

UPDATING CALIFORNIA'S DISCOVERY RULES WITH THE ELECTRONIC DISCOVERY ACT

by

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State rules concerning electronic discovery just got clearer. On June 29, 2009, Governor Schwarzenegger signed the Electronic Discovery Act (the "Act"), which became effective immediately. Just last year, the Governor vetoed an almost identical version of the Act in order to focus more attention on the budget crisis. Of course, we see how well that plan worked. The Act is modeled after the 2006 amendments to the Federal Rules of Civil Procedure. The new rules govern the discovery procedure for electronically stored information ("ESI") in California civil actions.

The Act broadens the scope of California's Civil Discovery Act by specifically including provisions relating to ESI and governing the production of ESI pursuant to discovery requests. The Act is the first significant revision of California's discovery rules in a couple of decades and is a compromise between those who favor in-depth discovery of electronic records and others who want safeguards for information that would be burdensome and costly to produce.

The Act's Most Significant Changes to Existing Discovery Rules

1. Expands the Means of Discovery

- A party may now request testing or sampling of discoverable information, not just an inspection or copying.

2. Governs Preservation of Objections to Requests for ESI

- A responding party may object to a request to produce ESI on grounds that it is not stored in a reasonably accessible source and the production would constitute an undue burden or expense. The objecting party can refuse to conduct a search absent a cost-sharing agreement.
- The objection must identify the source deemed not reasonably accessible.

3. Governs the Form of Production of ESI

- The requesting party may specify the form in which the ESI must be produced. The responding party must either produce the ESI in that form or object and state the form in which it intends to produce each type of requested information.
- If no form is specified in the request, the responding party must produce the ESI in the form in which it is ordinarily maintained or a form reasonably usable.
- The responding party cannot be required to produce more than one form of the requested ESI.
- A subpoena requesting ESI must follow the same guidelines.

4. Provides for Burden Shifting between Parties

- A party seeking a protective order or objecting to a demand for ESI has the burden to prove that the ESI is maintained in a source deemed not easily intelligible or otherwise not reasonably accessible because of undue burden or expense. Federal courts that have applied e-discovery rules require specific facts and evidence of the alleged burden and expense. One can expect California courts will do the same.
- If the objecting party meets its burden, the burden shifts to the requesting party to show good cause as to why the information still should be produced.
- If the court, in its discretion, decides that the information should be produced, it may then limit the discovery and set conditions to reduce the complained-of burden or expense for the responding party.

5. Reinforces Cost-Shifting: In Toshiba v. Super. Ct., the California Court of Appeals applied California Code of Civil Procedure section 2031.280(c) to the discovery of ESI on backup tapes, ruling cost shifting for the production of ESI was mandatory where the requested data must be translated to render it intelligible or accessible. 124 Cal.App.4th 762 (2004). Specifically, the Court held:

- Where requested information must be translated to render it intelligible or accessible, the requesting party bears the burden of the translation expense.
- Allocation of costs for such translation and willingness of the requesting party to pay for the translation are factors considered as to the discoverability of ESI.
- Former section 2031.280(c) was renumbered as section 2031.280(e) in the Act.
- Code of Civil Procedure section 1985.8(g) sets forth mandated cost shifting with respect to subpoenas for ESI.

6. Governs Sanctions for Failure to Produce ESI

- A responding party that fails to produce discoverable ESI pursuant to a discovery request may face monetary sanctions.
- Sanctions, however, are prohibited if the failure to produce ESI resulted from the loss of ESI during routine, good faith business operations.

7. Provides for the Return of Privileged Information

- ESI must be returned at the conclusion of the case because producing a large amount of ESI increases the risk of inadvertently disclosing privileged information.
- The Act does not explicitly state whether privilege is waived with inadvertent disclosure.

8. Provides Other Limits on Discovery

- A discovery request may also be limited by the court when it is unreasonably cumulative or duplicative, the requested information can be found in a more easily accessible or less expensive source, the requesting party had ample opportunity to obtain the information but did not do so, or the potential burden and expense of production is outweighed by the expected benefits.

- The following factors will be considered in determining whether to limit the request: amount in controversy, resources of the parties, importance of the issues in the litigation, and importance of the requested discovery in resolving the issues. The goal of limiting discovery is to ensure that the cost of discovery is relative to the cost of the overall case.

The Act seeks to limit costs of discovery and litigation over discovery disputes. So long as litigants familiarize themselves with the Act and maintain and implement a routine document retention policy, they will have the tools necessary to comply with all applicable provisions of the Act.

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