

Discovery of electronically stored information

New amendment to California Rule of Court, rule 3.724.

By Will Hoffman

Effective August 14, 2009, the Judicial Council amended California Rules of Court, rule 3.724 to deal with the discovery of electronically stored information (ESI). The parties must meet and confer on all issues relating to e-discovery at the same time as the other issues identified in rules 3.724 and 3.727, i.e., no later than 30 calendar days before the date set for the *initial* case management conference.

By pushing for an early CMC and case management order regarding the listed e-discovery issues, attorneys up on their game can gain a significant advantage. Hence, begin boning up now. Cases are won and lost in discovery, and e-discovery lays traps for the unwary. I set forth below the most significant of the rule 3.724(8) topics with my comments. Note that these new provisions relate only to ESI, not "traditional" documents.

Crucial to your strategy is the extent of your client's resources, including both the amount and forms of ESI it may possess; and the ability and war chest to handle ESI as produced to you. Be careful what you ask for. Pushing your adversary into expending considerable time and money responding to your discovery demands may push you to expend considerable time and money reviewing what you receive.

Rule 3.724(8)

(A) Issues relating to the preservation of discoverable electronically stored information;

Comment: By this point, both sides should have aggressively initiated litigation holds. In addition, now is the time to address the risk of any relevant ESI's being "lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system" (see, e.g., §2031.300) and the consequences thereof.

(B) The form or forms in which information will be produced;

Comment: Before agreeing to any form (read: format), make sure you know the forms in which your client holds its potentially relevant ESI. Don't promise e-mail in "native format" unless that's the way it's preserved. In addition, determine what the optimum form would be for ESI produced to you. Some ESI may be equally useful printed, whereas a spreadsheet is almost always better "live," i.e., in electronic form, so that, *inter alia*, you can see the formulas and comments.

(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

Comment: If the risk is low that you will inadvertently produce privileged material, and your adversary's risk is high, you may not want a strong "claw-back" provision when considering rule 3.724(8)(E) (*but see* new Code Civ. Proc., §2031.285 on treating privileged ESI).

(G) How the cost of production of electronically stored information is to be allocated among the parties;

Comment: Again, if you're a small fish against a big one, you will want to follow the traditional pattern of each side's bearing its own costs of production, and vice versa if you're the big fish. With ESI, unlike "traditional" discovery, the sheer volume can make any production very expensive. Cooperate and focus.


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