

Sign of Timesⁱ

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In October 2001, the California legislature passed amendments to the Code of Civil Procedure that greatly impacted the way attorneys would deal with electronic discovery. Similarly, California state and federal courts have been issuing new opinions regarding e-discovery practices and obligations.

The driving force behind these legal developments is the proliferation of electronic material over the past few years. For example, North American businesses sent an estimated 2.5 trillion e-mail messages last year, a number expected to grow to 3.25 trillion by the end of this year. Within 10 years, the total number of electronic records produced on the planet could double every sixty minutes. We are truly moving toward a paperless world, and the law must evolve to keep pace with it.

The e-evidence explosion and its resulting legal changes have forced attorneys to reassess their own evidentiary practices, both internally and in advising clients. Is it best to retain all my client's electronic records? Should we blindly destroy outdated e-mail? How do we respond to litigation, both from a data preservation perspective and in a way that allows us to find and produce relevant evidence?

Striving to answer questions such as these, attorneys are finding themselves caught in the intersection between technology and the law, and running the risk of sanctions if they choose the wrong path. Nowhere has this been more evident than in California law offices in the past year.

Discovery Code Changes

As California trial attorneys recall, Code of Civil Procedure Section 2017 was amended last year by addition of a subsection that addressed the use of technology in discovery. This amendment not only marked the first statutory recognition of e-discovery issues, but also made clear that courts would be taking a substantially increased role during the discovery phase.

At its most basic level, 2017 permits the court to authorize use of technology in conducting and maintaining discovery. Among the section's provisions, the court may enter orders allowing electronic service of discovery demands and responses, and electronic filing and service of discovery motions. The court may also enter orders allowing electronic methods for producing documents and for storing and accessing documents exchanged during litigation.

When parties seek an e-discovery order, the next level of Section 2017 comes into play. The court must examine the proposed plan to ensure it meets specified criteria. The plan must promote cost-effective efficient discovery. It must not impose undue hardship in time or money. For example, parties must not be required to purchase extraordinary services or products. Finally, any plan that includes e-discovery service providers must allow open competition among vendors. If the court finds any of these criteria not met, the request for an e-discovery order will be denied.

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The final and most novel level of 2017 emerges when a proposed plan requires a jointly retained e-discovery vendor. The court controls this process by first officially appointing the vendor, after considering the above open competition and requests of the parties.

The court must also approve the vendor contract, and may condition appointment upon contract modifications. At any time during litigation the court may order removal of an appointed vendor and vacate any vendor agreement. The court must also review the vendor's performance annually, or more often if the parties desire. Finally, the court is empowered to decide any disputes between the parties and vendors.

So what does 2017 mean to the practicing trial attorney?

Certainly California litigators were dealing with electronic evidence and discovery issues long before the October 2001 Discovery Code amendments. In the e-evidence area, as in most, it has taken the legislature a while to catch up with the times. Thus, the production and acquisition of electronic data during discovery is not new to us, nor is the use of e-discovery vendors. However, the revamped code has had an impact on our practices.

Perhaps the most positive effect has been the official approval of technology. The ability to electronically exchange and store all documents produced in a case enables us to streamline the time and expense of discovery and trial work, as does the ability to electronically file and serve discovery demands, responses, and related motions.

In the past, our ability to engage in such practices often required extensive negotiations with opposing counsel and motions with the court, and often we would be unsuccessful with both audiences. The new code has made counsel and courts more receptive to utilizing all electronic means available to make the discovery process less painful for everyone.

However, some attorneys may see the newfound court receptiveness to technology as a double-edged sword. This change in court attitude is likely due to the increased role of the judiciary that came with Section 2017. It is no longer sufficient just to reach agreements among counsel regarding electronic production and storage of documents and joint retention of vendors. These and other e-discovery issues are all now within the purview of the court, and in some instances solely up to the court to decide. We do not get to have our cake and eat it too.

The new judicial attitude toward technology spawned by statutory changes is also spilling over into how courts handle discovery disputes involving e-evidence. Courts are now becoming much more aware of the Discovery Code obligations vis-à-vis electronic data, and much more inclined to impose sanctions for the withholding and destruction of this data than in years past.

Recent Case Law Developments

One issue courts have had to grapple with is preservation of electronic evidence. E-mail and electronic files are abundant, but much of this data resides on backup tapes (frequently recycled) or individual laptops (frequently altered or overwritten).

In *In re Pacific Gateway Exchange, Inc.* 2001 WL 1334747 (N.D.Cal. Oct. 17, 2001), the U.S. District Court for the Northern District of California, recognized the heightened risk associated with preserving electronic records. In this securities class action, the Court lifted a discovery stay where the defendant was facing sale of its assets (including much of its

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technology infrastructure such as servers, desktops, laptops, etc.) pursuant to a bankruptcy proceeding.

Seeing the danger of relevant data being destroyed, the Court allowed the plaintiffs to serve preservation notices, issue document requests and conduct limited depositions.

In some instances, courts have not been able to mitigate the risk of electronic data destruction by prophylactic orders such as those in *In re Pacific*. Instead, the spoliation is brought to the court's attention after it occurs. Two recent California court opinions addressed issues relating to e-document spoliation sanctions.

In *Pennar Software Corp. v. Fortune 500 Sys. Ltd.*, 51 Fed.R.Serv.3d 279 (N.D. Cal. 2001), the same District Court imposed sanctions on the defendant in the form of attorneys' fees and costs for the defendant's failure to present a maintenance policy, log file or backup tapes that would track Web site modification and electronic document deletion procedures. When the evidence was finally produced, the Court found that the defendant had tampered with and deleted evidence in order to evade personal jurisdiction.

The California Court of Appeal in *Lombardo v. Broadway Stores, Inc.*, 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002) upheld sanctions against the defendant for destroying computer payroll records that were the subject of plaintiff's discovery demands. Defendant argued that no spoliation occurred because paper records existed. The Court rejected this argument, finding that maintaining paper copies did not absolve the defendant because even though the data was available, it was not in an accessible format.

The Court stated "it would be virtually impossible to manually extract all of the necessary and pertinent information from five million pages of [paper] records ... The computerized records had evidentiary unique value distinct from the hard copy records ... " While *Lombardo* is an unpublished decision, and thus cannot be cited, it is illustrative of how California courts are now treating electronic data and the penalties they are willing to impose for a party's failure to properly produce and maintain such evidence.

As the world's use and dependence on technology grows, the legal system is seeing a revolution in the old paper-driven discovery process. In the past year, California attorneys have attempted to mold a new set of "best practices" to address e-discovery issues. Yet, the changes in the last year are merely the beginning as attorneys and courts work to flesh out what is discoverable, who should pay for it and what sanctions should be imposed for spoliation or other e-discovery violations.

While many long time legal practitioners may bemoan the rampant exchange of electronic data as a strain on the legal system, the day is coming when the majority of every lawyer's or judge's cases will involve electronic material. The California legal community must stay tuned for future developments — the e-discovery story is far from over.

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