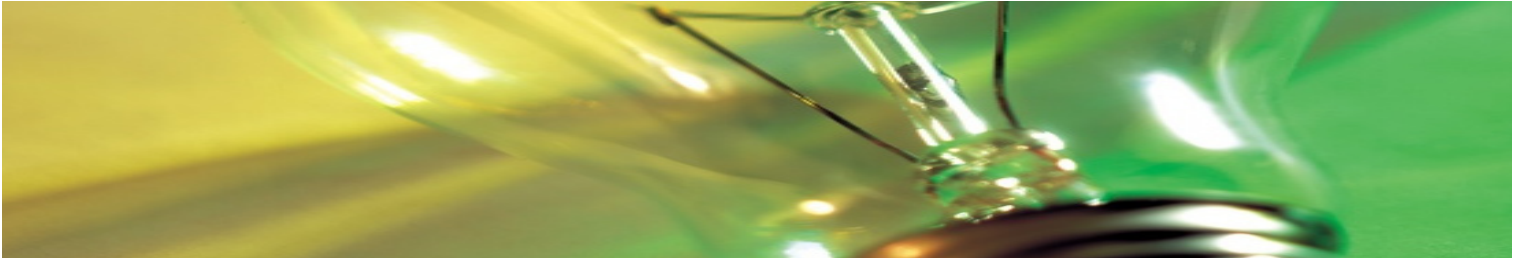


Special Bulletin

Wednesday, July 8, 2009



New California E-Discovery Rules

by Michaela L. Sozio

On June 29, 2009, for the first time, California enacted electronic discovery rules modeled after the Federal Rules of Civil Procedure. These new laws take effect *immediately*.

The new California Electronic Discovery Act not only updates California discovery rules, which have been largely unchanged since the 1980s, but also updates the procedural rules to take into account the growing advances in technology and the growing impact technology has had on litigation. These new rules take into account, among other things, the almost universal use of email, electronic data storage, Internet usage and text messaging. "Electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" and "electronically stored information", or "ESI", is any "information stored in an electronic medium." C.C.P. §2016.020(d),(e). In addition to defining these terms, existing provisions in the Code of Civil Procedure have been updated to include these new terms. For example, Section 2031.210, which governs inspection demands as to documents, tangible things, and land, now, specifically includes inspecting, testing, and/or sampling of electronically stored information.

The California Electronic Discovery Act largely mirrors the Federal Rules for e-discovery, but some nuances exist. For one, Federal Rules provide that the parties meet prior to discovery commencing in order to discuss discovery issues, including provisions for disclosure or discovery of electronically stored information. F.R.C.P. 16(b)(5). There is currently no such

counterpart in the California Electronic Discovery Act. Another difference concerns the "safe harbor" provision that protects a party against sanctions when electronically stored information is destroyed. While Federal Rule 37 protects a subpoenaed person against inadvertent electronic data "loss" if it occurred during routine and good faith use of computer systems, the new California law also extends those protections to electronic data that has also been "damaged, altered, or overwritten" during routine operations. C.C.P. §2031.060(i)(1). One issue that has not yet been addressed in the California Electronic Discovery Act is litigation holds. Federal cases interpreting Rule 37 hold that a party needs to institute a litigation hold when a party is put on notice of anticipated litigation in order to preserve ESI. However, there is nothing expressly set forth in the California Electronic Discovery Act regarding a litigation hold. Nonetheless, once a party receives notice of anticipated litigation in California State Court, it would be the prudent course of action to institute a litigation hold or otherwise disconnect any kind of automatic deletion system in place.

One important similarity concerns the accessibility and cost of obtaining and producing electronically stored information. Federal Rule 26(b)(2) provides that a "party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." If a motion to compel is brought, the withholding party has the burden of demonstrating that this discovery is not reasonably accessible. However, even if the burden is met by the party

seeking to withhold the ESI, the Court may still order such discovery if the requesting party can demonstrate good cause. F.R.C.P. 26(b)(2). California Code of Civil Procedure §2031.060(c) similarly provides that a party seeking a protective order as to the "production, inspection, copying, testing or sampling of electronically stored information" on the basis that such information "is not reasonably accessible because of undue burden or expense" has the burden of demonstrating the undue burden or expense. C.C.P. §2031.060(c). When electronically stored information is produced under the California Electronic Discovery Act, it should be produced in the form "ordinarily maintained or in a form that is reasonably usable." C.C.P. §2031.280(d)(1).

In all, the main benefit of California's Electronic Discovery Act is that formal procedures are now in place regarding discovery of electronically stored information, and the fact that these procedures, for the most part, emulate the Federal Rules which should serve to make this a smoother transition.

ABOUT THE AUTHOR



Michaela L. Sozio is a partner in the firm's Los Angeles office. She focuses her practice on copyright and trademark infringement and trade secret actions, unfair competition cases, defamation cases, products liability and complex business litigation matters.