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## **E-DISCOVERY UPDATE**

In 2005, *California Litigation* published “E-Discovery Basics” in, Volume 18, Number 2. The information, suggestions and references in that article are as valid and relevant today as when published; it is available for review at California-Discovery-Law.com and at the “members only” area of the Litigation Section webpage . Since then, e-discovery has been evolving: trial lawyers and trial courts handle specific issues; rule makers add new language and provisions. ESI is a fact of life and e-discovery is an important consideration in most litigation. It must be understood and considered by every lawyer. E-discovery is not some revolutionary concept or esoteric specialty; it is discovery that, today, necessarily includes ESI. The nature of ESI varies; new types are being sought in discovery as lawyers move beyond e-mail and hard drives. This article is merely an update on the process and practice of discovering electronic data, commonly referenced as “ESI” for “electronically stored information.”

Since the publication of E-Discovery Basics, there have been new rules, new case law (primarily federal district court cases), and new developments in technology. While all are important, an understanding of basic discovery concepts and of the nature of particular forms of ESI in order to properly apply discovery law to specific information is critical. Rather than involving some technical issue, many newsworthy cases involving attorney discipline, sanctions or financial calamity, often involve lack of compliance with well established discovery duties and rules: preservation, search, supervision, good faith, ethics, spoliation, production, etc. Recognition of the existence and evidentiary value of ESI was revolutionary for many lawyers; application of the rules to the facts of ESI is evolutionary.

## **LITIGATION SECTION E-DISCOVERY POCKET GUIDE**

In August, 2008, the Litigation Section of the California State Bar distributed to members its E-Discovery Pocket Guide which identifies specific issues and topics of which every California litigator, if not every lawyer, must be familiar and conversant. It includes ESI topics to discuss with clients, topics to discuss with opposing counsel at meet and confer conferences, and topics to cover in the initial case management conference with the court. The one page brochure is not exhaustive but illustrative of common issues and topics. Its purpose is to alert all lawyers of the minimum level of knowledge of ESI required to practice law today, to highlight major common issues, and to encourage continuing education. It emphasizes the need to understand ESI within the context and concepts of the discovery and litigation process. Its objective is to facilitate

cost effective discovery and assist compliance with any specific rules that may be adopted. Emphasis is on early consideration, discussion and resolution of issues to achieve that objective. A copy of the Pocket Guide can be downloaded from the Litigation Section home page.

A lawyer seeking sanctions, spoliation remedies, or in limini motions for failure to preserve, search or produce ESI should be prepared to explain why the issue was not raised and resolved with opposing counsel or the court as suggested in the E-Discovery Pocket Guide. Opposing counsel will have to explain why the potential evidence was not preserved, searched or produced as suggested in the Pocket Guide.

## NEW RULES

Most states and the federal courts have adopted global rules, local rules or both dealing with the discovery of ESI. California is in the process of doing so by legislation re-introduced this year as AB5. Bar associations and litigators still have an opportunity to have some input on the final product or to accept whatever is enacted.

**Federal Rules.** The most significant event, in terms of attracting public attention to ESI, has been the enactment of e-discovery rules as amendments to the Federal Rules of Civil Procedure in 2006. The proposed amendments were under consideration for many years, were the subject of lengthy public hearings and extensive comment by lawyers and interested parties throughout the country, and were significantly revised in the process. Their enactment brought national publicity to the topic of e-discovery and resulted in a plethora of CLE programs, webinars, and written articles in the legal and popular press. It also helped to develop a billion dollar e-discovery industry that continues to attract some of the largest corporations.

Some reports of the rules amendments suggested the opening of a vast new area for discovery; but, the rules amendments were a reaction to the fact that ESI had become a major source of information, potential evidence and discovery. After years of litigation and experience with discovery of ESI, some lawyers predictably requested new rules to limit discovery and assist them in the resolution of existing and future disputes. The effect and value, if any, of the new rules is still to be determined; but the publicity gave notice to all lawyers and litigants of the discoverability of ESI.

The amendments to the F.R.C.P. led to adoption of local rules or guidelines by many federal trial courts implementing or underscoring those provisions or the need to pay attention to ESI. For example, a Standing Order in the Northern District of California provides:

"Commencing March 1, 2007, all judges of the Northern District of California will require the identical information in Joint Case Management Statements filed

pursuant to Civil Local Rule 16-9. The parties must include the following information in their statement....

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6. Evidence Preservation: Steps taken to preserve evidence relevant to the issues reasonably evident in this action, including interdiction of any document-destruction program and any ongoing erasures of e-mails, voice mails, and other electronically-recorded material."

Notably, the Northern District rule includes but is not limited to ESI; it applies to paper. "Evidence Preservation" is not a new requirement, is not a result of the amendments to the F.R.C.P., did not arise from the Standing Order, and is not unique to ESI. Preservation relates to spoliation a concept in reported English and American case law for centuries. The new rules are recognition of an old concept and a reminder that most information is created, used, stored and discovered in electronic form. It is simply the application of existing rules and concepts to ESI. The E-Discovery Pocket Guide checklists identifies preservation issues to discuss with clients, opponents and the court in California litigation. See also California Rules of Court 3.724 – 3.728.

**Proposed California Rules.** In 2008, California followed most other state and federal jurisdictions in adopting rules related to e-discovery. The proposed California legislation was available for comment for over a month from late December to late January and was promptly enacted in the basic form proposed. However, the legislation was vetoed and litigants continued to resolve e-discovery disputes under existing rules and concepts which have proven sufficiently broad and flexible to handle such issues. The veto does not reflect on the e-discovery legislation which had unanimous political support including the unanimous support of the Judicial Council and of a broad cross section of bar organizations and lawyers. It was reintroduced as AB5 and as urgency legislation to take effect this year. Every association of litigating attorneys should study and comment upon the proposals to assure the rules are a positive contribution and do not create unintended, adverse consequences.

The proposed California e-discovery legislation, a spreadsheet summarizing comments on the proposal and committee responses covers 147 pages and was posted on April 18, 2008 on the Judicial Council website. In addition, the audiocast and agenda of the presentation to the Judicial Council is available at the website.

The proposed legislation confirms that ESI is discoverable but it may have to be specifically designated now. C.C.P. §2031.010(e). One benefit of the new legislation, similar to an F.R.C.P. amendment, is that it clarifies that a requesting party may, but is not required to, specify the "form" of production of "each type" of ESI in the request. C.C.P. §2031.030(a)(2). While many lawyers include such provisions in their request already, the legislation sanctions that practice and may encourage others to raise and

resolve this potentially important and expensive issue at an early stage. The words “form” like the word “is” may give rise to some issues: it generally includes such topics as TIFF or PDF vs. native format; it may include such issues as searchability or production of metadata. Raising issues such as the form of production early allows parties to resolve them in a timely manner avoiding unnecessary and undue expense. Courts may not appreciate those who fail to raise form and other issues until they are out of control. See *Covad Comm. Co. v. Revonet, Inc.*, 2008 WL 5377698 (D.D.C. Dec. 24, 2008). The need to specify form as to each type of ESI requires counsel to know the difference and the reasons, for example, that it may prefer to receive some ESI in native format and other ESI in PDF. Note that ESI need only be produced in one “form”. See proposed C.C.P. §2031.280(d)(2).

The legislation adds new terms as well as definitions that offer little illumination but add issues to litigate. To fully understand and litigate the new issues, counsel should be familiar with the federal rule sources and Committee Notes, the extensive federal case law interpreting and applying the new rules and terms, and the deviations in wording from the federal rules in some provisions. ESI is defined in the California legislation: “Electronically stored information” means information that is stored in an electronic medium.” While California courts have long recognized objections to discovery based upon undue burden or oppression, the legislation adds a new rule relating to “electronically stored information” that allows an objection or protective order to oppose discovery of such information if the objecting party shows that it is “from a source that is not reasonably accessible because of undue burden or expense.” As with existing law regarding undue burden, the objecting party bears the burden of proof of demonstrating inaccessibility due to undue burden. Proposed C.C.P. §2031.310(d). In addition to showing undue burden and expense, federal case law suggests the responding party may have to show that, in the case of ESI, it is “from a source that is not reasonably accessible.” *Cason-Merenda v. Detroit Med. Ctr.* (E.D. Mich. 2008), 2008 WL 2714239 [“Thus, to the extent that DMC maintains that the information produced by it in discovery was accessible, court ordered cost shifting is inappropriate.”] In California, a party seeking to compel production of any document or thing must show “good cause”. C.C.P. §2031.310(b). The proposed legislation adds a new “good cause” provision that permits a court to order production of “electronically stored information” that is “from a source that is not reasonably accessible” “if the court finds good cause for the production.” Proposed C.C.P. §2031.310(e). Existing California law (1) recognizes cost shifting for discovery in general in appropriate circumstances like other jurisdictions and (2) for over 20 years has provided in §2031.280(b) of the Discovery Act for cost shifting for production of electronic data. In one appellate case, the court held cost shifting to be mandatory if within that California statute. *Toshiba America Electronic Components, Inc., v. Superior Court* (2004), 124 Cal.App.4th 762. The proposed legislation adds a new section 2031.310(f) that allows the court, in its discretion [“may”], to allocate discovery expenses for “electronically stored information” that it has found to be “from a source that is not reasonably accessible because of undue burden or expense” if “the court finds good cause for the production.” Proposed §§2031.310(d)-(f).

Due to the volume of ESI there is an increased danger that privileged or other protected documents will be disclosed by accident despite proper precautions. In *Rico v. Mitsubishi Motors* (2007), 42 Cal.4th 807, the Supreme Court addressed the issue of inadvertent production as a waiver of privilege and with regard to the recipient's ethical responsibilities. The legislation adds a procedural rule for handling inadvertently produced ESI that differs slightly from the *Rico* guidelines. See proposed C.C.P. §2031.285. Federal cases have required lawyers claiming inadvertent production of ESI to demonstrate that they took reasonable precautions employing adequate electronic tools, knowledge and skills to avoid it. See *Victor Stanley, Inc. v. Creative Pipe, Inc.* (D. Md. 2008), 2008 WL 2221841. *Rhoads Industries, Inc. v. Building Materials Corp. of America* (E.D.Pa.,2008), 2008 WL 4916026. [5 factor approach applied to evaluate reasonable precautions taken to prevent and rectify an inadvertent disclosure of ESI].

Generally, the new terms and provisions are based on the discovery rule amendments to the F.R.C.P. Those federal rules are the subject of federal Committee Notes and federal trial court interpretations. The California committee responses to comments on the proposed legislation, acknowledged that the committee recognized and considered those interpretations in drafting and proposing the California rules. Note that specific provisions of the federal rules amendments that were adopted were not adopted *in toto* and that they were added to existing Discovery Act provisions that were not identical to the F.R.C.P. Despite these complications, the federal authorities provide guidance in the interpretation of the proposed California rules especially with regard to the new terms adopted from those rules.

Lawyers anticipating clear guidance or solutions to e-discovery issues will be disappointed. They and their clients will have to rely on their knowledge and skills as lawyers to resolve most issues based on existing discovery concepts and the facts of the particular cases. In addition, they will be confronted with new issues and responsibilities and the danger of unintended adverse consequences resulting from the legislation.

## NEW CASE LAW

While some recent California cases involve ESI, the electronic media is of minor or no significance to the issues in the case. For example, in *Electronic Funds Solutions v. Murphy* (2005),134 Cal.App.4th 1161, 36 Cal.Rptr.3d 663 terminating discovery sanctions were affirmed apparently based, in part, on the destruction of evidence on a computer hard drive using Data Eraser to wipe the hard drive after the order to produce but before production. The order was based on violation of two prior court orders after a history of thwarting discovery and a court warning of more severe sanctions. In *Krinsky v. Doe 6* (2008),158 Cal.App.4th 1242 the identity of an anonymous “speaker” on the Internet and potential defendant in a defamation action was protected by the 1st Amendment.

One case worth noting, involves an often overlooked concept prohibiting discovery of e-mail from a non-party server. It is reflected in the alternative holding in

*O'Grady v. Superior Court* (2006), 139 Cal.App.4th 1423, which involved reporter's privilege, Shield Act issues and source materials. Publishers of a web site sought to protect sources. A writ issued directing the trial court to enter a protective order to prohibit discovery of sources or content of e-mails to a party stored on a non-party service provider's servers "because (1) the subpoena to the email service provider cannot be enforced consistent with the plain terms of the federal Stored Communications Act [citations] ....." See also *Theofel v. Farey-Jones* (9<sup>th</sup> Cir.2003), 359 F.3d 1066.

For guidance under existing or proposed rules, California lawyers must look to federal case law. While few state or appellate court decisions are published, federal trial court judges provide non-binding but instructive examples of courts applying established discovery principles and interpreting new language to ESI discovery issues. The decisions are dependent upon unique facts and issues, are restricted by the authorities and facts presented and limited to one judge's approach and opinion. The decisions may be wrong or dated as knowledge of ESI and of search and storage technology evolves. Nevertheless, they are a valuable source of information, guidance and alternative solutions to common ESI issues likely to arise in litigation in all courts throughout the country. ESI transcends jurisdictions and discovery laws are similar enough that solutions to ESI issues in one court are of interest to all. More important, the federal judiciary and especially the Magistrate Judges who hear, decide and opine on these matters have been leaders and participants in the national dialog and development of this subject.

Cases involving ESI in the past few years are summarized for quick review at [California-Discovery-Law.com/electronic\\_data\\_discovery\\_new\\_developments.html](http://California-Discovery-Law.com/electronic_data_discovery_new_developments.html). Recent ESI case law covers diverse subjects: surveillance tapes, audio tapes, RAM, websites, Internet e-mail providers, text messages, tachnograph records, triggering events on a duty to preserve or imposition of a litigation hold, search duties, adequacy of key word search methodology, meet and confer obligations, case management orders, counsel's duty to inquire or assure compliance with search and preservation requirements, good cause showing to require production of inaccessible data, cost shifting, use of experts, work product or privilege protection for counsel's guidance on preservation, form of production, etc. K&L Gates, among others, provides a valuable Internet resource for federal case law on e-discovery which can be searched to find all cases on a particular subject, motion or term: e.g. cost shifting, sanctions, data preservation, mirror images, records retention policy, on-site inspection, spoliation, backup media recycling, keyword searches, court-appointed expert, backup tapes, format of production, privilege or work product, recovery of deleted data, metadata or "not reasonably accessible." <https://extranet1.klgates.com/ediscovery/>

## **CONTINUING E-DISCOVERY EDUCATION**

Most lawyers are aware of the importance of e-discovery and have begun to integrate it as part of normal case preparation. By now, every litigator should be aware of the need to consider the discovery of ESI in all cases, should know the differences between paper and electronic media, and should be aware of the subjects and issues mentioned in the E-Discovery Pocket Guide.

The need for continuing education on technical ESI issues cannot be over emphasized. Remember the adage “Let me state the facts my way and the law will take care of itself.” Today the “facts” include the nature of the specific ESI at issue, the latest search or filtering techniques and software, the economics of search, preservation, recovery, review, and production, the adequacy and expense of alternative sources, and the likely probative value of the information derived. The “law” consists of proper application of the same flexible discovery concepts to those ESI facts.

Real expertise in the technical aspects of ESI, is probably beyond most lawyers; but, we can be aware of our limitations, struggle to learn tech fundamentals, follow tech developments as they apply to discovery, attempt to spot issues, and enlist the expertise of others. Lawyers have an ethical and legal duty to understand, supervise and properly conduct discovery of ESI. See *Qualcomm Inc. v. Broadcom Corp.* (S.D.Ca. 2008), 2008 WL 66932, 2008 U.S. Dist. LEXIS 911, and subsequent decisions in the case.

Fortunately, there is an abundance of quality information on e-discovery available at low or no cost. The Internet offers the most recent information, free webinars by respected lawyers and experts that are often archived and available at your convenience, databases of e-discovery cases nationwide, discovery forms, power point presentations, blogs and columns, white papers, websites devoted to e-discovery, more articles and guidelines than can be read, and plenty of opinions. Some are better than others or meet different needs. The quality may change over time. Do not overlook non-legal programs regarding document management and storage, disaster recovery, search technology or techniques, security, and other related IT programs. Local bar associations and State Bar Sections offer basic courses and some more advanced courses at nominal cost. Service providers are often willing to conduct on site tutorials for law firms or bar association groups without charge. Several books on e-discovery are available. For resources see [http://www.willyancey.com/electronic\\_evidence.htm](http://www.willyancey.com/electronic_evidence.htm) and [http://www.california-discovery-law.com/electronic\\_data\\_discovery.htm](http://www.california-discovery-law.com/electronic_data_discovery.htm)

While case law cannot be ignored, it is far more important that lawyers, or their consultants, understand and be able to explain to opposing counsel and the court the nature of the relevant ESI and its value to the pending case. For example, cases may differ on the discoverability of metadata and, thus, be of marginal value as a “rule”. A lawyer must be able to make a presentation to the court that shows what metadata is being sought, how it can be produced and at what costs, what the metadata is likely to reveal, how that information relates to the potential issues or leads to evidence in the case, how it assists in analysis and use of the information, the lack of alternative sources of information, etc. See *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep’t of Homeland Sec.* (S.D.N.Y. 2008), 2008 WL 5062700. The ability to search, preserve, recover, review and produce particular ESI and the costs of doing so are likely to change rapidly. At one point, backup tapes were commonly requested; then they were viewed as “not reasonably accessible” or subject to cost shifting; but, advances in search and data storage technologies have changed the “ESI facts” that may change the discovery results. Lawyers should endeavor to be informed

## **CONCLUSIONS**

California will officially acknowledge ESI this year with the enactment of e-discovery amendments to the Discovery Act. Those provisions and the E-Discovery Pocket Guide must be read immediately and integrated into discovery plans, forms, checklists, and boilerplate. Responsibility cannot be delegated. Rules and checklists do not resolve issues. Every lawyer whose clients might be involved in litigation must understand the basics and continually update knowledge of ESI. Use free and low cost CLE programs and web resources to maintain competence. Develop ongoing relationships with ESI experts. Be proactive. Those who wait until they are confronted with an ESI problem will miss opportunities and risk severe adverse consequences. ESI knowledge provides benefits: cost effective discovery and analysis, level playing field, improved preparation, client satisfaction, attraction and retention.