Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 13, 2011

Title
Judicial Council-Sponsored Legislation (Civil Law): Cleanup Legislation on the Discovery of Electronically Stored Information

Rules, Forms, Standards, or Statutes Affected
Civil Subpoena Statutes and the Discovery Act

Recommended by
Policy Coordination and Liaison Committee
Hon. Marvin R. Baxter, Chair
Civil and Small Claims Advisory Committee
Hon. Dennis M. Perluss, Chair

Agenda Item Type
Action Required

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Executive Summary

The e-discovery legislation enacted in 2009 in a bill cosponsored by the Judicial Council left some gaps and omissions in the discovery statutes that should be corrected to properly address the discovery of electronically stored information and eliminate any confusion. The Policy Coordination and Liaison Committee (PCLC) and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to amend these statutes. If enacted next year, this legislation would become effective January 1, 2013.

Recommendation

The Policy Coordination and Liaison Committee and the Civil and Small Claims Advisory Committee recommend that the Judicial Council sponsor legislation to amend the Code of Civil Procedure, effective January 1, 2013, to address various gaps and omissions in the statutes concerning the discovery of electronically stored information.

The text of the proposed legislation is attached at pages 11–35.

Previous Council Action

The Judicial Council previously cosponsored legislation that resulted in the enactment of the Electronic Discovery Act.[1] Assembly Bill 5 (Evans; Stats. 2009, ch. 5) was jointly sponsored by the Judicial Council, Consumer Attorneys of California, and California Defense Counsel; other interested entities supported the legislation. The intent of the bill was to modernize the process of civil discovery to directly take into account the discovery of electronically stored information. It was signed by the Governor and enacted into law.[2] This legislation was the first major revision in California discovery law since the mid-1980s.[3]

Rationale for Recommendation

In introducing the discovery of electronically stored information into the Civil Discovery Act, AB 5 amended many sections of the Code of Civil Procedure.[4] Although the 2009 amendments relating to the discovery of electronically stored information were extensive, they were not comprehensive. Some sections of the code still refer to paper documents or records only and fail to mention electronically stored information in appropriate places. To be consistent with the Electronic Discovery Act, these sections should be amended.

Like the original legislation, this proposal seeks to integrate provisions relating to the discovery of electronically stored information into the existing framework of the Civil Discovery Act. It generally retains the same procedural requirements and timelines as exist under current law. The main features of the proposal are described below.

Subpoenas (Code Civ. Proc., § 1985 et seq.)[5]

Civil subpoenas are addressed in chapter 2 of title 3 of the Code of Civil Procedure (commencing with section 1985). AB 5 made changes to this chapter—most notably the addition of new section 1985.8 on subpoenas for the production of electronically stored information. That section provides that a subpoena in a civil proceeding may require the production of electronically stored

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[1] A copy of the Judicial Council report recommending the sponsorship of the e-discovery legislation is available at *http://www.courts.ca.gov/documents/042508item4.pdf*

[2] The text of AB 5, as chaptered, may be viewed at *www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf*.

[3] In 2009, the council also amended rule 3.724 of the California Rules of Court to require parties to meet and confer about any issues relating to electronic discovery before the first civil case management conference. A copy of the Judicial Council report on the amendment of rule 3.724 is available at http://www.courts.ca.gov/documents/age081409.pdf

[4] The bill amended Code of Civil Procedure sections 2016.020 (definitions), 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 (document production). It also added sections 2031.285 (production of privileged material) and 1985.8 (civil subpoenas).

[5] Unless otherwise stated, the statutory references in this discussion are to the amended statutes in the proposed cleanup legislation that is attached at the end of this report at pages 11–35.

information, and it includes many specific provisions similar to those in other statutes on the production of electronically stored information. But the amendments to the statutes in the chapter on subpoenas were incomplete.

To be consistent with the Electronic Discovery Act, the words "electronically stored information" would be added after the word "documents" in the first subpoena statute. (See amended Code Civ. Proc., § 1985(a).) Elsewhere in the statutes, the words "electronic data" would be replaced with "electronically stored information," to be consistent with the terminology used throughout the act. (See amended Code Civ. Proc., §§ 1985.3(a)(1) and 1985.6(a)(3).) A few other subpoena statutes would also be included in the proposed cleanup legislation. Two of these statutes refer to "documents" and do not currently contain provisions expressly addressing "electronically stored information"; hence, they too should be amended. (See proposed amendments to Code Civ. Proc., §§ 1987(c) and 1987.1(a) adding references to electronically stored information.) To be consistent with the amendments previously made to other sanctions statutes, a safe harbor provision similar to those added elsewhere in the act by AB 5 should be added to section 1987.2.[6] (See amended Code Civ. Proc., § 1987.2(b) adding a safe harbor provision to the sanctions statute.)

These amendments to the subpoena statutes may not be strictly necessary because section 1985.8 already provides generally that subpoenas may require the production of electronically stored information and includes other more specific provisions. However, the cleanup legislation would eliminate statutory inconsistencies in language, avoid possible ambiguity and confusion, and make the application of subpoenas to electronically stored information clearer and more consistent.

One aspect of these statutes merits particular attention. Some of the subpoena statutes concern production of information at trial as well as in discovery, and these statutes raise some procedural issues. In particular, section 1987(c) provides that if the notice to appear is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, the subpoena may include a request that the party or person bring with him or her books, documents, or other things.[7] Under this proposal, section 1987(c) would be amended

[6] The safe harbor provision provides that, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system. The provision also states that it shall not be construed to alter any obligation to preserve discoverable information.

[7] The subdivision further provides:

> The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure

to permit a request for "electronically stored information" as well as for "books, documents, or other things." When this proposal was circulated, comments were invited on whether, if that change is made, any changes need to be made to the 20-day provision or any of the other timeframes in the statute; that is, does the addition of requests for "electronically stored information" in section 1987(c) require any changes to the timing or procedures for requesting the production of information? Or are the current timing and procedures still appropriate? As discussed below, although concerns were expressed by a commentator and a member of the advisory committee that the current 20-day timeline may be insufficient for the subpoenaing of electronically stored information, the PCLC and advisory committee recommend retaining the existing timeline and procedures at present. This issue may be revisited in the future based on litigants' and courts' experiences with the subpoenaing of electronically stored information.

Scope of discovery (Code Civ. Proc., § 2017.020)

Code of Civil Procedure section 2017.020 prescribes the scope of discovery. It currently includes a provision for monetary sanctions. (Code Civ. Proc., § 2017.020(b).) However, this section does not include a safe harbor provision. To be consistent with the amendments previously made to other sanctions provisions, a safe harbor provision similar to those added elsewhere under AB 5 would be added to this section. (See amended Code Civ. Proc., § 2017.020(c).)

Discovery methods in complex litigation (Code Civ. Proc., §§ 2017.710–2017.740)

Chapter 3 of the Civil Discovery Act contains sections enacted in 2004 providing for the use of technology in conducting discovery in complex cases. (Code Civ. Proc., §§ 2017.710–2017.740.) This chapter was enacted in 2004 before the Electronic Discovery Act, and many of its provisions appear to be obsolete. The advisory committee asked judges and attorneys involved in complex litigation about this issue. The consensus was that these statutes are unused, unnecessary, and inconsistent in some respects with more recently enacted legislation on e-discovery, e-service, and e-filing. Accordingly, this proposal recommends that chapter 3 be repealed.

Methods and sequence of discovery (Code Civ. Proc., § 2019.040)

The proposal includes a new provision on the methods and sequence of discovery. (See Code Civ. Proc., § 2019.040.)[8] This provision would provide that, when any method of discovery permits the production, inspection, copying, testing, or sampling of documents or tangible things, such method shall also permit the production, inspection, copying, testing, or sampling of electronically stored information. (See Code Civ. Proc., § 2019.040(a).) The new section would also provide that all procedures available to compel, prevent, or limit the production, inspection,

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provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

By comparison, Code of Civil Procedure section 1985.3(d) provides that a subpoena duces tecum for the production of personal records "shall be served in sufficient time to allow the witness a reasonable time, as provided in section 2020.410, to locate and produce the records or copies thereof." That statute for the subpoena of personal records does not raise the same issues about the time frame for responses as does section 1987(c).

[8] This section was suggested by the State Bar's Committee on Administration of Justice.

copying, testing, or sampling of documents or tangible things shall be available to compel, prevent, or limit the production, inspection, copying, testing, or sampling of electronically stored information. (See Code Civ. Proc., § 2019.040(b).)

The new section is meant to serve as a general catchall provision to clarify that, even if a particular chapter, section, or subdivision of the Civil Discovery Act fails to specifically address the discovery of electronically stored information, all the methods of discovery and procedures relating to compelling or limiting discovery apply to the discovery of electronically stored information.

Nonparty discovery (Code Civ. Proc., § 2020.010 et seq.)

The Civil Discovery Act addresses nonparty discovery in chapter 6. (Code Civ. Proc., § 2020.010 et seq.) It provides for discovery of documents and things from nonparties, as well as testimony. To be consistent with the Electronic Discovery Act, the words "electronically stored information" would be added wherever the word "documents" appears in this chapter. (See Code Civ. Proc., §§ 2020.020(c), 2020.220(a), and 2020.510(a).)

The section on business records would be revised to include provisions similar to those that appear in the recently enacted subpoena section (section 1985.8(c)–(*l*)). (See amended Code Civ. Proc., § 2020.22(d)–(m).) These include provisions relating to specifying the form of production, the discoverability of electronically stored information that is not reasonably accessible, the proportionality principles, and a safe harbor provision.

The statutes on production of business records only and production of business records as well as testimony of a deponent would be amended to add provisions on the form of production. (Amended Code Civ. Proc., §§ 2020.410(a) and 2020.510(a)(4).)

Sanctions (Code Civ. Proc., § 2023.030)

The Civil Discovery Act addresses discovery sanctions generally in chapter 7. (Code Civ. Proc., § 2023.010 et seq.) Section 2023.030 specifies the sanctions that may be imposed for misuse of the discovery process. To be consistent with changes made elsewhere under the Electronic Discovery Act, this section would be amended to add a safe harbor provision. (See Code Civ. Proc., § 2023.030(f).)

Oral deposition inside California (Code Civ. Proc., § 2025.220 et seq.)

The Civil Discovery Act addresses oral depositions within California in chapter 9. (Code Civ. Proc., § 2025.010 et seq.) To be consistent with the Electronic Discovery Act, several sections in this chapter would be amended to include references to "electronically stored information" as well as a "document." (See Code Civ. Proc., §§ 2025.220(a), 2025.280(a)–(b), 2025.450(a)–(b), and 2025.460(e).)

The deposition notice statute would be amended to add that the notice shall include the form of any electronically stored information to be produced, if a particular form is desired. (See Code

Civ. Proc., § 2025.220(a)(7).) The section that provides for monetary sanctions would be amended to include a safe harbor provision. (See Code Civ. Proc., § 2025.410(e).)

The section on protective orders relating to oral depositions in California would be amended to add the same provisions that were added under AB 5 to section 2031.060, the protective order statute relating to the discovery of documents. These include provisions relating to the discovery of electronically stored information from a source that is not reasonably accessible, proportionality principles, and a safe harbor provision. (See Code Civ. Proc., § 2025.420(c)–(f) & (i).) Similarly, the section on motions to compel attendance and production relating to oral depositions would be amended to add the same provisions that were added under AB 5 to section 2031.310, the statute relating to motions to compel the discovery of documents. Again, these include provisions relating to the discovery of electronically stored information from a source that is not reasonably accessible, proportionality principles, and a safe harbor provision. (See Code Civ. Proc., § 2025.450(c)–(f) & (i).) Finally, similar provisions would be added to the section on motions to compel answers and production. (See Code Civ. Proc., § 2025.480(d)–(g) & (*l*).)

The section of the oral deposition statutes on objections based on privilege or work product protection would be amended to include a provision similar to that added to section 2031.210(d) under AB 5, which permits an objection based on the grounds that the electronically stored information is from a source that is not reasonably accessible. (See Code Civ. Proc., § 2025.460(d).) That section would also be amended to include a provision stating that the clawback provision in section 2031.285 is applicable to privileged or protected electronically stored information that is produced pursuant to a deposition notice. (See Code Civ. Proc., § 2025.460(f).)

Oral deposition outside California (Code Civ. Proc., § 2026.010 and 2027.010)

The Civil Discovery Act addresses oral depositions outside of California in chapter 10. Such depositions may include requests for production of documents. (Code Civ. Proc., §§ 2026.010 and 2027.010.) To be consistent with the Electronic Discovery Act, the sections in this chapter would be amended to provide for requests for "electronically stored information" as well as for a "document." The proposed amendments will clarify that electronically stored information is discoverable. (See Code Civ. Proc., §§ 2026.010(b), (c) & (f) and 2027.010 (b)–(c).)

Discovery in out-of-state actions (Code Civ. Proc., § 2029.200)

In chapter 10 the Civil Discovery Act addresses discovery in California relating to actions pending outside the state or country. (Code Civ. Proc., § 2029.100 et seq.) This chapter was recently amended to reflect the Interstate and International Depositions and Discovery Act. It does not need to be further amended to refer to electronically stored information because the statutes in this chapter already authorize the discovery of such information. But to be consistent with the Electronic Discovery Act, section 2029.200 would be amended to permit discovery by "inspection, copying, testing, or sampling" instead of only by "inspection and copying." (See Code Civ. Proc., § 2029.200(e)(2).)

Production of documents, electronically stored information, tangible things, land, and other property

The Civil Discovery Act addresses discovery of documents, electronically stored information, tangible things, land, and other property in chapter 14. (See Code Civ. Proc., § 2031.010 et seq.) The proposed legislation would make a minor technical change in this chapter. It would simply amend the chapter title to reflect the changes to the law made by AB 5; it would expressly refer to "electronically stored information" and to the ability to "copy, test, or sample."[9] The statutes in the chapter would not be changed.

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for public comment from April 21 through June 20, 2011. Five comments were received. The commentators included a consultant on discovery law, an insurance company, two superior courts, and the State Bar of California's Committee on Administration of Justice (CAJ).[10]

Comments on the e-discovery cleanup legislation

Four of the commentators focused on the specific cleanup provisions in the proposed legislation.[11]

A commentator from an insurance company stated that stronger cost-shifting language would be beneficial throughout the legislation. Specifically, the commentator suggested that "the rules should mandate the requesting party to provide good cause of why it should not contribute to the cost of producing not reasonably accessible ESI [electronically stored information]. Such a mandate is particularly applicable, and equitable, to non-party discovery where the subpoenaed party has no direct interest in the litigation." (See comment 2.)

The advisory committee discussed this suggestion and does not support making any changes in the discovery statutes regarding cost-shifting as part of this proposal. The cost-shifting provisions in the existing statutes on e-discovery were carefully developed considering both existing California law and the new federal rules on e-discovery. AB 5 also recognized that subpoenas of electronically stored information directed at nonparties should be handled differently from discovery directed only at parties. (See Code Civ. Proc., § 1985.8(k).) A broad coalition supported that approach. The PCLC and advisory committee therefore recommend

[9] Thus, the attached text shows the following change in the title: "Inspection, Copying, Testing, Sampling, and Production of Documents, Electronically Stored Information, Tangible Things, Land, and Other Property."

[10] A chart summarizing the comments and the committee's responses is attached at pages 29-38.

[11] The fifth commentator focused exclusively on the proposed repeal of chapter 3 on the Civil Discovery Act on the use of technology in conducting discovery in a complex case. That commentator's suggestions are discussed below.

against any modifications concerning cost-shifting as part of the present proposal that is intended to focus on addressing noncontroversial cleanup issues.

Another issue raised by the same commentator was that, although the commentator approved the proposed new section on the methods and sequence of discovery (section 2019.040), he thought that the section should be clarified to limit direct access to electronically stored information. The commentator specifically suggested that a comment might be added stating that this section does not presumptively permit direct access to a producing party's computer system unless good cause has been shown. (See comment 2.)

There are several responses to this comment. First, because this additional section would be in statute rather than a rule, it is not possible to add a comment directly to the statute. Furthermore, the issue raised by the commentator has already been addressed in the legislative history of the original e-discovery legislation. The Senate Judiciary Committee's Analysis of AB 5 in 2009 includes a comment from the author stating that the new language on "copying, testing, or sampling" used in the amended statutes is not intended to create a routine right of access to a party's electronic information system, although such access might be justified in some circumstances.[12] The author's comment, which draws on the Advisory Committee Note to Federal Rule 34(a), states that courts should guard against undue intrusiveness resulting from inspecting or testing electronic information systems. Thus, it appears that the legislative history already satisfactorily addresses the commentator's concerns.

Two comments were received on the issue raised in the invitation to comment about whether the timeframe in Code of Civil Procedure section 1987(c) for providing notice for production at trial (i.e., 20 days before trial) needs to be changed if the statute is amended to permit a request for "electronically stored information" as well as for "books, documents, and other things." The advisory committee discussed the issue and the alternatives suggested by the commentators.

A court stated that the current 20 days' notice required for requesting electronically stored information is unrealistic; it suggested that the statute be changed to require at least 60 days' notice. (See comment 5.) A member of the advisory committee also thought that it often might be difficult for parties to obtain electronically stored information by subpoena if notice is given only 20 days before trial. She predicted that there may be more pretrial litigation over the production and other problems. She did not recommend a specific change in the current notice provision at this time, but instead suggested that the subpoena statute be monitored to determine if problems develop that need to be addressed.

By contrast, the State Bar's Committee on Administration of Justice stated that it is opposed to amending the 20-day provision in section 1987(c) to extend the time period. It pointed out that section 1987(c) is not really a "discovery" statute. Under section 1987(c), the required notice

[12] Sen. Comm. on Judiciary, Analysis of Assem. Bill No. 5 (2009–2010 Reg. Sess.) as introduced June 8, 2009, comment (author's statement), page 6.

"shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control." Under Code of Civil Procedure section 2024.020, the cutoff for nonexpert discovery is 30 days before trial. The CAJ stated that extending the 20-day period under section 1987(c) to anything equal to or greater than 30 days before trial would mean that the time for sending a subpoena under section 1987(c) will lapse on the day of or before the statutory discovery cutoff date. Ultimately, extending the 20-day period would unfairly penalize parties who need to present the designated electronically stored information at trial by requiring them to send notice at an earlier date. (See comment 3.)

In the end, the advisory committee concluded that the time frame and procedures in Code of Civil Procedure section 1987(c) for providing notice for production at trial should not be changed at this time as part of the cleanup legislation. But advisory committee members also thought that the situation should be monitored and, if needed, problems addressed by future legislation.

Finally, a court noted that, for nonparty discovery, the statutes allow the subpoenaing party to specify the form for producing electronically stored information. (See Code Civ. Proc., § 1985.8(b).) It suggested that a nonparty should be allowed to produce discovery in whatever form is reasonably useful. (See comment 5.) The advisory committee discussed this suggestion and prefers an alternative more consistent with other provisions in the Electronic Discovery Act. Instead of incorporating the court's suggestion, the advisory committee recommends that Code of Civil Procedure section 1985.8 be amended to clarify that the subpoenaed person may object to the format requested. Based on Code of Civil Procedure section 2031.280(c), the PCLC and the advisory committee recommend that a new subdivision be added to section 1985.8 stating:

> If a person responding to a subpoena for production of electronically stored information objects to a specified form or forms for producing the information, the subpoenaed person may provide an objection stating the form or forms in which it intends to produce each type of information.

Comments on the repeal of statutes on discovery methods in complex litigation

One commentator focused his remarks on the proposed repeal of the chapter of the Civil Discovery Act on the use of technology in conducting discovery in a complex case (Code Civ. Proc., §§ 2017.710–2017.740). His comments include a discussion of the history and intent of the legislation. He also provided suggestions about what should be done to the sections in the chapter. He supported repealing some sections (such as 2017.720 [on court reporting] and 2017.730(e) [authorizing rules on e-discovery].) On the other hand, he recommended retaining other sections, and even expanding their scope by eliminating the provision in section 2017.730(a) that limits the applicability of the chapter to complex or other extraordinary cases. The commentator stated that the remaining provisions empower trial judges to modify discovery procedures that parties have long been able to do by stipulation; these provisions could be either amended or repealed. (See comment 1.)

The advisory committee considered whether to recommend repealing the chapter altogether as originally proposed or only parts of it. The committee thought that retaining some parts of the chapter, but not others, was likely to create confusion and uncertainty in the law. The advisory committee also noted that, before circulation of this proposal, judges in the complex litigation program were consulted about this chapter. None of those judges indicated that they used the chapter or thought it needed to be retained. Therefore, the PCLC and the advisory committee were not persuaded that the proposal should be changed and recommend that the chapter be repealed in its entirety.

Implementation Requirements, Costs, and Operational Impacts

This proposal will primarily affect parties and their attorneys engaged in the civil discovery process. It should improve that process by eliminating some ambiguities relating to the discovery of electronically stored information under current law. The implementation requirements for the courts would be minimal and would primarily involve providing updates for judicial officers and research attorneys on the changes in the law once the legislation is enacted. The legislation is not expected to impose any additional costs or have any operational impacts on the courts.

Relevant Strategic Plan Goals and Operational Plan Objectives

Attachments

1. Proposed cleanup legislation, at pages 11–28
2. Chart of comments and responses, at pages 29–38

Code of Civil Procedure would be amended, effective January 1, 2013, to read as follows:

[Subpoenas]

Section 1985. (a) The process by which the attendance of a witness is required is the subpoena. It is a writ or order directed to a person and requiring the person's attendance at a particular time and place to testify as a witness. It may also require a witness to bring any books, documents, electronically stored information, or other things under the witness's control which the witness is bound by law to produce in evidence. When a county recorder is using the microfilm system for recording, and a witness is subpoenaed to present a record, the witness shall be deemed to have complied with the subpoena if the witness produces a certified copy thereof.

(b)–(c) * * *

Section 1985.3. (a) For purposes of this section, the following definitions apply:

(1) "Personal records" means the original, any copy of books, documents, other writings, or ~~electronic data~~ electronically stored information pertaining to a consumer and which are maintained by any "witness" which is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in Section 5102 of the Financial Code), state or federal credit union, trust company, anyone authorized by this state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code or exempt from licensure pursuant to Section 17006 of the Financial Code, attorney, accountant, institution of the Farm Credit System, as specified in Section 2002 of Title 12 of the United States Code, or telephone corporation which is a public utility, as defined in Section 216 of the Public Utilities Code, or psychotherapist, as defined in Section 1010 of the Evidence Code, or a private or public preschool, elementary school, secondary school, or postsecondary school as described in Section 76244 of the Education Code.

(2) "Consumer" means any individual, partnership of five or fewer persons, association, or trust which has transacted business with, or has used the services of, the witness or for whom the witness has acted as agent or fiduciary.

(3) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding pursuant to this code, but shall not include the state or local agencies described in Section 7465 of the Government Code, or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(4) "Deposition officer" means a person who meets the qualifications specified in Section 2020.420.

(b)–(*l*) * * *

Section 1985.6. (a) For purposes of this section, the following terms have the following meanings:

(1) "Deposition officer" means a person who meets the qualifications specified in Section 2020.420.

(2) "Employee" means any individual who is or has been employed by a witness subject to a subpoena duces tecum. "Employee" also means any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum.

(3) "Employment records" means the original or any copy of books, documents, other writings, or ~~electronic data~~ electronically stored information pertaining to the employment of any employee maintained by the current or former employer of the employee, or by any labor organization that has represented or currently represents the employee.

(4) "Labor organization" has the meaning set forth in Section 1117 of the Labor Code.

(5) "Subpoenaing party" means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding, but does not include the state or local agencies described in Section 7465 of the Government Code, or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to Chapter 4 (commencing with Section 6000) of Division 3 of the Business and Professions Code.

(b)–(k) * * *

Section 1985.8. (a)–(b) * * *

(c) If a person responding to a subpoena for production of electronically stored information objects to the specified form or forms for producing the information, the subpoenaed person may provide an objection stating the form or forms in which it intends to produce each type of information.

~~(c)~~(d) Unless the subpoenaing party and the subpoenaed ~~party~~ person otherwise agree or the court otherwise orders, the following shall apply:

(1) If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A subpoenaed person need not produce the same electronically stored information in more than one form.

~~(d)~~(e) The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

~~(e)~~(f) If the person from whom discovery of electronically stored information is subpoenaed 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 subpoenaing party shows good cause, subject to any limitations imposed under subdivision ~~(h)~~(i).

~~(f)~~(g)If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

~~(g)~~(h) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably usable form.

~~(h)~~(i) 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 any of the following conditions exists:

(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.

(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 in the litigation, and the importance of the requested discovery in resolving the issues.

~~(i)~~(j) If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, as described in Section 2031.285, the provisions of Section 2031.285 shall apply.

~~(j)~~(k) A party serving a subpoena requiring the production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(k)(*l*) An order of the court requiring compliance with a subpoena issued under this section shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

~~(*l*)~~(m)(1) Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Section 1987. (a)–(b) * * *

(c) If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, it may include a request that the party or person bring with him or her books, documents, electronically stored

information, or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or any other time period as the court may allow, the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

Subject to this subdivision, the notice provided in this subdivision shall have the same effect as is provided in subdivision (b) as to a notice for attendance of that party or person.

Section 1987.1. (a) If a subpoena requires the attendance of a witness or the production of books, documents, electronically stored information or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person.

(b)–(c) * * *

Section 1987.2. (a) Except as specified in subdivision ~~(b)~~(c), in making an order pursuant to motion made under subdivision (c) of Section 1987 or under Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive.

(b) (1) Notwithstanding subdivision (a), absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or the attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

~~(b)~~(c) If a motion is filed under Section 1987.1 for an order to quash or modify a subpoena from a court of this state for personally identifying information, as defined in subdivision (b) of Section 1798.79.8 of the Civil Code, for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, and that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service, as defined in Section 230(f)(2) of Title 47 of the United States Code, if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet

and the respondent has failed to make a prima facie showing of a cause of action, the court shall award the amount of the reasonable expenses incurred in making the motion, including reasonable attorney's fees.

[Scope of Discovery]

Section 2017.020. (a)-(b) * * *

(b) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(c) (1) Notwithstanding subdivision (b), or any other section of this act, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.
(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

[Discovery Methods in Complex Litigation]

~~Section 2017.710. Subject to the findings required by Section 2017.730 and the purpose of permitting and encouraging cost-effective and efficient discovery, "technology," as used in this chapter, includes, but is not limited to, telephone, e-mail, CD-ROM, Internet Web sites, electronic documents, electronic document depositories, Internet depositions and storage, videoconferencing, and other electronic technology that may be used to improve communication and the discovery process.~~

~~Section 2017.720. (a) Nothing in this chapter diminishes the rights and duties of the parties regarding discovery, privileges, procedural rights, or substantive law.~~
~~(b) Nothing in this chapter modifies the requirement for use of a stenographic court reporter as provided in Section 2025.330. The rules, standards, and guidelines adopted pursuant to this chapter shall be consistent with the requirement of Section 2025.330 that deposition testimony be taken stenographically unless the parties agree or the court orders otherwise.~~
~~(c) Nothing in this chapter modifies or affects in any way the process used for the selection of a stenographic court reporter.~~

~~Section 2017.730. (a) Pursuant to a noticed motion, a court may enter an order authorizing the use of technology in conducting discovery in any of the following:~~
~~(1) A case designated as complex under Section 19 of the Judicial Administration Standards.~~

~~(2) A case ordered to be coordinated under Chapter 3 (commencing with Section 404) of Title 4 of Part 2.~~

~~(3) An exceptional case exempt from case disposition time goals under Article 5 (commencing with Section 68600) of Chapter 2 of Title 8 of the Government Code.~~

~~(4) A case assigned to Plan 3 under paragraph (3) of subdivision (b) of Section 2105 of the California Rules of Court.~~

~~(b) In a case other than one listed in subdivision (a), the parties may stipulate to the entry of an order authorizing the use of technology in conducting discovery.~~

~~(c) An order authorizing the use of technology in conducting discovery may be made only upon the express findings of the court or stipulation of the parties that the procedures adopted in the order meet all of the following criteria:~~

~~(1) They promote cost-effective and efficient discovery or motions relating thereto.~~

~~(2) They do not impose or require an undue expenditure of time or money.~~

~~(3) They do not create an undue economic burden or hardship on any person.~~

~~(4) They promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants.~~

~~(5) They do not require the parties or counsel to purchase exceptional or unnecessary services, hardware, or software.~~

~~(d) Pursuant to an order authorizing the use of technology in conducting discovery, discovery may be conducted and maintained in electronic media and by electronic communication. The court may enter orders prescribing procedures relating to the use of electronic technology in conducting discovery, including orders for service of discovery requests and responses, service and presentation of motions, conduct of discovery in electronic media, and production, storage, and access to information in electronic form.~~

~~(e) The Judicial Council may promulgate rules, standards, and guidelines relating to electronic discovery and the use of electronic discovery data and documents in court proceedings.~~

~~Section 2017.740. (a) If a service provider is to be used and compensated by the parties in discovery under this chapter, the court shall appoint the person or organization agreed on by the parties and approve the contract agreed on by the parties and the service provider. If the parties do not agree on selection of a service provider, each party shall submit to the court up to three nominees for appointment, together with a contract acceptable to the nominee. The court shall appoint a service provider from among the nominees. The court may condition this appointment on the acceptance of modifications in the terms of the contract. If no nominations are received from any of the parties, the court shall appoint one or more service providers.~~

~~(b) Pursuant to a noticed motion at any time and on a showing of good cause, the court may order the removal of the service provider or vacate any agreement between the parties and the service provider, or both, effective as of the date of the order. The continued service of the service provider shall be subject to review periodically, as agreed by the parties and the service provider, or annually if they do not agree. Any disputes involving the contract or the duties, rights, and obligations of the parties or the service provider may be determined on a noticed motion in the action.~~

[Methods and Sequence of Discovery]

Section 2019.040. (a) When any method of discovery permits the production, inspection, copying, testing, or sampling of documents or tangible things, such method shall also permit the production, inspection, copying, testing, or sampling of electronically stored information.

(b) All procedures available under this title to compel, prevent, or limit the production, inspection, copying, testing, or sampling of documents or tangible things shall be available to compel, prevent, or limit the production, inspection, copying, testing, or sampling of electronically stored information.

[Nonparty Discovery]

Section 2020.020. A deposition subpoena may command any of the following:

(a)–(b) * * *

(c) The attendance and the testimony of the deponent, as well as the production of business records, other documents, electronically stored information, and tangible things under Article 5 (commencing with Section 2020.510).

Section 2020.220. (a) Subject to subdivision (c) of Section 2020.410, service of a deposition subpoena shall be effected a sufficient time in advance of the deposition to provide the deponent a reasonable opportunity to locate and produce any designated business records, documents, electronically stored information, and tangible things, as described in Article 4 (commencing with Section 2020.410), and, where personal attendance is commanded, a reasonable time to travel to the place of deposition.

(b)–(c) * * *

(d) Unless the subpoenaing party and the subpoenaed person otherwise agree or the court otherwise orders, the following shall apply:

(1) If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A subpoenaed person need not produce the same electronically stored information in more than one form.

(e) The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(f) If the person from whom discovery of electronically stored information is subpoenaed 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 subpoenaing party shows good cause, subject to any limitations imposed under subdivision (h).

(g) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(h) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably usable form.

(i) 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 any of the following conditions exists:

(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.

(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 in the litigation, and the importance of the requested discovery in resolving the issues.

(j) If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, as described in Section 2031.285, the provisions of Section 2031.285 shall apply.

(k) A party serving a subpoena requiring the production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(*l*) An order of the court requiring compliance with a subpoena issued under this section shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(m) (1) Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) The subdivision shall not be construed to alter any obligation to preserve discoverable information.

Section 2020.410. (a) A deposition subpoena that commands only the production of business records for copying shall designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item, and shall specify the form in which any electronically stored information is to be produced, if a particular form is desired.

(b)–(d) * * *

Section 2020.510. (a) A deposition subpoena that commands the attendance and the testimony of the deponent, as well as the production of business records, documents, electronically stored information and tangible things shall:

(1) Comply with the requirements of Section 2020.310.

(2) Designate the business records, documents, electronically stored information, and tangible things to be produced either by specifically describing each individual item or by reasonably particularizing each category of item.

(3) Specify any testing or sampling that is being sought.

(4) Specify the form in which any electronically stored information is to be produced, if a particular form is desired.

(b)–(d) * * *

[Sanctions]

Section 2023.030. To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(b)–(e) * * *

(f) (1) Notwithstanding subdivision (a), or any other section of this act, absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

[Oral Depositions Inside California]

Section 2025.220. (a) A party desiring to take the oral deposition of any person shall give notice in writing. The deposition notice shall state all of the following:

(1) The address where the deposition will be taken.

(2) The date of the deposition, selected under Section 2025.270, and the time it will commence.

(3) The name of each deponent, and the address and telephone number, if known, of any deponent who is not a party to the action. If the name of the deponent is not known, the deposition notice shall set forth instead a general description sufficient to identify the person or particular class to which the person belongs.

(4) The specification with reasonable particularity of any materials or category of materials, including any electronically stored information, to be produced by the deponent.

(5) Any intention by the party noticing the deposition to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method as required by Section 2025.330 and any intention to record the testimony by stenographic method through the instant visual display of the testimony. If the deposition will be conducted using instant visual display, a copy of the deposition notice shall also be given to the deposition officer. Any offer to provide the instant visual display of the testimony or to provide rough draft transcripts to any party which is accepted prior to, or offered at, the deposition shall also be made by the deposition officer at the deposition to all parties in attendance. Any party or attorney requesting the provision of the instant visual display of the testimony, or rough draft transcripts, shall pay the reasonable cost of those services, which may be no greater than the costs charged to any other party or attorney.

(6) Any intention to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or of any expert witness under subdivision (d) of Section 2025.620. In this event, the operator of the video camera shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties.

(7) The form in which any electronically stored information is to be produced, if a particular form is desired.

(b) Notwithstanding subdivision (a), where under Article 4 (commencing with Section 2020.410) only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena shall serve as the notice of deposition.

Section 2025.280. (a) The service of a deposition notice under Section 2025.240 is effective to require any deponent who is a party to the action or an officer, director, managing agent, or employee of a party to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection and copying.

(b) The attendance and testimony of any other deponent, as well as the production by the deponent of any document, electronically stored information, or tangible thing for inspection and copying, requires the service on the deponent of a deposition subpoena under Chapter 6 (commencing with Section 2020.010).

Section 2025.410. (a)–(c) * * *

(d) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(e) (1) Notwithstanding subdivision (d), absent exceptional circumstances, the court shall not impose sanctions on any party, person, or attorney for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Section 2025.420.(a) Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order. The motion shall be accompanied by a meet and confer declaration under Section 2016.040.

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

(1) That the deposition not be taken at all.

(2) That the deposition be taken at a different time.

(3) That a video recording of the deposition testimony of a treating or consulting physician or of any expert witness, intended for possible use at trial under subdivision (d) of Section 2025.620, be postponed until the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent, or other means, for cross-examination.

(4) That the deposition be taken at a place other than that specified in the deposition notice, if it is within a distance permitted by Sections 2025.250 and 2025.260.

(5) That the deposition be taken only on certain specified terms and conditions.

(6) That the deponent's testimony be taken by written, instead of oral, examination.

(7) That the method of discovery be interrogatories to a party instead of an oral deposition.

(8) That the testimony be recorded in a manner different from that specified in the deposition notice.

(9) That certain matters not be inquired into.

(10) That the scope of the examination be limited to certain matters.

(11) That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, or copied, or that conditions be set for the production of electronically stored information designated in the deposition notice.

(12) That designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition.

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

(14) That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court.

(15) That the deposition be sealed and thereafter opened only on order of the court.

(16) That examination of the deponent be terminated. If an order terminates the examination, the deposition shall not thereafter be resumed, except on order of the court.

(c) The party, deponent, or any other affected natural person or organization that seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(d) If the party or affected person 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 demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) 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 any of the following conditions exist:

(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.

(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 in the litigation, and the importance of the requested discovery in resolving the issues.

~~(c)~~(g) If the motion for a protective order is denied in whole or in part, the court may order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just.

~~(d)~~(h) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(i)(1) Notwithstanding subdivision (h), absent exceptional circumstances, the court shall not impose sanctions on any party, deponent, or other affected natural person or organization or any of their attorneys for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Section 2025.450. (a) If, after service of a deposition notice, a party to the action or an officer, director, managing agent, or employee of a party, or a person designated by an organization that

is a party under Section 2025.230, without having served a valid objection under Section 2025.410, fails to appear for examination, or to proceed with it, or to produce for inspection any document, electronically stored information, or tangible thing described in the deposition notice, the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

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

(1). The motion shall set forth specific facts showing good cause justifying the production for inspection of any document, electronically stored information, or tangible thing described in the deposition notice.

(2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040, or, when the deponent fails to attend the deposition and produce the documents, electronically stored information, or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance.

(c) In a motion under subdivision (a) relating to the production of electronically stored information, the party or party-affiliated deponent objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(d) If the party or party-affiliated deponent from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of the undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) 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 any of the following conditions exists:

(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.

(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 in the litigation, and the importance of the requested discovery in resolving the issues.

~~(c)~~ (g)(1) If a motion under subdivision (a) is granted, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of the party who noticed the deposition and against the deponent or the party with whom the deponent is affiliated, unless

the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(2) On motion of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) in favor of that party and against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

~~(d)~~(h) If that party or party-affiliated deponent then fails to obey an order compelling attendance, testimony, and production, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010) against that party deponent or against the party with whom the deponent is affiliated. In lieu of, or in addition to, this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against that deponent or against the party with whom that party deponent is affiliated, and in favor of any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to that order.

(i)(1) Notwithstanding subdivisions (g) and (h), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

Section 2025.460. (a) The protection of information from discovery on the ground that it is privileged or that it is a protected work product under Chapter 4 (commencing with Section 2018.010) is waived unless a specific objection to its disclosure is timely made during the deposition.

(b)–(c) * * *

(d) If a deponent objects to the production of electronically stored information on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense and that the deponent will not search the source in the absence of an agreement with the deposing party or court order, the deponent shall identify in its objection the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the deponent preserves any objections it may have relating to that electronically stored information.

~~(d)~~(e) If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking that answer or production may

adjourn the deposition or complete the examination on other matters without waiving the right at a later time to move for an order compelling that answer or production under Section 2025.480.

(f) Notwithstanding subdivision (a), if a deponent notifies the party that took a deposition that electronically stored information produced pursuant to the deposition notice or subpoena is subject to a claim of privilege or of protection as attorney work product, as described in Section 2031.285, the provisions of Section 2031.285 shall apply.

Section 2025.480. (a) If a deponent fails to answer any question or to produce any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production.

(b–(c) * * *

(d) In a motion under subdivision (a) relating to the production of electronically stored information, the deponent objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(e) If the deponent from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of the undue burden or expense, the court may nonetheless order discovery if the deposing party shows good cause, subject to any limitations imposed under subdivision (g).

(f) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(g) 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 any of the following conditions exists:

(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.

(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 in the litigation, and the importance of the requested discovery in resolving the issues.

~~(d)~~(h) Not less than five days prior to the hearing on ~~this~~ a motion under this section, the moving party shall lodge with the court a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the motion. If a deposition is recorded by audio or video technology, the moving party is required to lodge a certified copy of a transcript of any parts of the deposition that are relevant to the motion.

~~(e)~~(i) If the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition.

~~(f)~~(j) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

~~(g)~~(k) If a deponent fails to obey an order entered under this section, the failure may be considered a contempt of court. In addition, if the disobedient deponent is a party to the action or an officer, director, managing agent, or employee of a party, the court may make those orders that are just against the disobedient party, or against the party with whom the disobedient deponent is affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against that party deponent or against any party with whom the deponent is affiliated.

(*l*)(1) Notwithstanding subdivisions (j) and (k), absent exceptional circumstances, the court shall not impose sanctions on a deponent or any attorney of a deponent for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information.

[Oral Depositions Outside of California]

Section 2026.010. (a) Any party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in another state of the United States, or in a territory or an insular possession subject to its jurisdiction. Except as modified in this section, the procedures for taking oral depositions in California set forth in Chapter 9 (commencing with Section 2025.010) apply to an oral deposition taken in another state of the United States, or in a territory or an insular possession subject to its jurisdiction.

(b) If a deponent is a party to the action or an officer, director, managing agent, or employee of a party, the service of the deposition notice is effective to compel that deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection and copying. The deposition notice shall specify a place in the state, territory, or insular possession of the United States that is within 75 miles of the residence or a business office of a deponent.

(c) If the deponent is not a party to the action or an officer, director, managing agent, or employee of a party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, and any related activity.

(d)–(e) * * *

(f) On request, the clerk of the court shall issue a commission authorizing the deposition in another state or place. The commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and electronically stored information and answer questions. The commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions. The commission shall be issued by the clerk to any party in any action pending in its venue without a noticed motion or court order. The commission may contain terms that are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application.

Section 2027.010. (a) Any party may obtain discovery by taking an oral deposition, as described in Section 2025.010, in a foreign nation. Except as modified in this section, the procedures for taking oral depositions in California set forth in Chapter 9 (commencing with Section 2025.010) apply to an oral deposition taken in a foreign nation.

(b) If a deponent is a party to the action or an officer, director, managing agent, or employee of a party, the service of the deposition notice is effective to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection and copying.

(c) If a deponent is not a party to the action or an officer, director, managing agent or employee of a party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the foreign nation where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, and any related activity.

(d)–(e) * * *

[Depositions in Out-of-State Actions]

Section 2029.200. In this article:

(a)–(d) * * *

(e) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(1) Attend and give testimony at a deposition.

(2) Produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(3) Permit inspection of premises under the control of the person.

[Production of Documents, Electronically Stored Information, Tangible Things, Land, and Other Property]

Chapter 14

Inspection, Copying, Testing, Sampling, and Production of Documents, Electronically Stored Information, Tangible Things, Land, and Other Property

LEG11-01

Civil Law: Proposed Cleanup Legislation on the Discovery of Electronically Stored Information (Amendments to the Code of Civil Procedure)

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	Richard E. Best California-Discovery-Law	NI	This comment is limited to the proposed repeal of Code Civ. Proc., §§ 2017.710–2017.740. No comment is offered regarding the "cleanup" of the Electronic Discovery Act. The Invitation to Comment indicates some confusion as to the purpose and effect of Code Civ. Proc., §§ 2017.710–2017.740 which was proposed and sponsored by the Judicial Council and added in 2001 (not 2004 as the invitation to comment states). First, it has nothing to do with the initial discovery of ESI and should not be in conflict with or duplicative of the Electronic Discovery Act. Second, it was not intended for use by the average lawyer or judge content with generic rules and routine procedures including those handling cases designated as complex. Rather, it was designed to provide a legal basis for judges and lawyers who sought more creative, efficient and cost effective means to handle discovery by using the same, proven technologies used outside the litigation	The scope of the comment is noted. The committee has reviewed the comment. It appreciates the history on the purpose of the statutes, but has concluded that the chapter on the use of technology in complex cases should be repealed in its entirety as originally proposed. Before the circulation of this proposal, judges in the complex litigation program were contacted about the chapter. None of those judges indicated that they used the chapter or thought it needed to be retained. Furthermore, the continuance of the chapter, or parts of it, is more likely to be a source of confusion than clarity. Accordingly, the committee recommends that the chapter be repealed.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			process. By 2000, some lawyers were using technology to achieve cost savings and efficiency in litigation by stipulation. However, sometimes, one lawyer in the case would resist. This legislation expressly authorized a motion and court order over an objection. However, it imposed restrictions now in §2017.730(c) to assure the purpose of the legislation would be promoted and to protect parties from perceived, potential, misuse or abuse. The number of lawyers familiar with technology has increased in the last ten years and the need for flexibility and creativity in the way discovery is handled has increased. To protect technologically challenged practitioners handling routine cases, the limitations of subpart (a) of 2017.730 were added. Those provisions are dated and should be eliminated. Similarly, §2017.720 seems unnecessary and could be eliminated. Subpart (e) of §2017.730 is the sole provision related to e-discovery. At the time	

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			of enactment, state and federal courts throughout the country were enacting e-discovery rules. Subpart (e) permitted the Judicial Council in 2001to adopt rules regarding e-discovery but the Judicial Council declined to do so. With the recent enactment of the Electronic Discovery Act, that section appears out of date and should be eliminated. Simply, these provisions empower trial judges on motion to modify discovery procedures in a manner similar to that parties have long been authorized to do by stipulation pursuant to provisions such as the current §2016.030. As an alternative, that section could be amended to authorize modifications by court order. As another alternative, these provisions could be amended or repealed in part as set forth above. However, if the committee does not want judges to have that authority, the Judicial Council may reverse its position and repeal its prior legislation in its entirety. At the time of enactment of the legislation,	

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			CJER and the Judicial Council published information and articles on the purposes and uses of the provisions which may still be available from the AOC.	
2.	State Farm Sacramento By Rana Faborg, Counsel		**Scope of Discovery (Code of Civil Procedure section 2017.020)** The safe harbor provision at Section 2023.030 (f) should be added, for consistency purposes, to Scope of Discovery (Code Civ. Proc. Sec. 2017.020) **Methods and Sequence of Discovery Section 2019.040 (a&b)** We approve of this section's addition but believe clarification should be made limiting direct access to the Electronically Stored Information (ESI). Perhaps the drafters could add a Comment stating this section does not presumptively permit direct access to a producing party's computer system unless or until good cause has been shown.	**Scope of Discovery (Code of Civil Procedure section 2017.020)** Agreed; a "safe harbor" provision was included in section 2017.020 in the legislative proposal that was circulated. **Methods and Sequence of Discovery Section 2019.040 (a&b)** Because this addition would be in statute rather than a rule, it is not possible to add a comment directly. It should be noted, however, that the issue raised by the commentator has already been addressed in the legislative history of the original e-discovery legislation. The Senate Judiciary Committee's Analysis of AB 5 in 2009 includes a comment from the author stating that the new language on "copying, testing, or

	Commentator	Position	Comment	Committee Response
				sampling" is not intended to create a routine right of access to a party's electronic information system, although such access might be justified in some circumstances. (See Sen. Jud. Comm., Committee Analysis of Assem. Bill No. 5 (2009–2010 Reg. Sess.) June 8, 2009, Comment (author's statement), at page 6.) The author's comment, which draws on the Advisory Committee Note to Federal Rule 34(a), states that courts should guard against undue intrusiveness resulting from inspecting or testing electronic information systems.
			Subpoena (Code of Civ. Procedure sections 1985 et seq., Oral Depositions Inside California (Code Civil Procedure 2025.220 et seq.): Cost Sharing Stronger cost sharing language would be beneficial throughout this Clean-Up Legislation. Specifically, the court reserves its right to set conditions for the production of ESI from a source not reasonably accessible, including cost sharing. Ideally,	**Subpoena (Code of Civ. Procedure sections 1985 et seq., Oral Depositions Inside California (Code Civil Procedure 2025.220 et seq.): Cost Sharing** The cost shifting provisions in the existing legislation were carefully developed considering both existing California law and the new federal rules on e-discovery. The legislation that was contained in AB 5 recognizes that subpoenas of ESI should be

	Commentator	Position	Comment	Committee Response
			the rules should mandate the requesting party to provide good cause of why it should not contribute to the cost of producing not reasonably accessible ESI. Such a mandate is particularly applicable, and equitable, to non-party discovery where the subpoenaed party has no direct interest in the litigation. (Section 1985.8(f), Section 2025.420(e), Section 2025.450(e), and Section 2025.480(f). Additionally, Section 1985.8 regarding Subpoenas for the production of ESI does not include any language regarding non-party subpoena expense reimbursement for costs related to producing electronically stored information. Perhaps a Comment should be added to state that non-party reimbursement costs are permitted as addressed in Cal. Evid. Code Section 1563 or should be paid by the requesting party (as a condition set forth in Section 1985.8(f)).	handled differently from discovery directed only at parties. (See Code Civ. Proc., § 1985.8(k).) A broad coalition supported the final result of that process. The committee therefore recommends against changing the balance as part of the present proposal that is intended be focused on addressing noncontroversial "clean up" issues. Because this proposal involves legislation rather than a rule, it is not possible to add a comment. Furthermore, to the extent that such a comment might be construed as modifying the statute to modify the cost-shifting provisions, that would change the balance that has previously been agreed upon and is not desirable as part of this clean-up proposal.
3.	The State Bar of California Committee on Administration of	AM	CAJ supports this proposal, subject to the comments below.	

	Commentator	Position	Comment	Committee Response
	Justice San Francisco		As noted in the Invitation to Comment, some of these subpoena statutes concern production of information at trial as well as in discovery. In particular, section 1987(c) provides that if the notice to appear is served at least 20 days before the time required for attendance, or within any shorter period of time as the court may order, the subpoena may include a request that the party or person bring with him or her books, documents, or other things. Under this legislative proposal, section 1987(c) would be amended to permit a request for "electronically stored information" as well as for "books, documents, or other things." Comments are invited on whether, if that change is made, any changes need to be made to the 20-day provision or any of the other timeframes in the statute. CAJ is opposed to amending the 20-day provision in section 1987(c) to extend the time period. Section 1987(c) is not really a "discovery" statute. Under section 1987(c), the required statutory notice "shall state the exact materials or things desired and that	The comment accurately states the issues raised in the invitation to comment. The committee found this comment persuasive and does not recommend amending the 20-day provision at this time.

	Commentator	Position	Comment	Committee Response
			the party or person has them in his or her possession or under his or her control." Under Code of Civil Procedure section 2024.020, the cutoff for non-expert discovery is 30 days before trial. Extending the 20-day period under section 1987(c) to anything equal to or greater than 30 days before trial would mean that the time for sending a subpoena under section 1987(c) will lapse on the day of or before the statutory discovery cutoff date. Ultimately, extending the 20-day period would unfairly penalize parties who need to present the designated electronically stored information at trial by requiring them to send notice at an earlier date. Separately, CAJ discussed the issue of what, exactly, it means to *produce* "electronically stored information" at trial or a deposition, but anticipates that further guidance as to appropriate practices and procedures will be developed as that issue progresses.	The comment correctly notes that the issue of what it means to *produce* electronically stored information at a trial or deposition is beyond the scope of the current proposal. This may well be a worthwhile subject to be explored in the future.
4.	Superior Court of Monterey County	A	No specific comments.	No specific response required.
5.	Superior Court of San Diego	AM	The proposal seeks to add electronically	The committee disagreed based partially on

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	County By Mike Roddy, Executive Officer		stored information (ESI) to subpoenas at time of trial. Under CCP 1987(c), only 20 days notice is required for this. This is not a realistic time period for E-Documents. A minimum of 60 days is required. For non-party discovery, it allows the subpoenaing party to specify that the information to specify the form for producing the ESI…. A non-party should be allowed to produce discovery in whatever form is reasonably usable. For objections based on undue burden & expense, the statute requires us 'to identify in [our] objection the types or categories of sources of electronically stored information that it asserts are not reasonably accessible." [CCP 2025.460(d), 2025.480(d).] This requirement should be eliminated. Where categories of information cannot be accessed, they cannot be identified.	the grounds stated in comment 3 above, and recommends retaining the current 20-day time frame for the present. As part of the clean-up legislation, the committee recommends amending Code of Civil Procedure section 1985.8 to clarify that the subpoenaed person may object to the format requested. This amendment is based on Code Civ. Proc., § 2031.280(c) (an opposing party may object to the requested form of production). The new California statutes, like the federal rules, require responding parties to identify and object to producing electronically stored information that is not *reasonably* accessible. This is quite different from information that *cannot* be accessed (for example, because it has been destroyed). One of the major contributions of the new federal rules and California statutes on e-discovery is that they provide procedures and guidance on the how

	Commentator	Position	Comment	Committee Response
				electronically stored information that is not *reasonably* accessible is to be handled by litigants and the courts. These procedures and guidance that are an important part of the new e-discovery legislation should be retained.