DISCOVERY LAW

Proposed California Digital Discovery Rules

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The information age has radically changed how we create, share and store information. According to a University of California study, 93% of all information created in 1999 was generated in digital form while only 7% was generated in other media, such as paper. *In re Bristol-Myers Squibb Securities Litigation* (D.N.J. 2002) 205 F.R.D. 437, 440 fn. 2 . Digital information is produced in ever growing volumes. In 2007, the email volume per person was estimated to be four gigabytes. One gigabyte of information would equal approximately 26 Banker's boxes of paper, so four gigabytes would equal approximately 104 Banker's boxes of paper! Our ever increasing and already prodigious production of digital information means that digital discovery issues will play an increasingly important role in litigation.

The Federal Courts moved into the digital world on December 1, 2006, when the amendments to the Federal Rules of Civil Procedure became effective. California is now poised to follow. In a unanimous vote on April 28, 2008, the California Judicial Council approved proposed legislation amending the California civil discovery rules to address digital discovery and electronically stored information ("ESI") issues. The Judicial Council will co-sponsor the legislation with the Consumer Attorneys of California and California Defense Counsel. Assembly member Noreen Evans has agreed to sponsor the legislation and Assembly Bill 926 will be used for this purpose.

The proposed legislation would modernize the California Code of Civil Procedure ("C.C.P.") to reflect the growing importance of digital discovery and ESI discovery issues. The proposal would amend the C.C.P. and add two new code sections relating to electronic discovery. These statutory changes are intended to incorporate many of the provisions in the Uniform Rules Relating to Discovery of Electronically Stored Information ("Uniform Rules") adopted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). A summary of the proposed legislation follows.

Definitions (C.C.P. §2016.020)
The Civil Discovery Act ("Act") would be amended to include definitions of "electronic" and "electronically stored information." New subdivision (d) would define "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar

capabilities." New subdivision (e) would define "electronically stored information" as "information that is stored in an electronic medium."

Scope of Discovery (C.C.P. §2031.010)
C.C.P. §2031.010 on the scope of discovery would be amended to expressly state that a party may obtain discovery of "electronically stored information." This section, and others in the Act also would be amended to say that parties may undertake discovery not only by "inspecting," but also by "copying, testing, or sampling." The addition of "copying, testing, and sampling" would make the new rules consistent with the Uniform Rules and the 2006 Amendments to the Federal Rules of Civil Procedure (Federal Rules).

Timing of Discovery (C.C.P. §2031.020)
The current timeframes for civil discovery will apply to electronic discovery. The parties, however, can stipulate to different times.

Form of Discovery (C.C.P. §2031.030)
An important digital discovery issue is the form in which the information must be produced and the Act would be amended to address this issue. C.C.P. §2031.030 would be amended to include a provision that "a party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced."

Protective Orders (C.C.P. §2031.060)
The provisions of the Act relating to protective orders would be amended. C.C.P. §2031.060(a) authorizing protective orders would be amended to expressly refer to "electronically stored information." A new subdivision (c) would be added, stating: "The party or affected person seeking a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating."

A new subdivision (d) would provide: "If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f)."

The California protective order statute would be further amended to provide that if the court finds that there is good cause for the production of electronically stored information that is not reasonably accessible, it may set conditions for the discovery of the information, including allocation of the expense of discovery. (See, C.C.P. §2031.060(e).)

The court also would have the authority to limit the frequency or extent of discovery of electronically stored information, even from sources that are reasonably accessible. Subdivision (f) would provide that the court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that: (1) it is

possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (4) 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, and the importance of the requested discovery in resolving the issues. (See, C.C.P. §2031.060(f).)

The amended protective order statute also would include a new "safe harbor" provision relating to sanctions similar to those to be added elsewhere in the Act. (See, C.C.P. §2031.060(i).)

Responses (C.C.P. §2031.280)
A new subdivision (c) would be added providing that, if a party responding to a demand for production of electronically stored information objects to the specific form of producing the information, or if no form or forms are specified for in the demand, the responding party shall state in its response the form or forms in which it intends to produce each type of the information.

C.C.P. §2031.280 also would be amended to include a new subdivision (d) that provides that, unless the parties otherwise agree or the court otherwise orders, if no form or forms for the production of electronically stored information are specified, the responding party shall produce the information in the form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form.

Current subdivision (c) (regarding the expense of translating data compilations into reasonably usable form) would be relocated to subdivision (e), but would otherwise be unchanged.

Claims of Privilege or Work Product Protection (C.C.P. §2031.285)
The sheer volume of digital information has created new issues regarding privileged information. The legislative proposal would add a new C.C.P. §2031.285, which would provide that, if electronically stored information produced in discovery is subject to a claim of privilege or protection as attorney work product, the party making the claim may notify the party that received the information of the claim and the basis for the claim. (See, C.C.P. §2031.285(a).) After being notified, the party that received the information shall either immediately return the specified information and any copies it has or present the information to the court conditionally under seal for a determination of the claim. A party that received information subject to a claim of privilege or protection may not disclose it until the claim is resolved. (See, C.C.P. §2031.285(b)–(d).)

New C.C.P. §2031.285 provides a procedure for handling privileged or protected materials contained in electronic form and produced in discovery. This procedure is not intended to modify substantive law. In discovery disputes, courts will continue to determine under applicable law whether any information produced in electronic form is privileged or protected, and whether a waiver of a privilege has occurred.

Motions to Compel (C.C.P. §2031.310)
California law allows a motion to compel. A responding party also may seek a protective order under C.C.P. §2031.060. New provisions would be added to the statute on motions to compel similar

to the new provisions in the protective order statute regarding the discovery of electronically stored information. These provisions specifically address matters such as the discovery of information from sources that are not reasonably accessible, the burden of proof, the grounds for the court to impose limitations on the frequency and extent of discovery of electronically stored information, and a safe harbor provision. (See, C.C.P. §2031.310(d)–(g) and (j).)

"Safe Harbor" Provisions (C.C.P. §§2031.060, 2031.300, 2031.310, and 2031.320)
Another important digital discovery issue is whether sanctions should be imposed on a party that fails to produce electronically stored information that has been lost, damaged, altered, or overwritten because of the routine, good faith operation of an electronic information system. The proposed legislation would add new "safe harbor" provisions to several sanctions statutes, stating: "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." In addition, after each of the new "safe harbor" provisions described above, the following sentence would be added: "This subdivision shall not be construed to alter any obligation to preserve discoverable information."

Subpoena Requiring Production of Electronically Stored Information (C.C.P. §1985.8)
The proposal would add a new C.C.P. §1985.8 relating to the subpoena of electronically stored information, which provides that a party serving a subpoena requiring the production of electronically stored information may specify the form or forms in which each type of information is to be produced. (See, C.C.P. §1985.8(b).) This section also addresses what happens if the subpoenaing party does not specify a form or forms for production. (See, C.C.P. §1985.8(c).)

New C.C.P. §1985.8 contains provisions similar to those added to the statutes on motions for a protective order and motions to compel relating to the discovery of electronically stored information, regarding the subpoenaed party's burden of showing that electronically stored information is from a source that is not reasonably accessible, the court's ability to permit discovery of such information on a showing of good cause, and the court's ability to set conditions, allocate expenses, and impose limitations on this discovery. (See, C.C.P. §1985.8(d)–(f) and (h).)

The new C.C.P. §1985.8(g) includes a provision stating that if "necessary, the person subpoenaed at the reasonable expense of the subpoenaing party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form."

New C.C.P. §1985.8 includes provisions designed to protect persons who receive subpoenas requiring production of electronically stored information from undue burden or expense. (See C.C.P. §1985.8(f)–(h).) It also contains a "safe-harbor" provision for persons whose electronically stored information is subpoenaed. (See, C.C.P. §1985.8(l).)