

**Invitation to Comment**

Title	Electronic Discovery: Legislation and Rules (amend Code Civ. Proc., §§ 2016.020, 2031.010–2031.060, 2031.210–2031.280, and 2031.290–2031.320; add Code Civ. Proc., §§ 1985.8 and 2031.285; and amend Cal. Rules of Court, rules 3.724 and 3.728)
Summary	The discovery of electronically stored information is an important feature of civil discovery because a significant amount of all information is currently stored in electronic form. To modernize civil discovery law and improve the procedures for handling the discovery of electronically stored information, this proposal would amend California’s Civil Discovery Act and two rules in the California Rules of Court on the management of civil cases.
Source	Civil and Small Claims Advisory Committee Hon. Lee Smalley Edmon, Chair
Staff	Patrick O’Donnell, Committee Counsel, 415-865-7665, patrick.o’donnell@jud.ca.gov
Discussion	<p><u>Importance of Electronic Discovery</u></p> <p>The transformation of information from primarily being in the form of paper documents to being primarily stored electronically has significantly affected the civil discovery process. Today most information is in digital rather than paper form. Information is created, stored, and used with computer technology, such as word processing, databases, and spreadsheets. Information may also be created, stored, and used in devices attached to or peripheral to computers, such as printers, fax machines, and pagers; in Internet applications, such as e-mail and the World Wide Web; in electronic devices, such as cell phones; and in media used to store computer data, such as disks, tapes, and CDs.</p> <p>The change from paper to electronically stored information has affected discovery in many ways. The volume and number of locations of electronically stored documents is much greater than for conventional paper documents. There may be hundreds of copies or versions of a single document located in various locations in a computer network or on servers.</p> <p>There are also significant differences in kind between paper documents and documents in electronic form. For instance, once</p>

paper documents are destroyed, they are permanently lost; however, “deleted” data generally can be retrieved and so may be discoverable. In addition, the advent of electronically stored information affects the costs of discovery. The large volume of electronically stored information sometimes can significantly increase the amount of time and cost of searching for information. But when electronic discovery is properly managed, it also can greatly reduce the cost of discovery.<sup>1</sup>

In response to the development of electronically stored information, the federal and state courts have been taking actions to modernize the discovery process. The Federal Rules of Civil Procedure were revised to include electronic discovery provisions, effective December 1, 2006. Some states have recently amended their discovery statutes or rules to include provisions relating to electronic discovery.<sup>2</sup>

In addition, the Conference of Chief Justices has approved guidelines on electronic discovery. The *ABA Civil Discovery Standards* have been revised to take electronic discovery into account. And the National Conference of Commissioners on Uniform State Laws (NCCUSL) has developed *Uniform Rules Relating to Discovery of Electronically Stored Information* (“*Uniform Rules*”).

In developing the proposed amendments to California’s Civil Discovery Act and the California Rules of Court, the Civil and Small Claims Advisory Committee worked closely with members of attorney organizations. The committee considered the federal and state rules, the guidelines, the standards, and the uniform rules described above. The NCCUSL *Uniform Rules* were found to be particularly useful. There was also consensus that any new e-discovery legislation and rules need to operate within the basic framework of California civil discovery law.

In sum, the proposals presented in this invitation to comment seek to improve the practices and procedures for handling the

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<sup>1</sup> These comments on the importance of electronic discovery are based on the Introduction to the Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (approved Aug. 6, 2006), p. v.

<sup>2</sup> States that have amended some of their statutes or rules to reflect the discovery of electronically stored information include Idaho, Illinois, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, and Texas. In some other states, changes in the law have been proposed.

discovery of electronically stored information by amending statutes and rules to include new e-discovery provisions that will be integrated into the framework of California's civil discovery law.

#### This Proposal: General Statement

This proposal relating to the discovery of electronically stored information has two parts. First, the proposal would amend the Civil Discovery Act (Code Civ. Proc., §§ 2016.010 et seq.) to include new provisions relating to electronic discovery and would add two new sections relating to electronic discovery to the act. These statutory changes would incorporate many of the provisions of the *Uniform Rules* into the act.

Second, the proposal would amend two case management rules in the California Rules of Court (rules 3.724 and 3.728) to encourage parties to identify and discuss issues relating to electronic discovery early in the course of litigation and to encourage courts to address these issues in case management orders. These rule amendments are closely connected with, and are intended to assist in implementing, the proposed legislation. The rule proposals would not go forward without the legislation.<sup>3</sup>

#### The Proposed E-Discovery Legislation

In California, the main law relating to civil discovery is contained in the Civil Discovery Act. This proposal relating to electronic discovery focuses on modernizing the act to reflect the growing importance of discovery of electronically stored information. A summary of the proposed legislation follows.

##### 1. *Definitions (Code Civ. Proc., § 2016.020)*

The Civil Discovery Act would be amended to include definitions of "electronic" and "electronically stored information." Specifically, new subdivision (d) would define "electronic" as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar

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<sup>3</sup> In spring 2006, a somewhat similar rules proposal was circulated for public comment. It would have amended rule 212 (on civil case management) to include new provisions relating to electronic discovery. However, the committee decided not to go forward with the proposed rule changes by themselves. It concluded that any such changes should be part of a more comprehensive approach to electronic discovery. Merely discussing electronic discovery issues, without having a comprehensive statutory framework for addressing these issues, would have only limited value. Hence, the committee has worked with members of attorney organizations to develop the current proposal, which is principally statutory with some supporting changes in the civil case management rules.

capabilities.”<sup>4</sup> New subdivision (e) would define “electronically stored information” as “information that is stored in an electronic medium.”<sup>5</sup>

## *2. Scope and Timing of Discovery (Code Civ. Proc., §§ 2031.010 and 2031.020)*

Code of Civil Procedure section 2031.010 on the scope of discovery would be amended to expressly state that a party may obtain discovery of “electronically stored information.” This section, section 2031.020, and others would also be amended to state that parties may undertake discovery not only by “inspecting,” but also by “copying, testing, or sampling.”

In developing this proposal, a different time frame for conducting the discovery of electronically stored information was considered but rejected. The conclusion was that the same time frames that are used for civil discovery in general should apply to electronic discovery. As under existing law, parties would have the ability to stipulate to different time frames.<sup>6</sup>

## *3. Form of Discovery (Code Civ. Proc., § 2031.030)*

An important issue that has arisen with the discovery of electronically stored information concerns the form in which the information must be produced. The Civil Discovery Act would be amended to address this issue. Specifically, section 2031.030 of the Code of Civil Procedure would be amended to include a provision that “a party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form in which each type of electronically stored information is to be produced.”<sup>7</sup>

The form of production of electronically stored information is also discussed below in connection with responses and subpoenas.

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<sup>4</sup> This definition is from NCCUSL, *Uniform Rules*, Rule 1 (Definitions), subdivision (2).

<sup>5</sup> This definition is based on NCCUSL, *Uniform Rules*, Rule 1 (Definitions), subdivision (3); however, the words “and is retrievable in perceivable form” have been omitted from the definition because the additional clause would unduly restrict the types of electronically stored information that are discoverable and lead to unnecessary disputes over the scope of production.

<sup>6</sup> But, as explained further below, there was also consensus that parties should identify issues relating to electronic discovery early, confer about these issues, and address them at case management conferences. (See The Proposed Rules Amendments discussion below.)

<sup>7</sup> This provision is based on NCCUSL, *Uniform Rules*, Rule 7 (Form of Production), subdivision (a).

4. *Protective Orders (Code Civ. Proc., § 2031.060)*

The provisions of the Civil Discovery Act relating to protective orders would be amended to address the discovery of electronically stored information. Specifically, section 2031.060(a) authorizing protective orders would be amended to expressly refer to “electronically stored information.”

A new subdivision (b) would be added stating: “The party or affected person or organization seeking a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating.”<sup>8</sup>

The amended protective order statute would not preclude the discovery of electronically stored information that is not reasonably accessible. A new subdivision (d) would provide: “If the party or affected person or organization from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the requesting party shows good cause.” This provision is based on NCCUSL, *Uniform Rules*, Rule 8, subdivision (c); however, the NCCUSL rule contains a specific balancing test rather than a good cause standard. The NCCUSL rule provides that the court may order the discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. Comments are invited on whether a good cause standard or a version of the NCCUSL balancing test should be used in new section 2031.060(d).

Under the proposed legislation, the California protective order statute would be further amended to provide that if the court finds that there is good cause for the production of electronically stored

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<sup>8</sup> This provision is based on NCCUSL, *Uniform Rules*, Rule 8 (Limitations on Discovery), subdivision (b). The provision on burden in Rule 8(b) applies to both motions for protective orders and motions to compel discovery.

information that is not reasonably accessible, it may set conditions for the discovery of the information, including allocation of the expense of discovery. (See amended Code Civ. Proc., § 2031.060(e).)<sup>9</sup>

The amended protective order statute would also give the court the authority to limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, provided that the court makes certain determinations. Specifically, new subdivision (f) would provide that the court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that: (1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. (See Code Civ. Proc., § 2031.060(f).)<sup>10</sup>

The amended protective order statute would include a new “safe harbor” provision relating to sanctions similar to those to be added elsewhere in the act. (See Code Civ. Proc., § 2031.060(i).)

Finally, it should be noted that while this proposal includes several additions to section 2031.060, the protective orders statute, to address the discovery of electronically stored information, it does not currently add similar provisions to section 2031.310, the statute on motions to compel further responses. Comments are invited on whether any additions or modifications to the statute on motions to compel are also needed.

#### *5. Responses (Code Civ. Proc., § 2031.280)*

The statute on the forms of production in response to a demand for discovery would be modified to reflect electronic discovery.

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<sup>9</sup> This provision is based on NCCUSL, *Uniform Rules*, Rule 8(d).

<sup>10</sup> This provision is based on NCCUSL, *Uniform Rules*, Rule 8(e).

A new subdivision (b) would be added providing that, if a party responding to a demand for production of electronically stored information objects to the specific form of producing the information, or if no form is provided for in the demand, the responding party shall state in its response the form in which it intends to produce each type of the information.

Section 2031.280 would also be amended to include a new subdivision (c) that provides that, unless the parties otherwise agree or the court otherwise orders, (1) if no form for the production of electronically stored information is specified, the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable; and (2) a party need not produce the same electronically stored information in more than one form.

*6. Claims of Privilege or Work Product Protection (Code Civ. Proc., § 2031.285)*

The discovery of electronically stored information has created new issues relating to the production of privileged or protected information. Because of the greater extent and volume of electronically stored information, it is more difficult than in the past to determine if information that is being provided pursuant to discovery demands contains privileged or protected material. In response to this situation, modifications to current statutes are appropriate to deal with the inadvertent disclosure of privileged or protected information contained in electronic form and produced in discovery.

This proposal would add a new section 2031.285 to the Civil Discovery Act. The section would provide that, if electronically stored information produced in discovery is subject to a claim of privilege or protection as attorney work product, the party making the claim may notify the party that received the information of the claim and the basis for the claim. (See Code Civ. Proc., § 2031.285(a).) After being notified, the party that received the information shall either immediately return the specified information and any copies it has or present the information to the court conditionally under seal for a determination of the claim. A party that received information

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subject to a claim of privilege or protection may not disclose it until the claim is resolved.<sup>11</sup>

7. *“Safe Harbor” Provisions. (Code Civ. Proc., §§ 2031.060, 2031.300, 2031.310, and 2031.320)*

An important issue relating to electronic discovery is the question of whether sanctions should be imposed on a party that fails to produce electronically stored information that has been lost, damaged, altered, or overwritten because of the routine, good faith operation of an electronic information system. The proposed legislation would add new provisions to several sanctions statutes stating: “absent exceptional circumstances, the court shall not impose sanctions on a party or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as a result of the routine, good-faith operation of an electronic information system.”<sup>12</sup>

In addition, after each of the new “safe harbor” provisions described above, the following sentence would be added: “This subdivision shall not be construed to alter any existing obligation to preserve discoverable information.”

The Proposed Rule Amendments

The proposed legislation is accompanied by a proposal to amend two civil case management rules. These rule amendments are intended to make the new legislation on electronic discovery more effective.<sup>13</sup> They would encourage parties and the courts to address any significant issues relating to electronic discovery early in the litigation—that is, before and at the initial case management conference.

8. *Rule 3.724 (Duty to meet and confer)*

To promote the early identification and discussion of issues relating to the discovery of electronically stored information, a new subdivision (b) would be added to rule 3.724 of the California Rules of Court. The provision would provide that, if any party informs any other party in writing that the discovery of

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<sup>11</sup> This provision is based on NCCUSL, *Uniform Rules*, Rule 9 (Claim of Privilege or Protection After Production), subdivision (a).

<sup>12</sup> This proposed safe-harbor provision is similar to NCCUSL, *Uniform Rules*, Rule 5; however, it extends beyond information that is “lost” to also cover information that is “damaged, altered, or overwritten.”

<sup>13</sup> As discussed above, the proposed rules amendments are closely connected with the legislation. The rule changes would not go forward unless the legislation is enacted.

electronically stored information is reasonably likely to be sought in the proceeding, all parties must meet and confer at least 45 days before the date set for the case management conference regarding the discovery of such information. When the parties meet and confer, they are to discuss pertinent issues such as the form or forms in which information will be produced, the time for producing the information, the scope of discovery of the information, and the methods for asserting or preserving claims of privilege or attorney work product. (See amended rule 3.724(b)(1)–(8).)<sup>14</sup>

Comments are specifically invited on whether, when an attorney receives notice under rule 3.724(b) that the discovery of electronic information is likely to be sought in the action, the attorney should be required immediately to notify his or her client that such information is likely to be sought. Comments are also invited on the list of subjects to be discussed at the conference, the timing of the discussions, and any related aspects of rule 3.724(b).

#### *9. Rule 3.728 (Case Management Order)*

Rule 3.728 provides a list of appropriate provisions to be included in case management conference orders. A new provision would be added: “Any appropriate orders relating to the discovery of electronically stored information.” (See amended rule 3.728(13).)

The proposed amendments to rules 3.724 and 3.728 are intended to assist parties and the courts to implement the legislative changes contained in this proposal by addressing issues relating to electronic discovery early in litigation. Some modifications may be made to the rules proposals to be consistent with any changes that are made to the legislation based on the comments; however, it not anticipated that significant changes will be made to the proposed amendments to the civil case management rules. If public commentators recommend any significant new rules relating to the discovery of electronically stored information, these will be considered separately and, if pursued, will be circulated later for public comment.

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Attachments

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<sup>14</sup> The list of issues in rule 3.724(b) is derived from NCCUSL, *Uniform Rules*, Rule 3(a)(1)–(7).

## Legislative Proposal

Code of Civil Procedure sections 2016.020, 2031.010, 2031.020, 2031.030, 2031.040, 2031.050, 2031.060, 2031.210, 2031.220, 2031.230, 2031.240, 2031.250, 2031.260, 2031.270, 2031.280, 2031.290, 2031.300, 2031.310, and 2031.320 would be amended, and sections 1985.8 and 2031.285 would be added, to read as follows:

1    **§ 2016.020.** As used in this title:

- 2
- 3    (a) “Action” includes a civil action and a special proceeding of a civil nature.
- 4
- 5    (b) “Court” means the trial court in which the action is pending, unless otherwise
- 6       specified.
- 7
- 8    (c) “Document” and “writing” mean a writing, as defined in Section 250 of the
- 9       Evidence Code.
- 10
- 11   (d) “Electronic” means relating to technology having electrical, digital,
- 12       magnetic, wireless, optical, electromagnetic, or similar capabilities.
- 13
- 14   (e) “Electronically stored information” means information that is stored in an
- 15       electronic medium.

16

17   **§ 2031.010**

- 18
- 19   (a) Any party may obtain discovery within the scope delimited by Chapters 2
- 20       (commencing with Section 2017.010) and 3 (commencing with Section
- 21       2017.710), and subject to the restrictions set forth in Chapter 5 (commencing
- 22       with Section 2019.010), by inspecting, copying, testing, or sampling
- 23       documents, tangible things, and land or other property, and electronically
- 24       stored information that are in the possession, custody, or control of any other
- 25       party to the action.
- 26
- 27   (b) A party may demand that any other party produce and permit the party
- 28       making the demand, or someone acting on that party’s behalf, to inspect and
- 29       to copy a document that is in the possession, custody, or control of the party
- 30       on whom the demand is made.
- 31
- 32   (c) A party may demand that any other party produce and permit the party
- 33       making the demand, or someone acting on the party’s behalf, to inspect and
- 34       to photograph, test, or sample any tangible things that are in the possession,
- 35       custody, or control of the party on whom the demand is made.

1  
2 (d) A party may demand that any other party allow the party making the demand,  
3 or someone acting on that party's behalf, to enter on any land or other  
4 property that is in the possession, custody, or control of the party on whom  
5 the demand is made, and to inspect and to measure, survey, photograph, test,  
6 or sample the land or other property, or any designated object or operation on  
7 it.

8  
9 (e) A party may demand that any other party produce and permit the party  
10 making the demand, or someone acting on that party's behalf, to inspect,  
11 copy, test, or sample electronically stored information in the possession,  
12 custody, or control of the party on whom the demand is made.

13  
14 **§ 2031.020**

15  
16 (a) A defendant may make a demand for inspection, copying, testing, or  
17 sampling without leave of court at any time.

18  
19 (b) A plaintiff may make a demand for inspection, copying, testing, or sampling  
20 without leave of court at any time that is 10 days after the service of the  
21 summons on, or in unlawful detainer actions within five days after service of  
22 the summons on or appearance by, the party to whom the demand is directed,  
23 whichever occurs first.

24  
25 (c) Notwithstanding subdivision (b), on motion with or without notice, the court,  
26 for good cause shown, may grant leave to a plaintiff to make ~~an~~ a demand for  
27 inspection, copying, testing, or sampling demand at an earlier time.

28  
29 **§ 2031.030**

30  
31 (a) A party demanding ~~an~~ inspection, copying, testing, or sampling shall number  
32 each set of demands consecutively, and a party demanding inspection,  
33 copying, testing, or sampling of electronically stored information may  
34 specify the form in which each type of electronically stored information is to  
35 be produced.

36  
37 (b) In the first paragraph immediately below the title of the case, there shall  
38 appear the identity of the demanding party, the set number, and the identity  
39 of the responding party.

40  
41 (c) Each demand in a set shall be separately set forth, identified by number or  
42 letter, and shall do all of the following:  
43

- 1 (1) Designate the documents, tangible things, ~~or~~ land or other property, or  
2 electronically stored information to be inspected, copied, tested, or  
3 sampled either by specifically describing each individual item or by  
4 reasonably particularizing each category of item.  
5  
6 (2) Specify a reasonable time for the inspection, copying, testing, or  
7 sampling that is at least 30 days after service of the demand, or in  
8 unlawful detainer actions at least five days after service of the demand,  
9 unless the court for good cause shown has granted leave to specify an  
10 earlier date.  
11  
12 (3) Specify a reasonable place for making the inspection, copying, testing,  
13 or sampling and performing any related activity.  
14  
15 (4) Specify any related activity that is being demanded in addition to an  
16 inspection, ~~and~~ copying, testing, or sampling, as well as the manner in  
17 which that related activity will be performed, and whether that activity  
18 will permanently alter or destroy the item involved.  
19

20 **§ 2031.040**

21  
22 The party making a demand for ~~demanding an~~ inspection, copying, testing, or  
23 sampling shall serve a copy of the ~~inspection~~ demand on the party to whom it is  
24 directed and on all other parties who have appeared in the action.  
25

26 **§ 2031.050**

- 27  
28 (a) In addition to the demands for inspection, copying, testing, or sampling  
29 ~~demands~~ permitted by this chapter, a party may propound a supplemental  
30 demand to inspect, copy, test, or sample any later acquired or discovered  
31 documents, tangible things, ~~or~~ land or other property, or electronically stored  
32 information ~~that are~~ in the possession, custody, or control of the party on  
33 whom the demand is made.  
34  
35 (b) A party may propound a supplemental demand for inspection, copying,  
36 testing, or sampling ~~demand~~ twice before the initial setting of a trial date,  
37 and, subject to the time limits on discovery proceedings and motions  
38 provided in Chapter 8 (commencing with Section 2024.010), once after the  
39 initial setting of a trial date.  
40  
41 (c) Notwithstanding subdivisions (a) and (b), on motion, for good cause shown,  
42 the court may grant leave to a party to propound an additional number of  
43 supplemental demands for inspection, copying, testing, or sampling.

1  
2 **§ 2031.060**  
3

4 (a) When an inspection, copying, testing, or sampling of documents, tangible  
5 things, ~~or~~ places, or electronically stored information has been demanded, the  
6 party to whom the demand has been directed, and any other party or affected  
7 person or organization, may promptly move for a protective order. This  
8 motion shall be accompanied by a meet and confer declaration under Section  
9 2016.040.

10  
11 (b) The party or affected person or organization seeking a protective order  
12 regarding the production, inspection, copying, testing, or sampling of  
13 electronically stored information on the basis that such information is not  
14 reasonably accessible because of undue burden or expense bears the burden  
15 of so demonstrating.  
16

17 ~~(b)~~(c) The court, for good cause shown, may make any order that justice requires  
18 to protect any party or other natural person or organization from unwarranted  
19 annoyance, embarrassment, or oppression, or undue burden and expense.  
20 This protective order may include, but is not limited to, one or more of the  
21 following directions:  
22

23 (1) That all or some of the items or categories of items in the ~~inspection~~  
24 demand need not be produced or made available at all.  
25

26 (2) That the time specified in Section 2030.260 to respond to the set of  
27 ~~inspection~~ demands, or to a particular item or category in the set, be  
28 extended.  
29

30 (3) That the place of production be other than that specified in the  
31 ~~inspection~~ demand.  
32

33 (4) That the inspection, copying, testing, or sampling be made only on  
34 specified terms and conditions.  
35

36 (5) That a trade secret or other confidential research, development, or  
37 commercial information not be disclosed, or be disclosed only to  
38 specified persons or only in a specified way.  
39

40 (6) That the items produced be sealed and thereafter opened only on order  
41 of the court.  
42

- 1 (d) If the party or affected person or organization from whom discovery of  
2 electronically stored information is sought establishes that the information is  
3 from a source that is not reasonably accessible because of undue burden or  
4 expense, the court may nonetheless order discovery if the requesting party  
5 shows good cause.  
6
- 7 (e) If the court finds good cause for the production of electronically stored  
8 information from a source that is not reasonable accessible, the court may set  
9 conditions for the discovery of the electronically stored information,  
10 including allocation of the expense of discovery.  
11
- 12 (f) The court shall limit the frequency or extent of discovery of electronically  
13 stored information, even from a source that is reasonably accessible, if the  
14 court determines:  
15
- 16 (1) That it is possible to obtain the information from some other source that  
17 is more convenient, less burdensome, or less expensive;  
18
- 19 (2) That the discovery sought is unreasonably cumulative or duplicative;  
20
- 21 (3) That the party seeking discovery has had ample opportunity by  
22 discovery in the action to obtain the information sought; or  
23
- 24 (4) That the likely burden or expense of the proposed discovery outweighs  
25 the likely benefit, taking into account the amount in controversy, the  
26 resources of the parties, the importance of the issues in the litigation,  
27 and the importance of the requested discovery in resolving the issues.  
28
- 29 ~~(e)~~(g) If the motion for a protective order is denied in whole or in part, the court  
30 may order that the party to whom the demand was directed provide or permit  
31 the discovery against which protection was sought on terms and conditions  
32 that are just.  
33
- 34 ~~(d)~~(h) The court shall impose a monetary sanction under Chapter 7 (commencing  
35 with Section 2023.010) against any party, person, or attorney who  
36 unsuccessfully makes or opposes a motion for a protective order, unless it  
37 finds that the one subject to the sanction acted with substantial justification or  
38 that other circumstances make the imposition of the sanction unjust.  
39
- 40 (i) Notwithstanding subdivision (h), absent exceptional circumstances, the court  
41 shall not impose sanctions on a party or its attorneys for failure to provide  
42 electronically stored information lost, damaged, altered, or overwritten as the  
43 result of the routine, good-faith operation of an electronic information

1            system. This subdivision shall not be construed to alter any existing  
2            obligation to preserve discoverable information.

3  
4    **§ 2031.210**

5  
6    (a) The party to whom ~~an~~ a demand for inspection, copying, testing, or sampling  
7    ~~demand~~ has been directed shall respond separately to each item or category  
8    of item by any of the following:

9  
10        (1) A statement that the party will comply with the particular demand for  
11        inspection, copying, testing, or sampling and any related activities.

12  
13        (2) A representation that the party lacks the ability to comply with the  
14        demand for inspection, copying, testing, or sampling of a particular  
15        item or category of item.

16  
17        (3) An objection to the particular demand for inspection, copying, testing,  
18        or sampling.

19  
20    (b) In the first paragraph of the response immediately below the title of the case,  
21    there shall appear the identity of the responding party, the set number, and  
22    the identity of the demanding party.

23  
24    (c) Each statement of compliance, each representation, and each objection in the  
25    response shall bear the same number and be in the same sequence as the  
26    corresponding item or category in the demand, but the text of that item or  
27    category need not be repeated.

28  
29    **§ 2031.220**

30  
31    A statement that the party to whom ~~an~~ a demand for inspection, copying, testing,  
32    or sampling demand has been directed will comply with the particular demand  
33    shall state that the production, inspection, copying, testing, or sampling and related  
34    activity demanded will be allowed either in whole or in part, and that all  
35    documents or things in the demanded category that are in the possession, custody,  
36    or control of that party and to which no objection is being made will be included in  
37    the production.

38  
39    **§ 2031.230**

40  
41    A representation of inability to comply with the particular demand for inspection,  
42    copying, testing, or sampling shall affirm that a diligent search and a reasonable  
43    inquiry has been made in an effort to comply with that demand. This statement

1 shall also specify whether the inability to comply is because the particular item or  
2 category has never existed, has been destroyed, has been lost, misplaced, or stolen,  
3 or has never been, or is no longer, in the possession, custody, or control of the  
4 responding party. The statement shall set forth the name and address of any natural  
5 person or organization known or believed by that party to have possession,  
6 custody, or control of that item or category of item.

7  
8 **§ 2031.240**  
9

- 10 (a) If only part of an item or category of item in ~~an inspection demand~~ a demand  
11 for inspection, copying, testing, or sampling is objectionable, the response  
12 shall contain a statement of compliance, or a representation of inability to  
13 comply with respect to the remainder of that item or category.  
14  
15 (b) If the responding party objects to the demand for inspection, copying, testing,  
16 or sampling of an item or category of item, the response shall do both of the  
17 following:  
18  
19 (1) Identify with particularity any document, tangible thing, ~~or~~ land, or  
20 electronically stored information falling within any category of item in  
21 the demand to which an objection is being made.  
22  
23 (2) Set forth clearly the extent of, and the specific ground for, the objection.  
24 If an objection is based on a claim of privilege, the particular privilege  
25 invoked shall be stated. If an objection is based on a claim that the  
26 information sought is protected work product under Chapter 4  
27 (commencing with Section 2018.010), that claim shall be expressly  
28 asserted.  
29

30 **§ 2031.250**  
31

- 32 (a) The party to whom the demand for inspection, copying, testing, or sampling  
33 is directed shall sign the response under oath unless the response contains  
34 only objections.  
35  
36 (b) If that party is a public or private corporation or a partnership or association  
37 or governmental agency, one of its officers or agents shall sign the response  
38 under oath on behalf of that party. If the officer or agent signing the response  
39 on behalf of that party is an attorney acting in that capacity for a party, that  
40 party waives any lawyer-client privilege and any protection for work product  
41 under Chapter 4 (commencing with Section 2018.010) during any subsequent  
42 discovery from that attorney concerning the identity of the sources of the  
43 information contained in the response.

1  
2 (c) The attorney for the responding party shall sign any responses that contain an  
3 objection.

4  
5 **§ 2031.260**

6  
7 Within 30 days after service of ~~an inspection~~ a demand for inspection, copying,  
8 testing, or sampling, or in unlawful detainer actions within five days of ~~an~~  
9 ~~inspection~~ a demand, the party to whom the demand is directed shall serve the  
10 copy of the response on all other parties who have appeared in the action, unless  
11 on motion of the party making the demand, the court has shortened the time for  
12 response, or unless on motion of the party to whom the demand has been directed,  
13 the court has extended the time for response. In unlawful detainer actions, the  
14 party to whom ~~an inspection~~ a demand is directed shall have at least five days  
15 from the dates of service of the demand to respond unless on motion of the party  
16 making the demand, the court has shortened the time for the response.

17  
18 **§ 2031.270**

19  
20 (a) The party demanding ~~an inspection, copying, testing, or sampling~~ and the  
21 responding party may agree to extend the time for service of a response to a  
22 set of demands for inspection, copying, testing, or sampling demands, or to  
23 particular items or categories of items in a set, to a date beyond that provided  
24 in Section 2031.260.

25  
26 (b) This agreement may be informal, but it shall be confirmed in a writing that  
27 specifies the extended date for service of a response.

28  
29 (c) Unless this agreement expressly states otherwise, it is effective to preserve to  
30 the responding party the right to respond to any item or category of item in  
31 the demand to which the agreement applies in any manner specified in  
32 Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280.

33  
34 **§ 2031.280**

35  
36 (a) Any documents produced in response to ~~an inspection~~ a demand for  
37 inspection, copying, testing, or sampling shall either be produced as they are  
38 kept in the usual course of business, or be organized and labeled to  
39 correspond with the categories in the demand.

40  
41 (b) If a party responding to a demand for production of electronically stored  
42 information objects to a specified form for producing the information, or if  
43 no form is specified in the demand, the responding party shall state in its

1 response the form in which it intends to produce each type of the  
2 information.

3  
4 (c) Unless the parties otherwise agree or the court otherwise orders:

5  
6 (1) If a demand for production does not specify a form for producing a type  
7 of electronically stored information, the responding party shall produce  
8 the information in a form in which it is ordinarily maintained or in a  
9 form that is reasonably usable; and

10  
11 (2) A party need not produce the same electronically stored information in  
12 more than one form.

13  
14 ~~(b)~~(d) If necessary, the responding party at the reasonable expense of the  
15 demanding party shall, through detection devices, translate any data  
16 compilations included in the demand into reasonably usable form.

17  
18 **§ 2031.285**

19  
20 (a) If electronically stored information produced in discovery is subject to a  
21 claim of privilege or of protection as attorney work product, the party making  
22 the claim may notify any party that received the information of the claim and  
23 the basis for the claim.

24  
25 (b) After being notified of a claim of privilege or of protection under subdivision  
26 (a), a party that received the information shall immediately sequester the  
27 information and either return the specified information and any copies that  
28 may exist or present the information to the court conditionally under seal for  
29 a determination of the claim.

30  
31 (c) In the absence of a timely motion under subdivision (d), a party shall be  
32 precluded from using or disclosing the specified information until the claim  
33 of privilege is resolved. If the party that received the information disclosed it  
34 before being notified, after being notified of a claim of privilege or of  
35 protection under subdivision (a), the receiving party shall immediately take  
36 reasonable steps to retrieve the information.

37  
38 (d) Within 30 days of receiving a claim of privilege or protection under  
39 subdivision (a), the receiving party may by a motion present the information  
40 to the court by lodging it conditionally under seal for a determination of the  
41 claim if it contests the legitimacy of the claim of privilege or protection. The  
42 receiving party shall preserve the information and keep it confidential, and is

1 precluded from using the information in any manner, until the claim is  
2 resolved.

3  
4 **§ 2031.290**

- 5  
6 (a) The demand for inspection, copying, testing, or sampling ~~demand~~ and the  
7 response to it shall not be filed with the court.  
8  
9 (b) The party demanding ~~an~~ inspection, copying, testing, or sampling shall retain  
10 both the original of the ~~inspection~~ demand, with the original proof of service  
11 affixed to it, and the original of the sworn response until six months after  
12 final disposition of the action. At that time, both originals may be destroyed,  
13 unless the court, on motion of any party and for good cause shown, orders  
14 that the originals be preserved for a longer period.

15  
16 **§ 2031.300**

17  
18 If a party to whom ~~an~~ a demand for inspection, copying, testing, or sampling  
19 ~~demand~~ is directed fails to serve a timely response to it, the following rules apply:  
20

- 21 (a) The party to whom the demand for inspection, copying, testing, or sampling  
22 ~~demand~~ is directed waives any objection to the demand, including one based  
23 on privilege or on the protection for work product under Chapter 4  
24 (commencing with Section 2018.010). The court, on motion, may relieve that  
25 party from this waiver on its determination that both of the following  
26 conditions are satisfied:  
27  
28 (1) The party has subsequently served a response that is in substantial  
29 compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and  
30 2031.280.  
31  
32 (2) The party's failure to serve a timely response was the result of mistake,  
33 inadvertence, or excusable neglect.  
34  
35 (b) The party making the demand may move for an order compelling response to  
36 the ~~inspection~~ demand.  
37  
38 (c) The court shall impose a monetary sanction under Chapter 7 (commencing  
39 with Section 2023.010) against any party, person, or attorney who  
40 unsuccessfully makes or opposes a motion to compel a response to ~~an~~ a  
41 demand for inspection, copying, testing, or sampling ~~demand~~, unless it finds  
42 that the one subject to the sanction acted with substantial justification or that  
43 other circumstances make the imposition of the sanction unjust. If a party

1 then fails to obey the order compelling a response, the court may make those  
2 orders that are just, including the imposition of an issue sanction, an evidence  
3 sanction, or a terminating sanction under Chapter 7 (commencing with  
4 Section 2023.010). In lieu of or in addition to this sanction, the court may  
5 impose a monetary sanction under Chapter 7 (commencing with Section  
6 2023.010).

7  
8 (d) Notwithstanding subdivision (c), absent exceptional circumstances, the court  
9 shall not impose sanctions on a party or its attorneys for failure to provide  
10 electronically stored information lost, damaged, altered, or overwritten as the  
11 result of the routine, good-faith operation of an electronic information  
12 system. This subdivision shall not be construed to alter any existing  
13 obligation to preserve discoverable information.

14  
15 **§ 2031.310**

16  
17 (a) On receipt of a response to ~~an~~ a demand for inspection, copying, testing, or  
18 sampling demand, the party demanding an inspection may move for an order  
19 compelling further response to the demand if the demanding party deems that  
20 any of the following apply:

21  
22 (1) A statement of compliance with the demand is incomplete.

23  
24 (2) A representation of inability to comply is inadequate, incomplete, or  
25 evasive.

26  
27 (3) An objection in the response is without merit or too general.

28  
29 (b) A motion under subdivision (a) shall comply with both of the following:

30  
31 (1) The motion shall set forth specific facts showing good cause justifying  
32 the discovery sought by the ~~inspection~~ demand.

33  
34 (2) The motion shall be accompanied by a meet and confer declaration  
35 under Section 2016.040.

36  
37 (c) Unless notice of this motion is given within 45 days of the service of the  
38 response, or any supplemental response, or on or before any specific later  
39 date to which the demanding party and the responding party have agreed in  
40 writing, the demanding party waives any right to compel a further response to  
41 the ~~inspection~~ demand.  
42

- 1 (d) The court shall impose a monetary sanction under Chapter 7 (commencing  
2 with Section 2023.010) against any party, person, or attorney who  
3 unsuccessfully makes or opposes a motion to compel further response to an  
4 ~~inspection~~ a demand, unless it finds that the one subject to the sanction acted  
5 with substantial justification or that other circumstances make the imposition  
6 of the sanction unjust.  
7
- 8 (e) If a party fails to obey an order compelling further response, the court may  
9 make those orders that are just, including the imposition of an issue sanction,  
10 an evidence sanction, or a terminating sanction under Chapter 7  
11 (commencing with Section 2023.010). In lieu of or in addition to that  
12 sanction, the court may impose a monetary sanction under Chapter 7  
13 (commencing with Section 2023.010).  
14
- 15 (f) Notwithstanding subdivisions (d) and (e), absent exceptional circumstances,  
16 the court shall not impose sanctions on a party or its attorneys for failure to  
17 provide electronically stored information lost, damaged, altered, or  
18 overwritten as the result of the routine, good-faith operation of an electronic  
19 information system. This subdivision shall not be construed to alter any  
20 existing obligation to preserve discoverable information.  
21

22 **§ 2031.320**  
23

- 24 (a) If a party filing a response to a demand for inspection, copying, testing, or  
25 sampling under Sections 2031.210, 2031.220, 2031.230, 2031.240, and  
26 2031.280 thereafter fails to permit the inspection, copying, testing, or  
27 sampling in accordance with that party's statement of compliance, the  
28 demanding party ~~demanding the inspection~~ may move for an order  
29 compelling compliance.  
30
- 31 (b) The court shall impose a monetary sanction under Chapter 7 (commencing  
32 with Section 2023.010) against any party, person, or attorney who  
33 unsuccessfully makes or opposes a motion to compel compliance with an  
34 ~~inspection~~ a demand, unless it finds that the one subject to the sanction acted  
35 with substantial justification or that other circumstances make the imposition  
36 of the sanction unjust.  
37
- 38 (c) If a party then fails to obey an order compelling inspection, copying, testing,  
39 or sampling, the court may make those orders that are just, including the  
40 imposition of an issue sanction, an evidence sanction, or a terminating  
41 sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or  
42 in addition to that sanction, the court may impose a monetary sanction under  
43 Chapter 7 (commencing with Section 2023.010).

1  
2 (d) Notwithstanding subdivisions (b) and (c), absent exceptional circumstances,  
3 the court shall not impose sanctions on a party or its attorneys for failure to  
4 provide electronically stored information lost, damaged, altered, or  
5 overwritten as the result of the routine, good-faith operation of an electronic  
6 information system. This subdivision shall not be construed to alter any  
7 existing obligation to preserve discoverable information.  
8

9 **§ 1985.8**

10  
11 (a) A subpoena in a civil proceeding may require that electronically stored  
12 information be produced and that the party serving the subpoena, or someone  
13 acting on the party's request, be permitted to inspect, copy, test, or sample  
14 the information. Any subpoena seeking electronically stored information  
15 shall comply with the requirements of Code of Civil Procedure Section 1985  
16 et seq.  
17

18 (b) A party serving a subpoena requiring production of electronically stored  
19 information must specify the form in which each type of information is to be  
20 produced.  
21

22 (c) If a party responding to a subpoena requiring production of electronically  
23 stored information objects to a specified form for producing the information,  
24 or if no form is specified in the request, the responding party shall state in its  
25 response the form in which it intends to produce each type of the  
26 information.  
27

28 (d) Unless the parties otherwise agree or the court otherwise orders:  
29

30 (1) If a subpoena requiring production of electronically stored information  
31 does not specify a form for producing a type of electronically stored  
32 information, the responding party shall produce the information in a  
33 form in which it is ordinarily maintained or in a form that is reasonably  
34 usable; and  
35

36 (2) A party need not produce the same electronically stored information in  
37 more than one form.  
38

39 (e) If necessary, the responding party at the reasonable expense of the requesting  
40 party shall, through detection devices, translate any data compilations  
41 included in the demand into reasonably usable form.  
42

- 1 (f) Subject to subdivisions (g) and (h), the provisions of Code of Civil Procedure  
2 Section 2016.010 et seq. relating to the discovery of electronically stored  
3 information apply to a person responding to a subpoena as if that person were  
4 a party.  
5
- 6 (g) A party serving a subpoena requiring production of electronically stored  
7 information shall take reasonable steps to avoid imposing undue burden or  
8 expense on a person subject to the subpoena.  
9
- 10 (h) An order of the court requiring compliance with a subpoena issued under this  
11 section shall protect a person who is neither a party nor a party's officer from  
12 undue burden or expense resulting from compliance.

## Rules Proposal

Rules 3.724 and 3.728 of the California Rules of Court would be amended to read as follows:

### 1 **Rule 3.724. Duty to meet and confer**

#### 2 3 **(a) Issues to be considered**

4  
5 Unless the court orders another time period, no later than 30 calendar days  
6 before the date set for the initial case management conference, the parties  
7 must meet and confer, in person or by telephone, to consider each of the  
8 issues identified in rule 3.727 and, in addition, to consider the following:

- 9
- 10 (1) Resolving any discovery disputes and setting a discovery schedule;
  - 11
  - 12 (2) Identifying and, if possible, informally resolving any anticipated
  - 13 motions;
  - 14
  - 15 (3) Identifying the facts and issues in the case that are uncontested and may
  - 16 be the subject of stipulation;
  - 17
  - 18 (4) Identifying the facts and issues in the case that are in dispute;
  - 19
  - 20 (5) Determining whether the issues in the case can be narrowed by
  - 21 eliminating any claims or defenses by means of a motion or otherwise;
  - 22
  - 23 (6) Determining whether settlement is possible;
  - 24
  - 25 (7) Identifying the dates on which all parties and their attorneys are
  - 26 available or not available for trial, including the reasons for
  - 27 unavailability; and
  - 28
  - 29 (8) Other relevant matters.
  - 30

#### 31 **(b) Issues to be considered relating to the discovery of electronically stored** 32 **information**

33  
34 If any party informs any other party in writing that the discovery of  
35 electronically stored information is reasonably likely to be sought in the  
36 proceeding, then at least 45 calendar days before the date set for the initial  
37 case management conference, all parties must meet and confer, in person or  
38 by telephone, to consider the following:

- 1
- 2 (1) Any issues relating to the preservation of discoverable electronically
- 3 stored information;
- 4
- 5 (2) The form or forms in which information will be produced;
- 6
- 7 (3) The time within which the information will be produced;
- 8
- 9 (4) The scope of discovery of the information;
- 10
- 11 (5) The method for asserting or preserving claims of privilege or attorney
- 12 work product, including whether such claims may be asserted after
- 13 production;
- 14
- 15 (6) The method for asserting or preserving the confidentiality, privacy,
- 16 trade secrets, or proprietary status of information relating to a party or
- 17 person not a party to the civil proceedings;
- 18
- 19 (7) How the cost of production of electronically stored information is to be
- 20 allocated among the parties; and
- 21
- 22 (8) Any other issues relating to the discovery of electronically stored
- 23 information, including developing a proposed plan relating to the
- 24 discovery of the information.
- 25

26 **Rule 3.728. Case management order**

27  
28 The case management conference must be conducted in the manner provided by  
29 local rule. The court must enter a case management order setting a schedule for  
30 subsequent proceedings and otherwise providing for the management of the case.  
31 The order may include appropriate provisions, such as:

- 32
- 33 (1)–(11) \* \* \*
- 34
- 35 (12) The date time, and place of any further case management conferences or
- 36 review; ~~and~~
- 37
- 38 (13) Any appropriate orders relating to the discovery of electronically stored
- 39 information; and
- 40
- 41 ~~(13)~~(14) Any additional orders that may be appropriate, including orders on
- 42 matters listed in rules 3.724 and 3.727.

## Item W08-01/LEG08-01 Response Form

**Title:** Electronic Discovery: Legislation and Rules (amend Code Civ. Proc., §§ 2016.020, 2031.010–2031.060, 2031.210–2031.280, and 2031.290–2031.320; add Code Civ. Proc., §§ 1985.8 and 2031.285; and amend Cal. Rules of Court, rules 3.724 and 3.728)

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name: \_\_\_\_\_ Title: \_\_\_\_\_

Organization: \_\_\_\_\_

- Commenting on behalf of an organization**

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Please **write** or **fax** or **[respond using the Internet](#)** to:

**Address:** Ms. Camilla Kieliger,  
Judicial Council, 455 Golden Gate Avenue,  
San Francisco, CA 94102

**Fax:** (415) 865-7664    **Attention:** Camilla Kieliger

**Internet:** <http://www.courtinfo.ca.gov/invitationstocomment/commentform.htm>

<b>DEADLINE FOR COMMENT: 5:00 p.m., Friday, January 25, 2008</b>
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Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council or the Rules and Projects Committee.  
All comments will become part of the public record of the council's action.*