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## States Moving to Adopt e-Discovery Rules

By Melissa Klein Aguilar — May 6, 2008

First came the long march to amend the Federal Rules of Civil Procedure and bring them into line with the Internet age. Now comes the chore of herding all 50 states into the same age as well.

The amended federal rules went into effect Dec. 1, 2006. The judiciary spent more than a year on the project, revamping the rules specifically to address electronically stored information and to give companies and their legal advisers clear guidance on how to navigate electronic discovery.

Since then, numerous states—including Idaho, Illinois, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, and Texas—have already amended their statutes or rules to reflect the discovery of ESI. Others—Alaska, Iowa, Maryland, Nebraska, Ohio, and Virginia, to name a few—are still in the midst of amending their own rules.



“Inch by inch, states are acting to put something on the books,” says Farrah Pepper, co-chair of the Electronic Data Discovery Initiative at the law firm Gibson, Dunn & Crutcher.


Most notably, on April 25 the Judicial Council of California unanimously approved proposed legislation that would integrate new e-discovery provisions into the framework of the state’s civil discovery law. California’s Code of Civil Procedure currently doesn’t address electronic discovery.

Many states simply follow the federal government’s lead in rules of judicial procedure. But California, while following the federal rules in most ways, does stray from the federal rules in some respects.


“In a lot of ways, the proposals are identical to what already exists in the FRCP,” such as specifying how electronic information is produced, or giving a procedure to assert privilege over documents that might have been disclosed by mistake, Pepper says. They also closely follow a template set of rules developed by the National Conference of Commissioners on Uniform State Laws.

One key difference in the California proposals is the treatment of “not reasonably accessible information,” such as data that might be stored on moldy old electronic media and cannot be understood by today’s technology.

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The federal rules require that companies must identify such hard-to-get information, but they don't necessarily have to produce it because of the undue cost to do so, says David Lender of the law firm Weil Gotshal & Manges. If the other party insists the information is vital, the court then decides whether the information should be produced and how to divide the costs among relevant parties.

The proposed California rule “essentially says the opposite,” Lender says. “It says if a party doesn't want to produce information that's not reasonably accessible, they can file a motion for a protective order.”



Lender

An earlier version of California's proposals drew a flurry of comments; people feared that the rules would require a company to file for a protective order every time another party asks for hard-to-find data. Noting that “is not the intent of the legislation nor will it be its effect,” the Judicial Council revised the proposals to address those concerns.

The Judicial Council's April 25 report goes on to state: “The usual California discovery procedures will apply to electronic discovery, including the ability of the party demanding the production of electronically stored information to file a motion to compel; hence, the resolution of disputes over the discovery of electronically stored information will not always require the filing of a motion for protective orders.”

Lender says the change should alleviate worries by clarifying that protective orders will not be necessary every time a discovery request is made.

“The rules make clear that the producing party can simply object, and then provide two alternatives to resolve the dispute if it cannot ... either on a motion to compel by the requesting party, or a motion for a protective order by the producing party,” he says.

Lender says that's no different than any other discovery dispute. “The parties meet and confer to shake it out,” he says. “It's a subtle difference from the federal rules, but the practical effect isn't that different.”



Others disagree. Erin Smart of the law firm Bingham McCutchen says the revised proposal doesn't adequately address concerns regarding the production of ESI on inaccessible sources. She notes that under the federal system, inaccessible sources of ESI are presumed exempt from discovery, although in some cases they must be preserved.

Smart Smart says the Judicial Council's proposal “appears to reject that presumption for California.” She believes that if the proposal becomes law, it's likely parties with inaccessible sources of ESI will be subject to claims that they must produce information from those sources unless they obtain a protective order.

While both the federal rules and the Judicial Council's proposal allow for discovery from inaccessible sources when there is “good cause,” Smart says the Judicial Council's proposal fails to answer the question of whether ESI from inaccessible sources is discoverable on a routine basis. That will likely force courts and parties to resolve the issue on a case-by-case basis through motion filings, which unnecessarily increases

#### PROS AND CONS

#### **The following commentary is excerpted from the Judicial Council of California's e-discovery report:**

There was substantial public interest in this proposal. Nearly fifty comments were received. The commentators included attorney organizations, business associations, corporations, judges, courts, law firms, and individual attorneys. While there was substantial support for the proposal, many commentators suggested specific modifications. Also, some opposed

the cost of litigation for both the parties and the courts, she says.

While the latest revisions mean the burden isn't entirely on the responding party to seek a protective order, Pepper says how that will play out in practice remains unclear. The outcome "will depend on how seriously parties take their obligation to meet and confer," she says. "Only time will tell whether this will be a successful departure from federal rules of civil procedure."

### **And the Small Details ...**

The proposals depart from the federal rules in other minor ways. For instance, they expressly define "electronic" to mean information stored in an electronic medium, while the federal rules don't specifically define the term.

The omission at the federal level was intentional, Pepper says, "so that over the years the definition could remain flexible as new technology emerged. There's some concern about whether that difference will in time become limiting, if there's technology not yet conceived of that doesn't fit that definition."

One departure from the federal rules that litigants are likely to favor is an expansion of the safe harbor for ESI that is lost as a result of the routine, good-faith operation of an electronic information system; California's rules would also cover information that is "damaged, altered, or overwritten."

"Litigants across the board can benefit from that," Pepper says.

Lender says the California proposals may hold some good news related to "cost shifting" when a litigant makes some discovery request the other party claims is too expensive. The proposals would give the court the authority to limit the frequency or extent of discovery of electronically stored information—even from a source that's reasonably accessible—if the court makes certain determinations. While it remains to be seen what the courts will do in cases involving accessible information, Lender says that could be an improvement on the federal law.

"At the federal level, there's been some case law that

the proposal, preferring the provisions of the federal rules on electronic discovery or no changes to the discovery law.

Support for the proposal came from a wide variety of sources. For instance, California Defense Counsel submitted a comment "express[ing] strong agreement with proposed changes in statewide Rules of Court and statutes relating to electronic discovery." Similarly, Consumers Attorney of California stated that its organization "strongly supports the proposed changes."

The main concern among those who were critical of the proposal was that it differs from the approach adopted in the recently adopted federal rules relating to the discovery of electronically stored information. The committee carefully considered all the comments on this subject. It concluded that the proposed legislation is actually quite similar to the new federal rules on the discovery of electronically stored information; the legislation adapts those rules so that the provisions relating to the discovery of such information are fully integrated into California's discovery statutes. Also, even though the proposed legislation differs in some respects from the federal rules, it provides a better approach to resolving issues relating to the discovery of electronically stored information in California. The proposed approach is fair, balanced, and efficient.

Lastly, some commentators expressed a concern that the proposed legislation would require the party from whom discovery of electronically stored information is sought to bring a motion for a protective order in every case. This is not the intent of the legislation nor will it be its effect. The usual California discovery procedures will apply to electronic discovery, including the ability of the party demanding the production of electronically stored information to file a motion to compel; hence, the resolution of disputes over the

suggests cost-shifting isn't a possibility when you're dealing with accessible information," he says.

Meanwhile, Patrick O'Donnell, supervising attorney for the Judicial Council, tells Compliance Week that the proposals will be incorporated into Assembly Bill 926, which is currently pending in the California State Senate Judiciary Committee.

Once the bill is amended to include the proposals, it would have to be approved by both houses. O'Donnell expects the legislation to be approved and sent to the governor for signature by September. If that happens, the bill could take effect as of Jan. 1, 2009.


While the assembly could make changes to the bill, O'Donnell expects the legislation to receive broad support. "We're optimistic it will go through substantially as proposed," he says.

Pepper notes that California courts could start applying the proposals to cases even before they formally take effect, just as federal courts did when the amendments to the FCRP were adopted but not yet effective.

discovery of electronically stored information will not always require the filing of motion for protective orders. To clarify this matter, Code of Civil Procedure section 2031.310 has been modified to include provisions parallel to those in section 2031.060 on motions for protective orders relating to the production of electronically stored information that are from sources that are not reasonably accessible.

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### Source

 [California Judicial Council Report](#)  
(April 16, 2008).

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