California Litigation Alert: California Signs Into Law New E-Discovery Rules

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Electronic document retention is a high-stakes field. Faulty retention practices have led to a $29 million verdict resting on a party's destruction of e-mails[1] and to $8.5 million sanctions and bar discipline proceedings for the attorneys involved.[2] With devastating sanctions becoming more and more the order of the day, courts have left no doubt that they take retention obligations very seriously in this digital age.

At this critical juncture, the California legislature has finally entered the fray. On June 29, 2009, Governor Arnold Schwarzenegger signed into law the Electronic Discovery Act (Act). Governor Schwarzenegger's approval came three years after the federal enactment of a similar set of electronic discovery (e-discovery) rules that updated the Federal Rules of Civil Procedure.

The Act amends the California Code of Civil Procedure by expressly permitting discovery of electronically stored information (ESI), with the end goal of improving discovery measures during litigation and avoiding undue involvement by the court in resolving e-discovery disputes. All discovery requested or responded to in regards to ESI must now comply with the Act, which for the first time provides definitions of ESI. The Act defines ESI as "information that is stored in an electronic medium" and defines "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities."[3]

California's new e-discovery rules closely parallel the federal version. The Act primarily applies the existing rules in the California Civil Discovery Act to ESI and establishes procedures to request and respond to e-discovery. Certain provisions in the Act, however, are distinct from their federal counterparts.

Production of ESI

The Act states that a requesting party may specify the form in which ESI is to be produced, and that if no form is specified or agreed to by the parties, the ESI must be produced in the form in which it is "ordinarily maintained" or in a form that is "reasonably usable." In the new rules, similar to the federal rules, a party need not produce ESI that is not "reasonably accessible because of undue burden or expense."

Distinct from federal practice, the Act places the burden on the ***responding*** party to seek a protective order demonstrating that the ESI is not reasonably accessible and indicating in which form it intends to produce the ESI. This rule is distinct from the federal rules, which require the requesting party to file a motion to compel to produce ESI. A requesting party may overcome the motion for a protective order if the court finds "good cause" to produce the ESI.

Safe Harbor

California's new rules, like the federal rules, provide a safe harbor for parties who lost ESI as a result of "the routine, good faith operation" of an electronic system. Such parties will not be sanctioned by the court. The Act proceeds beyond the federal rules, however, to provide a safe harbor not only for lost ESI, but also for ESI that has been "damaged, altered or overwritten" due to a routine, good faith operation of an electronic system. It is crucial for companies to ensure that their systems fit within this safe harbor.

Inadvertent Disclosure and Privileged Information

The Act provides measures to allow a party to retract inadvertently disclosed or privileged information. In case of inadvertent disclosure, a producing party may take "reasonable steps" to notify the receiving party of any privileged material. In turn, the receiving party must keep the information confidential and cannot use it in any manner "until the legitimacy of the claim of privilege or protection is resolved."

In light of California's new e-discovery rules, it is essential for companies to ensure that they have in place a documentation retention system that will help them secure protection from potentially case-dispositive electronic discovery sanctions. Please contact any of the attorneys listed to the left for more information regarding California's new e-discovery rules or the creation of document retention policies.

To view the full text of the Electronic Discovery Act, please click here.

Endnotes

[1] *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004). In 2005, Morgan Stanley faced a jury verdict of $1.5 billion for e-discovery abuses. Although the verdict has since been reversed on other grounds, attorneys have not forgotten the harsh consequences of committing e-discovery abuses. *See Coleman Holdings, Inc. v. Morgan Stanley*, 2005 WL 67071 (Fla. Cir. Ct. March 1, 2005), rev'd on other grounds, 955 So. 2d 1124 (Fla. Dist. Ct. App. 4th Dist., 2007).

[2] *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008).

[3] http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf

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For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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