

NEW AUTHORITY FOR IMPLEMENTING TECHNOLOGY IN DISCOVERY

The challenge to the bench and bar is to use technology to achieve cost effective discovery and litigation. In January, California lawyers and judges will have new statutory powers to realize that objective. Those who fully exploit these powers can realize the financial and other benefits of technology and electronic discovery. In addition, they may revolutionize the practice in their cases, aid their colleagues by sharing their experiences, and provide the basis for wider application of such techniques and the development of rules of court for their implementation.

In September, California enacted broad, enabling legislation to provide for the use of technology in conducting discovery. Code of Civil Procedure Section 2025(h)(3) was added to provide for appearances at deposition by telephone or other remote electronic means such as internet, video conference or whatever else may be available now or developed in the future. Code of Civil Procedure Section 2017(e) was added to authorize orders adopting procedures for conducting discovery “in electronic media and by electronic communication.” Pursuant to this section “the court may enter orders prescribing procedures relating to the use of electronic technology in conducting discovery, including orders for the service of requests for discovery and responses, service and presentation of motions, production, storage, and access to information in electronic form, and the conduct of discovery in electronic media.”

A simple application of Section 2017(e) would be the entry of an order authorizing service by e-mail. A more complex order might provide for the conduct of discovery in a web centric environment wherein all documents, deposition transcripts as well as audio and video records, formal discovery requests and responses, calendars, motions, court orders, communications etc. would be accessible via a common web site. On the case web site, a party could select the desired form interrogatories, complete appropriate fields, *inter alia* for propounding and responding parties, check the boxes of desired interrogatories, and click “serve”. The form interrogatories would be served and a

proof of service maintained on the web site. The due date might be noted on the web site calendar. Although service of the form interrogatories, like other communications, would be made to the party's mail box on the web site, an email notice might be sent to a designated off site location. Integration of the questions and answers in a seriatim format might be adopted for the convenience of all concerned. The interrogatories and responses would be available to all parties on the web site and any party could download or print hard copy. In essence, all discovery and motions could be conducted on a case web site. At the same time, each party would benefit from the electronic nature of the discovery in that it could have an internal system for electronic distribution of the discovery requests and accumulation, review, synthesis and response to the discovery.

Although the specific software to conduct fully web centric discovery may not be available at this time, the elements exist and are available to be integrated into a comprehensive program. For years, telephonic and video conferenced depositions have occurred and the costs are declining while the technology improves. Today, court reporting firms offer depositions over the internet with audio, video, real time transcripts, private chat rooms, and web site depositories of transcripts. Corporations have long used extranets to share litigation resources and coordinate national litigation. Document depositories for specific cases or mass litigation have been used, first for hard copy but now for electronic documents. California Rule of Court 1830 allows for service of documents by filing "electronically in a central electronic depository." Of course, for many years courts have offered tentative rulings, decisions and opinions over the web. Increasingly, discovery is being conducted in electronic media and searched using key words and text analysis. Data and information that is discovered can be integrated into case management software for case preparation and, ultimately, for electronic presentations in the courtroom.

The new legislation not only authorizes such use of technology but signals to vendors that a market for such an integrated product exists. Many vendors currently provide at least some of the applications that are authorized by this legislation. For representative web sites link to VIRTUAL DISCOVERY from the California Civil

Discovery Law web site found at <http://CaliforniaDiscovery.findlaw.com>. By expanding their services or partnering with other providers they will be able to offer comprehensive, integrated, user friendly applications that will enable lawyers and parties to benefit from the cost effective use of technology.

This is but one application. Lawyers, judges and vendors are challenged to find new and better ways to exploit technology to achieve cost effective discovery and litigation for the ultimate benefit of the public. Other applications might include the development of protocols for on site examination of personal computers and networks, special rules regarding the duties to preserve, search for and produce electronic documents and data, and the establishment of electronic depositories at the outset of litigation. Electronic key word and text searches might supplant the omnibus document request for each and every document that refers or relates to the case. See DISCOVERY OF ELECTRONIC & COMPUTER DATA at <http://CaliforniaDiscovery.findlaw.com>. Protection from inadvertent waiver of privilege is relatively clear in California but the issue might be addressed expressly in the context of electronic discovery. The new law is “enabling” legislation that does not prescribe a particular technology or procedure. The development of specific applications is left to the creative abilities of vendors, lawyers and judges to develop cost effective and user friendly applications and procedures.

The legislation allows for trial court implementation, modification and development of procedures and applications as technology and experience may direct on a case by case basis. The adversary system is ideal for this process and superior to the legislative or rule making process in which all litigants are subjected to generic and inflexible rules. The lawyers and their support staffs will demand something that works and provides practical and user friendly solutions from the outset. If some application does not perform up to expectations or creates unforeseen problems, corrections can be immediately implemented on noticed motion. If improvements or additions are desired, they can be added as the case progresses. An application or procedure can be adopted in whole, in part or as modified to meet the needs or economics of the specific litigation or

the parties. As a practical matter there is little danger that any procedures will be adopted contrary to the consensus of counsel that will use it in the specific case.

The benefits of individual trial court experience will inure to the benefit of all. Code of Civil Procedure Section 2017(e)(3) expressly authorizes that “The Judicial Council may promulgate rules, standards, and guidelines relating to electronic discovery and the use of such discovery data and documents in court proceedings.” The Judicial Council rule making power is available to provide overall guidance and standards without stifling initiative and creativity by micromanagement. It may decide to establish standards for such things as security or redundancy to assure minimal standards are met at the discovery phase and to assure the integrity of the electronic data for admission in court. In addition, the Council is authorized to adopt rules for the use of such data in court proceedings. Thus, the Judicial Council is provided broad authority to authorize the use of technology in the entire litigation process and to assure that minimum standards are maintained.

The legislation encourages competition and the development of cost effective discovery practices. While recognizing that some additional costs may be involved, subsection (2) requires express findings to avoid the imposition of undue expenditures. In order to avoid the appearance of court favoritism of vendors, subsection (5) provides for the selection of service providers by the parties. It also provides for the periodic review and removal of service providers that fail to meet expectations and for the resolution of contractual disputes by noticed motion in the action.

To avoid the imposition of new technology or expenses on small firms, the new authority is limited to cases likely to be more complicated: Plan 3, exempt, coordinated and complex cases. See California Rule of Court, Rule 2105. Although not limited to “complex” litigation, those cases, and especially the complex litigation pilot projects, are natural laboratories for the use of technology. Judges involved in such cases and projects have the benefits of experience with the Manual for Complex Litigation, existing special rules [e.g. CRC Rule 1830], and special funding for the pilot projects. Some judges have

already implemented procedures to use technology in complex litigation and this legislation will authorize such orders in the absence of stipulations of all parties. In addition, Judicial Counsel reports on the complex litigation pilot projects should provide future guidance for all trial courts as to what has been tried and with what success. Based on the success of such procedures, all courts will be able to implement proven technology to achieve cost effective discovery. In smaller cases where the statute does not apply, lawyers would be expected to implement technology by stipulation.

By enacting Section 2025(h)(3), California joins the federal courts and at least a dozen state courts in expressly authorizing depositions by telephone and other remote electronic means such as video conference or the internet. It allows any person other than the deponent to take or attend any deposition by remote electronic means. A party deponent must appear at the deposition in person and be deposed in the presence of the deposition officer. Pursuant to court order finding good cause and no prejudice to any party, a nonparty deponent may appear at deposition by remote electronic means.

The statute expressly provides for the Judicial Council to adopt rules and procedures to supplement the statute. Pending such adoption trial courts may be required to provide for implementation of the statute on a cases by case basis if the parties are unable to agree. Such issues may include: payment and apportionment of costs; notice requirements; responsibility for set up and for failure of communication; service of exhibits prior to the deposition.

The authority is available for lawyers and judges to make technology in the digital document age a valuable and productive tool in the litigation process. Vendors and service providers have and incentive to modify and adapt existing software to litigation. We have a choice as to the role technology will play in litigation.

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