

California Joins the E-Discovery Age

(Editor's Note: This is the second in a series of columns by past presidents of the Association. Mark A. Neubauer was president of ABTL from 1991-1992 after serving as Editor and Co-Editor of The Report from 1983-1990.)

Three years after the federal amendments to F.R.CIV. P. Rule 34 opened the floodgates to electronic discovery, California's state procedure has finally adopted its own Electronic Discovery Act which will dramatically change the playing field of state discovery law the way the Rule 34 changes altered the federal landscape.

Simply put, so-called "e-discovery" changes the equilibrium of litigation. Because of the volume of emails, recovery, production, and analysis of emails can impose tremendous costs upon the responding party, an individual plaintiff seeking e-discovery from a large corporate organization can wreak havoc, often forcing settlements unrelated to the merits simply to avoid the tremendous economic burden of e-discovery.



Mark A. Neubauer

Similarly, e-discovery — which in even a normal case may often run into six figures — can cause two warring corporations to hold back on e-discovery like two nuclear superpowers hold back from mutually assured self-destruction by not firing their missiles.

No doubt, emails have tremendous discovery value. They often contain important admissions or candid statements of intent. However, they also contain a lot of "junk" — meaningless communications or repetition of communications which have little or no discovery value, yet each of which must be reviewed for both privilege and substantive basis. Furthermore, very few cases hinge on the need for metadata or the internal electronic aspects of the communication since emails rarely involve a defalcation or change of the electronic data.

Yet, the California amendments to virtually all of the discovery statutes went immediately into effect upon passage on June 29, 2009 and will dramatically change how parties deal with discovery, including subpoenas. It will involve a new set of court rules and case law dealing with this new avenue of discovery as both courts and litigants attempt to sail between the competing icebergs of excessive cost and the need for valuable and relevant information.

New Court Rules

Just weeks after the passage of the California Electronic Discovery Act, the Judicial Council amended California Rule of Court 3.724 to include electronic discovery planning at the outset of litigation. Taking its cue from the more generalized Rule 26 of the Federal Rules, this new California Rule of Court requires the parties as part of the initial case management conference to review, consider and discuss potential e-discovery problems. Rule 3.724(8) provides:

Any issues relating to the discovery of electronically stored information, including:

- Issues relating to the preservation of discoverable electroni-

cally stored information;

- The form or forms in which information will be produced;
- The time within which the information will be produced;
- The scope of discovery of the information;
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;
- 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;
- How the cost of production of electronically stored information is to be allocated among the parties;
- Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and
- Other relevant matters.

As a result, every case will be part of the electronic discovery age. How state court judges respond to these rules remains to be seen. Clearly, in a lawsuit by an individual against a corporation, the individual will have little electronic discovery issues, but will be able to put tremendous pressure upon a corporation, which may have a massive number of emails to review, produce and categorize. There are fundamental issues of cost-shifting which courts will have to consider, balancing an individual's right of access to justice and discovery with the unequal burden e-discovery will place on a corporate defendant.

This will be a new world for California courts. But there is a growing body of federal case law where the issue of cost-shifting is considered. One of the leading cases is *In Re Priceline.com Securities Litigation*, 233 F.R.D. 88 (D. Conn. 2005). Unfortunately, cost shifting tends to be the exception rather than the rule, and so how California state courts respond to these new e-discovery rules will be important for all litigants, whether large or small. Now that e-discovery is an issue common to both state and federal courts, clients will have to be advised, even if they rarely have had a federal case before that would require electronic storage, to prepare standards and protocols regarding the maintenance of electronic data.

A key resource for developing client protocols for the retention of electronic data can be found in the Sedona Principles, an organization set up years ago to begin to deal with electronic discovery problems. Both lawyers and clients alike should examine the Sedona website, www.sedonaconference.org. Reliance on the Sedona principles will develop into important standards for determining "reasonableness" in state court, as they have been in federal court.

Subpoenas

One of the biggest changes to occur under the California Discovery Act is the manner in which third parties will have to respond to subpoenas.

For most of us, responding to a third-party subpoena consisted of merely copying the file, making sure that no privileged material was produced, and providing the copy to the subpoenaing party. No more.

Section 1985.8 has been added to require production of information "in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable". The latter phrase may still allow production of hard copy. However, the parties propounding the subpoena can specify the forms for the type of information. Any astute party would require it done in "the form in which it is ordinarily maintained".

The simple fact is that most information is not maintained in hard copy anymore. It is maintained electronically. Emails, Word or WordPerfect documents or PDF files. That will become the new form of production pursuant to subpoenas.

If that new type of production is costly, the responding party has the right to oppose the production because of "undue burden or expense" but must bear the burden of demonstrating that burden.

Similar to the federal rules, there can be cause-ship, Section 1985.8(f) provides that a court "for good cause" may "set conditions for discovery of the electronically stored information, including the allocation of the expense of discovery". (Emphasis added)

This is an important tool in controlling abuses to e-discovery. Propounding parties need to be careful what they ask for, because they may get it but have to pay for it as well.

Responding to subpoenas with electronic data is far different than simply grabbing a hard file. To search for a key word, you cast a dragnet drawing literally thousands of emails into the net. Those emails may not only contain relevant information but privileged communications or confidential business information. Moreover, the casual use of emails may also sweep into that dragnet embarrassing personal emails which have nothing to do with the search but were caught in the dragnet when someone appends a personal email to a business email. The electronic dragnet, using search terms, catches both in its web. As a result, responding parties have to exercise far greater care in responding to California's e-discovery requirements on subpoenas. No doubt, most clients will be unaware of the potential pitfalls in these new requirements for responses to subpoenas. Indeed, many subpoenas will be responded to by laypeople without realizing the problems they are unleashing.

Document Responses

The series of statutes beginning with CCP Section 2031.010 have all been amended to add "electronically stored information" to types of evidence such as "documents, tangible things, and land or other property".

Like statutes dealing with third-party subpoenas, responses to requests for production of documents requires the responding party to "produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable".

As those who have practiced under the changes to the federal rules already know, most astute document requests will specify the form, usually requiring the information in its native format.

That will sometimes require software to be made available to read the electronically stored information. California's new Electronic Discovery Act requires that the responding party "at the reasonable expense of the demanding party shall translate any data compilations...into a reasonably usable form".

Under the Federal Rules, these obligations have created not only cost burdens, but some questions as to the ability to read the electronic data. For example, in *In Re Honeywell International, Inc. Securities Litigation* 230 FRD 293 at 297 footnote 1 (S.D.N.Y. 2003), a confidentiality order was necessary to protect the proprietary software needed to review the data. See also *In Re Livent, Inc. NoteHolders Securities Litigation*, 2003 WL 2354 *23254 (S.D.N.Y. Jan. 2003).

The Burden Factor

Clearly, the most difficult issue in e-discovery has been its cost. Rule 34 of the Federal Rules of Civil Procedure has — since 2006 — evolved a series of cases attempting to control the burgeoning cost of e-discovery by shifting them to the propounding party.

One way federal courts have adopted to try to control the abusive potential of e-discovery is running sample test searches. Each side is requested to come up with search terms and agree upon a limited time frame. A search is then run to determine whether the search produces thousands of hits on responsive emails or a mere handful. In that way, courts seek to narrow the explosive potential of e-discovery. However, those examples have

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generally occurred in large cases, and in federal courts, which have far greater resources than state courts. It remains to be seen whether the recent changes in California Rule of Court 3.724 will be utilized by already-overworked state judges to deal with the tremendous problems of e-discovery.

Privilege Clawback

One of the major problems of e-discovery is the inadvertent disclosure of privileged information. It is simply unreasonable to expect the parties to catch every privileged communication in the deluge of potential emails that are responsive to a discovery requests.

Accordingly, as part of the Electronic Discovery Act, California has added Section 2031.285 to the Code of Civil Procedure which provides a dramatic change in prior law by codifying a “clawback” for inadvertently-disclosed material.

Under this new section 2031.285, a party who discovers it has accidentally disclosed privileged material can notify the receiving party who is obligated to “immediately sequester the information” and either return it and any copies or “present the information to the court conditionally under seal for a determination of the claim.”

But the burden on obtaining court determination ironically is placed not on the party seeking to protect the information, but on the “receiving party.” That motion must be made “within 30 days of receiving the claim and presenting the information to the court conditionally under seal.”

Additional teeth is provided to this clawback provision by saying that prior to the resolution of such a motion for determination of the privilege, the receiving party is “precluded from using or disclosing the specified information.” Section 2031.285(c)(1).

Again, this differs greatly from the federal rules, which do not even address this clawback problem.

Sanctions

Almost every California lawyer is aware of the nightmare that occurred in *Qualcomm, Inc. v. Broadcom Corp.*, 548 F.3d 1004 (Fed. Cir. 2008), where previously undiscovered and un-produced emails led not only to an adverse judgment and award of attorneys fees, but several attorneys referred for potential bar discipline.

Indeed, most lawyers comment that the fight over e-discovery has been more a fight over spoliation than a fight over actual discovery. For that reason, both Section 2031.300 and Section 2031.310 have been amended with a special provision regarding sanctions in the case of e-discovery.

The new standard is “absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to produce electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation.” The battle, of course, will be whether it is in “good faith.”

It also means that clients should develop protocols to establish good faith by, among other things, canvassing their industry as to what others are doing on file maintenance, documenting the economic and practical limitations of their electronic storage systems, and other factors set forth in the Sedona Principles. This should be done well before litigation, rather than after.

In short, we have entered a new age of electronic discovery in state court. No longer will people have to focus on burdensome interrogatories or requests for admissions. A simple request for electronic data should be enough to create havoc in a lawsuit.

In the days ahead, our state judges will have to deal with these substantial problems as new case law is developed to deal with this new form of discovery.