the fields noted below are available they shall be provided but there is no obligation to create metadata that does not exist. For hard copy sourced documents, the parties are obliged to provide custodian and location information to note the source of the material.

Metadata fields

1. **Custodian**
2. **Author**
3. **Title (or subject);**
4. **Date created;**
5. **Last date modified;**
6. **Created by;**
7. **Edited (modified) by;**
8. **For email:**
    1. Sent, received, from, to, cc, bcc
    2. Thread
    3. Parent/Child
9. **Starting production number;**
10. **Ending production number;**
11. **PageCount**
12. **Starting production number of attachment(s);**
13. **Ending production number of attachment(s);**
14. **Custodian;**
15. **Document type or file extension;**
16. **File Name**
17. **File Size**
18. **Original File path.**
19. **Native Link**
20. **OCR/Text path**

6) Native Format

After reviewing the TIF production, parties can, upon demonstrating a particularized need for production, request a TIF image at a higher resolution or color depth; color or other high quality hard copy, or native format of any documents by identifying such documents by production number range. Should the parties be unable to agree on the production request of a particular document under this paragraph, the requesting party may move to compel such production and the producing party shall have the burden to establish that the burden of producing the document substantially outweighs its benefit.

Should single-image TIF files from Excel spreadsheets (or other spreadsheets or databases) reproduce in an unformatted/ unwieldy way, the receiving party can request and upon showing particularized need the producing party will provide native Excel files with locked cells and no metadata (or other spreadsheet files or database files in like manner).

Certain multi-media files, audio and visual presentations, and other files that cannot be rendered as static TIF images will be produced in native electronic format by the parties. In such case, a placeholder slip-sheet TIF image indicating that the original electronic file could not be converted to TIF will be included in the appropriate sequence with the production number indicated. The native file will be provided concurrently with the placeholder slip-sheeted image. The file name will have the production number appended to the original file name with the original native file extension.

Source code produced through discovery will be pursuant to the terms of the protective order.

7) **Production Media**

All discoverable electronic information shall initially be produced in electronic image format in the manner provided above, on a hard drive, CD, DVD, or other mutually agreeable format on the most reasonable capacity media for each production set in capacity to ensure efficient handling by all parties. One USB hard drive is preferable to 5 DVDs, for example.

Because of the potential for a large number of documents to be produced, it may not be possible to review all images immediately upon production.

The parties agree that no rights are waived should an issue not be immediately identified with the production media or the document images.

6 CONCLUSION

Aside from this, you will also need to keep in mind other requirements in rule 34 and rule 26 which describe your requirements to discuss issues relating to: specificity, the eDiscovery process, timing, logistics regarding how the production will be delivered and how it can be accessed. Most importantly, we recommend working closely with the opposing party to identify these issues as early as possible. If you have any specific questions, consult your eDiscovery vendor (or leave us a message)!

APPENDIX A: MODEL PROTOCOLS

Western District of Washington
https://www.wawd.uscourts.gov/sites/wawd/files/61412ModeleDiscoveryProtocol.pdf

N District of California
https://cand.uscourts.gov/forms/e-discovery-esi-guidelines/

Judge Grimm, District of Maryland
https://inns.innsofcourt.org/media/54127/suggestedprotocolfordiscoveryofelectronicallystoredinformation.pdf

APPENDIX B: COMMITTEE NOTES

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, e-mail 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 [sic] 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).

Changes Made after Publication and Comment. The proposed amendment recommended for approval has been modified from the published version. The sequence of "documents or electronically stored information" is changed to emphasize that the parenthetical exemplifications apply equally to illustrate "documents" and "electronically stored information." The reference to "detection devices" is deleted as redundant with "translated" and as archaic.

The references to the form of production are changed in the rule and Committee Note to refer also to "forms." Different forms may be appropriate or necessary for different sources of information. The published proposal allowed the requesting party to specify a form for production and recognized that the responding party could object to the requested form. This procedure is now amplified by directing that the responding party state the form or forms it intends to use for production if the request does not specify a form or if the responding party objects to the requested form.

The default forms of production to be used when the parties do not agree on a form and there is no court order are changed in part. As in the published proposal, one default form is "a form or forms in which [electronically stored information] is ordinarily maintained." The alternative default form, however, is changed from "an electronically searchable form" to "a form or forms that are reasonably usable." "[A]n electronically searchable form" proved to have several defects. Some electronically stored information cannot be searched electronically.

In addition, there often are many different levels of electronic searchability—the published default would authorize production in a minimally searchable form even though more easily searched forms might be available at equal or less cost to the responding party.

The provision that, absent a court order, a party need not produce the same electronically stored information in more than one form was moved to become a separate item for the sake of emphasis.

The Committee Note was changed to reflect these changes in rule text, and also to clarify many aspects of the published Note. In addition, the Note was expanded to add a caveat to the published amendment that establishes the rule that documents—and now electronically stored information—may be tested and sampled as well as inspected and copied. Fears were expressed that testing and sampling might imply routine direct access to a party's information system. The Note states that direct access is not a routine right, "although such access might be justified in some circumstances."

COMMITTEE NOTES ON RULES—2015 AMENDMENT

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce. Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."