

California Discovery Practice Under the Electronic Discovery Act

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Introduction

Your discovery is now governed by the Electronic Discovery Act (EDA) (CCP §§1985.8, 2031.285) (AB 5 (2008)). California has joined the majority of states and the federal courts by enacting rules for the discovery of electronic information and evidence. The EDA expressly applies to production requests under CCP §2031, but not to document production at party depositions under CCP §2025; it applies to subpoenas of a nonparty, but not a party; and it does not apply to interrogatories or other written discovery. The legislature determined that “[t]his act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety . . . and shall go into immediate effect.” Even so, it may not be clear which provisions will apply to pending discovery. So, what do you need to do today?

The purpose of this article is to alert you to the major provisions and some possible issues so that you can read the EDA with a critical eye and make adjustments in your discovery practice immediately. Regrettably, it raises issues rather than answers questions.

Be wary of those who tell you what the law says and read it for yourself; experienced e-discovery lawyers differ in their interpretations. The new law provides few benefits and is unlikely to alter the extent of discovery or the outcome of disputes. However, its enactment is likely to increase discovery requests for electronically stored information (ESI), it creates potential traps and issues to litigate, it may increase costs and delay, and it is likely to have some unintended adverse consequences. It also adds some new terminology, most of which is not defined.

Electronically stored information is defined in the new law as “information that is stored in an electronic medium.” CCP §2016.020. Discovery of potential evidence requires discovery of ESI because that is the form in which most important and reliable information has been created and stored for years. This recognition by lawyers has already changed litigation. In 2006, the amendments to the Federal Rules of Civil Procedure relating to ESI generated international attention and press coverage by national media. The coverage in the legal, business, and popular press focused attention on the impact of ESI in litigation. Yet the federal rules amendments themselves have had little or no impact on the outcome of discovery disputes. Similarly, lawyers expecting clear guidance or answers to their questions are likely to be disappointed with the Electronic Discovery Act.

Although opinions differ, many experienced lawyers familiar with electronic discovery have noted numerous discovery issues created or not addressed by the legisla-

tion. Such issues can be resolved by lawyers and judges seeking practical and fair solutions by applying all existing as well as new rules. Lawyers can make a difference if they are familiar with the rules and the federal case law interpreting the language borrowed from those rules. Although the comments in this article are based in large part on experience with the rule-making process and the federal rules, federal cases have not been cited due to space limitations and their nonbinding nature. The public comments to the proposed legislation and the responses found on pages 32–179 of the final report to the Judicial Council are available at California-Discovery-Law.com/new_discovery_law_developments.htm. Although it is beyond the scope of this article, an understanding of databases, networks, word processing, and similar matters related to data creation and storage are important in achieving success in electronic discovery disputes.

Five-Step Introduction to Electronic Discovery

If you are new to electronic discovery, consider the following five-step approach. First, obtain and read the Electronic Discovery Act for yourself. The commentary of others is no substitute. A copy of the act can be downloaded from the New Developments links at <http://www.California-Discovery-Law.com>. Become familiar with the new terminology, *e.g.*, “electronically stored information,” “source that is not reasonably accessible because of undue burden or expense” (*i.e.*, “inaccessible data”), “reasonably usable,” and “form.” You may avoid some problems by taking a short time now to read the statute and spot issues that need your immediate attention. The key sections are CCP §§2031.060(c)–(i), 2031.210(d), 2031.280, and 2031.310(d)–(j). Walk yourself through the discovery process as propounder and as responder to see how you might adjust your practice in accord with the new rules.

Second, consider whether you need to update your forms and boilerplate, and the way you request and respond to document requests. The EDA already affects the way you request documents and respond to the requests of others. Instead of simply including ESI in the definitions or otherwise acknowledging that it is subject to discovery, the Act establishes a separate category for ESI as one of four categories of inspection that can be requested, and it creates separate rules governing production and privilege claims concerning ESI. CCP §§2031.010(e), 2031.285. Arguably, the party requesting production may have to expressly request ESI to have it included. Under prior law, many lawyers expressly requested ESI as part of their form of request. Those who do not do so already should update their forms or be sure to ask for it when they want it. Do not assume it is automatically included when you ask for “documents.” As discussed below, your request may specify the form in which each type of ESI must be produced by your

opponent. CCP §2031.030(a)(2). Your response to a request for ESI can specify the form in which your client intends to produce each type of ESI. CCP §2031.280(c). A party is only required to produce ESI in one form. CCP §2031.280(d)(2). You must consider in what form you want to receive or produce each type of information. Another important concept discussed below that must be raised early or in the response to a request for ESI is that the information is being requested from a “source that is not reasonably accessible because of undue burden or expense,” and that the responding party will not search that source for responsive ESI. CCP §§1985.8(d), 2031.060(c), 2031.210(d).

Third, obtain a copy of the E-discovery Pocket Guide. It can be downloaded from the website of the Litigation Section of the State Bar. The Pocket Guide was distributed in 2008 and, although it does not deal with the new law, it provides a good checklist to test your knowledge of e-discovery and to suggest topics and resources for further study. The Pocket Guide “identifies specific issues and topics of which every California litigator, if not every lawyer, must be familiar and conversant. It includes ESI topics to discuss with clients, topics to discuss with opposing counsel at the meet-and-confer conference, and topics to cover in the initial case management conference with the court. The one-page brochure is not exhaustive but illustrative of common issues and topics facing most civil litigators and courts.” The pending amendment to Cal Rules of Ct 3.724 requires discussion by counsel of any ESI discovery issues, including seven specified topics; the Pocket Guide suggests discussion of 19 topics.

Fourth, while you are reading the EDA, reread related sections of the California Discovery Act both for the detail and for the concepts affecting production. Electronic discovery issues have been and will continue to be resolved by applying existing law and concepts. Although the Act may appear to contain rigid rules, the concepts and opportunities for variance provide immense flexibility. To properly apply them requires an understanding of the rules and of the nature of the specific ESI at issue. The Act simply tacks on new provisions, largely borrowed from the federal rules, to the existing system.

Fifth, start contacting potential consultants who can advise you on technical issues and assist you in obtaining a working knowledge of the technical aspects of e-discovery. You may need them to help formulate your next request or response to a document request. Most electronic discovery providers have articles, archived presentations, and information on their webpages, and even YouTube and similar sites have video presentations on electronic discovery. Many free legal webinars, webpages, articles, and case law databases are available on the Internet. See, e.g., <http://www.craigball.com/>; California-Discovery-Law.com; <https://extranet1.klgates.com/ediscovery/>.

Major Items and Issues

The following comments highlight major items addressed in the new law and some potential issues with the intent of enabling you to quickly review them and make your own determination as to how you need to revise your forms or your approach to discovery of ESI. You may disagree or note other issues that are only revealed by a careful reading of the new text.

Existence of ESI

California discovery statutes have recognized electronic data since the 1980s. See CCP §1985.3(a)(1) (“electronic data pertaining to a consumer”) and former CCP §2031.280(b) (enacted in 1985 regarding cost-shifting). Although discovery of ESI has occurred since lawyers realized such evidence existed, specific requests for it became common in the mid to late 1990s. At that point, Texas recognized the potential high volume and costs of ESI discovery and adopted rules to control excesses. After years of study and public hearings, the Federal Rules of Civil Procedure were amended and many remaining states quickly followed. The EDA recognizes the existence and discoverability of ESI. It establishes special rules that will apply to ESI discovery while other discovery will continue to be governed by existing law. To the extent not varied, existing law will also govern ESI discovery.

Form of ESI Production

The new law permits specification of the “form” of production of ESI and limits production of it to one form. The term “form” is not defined and may not be as clear or as simple as it appears. Often, the form of production of ESI is an important and costly issue. Production in some forms may reveal information of which you are unaware or do not want to disclose. Redactions may not be secure or have other consequences depending on the form. The cost of printing a hard copy can be very expensive compared to an electronic copy, and the cost of production in electronic form may vary significantly depending on the form selected. You may need all, some, or no metadata and, depending on what you ask for, you may get immediate production or major opposition. In addition, a particular form may be preferable when it comes to using and analyzing ESI. Some forms of ESI are more susceptible to manipulation, extraction, or search. Some metadata may be critical. If you ask for some ESI in native format, you may not have the software necessary to read it or it may require software that is not available to the public. It may be desirable to produce, or receive, some ESI in one form and other ESI in another form. Obtaining a spreadsheet in native format may be essential while other documents may be sufficient or preferable in PDF or TIFF.

The new law permits the demanding party to “specify the form or forms in which each type of [ESI] is to be produced.” CCP §2031.030(a)(2). It is up to the lawyer to determine what constitutes a “form” and how specific the

description can or must be. Because the term “form” is subject to interpretation, the designations may give rise to disputes and motions. Common examples of forms are native format, PDF, and TIFF. The specified form might include a restriction that it be subject to a key word search, and it might even include paper printout as an alternative form. The new provision may or may not permit an instruction as to inclusion of metadata. Ambiguity, burden, or other issues with the manner in which you request or describe the “form” may result in delay as you litigate those disputes. Under prior law, you might have asked for all communications between two people. Now, if you specify the particular form, you may have to guess the communications’ current form and decide what form you want. You should ask yourself and your expert how you want information from a database, a website, cell phone records, audio recordings, or voice mail produced. The Electronic Discovery Act also limits the production of ESI to one form, which provides an incentive to get it right. The propounder of discovery is not required to specify the form, and you may want to avoid specification until you feel comfortable. Finally, the Act retains the existing default alternative forms of production for non-ESI documents (CCP §2031.280(a)), but adds a new default for ESI. CCP §2031.280(d)(1).

Although CCP §2031.030(a)(2) permits (“may”) the requesting party to specify the form of ESI production, CCP §2031.280(c) requires (“shall”) the responding party to do so even if the propounding party did not. Failure to comply appears to have no consequence because the same default provisions govern the form of production. Absent an agreement or court order, the production of ESI must be (1) in the form in which it is ordinarily maintained, or (2) in a “reasonably usable” form, which is another new term to litigate. CCP §2031.280(d)(1). Parties may desire to litigate the form issue, but the procedure is not clear. They may be reluctant to assume that the default form will apply or be acceptable. The motion section does not provide expressly for such motions. See CCP §2031.310. If the responding party objects or specifies an unacceptable form, the propounding party may seek to resolve the issue on a motion.

If the responding party objects to the form specified by the propounding party but fails to specify its intended form of production, a court might consider such a response to be an objection to form, an inadequate objection, or a waiver of objection. Once a party produces in what it considers a “reasonably usable form,” the recipient may conclude that it is not and seek reproduction in a form that it considers “reasonably usable.” Lawyers and courts must decide how such issues will be raised and on what basis determined. Federal case law provides some guidance.

Inaccessible ESI

Much attention is directed to the concept of ESI “from a source that is not reasonably accessible be-

cause of undue burden and expense.” CCP §§1985.8(d), 2031.060(c), 2031.210(d). It is highly probable that lawyers will disagree on such terms as “reasonably accessible” and “undue burden.” The term “reasonably accessible” is derived from dictum in early ESI discovery cases when backup tapes were the focus of attention. Since then, search technology and data storage technology and practice evolved to overcome many issues. However, the terminology survived and was adopted in the federal rules and then readopted into the EDA. No matter what the semanticists may argue, in practice it appears to be an alternative way to make the same undue burden objection with which all litigators are familiar. Instead of overruling an objection based on undue burden, federal trial courts that have compelled production have decided that the data was accessible or, if inaccessible, that good cause had been shown. Based on the facts in each case, the new language appears to be of no import as to the ultimate decision. Similarly, the new language probably will be of no practical consequence with regard to the ultimate outcome in California. Under either terminology, unduly burdensome discovery can be opposed successfully if an adequate factual showing is made. Unfortunately, new language has the potential to increase discovery disputes as parties dispute its meaning and effect.

Under prior California law, undue burden has long been recognized as a proper objection to discovery, and protective orders have been an available procedure to raise the undue burden issue. See CCP §§2017.020(a), 2031.060. Under both prior law and the Electronic Discovery Act, the party asserting an undue burden objection, or seeking a protective order against an unduly burdensome discovery request, has the burden of proof to establish the undue burden. CCP §§2031.060(c), 2031.310(d).

Code of Civil Procedure §2031.310(d) provides two new issues: (1) sources that a party will not search must be identified by type or category, and (2) if the party does so, any objections are preserved as to ESI within those sources. The first requirement invites vague, general, boilerplate source descriptions to be made to all ESI requests just to be on the safe side and to preserve objections. Presumably, the failure to identify a source will be a waiver of the inaccessibility objection as to that source of ESI. However, it may not be a waiver of an undue burden that is not based on the inaccessibility of the source. Conscientious lawyers seeking discovery will feel compelled to test such boilerplate language or risk missing vital information because the other side refuses to search its records. The propounding party now knows that sources of potentially responsive ESI that may contain the proverbial smoking gun have not been searched, and no facts to support the propounder’s claim of inaccessibility have been presented. Is that party likely to roll over or make a motion to force the other side to show its proof? Disputes on accessibility of sources are likely to be based not

on the information sought but primarily on technical and financial arguments regarding data storage, search, and retrieval. Given all this, counsel should take time to budget for increased expert witness fees.

If sources are found to be inaccessible, the next issue is whether there is “good cause” to produce the ESI anyway. It is not clear if such “good cause” must be shown at the time of the first motion or on a subsequent motion. It may be difficult to show good cause when, at this stage, there is no showing of whether anything exists or is of value. If good cause is shown for production of ESI from inaccessible sources, the issue of cost-shifting may need to be addressed.

Finally, there is the issue of any objections that may be preserved with regard to ESI within a contested source that a court determines is reasonably accessible. It is not clear when and how those objections need to be made. Past experience suggests that most lawyers will serve boilerplate objections at the time they first respond even though they have not made a search and do not know if any responsive ESI even exists. Alternatively, the objections would be made after a court determines that a party is required to search the sources. Lawyers must decide now what objections will be made, how sources will be identified, what factual showing will be made to satisfy the burden of proof, when and how good cause can be shown when the existence of specific information has not been established, and when to make the objections. The costs and delay from these requirements may prohibit pursuit of vital evidence.

Although a party objecting to searching inaccessible sources need not make a factual showing until the motion to compel is made, the party should determine that a factual basis as to each source exists and can be demonstrated before it makes such an objection. It would be awkward, if not sanctionable, to assert inaccessibility due to undue burden and expense and then not be able to provide any facts to support that assertion.

Good Cause

Under California law, a party seeking production of any document must show “good cause” to compel production. CCP §2031.310(b)(1). The EDA requires that good cause be shown to compel a party to search identified sources claimed to be inaccessible only after a court determines that the sources are in fact not reasonably accessible. The showing might be made at the same or, possibly, a subsequent hearing. CCP §2031.310(e). Although it may not be known at that time that any responsive ESI exists, lawyers must consider what facts will be presented at that time to show good cause.

Conditions and Cost-Shifting

If the court orders production, it can impose conditions and limitations. CCP §§2031.060(e)–(f), 2031.310(f)–(g). Such court discretion and flexibility existed under prior law. Similarly, cost-shifting has been

available for all discovery as well as the unique provisions of former CCP §2031.280(b), which is now CCP §2031.280(e). In *Toshiba Am. Electronics Components, Inc. v Superior Court (Lexar Media, Inc.)* (2004) 124 CA4th 762, 769, 21 CR3d 532, the court determined that under former CCP §2031.280(b) cost-shifting was mandatory if translations of data are involved. Because the term “may” is used in CCP §§2031.060(e) and 2031.310(f), cost-shifting in the case of inaccessible sources of ESI is discretionary. The determination of which section applies may be of great financial significance and even determine, as a practical matter, whether the information will be produced.

Protective Order Alternative

Note that a party using the protective order alternative for resisting discovery of inaccessible ESI must move promptly and make its full showing in support of the motion. CCP §2031.060. The party making an objection need not make the factual showing initially and can await a motion to compel. However, the objecting party must “identify . . . the types or categories of sources” that it refuses to search when it affirmatively asserts that they are inaccessible because of undue burden and expense. CCP §2031.210(d).

Safe Harbor

When e-discovery became common in the 1990s, corporations were concerned that they would be sanctioned for the unintentional destruction of potential evidence that occurred during normal operations being conducted in good faith; they sought protection from such adverse orders by rule amendments. What has become known as the “safe harbor” provision was an immediate consideration of the Federal Rules Committee and was adopted in a modified form as Fed R Civ P 37(e). The rule is sometimes referenced as the “shallow pond” due to the requirements and exceptions that were ultimately included. No one should rely on this protection in planning a document destruction policy. It does not relieve a party from a duty to suspend document destruction practices that will destroy evidence. It does not expressly apply to spoliation remedies.

The safe harbor applies when information is “lost, damaged, altered or overwritten as a result of the routine, good faith operation of an electronic information system.” CCP §§1985.8(l)(1), 2031.300(d), 2031.310(j). It is a last recourse for those who have acted in good faith but inadvertently permitted the destruction of potential evidence. Even then, the court can impose discovery sanctions if it decides exceptional circumstances justify them.

During the years that federal electronic discovery rules were being considered, the practice and duty to suspend routine document and ESI destruction that might destroy potential evidence became well-known and accepted. That duty is reflected in the preservation letter sent to

opponents and the litigation hold initiated when litigation is imminent. The notes of the advisory committee make clear that a party violates the “good faith” requirement if it allows the routine operation of the system to destroy evidence. See 2006 Advisory Committee Comment to Fed R Civ P 37. A party must take affirmative steps to alter the routine operation to prevent destruction.

California borrowed heavily from the federal rules in adding the new electronic discovery provisions, but it varied the safe harbor language. Although some observers have suggested the California rule is more protective of organizations that destroy potential evidence than the federal rule, others have noted the express provisions in the Act stating that it does not alter the preservation duty and thus the spoliation consequences under existing case law. CCP §§1985.8(l)(1), 2031.300(d)(2), (j), (j)(2). Although the addition probably will prove to be inconsequential or inapplicable, new words may create uncertainty and provide reasons to litigate. Spoliation of evidence has been prohibited for centuries and is a concept independent of the discovery sanctions. The federal advisory committee noted that the safe harbor only applied to discovery sanctions and not to other remedies such as spoliation. See 2006 Advisory Committee Comment to Fed R Civ P 37. It also noted that other compensatory orders for the loss of information might be appropriate to protect an innocent party from the permissible destruction of evidence.

Protections and Limitations

The new law contains provisions for court protection from abuse or undue burden similar to those contained in other Discovery Act provisions. CCP §§1985.8(h), 2031.060(b), (f). Although some commentators have emphasized the provision in CCP §2031.060(f) because of its mandatory language, its application will probably depend on a request and showing by a party.

Recovery of Privileged Documents

The new law adds a procedure unique to ESI for recovering privileged or work product documents that were produced to the other side. The disclosing party may notify and prevent the recipient from disclosing or using the documents unless that recipient makes a motion within 30 days of receipt of notice. See CCP §2031.285(d)(1). Note that this procedure provides for production to the court under seal, but that Evid C §915 prohibits a court from requiring disclosure of the information in order to rule on the privilege. See also *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 815, 68 CR3d 758 (discussing recipient’s ethical duty on receipt of inadvertently produced documents that are obviously privileged, confidential, or protected from discovery).

Subpoena

The EDA adds provisions in CCP §1985.8 for subpoenas, but it has not added a provision to sections for noticed depositions. The Act adds special provisions CCP

§1985.8(j) and (k), which require any court order or subpoena to avoid imposing any undue burden or expense on a nonparty.

Conclusion

Every lawyer or judge is entitled to an opinion and interpretation of the new law; uniformity of interpretation and application of its provisions is problematic; consistency and predictability is illusive. However, when new laws or major amendments are enacted, potential issues and controversies can be avoided by practical and cooperative lawyers and judges who facilitate the process and seek a fair and practical result. Every lawyer and judge had an opportunity to comment on this legislation when it was under consideration by the AOC and Judicial Council. Many bar associations participated in the drafting process and urged its enactment. Now, we must make it work.

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