



TUCKER ELLIS & WEST LLP

ATTORNEYS AT LAW

CLIENT ALERT

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CALIFORNIA ENACTS NEW RULES ON ELECTRONIC DISCOVERY

On June 29, 2009, California law on discovery of electronically stored information (ESI) was changed with the enactment of the Electronic Discovery Act. The new Act updates the Code of Civil Procedure (CCP) by establishing duties and responsibilities for parties requesting and producing ESI. The new amendments align California with other states and the federal courts in formulating procedural rules regarding discovery of ESI. The rules provide much needed and long overdue guidance to litigants in a state which revolutionized the storage of information in electronic media.

The Electronic Discovery Act includes several key provisions for parties subpoenaing, requesting and producing ESI, none more important that the safe harbor provision precluding any sanctions for failing to produce ESI that was lost, damaged or erased during routine, good faith operation of a system that stores ESI.

The Electronic Discovery Act added section 1985.8 and revised sections 2016 and 2031 of the CCP. California civil procedure now include the following key rules regarding ESI:

DEFINITION OF ESI: ESI is defined as information stored in an electronic medium. “Electronic” is defined as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.” CCP § 2016.020.

CHOICE OF FORM OF PRODUCTION:

A party serving a subpoena or discovery request for ESI may specify the form in which it seeks to inspect, copy, test or sample ESI. If none is specified, the producing party can choose a form in which the ESI is normally maintained or one that is reasonably usable, but need not produce it in more than one form. CCP §§ 1985.8, 2031.030, 2031.280.

PARTY OPPOSING PRODUCTION MUST DEMONSTRATE BURDEN:

A party opposing production on the basis that the ESI is not reasonably accessible because of undue burden or expense bears the burden of demonstrating that burden or expense (whether in an objection or a protective order). Specifically, those parties must identify the types of sources of ESI they claim are not reasonably accessible. CCP §§ 1985.8(d), 2031.060(c).

COURTS MAY ORDER PRODUCTION OF ESI NOT REASONABLY

ACCESSIBLE: Even if ESI is not reasonably accessible, a court may find good cause to order the production of ESI, and may set conditions on discovery, including the allocation of production expenses and translation of data by a producing party into a reasonably usable form. CCP §§ 1985.8(e)-(h), 2031.060(d)-(e).

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CONDITIONS LIMITING PRODUCTION OF ACCESSIBLE ESI:

Even if ESI is reasonably accessible, courts must limit the production of ESI if the same ESI can be obtained in a less burdensome manner, the discovery is unreasonably duplicative, a party has already had the opportunity to obtain the information, or the burden of production outweighs the benefit. In conducting the balancing test of burden and benefit, courts must take into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation and the importance of the ESI in resolving those issues. CCP §§ 1985.8(h), 2031.060(f).

SAFE HARBOR FOR ROUTINE

DELETION: Courts may not impose sanctions on a party or its attorney for failing to provide ESI that has been lost, damaged, altered or overwritten because of routine, good faith operation of an electronic system containing ESI. CCP §§ 1985.8(l), 2031.060(i).

PRIVILEGED ESI MUST BE SEQUESTERED AND RETRIEVED

UPON NOTIFICATION: If ESI that is privileged or protected attorney work product is inadvertently produced, the producing party may notify the receiving party of the privilege claim. The receiving party then must immediately sequester the ESI, and either return it or submit it to the court for determination of the claim of privilege. Until the court determines the claim of privilege, the receiving party may not use or disclose the privileged ESI and must take reasonable steps to retrieve privileged ESI already disclosed to third parties prior to notification of the claim of privilege. CCP § 2031.285.

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