

A corporation brought a patent infringement action in federal court against a manufacturer. The corporation alleged that the manufacturer infringed on the corporation's patent for a shoe design. During discovery, the corporation sent the manufacturer a request to "produce all electronic documents relating to the production of the shoe." The corporation did not specify the form in which the documents were to be produced.

The manufacturer produced one year's worth of electronic documents relating to the production of the shoe, but it argued that it could not produce any documents beyond this time because they had been deleted from its server. The corporation filed a motion to compel the production of the documents. In response to the motion, the manufacturer established that recovering the electronic documents would be unduly burdensome and costly because they could be recovered only if the manufacturer hired an expensive data-recovery firm.

How should the court rule on the corporation's motion to compel?

- A. It should deny the motion, because the corporation failed to specify the form in which the electronic documents should be produced.
- B. It should deny the motion, if the manufacturer provides a meritorious defense to the claim.
- C. It should grant the motion, if the corporation demonstrates that it will prevail on the merits of the case.
- D. It should grant the motion, if the corporation shows good cause for the production.

### Explanation:

During discovery, parties can use various **methods** to compel disclosure of information related to the case. A **request for production** is a discovery method used to compel an opposing party to produce and allow inspection of documents, **electronically stored information (ESI)**, tangible things, and real property.

A party generally must produce ESI in the form specified in the request or, if no form is specified, then in the ESI's ordinarily maintained or usable form. If ESI is not produced, the requesting party may file a motion to compel production. The **producing party** must then **show that** the ESI is **not reasonably accessible** due to **undue burden or cost**. If this is established, the court will order the production of ESI only if the **requesting party shows good cause** for the production.

Here, the corporation filed a motion to compel the production of the manufacturer's electronic documents related to the shoe design at issue. The manufacturer established that retrieving the documents that had been deleted from its server would be unduly burdensome and costly because it would have to hire an expensive data-recovery firm. However, if the corporation shows good cause for the production, the court should grant the corporation's motion to compel.

**(Choice A)** A party requesting the production of ESI may, but is not required to, specify the form in which the ESI is to be produced.

**(Choices B & C)** In opposing a motion to compel discovery, the producing party (the manufacturer) need not provide a meritorious defense. Additionally, the requesting party (the corporation) does not need to show that it will prevail on the merits. Instead, the focus is on whether the discovery at issue should be produced.

### Educational objective:

In response to a motion to compel the production of electronically stored information (ESI), the producing party must show that the ESI is not reasonably accessible due to undue burden or cost. If shown, the court will order the production of the ESI only if the requesting party demonstrates good cause for the production.

### References

- Fed. R. Civ. P. 26(b)(2)(B) (limitations on electronic discovery).
- 8 Charles Alan Wright et al., Federal Practice and Procedure § 2008.2 (3d ed. 2020) (explaining the procedure for inaccessible ESI).

## Production of electronically stored information (ESI)

