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On June 30, 2009 California became the 22nd state to enact separate rules that specifically address electronic discovery. The new California Electronic Discovery Act is effective immediately. It makes comprehensive changes to California's discovery rules and is designed to modernize California's discovery laws to reflect the growing importance of discovery of electronically stored information in today's digital world where paper is the exception and most information is stored electronically. While similar rules have been in effect in the federal courts since December 2006, as a result of the California EDA, California employers now need to be prepared to face the challenges associated with e-discovery when litigating in California state courts as well, taking into account unique twists that the California EDA places on the treatment of inaccessible data as well as mandatory cost-shifting for producing data from back-up media.

California Enacts New E-Discovery Rules that Mirror Federal Court E-Discovery Rules - with One Exception

By Paul D. Weiner, Michael J. McGuire, Donald W. Myers and Yordanos Teferi

On June 29, 2009, California Governor Arnold Schwarzenegger signed into law the Electronic Discovery Act ("California EDA"). The California EDA took immediate effect as an urgency measure, "in order to eliminate uncertainty and confusion regarding the discovery of electronically stored information," making California the 22nd state to enact separate statutes or rules that specifically address electronic discovery.

According to the author of the California EDA, Assembly Member Noreen Evans, the California EDA was necessary because "most information is now stored in electronic rather than paper form," and is designed to "modernize California's discovery law to reflect the growing importance of, and need for guidance in the handling of the discovery of electronically stored information." Senate Judiciary Committee Analysis of AB 5, June 9, 2009, available at www.sen.ca.gov and www.assembly.ca.gov/Evans ("SJC Analysis").

The California EDA Essentially Mirrors the Federal E-Discovery Rules

Like the majority of states that have enacted specific electronic discovery rules, the California EDA essentially mirrors the Federal Rules of Civil Procedure addressing electronic discovery that were enacted in December 2006. In particular, the California EDA:

- Specifically defines "electronically stored information." (ESI);
- Specifically provides that parties may obtain discovery of ESI;
- Permits a party to demand the production, inspection, copying, testing or sampling of ESI;
- Addresses the form of production for ESI;¹
- Permits a party to object to the discovery of ESI on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense.²

- Provides that even if a court determines that requested ESI is not reasonably accessible due to undue burden or cost, the court may still order production if the requesting party shows “good cause,” subject to certain conditions, including allocation of discovery expenses;
- Mandates that a court shall limit the discovery of any ESI - even from a source that is reasonably accessible - where: (1) it is possible to obtain the information from another, less expensive or more convenient source; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking the ESI has had ample opportunity to obtain the information sought; or (4) the likely burden or expense of the discovery outweighs its likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues;
- Mandates that parties must submit a meet and confer declaration under section 2016.040 before bringing a motion for protective order or a motion to compel with respect to ESI;³
- Incorporates “safe harbor” provisions whereby a court “shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system;”
- Sets forth a procedure to assert a claim of privilege or attorney work product protection of ESI inadvertently produced in discovery, establishes what the receiving party must do in response, and creates a mechanism for resolving such claims; and
- Specifically permits parties to seek ESI from third-parties via subpoenas, and applies to the subpoena process many of the same provisions that are in the provisions on motions for protective orders and motions to compel ESI.

The California Distinction: How the California ESA Addresses Inaccessible ESI

The one area where the California EDA strays from the federal approach concerns the discovery of electronically stored information from sources that a party identifies as not reasonably accessible.

In particular, the Federal Rules take a two-tiered approach to inaccessible data, making a distinction under Federal Rule of Civil Procedure 26(b)(2)(B) between “accessible” and “inaccessible” data. Rule 26(b)(2)(B) is entitled “Specific Limitations on Electronically Stored Information,” and provides: “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.” Rule 26(b)(2)(B) also places the burden on the requesting party to demonstrate “good cause” before an inaccessible data source must be searched. Thus, under the federal framework, a requesting party is encouraged to review and evaluate ESI produced from accessible sources before demanding ESI from inaccessible sources, and a responding party is relieved of the need to produce inaccessible ESI unless the court orders otherwise.

On the other hand, the California EDA does not contain explicit language that states a party does not have to provide discovery of inaccessible ESI. Just as important, unlike the Federal Rules, which put the burden on the requesting party to file a motion to compel to obtain discovery from sources of ESI that are identified as not reasonably accessible, the California EDA appears to place the burden on the producing party to file a Protective Order to claim that specified data sources are inaccessible due to undue burden or expense, and thus do not have to be searched. This was one of the main concerns among the more than 50 comments submitted for the version of the California EDA that was circulated for public comment. In its report to the Members of the Judicial Council in support of the final California EDA, the Policy Coordination and Liaison Committee (“PCLC Report”) responded to that criticism as follows:

Although the committee supports the adoption of many of the provisions in the federal rules . . . , it disagreed with the suggestion that the federal rules should be adopted in their entirety in California. The committee recommends the current legislative proposal, even though it differs in some respects from the federal approach, because it will work better under California discovery law. . . .

There are . . . some differences between federal and state discovery procedures and practices. In particular, federal discovery law requires the parties, without awaiting a discovery request, to provide initial disclosures, include a copy of, or a description by category and location of, electronically stored information that the disclosing party may use in support of its claims or defenses. The federal “two-tier” approach to the discovery of electronically stored information from a source that is not reasonably accessible operates within this discovery framework. The information is excluded from disclosure, unless a court orders discovery from such sources. . . .

By contrast, civil discovery in California is initiated by the parties. The proposed legislation described in this report is designed to work fairly and efficiently within this state’s discovery framework. Under California law, when a party demands the production of documents or electronically stored information, the responding party has various options. It may agree to comply with the demand. It may agree to comply in part. It may object to producing the information on various grounds, including that the production would be unduly burdensome. Or it may seek a protective order. If the responding party objects to a demand and does not seek a protective order, the demanding party may move to compel. If there is a motion for a protective order or a motion to compel, the parties must meet and confer to informally resolve each issue raised by the motion.

The California discovery system operates effectively to resolve disputes. The proposed legislation is intended to enable this system to operate even better in resolving disputes relating to the discovery of electronically stored information. In contrast to the federal “two-tier” system that requires a court order to permit the discovery of information from sources that are not reasonably accessible, California’s amended discovery statutes should enable discovery disputes over such information to be resolved often without court order. . . .

Some commentators expressed a concern that the proposed legislation will require the party from whom discovery of electronically stored information is sought to bring a motion for a protective order in every case. This is not the intent of the legislation nor will it be its effect. As indicated, the usual California discovery procedures will apply to electronic discovery, including the ability of the party demanding the production of electronically stored information to file a motion to compel; hence, the resolution of disputes over the discovery of electronically stored information will not always require the filing of motion for protective orders.⁴

The California EDA Preserves Mandatory Cost-Shifting for Producing ESI from Back-Up Media Articulated by the California Appeals Court in *Toshiba v. Superior Court of Santa Clara County*

Another California twist on inaccessible ESI concerns a decision from the California Court of Appeals about back-up tapes, which are a classic source of ESI that courts treat as “not reasonably accessible.”⁵ In *Toshiba*, the court of appeals reversed a decision of the trial court, and held that the cost-shifting provisions of California Code of Civil Procedure section 2031(g)(1) were mandatory, thus, the demanding party had to pay the costs (possibly as much as \$1.9 million) for recovering usable information from the responding party’s computer backup tapes. The parties did not dispute that the defendant’s backup tapes were “data compilations” within the meaning of section 2031(g)(1) or that the defendant would incur some expense to manipulate the tapes in order to produce usable information responsive to plaintiff’s document demand. (The court left open for consideration on remand by the trial court the factual issue of what constituted “reasonable and necessary” costs to restore and mine data from the back-up tapes at issue.) In reaching this decision, the court instructed:

Section 2031(g)(1) expressly provides that “[i]f necessary, the responding party at the reasonable expense of the demanding party shall, . . . translate any data compilations . . . into reasonably useable form.” The clause is unequivocal. We need not engage in protracted statutory analysis because its plain language clearly states that if translation is necessary, the responding party must do it at the demanding party’s reasonable expense.

[Plaintiff] contends that the cost shifting specified by section 2031(g)(1) may only be had upon a showing by the responding

party that it will suffer undue burden or expense. This contention ignores the plain language of the statute. It is also based almost entirely upon federal law, which does not include a provision similar to the cost-shifting clause of section 2031(g)(1). . . . Given the patent difference between the state and federal schemes, [Plaintiff's] reliance on federal decisions is misplaced. . . .

[Plaintiff] also argues that interpreting section 2031(g)(1) as an exception to the general rule would conflict with settled federal law. We agree that the cost-shifting provision of section 2031(g)(1) conflicts with the federal rule, but it appears to us that the Legislature intended it to be that way.

The California EDA retains the following language from section 2031(g)(1) that was interpreted in *Toshiba*, re-lettered 2031.280(e):

If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.

Identical language is also contained in the California EDA section that authorizes subpoenas for ESI. Moreover, in its report to the Members of the Judicial Council in support of the final California EDA, the Policy Coordination and Liaison Committee specifically stated:

The committee's legislative proposal does not change the language of section [2031(g)(1)] or the holding of the *Toshiba* decision. The proposal not only retains the current language [re-lettered as 2031.280(e)], but also includes it in new section 1985.8 [concerning subpoenas for ESI].⁶

Take Aways

Given the new California EDA, it is more important than ever for practitioners in California to become intimately familiar with their client's IT systems, policies and practices. In order to identify sources of information that are not accessible due to undue burden or cost, counsel must understand their client's IT systems, where relevant data resides, and how difficult and/or burdensome it is to extract such information for discovery. Further, intimate knowledge of a client's IT systems is critical for determining the form of production for ESI, which now needs to be addressed at the time discovery requests are served or responded to. Without such knowledge, counsel may agree to produce ESI in a manner that a client's IT systems will simply not allow and may fail to identify opportunities to take advantage of the cost-shifting provisions discussed above. These factors are especially important in labor and employment cases where an employer often has complex and intricate IT systems that may contain relevant ESI (including back-up media, legacy systems, third-party hosted systems, etc.), while the plaintiff only has to search very basic sources of ESI (like home computers, e-mail systems and social networking sites).

From a practical standpoint, the California twist on the treatment of inaccessible ESI is not that much different than the Federal Rules. At the end of the day, in federal court - and now under the EDA in California - responding parties have to be proactive if they intend to not search or produce electronic data from inaccessible sources by:

- Promptly identifying sources of ESI that are not reasonably accessible by lodging a timely objection to a discovery request (in California) or listing them in self-executing disclosures (in federal court);
- Providing sufficient details about the burdens and costs of providing the discovery from and the likelihood of finding responsive information on the sources identified; and
- Either party can file a motion to resolve the issue, with the responding party having the burden to establish the undue burden or cost of producing responsive ESI from the identified sources.

However, in all California cases, given the cost-shifting provisions of section 2031.280(e) of the EDA that are unique to California,

employers should be aggressive about seeking mandatory cost-shifting when dealing with a discovery request that calls for the production of ESI contained on any type of back-up media, in accordance with the mandates of *Toshiba*.

Employers also need to be vigilant about protecting the inadvertent disclosure of privileged information when producing ESI. Like Federal Rule of Civil Procedure 26(b)(5)(B), the California EDA does not address the substantive question of waiver, but instead merely provides a procedure for sequestering ESI until the court determines whether a waiver has occurred. Common law principles will still govern whether, and under what circumstances, inadvertent production of privileged or otherwise protected information results in a waiver, and the PCLC Report specifically states so.⁷ Given the explosion of ESI in the modern workplace, large volumes of ESI are routinely in play in employment cases - even relatively “small” cases. Thus, employers should consider negotiating a comprehensive clawback agreement (for example, the clawback agreement should cover the inadvertent production of metadata, an issue that is often overlooked) with plaintiff(s) at the outset of discovery to protect against privileged data slipping through. In appropriate cases, employers should also capitalize on state-of-the-art technologies to help protect against the inadvertent disclosure of privileged ESI. For example, once ESI has been harvested, as part of the data processing/review protocol, using basic litigation support review technologies like Relativity®, counsel can run an electronic, “bulk-tag” search to identify potentially privileged documents/ESI that warrant a special level of review.

Just like the federal rules, the California EDA also discourages gamesmanship when it comes to discovery of ESI, and instead places a premium on cooperation between counsel and their clients on issues surrounding ESI. This is consistent with leading industry guidance on these issues.⁸

Finally, as with Federal Rule 37(e), employers should not place too much reliance on the new “safe harbor” provisions of the California EDA. Not only does the rule explicitly state that it does not alter preservation obligations federal courts also have consistently held that the virtually identical federal safe harbor rule does not exempt from sanctions a party who fails to stop the automatic operation of a system that is eliminating information that may be discoverable in litigation, such as routine e-mail purges or backup tape recycling programs.

The bottom line: the new California EDA underscores the importance of having both the substantive expertise in this critically important area of the law, as well as practical, hands-on experience to meet the demands of e-Discovery when litigating in today’s digital age in California state courts.

Littler is one of the few firms in the Country that has a team of attorneys dedicated full-time to working with clients in the challenging field of electronic discovery, a move that clearly emphasizes the Firm’s commitment to providing its clients with cutting-edge solutions in this rapidly developing area. Littler’s E-Discovery lawyers provide focused guidance and expertise on all aspects of electronic discovery: from case- and client-specific advice about meeting preservation obligations; to working with Trial Teams to address “meet-and-confer” obligations; to developing strategies for efficient and effective data harvesting, analysis, review and production; to implementing cost-shifting/reduction strategies.

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 Paul D. Weiner is a National E-Discovery Counsel in Littler Mendelson’s Philadelphia office. Michael J. McGuire is an E-Discovery Counsel in Littler Mendelson’s Minneapolis office. Donald W. Myers is an E-Discovery Senior Associate and Yordanos Teferi is an E-Discovery Associate in Littler Mendelson’s Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Weiner at pweiner@littler.com, Mr. McGuire at mmcguire@littler.com, Mr. Myers at dmyers@littler.com, Ms. Teferi at yteferi@littler.com.

¹ A party demanding ESI may specify the form in which it is to be produced and the responding party may object to a specified form of production; if no form of production is specified, the responding party shall produce ESI in the form in which it is ordinarily maintained or a reasonably useable form. A party also does not need to produce the same ESI in more than one form. California EDA §§ 2031.030(a)(2); 2031.280(c) and (d)(1).

² A producing party may also promptly seek a protective order on the grounds that the ESI sought is not reasonably accessible because of undue burden or expense. California EDA §§ 2031.060(a) - (c). Such a motion must be accompanied by a meet and confer declaration, and the producing party bears the burden of demonstrating inaccessibility due to undue burden or expense. *Id.*

³ California EDA §§ 2031.060(a) and 2031.310(b)(2). The initial version of the California EDA that was circulated for public comment also contained language supporting changes in the civil case management rules that would have created a duty to meet and confer on ESI discovery issues before the initial case management conference, similar to the meet and confer requirements of Federal Rule of Civil Procedure 26(f)(3)(C). See Invitation to Comment LEG 08-01/W08-01, Rules Proposal, available at www.courtinfo.ca.gov/invitationstocomment/documents/w08-01. While those provisions were not included in the final California EDA, as noted above, meet and confer conferences are still required before a dispute concerning ESI can be brought before a court.

⁴ See Judicial Council of California, *Policy Coordination and Liaison Committee Report re: Electronic Discovery: Proposed Legislation*, April 16, 2008, at 11 - 13, available at www.courtinfo.ca.gov.

⁵ *Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County*, 124 Cal. App. 4th 762 (2004).

⁶ See PCLC Report at 126. Compare also SJC Analysis, at 10 - 11 (“This bill would not affect the standard articulated in *Toshiba v. Superior Court* regarding the allocation of costs for recovering ESI from back-up media. . . . [The procedures set forth in the California EDA] preserve the rule articulated by *Toshiba* for the allocation of the financial burden of producing ESI from back-up media, and are consistent with the intent of the sponsor of this bill.”)

⁷ See PCLC Report, at 7 (“[The new procedure of section 2031.285] is not intended to modify substantive law, citing *Reporter’s Notes to Rule No. 9 of the National Conference of Commissioners on Uniform State Laws, Uniform Rules Relating to Discovery of Electronically Stored Information* (“The rule does not address whether the privilege or protection that is asserted after production was waived by the production or ethical implications of use of such data. These issues are left to resolution by other law or authority”).

⁸ See e.g., *The Sedona® Cooperation Proclamation*, July 2008 (The Proclamation argues that cooperation is consistent with zealous advocacy, and is designed to facilitate collaborative, transparent discovery of ESI. It has been publicly endorsed by over forty federal and state judges across the country).