Management Alert

California Enacts New Electronic Discovery Act

After a number of years of debate and refinement, and even being vetoed last year by the Governor for budgetary reasons, California's Electronic Discovery Act ("the Act") was finally signed into law on June 29, 2009, and is expected to have a significant impact on discovery practice in state matters. The Act brings California in line with at least 20 other states that have promulgated their own local eDiscovery specific rules that are largely based upon the Amendments to the Federal Rules of Civil Procedure (FRCP) enacted in 2006. Given the volume of class action and other complex commercial suits filed in California, the Act, if properly embraced, can provide significant advantages and opportunities for corporate litigants in managing the costs and burdens of electronic discovery.

Some of the highlights of the Act are addressed below.

Definition of Electronically Stored Information

The Act amends prior section 2016.020 to specifically define the terms electronic and electronically stored information (ESI), and incorporates these definitions throughout the state's Discovery Act. The effect of this change is to make clear that all information stored on computers or other digital media is potentially within the scope of discovery.

"Not Reasonably Accessible" Information

While all ESI is potentially subject to discovery, the Act provides a framework to limit discovery of information that is not reasonably accessible. If a request seeks information from inactive archives, off-line legacy systems, or other sources that are not easily rendered intelligible or easily accessed in everyday business, for example, the responding party may object and state that it will not search the source in the absence of an agreement with the demanding party or a court order. The responding party then has the initial burden to disclose the types or categories of such information and show why the information sought is "not reasonably accessible" due to undue burden or expense. Once the producing party establishes that the information is not reasonably accessible, the legal burden then shifts to the requesting party to demonstrate good cause to the court as to why the information should still be produced. If the court finds good cause, it may order production, limit the discovery, or set conditions for production to reduce the burden or expense. For example, the court might order cost shifting or sampling as a way to control costs.

The Effects of Cost Shifting under Toshiba[1] and Prior Section 2031.280(c)

The prior version of section 2031.280(c) of the Discovery Act provided for cost shifting where translation of data is necessary in order to render discoverable information reasonably usable. In 2004, the California Court of Appeals applied this provision to the discovery of ESI stored on certain backup tapes and held that in that circumstance cost shifting was mandatory. Given the potential costs of discovering ESI stored on backup media, the allocation of financial burden was a focus of the Judicial Council, the sponsor of the Act's bill. As noted in the detailed report of the Policy Coordination and Liaison Committee to the Judicial Council ("Report"), there is no intent to diminish the rule of *Toshiba* by the Act. (See Report at 112-114, 123-126.) To this end, section 2031.280(c) has remained intact and is simply renumbered as 2031.280(e). Moreover, the Act creates a new Code of Civil Procedure Section 1985.8(g) relating to subpoenas with very similar language. However, as some federal courts have considered ESI stored on backup tapes created for disaster recovery purposes to be outside the scope of discovery, it remains to be seen how these provisions will be interpreted and applied in light of the framework described above. One plausible argument under these various sections is that while cost shifting remains mandatory for ESI which requires translation to be reasonably usable, the allocation of costs for this translation is but one factor in determining the discoverability of such ESI which may also be deemed not reasonably accessible because of other undue burdens or costs faced by the producing party. The willingness of the requesting party to pay for translation should remain but one factor the court may consider in rendering an opinion as to accessibility and limits to discovery.

Other Limits to Discovery

Courts may impose limits on discovery of ESI. Such limitations are not confined to information that is not reasonably accessible where good cause is shown. The courts may also limit discovery of accessible information where the information sought is unreasonably cumulative or duplicative, the information is available from more easily accessible or less expensive sources, the requesting party had ample opportunity to obtain the information but did not, or the likely burden and expense of production is outweighed by the likely benefits. Here the courts are to consider such factors as 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. This clause is based on the concept that discovery is not an endless pursuit of potential evidence but instead is a tool to aid in a just, speedy, and efficient trial. For these reasons, the costs of discovery should remain proportionate to the overall case. As such, these limitations provide significant opportunity for clients to limit the scope of discovery. It should be noted, however, that boilerplate objections as to burden and expense have not produced favorable results under the nearly identical federal provisions. Only when substantiated with specific facts and evidence of burdens and costs have the courts saw fit to limit discovery.[2] Given the Act's clear intent to address the rapidly growing costs of electronic discovery, we anticipate that this provision will become a valuable tool for litigants.

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1 Court of Appeal in *Toshiba v. Superior Court* (2004) 124 Cal.App.4th 762

2 See, *Speiker v. Quest Cherokee LLC* 2008 WL 4758604 (D.Kan. Oct. 30, 2008). Where a judge ruled that a request to search 32 gigabytes, or 1.4 million pages, of documents, was disproportionate to the amount at stake because the class had not been certified, the discovery was not relevant to class certification and the named plaintiff's claims didn't exceed $100,000. *Mancia v. Mayflower Textile Servs. Co.*, 2008 WL 4595175 (D.Md. Oct. 15, 2008). Where Judge Grimm explained, "discovery must be initiated and responded to responsibly, in accordance with the letter and spirit of the discovery rules, to achieve a proper purpose, and be proportional to what is at issue in the litigation, and if it is not, the judge is expected to impose appropriate sanctions to punish and deter."

Form of Production

Prior sections of the Civil Discovery Act required that any documents produced in response to an inspection demand be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand, but did not provide for the specification of a preferred format by the demanding party. Under the revised Act a requesting party may specify a format of production for ESI, and the responding party must produce ESI in that format or object to the specified format before producing the information. If objecting, or if no form is specified in the demand, the responding party shall also state in its response the form in which it intends to produce each type of information. In general, if a demand for production does not specify a form or forms for producing a type of ESI, the responding party is required to produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable, but need not produce the same ESI in more than one form.

Safe Harbor

Another significant change found in the Act is the Safe Harbor clause. Existing law provides a court the power to impose sanctions against a party or an attorney of a party for specified violations, including the spoliation of relevant evidence. The new Act provides that, not withstanding the prior provisions, the court shall not impose sanctions on a party or any attorney of a party for failure to provide ESI that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system. This provision may protect a party from claims of spoliation for the loss of certain ephemeral ESI such as system logs, transactional database information, or temporary caches that the party has no discretionary control to preserve or are not immediately known to be relevant to the matter at hand. The prepared litigant will establish a routine, systematic, and compliant document retention policy and will fully understand their systems to determine when to take advantage of this provision.

Meet and Confer

One of the most significant changes to the federal rules was the creation of a new meet and confer requirement in Rule 26(f). The Act has been criticized for lacking any similar blanket obligation for the parties to initially meet and confer regarding ESI in California state court proceedings. However, the Act's proponents have rightfully pointed out that parties are obligated to meet and confer prior to the filing of a protective order or motion to compel related to any discovery disputes or objections. Therefore, while there may not be an initial requirement to meet and confer in all cases, in any matter where a discovery dispute arises, the parties are required to meet and confer in good faith to seek to resolve the issues prior to seeking court intervention.

Privileged Information and Clawback

The massive volumes of documents that often accompany the discovery of ESI greatly increase the risk of inadvertent production of privileged information. To this end, the Act provides for the clawback and return of any inadvertently produced privileged information. These provisions are purely mechanical in nature, however, and only relate to the disposition of the produced documents. The provisions do not address the issue of whether there has been a waiver of the privilege. In the federal courts, the interaction between the clawback provision and party non-waiver agreements have been the subject of

considerable discussion and which lead to the amendment of Federal Rule of Evidence 502 to enhance the enforceability of non-waiver agreements. However, California has no state counterpart to this rule of evidence. It is therefore important that parties understand the limitations of the clawback provision and carefully consider the need for and limitations of any accompanying non-waiver agreement.

It remains to be seen how the California bar and courts will utilize and interpret these new rules. For certain, companies who embrace the rules and take reasonable steps to understand their IT systems will be best positioned to take full advantage of the savings the Act's intricacies can offer.

For more information about the Act, please contact the Seyfarth attorney with whom you work, or any eDiscovery attorney on our website (www.seyfarth.com/eDiscovery).

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