

Producing Documents in State Court Actions

by **Gianfranco A. Pietrafesa**

How are documents produced in state court actions? Must a party produce documents by organizing and labeling them to correspond to the categories in a document demand? May a party produce documents as they are kept in the usual course of business? How can a party be prevented from producing unresponsive and irrelevant documents so that key documents are not mixed together with other documents in the hope of obscuring their significance?

What Does the Rule Provide?

New Jersey Court Rule 4:18-1 governs requests for the production of documents, more commonly known as document demands. Under the rule, a party may serve on any other party a request to produce documents.¹ This allows a party to inspect and copy any documents designated in the request. The request must describe the documents individually and/or by category, and must do so with reasonable particularity. The request must also specify a reasonable time and place for the inspection and a reasonable "manner of making the inspection."²

A party served with a request must serve a written response stating, with respect to each individual document or category of documents, that "inspection ... will be

permitted as requested" or that the request to inspect is objected to, stating the reasons for the objection.³

How Are Documents Produced?

Rule 4:18-1 does not set forth how documents are to be produced for inspection. Moreover, no New Jersey case has been found specifically addressing the issue. Rule 4:18-1 is based on Federal Rule of Civil Procedure 34, and was adopted in 1972.⁴ Therefore, Rule 34 may provide some guidance on the manner of production.

Prior to being amended in 1980, Rule 34 did not specify the manner in which documents were to be produced for inspection. This led to the discovery practice of deliberately mixing critical documents with other documents to obscure their significance. Rule 34 was amended in an effort to curb this type of discovery abuse⁵ and now provides that a party producing documents for inspection must produce them either: (1) as they are kept in the usual course of business, or (2) organized and labeled to correspond with the categories in the request.⁶

Rule 4:18-1, despite being based on Rule 34, was not amended in a similar fashion. In the absence of such a rule provision, a party may argue that documents may be produced in any manner. Indeed, it may be argued that the absence of such a

provision is the result of a deliberate decision not to amend the rule. However, no record has been found to suggest that the state court ever considered such an amendment to the rule.

Nevertheless, in light of the public policy of curbing discovery abuses, it is submitted that a state court would probably order the production of documents in one of the two manners specified in Rule 34. For this reason, Rule 4:18-1 should be amended to correspond to Rule 34, requiring documents to be produced in one of the two manners specified in Rule 34.

How to Determine the Manner of Production

Which party selects the manner of production? Rule 4:18-1 provides that a party requesting the production of documents may specify a reasonable "manner of making the inspection" in the request.⁷ The rule further provides that a party responding to such a request must state whether the inspection "will be permitted *as requested*."⁸

Rule 34 is identical to Rule 4:18-1 in this respect.⁹ These provisions support an argument that a requesting party may select the manner in which documents are to be produced for inspection,¹⁰ and then a responding party may either consent or object to the requested manner of production.

However, several leading commentators on the federal rules state that the amendment to Rule 34 allows the producing party to select the manner of producing documents. Moore's Federal Practice states, without explanation, that the producing party has the choice of selecting the manner of production.¹¹ Professors Charles Alan Wright, Arthur R. Miller and Richard L. Marcus contend that the producing party has the right to choose the manner of production of documents.¹² They contend that allowing a requesting party to select the manner of production may result in the very discovery abuse that led to the amendment of Rule 34:

... Requiring further that these requested materials be segregated according to the requests would impose a difficult and usually unnecessary additional burden on the producing party. The categories are devised by the propounding party and often overlap or are elastic, so that the producing party might be compelled to decide which best suits each item in order to consign it to the proper batch. Such an undertaking would usually not serve any substantial purpose, and it could become quite burdensome if considerable numbers of documents were involved. Moreover, by requiring rearrangement, and the disassembling of the producing party's files, insisting on this manner of production invites claims of the very sort of "hiding" of materials that gave rise to the 1980 amendment.¹³

They therefore conclude that a producing party should have the option of selecting the manner of production.

In reality, neither party has absolute control over the manner of production. Rather, the requesting party may specify the manner of production that it prefers, and the producing party may either consent or object to the specified manner of production. As a practical matter, in addition to objecting to the specified manner of production, the producing party should specify in its written response the manner of production that it prefers, and the basis for producing documents in such a manner. This may deter a motion by the requesting party or, at a minimum, place the burden on the

requesting party to explain why the manner of production specified in the request is more reasonable. If the parties cannot agree on the manner of production, then they may proceed by way of motion.

In the absence of a specified manner of production in the document demand, it can be argued that the requesting party has waived its right to select the manner of production. However, even in such an instance a responding party in a state court action should, as noted above, be required to produce documents in one of the two manners specified in Rule 34.

How to Change the Manner of Production

The parties must attempt to reach an agreement on the manner of production; that is, they must attempt to resolve the discovery dispute amongst themselves without involving the court.¹⁴ If the dispute cannot be resolved, then either party may proceed by way of motion.

A requesting party may move for "an order compelling inspection in accordance with [the manner of production specified in the request]."¹⁵ Such an order may be obtained when a party "fails to permit inspection as requested."¹⁶ The rule also provides that the court may enter a protective order when necessary.¹⁷

A producing party may seek to change the manner of production by moving for a protective order on the grounds that the specified manner of production subjects the producing party to annoyance, oppression or undue burden or expense.¹⁸ If good cause is shown, the court will enter a protective order specifying the manner of production.¹⁹ As noted, the state court will likely specify one of the two manners of production specified in Rule 34.

Finally, it should be noted that under either motion, the court has the discretion to award attorney's fees and costs against either party.²⁰

Conclusion

In conclusion, Rule 4:18-1 should be amended to correspond to Rule 34 by specifying that documents must be produced either as they are kept

in the usual course of business or organized and labeled to correspond to the categories in the request. The amendment would provide guidance to practitioners by specifying the permissible manners of production. It would also curb the discovery abuse of mixing critical documents with other documents and reduce discovery disputes involving the manner in which documents are produced by the parties. ♪

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Endnotes

1. R. 4:18-1(a).
2. R. 4:18-1(b).
3. *Id.* Ordinarily, the written response must be served within 30 days of receipt of the document demand. *Id.*
4. Pressler, N.J. Court Rules (Gann), Comment 1 to R. 4:18-1. *Compare* Fed. R. Civ. P. 34.
5. Advisory Committee Notes, 85 F.R.D. 521, 532 (1980).
6. *See* Fed. R. Civ. P. 34(b), third paragraph.
7. R. 4:18-1(b).
8. *Id.* (emphasis added).
9. Fed. R. Civ. P. 34(b).
10. *See* Pressler, N.J. Court Rules (Gann), Comment 2 to R. 4:18-1 (the request must state the "manner of inspection and production").
11. 4A Moore's Federal Practice 2d, 34.05[1] at 34-32.
12. 8A Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, §2213 at 431-32 (1994).
13. *Id.* at 431. *But see* Sherman and Kinnard, Federal Court Discovery in the 80's—Making the Rules Work, 95 F.R.D. 245, 255-58 (1981) (arguing that a requesting party selects the manner of production in order to preserve the distinctions between interrogatories and document demands).
14. R. 1:6-2(c).
15. R. 4:23-1(a). *See also* R. 4:18-1(b).
16. *Id.* (emphasis added).
17. R. 4:23-1(a).
18. R. 4:10-3.
19. *See* R. 4:10-3(b) ("... discovery may be had only on specified terms and conditions ..."). The court also has the inherent power to enter an order specifying the manner of production of documents even in the absence of a specific rule. *See, e.g.,* R. 1:1-2.
20. R. 4:23-1(c); R. 4:10-3.