KAYE SCHOLER LLP

E-DISCOVERY

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California's New Discovery Rule

The nation's largest state court system has adopted new regulations on the discovery of electronically stored information. On June 29, 2009, California Governor Arnold Schwarzenegger signed the "Electronic Discovery Act," which became immediately effective. With the law's passage, California joins the Federal Courts and 22 other states in enacting regulations for dealing with e-discovery.

The goal of the California legislature in passing the bill was to "eliminate uncertainty and confusion regarding the discovery of electronically stored information and decrease unnecessary and costly litigation." The California law mostly mirrors the 2006 e-discovery amendments to the Federal Rules of Civil Procedure, subjecting electronically stored data to discovery and outlining guidelines on how discovery requests are handled. However, there are some differences.

The Federal Rules broadly define "electronically stored information" as "any medium which can be retrieved and examined." By comparison, California specifies electronically stored information as stored in "technology having electrical, digital, magnetic, wireless, optical, electromagnetic or similar capabilities." One could suggest that California's attempt to delineate all possible electronic mediums may actually lose pace with future technological advancements in data storage. In the near term, however, lawyers representing California clients will need to have a high level of insight into all forms of the organization's data storage in order to properly respond to discovery requests.

A possible trap for the unwary is the difference between the treatment by the California and Federal Rules of information deemed inaccessible. Under the new California rules, information that is not reasonably accessible because of expense is deemed inaccessible. However, the California rule presumes all electronic information is accessible and places the burden of objecting on the party receiving the request. The Federal Rules indicate that if the responding party deems the data inaccessible, it need not produce it, requiring the requesting party to bring a motion to compel. Thus, in California, the duty is on the responding party to object and demonstrate, in the first instance, that the information is inaccessible.

While the California rule burdens the responding party with advancing the objection to e-discovery, it also provides that courts must limit the frequency and extent of e-discovery when the information can be obtained from a less burdensome source or would be unreasonably duplicative, or the burden outweighs the likely benefit, given the amount in controversy. Additionally, the courts may allocate the expense of e-discovery. Litigants will want to pay close attention to this condition of proportionality and use it as a possible tool to rein in the cost of e-discovery.

Another key part of the California rules is a well-articulated safe harbor provision. California courts are prevented from imposing sanctions on a party for not producing electronically stored information that has been "lost, damaged, overwritten or altered due to routine, good faith operation of an electronic system." Therefore, companies do not need to store electronic data indefinitely, as long as changes to the data are made pursuant to already existing document retention or destruction policies.

Left unanswered by the new rule, however, is the effect of notice of litigation, and whether notice triggers a company's obligation to override standing retention policies and hold potentially discoverable material. This is an area that has been widely litigated under the Federal Rules, but is untested under California's new safe harbor provision. In the interim, a cautious, conservative approach is best advised.

Given the enormous volume of electronic information modern businesses handle, e-discovery is expensive and fraught with potential pitfalls. The new California rule brings the state in sync with the federal discovery rules and, at the same time, adds its own distinctive flavor to e-discovery.