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# California's New E-Discovery Rules vs. The FRCP: A Comparative Analysis

Earlier this year, California enacted changes to the discovery provisions of its Code of Civil Procedure (CCP), many of which tracked the e-discovery revisions to the Federal Rules of Civil Procedure (FRCP) that went into effect in December of 2006. Indeed, the drafters of the California legislation stated that it was modeled after the FRCP e-discovery provisions.

But differences do exist. California permits discovery to commence much earlier than the Federal rules do, so e-discovery issues may arise significantly sooner for parties litigating in California state court. In addition, California requires responding parties facing requests for electronically stored information (ESI) that they contend is not reasonably accessible to specifically object to such requests with detailed explanations or lose any ability to avoid production or shift production costs to the requesting party.

Whether these will turn out to be distinctions without a practical difference remains to be seen. What is clear at this point is that California practitioners and their clients need to be aware of and plan ahead to comply with the requirements of both the state and Federal rules.

### The Similarities Between the California Rules and Their Federal Counterparts

- Both define ESI broadly. CCP § 2016.020; FRCP 34(a)(1).
- Both allow a requesting party to inspect, copy, test or sample the responding party's ESI, within appropriate limitations. CCP § 2031.010; FRCP 34(a)(1).
- Both permit the requesting party to specify the form in which it wants the responding party to produce its ESI, and allow the responding party to object. CCP §§ 2031.030(a)(2), 2031.210(a)(3); FRCP 34(b)(1)(C), 34(b)(2)(D).
- Both permit sanctions for the failure to produce responsive ESI, and both provide a "safe harbor" precluding sanctions against a responding party if its loss of

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- responsive ESI is due to the routine, good faith operation of its electronic information systems. CCP §§ 2031.060(i)(1), 2031.300(d)(1); FRCP 37(e).
- Both provide mechanisms for the return of inadvertently produced privileged information. CCP § 2031.285; FRCP 26(b)(5)(B).
- Both apply their e-discovery provisions to third party subpoenas. CCP § 1985.8; FRCP 45.

### The Key Differences and Their Strategic Implications

#### The Timing of Discovery and the Early Meeting E-Discovery Discussions

Both sets of rules mandate early meetings of counsel regarding e-discovery issues. Under the California Rules of Court, amended after the CCP e-discovery revisions, specific topics relating to e-discovery must be discussed no later than 30 days prior to the first case management conference, i.e., typically within 150 days after the complaint is filed. CRC 3.724, 3.727. The Federal rules expressly require discussion of e-discovery matters no later than 21 days prior to the first scheduling conference, i.e., no later than 99 days after the complaint is served. FRCP 26(f)(3).

However, unlike the Federal rules, California permits the parties to promulgate discovery prior to this early discussion -- defendants at any time, and plaintiffs within 10 days after service of the complaint or an appearance by the defendant. As a result, ediscovery issues may come to the fore much more quickly under the California rules, potentially resulting in e-discovery disputes and motion practice prior to the early meeting and case management conference. The parties and their counsel is such cases need to develop a clear picture of what the relevant ESI is, where it is located and how it is stored virtually from the outset of the litigation, because they may find themselves moving to compel or for protective orders months before the case management conference.

#### California's "Not Reasonably Accessible" Objection Requirement

Both sets of rules also provide mechanisms for dealing with requests for ESI that the responding party contends is not reasonably accessible, and the potential for the shifting of costs relating to production of such ESI. However, the California rules, unlike the FRCP, require the responding party to respond to such requests with detailed objections explaining why the ESI is not reasonably accessible. CCP § 2031.210(d). The responding party must identify the types or categories of sources of ESI that are not reasonably accessible. (The responding party may also move for a protective order, which must state the same detailed grounds.) The Federal rules do not on their face require this degree of specificity, and simply provide that a party need not produce ESI from sources it identifies as not reasonably accessible because of undue burden or cost. FRCP 26(b)(2)(B). In addition, under the FRCP the burden is on the propounding party to move to compel, in response to which the responding party must make its showing of undue burden or cost.

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This apparent divergence between the California and Federal rules may turn out in practice to be a distinction without a difference (or it may be that the California rules simply add a degree of specificity that is already inherent in how the Federal rules should be interpreted.) Aggressive requesting parties in Federal cases likely will take the position that objecting to a production request on the grounds that it seeks ESI from sources that are not reasonably accessible, without specifically identifying the sources of that ESI, constitutes a waiver of the objection. Such an interpretation, which is not inconsistent with the language of the Federal rules, would make them similar in application to the California rules.

In addition, the Federal rules' requirement of a pre-discovery discussion of ediscovery issues should result in the same exchange of information about the sources of ESI the responding party contends are not reasonably accessible that the discovery objection process provides under the California rules. Thus, despite the procedural differences between the California and Federal rules, responding parties in both California and Federal courts should arm themselves as early as possible -- before discovery commences -- with information sufficient to support their positions that they should not be required to produce ESI they contend is not reasonably accessible.

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