E-Discovery: New to California[1]

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Introduction

The New Electronic Discovery Act

The new Electronic Discovery Act, Assembly Bill 5 (Evans), has modernized California law to address issues relating to the discovery of electronically stored information. The legislation was approved by the governor on June 29, 2009. As urgency legislation, the law became effective immediately. (The chaptered version of the AB 5 is available at http://tinyurl.com/nzl727.)

The legislation adds to and extends California's Civil Discovery Act to reflect the growing dominance of electronically stored information. It provides explicit procedures and standards for courts and litigants to use in addressing electronic discovery issues. By promoting the proper handling of electronic discovery, the legislation is intended to reduce the cost of discovery, thereby for the benefit of both courts and litigants. (See Sen. Jud. Comm., Committee Analysis of Assem. Bill No. 5 (2009–2010 Reg. Sess.) June 8, 2009 available at http://tinyurl.com/kqgxpe].)

The main features of the new Electronic Discovery Act are:

- The new definitions of "electronic" and "electronically stored information;"
- The broader scope and new methods of discovery that permit discovery by "copying, testing, and sampling," in addition to "inspection," of documents;
- New methods for parties to identify and handle the format of the electronically stored information that is demanded and to be produced in discovery;
- A new provision on objections to producing electronically stored information from a source that is not reasonably accessible;
- Amendments to the statutes on motions to compel and motions for protective orders to address issues relating to the discovery of electronically stored information from a source that is not reasonably accessible;

[1] The original version of this article was presented at the Annual Meeting of the State Bar of California in San Diego on September 11, 2009 and was revised for presentation at the State Bar meeting in Monterey on September 23, 2010.

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- New provisions (sometimes referred to as proportionality principles) providing that under certain circumstances courts shall limit the frequency and extent of discovery of electronically stored information;
- Cost shifting provisions under the new and existing law;
- New procedures for handling disputes over the production of electronically stored information subject to claims of privilege or work product protection;
- New "safe harbor" provisions; and
- New provisions on subpoenas for the production of electronically stored information.

Many of these provisions are based directly on the federal rules on electronic discovery that became effective December 1, 2006. However, as discussed further below, these provisions have been fully integrated into the framework of California discovery law and, in certain areas, modified.

The Digital Age

Like the new federal rules on electronic discovery, California's new e-discovery law is a response to the global shift in information from being primarily found in the form of paper documents to being primarily stored in digital form. Today most information is created, stored, and used with computer technology, such as word processing, databases, and spreadsheets. Information may also be created, stored, and used in devices attached to or peripheral to computers, such as printers, fax machines, and pagers; in Internet applications, such as e-mail and the World Wide Web; in electronic devices, such as cell phones; and in media used to store computer data, such as disks, tapes, and CDs.

The change from paper to electronically stored information has significantly affected civil discovery in many respects. The volume and number of locations of electronically stored documents are much greater than for conventional paper documents. There may be hundreds of copies or versions of a single document located in various locations in a computer network or on servers. There are also significant differences in kind between paper documents and documents in electronic form. For instance, once paper documents are destroyed, they are permanently lost; however, "deleted" data generally can be retrieved and so may be discoverable. The advent of electronically stored information also affects the costs of discovery. The large volume of electronically stored information sometimes can significantly increase the amount of time and the cost of searching for information. But when electronic discovery is properly managed, it also can greatly reduce the cost of discovery. (See Introduction to Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (approved Aug. 6, 2006), p. v; Judicial Council Report on Electronic Discovery (dated April 16, 2008) , page 2 [Judicial Council report is available at http://tinyurl.com/lkqu4w].)

E-Discovery Legislation: The New Provisions

The Electronic Discovery Act amends 19 sections of the Civil Discovery Act, including the definition section and 18 sections relating to inspection demands and responses. The act also adds two new sections that provide a procedure for handling the disclosure of documents subject to claims of privilege or work product protection and provisions on subpoenas for electronically stored information.

Although the legislation in many respects resembles the federal rules on electronic discovery, the new California e-discovery provisions on electronic discovery are fully integrated into the state's Civil Discovery Act. For California practitioners, the new provisions should fit comfortably into the civil discovery framework with which they are already familiar. Thus, the timeframes that are used for civil discovery will also apply to electronic discovery. The same meet-and-confer requirements and motion procedures that apply to civil discovery generally will apply to the discovery of electronically stored information. But some of the terms and provisions in the law, which are designed to deal expressly with electronically stored information rather than paper documents, are new.

New Definitions
The Electronic Discovery Act adds new definitions of "electronic" and "electronically stored information" (Code Civ. Proc., § 2016.020). Specifically, *"electronic"* means "relating to technology having electrical, digital, wireless, optical, electromagnetic, or similar capabilities." "*Electronically stored information"* is defined as "information that is stored in an electronic medium." The definition of the "electronically stored information" is intended to be expansive and encompass any type of information that is stored electronically. As a result, this definition specifically authorizes the discovery of non-traditional writings, documents, and papers. (Senate Analysis of AB 5.)

Scope and Methods of Discovery
The Electronic Discovery Act expressly authorizes the discovery of electronically stored information (Code Civ. Proc., § 2031.010(e)). Based on the broad definitions described above, this means that all types of electronically stored information are generally discoverable.

Also, the act provides that parties may undertake discovery not only by "inspecting," but also by "copying, testing, or sampling" electronically stored information. (Code Civ. Proc., § 2031.010 et seq.) The addition of "copying, testing, or sampling" broadens the methods of discovery to be consistent with the Federal Rules. But, as the California legislative history notes, the new language on "copying, testing, or sampling" is not intended to create a routine right of access to a party's electronic information system, although such access might be justified in some circumstances. The Senate Analysis of AB 5, drawing on the Advisory Committee Note to Federal Rule 34(a), states that courts

should guard against undue intrusiveness resulting from inspecting or testing electronic information systems.[3]

Format of Production of Information

The Electronic Discovery Act modifies the law on the demand for, and responses to, the production of documents to reflect the electronic form and format of most contemporary documents. It authorizes a party to specify the form or forms in which electronically stored information is to be produced (Code Civ. Proc., § 2031.030(a)(2).) It also provides an opposing party with an opportunity to object to the requested form of production. (Code Civ. Proc., § 2031.280(c).) Unless the parties otherwise agree or the court otherwise orders, if a demand does not specify a form or forms, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. (Code Civ. Proc., § 2031.280(d)(1).) A party need not produce the same electronically stored information in more than one form. (Code Civ. Proc., § 2031.280(d)(2).) These new provisions on the format of production are essentially the same as those in the Federal Rule 34(b)(1)(C) and (b)(2)(E)(ii)-(iii).

Objections: Information from a Source Not Reasonably Accessible

The Electronic Discovery Act includes an important novel provision on objections to electronically stored information. It provides that, if a responding party objects to the discovery of electronically stored information *from a source that is not reasonably accessible* because of undue burden or expense and that it will not search the source absent an agreement or court order, the party shall identify in its response the types or categories of sources of such information that it asserts are not reasonably accessible. By objecting and identifying information by a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that electronically stored information. (Code Civ. Proc., § 2031.210(d).) This provision balances the right of a party to object on the basis that the information sought is from a source that is not reasonably accessible with the need of the demanding party to ascertain the types or categories of sources that are the basis for the objection.

Motions Relating to Electronically Stored Information

The Electronic Discovery Act adds important new provisions relating to the discovery of electronically stored information to the statutes on motions to compel and motions for protective orders. (Code Civ. Proc., § 2031.310 and § 2031.060.) Some of these provisions apply only to electronically stored information that is *not reasonably accessible* due to undue burden or expense. Other new provisions contain principles of proportionality that apply to *all* electronically stored information.

[3] See Sen. Jud. Comm., Committee Analysis of Assem. Bill No. 5 (2009–2010 Reg. Sess.) June 8, 2009, Comment (author's statement) at page 6.

Information From a Source Not Reasonably Accessible

Under prior law, it was not clear how the discovery of information from a source that is not reasonable accessible was to be handled. Several new provisions in the Electronic Discovery Act address the discovery of such information. To clarifying that process, the amended statutes provide that:

- The party or affected person opposing or objecting to a demand bears the burden of showing that the electronically stored information sought in discovery is from a source that is not reasonably accessible because of undue burden or expense;
- The court may nonetheless order discovery of such information if the demanding party shows good cause; and
- If there is good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for such discovery, including allocation of the expense of discovery.[4]

Motions Relating to All Electronically Stored Information

The Electronic Discovery Act also provides that the court shall limit the frequency and extent of electronically stored information, *even from a source that is reasonably accessible*, if the court determines that any of the following conditions exists:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;
- The discovery sought is unreasonably cumulative or duplicative;
- The party has had ample opportunity by discovery in the action to obtain the information sought; or
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

The preceding principles of proportionality will become important determinants as to how electronic discovery is to be conducted and how disputes over discovery are to be resolved. Courts and litigants should therefore be prepared to undertake proportionality analysis as an integral feature of dealing with the discovery of electronically stored information.

It should be emphasized that the new provisions on electronic discovery apply to both motions to compel and motions for protective orders. When the e-discovery law was being developed, some commentators expressed a concern that the legislation would require the party from whom electronically stored information is sought to bring a motion

[4] The issue of cost shifting is discussed further below.

for a protective order in every case. This is neither the intent nor the effect of the legislation.

Under the amended statutes, the usual California discovery procedures will apply to electronic discovery. If the parties are unable to agree on the production of electronically stored information, a responding party objecting to the production may bring a motion for a protective order under section 2031.060, which has been amended to specifically address electronic discovery issues. Alternatively, if the responding party objects but does not seek a protective order, the demanding party may move to compel under section 2030.310, which has also been amended to specifically address electronic discovery issues. Hence, the resolution of disputes over the discovery of electronically stored information will not always require the filing of motions for protective orders. (See Judicial Council report, pages 8 and 13-14.)

Further, as in all other situations, if there is a motion for a protective order or a motion to compel in a case involving the discovery of electronically stored information, the parties must meet and confer to try to informally resolve each issue raised by the motion. Often, through agreements reached in the meet-and-confer process, discovery disputes will be able to be resolved without a court determination. Thus, the amended statutes operating within the California discovery framework should significantly assist litigants in the timely and efficient resolution of their disputes regarding the discovery of electronically stored information. (See Judicial Council report, page 13.)

Shifting Costs: New and Prior Legislation

The amendment of the Code of Civil Procedure sections on motions will allow a court, where it determines that there is good cause for requiring the production of electronically stored information that is not reasonably accessible, to set conditions for such discovery *including allocation of the expense of discovery*. (See (Code Civ. Proc., § 2031.310(f) and § 2031.060(e).) In addition, the prior statutory and case law regarding cost shifting remains fully in effect.

Before the enactment of the Electronic Discovery Act, the applicable law on when the costs of discovery may be shifted with respect to the discovery of electronically stored information was contained in Code of Civil Procedure section 2031(g)(1) (later renumbered as section 2031.280(c)) and the decision in *Toshiba Am. Electronics Components, Inc. v. Superior Court (Lexar Media, Inc.)* (2004) 124 Cal.App.4th 762. In *Toshiba*, the demanding party sought electronically stored information that could only be obtained from the responding party's back-up tapes. The trial court allocated these costs to the responding party. The appellate court reversed, concluding that recovery of the demanded electronically stored information would require the responding party to "translate any data compilations," so the burden of paying the "reasonable expense" of reconstituting the tapes fell on the demanding party under Code of Civil Procedure section 2031(g)(1). (124 Cal. App.4th at 769.)

The legislative history of the Electronic Discovery Act demonstrates that the act is not intended to change either section 2031.280(c) (former section 2031(g)(1)) or the rule in *Toshiba.* The Senate Analysis of AB 5 points out that the Judicial Council, a sponsor of the legislation, specifically stated there was no intent by enacting the new e-discovery legislation to diminish the rule of *Toshiba*. (See Senate Judiciary Committee, Analysis of AB 5, citing Judicial Council report, pages 112-114, 123-126.) Former Code of Civil Procedure section 2031(g)(1), which was the basis for the *Toshiba* decision, is retained in the new legislation, renumbered as Code of Civil Procedure Section 2031.280(e).

Further, the Electronic Discovery Act has added a new Code of Civil Procedure section 1985.8(g) relating to subpoenas. This section, which is based directly on the code section relied on by the court in *Toshiba,* provides that, "[i]f necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably useful form." So, far from changing or overruling the *Toshiba* decision, the new legislation preserves and extends the rule in *Toshiba* for the allocation of the financial burden of producing electronically stored information from back-up media. (See Senate Judiciary Committee, Analysis of AB 5.)

Disclosure of Privileged or Protected Information

The Electronic Discovery Act establishes a new procedure for handling disputes over the production of electronically stored information that is subject to claims of privilege or attorney work-product protection. (Code Civ. Proc., § 2031.285.) This is similar to the procedure in Federal Rule 26(b)(5)(B), though the California procedure applies only to electronic discovery.

Under the new California procedure, a party claiming that privileged or protected information has been produced in the course of discovery of electronically stored information may notify any other party of the claim and the basis for the claim. (Code Civ. Proc., § 2031.285(a).) After being notified, the party that received the information shall immediately sequester it and either return it to the provider or present it to the court conditionally under seal for a determination of the claim. (Code Civ. Proc., § 2031.285(b).) Until a motion on the claim is resolved, the information may not be used or disclosed. (Code Civ. Proc., § 2031.285(c).) If the receiving party does contest the claim, that party may seek a determination of the claim by making a motion within 30 days of receiving notice of the claim. (Code Civ. Proc., § 2031.285(d).)

Like the federal rule, the new California statute only establishes a procedure for asserting privilege or work-product protection claims after production. This procedure is not intended to modify substantive law; and it does not attempt to change the law that determines whether production waives the privilege or protection asserted. So in discovery disputes, courts will continue to determine under applicable law whether any

information produced in electronic form is privileged or protected, and whether that information is subject to waiver. (See Judicial Council report, page 7.)

"Safe Harbor" Provision: Spoliation
The Electronic Discovery Act adds "safe harbor" provisions to several of the discovery statutes relating to sanctions. These provisions provide that "absent exceptional circumstances, the court shall not impose sanctions on a party or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as a result of the routine, good-faith operation of an electronic information system."

The language of the California "safe harbor" provisions is more expansive than the federal version, which does not mention information that is "damaged, altered or overwritten." Furthermore, the new California statutes make it clear that new "safe harbor" provisions in the discovery statutes are not meant to comprehensively address issues of preservation. Each of the statutes includes a statement that the safe harbor provision "shall not be construed to alter any obligation to preserve discoverable information." (See e.g., Code Civ. Proc., § 2031.060(i).) This last statement does not appear in the Federal Rules.

Subpoenas for Production of Electronically Stored Information
The Electronic Discovery Act provides that subpoenas in a civil proceeding may require the production of electronically stored information. (Code Civ. Proc., §1985.8(a).) A party serving a subpoena seeking electronically stored information may specify the form in which the information is to be provided. (Code Civ. Proc., §1985.8(b).) The new subpoena statute contains provisions parallel to those in the new statutes regarding protective orders and motions to compel. (Code Civ. Proc., §1985.8(d)-(h).) It provides that court orders for compliance with a subpoena issued under the new section shall protect third parties from undue burden or expense. (Code Civ. Proc., §1985.8(k).)

California Rules of Court: Meet and Confer on E-Discovery

Early Consideration of E-Discovery Issues
In addition to the legislation on e-discovery, rule 3.724 of the California Rules of Court was amended on August 14, 2009, effective immediately, to require parties in civil cases to meet and confer about issues relating to the discovery of electronically stored information before the initial case management conference.

It is widely recognized that it is beneficial for the parties and the courts to identify and consider issues relating to the discovery of electronically stored information early in the course of litigation. For example, the Advisory Committee Notes, 2006 Amendment to Rule 26 of the Federal Rules of Civil Procedure include the following statements: "Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms"; "When the parties do

anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties"; and "Failure to address preservation issues early in the litigation increases uncertainty and raises the risk of disputes." (Fed. Rules Civ. Proc., Rule 26, Advisory Committee Notes on 2006 Amendment, subd. (f).)

The National Conference of Commissioners on Uniform State Laws has commented: "There is almost universal agreement that early attention to issues relating to the discovery of electronically stored information, including preservation issues, facilitates orderly discovery." (National Conference of Commissioners on Uniform State Laws (NCCUSL), *Uniform Rules Relating to Discovery of Electronically Stored Information,* Rule 3, Reporter's Notes.) Similarly, the guidelines on the discovery of electronically stored information of the Conference of Chief Justices state: "If a party intends to seek the production of electronically stored information in a specific case, that fact should be communicated to opposing counsel as soon as possible and the categories and types of information to be sought should be clearly identified." (Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (approved August 2006), p. 1.)

A research and education institute has stated in the preface to its principles addressing the production of electronic documents that "parties are well-served by an early discussion about the issues in dispute, the types of information sought, the likely sources and locations of such information, and the realistic costs of identifying, locating, retrieving, reviewing, and producing such data." (*The Sedona Principles: Best Practices, Recommendations, and Principles for Addressing Electronic Document Production* (Sedona Conference, July 2005, p. iv.)

Amendments to Rule 3.724

Consistent with these guidelines and principles, the California Rules of Court have been amended to provide for the early discussion of e-discovery issues. Specifically, under new subpart (8) of rule 3.724, parties in civil cases will be required to meet and confer, in person or by telephone, at least 30 calendar days before the initial case management conference about:

- Issues relating to the preservation of discoverable electronically stored information;
- The form or forms in which electronically information will be produced;
- The time within which the electronically stored information will be produced;
- The scope of discovery of the electronically stored information;
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

- The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings; and
- How the cost of production of electronically stored information is to be allocated among the parties.

Conclusion

The Electronic Discovery Act is the most important change in California discovery law since the 1980s. The new law modernizes the Code of Civil Procedure to address issues of the discovery of electronically stored information. This is done by adding an extensive set of new and amended statutory provisions on electronic discovery, while relying on the well-established framework for civil discovery to which practitioners are accustomed. In addition, rule 3.724 of the California Rules of Court has been amended to require parties to meet and confer early in a case about electronic discovery issues; this amendment is intended improve the handling of electronic discovery, within the familiar framework of the case management process. Together, these changes in the law should enable all of the parties and the courts to better address the significant challenges posed by the rapid transformation of stored information from paper to electronic form.