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California Trial Guide

Publication 114 Release 44

April 2010

HIGHLIGHTS

Legislature enacts procedures for electronic discovery.

- The Electronic Discovery Act (Stats. 2009, Ch. 5) took effect as urgency legislation on June 29, 2009. The EDA, modeled on Rule 26(b) of the Federal Rules of Civil Procedure, regulates the discovery from parties and nonparties of electronically stored information (ESI) in civil litigation. Its purpose is “to eliminate uncertainty and confusion regarding the discovery of electronically stored information, and thereby minimize unnecessary and costly litigation that adversely impacts access to the courts[.]” [Id. at § 23.]

Specifically, the EDA:

- Defines “electronic” and “electronically stored information [ESI]” [Code Civ. Proc. § 2016.020(d), (e)].
- Establishes procedures for obtaining the production of electronically stored information through the use of a subpoena [Code Civ. Proc. § 1985.8 (a)(1)] or demand

for production [Code Civ. Proc. § 2031.010(e)].

- Permits discovery by means of copying, testing, or sampling, in addition to inspection, of documents, tangible things, land or other property, or electronically stored information [Code Civ. Proc. §§ 1985.8 (a)(1), 2031.010(a)].
- Permits the party demanding production, inspection, copying, testing, or sampling of electronically stored information to specify the form in which each type of electronically stored information is to be produced [Code Civ. Proc. §§ 1985.8(b), 2031.030 (a)(2)].
- Permits the parties to agree to extend the date for inspection, copying, testing, or sampling beyond those provided in previously existing provisions [Code Civ. Proc. § 2031.270(a)].
- Provides that if the responding party objects to the discovery of electronically stored information on the grounds that it is from a

source that is not reasonably accessible because of undue burden or expense, and that the responding party will not search the source in the absence of an agreement with the demanding party or court order, the responding party shall identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By so objecting and providing the identifying information, the responding party preserves any objections it may have relating to such electronically stored information [Code Civ. Proc. § 2031.210(d)].

- Provides that if a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party shall state in its response the form in which it intends to produce each type of electronically stored information [Code Civ. Proc. § 2031.280(c)].
- Provides that if a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party must 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 electronically stored information in more than one form [Code Civ. Proc. §§ 1985.8(c)(1), (2), 2031.280(d)].
- Provides that a party seeking a protective order regarding, or a party objecting to or opposing a demand for, production, inspection, copying, testing, or sampling of electronically stored information, on the basis that the information is from a source that is not reasonably accessible, because of the undue burden or expense, shall bear the burden of so demonstrating [Code Civ. Proc. §§ 1985.8(d), 2031.310(d)].
- If it is established that the electronically stored information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to specified restrictions in specified circumstances [Code Civ. Proc. §§ 1985.8(e), (h), 2031.310(e)].
- Provides that if the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery, including the allocation of the expense of discovery [Code Civ. Proc. §§ 1985.8(f), 2031.310(f)].
- Provides that the court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that specified conditions exist [Code Civ. Proc. §§ 1985.8(h), 2031.310(g)].
- Provides that “absent exceptional circumstances, a court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, dam-

aged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system [Code Civ. Proc. §§ 1985.8(l), 2031.310(j)(1)].

Until California courts have had an opportunity to construe the EDA, counsel may rely on federal cases interpreting analogous provisions in Rules 26, 34, and 37 of the Federal Rules of Civil Procedure and California cases deciding electronic discovery disputes prior to the enactment of the EDA to the extent they are not inconsistent with the new legislation [*see, e.g., Toshiba America Electronics Components v. Superior Court* (2004) 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532, discussed in sections 100.52(6)(a)(ii) and 100.52(8)(d), regard-

ing the allocation of electronic discovery costs].

The new ESI discovery provisions are discussed in Unit 100, section 100.13.

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Publication 114, Release 44, April 2010

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Publication 114 Release 44

April 2010

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Publication 114, Release 44, April 2010

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