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MATTHEW BENDER® PRACTICE GUIDE: CALIFORNIA E-DISCOVERY AND EVIDENCE

Publication 1550 Release 18 February 2018

HIGHLIGHTS

2018 Update for California Legislation, and Recent Judicial Decisions

- The publication has been updated for changes to California legislation for 2018, and recent California and federal judicial decisions. For a more detailed summary of the important changes incorporated into the publication in this release, see below.

This release is the first 2018 update for MATTHEW BENDER® PRACTICE GUIDE: CALIFORNIA E-DISCOVERY AND EVIDENCE. This release adds coverage of important changes to California legislation for 2018 and California and federal cases dealing with e-discovery issues. Here are some of the developments covered in this release:

Recent Statutory Developments:

New Code of Civil Procedure Provision Allows Counsel to Ask for an Informal Discovery Conference With the Court. Assembly Bill 383 adds a new section to the Code of Civil Procedure that enables a party to request an informal discovery conference, or the court—on its own motion—to require one. CCP § 2016.080 provides that, "If an informal resolution is not reached by the parties, as described in Section 2016.040, the court may conduct an informal discovery conference upon request by a party or on the court's own motion for the purpose of discussing discovery matters in dispute between the parties." See Ch. 12, *Obtaining or Opposing Motion to Compel* 12.15[8].

Costs for Electronic Presentation of Exhibits Recoverable. Assembly Bill 828 modifies CCP § 1033.5(a)(13) to allow a prevailing party to recover the cost of "the electronic presentation of exhibits, including costs of rental equipment and electronic formatting." The new legislation keeps the limitation that the costs are recoverable "if they were reasonably helpful to aid the trier

of fact." See Ch. 4, *Planning E-Discovery* 4.08[4][c]

Electronic Court Filing Systems Must Be Accessible To Disabled People By June 30, 2019. Assembly Bill 103 amends CCP § 1010.6 to require all electronic filing services to meet disability-accessibility standards enumerated in the bill no later than June 30, 2019. See Ch. 2 *Governing Law in Electronic Discovery*, 2.17[1].

Changes to Electronic Service and Filing. Assembly Bill 976 makes changes to the electronic service and filing provisions of the Code of Civil Procedure, Penal Code, Probate Code, and Welfare and Institutions Code. Changes to the Code of Civil Procedure provide that:

- Any document served electronically between 12:00 a.m. and 11:59:59 p.m. on a court day is be deemed served that same day. If the document is served electronically on a noncourt day, it is deemed served on the next court day [CCP § 1010.6(a)(5)].
- Electronic service is deemed complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent [CCP § 1010.6(a)(4)].
- Any document received electronically by the court between 12:00 a.m. and 11:59:59 p.m. on a court day is deemed filed on that court day. Any document that is received electronically by the court on a noncourt day is deemed filed on the next court day [CCP § 1010.6(b)(3)].
- If the declaration is filed electronically, the declarant must have signed a paper-original on the same day or before the date of filing. The attorney filing the document represents, by the act of filing, that the declarant has complied signed a printed form before or on the same day as the filing [CCP § 1010.6(b)(2)(B)].
- Confidential or sealed records must be electronically served through encrypted methods to ensure that the documents are not improperly disclosed [CCP § 1010.6(a)(8)].

See Ch. 7, *Obtaining Injunction to Protect Against Destruction of Electronic Evidence Pending Discovery* 7.12[1][b] & 7.12[3]

Recent Judicial Decisions:

This release adds coverage of California and federal decisions that have been compiled or become final since the cutoff date for Release 17. Significant new decisions include the following:

Computer-Generated Report of Ankle-Monitor GPS Data Not Hearsay and Properly Authenticated By Testimony of Sergeant Who Used the System to Track the Defendant. The California Court of Appeals ruled that a computer-generated report of ankle-monitor GPS data showing a defendant's location at particular dates and times was properly authenticated by the testimony of the Sergeant who used it and the presumption of accuracy for computer records in Evid Code § 1552 [People v. Rodriguez (2017) 16 CA5th 355]. See Ch. 15, *Admissibility of Electronic Evidence at Trial* 15.15[6].

Facebook Chats Not Business Records Under [FRE 902(11)] But Were Properly Authenticated By Extrinsic Evidence. The United States Court of Appeals for the Third Circuit ruled that the prosecution could not rely upon the business-records exception to the hearsay rule FRE 902(11)

(the federal analog to Evid Code § 1562) to authenticate Facebook chat strings. The court reasoned that "at most, the records custodian employed by the social media platform can attest to the accuracy of only certain aspects of the communications exchanged over that platform, that is, confirmation that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times. This is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter." Nevertheless, the prosecution properly authenticated the chat records with extrinsic evidence that could allow a reasonable jury to conclude that the account belonged to the defendant and he was the person communicating with the victims [United States v. Browne (3rd Cir. 2016) 834 F.3d 403]. See Ch. 15, *Admissibility of Electronic Evidence at Trial* 15.05[2][e].

Request for Native File of All Facebook Posts Too Intrusive. In a products liability action regarding an implanted medical device the plaintiff sought damages that included pain and suffering, loss of enjoyment of life, and continuing medical care, including for depression with increased anxiety. Defendants asked her to produce a native file of her Facebook profile and various posts on her page. She responded with a PDF of the requested data. Defendants moved to compel production of all of the posts in native format. The court noted that a native file contains considerably more information than a PDF—namely metadata, which provides much more private information. The court also noted that the metadata contained in native files gives the who, what, when, where, and how of the making of a post, including metadata from non-parties [In re Cook Med., Inc. (SD Ind. Sept. 15, 2017) 2017 U.S. Dist. LEXIS 149915]. See Ch. 4 *Planning E-Discovery* 4.09[6].

Single-Page TIFFs With a Concordance Load File Not Reasonably Useable to Plaintiff Represented By Small Law Firm With Limited Means. Plaintiff, a small business represented by a small law firm, did not specify the form of production of ESI in its original request, but during meet and confer asked for OCR searchable PDF files. Defendant, a large corporation represented by a self-descried global law firm, produced single-page TIFFs with a Concordance load file. Plaintiff objected that the files were not in a reasonably useable format. The court ordered the defendant to produce the documents again as OCRF searchable PDF files, and incur the cost of doing so [Pac. Marine Propellers, Inc. v. Wartsila Def., Inc. (SD Cal., Octo 20, 2017), 2017 U.S. Dist. LEXIS 176307]. See Ch. 6, *Demanding Production of Electronically Stored Information in California Court* 6.06[2].

Discovery Requests Slid Under the Attorney's Door After Office Hours Not Served in Time. The federal District Court for the Northern District of California ruled that a plaintiff had not properly served discovery requests on the last day they could be served under the scheduling order where the plaintiff slid the discovery requests under defense counsel's office door when the office was closed and emailed the requests to defense counsel. FRCP 5(b)(2)(B)(ii) required service at the recipient's dwelling or abode with someone of suitable age and discretion who resides there if the office was closed. Also, the defendant had not consented to electronic service as required by FRCP 5(b)(2)(E) [Davis v. Elec. Arts Inc. (ND Cal. Sept. 12, 2017) 2017 U.S. Dist. LEXIS 147621]. See Ch. 10, *Opposing Demands for Production*

of Electronic Evidence in California Court 10.05[2].

Successful Movant Awarded Only Half its Attorney's Fees Despite Sanctioned Party's Disobedience of Scheduling Order Deadlines Where Motion to Compel Also Involved Good Faith Disputes. The court ordered a defendant to pay 50% of the plaintiff's attorney fees incurred in connection with a discovery dispute where the defendant had not even begun searching for ESI two weeks before the discovery cutoff; then missed two further deadlines and finally ended up producing the ESI nearly three months after the original discovery cutoff. In awarding only 50% of the plaintiff's attorney fees, the court noted that the plaintiff's motion to compel also involved good faith disputes unrelated to the defendant's failure to abide by the Court's deadlines; the plaintiff had taken "extreme positions during the course of discovery;" and the plaintiff had failed to appropriately address the discovery issues earlier in the case [Bird v. Wells Fargo Bank (ED Cal., July 20, 2017) 2017 U.S. Dist. LEXIS 113455]. See Ch. 12, *Obtaining or Opposing Motion to Compel* 12.16[4].

Request for Electronic Copy of Personal-Injury Plaintiff's Entire Facebook Account History Overbroad. Defendant trucking company's request for production demanded that a personal-injury plaintiff "download and produce an electronic copy of your Facebook account history to the enclosed flash drive." Plaintiff refused. The court denied in part the defendant's motion to compel. The court reasoned that, although there would be very little time or expense involved in the initial production of plaintiff's Facebook history, "such vast information has the potential to generate additional discovery or impact trial testimony. It's not difficult to imagine a plaintiff being required to explain every statement contained within a lengthy Facebook history in which he or she expressed some degree of angst or emotional distress or discussing life events which could be conceived to cause emotion upset, but which is extremely personal and embarrassing. There is also substantial risk that the fear of humiliation and embarrassment will dissuade injured plaintiffs from seeking recovery for legitimate damages or abandon legitimate claims." [Gordon v. T.G.R. Logistics, Inc., (D. Wyo. May 10, 2017) 321 F.R.D. 401]. See Ch. 1, *Understanding Electronic Evidence* 1.32[6].

No Adverse Inference or Terminating Sanctions Where Party's Consultant Repurposed a Hard Drive After Being Threatened With Criminal Prosecution By a Party to Trade Secret Litigation. A plaintiff company embroiled in an intellectual property dispute with its exclusive licensee of computerized sock-knitting technology alleged that the plaintiff had to spend $2 million re-creating software for the knitting patterns of a popular sock after the licensee refused to return the technology to the plaintiff. During the pendency of the litigation, an information technology consultant to the plaintiff repurposed a hard drive he had used to store a backup of the plaintiff's computerized knitting workstation. He repurposed the hard drive after being threatened by the defendant with criminal prosecution for possessing what the defendant claimed was its intellectual property. The District Court found that the defendant suffered prejudice from the spoliation, and although the consultant knowingly destroyed the data, he did so because of the threat of criminal prosecution, and not predominantly to deprive the defendant of the data's use in litigation with the plaintiff [Yoe v. Crescent Sock Co. (D. Tenn. 2017) 2017 U.S. Dist. LEXIS

187900]. See Ch. 13, 13 *Seeking or Opposing Sanctions for Noncompliance* 13.08[4].

Court Quashes Third-Party Subpoena Demanding Inspection of Computers, Cell Phones, and Storage Devices as Overly Burdensome. Plaintiff risk-management consultancy involved in a trade-secret dispute with a former employee issued a subpoena to the defendant's new employer seeking "to inspect and copy any and all computers, cell phones, and/or storage devices used or operated by [defendant] for contact information of individuals and businesses and to determine whether any calendar or schedule of meetings are maintained." The new employer was not a defendant in the law suit. The District court quashed the subpoena, holding that that plaintiff had failed sufficiently to justify the broad-ranging examination of the new employer's computer and electronic devices [Arthur J. Gallagher & Co. v. O'Neill (D. La. 2017) 2017 U.S. Dist. LEXIS 181728]. See Ch. 6, *Demanding Production of Electronically Stored Information in California Court* 6.19[1A].

Sampling Data Cited By Court to Support its Decision on Search Term Dispute. In an employment-mobility case alleging that employees of a scaffolding company misappropriated trade secrets when they went to a competitor, the parties agreed on a protocol where each side provided forensic images of the relevant devices to a special master; the master ran agreed-upon search terms against the forensic images; and each side produced results to the other side after reviewing for privilege. Defendants objected to a number of search terms requested by the plaintiff as overbroad, and vice-versa. In deciding that the vast majority of the proposed search terms were reasonable, the magistrate judge assigned to the case was able to cite to evidence of the number of hits on test runs of these search terms [Brand Energy & Infrastructure Servs. v. IREX Corp. (D. Pa. 2017) 2017 U.S. Dist. LEXIS 96763]. See Ch. 9, *Gathering and Producing Electronically Stored Information* 9.33[3].

Missed Local Rule Deadline Thwarts Attempt By Party to a Foreign Proceeding to Compel Further Discovery. A U.S. corporate plaintiff engaged in litigation in Japan obtained non-party discovery from another U.S. corporation pursuant to 28 U.S.C. § 1782. In response to the plaintiff's FRCP 45 subpoena, the non-party produced 20,000 documents. Nine weeks later, the plaintiff sent the non-party a letter detailing seven categories in which it asked for further production, and asked the non-party to run six specific search terms which led to the production of an additional 2,000 documents. Seven months later the plaintiff sent the non-party a letter asking it to run fourteen more search terms. The non-party responded two weeks later in a letter asserting it had already complied with the subpoena and refused. The plaintiff moved to compel. The court denied the motion as untimely under the local rule of court requiring motions to compel to be made within 21 days of receiving a response [Purolite Corp. v. Avantech, Inc. (D. S.C. 2017) 2017 U.S. Dist. LEXIS 100793]. See Ch. 14 *Discovery of Electronically Stored Information Residing in Foreign Jurisdictions* 14.06[6].

Email "Read-Receipt" Establishes Timely Service of a Discovery Demand. A defendant asked for its attorney fees after the plaintiff failed to show up for a deposition that defendant noticed via e-mail. The court ruled that, although plaintiff's counsel and his staff did not recall receiving any notice of deposition via email, the electronic "receive-receipt tag" and the "read-receipt tag" offered by defendant provided sufficient proof of delivery to

conclude that the defendant properly served plaintiff with notice of the deposition [Kuberski v. Allied Rec. Grp., Inc. (D. Ind. 2017) 2017 U.S. Dist. LEXIS 122926]. See Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court* 10.05[2].

Internet Cache Subject of Spoliation Sanctions Fight. The defendant in a defamation case stemming from an investor presentation made at a board meeting issued a litigation hold two weeks after the complaint was filed. The litigation hold defined documents to include electronically-stored information and advised employees to err on the side of preservation if there was a question as to whether material qualified as documents, but did not explicitly reference internet browser histories, internet search histories, or internet sites visited. The plaintiff moved for spoliation sanctions. The court denied the plaintiff's request. It found that the plaintiff could obtain deposition testimony, and that the plaintiff had not shown that the defendant acted with intent to deprive the plaintiff of the ESI [Eshelman v. Puma Biotechnology, Inc., (ED N.C., June 7, 2017) 2017 U.S. Dist. LEXIS 87282]. See Ch. 1, *Understanding Electronic Evidence* 1.19.

Demand for All of the Documents Supporting Each Record in a Database Unduly Burdensome When the Dispute Centered Around the Defendant's Profits on Three Product Lines. In litigation over profits defendants earned from three product lines, plaintiff sought discovery of Defendants' revenues and expenses pertaining to those products. Defendants furnished Plaintiff with spreadsheets and other charts showing their revenues, expenses, and profits from sales of the relevant product lines. The spreadsheets provided relevant financial data in summary form. In light of a declaration from the defendant that it would require "a team of at least ten employees working full time for many weeks, if not months, to even begin making progress on collecting the scope of the requested materials," The court held that the burden outweighed the likely benefit in light of the issues in the case, and denied the motion to compel without prejudice [Coll v. Stryker Corp. (D. N.M. 2017) 2017 U.S. Dist. LEXIS 107482]. See Ch. 6, *Demanding Production of Electronically Stored Information in California Court* 6.06[2].

No Adverse Inference Instruction Where Factual Dispute Existed Whether Spoliator Was on Notice to Preserve the Information. The defendant restaurant chain in an age-discrimination suit brought by the EEOC failed to preserve written employment applications and emails after the EEOC expanded its investigation of hiring practices from one restaurant to the entire chain. The parties disputed whether the defendant had ever received the EEOC's letter informing it of the broader scope of the investigation. The court allowed the parties to "present competing facts and theories to the jury about missing paper applications (and whether any were missing at all, as opposed to simply not being available because they never existed in the numbers anticipated by the EEOC), missing interview booklets and guides, and the loss of email, as well as evidence and argument about the relevance (or lack of relevance) of these materials." However, the Court refused the EEOC's request for an adverse inference instruction [United States EEOC v. GMRI, Inc. (D. Fla. 2017) 2017 U.S. Dist. LEXIS 181011]. See Ch. 13, *Seeking or Opposing Sanctions for Noncompliance* 13.08[4].

Responding Party Compelled to Write Program to Query its Database at Pro-

pounding Party's Expense. Plaintiff in a putative class action alleged that Defendant debt collection agency's practice of making autodialed, prerecorded-voice collection calls using contact information obtained from its clients or third-party skip-trace services foreseeably resulted in Defendant making numerous wrong number calls to the cell phones of people other than the debtor, in violation of the Telephone Consumer Protection Act [47 U.S.C. § 227 et seq.]. Plaintiff asked the defendant to query its database after the defendant's chief technology officer testified in deposition that it would be possible to write a script to query the defendant's call database to identify "wrong number" recipients of defendants' autodialed, prerecorded voice calls. Plaintiff proposed, alternatively, that the defendant could produce the relevant portions of its database so that plaintiff's expert could write the program and conduct the query himself. Defendant refused. The court granted plaintiff's motion to compel [Meredith v. United Collection Bureau, Inc. (ND OH, April 13, 2017) 319 F.R.D. 240]. See Ch. 9, *Gathering and Producing Electronically Stored Information* 9.11[3].

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