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California Discovery Act: Beware the Myth of the Delete Button

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INTRODUCTION

In 2009, the California legislature passed the Electronic Discovery Act (the "Act"), which amended various sections of the Code of Civil Procedure discovery statutes. The purpose of the Act was to codify the ability of parties to litigation to obtain discovery of electronically stored information ("ESI"). The Act added two new provisions to the California Code of Civil Procedure ("CCP") and amended nineteen existing CCP sections. It also includes a companion amendment to California Rules of Court, rule 3.724. While the Act is new, issues surrounding the production and collection of ESI have been around for years. Indeed, the provisions of California's Electronic Discovery Act closely parallel the federal civil procedure rules for handling ESI, which were implemented in 2006.

For the last few decades, there has been a steady march toward digitization of information. As a result, huge quantities of relevant evidence in litigation reside on electronic devices, and lawyers have long struggled with how to manage the onslaught of electronic evidence in a cost effective way. This article, which is divided into three parts, seeks to provide some assistance in that regard. The first part is devoted to a discussion of ESI, and the unique problems that ESI presents. The second part describes the legal rules that now govern the discovery of ESI in California. Finally, the third part is devoted to a discussion of best practices with respect to the collection and production of ESI.

WHY ALL THE FUSS ABOUT ESI ?

ESI is defined as information stored by a medium relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. (Cal. Code Civ. Proc. §§2016.020(d) and (e).) This definition is purposely broad, and essentially covers all information that is stored electronically.

There are a number of significant issues that make ESI a challenge. First, ESI can proliferate at an alarming rate. Second, ESI is decentralized, and usually resides on multiple locations in a variety of forms. Third, ESI can be easily and inadvertently modified. Fourth, ESI

is difficult to delete. Finally, users of ESI frequently say things in electronic communications that can prove devastating in litigation.

The Proliferation Problem

One of the most significant issues with ESI is the ease with which duplicate and near duplicate copies of documents can be created. For example, an e-mail sent from one person to six people creates seven separate documents. If each person on that chain responds with a "reply all," fifty-six more documents are immediately created. Since each one of these documents appears in a different person's e-mail in-box, each one is a different document and is therefore subject to discovery. The problem is compounded by the fact that each of those e-mails may have one or more attachments imbedded within it, which means that a single draft memo now exists multiple times. This scenario plays itself out on a daily basis, which means that even small cities can have thousands and thousands of relevant documents that take time and money to collect and review.

The Decentralization Problem

Another problem with ESI is that it can be found in many different locations. A document can reside in multiple places on a single user's computer, including hard drives, disk drives, and e-mail. The same document can also reside on a document management system, on a network, on an external drive, or on a PDA. As a practical matter, this means that searching for potentially responsive documents can involve combing through multiple electronic sources which takes time and resources.

This problem is compounded by the fact that the types of ESI vary. The most common ESI are documents that can be read by a particular application. Common examples include word and excel files. ESI documents can also take the form of an image. Common examples of image files include documents in Tagged Image File Format ("TIFF") or Portable Document Forman ("PDF"). Other forms of ESI include temporary internet files (which is a temporary area on a drive where data is stored for future use), random access memory (which is memory that is used

by a computer temporarily during executing of a computer process), and audio files (which include call center and voice mail data.).

The Modification Problem & the Myth of the Delete Button

ESI is also volatile. Sometimes, turning on a computer or accessing ESI can lead to changes in the underlying document. For example, the metadata embedded into many kinds of documents, including word and excel documents, often includes information identifying when the file was last accessed. While this may not matter in all instances, in some cases this issue is significant and collection must be done in a way that does not alter the underlying metadata. On the other side of the coin, while it is easy to inadvertently modify ESI, it is not easy to delete it. Deleted data is data that once existed as active data but that has been marked as deleted. Frequently, deletion of ESI does not mean that the data is really gone. Data from otherwise deleted files often remains on a hard drive until the space is used to store other data. Until that happens, the "deleted data" can usually be recovered from the computer's hard drive. This fragmentary data, if found, may be used as evidence in litigation. (See, e.g., *Dodge, Warren, & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1417-1418.)

The Smoking Gun Problem

Another significant problem with ESI is that people frequently say things via e-mail that they would likely not say in another forum. Many cases have been won or settled on the backs of incriminating e-mails. For example, an e-mail directive from Bill Gates to his subordinates in 1996 which stated that "[w]inning Internet browser share is a very, very important goal for us." was used by David Boies to convince a federal judge that Microsoft had conspired to drive Netscape out of the business. An e-mailed joke that stated "[Twenty-five] reasons beer is better than women" convinced Chevron to settle a sexual harassment claim in 1995 for \$2.2 million. And an e-mail from an American Home Products executive in which he stated "Do I have to look forward to spending my waning years writing checks to fat people with a silly lung problem?" helped drive a \$20 billion settlement of fen-phen claims. ESI, and in particular e-mail, is rife with these kinds of inappropriate, off color, and ill advised comments.

RULES OF THE ESI ROAD

The unique issues posed by ESI led California to pass the Electronic Discovery Act in 2009. The Act established a host of rules that govern the way that ESI should be treated in discovery. These rules touch on a number of significant issues, and include the following:

- Creation of a requirement that parties meet and confer over ESI issues. Cal. Rules of Court, rule 3.724(8).
- Discussion of the format that ESI must be produced in. CCP §2031.280(c); CCP §2031.280(c), (d)(1), (d)(2), (e).
- Discussion of the extent to which ESI must be produced, and cost allocation. CCP §§2031.060(c),(f); 2031.310(g); 2031.210(d); CCP §2031.280(e).
- Discussion of the safe harbor protections for failure to produce lost ESI in particular circumstances. CCP §§2031.060(i)(1); 2031.300(d)(1); 2031.310(j)(1); 2031.320(d)(1).

The Meet and Confer Requirements

At the same time that the California Electronic Discovery Act was enacted, the California Judicial Council amended Rule 3.724 of the California Rules of Court to improve the procedures for handling the discovery of electronically stored information and reduce the cost of discovery through proper management. Under this rule, parties are required to meet in confer by phone or in person *at least thirty days* before the date of the initial case management conference set by the Court. (Cal. Rules of Court, rule 3.724(8).) At that conference, parties are required to discuss the following e-discovery issues:

- Any issues related to the preservation of discoverable ESI;
- the form or forms in which ESI will be produced, and the timing of production;
- the scope of discovery;
- methods for asserting or preserving privilege and attorney work product claims;
- methods for asserting or preserving confidentiality, privacy, trade secrets, or proprietary status claims;
- cost allocation; and
- any other issues relating to discovery of ESI, including development of a proposed ESI plan.

This rule is designed to motivate parties to agree on key e-discovery issues at an early stage in the litigation to both reduce litigation costs and to minimize discovery disputes. It is, however, essential that the parties go into this meeting with a good understanding of e-discovery issues, and in particular, some knowledge of the practical realities of collecting and producing e-discovery because courts may hold an attorney to an agreement made regarding production of ESI even if the attorney was unaware at the time that compliance with the agreement would be extraordinarily expensive. (See *In Re Fannie Mae Sec. Litig.* (D.C. Cir. 2009) 552 F.3d 814.)

The Form of Production

A party requesting the material may specify the format in which the material is to be produced. (Code Civ. Proc. § 2031.030(a)(2).) One option is to request the data in native file format, which is the form in which electronically stored information is ordinarily maintained on the computers or other locations of the responding party. (Code. Civ. Proc. §2031.280(d)(1).) Some other options include: TIFF or pdf images, which are essentially digital snapshots of electronic documents; paper; and either documents culled from a database query or raw data from a database. If the requesting party fails to specify a format for production, the responding party may choose a format on its own, provided the format is either as the material is ordinarily kept or in another reasonably accessible format. (Code Civ. Proc. § 2031.280(d)(1).) A reasonably usable form has been interpreted to mean a format that is both electronically searchable and sortable. (See *L.H. v. Schwarzenegger* (ED CA 2008) 2008 US Dist LEXIS 86829, at *12-*13.) Once the responding party produces the material in the form specified by the requesting party or the form chosen by the responding party if no request was made, the responding party need not produce the material again in any other format. (Code Civ. Proc. § 2031.280(d)(2).)

Inaccessibility and Cost Allocation

While the Act does not change how a party is required to respond to an inspection demand, it does permit parties to object to the production of ESI on the basis that the party lacks reasonable access to such material. (Code Civ. Proc. § 2031.210(d).) This objection can be

based on the assertion that the type or category of documents are not reasonably accessible. The responding party can also object to the specified form of ESI production. The propounding party can respond to either of these objection by bringing a motion to compel, but in this instance, the burden of demonstrating that the search and production of ESI in the specified format would be unduly burdensome or costly is on the responding party. (Code Civ. Proc. § 2031.310(d).) Further, even if the Court concludes that the material is not easily accessible, it can still order production but can accompany that production order with a order that sets conditions for the discovery of that ESI, including allocation of the expense of the discovery. (CCP 2031.060(e).)

The most significant decision regarding cost shifting in California is *Toshiba American Electronic Components, Inc. v. Superior Court* (2004) 124 Cal.App.4th 762. In that case, Toshiba withheld from production hundreds of computer backup tapes. According to Toshiba's eDiscovery expert restoring and processing the tapes and searching them from relevant data would cost between \$1.5 and \$1.9 million. Lexar, the plaintiff, would not agree to shoulder any of that cost on the grounds that it would be unfair because the tapes required specialized tools to access them. The court concluded that Lexar must pay the "reasonable expense" for any "necessary translation" of electronic evidence that had been archived. (*Id.*) According to the Court, reasonableness and necessity are factual issues to be determined by the court on a case by case basis. (*Id.*)

Sanctions and “safe harbors”

The rules make clear that all parties have a duty to preserve evidence, which extends to ESI. (Code Civ. Proc. § 2023.010; *Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 495.) However, absent exceptional circumstances, a court may not impose 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 Civ. Proc. §§2031.060(i), 2031.300(d)(1).)

In *Pension Comm. of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, District Judge Scheindlin laid out a number of rules that Court can use to

determine whether the loss of ESI was in good faith. (Case No. 05 Civ. 9016 (SAS) (S.D.N.Y.), Opinion and Order filed January 11, 2010.) First, failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information. (*Id.*) Second, the failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of email or backup tapes after the duty to preserve has attached. (*Id.*) Third, counsel must direct employees to preserve all relevant records—both paper and electronic—after a duty to preserve attaches, as well as help create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee preserving all relevant records. (*Id.*)

SMOOTHING THE RIDE

Careful review and understanding of the Act is a good starting place for understanding ESI issues. There are also a few proactive steps that can be taken to make the process of ESI discovery a smooth one. These include getting your electronic house in order, understanding and instituting litigation holds, and developing an electronic discovery plan.

Getting Your Electronic House in Order

The first and perhaps best step that a practitioner can take to address ESI issues is to update and/or develop a comprehensive document retention plan that reflects and supports the City's needs and that ensures compliance with the appropriate legal requirements. If possible, it is best to prepare a document retention policy when there is no pending litigation. Some steps that need to be taken to prepare a document retention policy include:

- Establishment of a work group composed of representatives from multiple City departments, including legal and IT.
- Identification of objectives, which should include storage, indexing, maintenance, and retrieval of ESI, along with a policy and plan for destruction of outdated and unnecessary ESI.
- Identification of protocols that ensure compliance with retention periods established by statute, regulation, or contract.
- Inclusion of protocols to minimize litigation risk, and to ensure retention of documents relevant to threatened litigation.

- Provision of sufficient resources to IT to ensure that the policy can be implemented.
- Training of staff to ensure that they understand the policy.

Understanding and Instituting Litigation Holds

Another significant step that a practitioner can take to address ESI issues is to develop and implement a litigation hold policy. A City has an affirmative duty to preserve evidence when it "has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." (*Zubulake v. Warburg LLC* (S.D.N.Y. 2003) 220 F.R.D. 212, 216.) Future litigation must be probable not merely possible. (*Hynix Semiconductor, Inc. v. Rambus Inc.* (N.D. Cal. 2006) 591 F.Supp.2d 1038.) Once litigation becomes probable, the parties must put in place a 'litigation hold' to ensure the preservation of relevant documents. (*Zubulake*, 220 F.R.D. at 218.) The hold must include suspension of any routine document retention/destruction policies. (*Id.*) The following steps should be followed when instituting a litigation hold:

- Identification of key witnesses/departments;
- Suspension of any existing document destruction policy for the relevant witnesses/department;
- Written notice from the City's attorney regarding obligation to maintain existing documents; and
- Periodic updating of written notice.

Developing an ESI Discovery Plan

A third thing that a practitioner can do to address ESI issues is to develop an ESI discovery plan. This discovery planning should start with the presumption that most forms of discoverable information will be retrieved from electronic devices, and should take into consideration the burden and expense of collecting and producing ESI, and also the burden and expense of reviewing the other sides ESI. The following steps should be taken:

- Identify potential locations of discoverable ESI reside, which will likely include computer networks, servers, desktop computers, laptop computers, blackberries, personal data assistants, flash drives, memory sticks and cards, and printers.

- Develop protocol for collecting all relevant ESI. This protocol should include identification of custodians of relevant ESI and development of search terms that can be used to cut down on collection of irrelevant ESI.
- Evaluate what types of ESI the other side is likely to have, learn about their electronic system, and investigate their document storage and retention policies.
- Determine the form in which you would like ESI is to be produced. If the anticipated volume is small, it may make sense to request the documents in either pdf or paper format. If the anticipated volume is large, it may make be wise to retain a vendor and work with them to determine what form makes the most sense.
- Evaluate potential for cost shifting both for production of internal ESI, and for production of requested ESI.

CONCLUSION

ESI is one of the most significant issues facing litigation practitioners today. This paper provides a summary of some of the concerns, and makes some recommendations about best practices that can be utilized to make the process go smoothly. The issue, however, is evolving at a rapid pace due to the development of new and more sophisticated electronic devices and the growing use of social networking sites, so practitioners need to continue to monitor developments in both statutory and case law in order to stay ahead of the ESI onslaught.