EIM and Litigation Alert

California eDiscovery Legislation Signed Into Law, Effective Immediately

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INTRODUCTION

On June 29, 2009, Governor Arnold Schwarzenegger signed into law **AB 5**, California's first set of statutes designed to address the realities of electronic discovery. AB 5 adds two new statutes to the California Code of Civil Procedure and amends 19 pre-existing CCP sections. The new rules, which largely track current federal provisions, took effect immediately and bring California in line with the growing number of states adopting specific regulations for this critical area of modern civil litigation. Among other mandates, the new statutory scheme:

- subjects electronically stored information (ESI) to discovery automatically;
- changes procedures and processes applicable to discovery requests directed to both parties and non-parties;
- extends potential sanctions for non-compliance to ESI but also provides some potential protection from such sanctions; and
- impacts privilege considerations.

Two anticipated parallel amendments to Rules **3.724 and 3.728** of the California Rules of Court would:

- require meet-and-confer discussion of electronic discovery issues in preparation for, and at, the parties' first case management conference (CMC); and
- authorize the resulting case management order to address ESI.

Below is a summary of the major changes now in force as well as those expected to be formalized soon, based on Fenwick's decade of **award-winning** handling of all legal and technology aspects of the eDiscovery process for our clients' litigation matters.

I. THE NEW RULES – HIGHLIGHTS

A. Statutory Provisions

1. Scope of Discovery

A number of CCP provisions[1] now expressly identify ESI as automatically subject to the civil discovery process. In sum, ESI can be requested and, wherever appropriate, must be produced in response to requests for production and/or inspection from parties. The same is true as to non-party subpoena recipients, pursuant to new CCP § 1985.8.

2. Procedural Changes

a. Requested format(s) of production

Like their federal counterparts,[2] new CCP sections 2031.030(a)(2) (demands of parties) and 1985.8(b) (subpoenas of non-parties), provide that a discovery request "may specify the form or forms in which each type of . . . information is to be produced." State court litigants and their counsel must therefore be well-versed in the factors and strategies essential to framing cost-effective and strategically wise requests. The new California rules also provide that if a discovery demand or subpoena "does *not* specify a form or forms for producing a type of electronically stored information," then the recipient "shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable." *See* CCP §§ 2031.280(d)(1) (parties) and 1985.8(c)(1) (non-parties).

This very standard was adopted by the Federal Rules of Civil Procedure approximately three years ago, and the vagaries of it have tripped up

1 *See, e.g.,* CCP §§ 2016.020(d)-(e), 2031.010(a)(2), 2031.050(a), 2031.280(c)-(d)(1)-(2).
2 *See* Fed. R. Civ. P. 34(b) (parties) and 45(d) (non-parties).

many federal litigants during that time. Care must be taken at the outset of a lawsuit to assess the most beneficial ways to exchange ESI and to memorialize format specifications in an early stipulation. Over the past several years, Fenwick's Litigation and Electronic Information Management (EIM) Groups have seen an increasingly strong trend toward production in native file formats and we expect that trend to continue to accelerate now that the new California eDiscovery rules – and similar rules in other states – are in force.

b. Burden-Shifting for ESI that is "not reasonably accessible"

California's new rules also begin to address one of the most complicated issues in eDiscovery: ESI that is "not reasonably accessible", including back-up and forensically-recoverable "deleted" data. Like FRCP 26(b)(2)(B) and 45(b)(1)(D), the corresponding new California provisions do not specifically mention back-ups or forensics. Yet, also like their federal analogues, the California rules now do direct state courts to take into account the particular challenges entailed in collecting and preserving ESI that resides in sources that are comparatively difficult to access. Huge cost and person-power burdens can result if a producing party is required to engage in extensive search, collection, processing and production activities for such "not reasonably accessible" data.

For parties and non-parties alike, various California statutory provisions now follow the burden-shifting notion: Once a responding party demonstrates that a request entails "undue burden or expense," the requesting party can only obtain the inaccessible data if it shows "good cause." *See* CCP §§ 2031.060 (c)-(f)(1)-(4) (parties and "affected person[s]"), 2031.310(d)-(f) (parties and "affected person[s]") and 1985.8(e) (non-parties). Some practitioners and commentators have asserted that, unlike the federal rules, the California framework places too much of the burden-shifting onus on the responding party – including an affirmative obligation to raise a formal objection or be the first one to the courthouse. How the new "inaccessible" framework will actually play out in California state court practice remains to be seen.

Another open issue is the extent to which cost-shifting requests may be buttressed by these new rules. Under federal common law, there are many preconditions to obtaining a successful cost allocation.[3] In contrast, even before the recent enactments, California statutory law specifically mandated that "data compilations" translation costs be borne by the *requesting* party.[4] The "data compilation" exception remains in current CCP § 2031.280(e); and an identical exception is in the new non-party subpoena statute, namely § 1985.8(g).

In addition, there are now some ostensibly broader provisions authorizing allocation of costs to the discovery responder whenever any type of "not reasonably accessible data" is at issue. *See* CCP §§ 1985.8(f) (non-parties), 2031.060(e) (parties and "affected person[s]") and 2031.310(f) (parties and "affected person[s]"). How, or even if, these new provisions interplay with the translation exception will depend on future determinations by discovery commissioners and judges.

3. Sanctions for Failing to Comply or Cooperate

Like FRCP 37, many CCP statutes[5] now provide that absent exceptional circumstances a court may not impose sanctions on a party for failing to produce ESI lost as a result of the routine, good faith operation of an electronic information system. As adopted in California, this principle is expressly extended beyond parties to non-parties and attorneys. This rule will not obviate

3 *See Zubulake v. UBS Warburg LLC* ("*Zubulake III*"), 216 F.R.D. 280 (S.D.N.Y. 2003), discussed in detail at Robert D. Brownstone, **Preserve or Perish; Destroy or Drown – eDiscovery Morphs Into EIM**, 8 N.C.J. L. & Tech. (N.C. JOLT), No. 1, at 1, 33-41 (Fall 2006) ("NC JOLT").
4 *See Toshiba v. Super. Ct.* (*Lexar Media*), 124 Cal. App. 4th 762 (Cal. Ct. App. 2004) (applying precursor to recently amended CCP § 2031.280), discussed in **NC JOLT**, supra note 5, at 41-42.
5 *See* CCP §§ 1985.8(l)(1), 2031.060(i)(1), 2031.300(d)(1), (j)(1), 2031.320(d)(1).

compliance with any requirement that ESI be preserved. Moreover, presumably it will not eliminate the ability of California court to impose sanctions under its inherent powers and/or other statutory authority. However, this "safe harbor" provision should enable a party to fend off a spoliation charge by demonstrating that it only deleted or did not preserve potentially discoverable ESI pursuant to an ongoing retention/destruction policy that (1) was not instituted in response to a litigation or other dispute; (2) was consistently applied and enforced; and (3) contained a valid "litigation hold" (destruction-suspension) provision, under which a hold notice was issued and re-issued in a timely and effective manner. *See generally* Robert D. Brownstone and Juleen Konkel, **Give P's a Chance**, Recorder (May 11, 2009) (discussing federal case law, including three decisions from the Northern District of California).

4. Privilege-Waiver Protection

A mechanism for resolving waiver concerns is especially important in our digital age. The huge volumes of data reviewed and produced in eDiscovery render it exponentially more difficult to vet emails, attachments and stand-alone files for privilege and/or work-product protection. Analogous to FRCP 26(b)(5)(B) and 45(d)(2), two new California provisions – CCP § 2031.285 and § 1985.8(i) – provide a procedure for a party or non-party, respectively, to assert attorney-client privilege or work-product doctrine protection after information has been inadvertently produced.

If the producing party's assertion is contested, the rule gives the recipient 30 days to present the matter to the court for resolution. However, neither the new rule nor the lengthy proposal that created it seems to address the recipient's duties in exactly the same way as does recent California case law, namely ***Rico v. Mitsubishi Motors Corp.***, 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758 (Dec. 13, 2007). Moreover, like its federal cousin, the California statutory mechanism does not address whether the production has waived privilege or work-product protection. Instead, it leaves that substantive law issue to the court's traditional principles of determining issues such as whether the disclosure was intentional or inadvertent.

Even with the enactment of sections 2031.285 and 1985.8(i), California's privilege protection still seems to lags behind current federal law. While the California eDiscovery legislation hung in limbo during the last year, Congress enacted **Federal Rule of Evidence (FRE) 502**, which became law in September 2008. FRE 502 provides a fair amount of substantive protection to inadvertently disclosed information. For example, as long as a claw-back has been attempted under the FRCP 26(b)(5)(B) procedural mechanism, FRE 502 can limit the potential for a dreaded "subject-matter waiver." The new California statutes do not appear to go that far. It also remains to be seen whether FRE 502's attempt to make federal-court non-waiver determinations binding on subsequent state proceedings will be subject to a successful due process challenge.

B. Anticipated Amendments to CRC

In addition to the new amendments to the CCP, the California Judicial Council is expected to follow through on **April 16, 2008 recommendations** to amend both CRC 3.724 and 3.728. Both amendments would emphasize the importance of hashing out as many eDiscovery issues as possible early in state court litigation. In essence, these two new rules would intensify judicial expectation that counsel are engaged in ongoing, effective communication with their clients' appropriate Information Technology (IT) personnel.

The first new provision, CRC 3.724(b), would direct the parties to meet and confer to prepare a plan for electronic discovery starting 45 days in advance of the initial case management conference required by CRC 3.722(a). In particular, CRC 3.724(b) would provide that:

> [A]ll parties must meet and confer . . . to consider the following:
>
> (1) Any issues relating to the preservation of discoverable electronically stored information;

(2) The form or forms in which information will be produced;

(3) The time within which the information will be produced;

(4) The scope of discovery of the information;

(5) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(6) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;

(7) How the cost of production of electronically stored information is to be allocated among the parties; and

(8) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.

This new procedure would be analogous to the early eDiscovery-focused meet-and-confer mandated by FRCP 26(f) and its accompanying Advisory Committee note since December 1, 2006, and would implicitly formalize a requirement that litigants routinely involve their IT leaders early in eDiscovery process and dialogue. The second new provision, CRC 3.728, would add electronic discovery to the list of topics that may be addressed in the order that results from the first CMC.

II. SOME KEY PRACTICAL IMPLICATIONS

California's rule changes aim to reduce uncertainty and increase conformity in the application of the CCP to the exponentially increasing amount of discoverable data available. Thus, the amendments provide a modicum of enhanced guidance to courts and litigants on how to structure electronic discovery in state court civil cases. Yet there is no assurance that production or preservation of huge data sets has been or will be reined in; indeed, the adoption of these rules signals that litigants will be held even more accountable for participating, early and often, in the trial court's creation of standards and protocols for ESI preservation and production – and for ongoing compliance with both.

At a minimum, every organization should do its best to understand the "who, what, where, when and why" of its ESI and its overall electronic information management environment. Significant risk-management and cost benefits can be attained if companies craft proactive day-to-day information-management and litigation strategy from an eDiscovery standpoint. *See generally* Robert D. Brownstone and Juleen Konkel, **Give P's a Chance**, Recorder (May 11, 2009).

CONCLUSION

Fenwick & West's Litigation and Electronic Information Management Groups practice at the cutting edge not only of proactive eDiscovery planning and compliance but also of reactive eDiscovery process management. If you have any questions about what steps your company should be taking to ensure the proper handling of electronic information and to enable cost-effective litigation preparedness, do not hesitate to contact us.

To learn more about Fenwick & West's eDiscovery, Records-Retention, EIM and Litigation services, please see:

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