

# EARLY E-DISCOVERY RESOLUTION: HOW CALIFORNIA'S NEW E-DISCOVERY STATUTE INFLUENCES YOUR CASE FROM THE VERY START

by Benjamin A. Eilenberg

Over the past decade, e-discovery has been a growing concern for California attorneys and their clients. E-discovery disputes were resolved using an amalgam of traditional discovery principles and the Federal Rules of Civil Procedure. However, there were no clear guidelines. In 2009, the Legislature passed the California E-Discovery Act to help resolve the growing areas of concern over E-Discovery.

One of the lesser known changes in the California E-Discovery Act affects every civil case from its inception. Under California Rule of Court 3.727, parties must now meet and confer on e-discovery issues no later than 30 days before the first case management conference. This means that before anyone would typically know whether e-discovery may be required for the case, they must try to establish ground rules for how e-discovery will be done between the parties.

There are several factors to consider when coming up with e-discovery guidelines when meeting and conferring:

Will there be e-discovery?

If so, is the data in a commonly used program, or a proprietary system?

If the data is in a proprietary system, will you negotiate for a copy of the opposing side's software?

If you need to release a copy of proprietary software, will you require a confidentiality agreement?

Is metadata important in this case?

Will each side bear their own costs?

Will paper printouts suffice, or do the parties need the actual electronic data?

Do the parties expect to use outside consultants for e-discovery?

While not everything needs to be completely settled before the first CMC, lawyers can get into serious trouble by not having at least discussed the issue. Federal interpretations of e-discovery rules have held that by not establishing in what format the e-discovery would be produced, the parties waived the right to demand them in any particular format and paper printouts were therefore allowed. While California courts have not

yet ruled on the issue, by not meeting and conferring, there is a risk that a party waives the right to demand documents in their electronic form. If a party waives that right, or fail to ask for the electronic form in their discovery requests when sent, the opposing side may be able to simply send printouts of the applicable files. In most cases, this probably will not matter, but the occasional case will require a full electronic copy of the documents.

How should a lawyer prepare for the meet and confer? Many lawyers have turned to an inside source to help them prepare, and sometimes participate, in the meet and confer: Their IT department. Your in-house technical support team not only can help you to understand the technology and terminology, but may also help determine whether the opposing side's requests are reasonable. If your client keeps its documents in a proprietary database program, giving a copy of the program to the opposing side could be hazardous to your case (or could expose your client to accidental copyright infringement for transferring a license). On the other hand, if the documents are all in Microsoft Office, then the only real issue is what information is changing hands.

While meeting and conferring on discovery issues before the first CMC seems premature, it can save a lot of time, and more importantly, preserve your ability to address the issues later if necessary.

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