It Is Not A Bad Dream – The Electronic Discovery Act

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It Is Not A Bad Dream - They Really Are After Your Client's Files

Well, if not now... they will be.

So, there are some things that you need to know about the California's Electronic Discovery Act, which was signed into law in mid 2009.

What Is Electronic Discovery Act and What Does It Mean to Your Clients?

Opposing counsel, governmental entities and others, which have the "wherewithal" to access the Courts can inspect, copy, test, or sample essentially all unprivileged information which is stored in an electronic medium or format, e.g. e-mails, computerized financial records, personal notes and memos, etc... and sometimes even more importantly, the preliminary and interim drafts of documents, which might track the evolutionary changes to your client's thinking, their theories, motivations, shifting positions and final conclusions.

It isn't just what your client writes or prints in his/her or its "hard files" which might be scrutinized (and possibly second guessed) anymore. To a much greater and clearer extent, their electronic data is an "open book" as well and, some time in the future, it may be someone, such as opposing counsel, who wants to see it, who definitely will not have your client's best interests at heart.

Therefore, everything the client does which is memorialized in any form, in an electronic format, needs to be thoughtfully considered before putting the "pen to the page", electronically speaking. Likewise everything received by them from others which is maintained in their electronic files is potentially open to discovery, so hopefully those with whom they work and communicate will also be cognizant of maintaining professional files and correspondence.

One cannot safely assume that just because it is not on paper it is "safe" from prying eyes. Consider, for example the off-hand comment your client made in one of his or her e-mails just yesterday, with an intemperate or ill advised statement. Would they really want to justify themselves from the witness stand in a trial 1-2 years from now?

There is an important caveat to be kept in mind here... the citizens and the courts have clearly concluded that it is in the public interests that individuals and businesses handle their affairs honestly, professional-

ly and “according to Hoyle” and, if that mandate is followed, the statutory changes of the Electronic Discovery Act should hold no surprises or burdens for the client and should not be difficult to comply with.

How Does It Work?

The Act enlarges and clarifies the types of documents which are specifically discoverable to include so-called “Electronically Stored Information”, it better defines how such documents are to be requested through discovery and how the party receiving the subpoena or demand for document production is to respond and/or object.

It also lays out specific procedures for law and motion practice, in the event of disputes. For details which may be relevant in a specific case situation, I would refer you to the language of the code sections amended by the act, Code of Civil Procedure, § 1985.8, §2016.020 and §2031.010, et seq.

The Act also expands the types of document discovery, in that a party is not now necessarily limited to only inspection and copying of materials; but, they may now also request testing or sampling of discoverable information. Code of Civil Procedure, §1985.8(a)(1) and §2031.020. The timing and procedural requirements are set forth in Code of Civil Procedure,§2031.030 through §2031.050 .

The procedures for production of electronically stored information delineated in the Act also apply, with some limitations, to third parties who are compelled to produce information in response to valid subpoenas. Code of Civil Procedure, § 1985.8 (a)(1).

The Document Request

A person seeking a response to an e-document subpoena or a demand for document production, may demand any, unprivileged “electronically stored information”, which the Act defines quite broadly. §2016.020 of the Code of Civil Procedure, at sub-paragraph (d), defines “electronic" as meaning “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities” and at sub-paragraph (e) defines "electronically stored information" to mean “information that is stored in an electronic medium”.

A requesting party may also specify the form in which the information must be produced (see below). Code of Civil Procedure, § 1985.8 (b) and § 2931.010.

The Document Response

The responding party must either produce the e-documents in the form or format requested, or object. Where it objects to a specified form of production, or if no production form is specified in the demand, the responding party is required to state in its response the form in which it will produce each type of requested information. If no form is specified by the requesting party, the responding party must produce the data in the form in which it is “ordinarily maintained or a form reasonably usable”. Code of Civil Procedure, § 1985.8 (c). See also: Code of Civil Procedure, §2031.210 through §2031.320.

Finally, the responding party cannot be required to produce more than one form of the requested e-document(s). Code of Civil Procedure, § 1985.8 (c)(2).

Objecting to the Document Request

A party may object to production on the grounds that the material is not reasonably accessible because of undue burden or expense but it must bear the burden of demonstrating the validity of the objection. Code of Civil Procedure, § 1985.8 (d)

If the objecting party meets its burden, the burden shifts to the requesting party to show good cause as to why the information should still be produced. That is, even if the objecting party establishes that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, the court may still order discovery, if the demanding party shows good cause, but may also limit the discovery and set conditions to reduce the complained-of burden or expense. Code of Civil Procedure, § 1985.8 (e)

Code of Civil Procedure, § 1985.8(g) sets forth mandated cost shifting with respect to subpoenas for e-documents. In Toshiba America Electronics Components v. Superior Court, the California Court of Appeal applied California Code of Civil Procedure section 2031.280 (c) to the discovery of electronic data on backup tapes, ruling cost shifting for the production of e-documents was mandatory where the requested data must be translated to render it intelligible or accessible. 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532 (2004).

A discovery request may be limited by the court when it is unreasonably cumulative or duplicative, the requested information can be found in a more easily accessible or less expensive source, the requesting party had ample opportunity to obtain the information but did not do so, or the potential burden and expense of production is outweighed by the expected benefits. Code of Civil Procedure, §§ 1985.8 (h). See also: Code of Civil Procedure, §2031.060

Privilege Claims

Claimed privileges, such as attorney work product, attorney-client, are addressed as before. See: Code of Civil Procedure, § 2031.285.

Sanctions

The existing rules on sanctions which pertain to hard-copy discovery are now applicable to electronic discovery; but, importantly, the Act prohibits imposition of 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. Code of Civil Procedure, §1985.8 (l). See also: Code of Civil Procedure, §2031.060.

Closing Comment....

Caveat Scriptor (“Let the Writer Beware").