

RE Proposed Discovery Act Amendment
Discovery of Electronic Data
AB 926 2007-2008 Session

BACKGROUND

I write from the perspective of one who has heard and will hear and decide disputes concerning discovery of electronic data. I have reviewed the proposals for amending the Discovery Act, the summary of comments, the report to the Judicial Council and the oral presentation by advocates for the proposals before the Judicial Council on April 25, 2008.

For 29 years I heard discovery motions in the San Francisco Superior Court on a regular basis. Since retiring in 2003, I have continued to hear discovery motions, including those involving electronic data, as a Discovery Referee and private judge pursuant to stipulation of the parties. I have written numerous articles and presented numerous continuing legal education programs dealing with discovery in general and with electronic discovery. I taught a course on discovery at a local law school as an adjunct professor and wrote the text book for that course. In 1999, I organized, designed and presented throughout California a program on electronic discovery sponsored by California Continuing Education of the Bar. In 2000, I was invited to participate and present at an hearing in San Francisco before the federal rules committee on the subject of e-discovery rules. In 2000, as Chair of the discovery subcommittee of the rules advisory committee to the Judicial Council, I organized a statewide committee of experts and lawyers to consider the need for special e-discovery rules in California. Since 2001, I have lectured on e-discovery at CLE programs for California Judges. I was invited to join the Sedona Conference Working Group on e-discovery and have participated in and presented at their meetings. I was invited to present at a program before the Conference of State Court Chief Justices and when their *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* was approved in 2006, it contained provisions that I had proposed. For ten years I have maintained a website¹ on California Discovery Law which includes a section on discovery of electronic data and which contains additional and more detailed information about my background and experience with this subject. Like trial judges all over the country, I have dealt with e-discovery problems under the current law and will deal with it under whatever rules are passed. I support legislation or rules that provides clear and meaningful guidance, improve procedures, facilitate the process, reduce waste, resolves issue, and assure a fair resolution on the merits.

In my opinion, the current proposal for amending the Discovery Act does not provide significant improvement in the law and creates potential confusion, conflict and increased discovery costs. While some other legislation or rules could be helpful, it should be based on demonstrated need and on evaluation of the affect of rules on e-discovery already adopted in other jurisdictions. It should also be based on the experience and knowledge legal and technical experts and the expressed needs of practicing lawyers and judges who are now confronted with the subject of e-discovery.

RECOMMENDATION

Based on the above, I respectfully suggest that the Legislature
(1) Enact those provisions in the proposal that benefit the discovery process, namely the provisions regarding specification of the form² of production, proposed Code Civ. Proc., §§2031.030(a), 2031.280(c), the clarifying language as to production date added in §2031.210 (a)(1) but not the unilateral extension and delay of production by objection

authorized in the first sentence of §2031.280(b);

(2) Enact a provision to clarify and expressly include “electronic data” as a proper³ subject of discovery consistent with the term used by the Legislature in other discovery provisions regarding document production, Code Civ. Proc., §§1985.3, 1985.6;

(3) Defer further legislation pending review and recommendation by legislative committee or by the Law Revision Commission⁴, with such a study to include the input of experts knowledgeable and experienced with e-discovery and electronic data including vendors, service providers, computer forensics, records management, litigation support paralegals, and lawyers/judges with first hand experience with e-discovery under the federal rules and California law.

Although the AOC committee comments reflect a desire to rush the legislation through the legislative process, there is no urgency. Several commentators noted the short comment period⁵ and the inability to fully review the lengthy provisions over the holiday period. California is considering the topic ten years after some jurisdictions enacted rules and legislation and nine years after the federal rules committee began its study of the subject. During this period, trial courts throughout this country have resolved e-discovery disputes without any need for such rules. Assuming a need exists for new rules, California can take the time to do it right and avoid unintended consequences. The Legislature has the benefit of suggestions of the Judicial Council and of those who made the effort to comment on the proposals on which to build. It can have the benefit of the experience of other jurisdictions that have enacted e-discovery rules. It can also call on experienced and knowledgeable experts for assistance and seek the input of the various bar associations. While perfection will not be possible, quality should not be sacrificed for political expediency.

This comment focuses on the general issue of whether this proposal should be enacted and on what appears to be the major issue raised by many commentators---handling the burden of data “not reasonably accessible.”⁶ A separate document on specific issues that was not addressed by the AOC committee report is included and attached. Those issues and each of the issues raised by public comments in the report must be addressed to avoid unnecessary confusion and future litigation.

THE PROBLEM ADDRESSED

THE PROBLEMS CREATED

As Judicial Council guidelines for rule proposals note⁷, it is helpful to identify and articulate a problem in order to determine (1) if it needs to be addressed, (2) whether the proposal successfully addresses the problem, and (3) whether the proposed solution goes too far or has unintended consequences. The proponents of this legislation do not meet this standard; they merely identify the general subject matter, note that other jurisdictions have enacted rules, and suggests California adopt some rules on the subject matter. Other than proposing something that mentions e-discovery, the purpose and problem addressed are not identified so it is not possible to evaluate the need for change or effectiveness of any “solution.” While the legislation, with some minor exceptions, does not appear to provide any benefit, the injection of new words is likely to generate confusion, conflict, and increased costs and may have more unintended adverse consequences. The public comments are just the beginning. When actual litigation generates a close reading and the stakes justify motions, controversies and unintended results will proliferate. While that is inevitable, the confusion and unintended consequences should be minimized.

There is no demonstrated need for or benefit from the proposed rules or for urgent action. For many years, most noticeably in the last ten years, trial courts have applied existing, flexible discovery concepts to resolve disputes involving electronic data. There is no suggestion in the AOC report that

any judge or lawyer has been hindered or unable to resolve any dispute using current law or that a new rule would facilitate that resolution or solve any problem. There is no citation to a case or even a hypothetical example of a discovery problem that cannot be solved easily under existing law. There is no example of a situation that will be better handled under the proposed law. While judges or lawyers may not know initially how to handle particular problems involving electronic information, that is most likely to be due to lack of knowledge or understanding regarding the electronic data at issue. Problems also arise due to failure of parties to present facts or to a lack of understanding of existing discovery concepts and rules.⁸ New rules will not address those problems and more likely will exacerbate them.

Although both the Consumer Attorneys of California and the California Defense Counsel strongly support the proposed amendments, their comments in support suggest their interpretations of the proposal may differ and even be diametrically opposed.⁹ This may be explained since, as set forth below, the proposed amendments do not seem to change the law but only add more and different words. At a minimum, the comments from those organizations illustrate the potential for litigation should the amendments be adopted. Several other distinguished commentators pointed to other perceived problems and suggested alternatives. While the committee dismissed their comments, each represents a legitimate interpretation and the potential for more litigation.

FEDERAL RULES

All states base their discovery rules on the federal rules and some adopt them and any amendments verbatim without evaluation on the merits. California has evaluated those rules on their merits and has adopted the general pattern while varying when it determines that alternative rules would better serve the public. California departs from the federal rules significantly with its document production provisions. This makes it particularly confusing to try to graft federal rule provisions onto this section of the California law. It fails to account for inconsistencies between California law and the federal rule provisions or terms being adopted. Despite comments to the contrary, it is clear that the proposal is a version¹⁰ of the federal rules and other proposals based on them.¹¹ While the purpose and impact of federal rules should be considered, unclear language such as “not reasonably accessible” should not be adopted.

The report does not suggest that any surveys or empirical data suggest the federal amendments have improved the discovery process. It does not appear that any cases decided since the adoption of the rules has had a different result than would have occurred without the amendments. Surveys of corporate counsel have suggested the main impact of the federal amendments has been increased costs of litigation.

E-DISCOVERY IN CALIFORNIA

E-discovery issues have been resolved by trial courts in California for many years. E-discovery has been recognized in California case law and discovery statutes for over 20 years.¹² When California revised its discovery laws after a lengthy study by a “blue ribbon” task force in the mid '80s, it specifically included provisions for cost shifting on production of electronic data.¹³ Due to heightened interest in the late '90s, e-discovery became a separate subject of special interest in numerous CLE programs.

Contrary to some misconceptions, e-discovery is not limited to class actions and major corporate litigation. It is a potential issue in every case since most information today is created, used and preserved in electronic form. For many years, I have personally heard discovery motions involving

electronic data in “routine” cases such as slip and falls, assault and battery, auto accidents, sexual assaults, and small business disputes.

While the subject of e-discovery is new to some people and has recently received much publicity, trial courts in California as in the rest of the country have been resolving e-discovery disputes by employing the same flexible rules and concepts available for paper discovery. While the issues change with the technology and the media, the same, existing, discovery concepts apply to resolve them.

UNDULY BURDENSOME OBJECTION IN CALIFORNIA

California has long recognized that discovery may involve undue burden¹⁴ and that such an objection may be appropriate. In 1961, the Supreme Court cautioned against permitting unduly burdensome discovery and provided guidance for lawyers and trial courts. “In the exercise of its discretion the court should weigh the relative importance of the information sought against the hardship which its production might entail, and it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production....Greyhound Corp. v. Superior Court (1961), 56 Cal.2d 355, 384. “No hard and fast rule can be made. Only when the court has before it the "subject matter of the pending action," together with facts from which it can determine the need for disclosure, the ability of the respective parties to obtain the information, and the hardship which may be entailed by an order granting or denying, can it make an order which will be consistent with justice and the purposes of the discovery act.”*Id.* at p. 393. More recently in a "...motion for a protective order contending the subpoena was unreasonably burdensome and overly broad...", the Court noted: "Because of the potential for promiscuous discovery imposing great burdens...trial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered.” *Calcor v. Superior Court* (1997), 53 Cal.App.4th 216, 223¹⁵.

In California, if a demand for discovery is made on a party that is unduly burdensome, that party may either move for a protective order or simply object on that basis. In either case, the objecting party will have the burden of proof to support and sustain its objection.¹⁶

There is no reason why parties following existing California law cannot object to e-discovery requests, whether or not from “inaccessible”¹⁷ sources, on the basis of undue burden and oppression when appropriate. Alternatively, responding parties could seek a protective order based on undue burden. Thus, the issue that evoked the strongest response and confusion among those commenting, results from an addition to the law that is completely unnecessary and confusing.

INACCESSIBLE¹⁸ INFORMATION

“the information is from a source
that is not reasonably accessible
because of undue burden or expense”

Currently responding parties commonly object to production on the ground that the requested production would be unduly burdensome and courts apply a practical cost / benefit analysis to resolve the issue. For many years, courts in California and throughout the nation have applied this standard to electronic data. Following the federal rules amendments in December 2007, the e-discovery proposal amends *Code Civ. Proc.*, § 2031.310 “to address the discovery of electronically stored

information from a source that is not reasonably accessible”. While providing no benefit, this new term and others add new and unnecessary words over which parties can litigate.

“Not reasonably accessible” is nothing more than a different way of saying “unduly burdensome”¹⁹. If it cost an excessive amount to produce paper documents because they are not reasonably accessible, they would not have to be produced or the costs might be shifted upon a showing of such undue burden. That issue would be raised and showing made either in a motion for protective order by the responding party or by objecting and responding to a motion to compel. In fact, the arguments to oppose discovery of electronic data on such a showing has been made since e-data arose in discovery disputes based on existing law. The *Rowe* and *Zubulake* cases in the Southern District of New York on which the FRCP provisions are based were in turn based on terms in federal rules similar to those existing in the California Discovery Act. This provision adds nothing. The Emperor has no clothes.

TWO TIER APPROACH

The much touted “two tier system” does not exist within the proposed legislation and was expressly rejected by the AOC committee²⁰. This approach, wherein a requesting party first obtains the most accessible data, or “low hanging fruit”, has been employed frequently under existing law by stipulation, by court order, or by design of the discovery plan. The advantage is similar to that of sampling. First obtain the least expensive, least burdensome, and limited information. The limitation is without prejudice to further discovery of the same subject matter. Depending on what is revealed--- the costs, the need, the benefits etc.--- additional information of the same nature may be pursued at a later time which may be an open or limited period. Parties may want to agree to the two tier approach but they must be proactive and pay attention to details. The proposal does not create or expand the two tier approach.

A party who objects to producing electronic data has the same recourse under the proposal as under the existing law. It may (1) move for a protective order under C.C.P. §2031.060 or (2) object under C.C.P. §2031.210(a)(3).²¹ An objection that is not timely made is waived;²² so, it is likely that one based on “inaccessible data” will become routine. A responding party must respond within 30 days after service²³ and must produce at the time specified at least 30 days after service. The alternative motion for a protective order, which is rarely used in practice²⁴, must be made “promptly”. In either case, the objecting party has the burden of proof as to the objection.²⁵ In either case, the issue is decided when the motion is heard a short time after the request is made. A requesting party must move within 45 days of the response or waive any right to compel²⁶ a further response, unless the parties otherwise agree in writing to a “specific later data.”²⁷

The same rules apply under the proposed law except rather than, or in addition to, the objection on undue burden and oppression grounds, there is an express provision dealing only with “Electronically Stored Information” whereby a party may object that “such information is from a source that is not reasonably accessible because of the undue burden or expense.” This addition provides new terms for confusion, debate and increase motion practice. However, the

proposed statutory scheme does not suggest nor does it make any sense to have a two tier and two hearing approach in every case: one to decide good cause and all other issues and a second to decide inaccessibility issues somehow deferred or raised after the initial hearing and decision with a second showing of good cause to overcome the inaccessibility. Nor does it make sense for a responding party to decide on its own what might be inaccessible and respond without consideration of those sources. Nor can a requesting party ignore the claim of “inaccessibility” without waiving its right to compel.²⁸

UNINTENDED CONSEQUENCES

When new words are added to existing law, they inevitably give rise to interpretation and raise new issues to litigate. When new terms or new words defining terms are added it raises more new issues. While few comments were received from practicing litigators, they provide a hint of some of the potential unintended consequences. The general comments are of little or no value. The most laudatory comments are from those who drafted and are advocating the amendments. Others, some of whom are recognized experts on e-discovery, have raised in detail some concerns that have been dismissed as misinterpretations; but, each of those is a legitimate and sincere concern that suggests alternative approaches that trial courts and lawyers can and will take. Unless, addressed by the legislature, each represents a potential body of disputes that will increase litigation costs and lead to inconsistent and unpredictable results. In litigation, when real and specific issues involving high stakes will be addressed, new and unintended issues will arise. While this may not be a reason to oppose any and all change, it is a reason to exercise caution and to insist that the change provide some clear well defined benefit that justifies the risk.

CALIFORNIA'S EXISTING E-DISCOVERY RULE

Of significance and unlike federal law, California Code Civ. Proc., §2031.280(b)(2) and the *Toshiba America* case provide for cost shifting of costs for electronic discovery. Competent lawyers differ on what this section and case mean and require. In addition, they impact significantly on any proposed e-discovery legislation. For example, is there undue burden and expense when the requesting party is required to pay for the production? This provision and the case interpreting it mandate cost shifting whereby the proposal mimicking the federal rule makes it discretionary. Several public comments raised other issues which the committee has dismissed. These issues are significant and should not be ignored.

“GOOD CAUSE GOOD CAUSE”

California law requires a showing of “good cause” on any motion to compel production of documents.²⁹ The federal rules generally do not require a showing of “good cause” to compel.³⁰ The federal amendment added the requirement of showing good cause to compel production of electronic data that has been determined to be “inaccessible.” Adopting the language of the amended federal rule, the California proposal then added a second good cause showing for production of electronic data. The statute now requires a showing of good cause to

compel production and, if the responding party establishes that the data is “inaccessible,” another showing of “good cause,” which may be a different kind of “good cause,” to overcome that objection.

GUIDANCE

While the AOC comments identify the purpose of the proposal is to “expressly address issues relating to the discovery of electronically stored information” and notes “it is important that California addresses specific problems that arise from electronic discovery, there seems to be no attempt to address those “specific problems” that are before trial courts: preservation duties, litigation holds, RAM preservation and production, computer forensic exams, database searches and production, search obligations, metadata production, preservation of computer generated information, cost shifting, preservation orders, spoliation sanctions, privacy, particularity of requests for production, general objections, image copies of hard drives or servers, etc. The only new issue addressed is the form of production. Burden has been an issue since discovery originated. If guidance is a goal, the process should start with a serious inquiry into what subjects are of concern to lawyers and judges actually conducting e-discovery. Creating new obstacles and artificial issues is not guidance.

NEW MATERIAL

It appears that a new section 2031.280(b) has been added after the comment period to grant the responding party an option to object and take an open ended extension of the production date until the requesting party obtains a court order. Currently a party can only object to the particular demand and can obtain an extension only by agreement or court order. Some take unauthorized extensions by filing boilerplate objections that delay discovery and force the requesting party to go to court or bargain for compliance. This provision provides another and unnecessary tool for abuse. Any further delay at least should have time limits and other restrictions. This unilateral extension is unrelated to electronic data and applies to all requests for production.

CONCLUSION

It appears this proposal has the political support to be adopted without opposition but it may not serve the public interest to do so. While the proposed legislation contains some minor tweaking worthy of consideration and enactment, it is largely unnecessary and ineffective to provide meaningful improvements to address e-discovery. Worse it creates potential collateral issues and unintended consequences with applications that may vary from judge to judge. The legislature should exercise caution and care in reviewing the proposal, make those minor changes that accomplish a clear purpose with a positive affect, and reject those proposals that are likely to create artificial issues, foment unproductive disputes and increase the cost of litigation. If the legislature wants meaningful rules on this subject, it should enlist the input of experts with both knowledge and experience in dealing with electronic data and with discovery.

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- 1 <http://californiadiscovery.findlaw.com/index.htm>
- 2 The proposal could be improved but the subject matter is worthy of consideration. Form of production has been a subject of litigation. Clear identification of the issue will not eliminate the controversy but will raise the issue early and before significant costs have been expended or positions compromised. While the issue can and is raised and resolved early under present law by some lawyers, that approach does not appear to this commentator to be the norm.
- 3 While cases throughout the nation and in California deal with electronic data discovery and the proponents have not cited any cases or anecdotes showing a real need for this, it probably will clarify and modernize the statute. Using the same term used in other document discovery provisions of California law, provides consistency and is unlikely to create issues that will be created by injecting a totally new, different and unclear term like ESI. Several enlightened commentators identified problems with the definition which the committee dismissed but which illustrate the future litigation that this term will engender. Copying the term used in the federal rules and then changing the definition guarantees problems. The issues created by prior federal cases and the response of the committee is a clear sign of future controversy.
- 4 The Law Revision Commission has been systematically reviewing the Discovery Act in recent years and their expertise should be used. In addition, it has considered both e-discovery and privilege issues including inadvertent. The staff provides thorough research and excellent drafting skills.
- 5 See the AOC chart of comments and responses. The comment period ran from December 17, 2007 to January 25, 2008. The subject was briefly considered at the April 25th meeting of the Judicial Council.
- 6 While the statutory language is “the information is from a source that is not reasonably accessible because of undue burden or expense” this comment uses terms such as “inaccessible data” as a shorthand substitute.
- 7 At <http://www.courtinfo.ca.gov/reference/documents/factsheets/howprerule.pdf> the September 2007 Fact Sheet on rule proposals states in part, “It is helpful if the proposal includes:
 - A description of the problem to be addressed;
 - The proposed solution and alternative solutions;
 - Any likely implementation problems;”
- 8 *Toshiba America Electronic Components, Inc., v. Superior Court* (2004) 124 Cal.App.4th 762, 766. “Lexar cited three federal district court cases that held, in effect, that a demanding party ought not to be penalized when a producing party has chosen to keep records in a manner that makes them difficult to retrieve. (*In re Brand Name Prescription Drugs Antitrust Litigation*, (N.D. Ill. 1995) WL 360526; *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, (E.D. Penn. 1991) WL 111040; *Kozlowski v. Sears, Roebuck & Co.* (D. Mass. 1976) 73 F.R.D. 73, 76.) In the alternative, Lexar argued that the cost-shifting analysis used in federal court did not warrant cost shifting in this case. (*Zubulake v. UBS Warburg LLC* (S.D.N.Y. 2003) 217 F.R.D. 309, 322 (*Zubulake*)). TAEC responded that restoring its electronic backup tapes was an undue burden and that the federal analysis favored shifting the cost to Lexar. Neither party referred to the pertinent California statute, section 2031 (g)(1).”
- 9 The Plaintiff's' bar thought it would require search, identification, and justification for withholding relevant but “inaccessible” ESI. The CDC defense bar praised it but other defense lawyers feared it would require them to make a motion and to supply information about ESI early. The committee responses suggest no change: the defense bar can object and will have to show that requested discovery seeks “inaccessible” data only if plaintiffs make motions within the limited time allotted by the Code of Civil Procedure. Plaintiffs will have to show “good cause” for production of any documents and will have to show “good cause” for production of “inaccessible” electronic data. The addition and second showing of “good cause” is not required for “inaccessible” paper documents. It is not clear from the proposal what search and what identification of relevant but withheld data will be required.
- 10 Worse, the proposal adopts federal provisions as modified or with different definitions. This repeats the mistake made when the current C.C.P. §2031.280(b) was adopted with a change but without any clear legislative history. The section was interpreted 20 years later in a million dollar discovery dispute in *Toshiba America Electronic Components, Inc., v. Superior Court* (2004) 124 Cal.App.4th 762.
- 11 Committee responses to comments from the public frequently defended language and provisions as being the same as federal rules and stated “**The committee agrees...that the proposed legislation is largely similar to the federal rules.** See <http://www.courtinfo.ca.gov/jc/meetings.htm>
- 12 See fn. 4, C.C.P. §§1985.3, 1985.6 re discovery of “electronic data”, and *Dodge Warren & Peters Ins. Serv. v. Riley* (2003), 105 Cal.App.4th 1414 [Issuance of preliminary injunction to preserve electronic data affirmed]
- 13 C.C.P. §2031.280(b) *Toshiba America Electronic Components, Inc., v. Superior Court* (2004) 124 Cal.App.4th 762. The proposed legislation may conflict with this provision and trial courts will have to make that determination until an appellate court sorts it out. Several commentators pointed this out but their comments were rejected by the committee.
- 14 Undue burden is commonly expressed, but is not limited to excessive costs. It is balanced against benefits and includes many concepts in the mix such as alternative sources, resources of parties, importance of the information, potential value of the issues in terms of money and public interest, etc.
- 15 See also *West Pico Furniture Co. v. Superior Court* (1961), 56 Cal.2d 407, 417-418.

- 16 Evid.Code §500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.
California Civil Discovery Practice, 4th Ed. 2006 C.E.B., §15.54 "In drafting the opposition papers, counsel should remember that the burden rests with the party objecting to discovery to justify its failure to respond." Citing Coy v. Superior Court which involved interrogatories
Id §6.124 "...the moving party makes a preliminary showing that the question or request for production was relevant....Thereafter, the burden of proof rests on a deponent who has refused or failed to answer ...or produce a document...to show that the refusal or failure was justified...."
Greyhound Corp. v. Superior Court (1961), 56 Cal.2d 355 at p. 379 "...there are several situations where the litigant starts the discovery process without prior court intervention. The burden is then on the party seeking to deny that right."
In re ATM Fee Antitrust Litigation (N.D.Ca.2005), 233 F.R.D. 542 , 545 [Motion re document production granted.
"Finally, this Court finds that BAC fails to support its claim of burden, making only a blanket objection without specifics sufficient to justify denying discovery. The objecting party has the burden to substantiate its objections. Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540 (10th Cir.1984), cert. dismissed, 469 U.S. 1199, 105 S.Ct. 983, 83 L.Ed.2d 984 (1985).]
- 17 Readily accessible sources may provide billions of documents that might have to be preserved, searched, reviewed and produced.
- 18 The term "inaccessible" or "inaccessibility" is used for simplicity when referring to an objection that "the information is from a source that is not reasonably accessible because of undue burden or expense"
- 19 *Open TV v. Liberate Technologies* (N.D.Cal. 2003), 219 F.R.D. 474 (N.D. Cal. 2003) The Court applied existing law. It noted that "Accessibility turns largely on the expense of production." The Court found the production to be "unduly burdensome and expensive" and therefore "inaccessible" for discovery purposes. It then considered the various factors also noted in the Zubulake case and allocated costs of production.
- 20 The response to a comment in favor of the the two tier approach stated: "**The committee supports the proposed legislation rather than the federal two-tiered system.**" When a commentator suggested that responding parties should not be required to search "inaccessible" data in order to respond to a production request, the committee rejected that concern. While there is a basis to argue that every production "subject to objections" is a two tier approach, there is no case law support. Any objection has to be tested within the 45 day limit.
- 21 There is a third alternative created by the manner in which the proposed amendments have been drafted. The response provision does not expressly require a party to object on grounds that "electronically stored information" "is not reasonably accessible because of undue burden and expense." On a motion to compel a party to produce, C.C.P. §2031.210(d) allows either "a party or affected person" "objecting to **OR** opposing the production" to demonstrate that the information is not reasonably accessible. This is not consistent with the party's obligation to object or waive the objection in C.C.P. §2031.300(a). *Deary v. Superior Court (Hendrick)* (2001), 87 Cal.App.4th 1072, 1078 -79. *Scottsdale Insurance Co. v. Superior Court* (1997), 59 Cal. App.4th 263. *Korea Data Systems Co.Ltd. v. Superior Court* (1997), 51 Cal.App.4th 1513. *Best Products v. Superior Court LA* (2004), 119 Cal.App.4th 1181. *Standish v. Superior Court* (1999), 71 Cal.App.4th 1130, 1141. A fourth alternative of inability to produce is arguably available under C.C.P. §2031.210(a)(2).
- 22 **C.C.P. §2031.300(a). The committee rejected without explanation a proposal that was intended to "(3) Made clear in §§ 2031.210 and 2031.240 that inaccessibility is a proper grounds for objection to a request for production and have emphasized that the objection must be specifically made."**
- 23 C.C.P. §2031.260, unless extended by motion and order or by agreement §2031 .270
- 24 Since an objection stops production and puts the burden on the requesting party to file a motion, there is little incentive to seek a protective order unless there is some strategic or psychological reason.
- 25 Evid.Code §500. Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.
California Civil Discovery Practice, 4th Ed. 2006 C.E.B., §15.54 "In drafting the opposition papers, counsel should remember that the burden rests with the party objecting to discovery to justify its failure to respond." Citing Coy v. Superior Court which involved interrogatories
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- 26 Thus, if the responding party has raised the issue of “inaccessible” data, a requesting party must bring the issue before the court or waive its rights. The likelihood of this objection appearing in most discovery responses suggests that requesting parties must obtain an extension or be prepared to move for further responses in all cases. That extension MUST be confirmed in writing and specify the date. A requesting party cannot simply repropound the same or similar request if it decides to test the claim or pursue “inaccessible” data. C.C.P. § 2031.310(c). *Sperber v. Robinson* (1994), 26 Cal.App.4th 736. *Sexton v. Superior Court*(1997), 58 Cal.App.4th 1403 *Standon v. Superior Court* (1990), 225 Cal.App.3d 898. *Vidal Sasoon v. Superior Court* (1983), 147 Cal.App.3d 681. *Deyo v. Kilbourne*(1978), 84 Cal.App.3d 771, 788. Cf. *Crippen v. Superior Court*(1984) 159 Cal.App.3d 254. *Carter v. Superior Court* (1990), 218 Cal.App.3d 994 [Waiver by failing to move within 45 days not bar to seeking same documents by deposition]
- 27 "notice of this motion...given" *Sperber v. Robinson* (1994), 26 Cal.App.4th 736 [Filing and dropping earlier and timely motion does not satisfy statute]. *Sexton v. Superior Court*(1997), 58 Cal.App.4th 1403 [objection raised 1st at hearing is timely; court lacks jurisdiction except to deny motion as untimely; no power to extend]. *Standon v. Superior Court* (1990), 225 Cal.App.3d 898 [Motion to compel document production more than 45 days after the objection was served denied as untimely.] *Vidal Sasoon v. Superior Court* (1983), 147 Cal.App.3d 681. *Deyo v. Kilbourne*(1978), 84 Cal.App.3d 771, 788
- 28 See fn 22.
- 29 C.C.P. §2031.310(b)(1)
- 30 The federal rule follow a different structure, which California rejected in the 1985 revision, and lump all motions to compel together in Rule 37. The federal e-discovery rules then injected a good cause requirement to compel production of electronic information that is “inaccessible”.