

PROPOSED RULE TO FACILITATE DISCOVERY OF ELECTRONIC DATA & DOCUMENTS

In the last six years, many jurisdictions have been considering and some have adopted special e-discovery rules due to the unique properties of e-data. The initial issue is whether any rule directed to e-discovery will facilitate the discovery process or if it will either be unproductive or have adverse consequences. Usually, the proper application of existing discovery rules and concepts can avoid and remedy any discovery problems. It does not appear that any court decision or the literature has suggested an inability of the courts to deal with any problems due to a lack of authority or rules; rather, concern is raised regarding a lack of predictability and clarity of what is required. Certainty in rules can be illusive and undesirable and this rule focuses on guidance and facilitation.

A second issue is whether the issues raised in the e-discovery context are truly unique to e-discovery or applicable to all discovery. Conversely the concerns and issues may relate only to a small minority of cases which should be resolved on a case by case basis. However, this proposal is based on the assumption that it is likely that some e-discovery rules will be adopted and that records management experts, lawyers, and service providers should participate in the process of writing a rule that is clear and beneficial before they are confronted with a rule that may be undesirable.

A major danger in adopting rules on e-discovery is to base them on existing technology or discovery issues which will inevitably limit their value and lead to obsolescence prior to adoption. Another danger is to adopt a generic rule that is only of value in a limited number of cases and may create problems in other cases. Any rule can be abused and the proper application and success of any rule depends upon the reasonableness of the courts and parties. This rules provides for court intervention at any time to avoid such abuses.

A rough draft of an e-discovery rule based largely on a rule adopted in the Delaware District Court but modified to fit California procedure was circulated for comment to lawyers familiar with the issues that have arisen in practice regarding e-discovery. The draft was provided to business trial lawyers, consumer trial lawyers, bar associations representing different interests and to lawyers and service providers across the country who have been involved with these issues. Numerous comments and suggestions were received and many have been incorporated in the revised draft. The revised draft is inclusive on the assumption it is easier to delete unnecessary provisions. It is, however, still a rough draft and a starting point for discussion and requires further input from persons with technical expertise and practical experience such as service providers and records management experts.

The Delaware rule was selected as a starting point because it attempted to provide some meaningful rules that went beyond merely recognizing the existence of e-data and suggesting litigants address the issues. A major source of discovery problems, particularly in e-discovery, is a failure to anticipate and address issues before they become more expensive or difficult to resolve. This rule encourages, without requiring, parties to address issues early in the litigation, but provides for court intervention and a default rule when all else fails. It provides three options to counsel: discuss and agree with opposing counsel, seek a court order, or do nothing and be subject to the default rule. The default protocol is subject to modification by agreement or court order at any time.

Another source of e-discovery problems arises when no specific person has knowledge or responsibility for understanding the information storage and retrieval systems and the legal responsibilities to preserve evidence and respond to discovery. In *Zubulake V*, the SDNY imposed such duties on counsel where it may ultimately reside; but, lawyers are not trained in records management, information technology, computer forensics, or basic computer science. Most lawyers will not be sufficiently familiar with the corporate organization and records to perform this function. This proposed rule requires parties to identify a persons or persons responsible for early and active intervention and supervision to avoid problems that often result from neglect: the "E-discovery Master" and the "Retention Coordinator". Although they have different functions, one or several persons could be designated to provide these duties. The person could be a lawyer but that person will have factual information that may be relevant and discoverable and the person may be subject to deposition.

In order to properly conduct e-discovery, it is helpful if not essential to have some basic background information and understanding of the opponent's system, software, document retention policies, etc. This information could be obtained over a prolonged period of time by the normal discovery process. Obtaining this information early in the litigation when parties are encouraged to discuss these issues should save all parties time and money and help to focus discovery in the proper direction with the proper understanding of limitations on the opponents ability to preserve or produce information. This rule provides for exchange of basic information necessary for subsequent discovery upon demand in appropriate cases. It is qualified and should not be used to abuse the opponent but if one side perceives abuse it may seek a protective order to limit or eliminate any obligation to produce. At the same time, the proposed rule seeks to avoid rigid generic rules that might limit the flexibility required to meet the needs of a particular case. This rule is not intended to affect the law regarding privileges or work product or the rights and duties of parties to discovery. Its provisions would be

enforced in the same manner as any discovery obligations.

Richard E. Best
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Best@Justice.com

RESOURCES:

ARMA International: records and information management association

<http://www.arma.org/>

ABA Discovery Standards 10 and 29 amended August 2004

THE SEDONA PRINCIPLES: Best Practices Recommendations & Principles for Addressing Electronic Document Production (January 2004 Version) 01/2004; The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age 09/2004

http://www.thesedonaconference.org/publications_html

Discovery of Electronic Data [includes New Developments section with case summaries]

http://californiadiscovery.findlaw.com/electronic_data_discovery.htm

Texas Rule 196.4 eff.1999 <http://www.supreme.courts.state.tx.us/rules/>

Mississippi Rule 26

Federal District Court local rules on e-discovery: New Jersey, Wyoming, Arkansas, Delaware, etc.

<http://www.uscourts.gov/links.html>

9th Circuit Draft guidelines for local rules

Proposed revisions of the FRCP <http://www.uscourts.gov/rules/newrules1.html>

34(b) single form of production of e-data: specified, objection, & default form

26(f) early discussion of e-discovery issues

26(b)(5)(B) re inadvertent production of privileged material [note review granted by Supreme Court in *Rico* and *Jasmine Networks* cases.]

26(b)(2) re identity of inaccessible e-data Cf. CCP 2031(g)(2)&(3)

PROPOSED CALIFORNIA RULE OF COURT, C.R.C RULE 332 FACILITATION OF E-DISCOVERY

1. Introduction. The purpose of this rule is to facilitate discovery of electronic data and documents in a fair, reasonable, cost effective and efficient manner appropriate to the needs and considering all relevant factors of the particular issues and litigation. Counsel and persons responsible for discovery must be familiar with the nature of electronic data as well as related discovery matters such as the relevant computer systems and applications, document retention schedules, document retention

policies, and the storage and retrieval capabilities of the client. It is expected that parties to a case will confer in good faith early and throughout the litigation and cooperatively reach agreement or identify issues on the e-data expected to be the subject of discovery, the necessity of preserving specific items of potential evidence, the manner of conducting electronic discovery, the form of production of documents including production in searchable electronic form, the allocation of costs, and other issues relevant to the search, preservation and production of information maintained in electronic form. Any failure to confer or the pendency of any motion shall not be an objection to discovery or a reason for the delay thereof; but, the court shall consider such failures in determining other issues such as cost shifting, sanctions, or spoliation.

As used in this rule "electronic data and documents" refers to electronic data or information in any form that is capable of being produced.

Any violation of a written agreement, court order or this rule may be considered an abuse of the discovery process subject to all remedies and sanctions provided in the Discovery Act. This rule is not intended to alter any duties or rights to discovery or any substantive law including any law relating to privilege, work product or spoliation. The courts shall consider the failure to confer in good faith to raise and address potential issues at the earliest possible time in applying those rules.

Agreement of Parties. Counsel are expected to discuss and reach agreement on electronic discovery issues early and without court intervention and to continue that process as discovery issues arise throughout the litigation. This rule provides default provisions in the absence of such agreement and may be modified in whole or part at any time by the written agreement of counsel or by court order. Any agreement of the parties, including an agreement that the default provisions of this rule not be applied, shall be in writing and may be presented to the court as a stipulated order. If the parties cannot agree on any issue, the parties may seek the guidance of the court by way of a protective order for case management of discovery or for an order that the default provision not be applied in the case. Pending such hearing the court may enter an ex parte order staying discovery or governing discovery pending a hearing and determination of that motion. In the event that agreement has not been reached or a court order obtained on any such issues by the the time discovery is required to take place, the following default rules shall apply until such time as the parties reach agreement or the court enters an order on the specific matters covered herein.

2. Electronic Discovery Information Exchange. Upon written demand by any party, based upon a good faith belief that anticipated discovery of electronic data justifies it and in order to facilitate the reasonable and orderly preservation and discovery of e-data, and subject to court order modifying or setting aside the demand, the parties shall exchange the following information in writing signed by counsel and verified by the client on the date specified in the demand which shall be at least 30 days from the date of personal service plus additional time for alternative service:

A list of the person or persons, titles, contact information and brief description of job responsibilities of the persons most knowledgeable about the relevant computer system or network, the storage and retrieval of information, backup and archival of electronic information;

A list of the most likely custodians, other than the party [e.g. persons with authority and ability to produce relevant e-data that may not be readily known or easily accessible to the party and key persons who may have such data, including potential witnesses], of relevant electronic data, including for a each person, the person's title, contact information, a brief description job responsibilities, and a description of the electronic data in each person's possession, custody or control;

A list of each relevant electronic system that has been in place during relevant times and a general description of each system, including the nature, scope, character, organization, and formats employed in each system. The parties should also include other pertinent information about their electronic documents including whether and why any electronic documents are of limited accessibility or duration of existence, the estimated costs and suggested procedures for accessing such documents. Electronic documents of limited accessibility may include those created or used by electronic media no longer in use or for which retrieval involves substantial cost, including an estimate of the retrieval cost.

Each party shall identify the procedure and cycle for electronic data backup for each system and/or any procedure for archiving electronic records. A list of all electronic records that have been stored off-site or off-system shall be included in the list of relevant documents.

The name of the individual responsible for that party's electronic document retention policies, procedures, schedules, and practices (the Retention Coordinator"), and any successor upon replacement, as well as a general description of and written copy of the party's electronic document retention policies for the systems identified, any known deviations from such policies, any changes or suspension of document retention policies or practices as a result of pending litigation or a statement that no policy or practice exists. A person and any successor must be designated for purposes of this litigation. See ABA Discovery Standard 10.

A description of the efforts undertaken to date to preserve electronic documents that may be relevant, including, without limitation, any suspension of regular document destruction, identifying and removing computer media with relevant information from its operational environment and placing it in secure storage for access during litigation, or, alternatively, making forensic image backups of such computer media.

The name of the individual who shall serve as that party's "e-discovery liaison", and any successor upon replacement.

Notice of any known problems reasonably anticipated to arise in connection with compliance with e-discovery requests, including any limitations on search efforts considered to be burdensome or oppressive or unreasonably expensive, the need for any shifting or allocation of costs, the identification of potentially relevant data that is likely to be destroyed or altered in the normal course of operations or pursuant to the party's document retention policy.

3. E-discovery Master. Each party to a case shall designate one or more individuals, and any successors, who shall be responsible and have authority for that party's compliance with e-discovery obligations (the "E-discovery Master"). If more than one person is designated the specific area of each person's responsibilities must be clearly delineated and one individual who has overall authority and supervision shall be designated as the "Principle E-discovery Master". Regardless of whether the E-discovery Master is an attorney (in-house or outside counsel), a third party consultant, or an employee of the party, he or she must be:

Knowledgeable about the party's electronic systems and capabilities in order to explain, or provide others who can explain, these systems and answer relevant questions.

Knowledgeable about the technical aspects of electronic discovery, including electronic document storage, organization, and format issues.

Knowledgeable about the subject matter and issues involved in the litigation

Knowledgeable about and able to document preservation efforts of electronic data

Prepared to participate in e-discovery dispute resolutions and, if necessary to provide, or produce others to provide, information or testimony regarding e-discovery.

Although the attorneys of record and parties shall be responsible for compliance with e-discovery requests, the E-discovery Masters shall be responsible for organizing each party's e-discovery efforts to insure full and complete responses and production of information and, generally, to facilitate the e-discovery process.

4. Search Responsibilities. Parties are not required to conduct unreasonable searches for electronic documents or data provided any known limitations, untapped sources, or actual data or documents, are noted in the formal response required by C.C.P. 2031. As to any known sources of data or documents not searched, the party shall identify those sources, the reasons not searched, the probability that it may contain relevant information, the estimated cost of conducting a search, and the probability and time schedule for destruction or alteration of such data. This rule does not prohibit extraordinary searches upon a showing of good cause and subject to any conditions or limitations agreed by the parties or imposed by the court.

5. Search methodology. If a party intends to employ an electronic search to locate relevant electronic documents, it shall disclose in its formal response any restrictions as to scope and method which might affect its ability to conduct a complete electronic search of the electronic documents. To avoid the expense of duplicative search and production, the responding party should advise the requesting party

of any limitations on its search sufficiently in advance of production to permit an informal resolution of any dispute and the requesting party should grant reasonable time extensions to permit such resolution in advance. If possible, the parties shall reach agreement as to the method of searching, and the concepts, words, terms, and phrases to be searched with the assistance of the respective E-discovery Liaisons, who are charged with familiarity with the parties' respective systems. To minimize the expense, the parties may consider limiting the scope of the electronic search (e.g., time frames, fields, document types). Absent written agreement, this provision shall not delay any duty to respond and produce.

6. Format. The parties shall confer on the format of document production in order to achieve the maximum benefits of providing information, access, review, search, and use by the requesting party while minimizing the costs to the producing party and preserving the integrity and security of the data. Absent prior court order, the producing party must make reasonable efforts to produce the original data and all information relating to the discoverable electronic data including the original formatting of the document and its metadata, including access and revision history. The electronic document, file, data or information to be produced shall include all meta data unless there is an express objection and such meta data is preserved pending any determination of a timely filed motion.

7. Retention Agreement & Coordinator. The parties shall confer and seek an agreement that outlines the steps each party shall take to segregate and preserve the integrity of all relevant electronic data in order to avoid later accusations of spoliation. Each party shall designate one or more persons as a "Retention Coordinator" for the litigation. If more than one person is designated, the specific area of each person's responsibilities must be clearly delineated and one individual who has overall authority and supervision shall be designated as the "Principle Retention Coordinator". The Retention Coordinator shall have the authority and responsibility to:

Take reasonable steps to segregate and preserve the integrity of all potentially relevant electronic documents in order to avoid later accusations of spoliation. Such steps may include, without limitation, identifying and removing computer media with relevant information from its operational environment and placing it in secure storage for access during litigation, or, alternatively, making forensic image backups of such computer media or data;

Take steps to ensure that relevant e-mail and other electronic documents of persons likely to have relevant information or to be witnesses shall not be permanently deleted in the ordinary course of business and that electronic documents in their possession, custody or control shall not be altered or deleted unless duplicative files or data are preserved.

Provide notice as to the criteria used for spam and/or virus filtering of e-mail and attachments; e-mails and attachments filtered out by such systems shall be deemed nonresponsive so long as the criteria underlying the filtering are reasonable.

8. Privilege Documents. If it reasonably appears that electronic information protected by privilege or attorney work product has been produced without intent to do so, the recipient shall immediately notify the producing party and afford the producing party a reasonable opportunity to seek relief from such disclosure.

9. Costs. Generally, the costs of searching, reviewing and providing discovery shall be borne by the producing party and any costs of duplication shall be born by the requesting party. However, the court may apportion the costs of electronic discovery in an equitable manner upon a showing of good cause and based upon all relevant factors. Any issue of cost shifting should be addressed by the parties and presented to the court prior to the incurring of such expenses but such issues shall not delay production absent a stipulation of the parties or a court order.

10. Enforcement. The provisions of this rule may be enforced pursuant to the Discovery Act and any failure to comply with the requirements of this rule shall be considered an misuse of the discovery process within the meaning of C.C.P.§2023.