4. An opinion from the U.S. District Court for the Northern District of Illinois denying a motion to compel the Defendant to re-produce ESI organized by document request, where Defendant had produced the information as it was kept in the usual course of business and in a reasonably usable format.

In *In re Hair Relaxer Marketing Sales Practices and Products Liability Litigation*, Case No. 23-cv-0818 (MMR), Slip Opinion (N.D. Ill. Mar. 1, 2024), U.S. District Court Judge Mary M. Rowland addressed the standards for production of ESI under Federal Rule of Civil Procedure 34(b)(2)(E)(i).

In discovery, Plaintiffs served requests for production on Defendant, in response to which Defendant produced 1,005 documents (13,682 pages) in four rounds of production. *Id.* at 1. Plaintiffs disputed that Defendant produced ESI as it was "kept in the usual course of business" and moved under Rule 34(b)(2)(E)(i) to compel Defendant to "organize and label" its productions as they corresponded to Plaintiffs' requests.

In support of its motion, Plaintiffs provided examples of Defendants' productions that they claimed indicated Defendants' employees "extracted files from various electronic locations, compiled them into folders designated for each employee, then provided them to [Defendants'] vendor who prepared the materials for production." *Id.* at 2. Plaintiffs claimed that this process "effectively wrote over metadata from the files that identified their original author and/or custodian, date of creation, and file path," leaving Plaintiffs without "critical context." In response, Defendant argued that its ESI production was not subject to the "organize and label" provisions of Rule 34(b)(2)(E)(i).

Judge Rowland began her analysis with Rule 34(b)(2)(E), which provides in relevant part that "[u]nless 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." She noted that courts "in the Seventh Circuit and across the country are split on whether the organization requirements in Rule 34(b)(2)(E)(i) apply to ESI and hard copy documents alike."

Judge Rowland agreed with the "well-reasoned analysis of courts that apply Rule 34(b)(2)(E)(i) to documents and (b)(2)(E)(ii) to ESI, with no overlap" to find that the "plain text of the Rule distinguishes between hard copy documents and

ESI." *Id.* at 3. She further pointed out that the advisory committee notes accompanying the 2006 Amendments to the Rule 34 stated that "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."

Judge Rowland noted that "not all ESI fits the traditional definition of 'document,'" but "some ESI categories such as emails … do look like our everyday conception of what a 'document' is." She cited *In Anderson Living Tr. v. WPX Energy Prod., LLC*, 298 F.R.D. 514, 523-36 (D.N.M. 2014), which "painstakingly explains the legislative history of Rule 34 to further explain why the Rule treats documents and ESI differently: searchability." In particular, parties can "locate relevant portions of ESI through search terms without formal labeling or categorization." Accordingly, Rule 34(b)(2)(E)(ii) allows requesting parties to specify the form of production for ESI.

Judge Rowland stated that Plaintiffs specified a form of production (with which Defendant apparently complied) and that Plaintiffs agreed with Defendant on the search terms used to identify and produce ESI. In addition, she noted that Plaintiffs did not argue that Defendant's production was not in a "reasonably usable, *i.e.*, searchable form as Rule 34(b)(2)(E)(ii) requires." Accordingly, Judge Rowland found that Defendant's ESI production was proper under Rule 34(b)(2)(E)(ii) and that Defendant "need not double back and organize and label ESI to correspond to categories of Plaintiffs' requests for production."

But Judge Rowland noted that she did "not minimize Plaintiffs' need for relevant information." *Id.* at 4. She stated that Plaintiffs could follow up via depositions "[t]o the extent Plaintiffs lack vital information about a particular category of ESI (author, date, *etc.*)" and reminded Defendant that all ESI it produced must comply with the protocol agreed between the parties and with Rule 34(b)(2)(E)(i)'s "usual course of business" requirement.