THE RECORDER

133RD YEAR NO. 135 www.callaw.com WEDNESDAY, JULY 15, 2009 An incisivemedia publication

New California legislation tracks federal rules on e-discovery — with a few key exceptions

By Gareth T. Evans

On June 29, in the midst of the state's budget crisis, Gov. Arnold Schwarzenegger quietly signed into law the Electronic Discovery Act (Assembly Bill 5), which enacts comprehensive electronic discovery rules through amendments to the California Code of Civil Procedure. Because the Legislature deemed it urgent legislation, it is effective immediately.

E-Discovery

Almost identical legislation passed the California Legislature unanimously in 2008, but Schwarzenegger vetoed it — not based on any opposition on its merits, but rather because at that time the governor was vetoing all bills he considered nonpriority during the state's 2008 budget crisis.

Although the legislation largely follows the 2006 e-discovery amendments to the Federal Rules of Civil Procedure, it differs somewhat in its treatment of inaccessible information and in its safe harbor for lost information.

EXPRESSLY PERMITS DISCOVERY OF ESI

The legislation expressly permits discovery of electronically stored information and provides that parties may demand copying, testing, sampling or inspection of such information. See CCP §§2031.010(a), (e). In doing so, it recognizes that almost all cases to some extent or another now involve electronic discovery. This should not be surprising, as by some estimates more than 90 percent of all information generated today is in digital form and approximately 70 percent of that information is never reduced to hard copy.

PERMITS DISCOVERY OF 'INACCESSIBLE INFORMATION'

The legislation permits parties to seek discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense (for example, backup tapes). Unlike under the federal rules, the burden is on the responding party in the first instance to bring a motion for a protective order or to make written objections to such a request.

The legislation arguably turns the federal protection against producing inaccessible information on its head. The federal rules explicitly acknowledge that no duty exists to produce information from an inaccessible source. They provide that a party respond-

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ing to requests for production need not produce (but in some cases must still preserve) electronically stored information from sources that it identifies as not reasonably accessible because of undue burden or cost. The requesting party must bring a motion to compel if it wants the information. See FRCP 26(b)(2)(B). Thus, under the federal rules, if the electronically stored information is inaccessible, the party simply does not need to produce the documents, although the requesting party may bring a motion to compel in which the burden then shifts to the responding party to demonstrate that it is not reasonably accessible.

The new California legislation, by contrast, assumes that all electronically stored information is accessible. Rather than requiring the requesting party to bring a motion to compel in the first instance, as under the federal rules, it instead provides that the responding party may bring a motion for a protective order. See CCP §2031.060(c) (as amended). Some commentators have expressed a concern that the legislation will *require* the responding party to bring a motion for a protective order in every case. The California Judicial Council in its report on the legislation, however, states that "[t]his is not the intent of the legislation nor will it be its effect." It further states that the "usual California discovery procedures will apply to electronic discovery," i.e., the requesting party can bring a motion to compel electronically stored information that the responding party claims is inaccessible (as set forth in amended CCP §2031.310) *or* the responding party may bring a motion for a protective order (as set forth in amended CCP §2031.060).

Although the legislation does not require a motion for a protective order, it does require that the responding party must object in its written responses. Specifically, it must identify in its written responses the sources of electronically stored information that it asserts are not reasonably accessible. See CCP §§2031.210(d), 2031.310(d) (as amended). By doing so, "the responding party preserves any objections it may have" related to that electronically stored information. See CCP §2031.210(d) (as amended). This language suggests that the inaccessibility objections may be waived if a party fails to assert them in their written responses. Therefore, it will be important for counsel to have an understanding of the client's systems and their accessibility *before* serving written responses to document requests.

In opposing a motion to compel, the burden remains on the responding party to establish that the electronically stored information is inaccessible. See CCP §2031.310(d) (as amended). As under the federal rules, even if the responding party establishes that the electronically stored information is inaccessible, the court for good cause may nevertheless order its production, although it may order the requesting party to share in the costs of doing so. See CCP §§2031.060(e), 2031.310(f) (as amended).

PERMITS THE REQUESTING PARTY TO SPECIFY THE FORM OF PRODUCTION

The legislation contains nearly identical provisions to the federal rules regarding the form of production of electronically stored information.

The requesting party may specify the form or forms in which it wants electronically stored information to be produced, and the responding party must include in its response the form it intends to use if no form is specified or if it objects to the specified form. But the responding party is not required to produce the same electronically stored information in more than one form. If a demand does not specify a form, then the responding party must produce it either in the form in which it is ordinarily maintained or in a reasonably usable form. See CCP §§2031.030(a)(2), 2031.280(c)-(d).

These provisions require counsel to know the difference between different forms in which the information can be produced and the advantages and disadvantages to the client.

PROVIDES 'SAFE HARBOR' FOR LOST DATA

The legislation contains a "safe harbor" from sanctions for information destroyed as the result of the routine, good faith operation of an electronic system.

It provides that, "absent exceptional circumstances," the court may not impose sanctions for failure to provide electronically stored information that has been lost, damaged, altered or overwritten as the result of the routine, good faith operation of an electronic information system. The California safe harbor is potentially broader (at least in theory) than its federal counterpart, which only mentions "lost" information. See CCP §§2031.060(i), 2031.300(d), 2031.310(j), 2031.320(d) (as amended); compare FRCP 37(e).

Nevertheless, the safe harbor does not alter any obligation to preserve discoverable information, such as when there is a reasonable anticipation of litigation.

PROVIDES FOR RETURN OF INADVERTENTLY PRODUCED PRIVILEGED INFORMATION

The inadvertent production of privileged information is a particular problem in electronic discovery because the large quantities of information typically involved may impede a party's ability to identify and withhold all documents containing privileged information.

The legislation's approach to inadvertently disclosed privileged electronically stored information is similar to that of FRCP 26(b)(5)(B). After being informed of a claim of privilege regarding information already produced, the party that received the information must sequester it and either return it or make a motion within 30 days contesting the claim of privilege and presenting the documents to the court under seal. See CCP §2031.285 (a new section added by the legislation). Before resolution of the motion, the receiving party is precluded from using or disclosing the information.

By providing the option of presenting the documents to the court instead of simply requiring their immediate return, the legislation unfortunately may create an opportunity for the receiving party to engage in gamesmanship — such as intentionally presenting to the court sensitive, privileged documents whose contents might prejudice the court against the producing party. Even if the document is returned without dispute, it can be difficult as a practical matter to "unring the bell." Although the receiving party may not use information revealed through inadvertent production of privileged documents, it may provide the receiving party with a much better understanding of its case and inform its strategy.

REQUIRES COURTS TO LIMIT ELECTRONIC DISCOVERY UNDER CERTAIN CIRCUMSTANCES

Importantly, the legislation provides that courts *must* limit the frequency or extent of discovery of electronically stored information under certain circumstances, even from a source that is reasonably accessible.

Courts must do so where any of the following conditions exist: (1) it is possible to obtain the information from a more convenient, less burdensome or expensive source; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking the discovery has had ample opportunity to previously obtain the information sought; or (4) the likely burden or expense 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 information in resolving the issues. See CCP §2031.060(f) (as amended); see also CCP §1985.8(h) (new section applicable to

subpoenas).

These provisions reflect the concept of proportionality, which is becoming increasingly important in electronic discovery because of its frequently high costs, even in smaller cases.

PERMITS SUBPOENAS FOR NONPARTIES' ELECTRONICALLY STORED INFORMATION

Finally, the legislation introduces a new section that expressly provides for the use of subpoenas to obtain electronically stored information from nonparties. See CCP §1985.8. It contains many of the same provisions described above applicable to requests to a party for production of electronically stored information, including the court's ability to limit e-discovery in light of the amount in controversy, the producing party's resources and the importance of the information

Thus, three years after the electronic discovery amendments to the Federal Rules, California's Electronic Discovery Act has brought a fairly comprehensive set of rules and procedures for the conduct of electronic discovery in cases litigated in California state courts. Passage of the legislation almost certainly means that electronic discovery will play an increasingly important role in litigation in California state courts, just as it has in the federal courts following the 2006 e-discovery amendments to the Federal Rules.

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