

A woman sued a large company in federal court for violating federal environmental laws. During discovery, the woman's attorney requested that the company produce all electronically stored information (ESI) pertaining to the company's carbon dioxide production but did not specify the form in which this ESI was to be produced. The company provided a written response confirming that it would produce the requested documents.

One month later, the company sent the woman's attorney thousands of documents, emails, spreadsheets, and other files in their ordinarily maintained electronic forms. The attorney did not have the software necessary to access all of the produced ESI, so he sent the company a request for the production of the same ESI that specified the form in which it should be produced. The company refused.

The attorney filed a motion with the federal court to compel the company to produce the ESI again in the specified form.

Is the court likely to grant the motion?

- A. No, because the company may choose to produce the ESI in any form.
- B. No, because the company produced the ESI in forms in which they are ordinarily maintained.
- C. Yes, because the attorney is unable to access the ESI through his software.
- D. Yes, because the attorney may specify the form in which the ESI is to be produced.

Explanation:

Request for production

(FRCP 34)

Request	<ul style="list-style-type: none">• Must describe each item with reasonable particularity• Must specify reasonable time, place & manner of production• May specify form in which ESI is to be produced
Response	<ul style="list-style-type: none">• Must state that production or inspection will be permitted as requested OR specify grounds & reasons for objections• Due within 30 days of service
Production	<ul style="list-style-type: none">• Must produce documents as kept in usual course of business OR organize & label to correspond to categories in request• Must produce ESI in ordinarily maintained or reasonably usable form (if form not specified in request)• Need not produce same ESI in more than one form

FRCP = Federal Rule of Civil Procedure; **ESI** = electronically stored information

A **request for production** is a **method of discovery** used to compel an opposing party to produce and allow inspection of documents, electronically stored information (ESI), tangible things, and real property. Such a request:

- **must describe** with reasonable particularity **each item** to be produced or inspected
- **must specify** a reasonable **time, place, and manner** for the production or inspection *and*
- **may specify the form** in which **ESI** is to be produced.

If a request for ESI does **not specify a form** for production, the producing party **must produce ESI in its ordinarily maintained or reasonably usable form (Choice A)**. However, the producing party need not produce the same ESI in more than one form.

Here, the attorney's first request for production did not specify the form in which the ESI was to be produced. As a result, the company properly produced its various ESI in their ordinarily maintained forms. And since the company need not produce the ESI in multiple forms, it does not need to comply with the attorney's second request. Therefore, the court is unlikely to compel production.

(Choice C) The company is not required to reproduce the ESI merely because the attorney cannot access it through his software. That is because the attorney could have specified the form in his original request for production.

(Choice D) The attorney could have specified the form in which the ESI was to be produced in his *original* request for production—but not after the company produced the ESI in its ordinarily maintained form.

Educational objective:

A party requesting production of electronically stored information (ESI) may specify the form in which it is to be produced. If no form is specified, the producing party must produce ESI in its ordinarily maintained or reasonably usable form but need not produce the same ESI in more than one form.

References

- Fed. R. Civ. P. 34(b) (requesting & producing electronically stored information).